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Forty Years and Five Nays--The Nays Have It: Morrison's Blurred Political Accountability and the Defeat of the Civil Rights Provision of the Violence against Women Act

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I. Introduction

Discrediting the testimony of a female victim of physical abuse, a Maryland judge exclaimed, "I don't believe that anything like this could happen to me."[2] Unfortunately, this state judge is not alone in his skeptical attitude toward female victims of physical abuse and nor are insensitive remarks the only obstacles females face when bringing gender-based violence cases in state courts. Until recently, the formal legal systems of several states included biased state laws that failed to recognize the status of women as equals in society.[3] To take but one example, seven states allowed a man to legally rape his wife until 1990.[4] The informal impediments that begin with the reporting of the abuse to police and percolate into the courthouses add to the formal hurdles women must surmount in state courts.[5] Stereotypes about a woman's role in society, particularly about a woman's willingness to engage in sexual activity, persist and are reflected in comments like that of the Maryland judge.[6] In combination, these formal and informal barriers foster a "climate of condescension, indifference, and hostility" toward female victims of sexual assault[7] thereby creating state judicial systems where the physical abuse of women is "de jure illegal but de facto permitted."[8]

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2 S. REP. No. 102-197, at 34 (1991) (citation omitted).

3 *Id.* at 45 n.50 (observing that Kentucky, Louisiana, Oklahoma, and South Carolina retained their marital rape exemptions despite other changes in the law).

4 *Id.*

5 W.H. Hallock, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L. J. 577, 597 (1993).

6 *Id.* (asserting that stereotypes include blaming the victim and questioning the credibility of the victim).

7 *Women and Violence: Hearing on Legislation to reduce the Growing Problem of Violent Crime Before the Senate Subcommittee on the Judiciary*, 101st Cong. 65 (1990) (statement from NOW Legal Defense and Education Fund).

8 Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L. J. 1281, 1303 (1991) (arguing that rape discriminates against women in the same manner that lynching discriminated against African-Americans during the Reconstruction. Moreover, "[t]he legal system is dominated by members of the same group engaged in the aggression. The practice is formally illegal but seldom found to be against the law").

Despite the hardships, women must increasingly turn to ineffective state justice systems to remedy gender-based violence because of the regularity with which it occurs in our society. Men batter approximately 4,000,000 women each year and about 95% of all domestic violence victims are female.[9] Not only does a man beat a woman every fifteen seconds, but a man also rapes a woman every six minutes.[10] One in five women can expect to be raped during her lifetime while one in six will suffer the trauma of domestic violence.[11] Recently, the Senate Judiciary Committee concluded that "violence is the leading cause of injuries to women ages 15 to 44, more common than automobile accidents, muggings, and cancer deaths combined."[12] In short, men exact an enormous physical toll on women.

While the sheer number of cuts and bruises women suffer is devastating, these physical wounds translate into psychological damage for victims and non-victims alike that ultimately harms our nation's economy. Following an incident of gender-based violence, women experience "a sense of helplessness . . . which may lower self-esteem and hamper trusting relationships. . . . Anxiety, feelings of vulnerability, and depression may be persistent problems."[13] Although individual women suffer these "crimes of terror" at the hands of men, "[t]hey instill fear not only in the actual survivors but in every woman in America."[14] In response to this pervasive fear, women change behaviors such as taking safety precautions in public or staying away from public spaces altogether.[15] Moreover, the injuries that result from violence stress the health-care system and cause women to absent themselves from their jobs during recovery.[16] Estimates suggest that absenteeism caused by domestic violence costs employers $3-$5 billion annually.[17] Overall, the economic cost of gender-based violence is estimated to be at least $10 billion

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9 H.R. REP. NO. 103-395, at 26 (1993).

10 *See Violence Against Women: Victims of the System: Hearings on S. 15 Before the Senate Comm. on the Judiciary*, 102d Cong. 189, 238 (1991) (citing 1989 FBI data and the President of the National Federation of Business and Professional Woman/USA Inc.) [hereinafter *Violence Against Women: Victims of the System*].

11 *See Women and Violence: Hearings Before the Senate Comm. on the Judiciary on Legislation to Reduce the Growing Problem of Violent Crime Against Women*, 101st Cong. 77, 141 (1990) (referring to a 1990 criminological study).

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

13 WILLIAM M. GREEN, M.D., RAPE: THE EVIDENTIAL EXAMINATION AND MANAGEMENT OF THE ADULT FEMALE VICTIM 69 (1988) (describing the lingering psychological damage caused by rape).

14 *Violence Against Women: Victims of the System*, *supra* note 10, at 2 (statement of Sen. Biden maintaining that crimes involving gender-based violence "instill fear not only in the actual survivors but in every woman in America"); *see also* Kristin L. Taylor, *Treating Male Violence Against Women As a Bias Crime*, 76 B.U. L. REV. 575, 596 (1996) (arguing that violence against women subordinates all women).

15 H.R. CONF. REP. NO. 103-711, at 385 (1994) (arguing that crimes of violence prevent potential victims from traveling interstate and from participating in interstate business); George P. Choundas, *Neither Equal Nor Protected: The Invisible Law of Equal Protection, the Legal Invisibility of Gender-Based Victims*, 44 EMORY L. J. 1069, 1088-1091 (1995) (reciting that the fear of violence inhibits women's movement and "suffocates" women's lives).

16 S. REP. NO. 102-197, at 53 (1991); *see also* H.R. REP. NO. 103-711, at 385 (1994).

17 *Violence Against Women: Victims of the System*, *supra* note 10, at 240.

per year, which has a significant impact on interstate commerce.[18] Thus, gender-based violence is a national tragedy that manifests itself both in blood and money.

Recognizing the states' failure to handle the malignancy of gender-based violence and the resulting economic costs to the nation, Congress enacted the Violence Against Women Act (VAWA) in 1994 to augment impotent state measures already in place.[19] In passing the VAWA as part of the Violent Crime Control and Law Enforcement Act of 1994,[20] Congress declared violence against women, indeed all gender-based violence, to be gender discrimination.[21] To fight gender discrimination, the VAWA provides funding to states so that they may implement programs designed to reduce gender-based violence.[22] Furthermore, the VAWA stiffens criminal penalties for gender-motivated crimes and criminalizes acts of interstate domestic violence.[23] In addition to the previous funding and criminal provisions, the VAWA created a private civil rights remedy for acts of gender-motivated violence in section 13981. The civil rights remedy makes a person (public or private) found liable for an act of gender-motivated violence in federal court liable for compensatory, punitive, injunctive, or declarative relief.[24] While litigants challenged other portions of the VAWA in court, the civil rights remedy became far more controversial because it threatened to punish private actors in federal courts.[25]

Although Congress asserted power under the Commerce Clause and section 5 of the Fourteenth Amendment to enact the VAWA's civil rights remedy, opposition arose to the VAWA based upon the notion of federalism.[26] Federalism generally refers to "the division of political power by subject matter between the national government and the fifty states."[27] The Constitution delegates various enumerated powers to Congress and those not given to Congress are retained by the states, a command made explicit by the

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18 *Id.* at 189 (assuming a low estimate of approximately 100,000 rapes per year).

19 The Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18, 28, and 42 U.S.C.); *see also* S. REP. No. 103-138, at 38, 49-50 (1993) (discussing failure of states to give credibility to victims of gender-based crime and lenient punishment of those convicted of such crimes).

20 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

21 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, 5 (1996) (calling the declaration "unprecedented").

22 *See infra* note 132 and accompanying text.

23 *See infra* notes 133-34 and accompanying text.

24 42 U.S.C. § 13981(c) (1994).

25 *See, e.g.*, United States v. Meade, 175 F.3d 215 (1st Cir. 1999) (rejecting challenge to restraining order based upon the Fifth and Tenth Amendments); United States v. Page, 167 F.3d 325, 326 (6th Cir. 1999) (en banc) (equally divided court) (affirming conviction for interstate domestic violence); United States v. Cunningham, 161 F.3d 1343 (11th Cir. 1998) (denying Commerce Clause challenge to domestic violence restraining order provision).

26 *See, e.g.*, Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997).

27 William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769, 770 (1987).

Tenth Amendment.[28] By enacting the Tenth Amendment, the Framers assented to Madison's notion of a federal government with few and defined powers while state power remained numerous and indefinite.[29] As a further safeguard against an all-powerful central government, the separation of powers between co-equal branches of government serves to check the usurpation of power by one branch as against the others.[30] The federal judiciary, for example, ensures that Congress remains "within the limits assigned to [its] authority" when enacting legislation.[31] Thus, the federal judiciary protects against federal legislation that infringes upon states' rights.

The Supreme Court weighed the VAWA's federalism balance in *United States v. Morrison*.[32] As an indication of support for the VAWA, thirty-six popularly elected state attorneys general supported the constitutionality of the civil rights remedy.[33] Broad-based support notwithstanding, the Supreme Court struck down the provision as unconstitutional in a 5–4 decision.[34] According to the Court, Congress upset the balance of federalism when it enacted the VAWA provision by legislating in areas of traditional state concern such as family and criminal law.[35] As a result, states' rights is the ultimate trump card by which five votes defeated "forty votes": the support of thirty-six state attorneys general and four dissenting Justices.

This paper analyzes the assertion of states' rights that defeated the civil rights remedy of the VAWA. Part II briefly describes the history of federalism, with an emphasis on states' rights theory as revealed in Commerce Clause cases before and after President Roosevelt's New Deal. Part III traces the evolution of the controversy surrounding the VAWA's civil rights provision, including a description of the Court's reasoning in *Morrison*. Part IV discusses the "political accountability" theory used by the Court to strike down legislation in cases like *Morrison*, arguing that the Court, not the Congress, blurs the lines of political accountability when it strikes down popularly supported legislation. Part V asserts that the judicial activism exhibited by the Court in cases like *Morrison* is unjustified from a historical standpoint. The Framers intended the people to be the ultimate interpreters of the Constitution and the invalidation of the VAWA contravenes that intent. Moreover, the history of state-sponsored discrimination in this nation should give the Court pause before it sweeps away anti-discrimination legislation. The paper concludes that finding the civil rights section unconstitutional links present discriminatory acts to our nation's discriminatory past. Furthermore, the nullification of the civil rights provision threatens other federal legislative efforts to redress discrimination, such as federal anti-hate crime legislation.

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28 U.S. CONST. amend. X.

29 *See* Van Alstyne, *supra* note 27, at 773 (citing THE FEDERALIST No. 45, at 292 (J. Madison) (M. Beloff ed. 1987)).

30 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 2-3-§ 2-5 (2000).

31 THE FEDERALIST No. 78, at 395 (Alexander Hamilton) (Buccaneer Books 1992).

32 529 U.S. 598 (2000).

33 *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 103d Cong. 34-36 (1993) [hereinafter *Crimes of Violence Motivated by Gender*].

34 *Morrison*, 529 U.S. at 600.

35 *See infra* notes 187-189, 219-225 and accompanying text.

Despite these circumstances, the appropriate recognition of gender-based violence will occur in time because the law must adapt if the concept of law is to have real meaning in the everyday lives of the citizens of this nation.

II. The History of Tension Between Federal and State Authority

The latest skirmish between federal and state regulatory authority in *Morrison* highlights the tension between the two that has been a permanent fixture in American legal history. Since ratification of the Constitution, the regulation of commerce within the nation has been addressed repeatedly by legislatures.[36] Indeed, the intractable problem of trade between the states during the Articles of Confederation provided one of the instrumental reasons for calling the Constitutional Convention.[37] Responding to concern about commerce among the states, convention delegates endowed Congress with the power "[t]o regulate commerce with foreign nations, and among the several states."[38] The delegates hoped, in the words of Alexander Hamilton, that the commerce power would end the trade disputes, which "if not restrained by national control," would be "sources of animosity and discord."[39] Given this authority over commerce, Congress has used its power to assert national authority over a variety of state matters throughout history. Predictably, states frequently balked at the notion of federal intrusion into what they saw as their own affairs.[40] As a result, canvassing Commerce Clause jurisprudence symbolizes the ebb and flow of the tension between national versus state regulatory authority.

In the early years of the Supreme Court, the Court regularly upheld the power of Congress at the expense of states in cases like *Gibbons v. Ogden*[41] and *McCulloch v. Maryland*.[42] However, the advent of industrialization brought new challenges to the nation and increased the confrontations between the Court and Congress over the regulation of commerce.[43] In cases like *United States v. E.C. Knight Co.*, the Court began to define boundaries for congressional power under the Commerce Clause by holding that local activity could not be reached by congressional regulation unless it had a "direct" effect on interstate commerce.[44] On the other hand, the Court upheld

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36 *See, e.g., infra* notes 41-130 and accompanying text.

37 THE FEDERALIST No. 22, at 104 (Alexander Hamilton) (Buccaneer Books 1992) (noting "[t]he interfering and unneighbourly regulations of some states").

38 U.S. CONST. art. I, § 8.

39 THE FEDERALIST No. 22, at 104 (Alexander Hamilton) (Buccaneer Books 1992).

40 *See, e.g.*, United States v. California, 297 U.S. 175 (1936) (objection by the state of California to Federal Safety Appliance Act because its operation of railroads involved a "public function in its sovereign capacity"); Maryland v. Wirtz, 392 U.S. 183 (1968) (upholding 1966 amendment to Fair Labor Standards Act against state autonomy challenge).

41 22 U.S. (9 Wheat.) 1 (1824) (invalidating a grant by the New York legislature based upon the Commerce Clause).

42 17 U.S. (4 Wheat.) 316 (1819) (allowing the creation of the Bank of the United States based upon commerce authority and also preventing states from taxing the bank).

43 GERALD GUNTHER, CONSTITUTIONAL LAW 97 (12th ed., 1991) (pointing to the fight over the Interstate Commerce Act of 1887 and the Sherman Anti-Trust Act of 1890).

44 *United States v. E.C. Knight Co.*, 156 U.S. 1, 13 (1895) (dismissing an action under the Sherman Antitrust Act).

national regulations in cases like *Houston East and West Texas Railway Co. v. United States* (*The Shreveport Rate Case*) by examining the practical impact of the regulated act on interstate commerce.[45] Thus, the Court ratified national regulatory power in some cases and nullified it in others. As the 1930s approached, then, the Court's view of national regulatory power under the Commerce Clause can best be characterized as ambivalent, yet restrained.

Although the Court treated commerce legislation with ambivalence at the end of the nineteenth century, the situation changed in 1933 when Franklin D. Roosevelt took office in the midst of the nation's Great Depression. The Depression wreaked havoc with the nation's economy by decreasing production, employment, and income while increasing business failures and mortgage foreclosures.[46] The country required "action, and action now" to prevent further national economic erosion, and that is exactly what the Roosevelt administration set out to do.[47] Before doing so, however, Congress needed to locate a constitutional source of power for its reforms. Because the Depression created problems that were economic in nature, Congress used the Commerce Clause to support its legislative measures. With a basis for its progressive agenda, the Roosevelt administration embarked upon a flurry of legislative activity to stem the tide of the Great Depression during the "First Hundred Days" and then awaited the approval of the courts.[48]

Initially, the Court welcomed the reforms and gave the Roosevelt administration hope that the Court would uphold subsequent measures.[49] The initial optimism, however, began to fade with the decision in *A.L.A. Schechter Poultry Corp. v. United States*.[50] In *Schechter Poultry*, a slaughterhouse owner challenged the constitutionality of the National Industrial Recovery Act of 1933 (NIRA) after being convicted of wage and trade violations of a New York competition statute.[51] Relying on the power of the Commerce Clause, the government reasoned that Congress constitutionally enacted the NIRA because its subject matter regulated items in the stream of commerce and affected commerce.[52] Rejecting these rationales, the Court held the NIRA to be an unconstitutional use of the Commerce Clause, arguing that the transactions did not affect interstate commerce and were not themselves "in" interstate commerce.[53] Despite the nation's economic woes, the Court announced that "[e]xtraordinary conditions do not create or en-

45 Houston E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342 (1914) (upholding authority to regulate intrastate rail rates that discriminated against interstate rail traffic).

46 GUNTHER, *supra* note 43, at 115.

47 *Id.*

48 *Id.*

49 *Id.* (citing *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (upholding mortgage law); *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding milk regulations)).

50 295 U.S. 495 (1935).

51 *Id.* at 519 (the defendant allegedly violated the "Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area").

52 *Id.* at 544 (applying the reasoning from *The Shreveport Rate Case*).

53 *Id.* at 542-43 (arguing that the interstate nature of the poultry transactions ended when the shipments reached the local slaughterhouse).

large constitutional power."[54] Unlike its past ambivalence to national regulation, the Court began to protect the state from what it saw as the ability of the federal government to trample state authority. Concurring in the opinion, Justice Cardozo summed up the Court's fear of federal encroachment upon state legislative prerogatives by stating that "activities local in their immediacy do not become interstate and national because of distant repercussions."[55]

Following these defeats and others,[56] Roosevelt proposed the now infamous Court-packing plan and despite its failure, Roosevelt claimed that he had lost the battle but won the war based on subsequent Court decisions.[57] The change in judicial receptivity toward New Deal legislation is reflected in *NLRB v. Jones & Laughlin Steel Corp.*[58] In *Jones & Laughlin Steel*, the National Labor Relations Board ordered a steel company to end its unfair labor practices pursuant to its power under the National Labor Relations Act of 1935 (NLRA).[59] Although faced with arguments that the NLRA regulated purely local activity, the Court upheld the NLRA as a valid exercise of congressional power under the Commerce Clause.[60] The Court noted that the text of the NLRA limited its regulatory power to those acts "affecting commerce" and that Congress had the power to regulate those acts "which di-

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54 *Id.* at 528 (asserting that Congress only has the authority granted to it by the Constitution).

55 *Id.* at 553 (Cardozo, J., concurring).

56 *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 283 (1936). In *Carter*, the Bituminous Coal Conservation Act of 1935 required coal producers to comply with wage and hour restrictions or suffer sanctions for failure to do so. *Id.* at 283-84. To support the Act on Commerce Clause grounds, the federal government contended that the coal business affected the national interest and the general welfare of the nation. *Id.* at 289-91. The Court, however, disagreed and stated that the notion that the power of Congress extends to issues affecting the whole nation and the welfare of its people "have always definitely [been] rejected by this Court." *Id.* at 291. The Act, according to the Court, would stand or fall based on an analysis of the Commerce Clause using a direct/indirect test. *Id.* at 308. In this case, Congress abused its Commerce Clause power by legislating in areas of "purely local activity." *Id.* The Court found that the relationship between employers and employees with the resulting evils did indeed affect interstate commerce, but the Court characterized those evils as "local evils over which the federal government has no legislative control." *Id.* The Court deemed strikes and production problems to be secondary and indirect effects on interstate commerce. *Id.* In the end, the Court held the Act to be unconstitutional, thereby dealing another blow to the New Deal. *Id.* at 310.

57 GUNTHER, *supra* note 43 at 122-24 (describing the plan as involving the removal of any judge attaining the age of seventy years of age who has not retired within six months of reaching that age. If the judge failed to retire, the President could nominate one additional judge to the court on which the seventy-year-old judge sat. To limit expansion, the plan mandated that no more than fifteen judges could comprise the Supreme Court); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 685-86 (2d ed., 1985) (stating that "the Supreme Court's veto power wrecked some of the New Deal's most precious legal engines. Franklin Roosevelt, at this point, threatened to pack the Court—to increase its size with new appointments, presumably loyal New Dealers. Despite Roosevelt's great popularity, this plan notoriously backfired." However, "Roosevelt had the last laugh. He was elected four times, and he simply outlasted the "nine old men").

58 301 U.S. 1 (1937).

59 *Id.* at 22 (the violating behavior included the discriminatory discharge of employees involved with the union).

60 *Id.* at 49 (reversing the decision of the lower court).

rectly burden or obstruct interstate or foreign commerce."[61] According to the Court, Congress could use its power to protect interstate commerce "no matter what the source of the dangers which threaten it."[62] However, the plenary commerce power did not allow Congress to regulate "effects upon interstate commerce so indirect and remote" as to "effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[63]

After *Jones & Laughlin Steel*, the Court continued to allow Congress to expand its power base vis-à-vis the states in cases like *United States v. Darby*.[64] In *Darby*, the Court examined the constitutionality of the Fair Labor Standards Act of 1938.[65] Noting that manufacturing itself did not constitute interstate commerce, the Court opined that the shipment of goods amounted to commerce and fell within Congress's power to regulate.[66] Although the regulation of wages and hours typically fell within the province of the state and some chose not to regulate in this case, "[t]he power of Congress over interstate commerce [can] neither be enlarged or diminished by the exercise or non-exercise of state power."[67] Brushing state power aside, Justice Stone declared that the Tenth Amendment stated "but a truism that all is retained which has not been surrendered."[68] According to the Court, the Tenth Amendment merely sought "to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers."[69] In the end, the Court found the Act constitutional and continued to shake the floor upon which state power stood.

While the Court shook the floor of state power with decisions like *Darby*, it pulled it out from underneath the states in *Wickard v. Filburn*.[70] In *Wickard*, the Court investigated the constitutionality of the Agricultural Adjustment Act of 1938, which imposed a penalty on farmers who produced more wheat than allowed by a given quota.[71] Unlike past cases, the Court

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61 *Id.* at 32 (noting that "[it] is the effect upon commerce, not the source of the injury, which is the criterion").

62 *Id.* at 37. The Court observed that the "fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement.'" Furthermore, the commerce power allowed Congress to legislate to "promote its growth and insure its safety" and "to foster, protect, control and restrain." *Id.* at 36-37 (internal citations omitted).

63 *Id.* at 37.

64 312 U.S. 100 (1941).

65 *Id.* at 109-110 (the FLSA regulated the hours and wages of employees engaged in local manufacturing and prohibited interstate shipment of goods produced by employees falling below its requirements).

66 *Id.* at 113 (characterizing the target of the legislation as "indubitably a regulation of the commerce").

67 *Id.* at 114 (internal citation omitted). The Court continues: "Congress . . . is free to exclude from the commerce articles whose use in the state for which they are destined it may conceive to be injurious to the public health, morals, or welfare, even though the state has not sought to regulate their use." *Id.* (internal citations omitted).

68 *Id.* at 124.

69 *Id.*

70 317 U.S. 111 (1942).

71 *Id.* at 113.

refused to refer to "any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity" on interstate commerce.[72] Even though an activity "be local and though it may not be regarded as commerce," according to the Court, "it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"[73] Moreover, the Court declared that even activities that are trivial in isolation could be reached by congressional legislation if the effect on interstate commerce is substantial in the aggregate.[74] With its rejection of bright lines and acceptance of the aggregation theory, *Wickard* allowed the federal government to venture into state affairs to its fullest extent.

Despite the reach of *Wickard*, the Court's sensitivity to state autonomy began to grow in subsequent decisions like *Maryland v. Wirtz*[75] and *Fry v. United States*.[76] Following these decisions the Court gave full weight to state autonomy arguments in *National League of Cities v. Usery*.[77] In *National League of Cities*, the Court held an amendment to the Fair Labor Standards Act unconstitutional because it interfered with integral governmental functions when applied to "States qua States."[78] To a Court majority, upholding such a law would allow the federal government to impair the states' ability to regulate in areas traditionally governed by states such as "fire prevention, police protection, sanitation, public health, and parks and recreation."[79] Thus, the *National League of Cities* decision represented the first time in forty years that the Court invalidated federal legislation based upon the concept of state sovereignty.[80]

After reaching its height in *National League of Cities*, the attack on federal legislation based upon state sovereignty suffered a major defeat nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*.[81] In

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72 *Id.* at 120. The Court stated that the commerce power "has been held to have great latitude." *Id.*

73 *Id.* at 125.

74 *Id.* at 127-28 (observing that "appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial"); *see also* TRIBE, *supra* note 30, at § 5-4.

75 392 U.S. 183 (1968) (upholding a 1966 amendment to the Fair Labor Standards Act against a federalism challenge). Justice Douglas's dissent urged that the decision constituted "such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my belief not consistent with our constitutional federalism." *Id.* at 201 (Douglas, J., dissenting).

76 421 U.S. 542 (1975) (upholding the application of the Economic Stabilization Act to the wages of public employees). The Court noted that the Tenth Amendment was "not without significance" and declared the "constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Id.* at 547 n.7.

77 426 U.S. 833 (1976).

78 *Id.* at 847-52.

79 *Id.* at 851 (expressing concern about the ability of states to structure employment contracts in these areas).

80 *Id.* at 857 (Brennan, J., dissenting).

81 469 U.S. 528 (1985).

Garcia, the Court expressly overruled *National League of Cities* by holding that the Fair Labor Standards Act applied to a local transit system.[82] In so doing, the Court threw out the concept of state immunity from federal regulation based upon a "judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'"[83] The Court opined that the states must be free to act in the manner they choose regardless of how anyone, including the judiciary, views those acts.[84] Moreover, rules using line-drawing tests based upon what one views as "integral" or "traditional" allowed judges to pick and choose among state policies according to personal preferences.[85] In the end, decision-making based upon bright lines led to inconsistency in the law and "disserve[d] principles of democratic self-government."[86]

Among the principles of self-governance offended by examining the nature of governmental function, according to the *Garcia* majority, was that of federalism. Instead of using arbitrary assessments of governmental action to determine the constitutionality of legislation, the majority opined that the Court must be guided by the structure of the federal government.[87] In the minds of the *Garcia* majority, the Framers designed the federal government in large part to protect the states from the overreaching of Congress.[88] Referring to Madison, the majority asserted that equal representation in the Senate adequately protected state sovereignty and that the similarity of interests between the national and state legislatures provided a buffer against encroachment upon state liberty.[89] The Framers built "a federal system in which special restraints on federal power over the states inhered principally in the working of the National Government itself, rather than in discrete limitations on the objects of federal authority."[90] The procedural safeguards within the structure of the federal government, according to the majority, protected state interests better than judicially created limits or tests.[91] Because states participate in the federal government, "[t]he political process en-

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82 *Id.* at 531 (declaring that "the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest").

83 *Id.* at 546-47.

84 *Id.* at 546 (stating that "[t]he essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be").

85 *Id.* (observing that such tests allow an "unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes").

86 *Id.* at 547.

87 *Id.* at 550 (asserting that the "principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself").

88 *Id.* at 551 (citing JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175-84 (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954)).

89 *Id.* at 551-52 (citing THE FEDERALIST No. 62 (James Madison)).

90 *Id.* at 552.

91 *Id.* (stating that "[s]tate sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power").

sures that laws that unduly burden the states will not be promulgated."[92] In *Garcia*, the Court found that the political process suffered no defect; therefore, Congress had the power to regulate the local transit system under the Commerce Clause.[93]

Indicative of the differing views of states' rights issues on the Court, Justice Powell penned a strong dissent joined by three other Justices in *Garcia*.[94] According to the dissent, the Constitution guaranteed a "unique" federal system of government and the majority opinion significantly tampered with the system designed by the Framers.[95] Although the majority did "some genuflecting . . . to the concept of federalism," their opinion "effectively reduce[d] the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause."[96] The dissent argued that the majority's reasoning allowed "political decisions made by members of the Federal Government" to determine the ability of states to exercise their sovereignty when Congress legislated under the Commerce Clause.[97] Moreover, the majority's gutting of the Tenth Amendment implied that these political decisions would be immune from judicial review because they resulted from the political process.[98] For the dissenters, the judiciary constituted the body charged with the obligation "to say what the law is"; therefore, the majority decision violated *Marbury v. Madison*, "the most famous case in [our] history."[99]

In addition to violating the teaching of *Marbury v. Madison*, the *Garcia* dissent maintained that the majority opinion contravened the basic beliefs of the Framers themselves. Opponents of the Constitution at the founding feared that the national government would be too powerful and eventually devour the political role of the states in the governing process.[100] As a result, proponents of the Constitution assured doubters that a "provision explicitly reserving powers in the states" would be a top priority of the new Congress.[101] Protecting states' rights in the Constitution prevented the undermining of "the States and the Federal Government, a balance designed to protect our fundamental liberties."[102] Indeed, the dissent opined that the Framers saw that reserving power for the states served as an effective balance

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92 *Id.* at 556 (maintaining that "the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action").

93 *Id.* (stating that "the internal safeguards of the political process have performed as intended").

94 *Id.* at 557 (Powell, J., dissenting, joined by Burger, C.J., Rehnquist, J., and O'Connor, J.).

95 *Id.* at 560.

96 *Id.*

97 *Id.* (noting that these determinations will be made from "time to time").

98 *Id.*

99 *Id.* at 567. The dissent previously stated that the majority "rejects almost 200 years of the understanding of the constitutional status of federalism." *Id.* at 560.

100 *Id.* at 568.

101 *Id.* (stating that resolving the issue "would be among the first business of the new Congress").

102 *Id.* at 572.

to the power of the national government.[103] Interpreting the intent of the Framers, the dissent maintained that state government regulated the "everyday concerns of the people" because it responded to them more effectively.[104] By allowing the federal government to regulate intracity mass transit, a local concern, the dissent urged that the majority eviscerated the distinction between national and local, and propounded a model of federalism that paid "only lip service to the role of the States."[105]

If Court observers thought *Garcia* represented a blank check for congressional invasion of state sovereignty, the Supreme Court cancelled that check in *United States v. Lopez*[106] by holding the Gun-Free School Zones Act of 1990 (GFSZA) unconstitutional.[107] After noting that the statute neither regulated "the use of channels of interstate commerce" nor "instrumentalit[ies] of interstate commerce[, or persons] or [ ] thing[s] in interstate commerce," the Court focused its attention on whether the regulated act substantially affected interstate commerce.[108]

The government defended the commercial nature of the legislation by noting the substantial economic costs of violent crime, a reduction in the inclination to travel caused by violent crime, and the threat that guns in schools posed to the educational process itself.[109] The majority, however, reasoned that the GFSZA failed to regulate an activity constituting "commerce or any sort of economic enterprise" and found the GFSZA to be a criminal statute that invaded the police powers of the states.[110] If Congress could enact such a statute, according to the majority, then Congress could act without "any limitation on federal power, even in areas such as criminal law or education where states historically have been sovereign."[111] Agreeing with the government's contentions amounted to piling "inference upon inference" that would convert authority under the Commerce Clause "to a general police power of the sort retained by the States."[112] In the end, the majority refused to blur further the "distinction between what is truly national and what is truly local" and struck down the GFSZA.[113]

Writing a concurrence joined by Justice O'Connor, Justice Kennedy asserted that *Lopez* forced the Court "to appreciate the significance of federalism in the whole structure of the Constitution."[114] The concept of federalism,

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103 *Id.* at 571 (reciting that the states would perform this function based upon the loyalty of their citizens).

104 *Id.* (citing THE FEDERALIST No. 17 (Alexander Hamilton)).

105 *Id.* at 574 (stating that the majority failed to account for the state sovereignty intended by the Framers).

106 514 U.S. 549 (1995).

107 *Id.* at 568 (affirming court of appeals).

108 *Id.* at 559.

109 *Id.* at 563-64 (discussing the government's argument that possession of a firearm in a school zone may result in violent crime, which will ultimately affect the national economy by reducing the effectiveness of the educational process).

110 *Id.* at 561-67.

111 *Id.* at 564 (stating that if the Court accepted the government's position, it would be "hard-pressed to posit any activity by an individual that Congress is without power to regulate").

112 *Id.* at 567.

113 *Id.*

114 *Id.* at 575 (Kennedy, J., concurring).

according to Justice Kennedy, constituted "the unique contribution of the framers to political science and political theory."[115] A government based upon principles of federalism made both the federal and state government accountable to the citizens.[116] If the federal government began to regulate areas historically regulated by states, the distinction between what is national and what is local would be unclear and "political responsibility would become illusory."[117] A lack of political accountability posed a greater threat to liberty than an expansion of power by the national government.[118] Although the political process ensured the balance of power between the two governments, the judiciary must intervene when one branch usurped too much power for itself since the balance of federalism played "too vital a role in securing freedom."[119] In this case, the Court must intercede because the GFSZA tipped the scales of federalism too far in favor of the federal government.[120] Moreover, states remained capable to deal with the problem of guns near schools in a manner commensurate with local opinion, thereby allowing for varying solutions and experimentation.[121] Because the GFSZA failed to regulate commerce and regulated an area of traditional state concern, Justice Kennedy hesitatingly found the statute to be an unconstitutional exercise of Congress's power under the Commerce Clause.[122]

Similar to the numbers in *Garcia*, four of the justices dissented in an opinion written by Justice Breyer.[123] The principal dissent argued that Congress must be given "leeway" when enacting legislation because it, not the Court, is the body best able to judge the ties between the regulated activity and interstate commerce.[124] According to Breyer, scrutinizing Commerce Clause legislation under the "rational basis standard"[125] captures the defer-

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115 *Id.* at 575 (claiming that the insight of the Framers involved the realization that two governments enhanced liberty).

116 *Id.* at 576.

117 *Id.* at 577 (noting that the "boundaries between the spheres of federal and state authority would blur").

118 *Id.* (based upon the inability to hold either government accountable to citizens).

119 *Id.* at 578.

120 *Id.* at 580 (asserting that the "statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required").

121 *Id.* at 581 (reasoning that "[i]f a State or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are sufficient to enact those measures").

122 *Id.* at 583 ("Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, [this] interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce.").

123 *Id.* at 615 (Breyer, J., dissenting, joined by Stevens, J., Souter, J., and Ginsburg, J.).

124 *Id.* at 616-17 (Breyer, J., dissenting) (explaining that such a finding "requires the kind of empirical judgment of a kind that a legislature is more likely than a court to make with accuracy").

125 *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (stating that when a rationale appears in the legislative record justifying legislative action, the proper inquiry in assessing that record is whether Congress had a rational basis for its finding); *see also* Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) (stating that "where we find that legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end").

ence that should be given to Congress when using its commerce authority.[126] In this case, the facts involving violence, educational harm, and negative economic impacts demonstrated that Congress had a rational basis for enacting the GFSZA.[127] Moreover, upholding the GFSZA would neither obliterate the distinction between national and local nor allow the government to regulate just any state matter because the effects of violence on education and the economics of the nation were well-documented.[128] Although the Court has, in the past, upheld congressional regulation with fewer ties to interstate commerce than those associated with violence in schools, the majority in *Lopez* viewed the commerce power in a different manner from that which had been established for over fifty years.[129] In the end, the dissent reasoned that upholding the statute would not expand congressional power but would apply existing law to new circumstances for the benefit of all citizens.[130]

III. The VAWA Controversy

With confidence in its commerce authority prior to *Lopez*, Congress undertook to combat gender-based violence using its commerce power as part of its basis to enact the VAWA. After receiving evidence regarding the effects of gender-based violence for four years, Congress created a multidimensional statute embodied in the VAWA to tackle a "national tragedy."[131] For example, the VAWA disperses $1.6 billion to states to be used to improve police and educational efforts to reduce gender-based violence.[132] Furthermore, the VAWA requires all states to give "full faith and credit" to protec-

126 *Lopez*, 514 U.S. at 617 (Breyer, J., dissenting).

127 *Id.* at 618-24 (Breyer, J., dissenting) (describing the connection between guns in school zones and the economy).

128 *Id.* at 624 (Breyer, J., dissenting) (stating that "[i]t must surely be the rare case, then, that a statute strikes at conduct that (when considered in the abstract) seems so removed from commerce, but which (practically speaking) has so significant an impact on commerce"); *see also id.* at 603-15 (Souter, J., dissenting). Justice Souter further discussed the failure of the GFSZA to intrude into state prerogatives. *Id.* at 609. The commerce power of Congress, according to Justice Souter, did not diminish simply because the subject of legislation affected traditional state concerns. *Id.* Supreme Court precedent demonstrates the plenary nature of Congress's authority under the Commerce Clause, which allows it to invade state interests if it chooses to do so. *Id.* Traditional rules of statutory construction provided the Court with the tools to determine the existence of such an intent. *Id.* at 611. By characterizing the GFSZA as a federal criminal statute, the Court forgot its canons of statutory construction by finding a violation of federalism principles without finding congressional intent to alter the state-federal balance. *Id.* By ignoring these principles, the Court's decision devolved "into the sort of substantive policy review that the Court found indefensible 60 years ago." *Id.*

129 *Id.* at 625-29 (Breyer, J., dissenting) (citing *Perez v. United States*, 402 U.S. 146 (1971); *Daniel v. Paul*, 395 U.S. 298 (1969); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942)).

130 *Id.* at 625 (asserting that upholding the GFSZA would recognize that "gun-related violence near the classroom makes a significant difference to our economic, as well as our social, well-being").

131 *See* S. REP. No. 102-197, at 39 (1991).

132 *See, e.g.*, 42 U.S.C. §§ 13991-13994 (1994) (providing grants for the education and training of state judges and other monies to be used to study state and federal court practices); 42 U.S.C. § 14031 (1994) (providing grants to states so that they may improve recordkeeping regarding stalking or domestic violence).

tive orders issued in other states and criminalizes interstate domestic violence.[133] Moreover, the VAWA mandates the exclusion of a victim's prior sexual activity from federal litigation and provides a "rape shield" to the Federal Rules of Evidence.[134] Thus, the VAWA bolsters state efforts to prevent gender-based attacks and enhances penalties when they occur.

In addition to the funding and criminal provisions, the VAWA created a civil rights remedy for victims of gender-based violence in section 13981. Section 13981 allowed for a private action against a "person . . . who commits a crime of violence motivated by gender."[135] However, a person cannot be held liable under the civil rights remedy for "random acts of violence unrelated to gender."[136] Furthermore, federal jurisdiction is explicitly withheld from "any state law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree."[137] If a public or private defendant is found liable for a crime of violence motivated by gender, the plaintiff is entitled to compensatory, punitive, injunctive, declaratory, or any other relief deemed appropriate by a court.[138]

Litigants began to test the constitutionality of the VAWA's civil rights remedy in a number of cases because it made private actors liable in federal courts. In *Doe v. Doe*,[139] the court considered whether a rational basis existed to find that gender-based violence substantially affected interstate commerce, and if so, whether the means chosen to regulate the problem were reasonably adapted to constitutional ends.[140] Answering the first of these questions, a review of the "statistical, medical, and economic data before the Congress adequately demonstrated the rational basis for Congress' finding that gender-based violence has a substantial effect on interstate com-

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133 18 U.S.C. § 2265 (1994).

134 28 U.S.C. app. § 412 (1994) (changing the Federal Rules of Evidence).

135 42 U.S.C. § 13981(c) (1994). Subsection (d)(1) defines "crime of violence motivated by gender" to mean "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." Subsection d(2)(A) defines "crime of violence" as

> 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, United States Code, 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.

136 42 U.S.C. § 13981(e)(1) (1994) (stating that "[n]othing in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence or for acts of violence unrelated to gender that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender").

137 42 U.S.C. § 13981(e)(4) (1994) (stating that nothing confers "on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree").

138 42 U.S.C. § 13981(c) (1994).

139 929 F. Supp. 608, 612 (D. Conn. 1996).

140 *Id.* at 612 (citing Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (rational basis/means-ends inquiry)). The plaintiff claimed that she had been subjected to systematic physical and mental abuse including being forced "to be a 'slave,'" which included laying out clothes for the defendant's dates with his girlfriends. *Id.* at 610.

merce."[141] The court noted that Congress had actual evidence of a substantial impact on interstate commerce caused by gender-based violence instead of the "theoretical impact arguments" used to support the statute at issue in *Lopez*.[142] Analogizing the regulated activity under the VAWA to that in *Wickard*, the court opined that "[c]ertainly, the repetitive nationwide impact of women withholding, withdrawing or limiting their participation in the workplace or marketplace . . . as a result of gender-based violence . . . is of such a nature to be as substantial an impact on interstate commerce as the effect of excess 'home-grown' wheat harvesting."[143] In sum, the VAWA's legislative findings prevented the court from having to pile "inference upon inference" to find a rational basis to conclude that gender-based violence substantially affected interstate commerce.[144]

In addition to finding a rational basis for the legislation, the *Doe* court dismissed the defendant's argument that the civil rights remedy trampled upon state sovereignty in the areas of criminal, family, and state tort law.[145] The court reasoned that the VAWA left state criminal law intact because states remained free to criminally punish gender-based violence in the manner they desired.[146] Similarly, the VAWA did not intrude upon state family law because it denied federal jurisdiction over claims involving divorce, alimony, child custody, or the equitable distribution of property.[147] Rather than displacing any state laws, the *Doe* court argued that the civil rights provision complemented tort law by providing a federal forum for the vindication of a woman's civil right to be free from gender-motivated violence.[148]

Turning its attention to the means-ends inquiry, the *Doe* court observed that Congress deemed existing state and federal laws inadequate to protect women from gender-based violence.[149] Referring to House and Senate reports, the *Doe* court observed that "existing bias and discrimination in the criminal justice system often deprives victims" of redress for the harm suffered and that "[s]tudy after study had concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes affecting men."[150] The failure to punish violent crimes against women continues to harm victims after the fact due to the risk of retaliation if the initial crime is reported and the lingering emotional damage caused by the crime.[151] Given the demonstrated inadequacy of current legal mechanisms

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141 *Id.* at 615.

142 *Id.* at 613 (noting the "marked distinction" between the VAWA and the GFSZA).

143 *Id.* at 614.

144 *Id.* at 615 (arriving at its conclusion after "careful review of the Congressional history of VAWA").

145 *Id.* at 616.

146 *Id.* (observing that the VAWA did "nothing to a state's authority to arrest and prosecute an alleged batterer on applicable criminal charges").

147 *Id.*

148 *Id.*

149 *Id.* at 615 (reiterating that the enactment of the VAWA was based in part on the states' self-assessment of their failure to protect victims of gender-based violence).

150 *Id.* at 616 (citing H.R. REP. No. 103-711, at 385 (1994); S. REP. No. 103-138, at 39 (1993)).

151 *Id.* (citing *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993)).

and the nature of the conduct to be deterred, the *Doe* court found the civil rights remedy to be "reasonably adapted to an end permitted by the Constitution" and upheld the constitutionality of the VAWA's civil rights remedy.[152]

After the *Doe* court upheld the constitutionality of the VAWA, other courts faced similar challenges to the constitutionality of the civil rights provision of the VAWA, which escalated the debate surrounding the VAWA.[153] In *Seaton v. Seaton*,[154] the court characterized the VAWA's remedy as one of "extreme overbreadth" and feared that federal courts would become forums for "domestic disputes and invade the well-established authority of the sovereign states."[155] Despite its questions about the wisdom of the VAWA, the court investigated the constitutionality of the VAWA by using the rational basis and means-ends inquiries previously employed by the *Doe* court.[156] Although the VAWA did not regulate commercial activity per se, the *Seaton* court observed that Congress had voluminous findings before it that supported the existence of a rational basis for the legislation.[157] Because Congress concluded that the states failed to protect victims of gender-based violence with their own judicial systems, the VAWA did not amount to "an unreasonable means to the ends intended by Congress."[158] Thus, the *Seaton* court came to the same conclusion as the *Doe* court and upheld the constitutionality of the VAWA.[159]

Although the *Seaton* court reached the same conclusion as the *Doe* court, it did not do so without hesitation. Commenting on its decision, the *Seaton* court opined that it was "quite reluctantly inclined to agree with the *Doe* court" in finding that a rational basis to enact the VAWA existed largely based upon legislative findings.[160] Reliance on legislative findings, according to the court, provided Congress with the opportunity to compile statistics simply to demonstrate a rational basis for any given piece of legislation.[161] While not a concern in this case given the extensive nature of the VAWA hearings, courts must still closely scrutinize legislative findings to prevent an end run around the rationality test.[162] Nonetheless, the *Seaton* court continued to express its "deep concern" that the VAWA allowed federal courts to

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152 *Id.* at 617.

153 *See, e.g.*, Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997) (upholding the civil rights remedy as a valid exercise of the Commerce Power, even under *Lopez*.)

154 971 F. Supp. 1181 (E.D. Tenn. 1997).

155 *Id.* at 1190-91. The plaintiff filed suit against her husband under the VAWA claiming she had been the "victim of conspiracy, fraud, physical and sexual abuse, and emotional suffering." *Id.* at 1190. Moving for summary judgment against the plaintiff, the defendant not only denied the factual assertions, but also argued that Congress exceeded its power under the Commerce Clause when it enacted the VAWA. *Id.* Thus, the *Seaton* court found itself faced with the same question as the *Doe* court faced previously. The court expressed its view that the breadth of the civil rights remedy would be used by "parties seeking leverage in settlement rather than true justice." *Id.*

156 *Id.* at 1191.

157 *Id.* at 1192-94 (stating that the VAWA was "clearly not economic on the surface").

158 *Id.* at 1195 (although stating that it disagreed with "the inclusiveness of the VAWA").

159 *Id.*

160 *Id.* at 1193.

161 *Id.* at 1194.

162 *Id.* (noting that "it is unlikely Congress would spend four years determining the effects

hear family law claims.[163] The court viewed these claims as more appropriate for state forums because of their "closer relation to the concerns of their citizenry" and their ability to apply state law to local areas more capably than federal courts.[164] In the end, a "clearer signal or cogent framework to handle this type of legislation" would have helped the *Seaton* court because of its trepidation about its result.[165]

Courts would receive the needed guidance beginning with *Brzonkala v. Virginia Polytechnic and State University*,[166] a case that would eventually end up at the doors of the Supreme Court. Like the previous courts, the *Brzonkala* district court reasoned that the VAWA would stand or fall based upon whether the regulated conduct substantially affected interstate commerce, the third category of permissible Commerce Clause regulation under *Lopez*.[167] Applying the test from *Lopez*, the *Brzonkala* court proceeded to compare the differences and similarities between the statute at issue in *Lopez* and the VAWA.[168] According to the court, the differences between the GFSZA and the VAWA included the VAWA's voluminous legislative findings, the VAWA's civil nature when compared to the GFSZA's criminal nature, and the fewer inferential steps required to find a nexus between the VAWA and commerce when compared to the GFSZA.[169] The court, however, dismissed the impact of the legislative findings suggesting that "[w]hile findings will often be helpful, findings are not necessary for a determination of whether a rational relation to interstate commerce exists."[170] Furthermore, the court brushed aside the civil foundation of the VAWA by characterizing it as "criminal in nature" and found whatever differences might exist in the inferential chain to be inconsequential.[171] Thus, the *Brzonkala* district court asserted that the differences between the GFSZA in *Lopez* and the VAWA actually amounted to similarities and that both regulated an activity "remote from interstate commerce."[172]

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of gender-based violence on interstate commerce for the sole purpose of overcoming the rationality test and the Supreme Court's decision in *Lopez* . . . .").

163 *Id.* (fearing that the Act would allow "domestic relations litigation to permeate the federal courts").

164 *Id.*

165 *Id.* (quoting United States v. Wall, 92 F.3d 1444, 1452 (6th Cir. 1996)).

166 935 F. Supp. 779 (W.D. Va. 1996). The plaintiff claimed that she had been raped three times in a dormitory room and that the defendants subsequently made statements after the fact that indicated their gender-based animus. *Id.* at 782.

167 *Id.* at 786.

168 *Id.* at 788-93.

169 *Id.* at 789-91 (discussing the differences between the VAWA and the GFSZA in a section entitled "Possible Differences").

170 *Id.* at 790 (declaring that "the fact that the effects need not be inferred in this case is not a very important difference" because the *Lopez* Court had findings and it still dismissed the GFSZA).

171 *Id.* at 790-91 (stating that "[r]egardless, of whether a statute based on the Commerce Clause is civil or criminal is of limited relevance. With statutes regulating intrastate activities, the primary concern is whether the activity is economic" and characterizing the determination of the inferential chain as an "inexact science").

172 *Id.* at 791.

After reciting the similarities between the GFSZA and the VAWA, the *Brzonkala* district court chastised the *Doe* court for arriving at a conclusion contrary to established jurisprudence and supported its decision on federalism grounds.[173] According to the *Brzonkala* district court, the *Doe* court misapplied *Wickard* because that case comprehended the regulation of acts being commercial or economic in nature while the VAWA regulated an intrastate activity with no apparent commercial or economic features.[174] Emphasizing the VAWA's noncommercial and intrastate nature, the court reasoned that allowing Congress to regulate intrastate acts "would have the practical result of excessively extending Congress's power and of inappropriately tipping the balance away from the states."[175] Although the findings indicated that gender-based violence had a "major effect on the national economy," they did not necessarily imply a substantial effect on interstate commerce sufficient to bring an activity within the regulatory power of Congress.[176] If such a chain of causation won the day, then Congress could regulate acts such as insomnia, whose costs to the country equal or exceed those of domestic violence.[177] In the end, the *Brzonkala* district court decided that Congress extended its Commerce Clause power beyond its reach and into state affairs by enacting the VAWA and that "[a]ny other conclusion would strain reason."[178]

Following the district court decision in *Brzonkala*, the plaintiff filed an appeal with the Fourth Circuit thereby giving it the opportunity to rule on the constitutionality of VAWA's civil rights remedy.[179] Noting the precedential weight of *Lopez*, the Fourth Circuit set out to determine whether gender-based violence substantially affected interstate commerce.[180] The court began by categorizing gender-based violence as not "even arguably commercial or economic" and as lacking "a meaningful connection with any particular, identifiable economic enterprise or transaction."[181] In fact, the court argued

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173 *Id.* at 791-93 (listing the similarities in a section confusingly titled "Similarities (Other than those in the Possible Differences Section)" as the noneconomic nature of the VAWA and the GFSZA, the absence of a jurisdictional element in both statutes, and both laws violate the principle of federalism).

174 *Id.* at 791.

175 *Id.* at 792.

176 *Id.* (stating that "[s]howing that something affects the national economy does not suffice to show that it has a substantial effect on interstate commerce").

177 *Id.* at 793 (reciting that insomnia costs the nation a reported $15 billion per year, insomniacs travel across state lines, and that insomniacs buy medicine that has traveled across state lines).

178 *Id.*

179 Brzonkala v. Va. Polytechnic Inst. and State Univ., 169 F.3d 820 (4th Cir. 1999) (en banc) (reversing a divided panel of the Court of Appeals that reinstated the plaintiff's claim under VAWA's civil rights remedy and upheld its constitutionality).

180 *Id.* at 830-33.

181 *Id.* at 834. The court maintained that

> [t]he statute does not regulate the manufacture, transport, or sale of goods, the provision of services, or any other sort of commercial transaction . . . [and] excludes from its purview those violent crimes most likely to have an economic aspect . . . and instead addresses violent crime arising from the irrational motive of gender-based animus, a type of crime relatively unlikely to have any economic character at all.

that the GFSZA in *Lopez* fell more clearly in the category of commercial regulation than the VAWA.[182] As a result, the VAWA failed to regulate economic activity and to find otherwise "would divest the words 'commerce' and 'economic' of any real meaning."[183]

To support its Commerce Clause conclusion, the Fourth Circuit analyzed its decision in light of the principles of federalism. *Lopez*, according to the Fourth Circuit, affirmed the proposition that courts must carefully weigh the consequences of their decisions in terms of federalism so as not to "eliminate all limits on federal power."[184] In this case, the only way to uphold the civil rights remedy would be to find that gender-based violence substantially affected interstate commerce.[185] In so concluding, however, a court would have to rely "on arguments that lack any principled limitations and would, if accepted, convert the power to regulate interstate commerce into a general police power."[186]

The VAWA's civil rights remedy not only regulated acts traditionally punished by states, but it also provided a federal remedy in the absence of state relief whether that absence resulted from state criminal law policy, the discretion of the prosecutor, or state tort law policy.[187] Moreover, the VAWA blurred the division of accountability for the failure to punish gender-based violence.[188] Allowing Congress to exceed its power in this fashion "would arrogate to the federal government control of every area of activity that matters, reserving to the states authority over only the trivial and insignificant."[189]

Id.

182 *Id.* at 836.

183 *Id.* (citing United States v. Lopez, 514 U.S. 549, 565 (1995)). After finding no economic aspects to the civil rights remedy, the court next examined the jurisdictional reach of the VAWA. The court recited the rule from *Lopez* that a jurisdictional element ensures that "each specific application of the regulation involves activity that in fact affects interstate commerce." *Id.* at 831. Applying the jurisdictional lesson from *Lopez*, the court observed that the civil rights remedy lacked a jurisdictional element limiting action as for liability to those having an interstate nexus. *Id.* at 836. Unlike section 13981, the criminal provisions of the VAWA attached jurisdiction only to acts involving the crossing of state lines or Indian Territory. *Id.* The civil rights remedy, on the other hand, failed to explicitly limit jurisdiction to acts with an interstate nexus and did not "include any language which could possibly be construed to constitute such a jurisdictional element." *Id.* Because the VAWA not only failed to regulate economic activity but also lacked a jurisdictional element, the court declared that it could not uphold the statute under *Lopez* or any other Supreme Court precedent. *Id.* As a result, the Fourth Circuit Court of Appeals held the VAWA to be an unconstitutional exercise of congressional power under the Commerce Clause. *Id.* at 905.

184 *Id.* at 837 (stating that a court has to evaluate its holdings in light of our federal system of government).

185 *Id.* at 838.

186 *Id.*

187 *Id.* at 841-42.

188 *Id.* at 842 (noting that "[a]ccordingly, citizens of the States will not know which sovereign to hold accountable for any failure to address adequately gender-motivated crimes of violence").

189 *Id.* at 844. Concluding its Commerce Clause and federalism discussion, the Fourth Circuit examined the power of Congress to enact the civil rights remedy under section 5 of the Fourteenth Amendment. The court observed that Supreme Court precedent held that the Fourteenth Amendment generally "confer[red] rights only against the states." *Id.* at 863. Moreover,

The Supreme Court granted certiorari to examine the constitutionality of VAWA's civil rights remedy in *United States v. Morrison*.[190] Following its summation of the *Lopez* principles, the Supreme Court applied *Lopez* to the VAWA to determine its constitutionality under the Commerce Clause.[191] The VAWA, according to a majority of the Court, failed to regulate economic activity "in any sense of the phrase."[192] As a result, the cumulative effects of gender-motivated intrastate violence could not be aggregated without violating precedent allowing aggregation only where the regulated act is economic in nature.[193] Although the Court noted the presence of the legislative findings, it declared them to be "insufficient" to uphold Commerce Clause legislation because the Court itself ultimately determines whether or not a given activity substantially affected interstate commerce.[194] The Court believed the link between gender-based violence and interstate commerce to be too tenu-

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the Supreme Court consistently indicated that "Congress' Section 5 power to enforce Section 1 is correspondingly limited to remedial action against States and state actors." *Id.* Nevertheless, the possibility remains that Congress may regulate private conduct by a statute that is invoked only upon an "individualized showing that the State had violated the . . . Fourteenth Amendment." *Id.* at 867. In this case, however, the VAWA's civil rights remedy regulated purely private conduct and failed to limit claims to those involving states, state officers, individuals acting under color of state law, or those conspiring with state officials. For example, the petition in this case did "not even intone, much less allege" that the defendants were state actors or involved the state in any way. *Id.* at 870. Moreover, the VAWA remedy took effect whether or not an "individualized showing of unconstitutional state action" is made or attempted. *Id.* at 870. Cases arose under section 13981, according to the court, "without regard to whether the state adequately enforces its applicable criminal or civil laws" and applied both to states enforcing their laws and those turning "blind eye" toward gender-based violence. *Id.* To allow a statute of this nature to stand, in the court's mind, would allow Congress to create a municipal code by which it could control all the rights of citizens and destroy the legislative prerogatives of the individual states. *Id.* Because the VAWA regulated purely private conduct without reference to state action, the Fourth Circuit held that Congress exceeded its Fourteenth Amendment power when it enacted section 13981 and declared that section to be unconstitutional. *Id.* When combined with its previous Commerce Clause holding, the Fourth Circuit invalidated both constitutional grounds upon which Congress based its enactment of VAWA's civil rights remedy.

190 529 U.S. 598 (2000), *aff'g* Brkonkala v. Va. Polytechnic Inst. and State Univ., 169 F.3d 820 (4th Cir. 1999) (case name changed due to United States intervention to defend the statute and dismissal of plaintiff's Title IX claims against the school).

191 *Id.* at 607-19. The Court observed that it had the power to overrule congressional legislation "only upon a plain showing" that Congress transgressed its constitutional authority. *Id.* at 607. Given this command, the Court investigated Congress's authority to enact the VAWA under the Commerce Clause in light of its decision in *Lopez*. Despite the expansive nature of modern Commerce Clause power, *Lopez* enumerated the bounds on Congress's commerce authority, which made regulation constitutional so long as the regulated activity substantially affected interstate commerce. *Id.* at 612. As a link to interstate commerce, Congress could include a jurisdictional element to demonstrate that the regulation "is in pursuance of Congress' regulation of interstate commerce." Although not required, legislative findings allow courts to evaluate the rationality of the legislative decision linking the regulated act to interstate commerce. *Id.* Last, *Lopez* instructed that the link between the regulated act and interstate commerce could not be so tenuous as to allow Congress to regulate any act under its commerce power. *Id.* If Congress possessed unlimited power, it could regulate acts historically regulated by the states and thereby invade the state. *Id.* at 612-13.

192 *Id.* at 613.

193 *Id.* (reiterating that historical Commerce Clause jurisprudence only allows aggregation where the regulated act is economic in nature).

194 *Id.* at 614 (citing United States v. Lopez, 514 U.S. 549, 557 n.2 (1995)).

ous to support Commerce Clause legislation.[195] Accepting the rationale used to support the VAWA would allow Congress to regulate "every attenuated effect upon interstate commerce," such as murder or family law because their effect on the nation's economy is significant in the aggregate.[196] However, an expansion of power in this fashion would be "to completely obliterate the Constitution's distinction between national and local authority."[197] Thus, the Supreme Court held that Congress exceeded the bounds of its power under the Commerce Clause when it enacted the VAWA.[198]

Similar to past decisions involving federalism and the Commerce Clause, four justices sharply disagreed in a dissent written by Justice Souter.[199] Like the Fourth Circuit, the dissent argued that the role of the courts merely amounted to determining whether a rational basis existed for the legislation regardless of a court's view of the legislation's wisdom.[200] To aid judicial review, legislative findings must be given due weight because they represent the facts upon which Congress relied when enacting legislation.[201] In this case, unlike the facts in *Lopez*, Congress amassed a "mountain of data" to support its conclusion that gender-based violence substantially affected interstate commerce.[202] Indeed, the dissent pointed out that the evidence supporting the enactment of the VAWA was "far more voluminous than the record compiled by Congress and found sufficient in two prior cases upholding Title II of the Civil Rights Act of 1964 against Commerce Clause chal-

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195 *Id.* at 615 (stating that the reasoning urged by the petitioners sought to follow a "but-for causal chain from the initial occurrence of violent crime to every attenuated effect on interstate commerce" that would allow Congress to regulate any crime).

196 *Id.* at 615-16.

197 *Id.* at 615 (noting that their concern about the obliteration "seems well founded").

198 *Id.* at 619. The Court also found the civil rights remedy to be unconstitutional under the Fourteenth Amendment because the Amendment only reaches state actors and not private actors. *Id.* at 619-27. The civil rights remedy was not aimed at the action of states, according to the majority, but only at private individuals. *Id.* at 625-26. The Court observed that state-sponsored discrimination violated equal protection unless it served "important governmental objectives using a discriminatory means . . . substantially related to the achievement of those objectives." *Id.* at 620. The Court, however, described congressional power under the Fourteenth Amendment as limited by the time-honored principle that the amendment prohibited only state action and did not contemplate barring private conduct. *Id.* Although the Court noted the evidence pointing to bias against victims of gender-based violence in state courts, the Court found that the VAWA proscribed the acts of individuals and not those of states. *Id.* at 625-26. In this case, for example, the VAWA claim fails to indict any state official as a result of the attack on *Brzonkala*. *Id.* at 626. Moreover, the Court argued that the VAWA's remedy was overbroad because it applied to every state despite evidence that state court discrimination did not exist in every state. *Id.* at 626-27. As a result, the Court concluded that Congress's power under the Fourteenth Amendment did not reach far enough to allow it to enact the VAWA and held it to be unconstitutional. *Id.* at 627.

199 *Id.* at 628 (Souter, J., dissenting, joined by Stevens, J., Ginsburg, J., and Breyer, J.).

200 *Id.* at 638 (maintaining that the "business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact").

201 *Id.*

202 *Id.* at 628-29 (listing some of the evidence linking domestic violence and rape to interstate commerce used by Congress when it enacted the VAWA).

lenges."[203] By ignoring the legislative record and the deference due to the legislative judgment of Congress, the majority propounded a "new system of congressional deference subject to selective discounts."[204]

In addition to setting aside the legislative prerogatives of Congress, the dissent urged that the majority opinion failed to take proper account of the history of Commerce Clause jurisprudence. History, according to the dissent, demonstrated that the categorical labeling of regulated acts had "proven as unworkable in practice as they are unsupportable in theory."[205] By examining previously rejected distinctions based upon the economic/noneconomic nature of an activity, the majority sought to limit federal power to protect an allegedly bright line marking the boundary of state sovereignty.[206] However, previous cases made clear that the federal government may legislate in areas of state interest when it legislates under the auspices of a constitutionally enumerated power.[207] Moreover, the dissent maintained that even the Founders believed that politics, not judicial review, would sway the balance of power between the federal and state governments as the economy changed.[208] Cases from *Wickard* to *Garcia* reiterated that the political process sufficiently guarded against federal intrusion into state sovereignty.[209] In the end, the dissent declared the majority opinion to be in error and "doubt[ed] that the majority's view will prove to be enduring law."[210]

IV. Political Accountability and Federalism

Two common themes run throughout the history of Commerce Clause jurisprudence: the fear of federal intrusion into state legislative prerogatives, and the ability of the political process to protect those prerogatives. The notion that the political process protects our dual structure of government is derived from Herbert Wechsler's 1954 influential article titled *The Political Safeguards of Federalism: The Role of the States in the Composition and Se-*

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203 *Id.* at 635 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) and Katzenbach v. McClung, 379 U.S. 294 (1964)).

204 *Id.* at 638.

205 *Id.* at 640 (reasoning that the Commerce Clause singularly granted Congress power to regulate commerce, that Congress may not regulate under that provision any subject that fails to affect commerce, and that "[i]t does not at all follow that an activity affecting commerce nonetheless falls outside the commerce power, depending on the specific character of the activity, or the authority of a State to regulate it along with Congress").

206 *Id.* at 644. The dissent asserted that

> [j]ust as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit.

Id.

207 *Id.* at 645.

208 *Id.* at 647.

209 *Id.* at 649-50 (noting that although similar states' rights concerns were heard when the end of state legislative election of senators ended, they did not prevent passage of the amendment).

210 *Id.* at 654.

lection of the National Government.[211] In his piece, Wechsler asserts that "[t]he actual extent of central intervention in the governance of our affairs is determined far less by the formal power distribution than by the sheer existence of the states and their political power to influence the action of the national authority."[212] To support his point, Wechsler asserted that the states retained power over the national authority due to their role in the election of Congress and the President.[213] Individuals chosen to constitute the national government are elected by citizens of states as mandated by the Constitution and must be keenly aware of local sensitivities to be elected in the first place.[214] Because states and their interests play a key role in the composition and selection of the federal government, local concerns within states "cannot fail to find reflection in the Congress."[215] States, according to Wechsler, remained "the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity."[216] Even Madison, Wechsler pointed out, argued that the political process, not the judiciary, would constrain the power of the national government.[217] In the end, the design of the Constitution "is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states."[218]

As evidence of the adaptive nature of the Constitution envisioned by Wechsler, Court disputes about states' rights and the need for the judiciary to safeguard federalism reflects ideas encompassed by Wechsler's theory. From *E.C. Knight Co.* to *Morrison*, the Court typically voiced this concern by stating that a federal regulation will "obliterate" the distinction between what is national and what is local. Underlying this obliteration is the notion that political accountability is blurred when the national legislative power is brought to bear upon traditionally state legislative concerns.

The best expression of the idea of blurred political accountability is found in *New York v. United States.*[219] In that case, Justice O'Connor opined that Congress possessed significant powers to govern the nation, which includes areas of state concern, but does not include the power to force states

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211 Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

212 *Id.* at 544.

213 *Id.* at 546-58 (stating that "[i]f I have drawn too much significance from the mere fact of the existence of the states, the error surely will be rectified by pointing also to their crucial role in the selection and composition of the national authority").

214 *Id.* at 547.

215 *Id.* (urging that "[t]o the extent that federalist values have real significance they must give rise to local sensitivity to central intervention; to the extent that such a local sensitivity exists, it cannot fail to find reflection in the Congress").

216 *Id.* at 546.

217 *Id.* at 558 (stating that "the inherent tendency" necessitates "the widest support before intrusive measures of importance can receive significant consideration, reacting readily to opposition grounded in resistance within the states").

218 *Id. But see* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752 (1995) (arguing generally that Wechsler's theory is out of touch with the modern political process); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. Rev. 1311 (1997) (discussing the new federalism).

219 505 U.S. 144 (1992).

to govern according to their directives.[220] State officers regulate local matters, and remain responsive to local concerns because they suffer the consequences of a dissatisfied local electorate.[221] Where the federal government displaces state prerogatives, however, the political accountability of governmental officers becomes blurred because state officials may suffer the electoral consequences despite being forced to implement federal mandates designed by federal officials.[222] State voters could become confused as to which governmental body is responsible for the regulation of local concerns when federal law invades state affairs. If citizens dislike the implemented federal policy, they may vote to remove state officials despite their lack of involvement with the legislative process or the legislation itself;[223] therefore, federal officials are "insulated from the electoral ramifications of their decisions."[224] In the end, political "[a]ccountability is thus diminished when . . . elected state officials cannot regulate in accordance with the views of the local electorate . . ." and must comply with laws drafted by the federal government.[225]

As evidence of the persistent disagreement about the political safeguards of federalism in recent cases, the *Morrison* dissent reasoned that politics had long been considered "the determinant of the federal balance within the broad limits of a power like commerce."[226] Moreover, Supreme Court precedent from *Wickard* to *Garcia* reaffirmed that the Constitution left both "conflicts of economic interest" and "conflicts of sovereign political interests" to be resolved by the political process.[227] Although developments such as national growth and the Seventeenth Amendment reduced state power, the dissent urged that the Constitution contained no "circuit breaker" to prevent results of the political process.[228] These political consequences, according to the dissent, did not amount to holes in the Constitution that needed to be judicially repaired, but are legitimate results of the political restraints on the federal system intended by the Framers.[229]

Examining the role of politics in maintaining the state-federal balance, the *Morrison* majority asserted that the Framers divided the power distribution at the federal level so that the Constitution would not be defined only by public opinion and legislative self-restraint.[230] Although politics affected constitutional interpretation and application, the judiciary ultimately enjoyed

220 *Id.* at 162.

221 *Id.* at 168.

222 *Id.* at 169 (claiming that state officials could "bear the brunt of public disapproval").

223 *Id.*

224 *Id.*

225 *Id.*

226 *See* United States v. Morrison, 529 U.S. 598, 648 (2000).

227 *Id.* at 649.

228 *Id.* at 650.

229 *Id.* at 652 (stating that "[a]mendments that alter the balance of power between the National and State Governments, like the Fourteenth, or that change the way the States are represented within the Federal Government, like the Seventeenth, are not rips in the fabric of the Framers' Constitution, inviting judicial repairs").

230 *Id.* at 616 n.7 (characterizing Justice Souter's defense of the political process as "remarkable").

the power to define what is a constitutional exercise of power.[231] Political accountability as understood by the dissent thus departed from the "cardinal rule of constitutional law," which is that the judiciary determines what the law is regardless of legislative enactments.[232] According to the majority, the accountability of politicians for their legislative acts only restrained the commerce power of Congress "within that power's outer bounds."[233] Wielding its power, the majority concluded that giving effect to the VAWA would blur the distinction between national and local authority to regulate matters of local concern.[234] Thus, political accountability only affected the state-federal balance within the sphere of permissible regulation; it did not define the sphere because that task belonged uniquely to the judiciary.[235]

Taking up its unique task, the Supreme Court's decision in *Morrison* represents the Court's continuing effort to protect the states from what it views as the ever-expanding power of the federal government. Indeed, the Court's recent decisions reflect its willingness to jealously guard state authority by supporting positions that decentralize power.[236] Scholars refer to the rediscovered barrier between federal and state legislative authority brought about by judicial activism as the "new federalism."[237] The Court's infatuation with the new federalism harkens back to the past when previous Courts commonly held Congress's power to enact national legislation finite. Moreover, the new federalism rejects the holding in *Garcia* and discards Wechsler's "political safeguards theory" of federalism.[238] However, the new federalism disserves the law by protecting states' rights in a manner unsupported by historical precedent.[239] Moreover, the new federalism allows justices to make decisions based upon individual preferences without reference to precedent. The David-like Supreme Court is not supposed to slay the Goliath-like Congress in the name of states' rights based upon personal conceptions of governmental operation. David merely checks Goliath.

By continuing to discredit the political safeguards of federalism, particularly in a case like *Morrison*, the Supreme Court, not Congress by its legislation, blurs the political accountability of local and federal officials. The indispensable element of the political accountability theory is that citizens must recognize which officials are responsible for legislative acts so that they

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231 *Id.* at 617 n.7.

232 *Id.*

233 *Id.*

234 *Id.* at 617-18 (reasoning that the decision preserved the historical theme that the regulation of intrastate violence having nothing to do with the instrumentalities, goods, or channels of interstate commerce should be regulated by the states).

235 *Id.* at 617 n.7.

236 *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997) (holding the Brady Act's requirement that state officials perform background checks before selling firearms to be unconstitutional); City of Boerne v. Flores, 521 U.S. 507 (1997) (holding the Religious Freedom Restoration Act of 1993 unconstitutional on the basis of federalism).

237 *See, e.g.*, John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27 (1998); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

238 Ronald J. Krotoszynski, *Listening to the "Sounds of Sovereignty" But Missing the Beat: Does the New Federalism Really Matter?*, 32 IND. L. REV. 11, 13 (1998).

239 *See infra* Part V.

can demonstrate their approval for those acts by voting to retain or remove those officials. By invalidating popular congressional legislation, however, the Court injects confusion into the political arena because citizens cannot determine who has the ability to remedy a national problem. Citizens look to the federal government to remedy problems that are national in scope and to deal with issues about which the individual states are incompetent. Indeed, the Supreme Court noted this role of the federal government in *National League of Cities* when it opined that some problems could pose such a threat that "only collective action by the National Government might forestall."[240] Given the evidence presented to Congress during the VAWA's hearings, gender-based violence cannot be considered anything but a national problem.

Because gender-based violence is a problem with national dimensions, the federal government is the only body that can completely address the issue. The evidence presented to Congress documented that state justice systems failed to adequately redress gender-based violence.[241] Recognizing the discriminatory treatment gender-based violence victims received from states, the popularly elected federal officials who represent individual states and their associated interests chose to enact the VAWA to combat the problem. Moreover, the overwhelming majority of states supported the VAWA based upon the declarations of the popularly elected state attorneys general. For example, the National Association of Attorneys General supported the VAWA by a unanimous vote.[242] Furthermore, attorneys general from thirty-eight states affirmed the need for the VAWA's civil rights remedy, stating that "the current system for dealing with violence against women is inadequate."[243] Even when litigants challenged the VAWA in the Court, thirty-six of the states filed amicus briefs arguing for the constitutionality of the measure.[244] On the other side, only one state filed a brief urging the Court to find the civil rights provision unconstitutional.[245] Given the extensive state support and the assent of the national legislature, the VAWA is not a legislative intrusion on states' rights, but rather an example of the cooperative federalism required to address areas of national concern.

Despite their federalism concerns, the *Morrison* majority overlooks the differences between areas of law such as family law and gender-based violence. While citizens do not want or need an overly intrusive federal govern-

240 *See* Nat'l League of Cities v. Usery, 426 U.S. 833, 853 (1976).

241 *See, e.g.*, S. REP. No. 102-197, at 47 (1991) (citing a Colorado Gender Bias Task Force survey showing that 41% of surveyed judges believe juries give sexual assault victims less credibility than victims of other crimes); *id.* at 44 (stating that less than 1% of all rape victims have collected damages from their attackers).

242 *Id.* at 37-38.

243 *Crimes of Violence Motivated by Gender*, *supra* note 33, at 34-36.

244 *See* Brief of Amici Curiae the States of Arizona, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Washington, West Virginia, and Wisconsin, and the Commonwealths of Massachusetts and Puerto Rico for Petitioners' Brief on the Merits, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29).

245 *See* Brief of Amicus Curiae the State of Alabama for Respondents, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29).

ment, the regulation of gender-based violence does not provide a basis for the expansion of federal power at the expense of the states. Gender-based violence is a problem that differs from the areas mentioned by the *Morrison* Court in that citizens recognize it as a national problem incompatible with state resolution. The areas of state concern cited by the various courts that encountered the *Brzonkala* claim—i.e., divorce, child-rearing, marriage, and insomnia—are not recognized as national problems in the same manner because there is no popular support for federal intrusion under present circumstances. Although the *Brzonkala* district court may be correct that insomnia affects interstate commerce more than gender-based violence, private and public interest groups do not lobby for the federal regulation of insomnia like they did in support of the VAWA. The situation would change if, for example, insomniacs killed thousands of people every year in a manner uncontrollable by state police. Under such circumstances, cries would ring out for federal intervention and courts, cognizant of public opinion, would support federal intervention. Similarly, the public, through its elected officials, does not perceive a crisis in state handling of marriage, divorce, or child-rearing; therefore, it does not support federal regulation of these areas and no federal action will arise. Thus, comparing gender-based violence to acts like insomnia or family law misapprehends the connection between supportive public opinion and federal intervention.

In addition to disregarding the popular assent that brought the VAWA into being, the Supreme Court's invalidation of the civil rights remedy puts local electorates in an untenable position. Voting to remove either state or federal officials from office threatens to alter state or federal support for the fight against gender-based violence if newly elected officials turn a deaf ear to the issue. Failing to support legislative remedies or ignoring the issue altogether leaves the discriminatory status quo in place. For example, newly elected state politicians could refuse to enact further legislation because of the remedies already available under state law, thereby ignoring their ineffectiveness.[246] Furthermore, newly elected federal politicians will hesitate to tackle the issue again so closely on the heels of *Morrison*'s defeat. As a result, *Morrison's* reliance on the local electorate to address gender-based violence risks perpetuating a problem that Congress had crafted a national solution to address.

In *Morrison*, the Court simply chose to elevate its concern about expanding federal power above the public's desire for an avenue of redress for victims of gender-based violence. However, picking and choosing among policies separated from public opinion is an option for the Supreme Court

246 Even though there was broad public support for VAWA, state officials are unlikely to act without an opportunity for political gain. Because the problem is so pervasive, they are likely to view it as one that they cannot fix and, therefore, will avoid the problem because political gain will come only through solving the problem. The pervasive nature of the problem not only diminishes political gain, but counsels against trying to fix the problem. State officials might be loathe to create solutions to which the judiciary might disagree or fight. As a result, it is easier to do nothing on the state level and throw blame on the federal government for its failure to rectify the problem. In other words, moving political accountability elsewhere, which prevents political loss, might actually be a gain in the world of politics.

due to its unique position in the structure of our government. Although the Court frequently asserts that transgressions of federal power blur the lines of political accountability, they can do so precisely because they themselves are politically unaccountable for their decisions. As one Anti-Federalist noted during the debate over ratification, "[t]he opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or controul their adjudications."[247] Judicial activism, then, is a byproduct of the inability to match judicial decisions to political consequences. For example, there can be little doubt that a substantial movement would have arisen to remove Justice Blackmun from the Court after his opinion in *Roe v. Wade* if political consequences fell upon justices after making their decisions.[248] Given the support of the VAWA, several justices would have to perform a graceful two-step to dance around the political consequences of their decisions in *Morrison*. In short, the mismatch between judicial decisions and politics allows the Court "to stumble around the United States Code, heedlessly striking down federal laws in what amounts to a treacherous game of blind man's bluff with the Constitution and the American government" that is out of touch with popular opinion.[249]

V. A History of Unlearned Lessons

A. Judicial Activism

Despite the Court's reliance on historical precedent to support its invalidation of the VAWA, history itself counsels that the judicial activism exhibited by the Court in cases like *Morrison* is unwarranted. Indeed, whether the Framers understood judicial review as allowing the type of judicial activism employed by the modern Court to be in the Constitution is "*the* crucial issue of American constitutional history."[250] Nonetheless, the now familiar reliance on historical pronouncements regarding judicial power is found in *Morrison*. Justifying judicial review, the *Morrison* majority asserted that the Framers divided power at the federal level "so that the Constitution's provisions would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the legislature's self-restraint."[251] As Hamilton noted, "[t]he interpretation of the laws is the proper and peculiar province of the courts."[252] Although politics play a role in constitutional interpretation and application, the *Morrison* majority maintained that the federal judiciary is "supreme in the exposition of the law of the Con-

247 JACK N. RAKOVE, ORIGINAL MEANINGS 186 (1996) (quoting the Anti-Federalist Brutus).

248 Roe v. Wade, 410 U.S. 113 (1973) (granting the right to abortion under certain circumstances).

249 Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 291 (2000).

250 RAKOVE, *supra* note 247, at 175 (relating the Supremacy Clause to the doctrine of judicial review).

251 United States v. Morrison, 529 U.S. 598, 616 n.7 (2000).

252 THE FEDERALIST No. 78, at 395 (Alexander Hamilton) (Buccaneer Books 1992).

stitution."[253] Further asserting its power in Commerce Clause cases, the *Morrison* majority reiterated that whether Congress can exercise regulatory power under the Commerce Clause "is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."[254] These statements reflect the vital link between the written law embodied in a constitution and the faith in competence of a judiciary to decide issues involving the constitution.

While the public might have faith in the Court's constitutional interpretation, the Court's characterization of the evolution of judicial review misconstrues the historical record.[255] Although the Framers intended judicial review to apply to federal legislation, they believed that most of the controversies requiring judicial intervention would involve the federalism structure of the government.[256] Before the Constitution, several state legislatures interpreted their constitutions at their whims and passed laws in contravention of constitutional guarantees.[257] Moreover, the failure of the states to act in the best interest of the nation under the Articles of Confederation convinced the Framers that the nation needed constitutional reform.[258] In fact, many Framers believed that the continuing failure of the states to act for the national good resulted from state politics.[259] In order to progress, the nation

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253 *Morrison*, 529 U.S. at 616 n.7.

254 *Id.* at 614 (quoting United States v. Lopez, 514 U.S. 559, 557 n.2).

255 *But see generally* Kramer, *supra* note 249, at 240-50; RAKOVE, *supra* note 247, at 171-80. According to Rakove, in addition to sweeping assertions of power based upon precedent, the text of the Constitution and the writings of some of its Framers support the Court's view of judicial review. At the time of the Constitutional Convention, one primary concern of the Framers involved the separation of authority between federal and state legislatures "in controversies relating to the boundary between the two jurisdictions." *Id.* at 176 (quoting THE FEDERALIST No. 39 (James Madison)). As an alternative to giving Congress a negative over all state laws if it found them repugnant to the Constitution, the Framers drafted the Supremacy Clause thereby making the nation's laws the supreme law of the land and binding the states regardless of contrary state law. *Id.* at 172-74. By creating the Supremacy Clause, the Framers incorporated "a principle of judicial review into all the state governments by the unilateral fiat of the Constitution." *Id.* at 175. Reaffirming the role of the judicial branch of the national government, Madison noted that the body to decide disputes over national/state authority to regulate "is to be established under the general government." *Id.* at 176 (quoting THE FEDERALIST No. 39 (James Madison)). Moreover, Hamilton observed in Federalist 78 that "the courts were designed to be an intermediate body between the people and the legislature; in order, among other things, to keep the latter within the limits assigned to their authority." THE FEDERALIST No. 78, at 395 (Alexander Hamilton) (Buccaneer Books 1992). In the end, the rejection of the proposed negative on state laws paved the way for a clause that endowed the judiciary with the ability to enforce nationally supreme laws so long as courts could be relied upon to responsibly enforce national laws.

256 RAKOVE, *supra* note 247 at 175 (stating that "the more likely sources of constitutional controversy requiring judicial review did not lie along the axis of the separation of powers—that is, within the realm of national government alone. They would arise instead along the unchartered borders where the powers of state and national governments would overlap").

257 Kramer, *supra* note 249, at 238.

258 RAKOVE, *supra* note 245, at 29 (noting that the inability of the states to approve amendments to the Articles, to meet the financial needs of Congress, and to implement the Treaty of Paris all contributed to the desire for reform).

259 Kramer, *supra* note 249, at 243-44 (claiming that the states had a "bad history of ignoring both the Articles of Confederation and their own state constitutions").

needed a mechanism to enforce national laws against the states to secure the welfare of the nation.[260]

To protect the national government from the parochial interests of the states, the Framers drafted the Supremacy Clause, thereby elevating national laws above those of the states.[261] Against this background of state recalcitrance, however, a different image of the Supremacy Clause emerges. The judicial review comprehended by the Supremacy Clause protected the national government from encroachment by the states, and not vice versa as the Supreme Court typically implies. Indeed, the use of judicial review as a method to protect the states from federal overreaching received little to no attention at the Constitutional Convention.[262] Moreover, state ratifying conventions generally did not contemplate judicial review at all and if they did, the discussion remained as a side note to matters considered more important.[263] The Framers simply "hoped to create a national government strong enough to resist the states' relentless encroachments and capable of acting on its own."[264] As a result, the Framers had "little reason to worry that Congress would enact or the president approve constitutionally improper statutes that the federal judiciary would feel compelled to overturn."[265] In short, "no one in the Founding generation would have imagined that courts could or should play a prominent role in defining the limits of federal power."[266]

Given the experiences and political concerns of the Framers, the failure to highlight judicial review in the Constitution is not surprising. The Framers wrote the Constitution in the wake of both the American Revolution and the Glorious Revolution during which a ruling hand had been overthrown by the sword.[267] As a result, the Framers had over a century of experience in a federal system that provided them with a model of how to prevent transgressions of power.[268] In the minds of the Framers, then, the chief mechanism by which to control a body exceeding its authority involved the mobilization of popular opinion against abuses of power.[269] Whether the organization of the public included protests like those against the Stamp Act or outright violence like that during the Revolution, the Framers understood popular action to be

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260 RAKOVE, *supra* note 247, at 28-31 (describing how the Articles of Confederation and the nature of state internal politics spurred the constitutional reform).

261 Kramer, *supra* note 249, at 243-44.

262 *Id.* at 242 (asserting that the little attention paid to judicial review at the Convention is "old news—and not very important news either" because the ratifiers had a different conception of the power to change laws).

263 *Id.* at 246-52. Kramer observes that the ratification debates more accurately reflect the understanding of judicial review at the time of the Founding, but the evidence from those debates "is even harder to square with the idea that the Constitution assigned courts responsibility for defining the limits of federal power." *Id.* at 246. Moreover, the absence of evidence supporting the expansive role of judicial review at the Founding "utterly discredits any notion that federal courts were an important element of the design to protect state sovereignty." *Id.* at 252.

264 *Id.* at 246.

265 RAKOVE, *supra* note 247, at 175.

266 Kramer, *supra* note 249, at 235 (continuing in the next sentence, "And no one did").

267 *Id.* at 266.

268 *Id.*

269 *Id.*

the only certain way to prevent tyrannical government.[270] In the end, "the idea of depending on courts to stop a legislature that abused its power simply never occurred" to most of the Framers at either the Constitutional or state-ratifying conventions.[271]

As a corollary to the ability of the people to resist an overreaching authority, the Framers committed the ability to interpret the Constitution to the people themselves. The Framers knew that the Constitution would have to be interpreted based upon ambiguities inherent in the usage of language to convey ideas.[272] Rather than endow the judiciary with sole interpretive authority, the Framers believed that uncertainty in meaning should be resolved by politics or popular action.[273] By assigning power to the people, the Framers implicitly held that permitting judges to decide disputes over constitutional meaning "violated core principles of republicanism."[274] Although judges possessed the power to enforce standards to which the public popularly assented, they had no power to outline the boundaries of constitutional power.[275] Allowing the judiciary to do so usurped a function that rightly belonged to the citizens of the nation.[276] Furthermore, despite the support for judicial review in Federalist 78, even Hamilton noted that "the power of the people is superior to both" the legislative and judicial power.[277] As a result, history disavows any notion asserting that the Framers designed the federal courts to be the ultimate protectors of state sovereignty.

Given the power that the Framers believed resided with the people, the *Morrison* decision contravenes that power in favor of the power of the judiciary. By deeming the VAWA to be an unconstitutional exercise of power, the Supreme Court mistakenly ignores the political process that resulted in the VAWA and disregards the legislative judgment of a co-equal branch of government that a vast majority of states supported. While the majority in *Morrison* voices implicit concerns about confusion regarding political accountability, it reached a conclusion contrary to the political will of the people. Because the elected officials of both state and federal governments supported the VAWA, the consent of the people is represented in its enactment. The citizens of each state voted to place individuals in office that they believed best represented their interests. Although federal officials legislate with an eye toward the national welfare, they presumably do not forget the interest of their local constituency. For example, federal representatives of North Carolina are unlikely to support legislation banning the use of tobacco in this country because such legislation would snuff out the nation's cigarette

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270 *Id.* (calling the mobilization of popular opinion "the blueprint" for opposing an abusive government).

271 *Id.*

272 *Id.* at 237 (noting that the Framers realized that this might involve lengthy periods of uncertainty or even controversy).

273 *Id.*

274 *Id.* (defining those principles as involving the resolution of constitutional disputes by the sovereign citizens).

275 *Id.* at 240 (observing that judges had no power to define the scope of constitutional limits where those limits were not "plainly settled").

276 *Id.*

277 THE FEDERALIST NO. 78, at 395 (Alexander Hamilton) (Buccaneer Books 1992).

industry. In the case of gender-based violence, the popularly elected members of Congress reviewed ample evidence demonstrating the discriminatory treatment of victims of gender-based animus in state judicial systems. However, the Supreme Court deemed their review of the evidence linking violence to interstate commerce to be irrational, thereby overturning the conclusion of a majority of states and their politically accountable officials. Because of the *Morrison* decision, "the States will be forced to enjoy the new federalism whether they want it or not."[278]

B. State-Sponsored Discrimination

While the ultimate governing power resides with the people, history teaches that such power allows states to discriminate against disfavored groups. Indeed, the history of state-sponsored discrimination should give the Supreme Court pause before it strikes down anti-discrimination legislation. Despite its benefits, the history of federalism demonstrates that it has allowed for the subordination of minority groups whose opinions or interests do not align with those of the majority at the local level. As a result, our form of government eternally runs the risk of majoritarian misrule. Discrimination has occurred most often at the hands of local control. As a result, the Supreme Court's emphasis on decentralizing power from the federal government to state government increases the opportunity for discrimination.

In the minds of some of the Framers, the risk of majoritarian misrule increases as the level of government decreases. Referring to state government, Madison opined that

> [t]he smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; . . . and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.[279]

On the other hand, the risk of oppression decreased at the national level because the greater number of interests made it less probable that a majority would have an incentive to trample minority rights.[280] Thus, the national government, not state government with its understanding of local concerns, best protects the interests of minority groups.

A glance at the past confirms that smaller governmental units fail to protect minority interests because history is littered with examples of the abuse of state power in a manner harmful to various groups. The most glaring instance of state-sponsored discrimination is the plight of African-Americans in this country. Beginning at the Founding, the Southern states banded

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278 United States v. Morrison, 529 U.S. 598, 654 (2000) (Souter, J., dissenting); *see also* Wechsler, *supra* note 211, at 559 (stating that "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of the Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress").

279 THE FEDERALIST No. 10, at 48 (James Madison) (Buccaneer Books 1992).

280 *Id.*

together to protect their "peculiar institution" of slavery.[281] At the Convention, a South Carolina delegate linked federalism to slavery by exclaiming that the Southern states had

> a security that the general government can never emancipate them, for no such authority is granted; and it is admitted, on all hands that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states.[282]

Moreover, one delegate asserted that "[t]he morality and wisdom of slavery are considerations belonging to the states themselves."[283] Because of the slavery issue, the great divide at the Convention did not lie between large and small states, but between Northern and Southern states.[284] Despite the persistent disagreement about slavery, delegates knew that a spirit of compromise had to prevail if the Constitution had any hope of being ratified by the states. As a result, the final Constitution contained important concessions to Southern states such as the Fugitive Slave Clause, the prohibition on restricting slave importation, and the infamous Three-Fifths Clause.[285] Though included for the political purposes of ratification, the Constitution represented to many "a covenant with death and an agreement with hell."[286]

In spite of the freedom offered to the slaves after the Civil War, the promises of the Reconstruction went unfulfilled as the Southern states erected laws that perpetuated the pre-War social system. Almost all of the Confederate states passed, for example, the Black Codes in an attempt to retain their pre-War lifestyle.[287] Mississippi, for example, enacted laws preventing an African-American from testifying in cases where all of the parties were white and returned African-Americans to their employers if they quit without good cause.[288] In short, the Southern states mobilized their legal resources in a manner that replaced slavery with a kind of social caste system. The newly freed African-American experienced the same disabilities they had before the war—only the legal maneuvering required to continue their plight changed.

Reacting to the South's continued discrimination against African-Americans, Congress passed anti-discrimination schemes such as the Thirteenth, Fourteenth, and Fifteenth Amendments and wrote four Civil Rights Acts into law by 1875.[289] Despite these federal protections, some Southern states

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281 FRIEDMAN, *supra* note 57, at 218 (citing KENNETH M. STAMPP, THE "PECULIAR" INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (1956)).

282 Pace Jefferson McConkie, *Civil Rights and Federalism Fights: Is There a "More Perfect Union" for the Heirs to the Promise of Brown?*, 1996 B.Y.U. L. REV. 389, 391 (1996) (quoting PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM AND COMITY 23-24 (1981) (quoting 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 254-55 (Max Farrand ed., 1937) (statement of Charles Pinckney))).

283 RAKOVE, *supra* note 247, at 87 (statement of delegate Oliver Ellsworth of Connecticut).

284 *Id.* at 72.

285 U.S. CONST. art. I, § 2.

286 RAKOVE, *supra* note 247, at 58 (statement of William Lloyd Garrison).

287 FRIEDMAN, *supra* note 57, at 504.

288 *Id.* (citing 1865 Miss. Laws chs. 4, 6).

289 GUNTHER, *supra* note 43, at 880-81 (noting that the Thirteenth Amendment embodied

created laws forcing a separation between the races during the Jim Crow era.[290] In 1891, for example, a Georgia law mandated separate railroad cars for African-Americans and whites while Arkansas required separate accommodations for its African-American and white prisoners in 1903.[291] Even the Supreme Court gave its support to the principle of segregation in *Plessy v. Ferguson*[292] by upholding a Louisiana law that required "equal but separate accommodations" for "white" and "colored" railroad passengers.[293] Referring to the Fourteenth Amendment, the Supreme Court argued that "it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."[294] According to the Court, laws separating the races and those regulating their interactions had long been recognized "as within the competency of state legislatures in the exercise of their police power."[295] As a result, states remained free to regulate the interaction between the races based upon their sovereignty.

Further succumbing to states' rights, the Supreme Court responded to the charge that upholding the Louisiana law allowed the states to regulate matters on the basis of physical characteristics.[296] In the face of this assertion, the Court committed such decisions to the discretion of state legislatures. The Supreme Court opined that "the exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."[297] State legislatures could reasonably enact laws that accounted for "established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."[298] As a result, the Louisiana law did not stamp African-Americans with a "badge of inferiority" and the only way to perceive such a badge was if "the colored race chooses to put that construction on it."[299] However, *Plessy* not only disregarded the history of slavery,

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the Emancipation Proclamation, the Fourteenth Amendment ratified the Civil Rights Act of 1866, the Fifteenth Amendment provided voting rights, the 1866 Act put an end to the Black Codes, the 1870 Act dealt with denial of voting rights, the 1871 Act established civil and criminal liabilities as enforcement for the Fourteenth Amendment, and the 1875 Act dealt with public accommodations discrimination); FRIEDMAN, *supra* note 57, at 505-08 (observing that the Court found the 1875 Act to be unconstitutional).

290 FRIEDMAN, *supra* note 57, at 506 (referring to the era after Reconstruction that placed African-Americans in "a system of legal and social apartheid" throughout many Southern states).

291 *Id.* at 506.

292 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

293 *Id.* at 540.

294 *Id.* at 544 (noting that the Fourteenth Amendment "undoubtedly" was meant to make the races equal).

295 *Id.*

296 *Id.* at 549 (responding to the argument that allowing discrimination on the basis of skin color would thus allow discrimination on the basis of other qualities like hair color, nationality, or alienage).

297 *Id.* at 550.

298 *Id.* (noting that the Louisiana law did no more offense to the Fourteenth Amendment than the acts of Congress requiring segregated schools in Washington, D.C.).

299 *Id.* at 551.

but also ignored the present status of African-Americans in the South who faced repercussions, such as lynching, if they violated the laws designed to protect the peace and comfort of the people. In the end, *Plessy* reflected Madison's fear of state legislative misrule—a fear that African-Americans would not overcome in a legal sense until *Brown v. Board of Education*.[300]

Even after the Supreme Court's landmark decision in *Brown v. Board of Education*, Southern supporters of states' rights remained wedded to the outwardly subordinating concept of segregation. The Virginia legislature issued a mandate opposing "further encroachment by the Supreme Court" and hoped that the Virginia judiciary would protect the state against further federal intrusion.[301] Moreover, the Virginia "Defenders of State Sovereignty" called for schools to be closed if they became integrated and for concomitant tuition payments to be made on behalf of children attending different schools because of integration.[302] Similarly, the Alabama and Arkansas legislatures opposed *Brown* because it invaded their state sovereignty by imposing on their authority to regulate their educational systems.[303] By insisting on local control, the Southern states gained a valuable trump card to play in the national political arena by making national efforts only possible when African-Americans were excluded from the agenda.[304] Despite its renowned decision in *Brown*, "[t]he inescapable conclusion is that federalism protected slavery for the first seven decades of the nation's history. Then, for nearly another century, it served as a reliable fortress for the perpetuation of systemic racial segregation and discrimination."[305]

Although the African-American experience graphically depicts the ever-present threat of state-sponsored discrimination, other groups have also paid the price of local control that Madison so feared. The poor, for example, have long experienced discriminatory treatment at the hands of local officials. Indeed, the fundamental tenet upon which a community cared for its poor historically revolved around local control.[306] In the nineteenth century, for example, many individuals viewed the poor as idlers and communities failed to aid the poor with the benefit of laws designed to improve their lot in life.[307] In fact, nineteenth century communities "resented" the money paid to support their own poor and designed poor laws "to deter, to make poverty

300 FRIEDMAN, *supra* note 57, at 508 (characterizing the Court's stance as "studied ignorance (or disregard)"); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (ending school segregation).

301 The Honorable Linwood Holton, *A Former Governor's Reflection on Massive Resistance in Virginia*, 49 WASH. & LEE L. REV. 15, 19 (1992) (citing ROBIN L. GATES, THE MAKING of MASSIVE RESISTANCE 110 (1962)).

302 *Id.* at 18 (citing ROBIN L. GATES, THE MAKING of MASSIVE RESISTANCE 49 (1962)).

303 *See* McConkie, *supra* note 282, at 399-400 (citing ARK. CONST. amend. XLIV (repealed 1990); *All Things Considered* (National Public Radio broadcast, July 27, 1995) (quoting Gov. George Wallace (June 11, 1963))).

304 Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 592 n.164 (1998) (citing ROBERT C. LIEBERMAN, SHIFTING THE COLOR LINE: RACE AND THE WELFARE STATE 7-8 (1998)).

305 Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, YALE L. & POL'Y REV. 227, 233-34 (1996).

306 FRIEDMAN, *supra* note 57, at 213.

307 *Id.* at 214 (maintaining that a poor individual was also viewed as "a profligate, a weakling").

unpalatable, to make relief come bitter and dear."[308] Because the notion of "settlement" fixed responsibility as to which community supported any particular impoverished person, towns frequently brought suit against one another as a last-ditch effort to regain support monies.[309] Furthermore, if a poor person happened upon a new town, the townspeople sometimes greeted the individual by physically removing them to a point beyond the community line so as to prevent "settlement" and the resulting costs of support or litigation.[310] To offset the costs of care if a person avoided physical removal and got settled, local communities often auctioned off the care of the poor to the lowest bidder who received labor in exchange for providing a meager subsistence.[311] In sum, placing responsibility for the care of the poor in the hands of local communities created "an engine of sheer exploitation" in the nineteenth century that would not break down until centralized governmental welfare.[312]

Despite the modern promise of nationally administered welfare for the poor, recent policies of states and local communities continue to work to the disadvantage of the poor. In 1996, Congress repealed a sixty-year-old grant program by enacting the Personal Responsibility and Work Opportunity Reconciliation Act, which provided monetary entitlements to states to care for the poor in a section titled Temporary Assistance to Needy Families (TANF).[313] Consistent with the new federalism, Congress enacted the TANF because it believed that states and local communities would create relief programs better suited to local concerns and be politically accountable for their decisions.[314] Echoing its federalism concerns, the TANF recites that one of its goals is to "restore[ ] the States' fundamental role in assisting needy families."[315] To further its goal, the TANF allows the states to fashion poor relief programs in the manner they desire as long as they are "fair and equitable" and do not violate constitutional protections.[316] Under the TANF, the states receive a fixed amount of money to spend on poor relief regardless of the number of individuals applying for such relief.[317] Because the TANF allows states to keep excess funds not used for welfare spending, states have a major incentive to decrease welfare costs and funnel the savings to other projects.[318] Although people are no longer physically removed from communities, the devolution of poor relief from federal to local control fails to aid the impoverished much as it failed in the past.

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308 *Id.* at 214-15.

309 *Id.* at 215-16 (citing Litchfield v. Farmington, 7 Conn. 100 (Conn. 1828)).

310 *Id.* at 216 (discussing the process of "warning out," meaning that a town would warn a person not to settle there without getting permission from the town, which prevented settlement and the accompanying liability).

311 *Id.*

312 *Id.*

313 *See* Cashin, *supra* note 304, at 553 (citing Pub. L. No. 104-193, 110 Stat. 2105 (1996)).

314 *Id.* at 566 (deeming the federalism rhetoric to be instrumental in passing the TANF).

315 *Id.* at 558 (quoting H.R. CONF. REP. No. 104-725, at 261 (1996)).

316 *Id.* at 559 (quoting 42 U.S.C. § 602).

317 *Id.* (citing 42 U.S.C. § 609).

318 *Id.*

Underlying the failure of the TANF to care for the poor is the idea of the alignment of majority interest that so influenced Madison at the Founding. In the case of the TANF, the faction wielding control is the middle class, whose interests run counter to welfare relief.[319] When states are given discretion to use funds as they wish, the middle-class benefits because state politics is largely middle class politics.[320] To maintain their political standing, politicians must support programs that benefit the most voters, and most voters are included in the middle class. As a result, money intended to aid the poor flows into more politically attractive projects that benefit more people like hospitals, roads, or parks.[321] Furthermore, state policy often makes new communities rely on the collection of local taxes for support, which allows communities to give effect to their biases by excluding people from the community who cannot contribute to its support.[322] Combining the state welfare cuts and spending in local communities based upon middle-class bias, the TANF actually contributes to the problems facing the poor rather than alleviating them. Ultimately, the decentralization of regulation applauded under the new federalism allows state majorities to ignore the welfare of the minority.

Like the poor and African-Americans, women have also suffered discriminatory treatment at the hands of state regulators throughout history. Much of the discrimination women have faced results from the continuing vitality of Victorian beliefs that largely confined a woman's work to the domestic sphere.[323] In the past, even the Supreme Court supported the noneconomic societal role of women by upholding the right of Illinois to exclude women from the practice of law based upon notions of state sovereignty couched in Victorian terms.[324] Denying women admission to the bar, the Supreme Court asserted that

> [m]an is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is found in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.[325]

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319 *Id.* at 591.

320 *Id.* at 584.

321 *Id.* at 583 (noting that public finance scholars have found that federal monies to states via grants-in-aid programs go toward public expenditures and not toward human services).

322 *Id.* at 589 (observing also that state and local legislative bodies frequently label their support programs to circumvent federal requirements).

323 ELAINE TYLER MAY, GREAT EXPECTATIONS 16-18 (1980) (stating that the wife took care of the home, kept the home free from impurity, and led reform movements outside of the home).

324 Bradwell v. People of State of Ill., 83 U.S. (16 Wall.) 130 (1873).

325 *Id.* at 141.

More recently, the Supreme Court again fell prey to the view that women must be protected, particularly by the state, in *Goesaert v. Cleary*.[326] In *Goesaert*, the Supreme Court rejected an equal protection challenge to a Michigan law providing that no woman could obtain a bartender's certificate unless she was the "'wife or daughter of the male owner' of a licensed liquor establishment."[327] Mixing paternalistic and federalism concerns, the Supreme Court opined that "Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight. This Court is certainly not in a position to gainsay such belief by the Michigan legislature."[328] Other than protecting women from its view of the vices of bar life, it is unclear what the Michigan legislature thought the "hazards" might be that justified their exclusion from the bartending profession. Thus, notions of paternalism infected court decisions in both past and present times.

The long-standing paternalistic notions of women not only intermingled with federalism in courthouses to discriminate against women in the past, but they have also historically affected other legislative efforts regarding women.[329] Far from frowning upon gender-based animus in the form of domestic violence, some states passed laws allowing it under certain circumstances. For example, an 1824 Mississippi law allowed husbands to inflict "moderate chastisement in cases of emergency" upon their wives.[330] Although aggravated assault constituted a crime in every state during the nineteenth century, judges and lawmakers believed wife-beating to be a matter best resolved by those in the home.[331] Judges and lawmakers did not condone wife-beating, but neither did they see it as a social problem to be resolved by the government.[332] The foundation for the blind eye turned toward domestic violence in the past again lay in Victorian thinking. Because "a husband could be held legally responsible for his wife's actions, he should have the right to control her actions and punish her when necessary."[333]

In addition to infecting the area of domestic violence, the outdated Victorian views of women also plagued another violent aspect of gender-based animus—the law of rape. States have long defined rape to be a criminal offense, but the interests of men "warped" the enforcement of the rape laws as written.[334] Similar to prevailing patterns today, police hesitated before becoming involved in "domestic disturbances" in the past and police manuals instructed police to take no action during a call other than to try to calm the

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326 335 U.S. 464 (1948).

327 *Id.* at 465 (quoting MICH. STAT. ANN. § 18.990(1) (Cum. Supp. 1947)).

328 *Id.* at 466 (previously stating that Michigan could legislate to reduce moral or social problems it fears).

329 LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 419-20 (1993).

330 RODERICK PHILLIPS, UNTYING THE KNOT: A SHORT HISTORY OF DIVORCE 99 (1991).

331 FRIEDMAN, *supra* note 329, at 222.

332 *Id.* at 223.

333 PHILLIPS, *supra* note 330, at 98.

334 FRIEDMAN, *supra* note 329, at 430.

parties.[335] These practices reflect the Victorian notion that the law should not intrude into the home and harmed women because the home was largely the domain of women to the Victorian mind. Furthermore, the hands-off approach to rape and Victorian thinking even influenced the judiciary and its treatment of sexual assault victims. The law of rape required a woman to resist and women who gave in had no right to complain.[336] Predating the judge's comment cited at the beginning of the paper, judges expected women to resist attacks as a sign of innocence because "what woman (said the judges) would not be so 'revoltingly unwilling' to be raped that she would not 'resist so hard and so long as she was able?'"[337] Juries too frequently placed the victim's character and dress at issue as they searched for evidence of resistance.[338] Given these disabilities imposed by the unwritten law in both the present and past, it is no wonder that women hesitate to notify authorities about instances of gender-based violence—they are seen as both a victim and cause of the incident.

In light of the history of discrimination against women, the Supreme Court's rejection of the VAWA reflects many of the same ideals that have plagued women throughout history. Despite asserting that the VAWA regulates an area of traditional state concern involving the family, history demonstrates that states have failed to address or redress gender-based violence because it intrudes into the domestic sphere. However, the reliance on family law as an area of state prerogative immune from federal inspection is misplaced. Marriage is frequently cited as an area historically regulated by states, but that did not prevent the Supreme Court from overturning Virginia's anti-miscegenation statute in *Loving v. Virginia*.[339] Furthermore, the Supreme Court recently stuck down a Washington family law statute that allowed any person to seek court-ordered visitation with children.[340] Thus, the Supreme Court does not fail to interfere with state family law when it feels doing so will promote justice.

VI. Conclusion

In the end, the *Morrison* decision ties modern-day discrimination to our nation's discriminatory past. The result in *Morrison* symbolizes the power that traditional views of women still have over the nation. Declaring the VAWA to be unconstitutional continues a "'romantic paternalism' which, in practical effect, put[s] women, not on a pedestal, but in a cage."[341] However, women are no longer confined to the domestic sphere. Modern society relies

335 *Id.* at 429 (calling behavior of this kind "tacit approval of the husband's right to beat his wife").

336 *Id.* at 216 (characterizing anything less than putting up a real fight as "grudging consent").

337 *Id.* at 217 (quoting People v. Dohring, 59 N.Y. 374 (N.Y. 1847)).

338 *Id.* at 431 (citing HARRY KALVEN, JR., & HANS ZEISEL, THE AMERICAN JURY 250-252 (1966)).

339 388 U.S. 1 (1967).

340 Troxel v. Granville, 530 U.S. 57 (2000).

341 Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (observing that "our nation has had a long and unfortunate history of sex discrimination").

on women in the work force, and they constitute an important aspect of the ever-changing notion of commerce. Overturning the VAWA simply ignores the contribution of women to the economy and suggests an outdated version of what constitutes women's work. With its support of the VAWA, however, public opinion demonstrates that outdated ideas of women are not as prevalent in society. But, the public does not have five votes on the Court.

Not only does *Morrison* represent a link to our nation's history of discrimination, but it also is a bad portent for other anti-discrimination legislation. For example, Congress has tried (but not yet succeeded) to enact the Hate Crimes Prevention Act to prevent discrimination against suspect classes.[342] As a basis for the legislation, Congress relied upon its commerce power by linking hate crimes to interstate commerce via legislative findings.[343] In short, the legislative history and goals of the federal Hate Crimes Prevention Act are quite similar to that of the VAWA. By invalidating the VAWA's civil rights remedy, the Court places the anti-hate crime measure in a constitutionally tenuous position because the reasoning used to overturn the civil rights provision applies equally as well to the federal hate crimes act. As a result, the ability of the federal government to redress discrimination is weakened and forces groups to rely on state government for remedies. History demonstrates, however, that state governments use their sovereign rights as a proxy for state-sponsored discrimination, thereby leaving some without redress for discriminatory acts.

In addition to throwing out the written law embodied in the VAWA, the *Morrison* decision diminishes the symbolic value of the law—a crucial aspect of the law in general. The relationship between objects and governmental approval is a powerful symbol in the eyes of the public.[344] To see the vital link between symbolism and governmental approval, one need look no further than the controversy surrounding the Confederate flag flying atop the South Carolina capitol building or the clamor to remove holiday displays from governmental buildings.[345] Seeing reminders of our nation's tragic past, such as the Confederate banner, gives the public the feeling that the government or its officials embrace the past and support ideals long rejected by history. By deeming the VAWA to be unconstitutional, the Court gives its symbolic imprimatur to gender-based animus. Although the justices certainly do not support gender-based violence in any way, their decision out tacks the one body capable of dealing with a national problem—the Congress.

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342 For the latest version, see S. 622, 106th Cong. (1999) (amending 18 U.S.C. § 245 to punish those convicted of injuring others due to race, color, national origin, religion, gender, sexual orientation, or disability).

343 *See, e.g.*, John Bacon & Kathy Kiely, *S.C. Governor Signs Bill to Lower Battle Banner*, USA TODAY, May 24, 2000, at 3A; Associated Press, *S.C. Law to Lower Flag July 1; Governor Declares Debate is History; NAACP Disagrees*, WASH. POST, May 24, 2000, at A2.

344 *But see* Christopher James Regan, Note, *A Whole Lot of Nothing Going On: The Civil Rights "Remedy" of the Violence Against Women Act*, 75 NOTRE DAME L. REV. 797, 811 (calling the VAWA's civil rights remedy "psychotherapeutic legislation" because it will not achieve its intended results).

345 Lynch v. Donnelly, 465 U.S. 668 (1984) (involving a dispute about a Nativity scene erected by the city of Pawtucket, Rhode Island).

Despite all of the alarming similarity with the past experiences of minority groups, history also demonstrates that the Court's view of the federal protection against gender-based animus will change in time. As time advances, our nation has extended the law to protect the minority from the interests of the majority. After holding, for example, the Civil Rights Act of 1875 unconstitutional, the Supreme Court bravely opposed racial discrimination in decisions like *Brown v. Board of Education*.[346] In fact, the Civil Rights Act of 1964 not only ostensibly protected the civil rights of African-Americans, but also gave women a right to sue employers on the theory of sex discrimination under Title VII.[347] However, the recognition of sex discrimination is a recent development and only begins the work needed to better the status of women in society. In his *Morrison* summation, Justice Rehnquist contended that "no civilized system of justice could fail to provide her a remedy" for the harm that resulted from the victim's gender-based attack.[348] The *Morrison* decision discards one potential remedy available to victims of gender-based violence and funnels them to state justice systems fraught with gender-based discrimination, thereby reducing a victim's chance to obtain a remedy. We are not as civilized as we think, but we will change in time.

346 *See supra* note 300 and accompanying text.

347 Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 816 (1991) (observing that the "federal cause of action for sexual harassment is an innovation of our times." Moreover, the inclusion of "sex" in The Civil Rights Act of 1964 was "something of an accident, at best" and that the phrase "sexual harassment" was not used until the 1970s).

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