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No Civilized System of Justice: The Fate of the Violence against Women Act

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"NO CIVILIZED SYSTEM OF JUSTICE": THE FATE OF THE VIOLENCE AGAINST WOMEN ACT

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> If the allegations here are true, no civilized system of justice could fail to provide [petitioner Christy Brzonkala] a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States.[1]

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1 United States v. Morrison, 529 U.S. 598, 627 (2000).

I. INTRODUCTION

What is the proper role for federal law in the fight against domestic violence, rape, and other forms of violence against women? Does the federal government have a legitimate function to serve as guardian of women's civil rights, or should violence against women be left to the states to resolve as they see fit, through the familiar channels of criminal, tort and domestic relations law? If it is true, as Chief Justice Rehnquist wrote for the Supreme Court, that "no civilized system of justice could fail to provide . . . a remedy" for gender-motivated violence but that the remedy must come from the states,[2] what recourse do women have when the states have failed them?

To answer these questions, there is no better place to start than with the short and troubled history of the civil rights provision of the Violence Against Women Act (VAWA).[3] Until the Supreme Court's recent decision in *United States v. Morrison*,[4] VAWA's civil rights remedy stood as a high-water mark in the federal effort to combat violence against women. When VAWA was signed into law in 1994, it added to the United States Code dozens of provisions designed to prevent and redress domestic violence, rape, and other violent crimes against women.[5] Most significantly, VAWA declared for the first time that there is a federal civil right to be free from crimes of violence motivated by gender.[6] VAWA's civil rights provision created a private right of action allowing a victim of gender-motivated violence to bring a civil lawsuit in response to the violation of her federal civil rights.[7] Feminist scholars and advocates hailed the new civil rights remedy as a breakthrough in legal protection for women's equality.[8]

Less than six years later, VAWA's civil rights provision was a dead letter, struck down by the United States Supreme Court in *Morrison*. The Court held that Congress lacked constitutional authority to enact the civil rights remedy, despite an extensive legislative record[9] demonstrating that the statute fell within Congress's powers under both the Commerce Clause[10] and section 5 of the Fourteenth Amendment.[11] According to the Court, a legal remedy for gender-motivated vio-

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2 *Id.*

3 Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified in relevant part at 42 U.S.C. § 13981 (1994)).

4 529 U.S. 598 (2000).

5 For an overview of various provisions of VAWA, see *infra* Part II.

6 42 U.S.C. § 13981(b) (1994).

7 *Id.* § 13981(c).

8 *See, e.g.*, CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW 966 (2001).

9 On VAWA's legislative history, see *infra* Parts II-III.

10 U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

11 U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

lence, if any, may be provided only by the states, not by federal law.[12]

The events leading up to the fateful *Morrison* decision began to unfold in September 1994, when eighteen-year-old Christy Brzonkala enrolled as a freshman at Virginia Polytechnic Institute and State University (Virginia Tech).[13] She alleges that a few weeks after arriving on campus, she was gang-raped by Antonio Morrison and James Crawford, two male students who were members of Virginia Tech's nationally ranked football team.[14] Minutes after she met the two men for the first time, they took turns pinning her down on a bed in her dormitory and forcibly raping her, despite her protests and her attempts to break free.[15] Immediately after the attack, Morrison told her, "You better not have any fucking diseases."[16] Later, she learned that Morrison announced publicly in the dormitory's dining hall, "I like to get girls drunk and fuck the shit out of them."[17] She also learned that another male student athlete later advised Crawford that he should have "killed the bitch."[18]

Christy Brzonkala was severely traumatized by the attack, became depressed and suicidal, and was unable to continue attending classes.[19] She filed a complaint under Virginia Tech's sexual assault policy against the two young men, and the school held a disciplinary hearing.[20] During the hearing, Antonio Morrison admitted that he had sexual contact with Brzonkala despite the fact that she twice told him "no."[21] The disciplinary committee decided that there was insufficient evidence to take action against James Crawford, but found Morrison guilty of sexual assault and ordered him suspended for two semesters.[22] However, university officials demanded a rehearing, reduced the charges against Morrison, and finally ruled that he would be allowed to continue attending the school and would retain his full athletic scholarship.[23]

After learning of this outcome, Brzonkala feared retaliation and humilia-

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12 United States v. Morrison, 529 U.S. 598, 627 (2000).

13 *See id.* at 602.

14 *See id.* Because the case was decided on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the factual allegations in plaintiff's complaint must be assumed to be true. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779, 783 (W.D. Va. 1996), *aff'd* 169 F.3d 820 (4th Cir. 1999) (en banc), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000).

15 *Brzonkala*, 935 F. Supp. at 782.

16 *Id.*

17 *Id.* Both the trial court and the court of appeals en banc relied on this statement to show that Morrison possessed the requisite gender-based "animus" to make out a claim under the VAWA civil rights remedy. *Brzonkala*, 169 F.3d at 830; *Brzonkala*, 935 F. Supp. at 785.

18 Plaintiff's Amended Complaint at 10, Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779 (W.D. Va. 1996) (No. 95-1358-R).

19 *Id.* at 8.

20 United States v. Morrison, 529 U.S. 598, 603 (2000).

21 *Id.*

22 *Id.*

23 Plaintiff's Amended Complaint at 15-18, *Brzonkala* (No. 95-1358-R).

tion if she remained on campus.[24] Instead of returning to Virginia Tech to continue her education, she withdrew from the university.[25] She filed suit in the United States District Court for the Western District of Virginia, raising claims under the civil rights provision of the federal Violence Against Women Act, Title IX of the Education Amendments of 1972,[26] and state tort and contract law.[27]

As this brief recitation of the facts makes clear, Christy Brzonkala's case is about several fundamental issues. It is about male violence against women, and the anti-female animus that often underlies such violence. Specifically, it is about rape, which Christy Brzonkala later described as "like having your soul torn out."[28] It is about the common pattern of male college athletes sexually abusing women, universities' tolerance of such behavior in order to protect their sports teams,[29] and the resulting damage to women's educational opportunities.[30] It is about the indifference or outright hostility of state actors to the plight of female victims of violence.[31] It is about Congress's determination that violent crimes motivated by gender constitute a federal civil rights violation, and whether Congress had the constitutional power to make that determination. Most of all, in the eyes of Christy Brzonkala and many observers, it is about the quest to obtain gender equality in a world where male violence is a primary instrument of women's oppression.[32]

But by the time Christy Brzonkala's case reached the United States Su-

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24 *Id.* at 18.

25 *Id.*

26 20 U.S.C. §§ 1681-88 (1994).

27 Plaintiff's Amended Complaint, *Brzonkala* (No. 95-1358-R). Brzonkala also tried to press criminal charges but was unsuccessful. See *infra* note 228.

28 Christy Brzonkala, Statement at the National Press Club (Jan. 7, 2000); *see also* Coker v. Georgia, 433 U.S. 584, 597 (1977) (describing rape as the ultimate violation of self, short of homicide).

29 According to an article about the case, during a period of several months beginning in 1995, Virginia Tech's football players had 21 arrests, six convictions, and four dropped charges, involving both sexual and non-sexual offenses; these included several criminal charges against Morrison and Crawford that were unrelated to the *Brzonkala* case. Patrick Tracey, *Christy's Crusade*, MS., Apr./May 2000, at 53, 61. On the frequency of sexual assaults by college athletes and the unwillingness of universities to intervene, see generally, e.g., JEFF BENEDICT, PUBLIC HEROES, PRIVATE FELONS: ATHLETES AND CRIMES AGAINST WOMEN (1997); Ellen E. Dabbs, *Intentional Fouls: Athletes and Violence Against Women*, 31 COLUM. J.L. & SOC. PROBS. 167 (1998); Timothy Davis & Tonya Parker, *Student-Athlete Sexual Violence Against Women: Defining the Limits of Institutional Responsibility*, 55 WASH. & LEE L. REV. 55 (1998).

30 Brzonkala's Title IX claim was dismissed by the trial court and reinstated by the court of appeals en banc. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820, 827 n.2 (4th Cir. 1999) (en banc), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000). The Title IX claim later settled and was not before the Supreme Court in *Morrison*. *See Morrison*, 529 U.S. at 605 n.2; Julie Goldscheid, United States v. Morrison *and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109, 121 n.75 (2000).

31 *See infra* note 228 and accompanying text (discussing the failure of Virginia state university and criminal authorities to provide appropriate redress to Brzonkala).

32 *See generally* Catharine A. MacKinnon, *Disputing Male Sovereignty: On* United States v. Morrison, 114 HARV. L. REV. 135 (2000); Tracey, *supra* note 29.

preme Court, both its name and its meaning had changed.[33] As the Violence Against Women Act moved through Congress, and as Brzonkala's case moved through the courts,[34] judges distorted and recharacterized them as being about domestic violence, family law, and states' rights.[35] An examination of the way these themes emerged and were resolved has much to tell us about the lingering barriers to women's legal equality that persist even in the face of growing momentum for feminist law reform. Rather than overtly resisting women's claims for equality, opponents of VAWA's civil rights remedy in Congress and the courts deflected the discussion onto seemingly neutral topics in order to discredit the legislation. Yet those seemingly neutral topics – domestic violence, family law, and states' rights – all carry a long history of association with discrimination against women.[36]

Ultimately, a narrow majority of the Supreme Court struck down VAWA's civil rights provision in an opinion that entirely failed to confront the issues of women's equality, sex discrimination, and civil rights,[37] but which served to overturn one of the most important feminist legislative achievements of recent years.[38] Although the other provisions of the Violence Against Women Act live on, and efforts are underway to enact new remedies for gender-motivated violence under federal, state, and local law, the *Morrison* decision dealt a severe setback to efforts to improve the legal response to violent discrimination against women.[39]

Part II of this article will provide an overview of the Violence Against

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33 The case, which was known in the trial court and court of appeals as *Brzonkala v. Virginia Polytechnic Institute & State University*, was decided by the Supreme Court under the name *United States v. Morrison*. After the Fourth Circuit en banc held the statute unconstitutional, both Brzonkala and the United States, which had intervened to defend the constitutionality of the statute, filed petitions for certiorari with the Supreme Court. Because the United States' petition was docketed first, it received a lower docket number than Brzonkala's petition, with the result that the name of the United States appears first in the caption. *See* Goldscheid, *supra* note 30, at 120 n.64. Virginia Tech was not a party to the case in the Supreme Court because the Title IX claim was not before the Court. *See supra* note 30.

34 Briefly, the procedural history of the case is as follows. The federal district court found that Brzonkala had stated a claim under VAWA but that the statute was unconstitutional because it exceeded Congress's powers under both the Commerce Clause and the Fourteenth Amendment. Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779, 788 (W.D. Va. 1996). A panel of the Fourth Circuit reversed on the constitutional issue. Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949 (4th Cir. 1997). After vacating the panel decision and granting rehearing en banc, the Fourth Circuit affirmed the trial court. Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820 (4th Cir. 1999) (en banc). The Supreme Court affirmed. United States v. Morrison, 529 U.S. 598 (2000). *See generally infra* Part III.

35 *See generally infra* Part III.

36 *See generally infra* Parts III-IV.

37 *See generally infra* Part III.C.

38 *See, e.g.*, S. REP. NO. 102-197, at 85-86 (1991) (statement of Burt Neuborne, describing VAWA's civil rights remedy as "an enormous step forward" for women's equality).

39 The *Morrison* decision also has broader implications for the viability of other federal legislation enacted under the Commerce Clause and section 5 of the Fourteenth Amendment. *See generally* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441 (2000); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender and the Globe*, 111 YALE L.J. (forthcoming Nov. 2001). Some lower courts have already begun to invalidate other statutes on the basis of *Morrison*. *See, e.g.*, United States v. Fasse, 227 F.3d 660 (6th Cir. 2000) (striking down Child Support Recovery Act on the basis of *Morrison*), *rev'd*, 265 F.3d 475 (6th Cir. 2001) (en banc).

Women Act and its significance, with particular emphasis on the civil rights provision. Part III will discuss the judicial resistance to VAWA's civil rights remedy in Congress and the courts, culminating in the Supreme Court's decision in *United States v. Morrison*. Part IV will examine the links between slavery and violence against women and explore the parallels between the states' rights argument against VAWA's civil rights remedy and the states' rights argument in support of slavery. Part V will assess the impact of *Morrison* on the Violence Against Women Act and future prospects for civil rights relief for gender-motivated violence.

II. THE VIOLENCE AGAINST WOMEN ACT: A LEGAL MILESTONE

Less than two weeks before Christy Brzonkala was raped, President Clinton signed into law the Violence Against Women Act of 1994,[40] the federal government's most ambitious attempt to confront the epidemic of domestic violence, sexual assault, and other types of violent crime that have long plagued American women.[41] Enacted as part of the Violent Crime Control and Law Enforcement Act of 1994,[42] after more than four years of intensive lobbying by women's rights groups and others,[43] the Violence Against Women Act contains a broad array of measures designed to reduce the frequency of violence against women, provide needed services to victims, and hold perpetrators accountable.[44]

Subtitle A of VAWA, entitled Safe Streets for Women, subjects perpetrators of certain federal sex crimes to increased prison sentences and mandatory restitution; provides grants to improve state and local law enforcement, prosecution, and victim services in cases of violent crimes against women; requires states, in order to be eligible for such grants, to incur costs of forensic medical exams for rape victims and to pay filing costs and service fees for domestic violence victims; authorizes appropriations to improve safety in public parks and on public transportation; and allows federal funds to be used for rape prevention and education programs. Subtitle A also amends the Federal Rules of Evidence to restrict admissibility of evidence of a victim's sexual behavior or sexual predisposition in both civil and criminal cases.[45]

Subtitle B, Safe Homes for Women, provides federal funding for a national

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40 Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 20, 28, and 42 U.S.C.).

41 *See, e.g.*, Peter Edelman, *The Role of Government in the Prevention of Violence*, 35 HOUS. L. REV. 7, 8 n.5 (1998) (describing VAWA as "the first significant legislative attempt by the federal government to deal with the problem of violence against women even though such violence has been a part of our society since the founding of the United States").

42 Pub. L. No. 103-322, 108 Stat. 1796 (1994).

43 *See generally* Sally Goldfarb, *The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications & Litigation Strategy*, 4 J.L. & POL'Y 391, 392-97 (1996); Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1 (1996).

44 The following discussion summarizes some important features of the legislation and is not intended to be comprehensive.

45 *See generally* Pub. L. No. 103-322, tit. IV, subtitle A, 108 Stat. 1796, 1918-19.

toll-free domestic violence hotline; creates federal criminal penalties for domestic violence committed across state lines and interstate violations of protection orders; requires states to give full faith and credit to protection orders issued in other states; furnishes increased federal funding for battered women's shelters; and establishes grant programs to encourage arrests in domestic violence cases, to provide young people with domestic violence education, and to improve coordination of local domestic violence services. Subtitle B also directs the federal government to undertake research and data collection efforts involving sexual and domestic violence.[46]

The Equal Justice for Women in the Courts Act, Subtitle D, authorizes grants to educate judges and other court personnel on rape and domestic violence and to study gender bias in the federal courts.[47] Subtitle E, Violence Against Women Act Improvements, contains a variety of measures concerning penalties for federal sex offenses, testing for sexually transmitted diseases for victims of sexual assault, federal studies on various aspects of sexual assault and domestic violence, and other topics.[48] Subtitle F, entitled National Stalker and Domestic Violence Reduction, focuses on improving federal, state, and local record-keeping and information-sharing on domestic violence and stalking offenses.[49] Subtitle G, Protections for Battered Immigrant Women and Children, is designed to enable battered immigrant women to obtain lawful immigration status without having to seek the assistance of an abusive partner.[50] In all, the Violence Against Women Act of 1994 authorized a then-record amount of $1.62 billion in federal funds over six years for research, education, improvement of the legal system, and assistance to victims.[51]

The most innovative section of the statute was Subtitle C, Civil Rights for Women.[52] This measure, which was the basis of Christy Brzonkala's claim and was held unconstitutional in *United States v. Morrison*, created a groundbreaking federal civil rights remedy for acts of gender-motivated violence.[53] Under the civil

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46 *See generally id.* at subtitle B, 108 Stat. at 1925-41.

47 *See generally id.* at subtitle D, 108 Stat. at 1942-45.

48 *See generally id.* at subtitle E, 108 Stat. at 1945-50.

49 *See generally id.* at subtitle F, 108 Stat. at 1950-53.

50 *See generally* Pub. L. No. 103-322 tit. IV, subtitle G, 108 Stat. 1796, 1953-55.

51 *See generally id.*, 108 Stat. at 1902.

52 *Id.* at subtitle C, 108 Stat. at 1941-42.

53 The civil rights provision reads in relevant part as follows:

(b) **Right to be free from crimes of violence** All persons within the United States shall have the right to be free from crimes of violence motivated by gender....

(c) **Cause of action** A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as the court may deem appropriate.

(d) **Definitions** For purposes of this section –

(1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and

rights provision, a person who committed a "crime of violence motivated by gender," whether or not acting under color of state law, could be held liable in a private civil action for violating the victim's federal civil rights.[54] The phrase "motivated by gender" was defined as an act "committed because of gender or on the basis of gender and due, at least in part, to an animus based on the victim's gender."[55] The term "crime of violence" included acts that federal or state law would consider a felony against a person, or a felony against property that presents a serious risk of physical injury to a person.[56] The definition of "crime of violence" also included acts that would constitute such a felony but for the relationship between the perpetrator and the victim.[57] Although VAWA's legislative history focused on domestic violence, rape, and murder of women, the civil rights remedy applied to any crime of violence motivated by gender, as defined in the statute.

VAWA's civil rights provision permitted successful plaintiffs to recover compensatory and punitive damages, injunctive and declaratory relief, attorney's fees, and "such other relief as a court may deem appropriate."[58] Claims could be filed in either federal or state court.[59] The civil rights cause of action was available regardless of whether the defendant had been criminally charged, prosecuted, or convicted.[60]

By identifying gender-motivated violence as a denial of women's right to equality, the VAWA civil rights remedy marked a dramatic turning point in the law. Feminist theorists and advocates had long argued that male violence against women is one of the principal ways in which women's subordinate social status is expressed and perpetuated.[61] When the Violence Against Women Act was pending in Congress, its supporters emphasized that women's disproportionate vulnerability

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(2) the term "crime of violence" means –
(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and
(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

42 U.S.C. § 13981 (1994).

54 *Id.* § 13981(c).

55 *Id.* § 13981(d)(1).

56 *Id.* § 13981(d)(2)(A).

57 *Id.* § 13981(d)(2)(B).

58 *Id.* § 13981(c).

59 *Id.* § 13981(e)(3).

60 *Id.* § 13981(d)(2)(A).

61 *See generally* Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 14-18 (2000).

to gender-based violence results in a form of second-class citizenship.[62] As Congress learned, American women confront violence on a staggering scale: Three to four million women are battered every year,[63] two thousand to four thousand are murdered annually by a spouse or intimate partner,[64] and a woman is raped every six minutes.[65] In the overwhelming majority of cases, these crimes are committed against women by men.[66] Men often use physical violence to enforce stereotypical gender roles and to assert an ideology of male supremacy – in short, to keep women in their place.[67]

Congress found that state laws were inadequate to redress violence against women.[68] First, in many states, antiquated legal doctrines such as marital rape exemptions, interspousal tort immunity, and parental tort immunity remain in force and block access to justice for female victims of violence.[69] Second, regardless of the laws on the books, gender bias against women and a tendency to trivialize domestic violence and rape are rampant among police, judges, prosecutors, and other actors in the state legal system.[70] Finally, although many states have made progress in making civil orders of protection, personal injury claims, and criminal prosecutions available in cases of domestic violence and rape, such remedies fail to address the discriminatory aspect of gender-motivated violence.[71] Unlike typical state civil and criminal laws, VAWA's civil rights remedy was designed to "protect against the bias element of crimes of violence motivated by gender."[72]

Like state laws, previous federal laws also fell short of providing an adequate remedy for gender-based violence. Title VII and Title IX cover limited instances of sex-discriminatory violence in the context of employment and education

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62 *See, e.g., Women and Violence: Hearing Before the Senate Judiciary Comm.*, 101st Cong. pt. 1, 57 (1990) (statement of Helen Neuborne) [hereinafter *1990 Senate Hearing*]; S. REP. NO. 102-197, at 35 (1991).

63 S. REP. NO. 101-545, at 30 (1990).

64 *Id.* at 36.

65 *Id.* at 31.

66 *See, e.g.*, PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 8 (1998). Not all acts of violence against women are committed by men, nor are women the only victims of crimes such as rape and domestic violence. The VAWA civil rights remedy would cover cases of violent crime that could be proven to be motivated by gender, regardless of whether the perpetrator or victim was male or female. However, the focus of this article is on the predominant problem of male-against-female violence.

67 *See, e.g.*, Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN'S L.J. 123, 147 (1999).

68 *See, e.g.*, H.R. CONF. REP. NO. 103-711, at 385 (1994); S. REP. NO. 103-138, at 44 (1993).

69 S. REP. NO. 103-138, at 42, 47, 55 (1993).

70 H.R. CONF. REP. NO. 103-711, at 385 (1994); S. REP. NO. 103-138, at 44-46, 49 (1993).

71 At the time VAWA was enacted, only a handful of states had passed hate crimes laws prohibiting gender-discriminatory violence. S. REP. NO. 103-138, at 48 & n.47 (1993).

72 H.R. CONF. REP. NO. 103-711, at 385 (1994).

respectively, but offer no protection for violence committed in other settings.[73] The other federal civil rights laws passed prior to VAWA do not apply to most cases of violence against women. For example, 42 U.S.C. § 1983 requires a showing of action taken under color of state law, and 42 U.S.C. § 1985(3) requires proof of a conspiracy to deprive the plaintiff of a federally protected right,[74] but most acts of violence against women are committed by private individuals acting alone.[75] Additionally, two major federal statutes addressing hate crimes omit crimes based on gender altogether.[76]

VAWA's civil rights provision was modeled on previous federal civil rights legislation.[77] Congress borrowed key statutory language from earlier federal civil rights laws,[78] and the congressional committee reports on VAWA instructed judges applying the civil rights remedy to look to older, well-established federal civil rights statutes for interpretive guidance.[79] However, VAWA extended federal civil rights protection into uncharted territory by proclaiming for the first time a general civil right to be free from crimes of violence motivated by gender. Congress justified this new departure as an attempt to fill the gaps left by previous federal laws. In the words of the Senate Judiciary Committee, "It is time for attacks motivated by gender [bias] to be considered as serious as crimes motivated by religious, racial, or political bias."[80]

In keeping with its function as an "antidiscrimination remedy for violently expressed gender prejudice,"[81] the civil rights remedy covered only those acts that could be proven by a preponderance of the evidence to be motivated by gender.[82] In

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73 *See* Education Amendments of 1972, tit. IX, 20 U.S.C. §§ 1681-88 (1994); Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2001 *et seq.* (1994). As Congress pointed out in its findings accompanying VAWA's civil rights provision, "current [federal] law provides a civil rights remedy for gender crimes committed in the workplace, but not for crimes of violence motivated by gender committed on the street or in the home." H.R. CONF. REP. NO. 103-711, at 385 (1994).

74 As the Senate Judiciary Committee pointed out, it is also "an unsettled question whether section 1985(3) applies to sexual discrimination." S. REP. NO. 102-197, at 42 (1991). *See generally infra* note 302 and accompanying text.

75 *See generally* Goldfarb, *supra* note 61, at 12-14, 37.

76 *See* 18 U.S.C. § 245 (2000); 28 U.S.C. § 534 (1994) (Hate Crimes Statistics Act).

77 S. REP. NO. 103-138, at 51-53 (1993) (stating that VAWA's civil rights remedy is "a logical extension" of the nation's 120-year-old tradition of using federal civil rights laws to combat discriminatory violence); *id.* at 64 (stating that VAWA's civil rights remedy was modeled on Title VII and 42 U.S.C. §§ 1981, 1983, and 1985(3)).

78 The phrase "because of gender or on the basis of gender," *see* 42 U.S.C. § 13981(d)(1) (1994), was based on Title VII of the 1964 Civil Rights Act. S. REP. NO. 103-138, at 52-53 (1993). The term "animus," *see* 42 U.S.C. § 13981(d)(1), was drawn from Supreme Court case law interpreting 42 U.S.C. § 1985(3) (1994). *See* Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).

79 *See* S. REP. NO. 103-138, at 52-53 (1993); S. REP. NO. 102-197, at 50-51 (1991).

80 S. REP. NO. 103-138, at 38 (1993).

81 *Id.*

82 *See* 42 U.S.C. § 13981(e)(1) ("Nothing in this section entitles a person to a cause of action . . . for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender . . . .").

a number of cases brought under VAWA during the five and a half years preceding the *Morrison* decision, judges found evidence of the requisite gender motivation based on defendants' use of gender-specific epithets, attacks on multiple female victims, attempts by the defendant to force the victim to comply with traditional gender roles, the sexual nature of an attack, and other indications of gender-based intent.[83] Indeed, both the trial court and the court of appeals en banc found that Christy Brzonkala's allegations of gender motivation were sufficient to state a claim under the civil rights provision, although both courts concluded that the statute was unconstitutional.[84]

The principal contribution of VAWA's civil rights remedy was to reconceptualize violence against women as part of a social pattern rather than a series of isolated events.[85] This approach reflects the insights of feminism into the pervasiveness of male violence in the lives of women and its role in maintaining women's disadvantaged social status. Gender-motivated violence, like other forms of discrimination, is a collective injury, a social wrong carried out on an individual level. Since their inception in the 1970s, the modern battered women's movement and anti-rape movement have struggled to convey the ways in which individual acts of violence grow out of and reinforce an overarching structure of unequal power between the sexes.[86] The civil rights provision of the Violence Against Women Act put that vision into practice. By recognizing that violence is inflicted on women because of their membership in a group defined by their gender, that such violence erodes women's status as equal citizens, and that women are entitled to protection from such violence as a matter of federal civil rights, VAWA achieved what Professor Catharine MacKinnon has described as "a conceptual overhaul from the ground up."[87]

VAWA's civil rights provision was a pioneering attempt to provide legal redress at the national level for one of the most common and fundamental manifestations of gender inequality. This quantum leap in the legal response to violence against women did not go unchallenged. As the following section will describe, from the time it was introduced until the Supreme Court declared it unconstitutional, the civil rights remedy was the target of a series of attacks claiming that it usurped the states' authority to regulate violence against women as they see fit.

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83 *See* Schwenk v. Hartford, 204 F.3d 1187, 1203 (9th Cir. 2000); Ziegler v. Ziegler, 28 F. Supp. 2d 601, 606-07 (E.D. Wash. 1998); Goldscheid, *supra* note 67.

84 Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779, 783 (W.D. Va. 1996), *aff'd*, 169 F.3d 820, 830 (4th Cir. 1999) (en banc), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000).

85 As the Senate Judiciary Committee stated in a report on the legislation, "While traditional criminal charges and personal injury suits focus on the harm to the individual, a civil rights claim redresses an assault on a commonly shared ideal of equality." S. REP. NO. 103-138, at 51 (1993); S. REP. NO. 102-197, at 49 (1991).

86 *See generally, e.g.*, SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT (1982); ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING (2000).

87 MacKinnon, *supra* note 32, at 138.

III. OF ALCHEMY AND MYTH-MAKING: THE VIOLENCE AGAINST WOMEN ACT, FAMILY LAW, AND FEDERALISM

Although the Violence Against Women Act's civil rights provision broke new ground in its treatment of gender-motivated violence, it was clearly recognizable as an extension of a familiar legal concept: federal civil rights legislation. However, while VAWA was pending in Congress and after it was enacted, judges repeatedly portrayed the civil rights remedy as a statute governing domestic relations. Having recast the civil rights remedy as a family law matter, the judges were able to argue that the remedy had no legitimate place in federal law because family law is controlled exclusively by the states. Both the description of VAWA as a family law statute, and the assertion that the states enjoy a monopoly over domestic relations, are fundamentally inaccurate.[88] These developments in Congress and the lower courts set the stage for *United States v. Morrison*, in which the Supreme Court held that the civil rights provision of VAWA was unconstitutional.

A. *Judicial Alchemy: How a Civil Rights Statute Became Family Law*

Almost from the moment of VAWA's introduction in 1990, the civil rights remedy faced vigorous opposition, primarily from federal and state judges.[89] Both the Judicial Conference of the United States, representing the federal judiciary, and the Conference of Chief Justices, its state counterpart, issued resolutions condemning the legislation and lobbied actively against it.[90] The judges offered various reasons for their opposition, including a fear that the new remedy would flood the already overcrowded federal docket.[91] The judicial organizations also accused

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[88] As Professor Judith Resnik has shown, the tendency of judges to think about the respective spheres of federal and state law in rigid categorical terms leads to at least two types of errors: first, the failure to place a given legal issue in the correct category, and second, the failure to recognize that the boundaries between federal and state jurisdiction are constructed and contingent rather than natural and immutable. *See generally* Resnik, *supra* note 39. VAWA's civil rights provision fell victim to both of these errors. *Id.*

[89] *See generally* Goldfarb, *supra* note 43; Nourse, *supra* note 43.

[90] *See Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House of Representatives Comm. on the Judiciary*, 103d Cong. 74-76 (1993) [hereinafter *1993 House Hearing*] (Judicial Conference of the United States resolution); *id.* at 77-84 (Conference of Chief Justices resolution). The Judicial Conference of the United States later withdrew its opposition. *See id.* at 70-73; *infra* notes 106-10 and accompanying text. For a critical analysis of the federal judiciary's lobbying efforts against VAWA, see generally Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269 (2000). Unlike the Judicial Conference and the Conference of Chief Justices, the National Association of Women Judges endorsed VAWA, including the civil rights provision. *See 1993 House Hearing*, *supra*, at 30-32.

[91] *See, e.g.*, *1993 House Hearing*, *supra* note 90, at 75. The claim that VAWA's civil rights provision would burden the federal courts was an implicit value judgment on the relative importance of gender-motivated violence in comparison to other subjects under federal jurisdiction. In any event, the fear that VAWA cases would overwhelm the federal courts proved to be unfounded. *See* Brief of Senator Joseph R. Biden, Jr. as Amicus Curiae at 18, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29) ("Although the precise number of cases filed is not known, there have been far fewer than one hundred reported cases asserting claims under § 13981 in federal court . . . since the statute's enactment in 1994."). Before VAWA was enacted, Professor Cass Sunstein correctly predicted that a small number of cases would be filed under the civil rights provision but stated that this fact would not diminish its importance as an addition to the

VAWA's civil rights provision of contributing to the excessive federalization of criminal law.[92] However, the principal argument advanced by the judiciary against the Violence Against Women Act's civil rights provision was that it would impose unwarranted federal authority over family law matters. Chief Justice Rehnquist used his 1991 Year-End Report on the Federal Judiciary to urge Congress not to pass VAWA's civil rights measure because it could "involve the federal courts in a whole host of domestic relations disputes."[93] Similarly, the Conference of Chief Justices protested that VAWA could "cause major state-federal jurisdictional problems" by encroaching on the states' exclusive responsibility for family law.[94]

By any objective measure, VAWA's civil remedy for gender-motivated violence was not a federal domestic relations law. It was a federal civil rights law, modeled on previous federal civil rights statutes.[95] A family relationship between the plaintiff and defendant was neither necessary nor sufficient to prove a civil rights violation under VAWA. Although the civil rights provision covered acts of violence within the family, it did so only to the extent that those acts could be shown by a preponderance of the evidence to have been motivated by gender bias.[96] Even if a VAWA claim were brought between family members, any relief granted would be in the form of recompense for a violation of civil rights, which is conceptually distinct from the types of relief granted in domestic relations actions.[97] In fact, a sizeable percentage of cases filed under the civil rights provision arose in a commercial or educational setting, not within the family.[98]

Nevertheless, in their official statements, federal and state judges appeared convinced that violence against women is domestic violence, domestic violence is family law, and family law is entrusted solely to the states. For example, the Con-

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array of federal civil rights protections. Cass Sunstein, Remarks at Congressional Staff Briefing on the Violence Against Women Act (Sept. 16, 1992); *see also infra* Part V.A (describing symbolic and practical importance of civil rights remedy).

92 *See, e.g., 1993 House Hearing, supra* note 90, at 71, 73. Like family law, criminal law is often singled out as a quintessential state law concern. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 564 (1995). *But see, e.g.*, Resnik, *supra* note 39 (arguing against essentialist conceptions of criminal and family law as inherently non-federal).

93 William H. Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH, Jan. 1992, at 1, 3.

94 *1993 House Hearing, supra* note 90, at 77, 80.

95 The statute appeared under the heading "Civil Rights for Women" and stated that "[i]t is the purpose of this subtitle to protect the civil rights of victims of gender motivated violence . . . by establishing a Federal civil rights cause of action . . . ." 42 U.S.C. § 13981(a) (1994); *see also* Ziegler v. Ziegler, 28 F. Supp. 2d 601, 612 (E.D. Wash. 1998) (describing VAWA as a civil rights measure in the tradition of other federal civil rights legislation); *supra* notes 77-80 and accompanying text (describing relationship of VAWA to previous federal civil rights laws).

96 *See* 42 U.S.C. § 13981(e)(1) (1994).

97 *See* Doe v. Doe, 929 F. Supp. 608, 615-16 (D. Conn. 1996) (rejecting argument that VAWA "impermissibly 'federalizes' . . . family law" and stating that VAWA "complements [state law] by recognizing . . . a civil right to be free from gender-based violence").

98 Brief of Law Professors as Amici Curiae at 13-14 & n.18, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29) (stating that 45 percent of reported VAWA decisions involved workplace, other commercial, or educational settings).

ference of Chief Justices asserted that "the most common source of violence against women charges [is] domestic relations cases that are the exclusive province of the State courts."[99] The Conference of Chief Justices further warned that the new civil rights remedy would "plunge the federal government" into "inter-spousal litigation [which] goes to the very core of familial relationships" and which "has been traditionally reserved to the states."[100] Because VAWA would regulate violence within the family, the judges argued, Congress was impermissibly meddling in state family law.[101]

The federal and state judicial organizations complained both that the civil rights remedy would bring family law matters into the federal courts,[102] and that it would bring federal claims into state family law proceedings.[103] On the latter point, a spokesman for the Conference of Chief Justices went so far as to predict that the new legislation "would add a new count to many if not most divorce and other domestic relations cases."[104] Both organizations charged that women would routinely use VAWA as a "bargaining tool" to extract larger settlements in divorce negotiations. [105]

The judges' lobbying was effective. The civil rights section was amended in significant ways to restrict the number and types of claims that could be filed.[106] Based on those compromises, the United States Judicial Conference withdrew its opposition to the civil rights measure,[107] and the legislation then passed by an

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99 *1993 House Hearing*, *supra* note 90, at 78.

100 *Id.* at 80.

101 *See, e.g., id.* at 83 (Conference of Chief Justices resolution opposing VAWA civil rights provision on the ground that "spousal and sexual violence and all legal issues involved in domestic relations historically have been governed by state criminal and civil law"); Letter from The Honorable Vincent L. McCusick, President, Conference of Chief Justices, to Senator Joseph R. Biden, Jr. 2 (Feb. 22, 1991) [hereinafter Letter from The Honorable Vincent L. McCusick] (condemning "direct federal intervention into the tangled and tragic cases involving family breakdown and violence"). *See also 1993 House Hearing*, *supra* note 90, at 75 (United States Judicial Conference resolution assuming that primary source of VAWA claims would be divorce cases and other domestic relations disputes).

102 *See, e.g., 1993 House Hearing*, *supra* note 90, at 75; *id.* at 80; Rehnquist, *supra* note 93, at 3.

103 *See, e.g., 1993 House Hearing*, *supra* note 90, at 78.

104 Letter from The Honorable Vincent L. McCusick, *supra* note 101, at 1.

105 *1993 House Hearing*, *supra* note 90, at 75, 80. Senator Biden, the bill's chief sponsor, called this argument "outrageous" and stated that "to assume that women as a group are prone to file frivolous lawsuits
. . . plays upon the very gender-biased stereotypes that my legislation was intended, in part, to dispel." Letter from Senator Joseph R. Biden, Jr. to Delegates of the American Bar Association 2 (Aug. 10, 1992).

106 The Senate Judiciary Committee acknowledged that the amendment requiring a plaintiff to prove gender animus was added to the bill as a result of discussions with a representative of the Judicial Conference. S. REP. NO. 103-138, at 40, 64 (1993). In addition to the animus requirement, other amendments that reflected the preferences of the Judicial Conference included limitations on the types of felonies covered by the legislation; a ban on supplemental federal jurisdiction over state law claims seeking establishment of a domestic relations decree; and a prohibition on removal to federal court of any VAWA action initially filed in state court. *See 1993 House Hearing*, *supra* note 90, at 71.

107 *1993 House Hearing*, *supra* note 90, at 70-73. The Conference of Chief Justices remained opposed to the bill. *Id.* at 77-84.

overwhelming bipartisan majority.[108] Notably, several of the amendments were designed to limit the statute's coverage to clearly demonstrated cases of discrimination and to clarify that VAWA was not intended to invade the field of family law.[109] The statute as passed expressly stated that federal courts hearing VAWA cases would not have supplemental jurisdiction over state law claims seeking establishment of a divorce, alimony, marital property, or child custody decree.[110]

Judicial concerns about the possibility of family law seeping into federal courts and federal claims seeping into state family courts did not cease to exist when VAWA was enacted. Instead, those concerns were transferred to the case law interpreting and applying the civil rights provision.[111] In the years leading up to the Supreme Court's decision in *United States v. Morrison*, a series of lower court cases considered claims that the civil rights remedy was unconstitutional.[112] Although the overwhelming majority of those cases upheld the statute's constitutionality,[113] a few of them continued to misconstrue VAWA's civil rights remedy as a family law issue.

In Christy Brzonkala's case, both the trial court and the court of appeals en banc repeatedly adduced the issue of family law in the course of explaining their decisions to hold VAWA's civil rights remedy unconstitutional.[114] According to the

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108 *See* Nourse, *supra* note 43, at 34-36.

109 *See* 42 U.S.C. § 13981(d)(1) (1994) (requiring proof of animus); *id.* § 13981(e)(1) (excluding "random acts of violence unrelated to gender"); *id.* § 13981(e)(4) (denying supplemental federal jurisdiction over state law claims seeking establishment of a domestic relations decree); 28 U.S.C. § 1445(d) (1994) (forbidding removal of VAWA action from state to federal court).

110 42 U.S.C. § 13981(e)(4).

111 In addition, Chief Justice Rehnquist continued to criticize VAWA in speeches and articles. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820, 842 n.12 (4th Cir. 1999) (en banc), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000); Resnik, *supra* note 90, at 275.

112 *See generally* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820 (4th Cir. 1999) (en banc), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000); Santiago v. Alonso, 96 F. Supp. 2d 58 (D.P.R. 2000); Burgess v. Cahall, 88 F. Supp. 2d 319 (D. Del. 2000); Williams v. Bd. of County Comm'rs, No. 98-2845-JTM, 1999 U.S. Dist. LEXIS 13532 (D. Kan. Aug. 24, 1999); Kuhn v. Kuhn, No. 98-C-2395, 1999 U.S. Dist. LEXIS 11010 (N.D. Ill. July 15, 1999); Bergeron v. Bergeron, 48 F. Supp. 2d 628 (M.D. La. 1999); Wright v. Wright, No. Civ. 98-572-A (W.D. Okla. Apr. 27, 1999); Ericson v. Syracuse Univ., 45 F. Supp. 2d 344 (S.D.N.Y. 1999); Culberson v. Doan, 65 F. Supp. 2d 701 (S.D. Ohio 1999); Doe v. Mercer, 37 F. Supp. 2d 64 (D. Mass.), *vacated & remanded on other grounds sub nom.* Doe v. Walker, 193 F.3d 42 (1st Cir. 1999); Liu v. Striuli, 36 F. Supp. 2d 452 (D.R.I. 1999); Ziegler v. Ziegler, 28 F. Supp. 2d 601 (E.D. Wash. 1998); Griffin v. City of Opa-Locka, No. 98-1550-Civ-Highsmith (S.D. Fla. Aug. 27, 1998); C.R.K. v. Martin, No. 96-1431-MLB, 1998 U.S. Dist. LEXIS 22305 (D. Kan. July 10, 1998); Timm v. DeLong, 59 F. Supp. 2d 944 (D. Neb. 1998); Mattison v. Click Corp. of Am., No. 97-CV-2736, 1998 U.S. Dist. LEXIS 720 (E.D. Pa. Jan. 27, 1998); Crisonino v. N.Y. City Hous. Auth., 985 F. Supp. 385 (S.D.N.Y. 1997); Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997); Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997), *rev'd in part on other grounds*, 134 F.3d 1339 (8th Cir. 1998); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996); Fisher v. Grimes, No. 98 CVD 865 (N.C. Dist. Ct. July 22, 1999); Young v. Johnson, No. CV 97-90014 (Ariz. Sup. Ct. May 13, 1999) (written record of oral proceedings).

113 Of the 23 cases listed *supra* in note 112, only *Brzonkala*, *Santiago*, and *Bergeron* found the civil rights remedy unconstitutional.

114 *Brzonkala*, 169 F.3d at 828 (approving district court's conclusion that "the practical implications" of upholding VAWA's civil rights remedy under the Commerce Clause "would be to grant Congress power

Fourth Circuit, the fact that the civil rights provision expressly disclaimed federal jurisdiction over state domestic relations claims did not allay any anxiety that domestic relations claims would find their way into federal court, but rather confirmed that such anxiety was well-founded.[115]

The Fourth Circuit's preoccupation with family law led it to treat the category of gender-motivated violence covered by the statute as if it were coextensive with domestic violence,[116] a description that is both under- and overinclusive.[117] Similarly, in *Bergeron v. Bergeron*,[118] the federal district court struck down VAWA's civil rights provision, declaring, "This law is legislation regulating domestic violence, not commerce."[119]

The fallacy of equating VAWA's civil rights provision with family law was not limited to opinions finding the statute unconstitutional. *Seaton v. Seaton*,[120] a case that upheld VAWA's constitutionality, contained the following remonstrance: "The framers of the Constitution did not intend for the federal courts to play host to domestic disputes . . . . [T]his court must again express its deep concern that the Act will effectively allow domestic relations litigation to permeate the federal courts."[121] Echoing the objections raised by federal and state judicial organizations while VAWA was pending in Congress,[122] the *Seaton* court charged

to regulate virtually the whole of criminal and domestic relations law"); *id.* at 842 (stating that the VAWA civil rights remedy "could involve the federal courts in a whole host of domestic relations disputes" (quoting Rehnquist, *supra* note 93)); *id.* at 843 ("[T]o adopt such an understanding of Congress' power to regulate interstate commerce would be to extend federal control to a vast range of problems falling within even the most traditional areas of state concern . . . even divorce . . . ."); *id.* at 854 (asserting that the congressional findings offered in support of VAWA's constitutionality "would justify federal regulation, and even occupation, of the entire field of family law, including divorce, alimony, child custody and the equitable division of property"); *id.* at 859 (arguing that if "Congress can regulate any problem solely by finding that it affects the economy and has not been fully remedied by the States," then it can regulate "the core areas of family law," including "divorce, alimony, the equitable division of property, and child custody"); Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779, 788 (W.D. Va. 1996) (referring to the danger that an overly broad interpretation of the Commerce Clause would permit Congress to regulate "family law (including marriage, divorce, and child custody)" (quoting United States v. Lopez, 514 U.S. 549, 564 (1995))), *aff'd* 169 F.3d 820 (4th Cir. 1999) (en banc), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000); *id.* at 793 ("[I]f VAWA is a permissible use of the commerce power . . . , then it would be inconsistent to deny the commerce power's extension into family law . . . .").

115 *See Brzonkala*, 169 F.3d at 842 ("[T]he fact that Congress found it necessary to include such a jurisdictional disclaimer confirms both the close factual proximity of the conduct regulated by section 13981 to the traditional objects of family law, . . . and the extent of section 13981's arrogation to the federal judiciary of jurisdiction over controversies that have always been resolved by the courts of the several States.").

116 *See id.* at 841-43 (criticizing VAWA's focus on domestic violence, which "frequently arise[s] from the same facts that give rise to issues such as divorce and child custody, which lie at the very core of family law"); *see also id.* at 896 (Wilkinson, C.J., concurring) (stating that the civil rights provision "attach[es] civil penalties to criminal, but domestic, conduct"); *id.* at 904-05 (Niemeyer, J., concurring) (using the phrase "domestic violence" as a synonym for gender-motivated violence).

117 *See supra* notes 95-98 and accompanying text.

118 48 F. Supp. 2d 628 (M.D. La. 1999).

119 *Id.* at 638. Both *Bergeron* and *Santiago v. Alonso* relied extensively on the Fourth Circuit's reasoning in *Brzonkala*, including its emphasis on family law. *See* Santiago v. Alonso, 96 F. Supp. 2d 58, 66-67 (D.P.R. 2000); *Bergeron*, 48 F. Supp. 2d at 634-40.

120 971 F. Supp. 1188 (E.D. Tenn. 1997).

121 *Id.* at 1190-91, 1194.

ganizations while VAWA was pending in Congress,[122] the *Seaton* court charged that VAWA's civil rights remedy "opens the doors of the federal courts to parties seeking leverage in [divorce] settlements rather than true justice."[123]

Why was the judiciary predisposed to subsume VAWA's civil rights remedy under the heading of family law? As I have described at greater length elsewhere, the characterization of VAWA's civil rights provision as a domestic relations measure reflects the judicial tendency to associate women, and legal issues involving women, with the domestic sphere.[124] For centuries, our culture has emphasized women's sexual, procreative, and nurturing capacities over other aspects of their identities, and the law has reflected this bias.[125] Furthermore, by positioning VAWA as a domestic relations law, the judges laid the groundwork to attack it as unsuitable for federal jurisdiction. The judges' eagerness to label VAWA's civil rights provision as a family law statute was matched by their fervor in claiming that family law is entirely foreign to the federal courts and subject to the untrammeled authority of the states.[126] As the following subsection will show, this assumption, although widely shared, is incorrect.

B. Judicial Myth-Making: Family Law As "Not Federal In Nature" [127]

As the preceding discussion has demonstrated, the premise that VAWA's civil rights provision concerned domestic relations led directly to the conclusion that it had no legitimate place in federal law. This is a familiar but erroneous stance.

Since at least the late nineteenth century, federal and state courts alike have routinely assumed that "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."[128] This sentiment is often traced to the domestic relations exception to federal diversity jurisdiction.[129] The domestic relations exception arose from the 1859 case of *Barber v. Barber*,[130] in which the Supreme Court stated that "we disclaim altogether any jurisdiction in the courts of the United States upon

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122 *See supra* note 105 and accompanying text.

123 *Seaton*, 971 F. Supp. at 1190.

124 *See* Goldfarb, *supra* note 61, at 18-34.

125 *See, e.g.*, Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1696 (1991).

126 *See supra* notes 99-101 and accompanying text.

127 *See 1993 House Hearing*, *supra* note 90, at 82 (Conference of Chief Justices statement warning that VAWA civil rights remedy would "wreak major unforeseen changes in a large area of civil litigation which is not federal in nature").

128 *See* In re Burrus, 136 U.S. 586, 593-94 (1890).

129 *See generally, e.g.*, Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073 (1994).

130 62 U.S. (21 How.) 582 (1859).

the subject of divorce, or for the allowance of alimony."[131] The *Barber* case actually held that the federal courts did have jurisdiction to enforce an existing state alimony judgment; therefore, the statements disclaiming jurisdiction over divorce and alimony decrees were dicta.[132] *Barber's* disavowal of federal jurisdiction over family law was not grounded in the Constitution,[133] and the Court cited no authority and provided no explanation for its position.[134] Nevertheless, the Court's pronouncement in *Barber* "formed the basis for excluding 'domestic relations' cases from the [diversity] jurisdiction of the lower federal courts, a jurisdictional limitation those courts have recognized ever since."[135]

The domestic relations exception applies only to federal jurisdiction based on diversity of citizenship and has no bearing on other types of federal jurisdiction.[136] Furthermore, the Court's most recent decision on the domestic relations exception, *Ankenbrandt v. Richards*,[137] reaffirmed the exception but specifically held that it does not apply to tort claims arising from intrafamily violence.[138] VAWA's civil rights provision is entirely consistent with the *Ankenbrandt* holding.[139]

Despite the common belief that domestic relations are "a virtually exclusive province of the States,"[140] issues concerning the family have never been absent from federal law. Congress and the Supreme Court have made law in areas ranging from divorce, alimony, and child custody to marriage, adoption, paternity, illegitimacy, visitation, child support, and child abuse, to name just a few.[141] Federal con-

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131 *Id.* at 584.

132 *See* Ankenbrandt v. Richards, 504 U.S. 689, 694 (1992) (citing *Barber*).

133 *Id.* at 695-96.

134 *Id.* at 694.

135 *Id.*

136 *See generally Ankenbrandt*, 504 U.S. 689.

137 504 U.S. 689 (1992).

138 *Id.* at 701-04.

139 Although VAWA established a federal cause of action triggering federal question jurisdiction rather than diversity jurisdiction and therefore was not required to comply with the domestic relations exception, the drafters took the prudential step of curtailing supplemental jurisdiction over state claims by adopting limitations similar to those articulated by the Court in *Ankenbrandt*. *Compare Ankenbrandt*, 504 U.S. at 704 ("concluding . . . that the domestic relations exception [to federal diversity jurisdiction] encompasses only cases involving the issuance of a divorce, alimony, or child custody decree") *with* 42 U.S.C. § 13981(e)(4) (1994) (stating that the civil rights remedy does not "confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of property, or child custody decree").

140 *See* Sosna v. Iowa, 419 U.S. 393, 404 (1975).

141 For surveys of federal statutes and cases addressing family law topics, see, e.g., Linda Henry Elrod, *Epilogue: Of Families, Federalization, and a Quest for Policy*, 33 FAM. L.Q. 843, 846-51 (1999); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 U.C.L.A. L. REV. 1297, 1302 n.7, 1373-86 (1998); Resnik, *supra* note 125, at 1721-29, 1742-44; Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C. L. REV. 669, 707 (1995); *Supreme Court Cases*, FAM. ADVOC., Spring 2001, at 15.

trol over the field of family law has increased markedly in recent decades.[142]

The perception that family issues have no place in federal court, although inaccurate, retains a strong hold on the judicial imagination. In *United States v. Lopez*,[143] for example, the Supreme Court repeatedly invoked family law as a paradigmatic example of an area that is off-limits for federal law-making.[144] Similarly, as we have seen, judicial testimony and opinions on VAWA were replete with claims that state law has sole authority over domestic relations matters.[145] In the *Brzonkala* case, Chief Judge Wilkinson resorted to a military metaphor to depict what he viewed as VAWA's illegitimate invasion into the domain of state family law. He stated in his concurring opinion, "VAWA's civil suit provision falters for the most basic of reasons. [It] scales the last redoubt of state government – the regulation of domestic relations."[146]

The judicial inclination toward keeping federal law out of the family and the family out of federal law stems from several sources. Because the family has historically been viewed as "private," family disputes have been seen as out of place in the consummate "public" sphere of federal law.[147] Also, cases concerning women are widely considered less important than other legal issues, and family matters are "messy" in that they involve details of interpersonal relationships, which many judges find unseemly.[148] Therefore, in order to enhance the prestige of their positions, federal judges may contrive to keep family law matters off of their dockets.[149]

Another reason for resistance to federal law affecting the family is the desire of state legal actors to maintain their prerogatives. Territorial protectionism is evident in the comments of the Conference of Chief Justices on the VAWA civil rights remedy.[150] The state judges' mission to preserve their turf dovetails neatly with federal judges' distaste for family law issues.

Although family law has long been considered a state law enclave, there is one area of law concerning the family – namely, domestic violence – in which legal remedies were traditionally unavailable in any forum. Until the mid-nineteenth century, the right of chastisement gave men the legal prerogative to exercise "moderate correction" — that is, physical force — to punish their wives.[151] As

142 *See, e.g., Ankenbrandt*, 504 U.S. at 715 (Blackmun, J., concurring); Elrod, *supra* note 141, at 846-51; Ann Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL'Y & L. 541 (1998).

143 514 U.S. 549 (1995).

144 *Id.* at 564-65.

145 *See supra* Part III.A.

146 Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820, 896 (1999) (en banc) (Wilkinson, C.J., concurring), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000).

147 *See* Goldfarb, *supra* note 61, at 18-41.

148 *Id.* at 31-32.

149 *See* Resnik, *supra* note 125, at 1749-50.

150 *See generally 1993 House Hearing*, *supra* note 90, at 77-84. *See also* Letter from The Honorable Vincent L. McCusick, *supra* note 101, at 2 (claiming that VAWA raises "serious questions as to the role of federal courts in the development of domestic relations law, an area in which they have little experience and which, more than any other, has until now been reserved to the states").

erate correction" — that is, physical force — to punish their wives.[151] As soon as the right of chastisement began to be discredited by nineteenth-century ideals of affection in marriage, the ideology of family privacy arose to take its place.[152] As Professor Reva Siegel has shown, courts continued their practice of denying redress to battered women but now based their decisions on the view that the law must not intrude in the intimate relationship between husband and wife.[153] A number of nineteenth-century cases refusing to help battered wives used the metaphor of a protective curtain shielding the home from the harsh scrutiny of the courts.[154] For example, an 1868 North Carolina case stated, "[H]owever great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber."[155] The ideology of family privacy, like the right of chastisement that preceded it, ensured that women seeking legal relief for domestic violence would be unsuccessful.

Closely related to the ideology of family privacy is the doctrine of coverture, which states that upon marriage, the wife's legal identity merges into that of the husband.[156] The doctrine of coverture shaped the origins of American family law, and its influence is still felt today. Because husband and wife were viewed as one person under the law, one could not sue the other, which justified the doctrine of interspousal tort immunity, still in force in several states.[157] Similarly, because a man cannot rape himself, the doctrine of coverture led logically and necessarily to the conclusion that men should be exempt from prosecution for raping their wives.[158] Although the marital rape exemption no longer exists in its pure form, the majority of states retain a modified version of the exemption by criminalizing a narrower range of sexual offenses within marriage than outside of it, by subjecting sexual offenses within marriage to less severe punishments, or by creating special procedural hurdles for marital rape prosecutions.[159] Thus, although states have adopted a wide range of criminal and civil remedies for domestic violence during the past thirty years,[160] the vestiges of the law's refusal to intervene in the family remain.

All of these considerations undoubtedly played a role in shaping the judi-

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151 *See* Goldfarb, *supra* note 61, at 23.

152 Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2121-41 (1996).

153 *Id.*

154 *See* Goldfarb, *supra* note 61, at 22 n.92.

155 State v. Rhodes, 61 N.C. (Phil. Law) 453, 457 (1868).

156 *See* Goldfarb, *supra* note 61, at 21.

157 *Id.* at 23 & n.100.

158 *Id.*

159 *Id.*

160 *See generally* SCHNEIDER, *supra* note 86.

cial attitude toward the Violence Against Women Act's civil rights remedy,[161] but they were not the primary justifications offered by the judges for their opposition to the statute. Instead, in the current intellectual and political climate, the judges turned to federalism as their most frequently articulated reason for keeping domestic violence in particular, and domestic relations in general, out of federal law. The trial court decision in *Brzonkala* stated that upholding VAWA would have "the practical result of excessively extending Congress's power and of inappropriately tipping the balance [of power] away from the states."[162] The Fourth Circuit's en banc opinion purported to be dictated by "the principles of limited federal government upon which this Nation was founded"[163] and referred numerous times to the danger that upholding VAWA would violate the basic precepts of federalism by granting unlimited powers to Congress.[164] In this way, the distinctly gendered ideologies that helped shape the opposition to VAWA's civil rights provision[165] were concealed behind the rhetoric and reasoning of federalism. As the following section will discuss, this process continued when the case reached the Supreme Court.

C. United States v. Morrison *and the Constitutionality of VAWA's Civil Rights Remedy*

At the time VAWA passed in 1994, Congress's constitutional authority to legislate against gender-motivated violence appeared incontrovertible. Congress declared that it was enacting the civil rights remedy pursuant to the Commerce Clause and section 5 of the Fourteenth Amendment.[166] The legislation was supported by an unusually thorough record of legislative hearings, committee reports, and findings, compiled over the course of more than four years of congressional deliberations.[167] Almost six decades had passed since the Court had last overturned a federal statute enacted under the Commerce Clause.[168]

After VAWA was signed into law, the Supreme Court's decisions in

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161 To give a particularly blatant example of arguments against VAWA that built on traditional sex-discriminatory legal doctrines, some opponents of the legislation attacked it on the ground that it would undermine marital rape exemptions and interspousal tort immunities. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820, 843, 873 (4th Cir. 1999) (en banc), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000); Santiago v. Alonso, 96 F. Supp. 2d 58, 66-67 (D.P.R. 2000); *1993 House Hearing*, *supra* note 90, at 81 (statement by the Conference of Chief Justices); *id.* at 27-28 (statement of Bruce Fein).

162 Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779, 792 (W.D. Va. 1996), *aff'd* 169 F.3d 820 (4th Cir. 1999) (en banc), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000).

163 *Brzonkala*, 169 F.3d at 826.

164 *Brzonkala*, 169 F.3d at 838, 843, 844, 852, 853, 888, 889. For further discussion of the Fourth Circuit's federalism analysis, see Goldfarb, *supra* note 61, at 83-85; Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong With Conservative Judicial Activism*, 45 VILL. L. REV. 201 (2000).

165 *See supra* notes 151-61 and accompanying text.

166 42 U.S.C. § 13981(a) (1994).

167 *See* United States v. Morrison, 529 U.S. 598, 628-35 (2000) (Souter, J., dissenting).

168 *See* Anisimov v. Lake, 982 F. Supp. 531, 534 (N.D. Ill. 1997).

United States v. Lopez,[169] *City of Boerne v. Flores*,[170] and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*[171] made the constitutionality of the civil rights provision a closer question. Nevertheless, there were ample grounds to hold that the civil rights provision could withstand the Court's tests under the Commerce Clause and the Fourteenth Amendment.[172] Of the almost two dozen judicial decisions issued by the lower federal and state courts on the constitutionality of VAWA's civil rights provision, the overwhelming majority upheld the statute.[173]

Christy Brzonkala's case was an exception to this rule. The federal district court found that she had stated a claim of gender-motivated violence under the statute, but dismissed her claim on the ground that neither the Commerce Clause nor section 5 of the Fourteenth Amendment gave Congress the power to enact the civil rights remedy.[174] After a panel of the Fourth Circuit reversed on the constitutional issue, the Fourth Circuit reheard the case en banc and affirmed the trial court's holdings that Christy Brzonkala had stated a valid claim and that Congress lacked constitutional authority to enact the legislation.[175] Finally, the Supreme Court, in *United States v. Morrison*, affirmed by a vote of five to four, sealing the fate of the civil rights remedy.[176] As a brief description of the *Morrison* decision

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169 514 U.S. 549 (1995).

170 521 U.S. 507 (1997).

171 527 U.S. 627 (1999).

172 For a discussion of the civil rights provision's constitutionality after *Lopez*, *Boerne*, and *Florida Prepaid*, see Goldfarb, *supra* note 61, at 57-85.

173 *See supra* note 112. The following cases upheld the civil rights provision under the Commerce Clause: Burgess v. Cahall, 88 F. Supp. 2d 319 (D. Del. 2000); Williams v. Bd. of County Comm'rs, No. 98-2845-JTM, 1999 U.S. Dist. LEXIS 13532 (D. Kan. Aug. 24, 1999); Kuhn v. Kuhn, No. 98-C-2395, 1999 U.S. Dist. LEXIS 11010 (N.D. Ill. July 15, 1999); Wright v. Wright, No. Civ. 98-572-A (W.D. Okla. Apr. 27, 1999); Ericson v. Syracuse Univ., 45 F. Supp. 2d 344 (S.D.N.Y. 1999); Culberson v. Doan, 65 F. Supp. 2d 701 (S.D. Ohio 1999); Doe v. Mercer, 37 F. Supp. 2d 64 (D. Mass.), *vacated and remanded on other grounds sub nom.* Doe v. Walker, 193 F.3d 42 (1st Cir. 1999); Liu v. Striuli, 36 F. Supp. 2d 452 (D.R.I. 1999); Ziegler v. Ziegler, 28 F. Supp. 2d 601 (E.D. Wash. 1998); Griffin v. City of Opa-Locka, No. 98-1550-Civ-Highsmith (S.D. Fla. Aug. 27, 1998); C.R.K. v. Martin, No. 96-1431-MLB, 1998 U.S. Dist. LEXIS 22305 (D. Kan. July 10, 1998); Timm v. DeLong, 59 F. Supp. 2d 944 (D. Neb. 1998); Mattison v. Click Corp. of Am., No. 97-CV-2736, 1998 U.S. Dist. LEXIS 720 (E.D. Pa. Jan. 27, 1998); Crisonino v. N.Y. City Hous. Auth., 985 F. Supp. 385 (S.D.N.Y. 1997); Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997); Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997), *rev'd in part on other grounds*, 134 F.3d 1339 (8th Cir. 1998); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996); Fisher v. Grimes, No. 98 CVD 865 (N.C. Dist. Ct. July 22, 1999). In addition, *Wright*, *Timm*, and *Fisher* found the statute valid under the Fourteenth Amendment.

174 Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779, 788 (W.D. Va. 1996), *rev'd*, 132 F.3d 949 (4th Cir. 1997), *vacated & reh'g en banc granted* (Feb. 5, 1998), *aff'd*, 169 F.3d 820 (4th Cir. 1999) (en banc), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000).

175 Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820 (4th Cir. 1999) (en banc).

176 United States v. Morrison, 529 U.S. 598 (2000). The *Morrison* majority consisted of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Thomas wrote a concurring opinion rejecting the "substantial effects" test for Commerce Clause challenges. *Id.* at 627. In dissent, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, asserted that the civil rights provision was a legitimate exercise of Congress's powers under the Commerce Clause. *Id.* at 628-55. Justice Breyer's dissent, joined by

will show,[177] the Supreme Court, like the courts below, reiterated the concern about preserving state control over family law that had been expressed by the judiciary while VAWA was under consideration in Congress.[178] However, the mentions of family law in the *Morrison* opinion were comparatively few; instead, the Court focused on a more general concern with safeguarding the rights of the states under federalism.

The oral argument in *Morrison* signaled that VAWA's relationship to family law was very much a live issue. At oral argument, the justices and counsel on both sides referred to family law in various ways. Antonio Morrison's counsel warned the Court that upholding VAWA would allow Congress to usurp state control over domestic relations law.[179] He also denounced VAWA for overriding state tort immunities and marital rape exemptions.[180] Meanwhile, Christy Brzonkala's lawyer was careful to point out that VAWA expressly disallowed federal jurisdiction over divorce and related family law issues.[181] Justice Ginsburg, who was clearly favorably disposed toward the legislation, reminded her colleagues that there was no question of a family relationship in the case at bar.[182] Yet the concerns of the justices about federal incursions into family law went beyond the facts of the case before them, and even beyond VAWA itself. Justice O'Connor asked questions designed to probe whether upholding VAWA under the Commerce Clause would result in opening the door to Congress to legislate a comprehensive federal code of marriage, divorce, alimony, and child support.[183] In so doing, she alluded to a slippery slope that the Court has scrupulously attempted to avoid.[184]

When *Morrison* was decided, Chief Justice Rehnquist's opinion for the Court rested in part on the slippery slope rationale. If VAWA's civil rights remedy could be sustained under the Commerce Clause, he wrote, the same reasoning could "be applied equally as well to family law and other areas of traditional state regulation," including "marriage, divorce, and childrearing."[185] Such legislation

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Justices Stevens, Souter, and Ginsburg, also argued for upholding the civil rights provision under the Commerce Clause. *Id.* at 655-64. In addition, a section of Justice Breyer's dissent that was joined only by Justice Stevens expressed "doubt" about the majority's reasoning rejecting section 5 of the Fourteenth Amendment as a source of authority for the legislation. *Id.* at 664-66.

177 A comprehensive analysis of the *Morrison* decision is beyond the scope of this article. For additional commentary on *Morrison*, see, e.g., Sally F. Goldfarb, Violence Against Women and the Use and Abuse of Federalism (unpublished manuscript on file with the author); Goldscheid, *supra* note 30; MacKinnon, *supra* note 32; Post & Siegel, *supra* note 39.

178 *See supra* Part III.A-B.

179 Tr. of Oral Argument, United States v. Morrison, Nos. 99-5, 99-29, 2000 WL 41232, at *11, *13 (U.S. Jan. 11, 2000).

180 *Id.* at *17-*18.

181 *Id.* at *4.

182 *Id.* at *18.

183 *Id.* at *4, *7.

184 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 564-65 (1995).

185 United States v. Morrison, 529 U.S. 598, 615-16 (2000); *see also id.* at 613 (quoting *Lopez*, 514 U.S. at 564).

would, in the Court's view, fatally undermine the "distinction between what is truly national and what is truly local."[186] By using the issue of family law to delegitimate VAWA's civil rights remedy, the Court built on the foundation laid by the judges who had lobbied against VAWA's passage.[187] The Court conceded that Congress "expressly precluded § 13981 from being used in the family law context," but in a curious twist of logic reminiscent of the Fourth Circuit's en banc opinion,[188] it rejected the significance of this fact.[189]

The Court's comments about family law occurred in the course of its Commerce Clause analysis. For its holding that VAWA's civil rights remedy exceeded Congress's powers under the Commerce Clause, the Court relied heavily on *United States v. Lopez*.[190] Using four "considerations" drawn from the *Lopez* decision,[191] the Court compared VAWA's civil rights remedy to the Gun Free School Zones Act (GFSZA) struck down by *Lopez*.[192] First, the *Morrison* Court found that gender-motivated violence, like possession of a gun in a school zone, is a noneconomic activity.[193] Second, the Court observed that VAWA, like GFSZA, contained no jurisdictional element requiring proof of a connection with or effect on interstate commerce in each case.[194] Third, the Court acknowledged that in contrast to the lack of congressional findings in support of GFSZA, Congress made extensive findings on the effects of gender-motivated violence on interstate commerce.[195] Nonetheless, the Court asserted that the findings were "substantially weakened" by their reliance on "a method of reasoning" that the Court described as "unworkable."[196] With respect to its fourth criterion, the Court found that VAWA, like the GFSZA, had an "attenuated" effect on interstate commerce.[197]

While the Court purported to stop short of adopting a "categorical rule" against congressional regulation of noneconomic activity that substantially affects

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186 *Id.* at 617-18 (citations omitted). The Court also referred to the specter of a comprehensive federal criminal code. *Id.* at 615, 617-18. Criminal law, like family law, is often cited to exemplify a subject properly consigned to state law. *See supra* note 92.

187 Those judges included, of course, Chief Justice Rehnquist himself. *See generally supra* Part III.A. *See also* Resnik, *supra* note 90.

188 *See supra* note 115 and accompanying text.

189 *See Morrison*, 529 U.S. at 616 ("Congress . . . expressly precluded § 13981 from being used in the family law context. Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace.") (footnote and citation omitted). In this passage, the Court seemed to indicate that it was necessary to invalidate a statute that does *not* bring family law into the federal courts in order to prevent Congress from someday passing a statute that does.

190 514 U.S. 549 (1995).

191 *Morrison*, 529 U.S. at 609.

192 *Id.* at 609-16.

193 *Id.* at 613.

194 *Id.*

195 *Id.* at 614.

196 *Morrison*, 529 U.S. at 615.

197 *Id.*

interstate commerce,[198] it "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce,"[199] in effect creating just such a categorical distinction. Moreover, despite protestations of deference to Congress,[200] the majority implicitly "supplant[ed] rational basis scrutiny [under the Commerce Clause] with a new criterion of review" that is far more demanding.[201]

This outcome was far from predetermined. In *United States v. Lopez*, the Court held that a federal statute can be upheld under the Commerce Clause if it regulates activities that substantially affect interstate commerce.[202] VAWA's legislative history contained a "mountain of data" demonstrating that domestic violence, sexual assault, and other forms of violence against women have an enormous effect on women's employment, workplace productivity, travel, consumer spending, and health care expenses, and on interstate commerce generally.[203] Congress found that one of the primary effects of gender-based violence is to make it impossible for women as a group to function effectively in the economic sphere. The Senate Judiciary Committee stated that "[g]ender-based violence bars its most likely targets — women — from full partic[ipation] in the national economy."[204] Actual violence and fear of violence interfere with women's ability to get and keep jobs and force women into poverty, homelessness, and dependency on welfare.[205] When discrimination poses a barrier to a disadvantaged group's participation in the national economy, federal civil rights legislation adopted under the Commerce Clause is a suitable solution.[206]

After disposing of the Commerce Clause issue, the Court turned to the Fourteenth Amendment. While VAWA was pending, Congress heard evidence that the states routinely deny female victims of domestic violence and sexual assault the equal protection of the laws.[207] As the *Morrison* majority conceded, Congress's

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198 *Id.* at 613.

199 *Id.* at 617.

200 *Id.* at 607.

201 *See Morrison*, 529 U.S. at 637-38 (Souter, J., dissenting).

202 United States v. Lopez, 514 U.S. 549, 558-59 (1995).

203 *See Morrison*, 529 U.S. at 628-36 (Souter, J., dissenting).

204 S. REP. NO. 103-138, at 54 (1993).

205 *See Morrison*, 529 U.S. at 628-36 (Souter, J., dissenting); Goldfarb, *supra* note 61, at 72-74.

206 *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 304 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261-62 (1964). In his testimony before Congress, Professor Cass Sunstein argued that gender-motivated violence provides an even more compelling case for federal antidiscrimination legislation than the type of nonviolent discrimination at issue in *McClung* and *Heart of Atlanta*. *1993 House Hearing*, *supra* note 90, at 60; *see also id.* at 43-44 (statement of Burt Neuborne) (stating that the "need to eradicate the destructive effects of gender bias from our economic system" supports congressional authority to enact VAWA's civil rights remedy under the Commerce Clause).

207 *See, e.g.*, S. REP. NO. 103-138, at 55 (1993) (quoting *Violence Against Women: Victims of the System, Hearing Before the Senate Judiciary Comm.*, 102d Cong. 104 (1991) (statement of Cass Sunstein) (stating that "the criminal justice system is not providing equal protection of the laws to women, in the classic sense")).

findings of "pervasive bias in various state justice systems against victims of gender-motivated violence" were supported by a "voluminous congressional record."[208] In the Court's words,

> Congress concluded that . . . discriminatory stereotypes [held by participants in state justice systems] often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence.[209]

Notwithstanding these observations, the Court ruled that Congress's effort to enact legislation to "remedy the States' bias and deter future instances of discrimination in the state courts"[210] was not authorized by section 5 of the Fourteenth Amendment, for two reasons. First, according to the Court, the Fourteenth Amendment permits Congress to regulate only state action, not the behavior of private actors.[211] Second, the Court found that VAWA's civil rights measure lacked the requisite "'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[212]

Like its Commerce Clause analysis, the Court's Fourteenth Amendment reasoning is subject to criticism on a number of grounds. Both *City of Boerne v. Flores*[213] and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*[214] confirmed that section 5 of the Fourteenth Amendment gives Congress the power to pass legislation designed to deter or remedy constitutional violations, even if in the process it prohibits conduct that is not itself unconstitutional. Despite language in modern Supreme Court cases suggesting that this remedial power could extend to private action,[215] the *Morrison* Court turned to the nineteenth-century cases of *United States v. Harris* and the *Civil Rights Cases* to conclude that section 5 confers no authority on Congress to regulate private actors.[216] However, unlike *Morrison*, *Harris* and the *Civil Rights Cases* did not present the Court with an allegation that Congress had targeted private action in order to rem-

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208 *Morrison*, 529 U.S. at 619-20.

209 *Id.* at 620 (citations omitted).

210 *Id.*

211 *Id.* at 621-22.

212 *Id.* at 625-26 (citing Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); City of Boerne v. Flores, 521 U.S. 507, 526 (1997)).

213 521 U.S. at 518-20.

214 527 U.S. at 638-39.

215 *See, e.g.*, District of Columbia v. Carter, 409 U.S. 418, 423 n.8 (1973); United States v. Guest, 383 U.S. 745, 762 (1966) (Clark, J., concurring); *id.* at 782 (Brennan, J., concurring in part and dissenting in part).

216 *Morrison*, 529 U.S. at 621-22 (citing Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1883)).

edy and deter discriminatory state action.[217] In light of the proven discrimination against victims of gender-motivated violence in the civil and criminal justice systems of many states, a federal cause of action against private actors who commit gender-motivated violence should have been upheld under section 5.[218]

As for the "congruence and proportionality" issue, VAWA's civil rights provision was an integral part of Congress's attempt to improve the states' response to violence against women by means of comprehensive legislation that included both measures aimed directly at the states and "the creation of a federal remedy to substitute for constitutionally inadequate state remedies."[219] This statutory scheme was a balanced and appropriate response to a serious national problem.[220]

The engine driving the Court's constitutional analysis in *Morrison* was a preoccupation with federalism. No fewer than five times, the majority alluded to its fear of "obliterat[ing] the distinction between what is national and what is local and creat[ing] a completely centralized government."[221] The Court claimed that its decision to strike down VAWA's civil rights provision was dictated by the need to maintain a federal government of limited powers. The majority's clear implication was that no limiting principle was available that would both sustain the constitutionality of VAWA and avoid conferring a general police power on Congress.[222] Such a limiting principle was readily available to the Court, however. The fact that the civil rights remedy was enacted to combat discrimination distinguishes VAWA from a general federal domestic relations law or criminal law,[223] as well as from the Gun Free School Zones Act. The Court could have upheld VAWA under the Commerce Clause by focusing on the discriminatory violence that prevents women from participating equally in interstate commerce, just as it could have upheld VAWA under section 5 of the Fourteenth Amendment by focusing on the need to remedy and deter discrimination against women by actors in the state legal systems. Neither of these approaches would have created a federal government of unlimited powers. Instead, the Court paid virtually no notice to the fact that the statute under consideration was a civil rights law.[224] In so doing, it both overlooked a basis on

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217 *See id.* at 664-65 (Breyer, J., dissenting); Goldscheid, *supra* note 30, at 127-28.

218 VAWA would both remedy state actors' discrimination by providing an alternative source of redress, and deter future discriminatory state action by setting an example of taking gender-motivated violence seriously. *See Morrison*, 529 U.S. at 665 (Breyer, J., dissenting) (stating that VAWA civil rights remedy "may lead state actors to improve their own remedial systems, primarily through example"); S. REP. NO. 103-138, at 55 (1993) (stating that VAWA "provides a necessary remedy to fill the gaps and rectify the biases of existing State laws").

219 *See Morrison*, 529 U.S. at 665 (Breyer, J., dissenting); S. REP. No. 102-197, at 34-35 (1991) (describing civil rights measure and other components of VAWA as "different complementary strategies").

220 *See Morrison*, 529 U.S. at 665-66 (Breyer, J., dissenting).

221 *Id.* at 608, 608 n.3, 615, 616 n.6, 620; *see also id.* at 617-18 ("The Constitution requires a distinction between what is truly national and what is truly local.").

222 *See id.* at 615-19.

223 *Cf., e.g., id.* at 615-16 (stating that accepting petitioners' reasoning would allow Congress to take over the regulation of criminal and family law).

224 *See generally* Goldscheid, *supra* note 30; MacKinnon, *supra* note 32.

which VAWA could have been found constitutionally sound, and obscured the dire implications of its decision for women's right to equality.

The *Morrison* Court's attention to federalism was not surprising. In recent years, the Court has energetically taken on the task of redefining the respective roles of federal and state government.[225] Indeed, the constitutional challenge to VAWA's civil rights remedy necessarily implicated federalism, and there are legitimate constitutional reasons why Congress does not and should not enjoy an unlimited mandate. However, the form that *Morrison*'s federalism analysis took is deeply troubling. As Justice Souter pointed out in dissent, the Court seemed less concerned with "any logic serving the text" of the Constitution than with "preserving . . . state autonomy to legislate or refrain from legislating as the individual States see fit."[226] In the Court's eagerness to limit the powers of Congress and enhance the powers of the states, VAWA made a perfect target.

In the final analysis, the injustice of the *Morrison* decision lies in its abandonment of women to the same state laws that have failed them so often before. Telling Christy Brzonkala that any "civilized system of justice" would provide her with a remedy and then relegating her to the law of Virginia is a cruel contradiction,[227] for it was a Virginia state university and the Virginia criminal justice system that provided her with no recourse whatsoever.[228] A primary reason for the enactment of VAWA's civil rights remedy was Congress's recognition that state laws and the mechanisms for enforcing them were pervaded by gender bias.[229] Expecting state legal actors to recognize in the perpetrators of gender-motivated crimes the same types of gender bias that they fail to recognize in themselves seems quixotic at best. Given these contradictions, it is not surprising that the *Morrison* opinion does not dwell on women's civil rights, which was in reality the principal subject of both the challenged statute and Christy Brzonkala's case. Highly

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225 *See, e.g.*, Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); Alden v. Maine, 527 U.S. 706 (1999); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); Printz v. United States, 521 U.S. 898 (1997); City of Boerne v. Flores, 521 U.S. 507 (1997); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

226 *Morrison*, 529 U.S. at 644-45 (Souter, J., dissenting).

227 *See id.* at 627 ("If the allegations here are true, no civilized system of justice could fail to provide [Brzonkala] a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, not by the United States.").

228 For a summary of Virginia Tech's inadequate response to Brzonkala's rape complaint, see *supra* Part I. Brzonkala alleged that rape of a female student by a male student is the only felony that Virginia Tech authorities do not automatically report to the police. Plaintiff's Amended Complaint at 9, Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779 (W.D. Va. 1996) (No. 95-1358-R). Although Brzonkala later reported the crime to police and sought to have it prosecuted, the grand jury refused to indict. *See* MacKinnon, *supra* note 32, at 140. The failure of state law to impose meaningful criminal penalties for rape is a common phenomenon. *See Morrison*, 529 U.S. at 620; *id.* at 633 (Souter, J., dissenting). It is possible that Brzonkala could have a successful claim under state tort law. However, for reasons discussed *supra* in Part II and *infra* in Part V.A, the federal civil rights remedy was far more favorable to plaintiffs than most state tort laws.

229 *See, e.g.*, S. REP. NO. 103-138, at 42, 44-47, 49-50, 55 (1993). *See also* MacKinnon, *supra* note 32, at 176 ("If the states could have given women equality, they would have, and there would have been no VAWA because there would have been no need for one.").

attentive to the prospect of a slippery slope for federalism, the Court ignored completely the slippery slope it was creating for women.[230]

IV. ECHOES OF THE PAST: STATES' RIGHTS, VIOLENCE AGAINST WOMEN, AND SLAVERY

In *Morrison*, the Court invalidated a federal civil rights statute in the name of limiting federal power and preserving state autonomy. We have seen this type of deference to the states before, during crucial periods of our nation's history. The cause of states' rights potentially has many legitimate and beneficial applications,[231] but in practice, it has frequently functioned as an excuse for maintaining conditions of social inequality. Far from being a neutral structural principle, states' rights are often a justification for states' wrongs.[232]

Although the federalist system was promoted by the Framers as a way to ensure stability through a balance of powers between the federal and state governments, it was also designed from its inception to ensure that Southern states could retain the institution of slavery.[233] States' rights arguments were invoked during the nineteenth century in support of slavery and secession and in resistance to Reconstruction.[234] Later, the same arguments were deployed in opposition to suffrage for women[235] and civil rights for African-Americans.[236] Today, the states' rights banner is being waved by those who oppose a civil rights remedy for gender-motivated violence.[237] Domestic violence and other family-related issues, they argue, are exclusively under the control of the states.[238]

It would be simplistic and inaccurate to suggest that arguments for state autonomy inevitably conflict with support for the rights of disadvantaged groups and individuals. During earlier eras[239] as well as our own,[240] state law has afforded

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230 *See* MacKinnon, *supra* note 32, at 152.

231 A full consideration of the value of state autonomy in a federalist scheme is beyond the scope of this article. *See generally, e.g.*, DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 58-106 (1995).

232 *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 6-7 (1998).

233 *See* SHAPIRO, *supra* note 231, at 53.

234 *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 *passim* (1988); Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 8 (1995); Hasday, *supra* note 141, at 1397.

235 *See, e.g.*, Minor v. Happersett, 88 U.S. 162, 170-78 (1874).

236 *See, e.g.*, TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63 at 222-24, 380, 821-22 (1988); Hasday, *supra* note 141, at 1397-98.

237 *See supra* Part III.

238 *See, e.g.*, Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820, 842-43 (4th Cir. 1999) (en banc), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000).

239 *See generally* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975). *See also, e.g.*, Arthur Bestor, *State Sovereignty and Slavery*, 54 J. ILL. ST. HIST. SOC'Y 117 (1961) (tracing uses of states' rights arguments by opponents as well as supporters of slavery); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1110-14 (1977) (describing states' rights stance adopted by antislavery lawyers in reaction to federal fugitive slave laws and the Supreme Court's rejection of this strategy in

opportunities for progressive reform. However, in reality, resistance to federal intervention has usually correlated with the defense of repressive social and legal regimes.[241] Furthermore, as an empirical matter, states have frequently proven themselves unable or unwilling to protect the rights of oppressed groups and individuals within their borders in the absence of federal assistance or compulsion.[242] The Violence Against Women Act is an example of a federal attempt to correct for deficiencies in the states' treatment of a disadvantaged group – in this case, female victims of violence – by providing an infusion of federal resources, federally-dictated changes in state law and policy, and an alternative federal remedy.[243]

There is a poignant resonance in the use of the states' rights argument, which has been so closely identified with defenders of slavery, to oppose domestic violence claims under the Violence Against Women Act. The subject of domestic relations, including domestic violence, is deeply intertwined with the subject of slavery.

In traditional legal analysis, slavery *was* a domestic relation.[244] Eighteenth- and nineteenth-century treatises on domestic relations routinely grouped together the law of husband and wife, parent and child, and master and servant. Blackstone termed these "[t]he three great relations in private life,"[245] and his American counterparts followed suit in their writings.[246] Each of these relationships was characterized by legally enforceable dominance and dependence, with the subordinate party required to provide services and obedience in exchange for the dominant party's obligation (in theory) to furnish support and protection.[247] Moreover, the subordi-

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Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) and *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859)).

240 *Compare* VT. STAT. ANN. tit. 15, ch. 23 §§ 1201-07 (2001) (permitting same-sex couples to enter into civil unions, which confer the same rights and responsibilities as marriage under state law) *with* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. II 1996) and 28 U.S.C. § 1738C (Supp. II 1996)) (requiring the federal government and permitting the states to deny recognition of same-sex marriage). State constitutional law is capable of extending broader protections than the United States Constitution. *See generally, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L. J. 881 (1989); Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985). *But see, e.g.*, Earl M. Maltz, *False Prophet – Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS L.Q. 429 (1988) (critiquing the call for expansion of state constitutional law as a smoke screen for liberal judicial activism).

241 *See supra* notes 230-38 and accompanying text.

242 *See id.*

243 *See supra* Part II.

244 *See* Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465, 466 (1995) (stating that antebellum Southerners conceived of the servitude of slave to master as analogous to the servitude of wife to husband under the common law); Hasday, *supra* note 141, at 1299 ("In the nineteenth century, many Americans defined slavery as a domestic relation . . . ."); Amy Dru Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471, 477 (1988) ("[T]he legal codes of the southern states . . . classified *master and slave* and *husband and wife* as parallel parts of the law of domestic relations.").

245 1 WILLIAM BLACKSTONE, COMMENTARIES *410.

246 *See* Hasday, *supra* note 141, at 1389-90.

247 *See, e.g.*, Stanley, *supra* note 244, at 477. *See also supra* notes 156-58 and accompanying text

nate party lacked rights characteristic of full legal personhood, such as the right to ownership of one's own person, to enter into contracts, and to control one's labor and keep its proceeds.[248] The subordination of wives and the subordination of slaves were viewed not only as analogous, but as mutually reinforcing.[249]

The connection between the legal status of married women and slaves was not lost on Congress when it was considering the Thirteenth Amendment.[250] During debates on the Thirteenth Amendment, members of Congress expressed concern that restructuring the relationship of master and slave could disturb the traditional allocation of power under coverture. One member of Congress protested,

> The parent has the right to the service of his child . . . . A husband has a right of property in the service of his wife; he has the right to the management of his household affairs . . . . All these rights rest upon the same basis as a man's right of property in the service of slaves.[251]

A senator declared that if the proposed amendment were adopted, "I suppose before the law a woman would be equal to a man, a woman would be as free as a man. A wife would be equal to her husband . . . before the law."[252] Another congressman, objecting to federal intrusion into state control over "domestic slavery," asked rhetorically, "Should we amend the Constitution so as to change the relation of parent and child, guardian and ward, husband and wife, the laws of inheritance, the laws of legitimacy? . . . Where will it end, when once begun?"[253]

(describing the doctrine of coverture).

248 Stanley, *supra* note 244, at 477; *see also* Frontiero v. Richardson, 411 U.S. 677, 685 (1973) (plurality) ("[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property . . . .").

249 The compliance of White women became inextricably linked to that of the slaves. For, it was believed, "any tendency of one member of the system to assert themselves against the master threatened the whole." As it was often asserted by slavery apologists, any change in the role of women or Blacks would contribute to the downfall not only of slavery, but of the family and society as well.

PAULA GIDDINGS, WHEN AND WHERE I ENTER 43 (1984) (citation omitted).

250 The Thirteenth Amendment, adopted in 1865, reads as follows:

Section 1. Neither slavery nor involuntary servitude, except as a punishment whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

251 CONG. GLOBE, 38th Cong., 2d Sess. 215 (1865) (statement of Rep. White).

252 CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864) (statement of Sen. Howard).

253 CONG. GLOBE, 38th Cong., 2d Sess. 242 (1865) (statement of Rep. Cox). The dire warnings of a slippery slope that are quoted in the text were most likely calculated to inspire opposition to the amendment. *See* Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 216 (1992). The assertion that emancipation of slaves would lead to emancipation of WIVES and children was not endorsed by the amendment's supporters, *see id.*, nor by those responsible for interpreting it. *See, e.g.*, Robertson v. Baldwin, 165 U.S. 275, 282 (1897) (stating in dicta that the Thirteenth Amendment was not intended to disrupt "the right of parents and guardians to the custody of

Even after emancipation, the overlap between slavery and other branches of family law remained evident. For example, a leading family law treatise published in 1891,[254] in the course of explaining why the federal government cannot intrude on state sovereignty over the law of marriage and divorce, cited as authority the Supreme Court's decision in *Strader v. Graham*.[255] That case, decided in 1850, held that every state has the power to determine "the status, or domestic and social condition, of the persons domiciled within its territory," including the question of whether a person is a slave or free, and that the federal government may not interfere in that determination.[256] The parallel between state control over slave status and state control over marital status was clear.

The association between slavery and family law was not arbitrary. Slaveholding society regarded slaves as members of the master's family, albeit members with highly constrained roles and no meaningful rights.[257] Indeed, many masters were actually related to their slaves. "They were the fathers of slave women. They were the (half) brothers of slave women. They were the sexual partners of slave women. And sometimes they were more than one of these things at the same time."[258] To the extent that enslaved women experienced violence within the "extended family" structure of the slaveholding household,[259] they were essentially victims of domestic violence. Forced to work within and around the master's home and subjected to unwanted physical and sexual attacks from the male head of the household, enslaved women experienced an intensified, particularly egregious form

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their minor children or wards"); CONG. GLOBE, 39th Cong., 1st Sess. 1784 (1866) (statement of Sen. Cowan) (stating, in debate on the Civil Rights Act of 1866, that the Thirteenth Amendment did not confer any rights on minors, apprentices, or married women). Nevertheless, the Thirteenth Amendment unquestionably had profound legal implications for the family, not only because of the links between slave law and other branches of family law, but also because emancipation led to new rights for former slaves in their capacities as spouses and parents, *see generally* Hasday, *supra* note 141, at 1337-57, and because slavery itself was an institution often characterized by blood and sexual ties between masters and slaves. *See* Akhil Reed Amar & Daniel Widawsky, *Child Abuse As Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1367-68 (1992); *infra* note 258 and accompanying text (discussing blood and sexual relationships between masters and slaves).

254 JOEL PRENTISS BISHOP, 1 NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION § 155, at 70 (Chicago, T.H. Flood & Co. 1891).

255 51 U.S. (10 How.) 82 (1850).

256 *Id.* at 93-94. The author of *Strader v. Graham* was Chief Justice Taney, well known as the author of the Court's opinion in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

257 *See, e.g.*, GIDDINGS, *supra* note 249, at 41, 43.

258 Amar, *supra* note 244, at 467; *see also* MARY B. CHESTNUT, A DIARY FROM DIXIE 21-22 (Ben A. Williams ed., 1949) ("Like the patriarchs of old, our men live all in one house with their wives and their concubines; and the mulattoes one sees in every family partly resemble the white children."), *quoted in* EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 426 (1974); RICHARD HILDRETH, 2 THE SLAVE 9 (Boston, Mass. Anti-Slavery Society 1836) ("[The slave Cassy] started up; – but he caught her in his arms, and dragged her towards the bed . . . . [S]he looked him in the face, as well as her tears would allow her . . . . 'Master – Father,' she cried, 'what is it you would have of your own daughter?'"), *quoted in* Neal Kumar Katyal, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 801 n.66 (1993). For further discussion of sexual exploitation of enslaved women, see *infra* notes 279-81, 286-87 and accompanying text.

259 *See* GIDDINGS, *supra* note 249, at 41, 43.

of domestic violence.[260] Their vulnerability and lack of power, the master's economic incentive to exploit their labor, and the sexual component of the abuse that they suffered all resemble a classic domestic violence situation.[261]

Early proponents of women's rights commonly likened the plight of white women – particularly married white women – to that of slaves.[262] For nineteenth-century American feminists, many of them veterans of the abolitionist movement, this comparison was particularly compelling.[263] Elizabeth Cady Stanton stated flatly, "The civil, political and religious status of women and slaves is the same in principle."[264] Although the goals and tactics of the anti-slavery and woman's rights movements diverged during the mid-nineteenth century,[265] the comparison to slavery remained central to the feminist cause.[266]

Nineteenth-century feminists identified resemblances between wives and slaves arising not only from their shared powerlessness and obligation to obey and work for the patriarch, but also from their shared exposure to violence. An 1870 article in a feminist journal used the wife-as-slave metaphor to describe battered women:

> If he comes home in the dead of the night, and because his wretched slave is asleep, or his supper is not ready at an impossible hour, or being ready, is not cooked to his liking; or if, for any

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260 *See generally* McConnell, *supra* note 253, at 219-20.

261 On the role of sexual abuse in domestic violence, see, e.g., DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES (1985); DIANA RUSSELL, RAPE IN MARRIAGE (1990).

262 *See, e.g.*, MARGARET FULLER, WOMAN IN THE NINETEENTH CENTURY 33 (W.W. Norton & Co. 1971) (1844) ("There exists in the mind of men a tone of feeling toward women as toward slaves."), *quoted in* GIDDINGS, *supra* note 249, at 43; MARY WOLLSTONECRAFT, MARIA, OR THE WRONGS OF WOMAN (1798) ("Was not the world a vast prison, and women born slaves?"), *quoted in* David Brion Davis, *The Other Revolution*, N.Y. REV. BOOKS, Oct. 5, 2000, at 42.

263 Davis, *supra* note 262, at 44 ("[I]n America hundreds of female abolitionists made the discovery well-summarized by Mary Kelley: 'in striving to strike [the slave's] irons off, we found most surely that we were manacled *ourselves*.'").

264 Stanley, *supra* note 244, at 478 (quoting REVOLUTION, Aug. 19, 1869).

265 Although the nineteenth-century abolitionist and feminist movements had much in common including many shared members, conflicts arose over such issues as women's participation in abolitionist meetings, the place of women's rights in the abolitionist agenda, and especially the privileged treatment of men in the Fourteenth and Fifteenth Amendments. *See* BARBARA ALLEN BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY 33-36, 48-54 (2d ed. 1996); Davis, *supra* note 262, at 45-46. Despite their efforts to link the rights of white women to the rights of slaves, some white feminist leaders responded to the prospect of granting the vote to male former slaves before women by making overtly racist claims of white women's superiority to African-American men. *See* ANGELA Y. DAVIS, WOMEN, RACE & CLASS 70-86 (1981) (describing racist stance of Elizabeth Cady Stanton and Susan B. Anthony). African-American supporters of women's suffrage, like their white counterparts, were split on whether to support enfranchising African-American men before any women. *See* GIDDINGS, *supra* note 249, at 64-68.

266 *See, e.g.*, Marcellene Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097, 1149 n.323 (1998) (quoting testimony before Congress during the 1870s in which Victoria Woodhull advocated for a statute enfranchising women by arguing that "women, white and black, have from time immemorial groaned under what is properly termed in the Constitution 'previous condition of servitude'" (citation omitted)).

> reason, or no reason, he should beat and kick and pound that slave, why, of course nobody interferes – it is only a man licking his wife . . . .[267]

The links between domestic violence and slavery do not exist only in the past. In modern domestic violence, as in slavery long ago, physical force and confinement are used to coerce women into providing involuntary and unpaid sexual and household services.[268] Clearly, the analogy between domestic violence and antebellum slavery is not perfect. Whatever other hardships a battered woman suffers today, she is not subject to legally enforced chattel slavery, a uniquely pernicious institution. Even when the doctrine of coverture was at its height, the treatment of married white women as the property of their husbands differed significantly from the treatment of slaves as the property of their masters.[269] Still, the typical battered woman's subjection to her abuser's wishes and demands, her obligation to perform unpaid domestic labor for his benefit, and her exposure to his "unchecked private violence" all combine to make her subject to the "separate sovereign[ty]" of the abuser, a condition which is "constitutive of the state of slavery."[270] Although battered women (unlike antebellum slaves) are not forbidden by law to leave their abusers, in reality it is often difficult or impossible for them to do so because of the risk of retaliation, economic dependency, and other factors.[271] If the definition of slavery is "'the state of entire subjection of one person to the will of another,'"[272] many battered women surely qualify.[273]

The correspondence between domestic violence and slavery is visible in litigation under the Violence Against Women Act's civil rights provision. In *Doe v. Doe*,[274] the case that resulted in the first reported decision on the constitutionality of VAWA's civil rights remedy, the plaintiff alleged that her husband had brutally

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267 *Killing No Murder*, WOODHULL & CLAFLIN'S WKLY., June 11, 1870, at 8, *cited in* MacKinnon, *supra* note 32, at 155 & n.111.

268 For discussion of similarities between slavery and domestic violence, see generally Hearn, *supra* note 266, at 1159-63; McConnell, *supra* note 253. *See also* Amar & Widawsky, *supra* note 253 (describing child abuse as slavery).

269 *See, e.g.*, DAVIS, *supra* note 265, at 7-8, 27; GIDDINGS, *supra* note 249, at 43. In recognition of these distinctions, Professor Joyce McConnell, in her groundbreaking article setting out a Thirteenth Amendment analysis of domestic violence, refers to domestic violence as involuntary servitude rather than slavery. McConnell, *supra* note 253, at 207-09.

270 *See* ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM 36 (1994).

271 *See* Hearn, *supra* note 266, at 1160-61; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

272 Hodges v. United States, 203 U.S. 1, 17 (1906) (citing WEBSTER'S DICTIONARY), *overruled on other grounds in* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 n.78 (1968).

273 *See generally* Evan Stark, *Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973 (1995) (emphasizing coercion, control, entrapment, and deprivation of liberty as hallmarks of domestic violence).

274 929 F. Supp. 608 (D. Conn. 1996).

abused her throughout their seventeen-year marriage.[275] In addition to violent physical attacks, her husband had, in the words of her complaint, forced her to be his "slave" and to perform demeaning manual labor.[276] The plaintiff's husband also allegedly prevented her from leaving the house.[277] Similar themes of imprisonment of battered women emerged in legislative testimony on the Violence Against Women Act.[278]

Like domestic violence, sexual violence has a close connection to slavery. Women slaves were habitually subjected to rape by masters, overseers, and other white men, as well as being forced by their masters to have sex with fellow slaves, friends of the master, and others.[279] The law imposed no punishment for such acts.[280] Because a child's status as slave or free was determined by the status of the child's mother, and because importation of slaves was banned beginning in 1808, a master had a powerful economic incentive to rape a slave or force her to "breed" with another man.[281]

After emancipation, African-American women remained vulnerable to rape by white men; such rapes were widespread and rarely resulted in legal sanctions.[282] Even today, in a lasting reminder of the patterns of antebellum slavery, African-American women are more likely than white women to be raped and are

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275 *Id.* at 610.

276 *Id.* (citing Plaintiff's Complaint at ¶ 12, 27). According to plaintiff's complaint, the tasks her husband forced her to perform included "maintaining and laying out his clothes for his numerous dates with his many girlfriends and mistresses." *Id.* He also allegedly ordered her to "clean up the mess" after he threw many of her possessions on the floor in an angry rampage. Plaintiff's Complaint at 5, Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996) (No. 3:95cv2722 (JBA)).

277 Plaintiff's Complaint at 4, 6-7, Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996) (No. 3:95cv2722 (JBA)).

278 One witness, a prosecutor, testified that victims of domestic violence are "prisoners in their own homes." *1990 Senate Hearing*, *supra* note 62, at 109 (statement of Roni Young). A battered woman testified that she was "h[eld] hostage" by her husband and stated that for women trapped by domestic violence, "freedom is . . . a dream." *Violence Against Women: Hearing Before the Subcomm. on Crime & Criminal Justice of the House of Reps. Comm. on the Judiciary*, 102d Cong. 57, 59 (1992) (statement of Jane Doe).

279 DAVIS, *supra* note 265, at 6-7, 23-26; Katyal, *supra* note 258, at 799-803; McConnell, *supra* note 253, at 217 n.52. Not all sexual contacts between white men and black women during slavery amounted to forcible rape. *See* JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 100-04 (1988); GENOVESE, *supra* note 258, at 413-29. Yet the vast disparity of power between the parties makes it impossible to conceive of such unions as truly consensual. *See, e.g.*, DAVIS, *supra* note 265, at 25-26 (critiquing Genovese's emphasis on the potential for "love" between master and slave); GIDDINGS, *supra* note 249, at 43-44 (describing a master's offer of material reward if a female slave would "voluntarily" accede to his sexual demands); Katyal, *supra* note 258, at 811 (describing various types of incentives and coercion used to compel slaves to submit to sex).

280 Katyal, *supra* note 258, at 812; Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 118-19 (1983). White society obscured and excused the pattern of white men raping female slaves by subscribing to an invidious stereotype of African-American women as lascivious and promiscuous. GIDDINGS, *supra* note 249, at 35; Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 569-71. By contrast, white society grossly exaggerated and demonized the role of African-American men as rapists of white women. *See generally* Wriggins, *supra*, at 104-06.

281 GIDDINGS, *supra* note 249, at 37; Katyal, *supra* note 258, at 803.

282 GIDDINGS, *supra* note 249, at 48-49; Wriggins, *supra* note 280, at 119-21.

less likely than white women to see their rapists convicted and sentenced to a lengthy prison term.[283]

While rapes of African-American women by white men are the form of sexual violence that most closely reflects the conditions of slavery, the analogy does not end there. For example, a batterer's sexual abuse of his wife or girlfriend recalls the plantation patriarch's sexual abuse of his female slaves.[284] Sexual abuse of daughters also corresponds to slave-era practices.[285]

Similarly, forced prostitution mirrors women's experiences under slavery. Some enslaved women were purchased expressly to be used for sexual services.[286] Indeed, abolitionists frequently referred to the condition of female slaves as prostitution and called on the nation to eliminate this scourge.[287] During the late nineteenth and early twentieth centuries, opponents of forced prostitution referred to their target as "white slavery," in an explicit tribute to the earlier abolitionist movement.[288] Modern commentators point out that forced prostitution is a type of violence against women that entails "physical abuse, lack of free will, forced labor, and social stratification" – in short, a form of present-day slavery.[289] Several courts have found that forced prostitution violates legal prohibitions against involuntary servitude.[290]

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283 CATHERINE J. WHITAKER, U.S. DEP'T OF JUSTICE, BLACK VICTIMS 2 (1990) (indicating that African-American women's rate of victimization by rape is nearly twice that of white women); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1277 (1991); Wriggins, *supra* note 280, at 121-23. By the same token, the legal system continues to treat African-American men accused of raping white women with disproportionate harshness. DAVIS, *supra* note 265, at 172-201; Wriggins, *supra* note 280, at 113-17.

284 *See supra* notes 260-61 and accompanying text (discussing parallels between sexual abuse of slaves and sexual abuse as a component of domestic violence); *see also* McConnell, *supra* note 253, at 209 n.13 ("[I]f involuntary servitude prohibits that which is 'akin to slavery,' then it must be interpreted as prohibiting violent coercion of sexual services." (citation omitted)).

285 *See supra* note 258 and accompanying text (describing masters' sexual exploitation of their enslaved daughters). On child abuse as slavery, see generally Amar & Widawsky, *supra* note 253.

286 Katyal, *supra* note 258, at 798-99 (describing "the fancy-girl markets, where the most beautiful slaves were sold to rich white men" to serve as their "concubines"). Like a modern pimp, the master could both have sex with the slave himself and force her to have sex with others for his economic benefit. *Id.* at 803, 810.

287 *See id.* at 796-97. In the words of Senator Charles Sumner, "By license of Slavery, a whole race is delivered over to prostitution and concubinage, without the protection of any law. Surely, Sir, is not Slavery barbarous?" Senator Charles Sumner, The Barbarism of Slavery, *in* 5 THE WORKS OF CHARLES SUMNER 1, 21 (1871) (speech in the United States Senate on the Admission of Kansas as a Free State (June 4, 1860)), *quoted in* Amar & Widawsky, *supra* note 253, at 1366.

288 *See* White Slave Traffic Act, 18 U.S.C. §§ 2421-2424 (Supp. IV 1998) (Mann Act, enacted in 1910); Katyal, *supra* note 258, at 805-06. *But see* Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 59-70 (1996) (asserting that the campaign against "white slavery" was motivated by the racist myth that white women needed to be protected from sexually predatory African-American men).

289 Katyal, *supra* note 258, at 792-93. *See generally* KATHLEEN BARRY, FEMALE SEXUAL SLAVERY (1979). *See also* McConnell, *supra* note 253, at 218 (stating that "coerced sexual services . . . should be considered as falling within the scope of the [Thirteenth Amendment's] involuntary servitude prohibition").

290 Katyal, *supra* note 258, at 807-08 (citing cases).

As described above, the patterns of violence against women in this country are deeply entangled with the legacy of slavery, and the impact of violence against women on its victims presents striking similarities to slavery's degrading and confining effects. This convergence supports a strong argument that the Thirteenth Amendment provides Congress with constitutional authority for legislation addressing violence against women.[291] In testimony before Congress on the Violence Against Women Act, Professor Burt Neuborne stated, "Gender-motivated violence is a . . . form of physical subordination that tracks the badges and incidents of slavery and involuntary servitude," and he called on Congress to "apply the moral imperative of the 13th Amendment to the victims of gender-based violence."[292] Although it was originally designed to liberate African-American slaves from bondage, the scope of the Thirteenth Amendment is not restricted to African-Americans,[293] nor is it limited to chattel slavery[294] or forced labor for economic gain.[295] The fact that much violence against women takes place within the family,[296] and the fact that many battered women voluntarily entered into relationships that later became abusive,[297] do not preclude application of the Thirteenth Amendment. The amendment was intended to be construed broadly[298] and gives Congress the power to pass legislation eliminating all "badges and incidents" of slavery.[299] For all the reasons described above, violence against women is in many respects a "relic" and "vestige[]" of slavery that is an appropriate target for congressional action under the Thirteenth Amendment.[300]

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291 *See generally* Hearn, *supra* note 266.

292 *1993 House Hearing*, *supra* note 90, at 49-50 (1993) (statement of Burt Neuborne); *Women and Violence: Victims of the System, Hearing Before the Senate Judiciary Comm.*, 102d Cong. 101-02 (1991) [hereinafter *1991 Senate Hearing*] (statement of Burt Neuborne).

293 McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 285-96 (1976); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1872).

294 Pollock v. Williams, 322 U.S. 4, 17-18 (1944).

295 Griffin v. Breckenridge, 403 U.S. 88, 105 (1971); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440-43 (1968).

296 On the application of the Thirteenth Amendment to activities within the private, familial sphere, see generally Amar & Widawsky, *supra* note 253 (analyzing child abuse as slavery); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990) (arguing that coercing a woman to continue a pregnancy is involuntary servitude); McConnell, *supra* note 253 (analyzing domestic violence as involuntary servitude).

297 *See* McConnell, *supra* note 253, at 209 n.13 ("The law [of involuntary servitude] recognizes that even where a relationship between an employer and an employee is entered into voluntarily by both parties, when the relationship is coercively maintained by threats of or actual violence, it converts to one that is involuntary.").

298 *See* The Civil Rights Cases, 109 U.S. 3, 20 (1883) ("[T]he amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."); *id.* at 35-38 (Harlan, J., dissenting).

299 *Jones*, 392 U.S. at 440-43; *see also Griffin*, 403 U.S. at 105. For scholarly commentary arguing for expansive applications of the Thirteenth Amendment, see generally, e.g., Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403 (1993); Amar & Widawsky, *supra* note 253; Colbert, *supra* note 234; Hearn, *supra* note 266; Katyal, *supra* note 258; Koppelman, *supra* note 296; McConnell, *supra* note 253.

action under the Thirteenth Amendment.[300]

Despite the many parallels between violence against women and slavery, neither Congress nor the petitioners in *Morrison* claimed the Thirteenth Amendment as a constitutional basis for the civil rights provision of the Violence Against Women Act.[301] The decision not to invoke the Thirteenth Amendment was no doubt made for strategic reasons, in light of the apparent strength of the Commerce Clause and section 5 arguments and the relative novelty of a Thirteenth Amendment claim.[302] An additional ground for hesitating to advance a Thirteenth Amendment justification for the Violence Against Women Act is the fact that the amendment applies more readily to some types of gender-motivated violence than others.[303] Nevertheless, the Supreme Court in *Morrison*, particularly the dissenters,

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300 *See Jones*, 392 U.S. at 441 n.78, 443.

301 The trial court in *Brzonkala* took note of a sentence in an early Senate Judiciary Committee report that seemed to indicate that Congress was relying on the Thirteenth Amendment to enact VAWA's civil rights remedy. Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779, 796 (W.D. Va. 1996) (citing S. REP. NO. 102-197, at 53 (1991)), *aff'd*, 169 F.3d 820 (4th Cir. 1999) (en banc), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000). However, the reference to the Thirteenth Amendment in the committee report was apparently a typographical error. The sentence, which stated that the civil rights provision "takes aim at gender-discrimination [sic] prohibited under the 13 [sic] amendment," appeared in a section of the report entitled "The 14th Amendment," and its reference to gender discrimination confirms that the Fourteenth Amendment was the constitutional provision under discussion. S. REP. NO. 102-197, at 53. A later Senate Judiciary Committee report reproduced the earlier section on "The 14th Amendment" almost verbatim but substituted a reference to the Fourteenth Amendment in place of the reference to the Thirteenth Amendment quoted above. S. REP. NO. 103-138, at 55 (1993). In any event, the *Brzonkala* trial court rejected the Thirteenth Amendment as a basis for enacting VAWA. *Brzonkala*, 935 F. Supp. at 796 n.3.

302 The Supreme Court has never squarely held that the Thirteenth Amendment applies to claims arising from gender discrimination. Several lower courts have ruled that 42 U.S.C. § 1985(3), a statute upheld under the Thirteenth Amendment in Griffin v. Breckenridge, 403 U.S. 88 (1971), covers gender-based claims. *See* Lyes v. City of Riviera Beach, 166 F.3d 1332, 1336-40 (11th Cir. 1999) (en banc) (citing cases); Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1262 (3d Cir. 1978), *rev'd*, 442 U.S. 366 (1979); Hearn, *supra* note 266, at 1156 (citing cases). Although there is language in Supreme Court opinions suggesting that this is the correct outcome, a majority of the Court has never issued a definitive ruling on the matter. *See, e.g.*, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 269-70 (1993) (holding that it is unnecessary to decide whether women constitute a qualifying class under § 1985(3) because plaintiffs have failed to show class-based animus against women); *id.* at 322 (Stevens, J., dissenting) (stating that "women are unquestionably a protected class" under § 1985(3)); *id.* at 349 (O'Connor, J., dissenting) ("I would find . . . that § 1985(3) reaches conspiracies targeted at a gender-based class."); United Bhd. of Carpenters & Joiners, Local 610 v. Scott, 463 U.S. 825, 853 (1983) (Blackmun, J., dissenting) ("[C]ertain class traits, such as race, religion, sex, and national origin per se meet [the animus] requirement [of § 1985(3)]."); Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979) (holding that 42 U.S.C. § 1985(3) may not be used to redress violations of Title VII; not reaching the question of whether § 1985(3) creates a remedy for gender discrimination); *id.* at 389 n.6 (White, J., dissenting) ("It is clear that sex discrimination may be sufficiently invidious to come within the prohibition of § 1985(3) . . . ."); *Griffin*, 403 U.S. at 102 (holding that § 1985(3) requires a showing of "some racial, or perhaps otherwise class-based, invidiously discriminatory animus"). *But see* United Bhd. of Carpenters & Joiners, 463 U.S. at 836 ("[I]t is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans."); *Novotny*, 442 U.S. at 379, 381 (Powell, J., concurring) (stating that the reach of § 1985(3) is limited to conspiracies to violate fundamental rights derived from the Constitution and that the Constitution does not create any protection against "gender-based discrimination perpetuated solely through private action"). *See generally* Hearn, *supra* note 266, at 1152-57 (discussing treatment of gender discrimination under § 1985(3)).

303 As the discussion in this Part suggests, the Thirteenth Amendment argument applies more clearly to domestic violence; rapes of African-American women by white men; sexual abuse of wives, girlfriends,

could have considered the Thirteenth Amendment *sua sponte* as an independent source of authority for Congress's enactment of the civil rights remedy. The fact that they did not do so represents another missed opportunity to consider the implications of gender-motivated violence for women's equality.

The argument for deferring to the states with regard to domestic violence (and, by extension, other forms of violence against women) carries with it echoes of the same argument being made with regard to slavery. In both instances, states' rights provide a seemingly reputable facade for the preservation of inequality, particularly women's inequality.[304] Drawing on this analogy, feminist legal scholar Catharine MacKinnon has described the *Morrison* case as "a major battle in women's civil war: a battle at once over the structure of the union and the status of the sexes in civil society."[305] The very similarity of the issues at stake in the two "civil wars" places in sharp relief the significance of the defeat in *Morrison*. Congress proposed the Thirteenth Amendment after overcoming arguments that the amendment would violate traditional understandings of federalism[306] and would impose unwarranted federal interference with family relations.[307] Some 130 years later, Congress enacted VAWA after overcoming the same arguments.[308] Unlike the Thirteenth Amendment, however, the Violence Against Women Act's civil rights provision has now been struck from the statute books. In the "battle" over the Violence Against Women Act in the Supreme Court, states' rights have prevailed over the rights of American women.

V. THE VIOLENCE AGAINST WOMEN ACT AFTER *UNITED STATES V. MORRISON*

Although *Morrison* sounded the death knell for VAWA's civil rights remedy, it left the remainder of the statute intact. It also presented those who seek to reinstate civil rights protection for gender-motivated violence with a daunting challenge: how to do so while complying with the dictates of the Supreme Court's reasoning in *Morrison*.

A. The Unique Value of a Federal Civil Rights Remedy

What was at stake in *Morrison* was nothing less than the recognition that

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and daughters; and forced prostitution than to some other gender-motivated crimes, such as an isolated intraracial rape or murder by a stranger. *But see* Hearn, *supra* note 266, at 1162-67 (arguing that Congress had power under the Thirteenth Amendment to enact VAWA because all gender-discriminatory violence against women "is an incident of [either] nineteenth-century slavery [or] the nineteenth-century involuntary servitude of common-law marriage").

304 On slavery as an institution that particularly victimized women, see DAVIS, *supra* note 265, at 3-29; GIDDINGS, *supra* note 249, at 39-46. On the relationship between states' rights arguments used in support of slavery and in opposition to VAWA, see MacKinnon, *supra* note 32, at 136-37.

305 MacKinnon, *supra* note 32, at 177.

306 *See* Colbert, *supra* note 234, at 8.

307 *See supra* notes 250-53 and accompanying text (quoting congressional criticism of the Thirteenth Amendment).

308 *See supra* Part III.A-B.

gender-motivated violence is not merely an individual crime or a personal injury, but an assault on a publicly shared ideal of equality.[309] The language of civil rights has unique significance in our society.[310] The message of the Violence Against Women Act's civil rights provision had the power to transform how battered and raped women, their assailants, and the rest of society see violence against women[311] — indeed, to transform how we see women generally.[312] This transformative power was recognized by Professor Cass Sunstein when he described VAWA as "an excellent example of anti-caste legislation."[313]

In addition to publicly reframing violence against women as an equality issue, the civil rights remedy provided a uniform national standard of legal protection for women. Only federal civil rights law can secure women's equality as a feature of national citizenship.[314] As Congress recognized when it passed VAWA, "Each and every one of the existing civil rights laws covers an area in which some aspects are also covered by State laws. What State laws do not provide, and cannot [provide] by their very nature, is a national antidiscrimination standard."[315]

Aside from its symbolic significance, the creation of a federal civil rights remedy had some very concrete advantages for plaintiffs.[316] In some cases, VAWA was the only source of legal redress for victims of violence against women; in many others, it provided a desirable alternative or complement to other legal remedies. VAWA allowed plaintiffs to circumvent the restrictive effects of state tort immunities, marital rape exemptions, and short statutes of limitations.[317] VAWA also overcame the inadequacies of previous federal laws that required the plaintiff to show action taken under color of state law or a conspiracy to interfere with the

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309 *See* S. REP. NO. 103-138, at 51 (1993) ("While traditional criminal charges and personal injury suits focus on the harm to the individual, a civil rights claim redresses an assault on a commonly shared ideal of equality."); S. REP. NO. 102-197, at 49 (1991) (same); *see also* Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in* Brzonkala v. Morrison, 75 N.Y.U. L. REV. 150, 150 (2000) ("Congress's capacity to protect women from the injustice of violence and discrimination is a critical element in the architecture of civil rights in the United States, and the scope of that capacity may well be at stake in *Brzonkala*.").

310 *See* S. REP. NO. 103-138, at 50 (1993); *1991 Senate Hearing*, *supra* note 292, at 127 (statement of Burt Neuborne).

311 *See* Martha Minow, Editorial, *Violence Against Women – A Challenge to the Supreme Court*, 341 N. ENG. J. MED. 1927 (1999).

312 *See generally, e.g.*, MacKinnon, *supra* note 32. For further discussion of the unique message of VAWA's civil rights remedy, see *supra* Part II.

313 Cass R. Sunstein, *Civil Rights Legislation in the 1990s: Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 772 n.64 (1991).

314 *See, e.g.*, Brande Stellings, *The Public Harm of Private Violence: Rape, Sex Discrimination, and Citizenship*, 28 HARV. C.R.-C.L. L. REV. 185 (1993).

315 S. REP. NO. 102-197, at 49 (1991).

316 *See* S. REP. NO. 103-138, at 38 (stating that VAWA's "goals are both symbolic and practical").

317 The statute of limitations for VAWA civil rights actions was four years. *See* 28 U.S.C. § 1658 (1994).

plaintiff's exercise of a federally protected right.[318] Although Title VII prohibits gender-motivated violence in the workplace, VAWA provided a superior remedy because it permitted unlimited awards of compensatory and punitive damages; had a far longer statute of limitations; did not require exhaustion of administrative remedies; and applied to workplaces with fewer than fifteen employees.[319]

The ability to get into federal court was potentially a major benefit for plaintiffs.[320] VAWA civil rights claims brought in federal court were covered by Federal Rule of Evidence 412, which was amended elsewhere in VAWA to extend the rape shield law to civil cases.[321] Few states offer similar evidentiary protections.[322] The combination of differing judicial selection techniques, insulation from political pressure, superior resources, and more time to spend on each case often makes the federal courts a preferable forum for parties seeking to advance the rights of disadvantaged groups and individuals.[323] Although federal judges are by no means uniformly sympathetic to civil rights plaintiffs, and some of the advantages of the federal courts are in danger of disappearing because of their growing caseload,[324] the fact remains that the federal forum remains a desirable option in many cases.[325]

As a civil rather than criminal statute, VAWA's civil rights remedy was particularly valuable. VAWA empowered women by placing control over the litigation in their own hands and avoided the obstacles of gender bias among police and prosecutors.[326] In criminal actions, the victim does not direct the prosecution. She may be denied the choice of whether to press or drop charges and may even be forced to testify against her will, policies that are a subject of lively debate among advocates for battered women.[327] Under VAWA's civil rights remedy, the victim was a "private attorney general," entitled to conduct the litigation as she chose.[328]

Unlike criminal statutes, VAWA permitted plaintiffs to collect money

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318 *See* 42 U.S.C. §§ 1983, 1985(3) (1994); *supra* Part II.

319 *See generally* 1 MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION 35-1 to 35-31 (1998).

320 *See 1990 Senate Hearing*, *supra* note 62, at 2; S. REP. NO. 101-545, at 42 (1990).

321 Pub. L. No. 103-322 § 40141, 108 Stat. 1918 (1994) (codified at Fed. R. Evid. 412).

322 *See* S. REP. NO. 102-197, at 46 (1991).

323 *See* Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 799-800 (1995).

324 *See id.* at 804.

325 VAWA allowed plaintiffs to choose whether to file in federal or state court. 42 U.S.C. § 13981(e)(3), (4) (1994).

326 *See Violence Against Women: Hearing Before the Subcomm. on Crime & Criminal Justice of the House of Reps. Comm. on the Judiciary*, 102d Cong. 9-10 (1992) (statement of Senator Joseph Biden); S. REP. NO. 101-545, at 42 (1990).

327 *See, e.g.*, Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996); Sheila James Kuehl et al., *Forum: Mandatory Prosecution in Domestic Violence Cases*, 7 UCLA WOMEN'S L.J. 169 (1997).

328 *See* Doe v. Doe, 929 F. Supp. 608, 616 (D. Conn. 1996) (citation omitted).

damages and to win injunctive relief. Its burden of proof was the preponderance of the evidence standard rather than the more onerous standard of beyond a reasonable doubt.[329] Defendants were not able to claim the constitutional rights conferred on criminal defendants, such as the right to refuse to testify.[330]

Historically, the law has been far more willing to recognize violence against women as a criminal offense than as a civil rights violation.[331] The criminal approach identifies acts of violence as isolated instances of wrongdoing, rather than as part of a social framework in which individual men partake of the benefits of male power and female dependence. An additional problem with criminal remedies is their disproportionate impact on communities of color.[332] Thus, while criminal penalties have an important role to play, the civil remedy provided by VAWA was advantageous in a number of ways.

In summary, VAWA's civil rights remedy was a uniquely valuable weapon in the fight against gender-motivated violence. It remains to be seen how many of its strengths can be duplicated in other legislation.[333]

B. *"Though Much Is Taken, Much Abides":*[334] *The Enduring Legacy of VAWA*

Although *Morrison* was a profound loss, it left most of VAWA untouched. The Court's finding of unconstitutionality applies only to VAWA's civil rights provision. As indicated earlier, the Violence Against Women Act of 1994 is a statute with sweeping coverage. Among its other accomplishments, the legislation makes it a federal crime to cross state lines in order to commit domestic violence or to violate a protection order; requires states to give full faith and credit to protection orders issued by other states; authorizes federal grants to increase the effectiveness of police, prosecutors, judges, and victim services agencies in cases of violent crime against women; provides funding for a national toll-free domestic violence hotline; increases federal financial support for battered women's shelters; reforms immigration law to help battered immigrant women escape their abusers without being forced to leave the country; amends the Federal Rules of Evidence to extend rape shield protection to civil as well as criminal cases; and provides federal leadership for efforts to expand research and record-keeping on violence against women.[335] None of these other provisions was under consideration in *Morrison.*

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329 42 U.S.C. § 13981(c), (e)(1).

330 *Cf.* U.S. CONST. amend. V (conferring right to refuse to testify in criminal cases).

331 *See generally* Elizabeth M. Schneider, *Engaging With the State About Domestic Violence: Continuing Dilemmas and Gender Equality*, 1 GEO. J. GENDER & L. 173 (1999).

332 *See generally, e.g.*, Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J.L. & POL'Y 463 (1996).

333 *See infra* Part V.C.

334 Alfred, Lord Tennyson, *Odysseus*, *in* 2 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 1024, 1025 (M.H. Abrams et al. eds., 3d ed. 1974) (1842).

335 *See generally supra* Part II. The constitutionality of the interstate crimes was previously challenged, but it has been consistently upheld under the Commerce Clause by the courts of appeals on the

The very breadth of the Violence Against Women Act of 1994 signaled a dramatic and lasting change in the way federal law approaches the issues of domestic violence, sexual assault, and other forms of violence against women. Before VAWA was enacted, federal law concerning domestic violence and sexual assault consisted of a smattering of federal grant programs and a few criminal provisions governing crimes committed on federal lands or across state lines.[336] Now, the federal response to violence against women encompasses research, prevention, victim services, criminal punishment, and more.

The passage of VAWA in 1994 paved the way for further federal legislative action. In 1996, VAWA was amended to create an additional federal crime of interstate stalking.[337] Four years later, Congress passed the Violence Against Women Act of 2000.[338] This statute reauthorizes and expands federal funding for programs to combat violence against women; amends the provisions concerning the crimes of interstate stalking, interstate domestic violence, and interstate violation of a protection order; strengthens the requirements for granting full faith and credit to protection orders; and provides for additional federal studies of various aspects of violence against women. Included in the Violence Against Women Act of 2000 is the Battered Immigrant Women Protection Act, which restores and enhances the protections afforded to battered immigrant women by VAWA of 1994.[339] At the same time, Congress enacted the Trafficking Victims Protection Act, which creates criminal penalties and other measures designed to combat the trafficking of women and girls, including sex trafficking.[340] Increasingly ambitious federal legislation that builds on VAWA's foundation continues to be introduced.[341]

VAWA has changed the state of our knowledge about violence against women. The statute has spurred data collection and research.[342] Interestingly, the amicus curiae briefs submitted to the Supreme Court in *United States v. Morrison* contain many useful statistics about violence against women that were not part of the original legislative record amassed by Congress, for the simple reason that they

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ground that the statute requires proof of interstate travel in each case. *See* United States v. Morrison, 529 U.S. 598, 613 n.5 (2000).

336 *See, e.g.*, White Slave Traffic Act, 18 U.S.C. §§ 2421-2424 (Supp. IV 1998); Family Violence Prevention and Services Act, 42 U.S.C. §§ 10401-10415 (1994).

337 Pub. L. No. 104-201, 110 Stat. 2655 (1996) (codified as amended at 18 U.S.C. § 2261A (Supp. II 1996)).

338 Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491 (2000).

339 Battered Immigrant Women Protection Act, Pub. L. No. 106-386, 114 Stat. 1518 (2000).

340 Trafficking Victims Protection Act, Pub. L. No. 106-386, 114 Stat. 1466 (2000).

341 *See, e.g.*, Victims Economic Security and Safety Act, S. 1249, 106th Cong. (2001) (providing workplace protections for victims of sexual and domestic violence); Victims Economic Security and Safety Act, H.R. 2670, 106th Cong. (2001) (same).

342 *See, e.g.*, NATIONAL RESEARCH COUNCIL, UNDERSTANDING VIOLENCE AGAINST WOMEN (Nancy A. Crowell & Ann W. Burgess eds., 1996); Demetrios N. Kyriacou et al., *Risk Factors for Injury to Women from Domestic Violence*, 341 N. ENG. J. MED. 1892, 1892 (1999) (describing major empirical study on domestic violence undertaken in response to research recommendations made by panel created by Congress pursuant to VAWA).

are the product of research completed as a result of VAWA's passage.[343]

The importance of being able to harness federal institutions in the fight against domestic violence, sexual assault, and other forms of violence against women should not be underestimated. For the first time, violence against women has been made a top priority at the highest levels of government. As a result of passage of VAWA, the United States Department of Justice created a Violence Against Women Office devoted to implementing the Act,[344] and the Department of Health and Human Services undertook a similar effort.[345] In addition, the investigatory powers of the FBI and the Bureau of Alcohol, Tobacco and Firearms are now available to assist in prosecutions arising under VAWA's criminal provisions.[346]

Federal funding for state and local programs is one of the most important aspects of VAWA. The statute originally authorized 1.62 billion dollars in federal funds over six years.[347] When Congress reauthorized the legislation in 2000, it more than doubled the level of authorized funding to 3.3 billion dollars over five years.[348] These funds are responsible for sustaining crucial programs established by the original VAWA legislation, as well as establishing new grant programs to help meet the needs of female victims of violence.

Federal involvement has also galvanized public attention to this issue. While VAWA was pending in Congress, it triggered extensive press coverage and became a focal point for a national debate about the nature of domestic violence and sexual assault and their impact on the lives of American women.[349] Federal leadership has permitted public education on violence against women to take place on an unprecedented scale.[350]

Another lasting legacy of VAWA is the Task Force that was founded in 1990 to work for its passage.[351] From modest beginnings around a table at the

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343 *See generally, e.g.*, Brief for Amici Curiae Equal Rights Advocates et al., United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29).

344 On implementation of VAWA by the United States Department of Justice, see generally Noel Brennan, *The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications & Litigation Strategy*, 4 J.L. & POL'Y 419 (1996).

345 *See generally* Edelman, *supra* note 41. The nature and effectiveness of these efforts by the federal administrative agencies are subject to change depending on the presidential administration. Proposed legislation to require a permanent Violence Against Women Office within the Justice Department has not been enacted. Violence Against Women Office Act, S. 161, 106th Cong. (2001); Violence Against Women Office Act, H.R. 28, 106th Cong. (2001).

346 MARGARET S. GROBAN, THE FEDERAL DOMESTIC VIOLENCE LAWS AND THE ENFORCEMENT OF THESE LAWS 2 n.1 (Oct. 1, 1999) (unpublished manuscript on file with the author).

347 *See generally* Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (1994).

348 *See generally* Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491 (2000).

349 *See, e.g.*, Helen Neuborne, *Mere Talk Won't Make Life Any Safer for Women*, L.A. TIMES, Aug. 16, 1993, at B7; Eloise Salholz, *Women Under Assault: Sex Crimes Finally Get the Nation's Attention*, NEWSWEEK, July 16, 1990, at 23.

350 Noel Brennan, *supra* note 344, at 424 (discussing federal involvement in development of public education campaigns on violence against women).

351 Under the auspices of NOW Legal Defense and Education Fund, where I then worked as a senior staff attorney, I convened the first meeting of the National Task Force on the Violence Against Women Act in

NOW Legal Defense and Education Fund's office in New York, the Task Force grew to encompass over 1,000 groups and individuals by the time VAWA passed in 1994.[352] The formation of this coalition marked the first time that domestic violence advocates and rape crisis groups, as well as women's rights and civil rights organizations, labor, religious, and community groups and others, worked together on a continuing basis to develop federal policy initiatives responding to violence against women. Now known as the National Task Force to End Sexual and Domestic Violence Against Women, the group currently has twenty committees and a mailing list of over 3,000 groups and individuals, and it continues to work actively to improve legislation, policies, and practices on issues of violence against women.[353]

Clearly VAWA, even as expanded by Congress in 2000, is not the definitive federal response to violence against women; much more remains to be done.[354] Many of its accomplishments are dependent on a sympathetic presidential administration and on Congress's continued willingness to appropriate federal funds. The loss of the civil rights provision has robbed the statute of one of its most significant features. Nevertheless, the passage of VAWA in 1994 created a climate in which a high level of federal attention to domestic violence, sexual assault, and other types of violence against women has become the norm. Regardless of the *Morrison* decision, we have entered a new era.[355]

C. *Federal, State, and Local Responses to Gender-Motivated Violence After* Morrison

In the aftermath of Morrison, federal, state, and local legislators have attempted to fill the void left by the invalidated civil rights remedy.

Shortly after *Morrison* was decided, Representative John Conyers introduced the Violence Against Women Civil Rights Restoration Act,[356] which sought to amend VAWA's civil rights remedy so as to meet the requirements imposed by the Supreme Court's constitutional analysis in *Morrison.* The proposed legislation would limit recovery to crimes of violence motivated by gender that occur under the following circumstances:

September 1990.

352 *See* Goldfarb, *supra* note 43, at 395.

353 Telephone interview with Patricia Reuss, Vice President for Government Relations, NOW Legal Defense and Education Fund (May 14, 2001).

354 For example, in addition to the Victims Economic Security and Safety Act which has not yet been enacted, *see supra* note 341, the effort to expand federal hate crimes laws to include crimes motivated by gender has thus far been unsuccessful. *See generally* Goldscheid, *supra* note 67.

355 One possible indication of the impact of VAWA is the fact that the number of female victims of domestic violence dropped by 21 percent between 1993 and 1998. *See* CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE (May 2000). Government officials ascribed this decline to the effectiveness of programs established by VAWA. *See* E-mail message from Rachel Little, NOW Legal Defense and Education Fund, to National Task Force to End Sexual and Domestic Violence Against Women (May 23, 2000, 12:05 p.m.) (quoting Senator Joseph Biden, Representative Tammy Baldwin, and Vice President Al Gore) (on file with the author).

356 H.R. 5021, 106th Cong. (2000).

(1) in connection with the offense –
(A) the defendant or the victim travels in interstate or foreign commerce;
(B) the defendant of the victim uses a facility or instrumentality of interstate or foreign commerce; or
(C) the defendant employs a firearm . . . or other weapon . . . or a narcotic or drug . . . or other noxious or dangerous substance, that has traveled in interstate or foreign commerce;
(2) the offense interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or
(3) the offense was committed with intent to interfere with the victim's commercial or other economic activity.[357]

In addition to authorizing civil rights lawsuits by individual plaintiffs, the bill would also permit the Attorney General to bring an action for equitable relief against any state actor who is reasonably believed to have engaged in a pattern of gender-discriminatory resistance to investigating or prosecuting gender-based crimes.[358]

While this bill represents a laudable effort to reestablish federal civil rights protections for gender-motivated violence, there is a danger that it will exclude many causes of action that would have been viable under VAWA's original civil rights remedy. The emphasis on interstate travel does not reflect the circumstances of most incidents of violence against women and would help relatively few victims. Although gender-motivated violence has an enormous effect on women's economic well-being,[359] it will often be difficult for plaintiffs to demonstrate a cause and effect relationship between the violence and interstate commerce in individual cases.[360]

Analogues of the VAWA civil rights remedy have been introduced at the state level.[361] New York City has already adopted a local civil rights remedy for gender-motivated violence based on VAWA.[362] Free of the constraints imposed by

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357 *Id.*

358 *Id.*

359 *See supra* notes 203-05 and accompanying text.

360 *See* Timm v. DeLong, 59 F. Supp. 2d 944, 956-57 (D. Neb. 1998) (stating that imposing a "jurisdictional element providing a link to interstate commerce" "would impede the efficacy of the civil rights remedy").

361 S. 1535, 44th Leg., 2d Sess. (Ariz. 2000); H.R. 4407, 91st Leg. Sess. (Ill. 2000); S. 7903, 223rd Leg. Sess. (N.Y. 1999).

362 *See* Nina Bernstein, *Right to Sue Is Backed in Sex Bias Crimes*, N.Y. TIMES, Dec. 1, 2000, at B3. Legislative action has taken place on the county level as well. *See* Randal C. Archibold, *White Plains: Domestic Violence Law*, N.Y. TIMES, Jan. 10, 2001, at B6 (describing proposed Westchester County, N.Y., legislation creating a civil cause of action for gender-motivated violence).

the federal constitution and pressure from the federal judiciary,[363] states and localities can go further than Congress and avoid the compromises that limited the scope of VAWA's civil rights remedy.[364]

However, state and local legislation has a number of disadvantages.[365] Gender-motivated violence is a national problem that requires a national solution. Proceeding state by state is, to use Professor Deborah Rhode's analogy, like eliminating slavery plantation by plantation.[366] Assuming that not all states and localities adopt identical civil rights laws, protection from gender-motivated violence will vary widely depending on the jurisdiction that controls the case. When states or localities adopt a civil rights remedy, they will be unable to provide all of the advantages previously offered by VAWA unless they also adopt the numerous other benefits available to plaintiffs under federal law, such as a four-year statute of limitations, civil rape shield law, unlimited compensatory and punitive damages, and attorneys fee awards. Many of these are not currently available under the laws of most states.

Regardless of the specific strategy or strategies that advocates for a new civil rights remedy adopt, the goal of such legislation must be to respond to gender-motivated violence as an instrument of women's subordination.[367] Unless the civil rights remedy is developed in this context, its transformative potential will be lost. VAWA's civil rights provision was a meaningful challenge to male dominance because it focused on women's right to equal citizenship as expressed in the Fourteenth Amendment, women's economic oppression as addressed by the Commerce Clause, and women's empowerment as advanced through a civil remedy. It is by no means clear that these messages can be recaptured while jumping through the hoops constructed by the Supreme Court's new federalism analysis.

VI. CONCLUSION

By the final decade of the twentieth century, thanks to considerable social, political, and legal advocacy, there was widespread awareness that violence against women is a serious crime and a grave social problem. The Violence Against Women Act of 1994 took that realization to a new level by drawing on the resources and leadership of the federal government to an unprecedented degree. Most significantly, VAWA's civil rights provision took the leap of recognizing that freedom from gender-motivated violence is fundamental to women's equality. This innovative federal remedy was an extension of a process that had started some thirty years earlier when anti-rape and domestic violence advocates, as part of the "second wave" of the American feminist movement, began working for law re-

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363 *See supra* Part III.A.

364 For example, the New York City law covers acts that are misdemeanors as well as felonies. Bernstein, *supra* note 361.

365 On the advantages of federal legislation, see *supra* Part V.A.

366 Tracey, *supra* note 29, at 61 (quoting Deborah Rhode).

367 *See generally* Schneider, *supra* note 331 (discussing the importance of placing domestic violence in the broader context of women's inequality).

form at the local and state levels.

In *United States v. Morrison*, the Supreme Court struck down VAWA's civil rights remedy in an opinion that barely acknowledged that a civil rights statute was at stake and instead reflected judicial assumptions that gender-motivated violence belongs under the rubric of family law and therefore must be handled by the states. Like the states' rights argument made in support of slavery, the Court's federalism analysis had the result of preserving entrenched social inequality. Although *Morrison* left the remaining provisions of VAWA intact, its invalidation of the civil rights remedy was a severe blow to feminist law reform efforts.

In his dissent in *Morrison*, Justice Souter expressed "doubt that the majority's view will prove to be enduring law."[368] To supporters of VAWA's civil rights remedy, that passage is one of the few encouraging signs to emerge from the *Morrison* case. Until such time as Justice Souter's prediction proves true, *Morrison* will remain a significant impediment to the feminist project of conceptualizing, articulating, and enforcing women's right to be free from violence.

368 United States v. Morrison, 529 U.S. 598, 654 (2000) (Souter, J., dissenting).