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Missed Opportunity: Congress's Attempted Response to the World's Demand for the Violence Against Women Act

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NOTES

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ABSTRACT

The Supreme Court's decision in U.S. v. Morrison struck down, as a violation of the Commerce Clause, § 13,981 of the Violence Against Women Act, that provided a private right of action for victims of gender-motivated violence to assert against their abusers. However, § 13,981 should have been affirmed as implementing legislation designed to fulfill U.S. obligations under the International Covenant on Civil and Political Rights and customary international law. Recognizing § 13,981 as implementing legislation serves as a foundation for the United States to restore itself as a legitimate human rights leader capable of both appreciating its own international obligations and pressuring other nations to come into compliance with international human rights obligations. Furthermore, only through setting a precedent recognizing broad Congressional authority to pass implementing legislation would there be a structure in place for Congress to devote itself to domesticating the legal obligations present in non-self-executing human rights treaties.

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I. INTRODUCTION

Vice President Joseph R. Biden once described the Violence Against Women Act (VAWA) as a necessary prerequisite to breaking "down the barriers that continue to exist in the unequal application of

the law."[1] Certainly, few can disagree that the VAWA serves a noble, if not moral, purpose in providing legal protection for victims of domestic and gender-motivated[2] violence. Indeed, the international community, as well as many members of Congress, heralded the progressive legislation as a standard-bearer, ensuring human rights regardless of sex and gender.[3]

However, the bill's advocates felt a stunning disappointment on May 15, 2000, when the United States Supreme Court announced its landmark decision striking down the VAWA's prize possession, the private right of action.[4] This private right of action, found in § 13,981, allowed victims of gender-motivated violence to bypass the difficulty of achieving a criminal conviction and to seek civil damages directly from their abusers.[5] The *Morrison* Court refused to uphold § 13,981 on either Commerce Clause or Equal Protection grounds.[6] However, a justification exists for upholding § 13,981 that was not raised by the Solicitor General before the Court.

This Note advocates the proposition that the Supreme Court should have upheld the private right of action contained in § 13,981 as proper implementing legislation for U.S. obligations under both the International Covenant on Civil and Political Rights (ICCPR) and customary international law (CIL). Both the ICCPR and CIL recognize gender-motivated violence as a human rights violation and encourage nations to implement strategies capable of redressing such violence.[7] The private right of action serves as a concrete domestic codification of U.S. international obligations.[8]

Congress possesses wide discretion when entering into treaties and imposing the statutory guidelines necessary to enforce the

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1. *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103rd Cong. 194 (1993) (statement of Sen. Joseph R. Biden, Chairman, S. Comm. on the Judiciary). Congress Enacted VAWA on Sept. 13, 1994. Violence Against Women Act, 42 U.S.C. § 13981 (1994).

2. VAWA defines the term "crime of violence motivated by gender" as "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." 42 U.S.C. § 13981. Black's Law Dictionary defines "domestic violence" as "[v]iolence between members of a household, usu. spouses; an assault or other violent act committed by one member of a household against another." BLACK'S LAW DICTIONARY 1564 (7th ed. 1999).

3. Jordan J. Paust, *Human Rights Purposes of the Violence Against Women Act and International Law's Enhancement of Congressional Power*, 22 HOUS. J. INT'L L. 209, 213–15 (2000).

4. *See* United States v. Morrison, 529 U.S. 598, 627 (2000) (declaring the private right of action in VAWA unconstitutional).

5. 42 U.S.C. § 13981.

6. *Morrison*, 529 U.S. at 627.

7. International Covenant on Civil and Political Rights art. 21, 999 U.N.T.S. 171, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]; Paust, *supra* note 3, at 209.

8. Paust, *supra* note 3, at 209.

mandates of those treaties.[9] Moreover, the Supreme Court has recognized previously that the United States is subject to *jus cogens* norms, citing the Constitution's language regarding the binding nature of the law of nations.[10] Congress thus deserved significant deference from the federal judiciary when enacting legislation creating the private right of action because of its intersection with international legal obligations.

The credibility of the United States' commitment to human rights has suffered since the dawning of the war on terror. The Court's recognition of the VAWA as a centerpiece of the U.S. strategy for adhering to international gender violence norms would have symbolized a recommitment to human rights, particularly human rights treaties. "[A] fuller, more complete conception of law demands that American law be pictured alongside international law," and only through moves such as recognizing the international legitimacy of the VAWA can that be accomplished.[11]

This Note offers an understanding of the intersection between § 13,981, international legal obligations, and the effect of a strong treaty power doctrine on U.S. human rights credibility and the international human rights regime. Part II outlines the history of the *Morrison* decision and Congressional treaty implementing powers. Part III examines the negative effects the Supreme Court's ruling in *Morrison* inflicted on U.S. human rights credibility. Furthering this discussion, Part IV analyzes how § 13,981 implements the ICCPR and satisfies customary law obligations requiring legislative action. Finally, Part IV discusses the chilling effect of the Supreme Court's decision on international relations, the future of implementing legislation, and Congress's willingness to engage international human rights treaties.

II. BACKGROUND: EXPLORING THE HISTORICAL CONTEXT

A. *The History of* United States v. Antonio J. Morrison

The Supreme Court's decision in *U.S. v. Morrison* determined that neither the Commerce Clause nor the Fourteenth Amendment Equal Protection Clause could serve as a basis for Congressional authority to enact the private right of action contained in § 13,981 of the VAWA.[12] The U.S. Solicitor General made the tactical decision to

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9. *Id.* at 216–20.

10. U.S. CONST. art. I, § 8, cl. 3; United States v. Arjona, 120 U.S. 479, 483 (1887).

11. Noah Feldman, *When Judges Make Foreign Policy*, N.Y. TIMES, Sept. 28, 2008, (Magazine), at 50, 52.

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

put before the Court only issues pertaining to the extent of Commerce Clause authority and the limitation of the Fourteenth Amendment's State Action Doctrine.[13]

The particular facts of the *Morrison* decision prove useful as an illustration of how § 13,981 functions. In the fall of 1994, Christy Brzonkala was sexually assaulted and raped by Antonio Morrison and James Crawford. Brzonkala was in her first year at Virginia Polytechnical Institute and State University (Virginia Tech) and Morrison and Crawford were members of the Virginia Tech football team.[14] During the Virginia Tech hearing, Morrison conceded that he continued to have sex with Brzonkala despite being verbally told "no" twice.[15] Virginia Tech punished Morrison with a suspension.[16] No sanctions were issued against Crawford.[17] The Virginia grand jury failed to indict either Morrison or Crawford due to an alleged lack of sufficient evidence.[18]

Brzonkala then took advantage of the recently enacted civil remedy provided by VAWA's § 13,981.[19] Brzonkala's VAWA suit served as the initial constitutional test for the private right of action's civil remedy when the District Court for the Western District of Virginia held that Congress did not have the necessary authority to enact § 13,981.

The *Morrison* decision's greatest constitutional impact is the extension of the Rehnquist Court's federalism revolution. The federalism revolution finds its roots in the Court's infamous Guns Free School Zone Act decision in *United States v. Lopez*.[20] The *Morrison* Court found that violence against women was non-economic activity.[21] Moreover, the *Morrison* majority rejected the argument "that Congress may regulate non-economic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce."[22] The *Morrison* Court's primary concern was that if the court upheld § 13,981's civil remedy, functionally, Congress could regulate all violent crimes.[23] The Court came to this conclusion despite significant evidence in the record that violence against women substantially impacts commerce by affecting a woman's ability to

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13. *See id.* at 603–10 (addressing only the question of Constitutional legitimacy through the lens of the Commerce Clause and Equal Protection Doctrine).
14. *Id.* at 603–04.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 604.
20. United States v. Lopez, 514 U.S. 549 (1995).
21. Morrison, 529 U.S. at 617.
22. *Id.*
23. *Id.*

work and engage in the marketplace.[24] This evidence laid the foundation for Justice Souter's strong dissent.[25]

The *Morrison* Court discounted evidence that showed a low success rate for domestic violence prosecutions and that victims often experienced prosecutorial discrimination in violation of the Equal Protection Clause.[26] Brzonkala argued that state-level bias resulted in "insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence."[27]

The foundation for the Court's rejection of this equal protection argument is the State Action Doctrine established in the Supreme Court's decision in *United States v. Cruikshank*.[28] The essential premise of this doctrine is that both the Due Process Clause and the Equal Protection Clause only constrain state actors and cannot be used as a basis for rulings regarding the actions of private individuals.[29] The *Morrison* majority held that even if the petitioner proved gender-based disparate treatment by the state in the instant case, § 13,981 is still invalid because it is aimed at private individuals who committed acts of gender-motivated violence.[30]

B. *Congress's Constitutional Mandate to Implement Treaties*

The Supreme Court has long recognized Congress's constitutionally grounded authority to enact domestic legislation to bring the United States into compliance with treaty or CIL obligations.[31] Additionally, Congress retains the authority to implement treaty or CIL requirements even when doing so abridges traditional areas of state interest.[32] The United States maintains a leadership role at the forefront of a new human rights regime.[33] The U.S. position in this field necessitates a reexamination of Congress's ability to enact legislation and preserve international human rights credibility. Indeed, noted constitutional scholar Noah Feldman suggests that "[it] is becoming increasingly clear that the defining constitutional problem for the present generation will be the nature of the relationship of the United States to what is somewhat

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24. *Id.* at 614–16.
25. *Id.* at 628–29.
26. *Id.* at 627.
27. *Id.* at 620.
28. United States v. Cruikshank, 92 U.S. 542, 549–52 (1875).
29. *Id.*
30. United States v. Morrison, 529 U.S. 598, 626–27 (2000).
31. Paust, *supra* note 3, at 215.
32. *Id.*
33. Feldman, *supra* note 11, at 52.

optimistically called the international order."[34] Most importantly, "it includes questions of momentous consequence, like whether international law should be treated as law in the United States."[35] Certainly, an inquiry into Professor Feldman's concerns must begin with Congress's authority to enact legislation originating in international law.

1. Congressional Authority Arising from Constitutional Treaty Powers

Treaty laws traditionally allocate a very limited role for the judicial branch, wisely leaving the process up to both the President and Congress. Indeed, the Constitution does not specifically assign any role to the courts in the treaty process.[36] The Constitution provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur."[37] Congress's authority originates from Article I, § 8, Clause 10 of the Constitution (the Define and Punish Clause), which grants Congress the express authority to define and punish "offenses against the law of nations" through statutory enactment.[38] Moreover, Congress draws upon significant discretionary authority from Article I, § 8, Clause 18 (the Necessary and Proper Clause) "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers," which includes implementing international treaty and CIL obligations into domestic legislation.[39] Finally, Article 6 (the Supremacy Clause) requires that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby," thus allowing Congressional legislation enacting treaty obligations to supersede other constitutional concerns.[40] Congress has substantial authority to serve as the conduit for introducing international law into U.S domestic law. The difficulty arises in positioning Congress's constitutional authority in an increasingly international stage.

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34. *Id.*

35. *Id.*

36. See U.S. CONST. art. 1, § 3 (providing roles for the President and the Congress in the treaty-making process, and failing to mention the courts).

37. *Id.*

38. *Id.* art. 1, § 8, cl. 10; Brief for International Law Scholars and Human Rights Experts as Amici Curiae Supporting Petitioners at 18, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99–5, 99–29) [hereinafter Brief for Int'l Law Scholars].

39. U.S. CONST. art. 1, § 8, cl. 18; Brief for Int'l Law Scholars, *supra* note 38, at 18.

40. U.S. CONST. art. 6.

The Supreme Court's decision in *Missouri v. Holland* laid the foundation for the Court's treatment of treaty-based legislation.[41] The 1920 decision upheld the federal Migratory Bird Treaty Act of 1918, despite evidence that the legislation abridged traditionally held states' rights under the Tenth Amendment.[42] Citing the Supremacy Clause, Justice Holmes wrote for the majority that "the great body of private relations usually fall within the control of the State, but a treaty may override its power . . . ."[43]

Most importantly, the *Missouri v. Holland* Court removed the Tenth Amendment barrier to treaty-implementing legislation, recognizing Congress's need to fulfill obligations in the international political arena.[44] Thus, so long as the Constitution does not explicitly prohibit any particular requirement of a lawfully entered treaty, Congress has substantial discretion when enacting legislation that brings treaties into force.[45] Speaking directly on the concept of implementing legislation, Holmes wrote that "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government."[46]

2. Congressional Authority Arising out of Customary International Law

CIL is a second source of international authority to justify legislation that the Supreme Court might otherwise strike down as unconstitutional. CIL "consists of the rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act in that way."[47] Unlike treaty law, CIL is

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41. Missouri v. Holland, 252 U.S. 416 (1920).

42. *Id.* at 435.

43. *Id.* at 434.

44 With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution.

Id. at 433.

45. *Id.*

46. *Id.* at 432.

47. SHABTAI ROSENNE, PRATICE AND METHODS OF INTERNATIONAL LAW 55 (1984).

codified through extensive international recognition.[48] The International Court of Justice holds that when deducing "the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule."[49] When consensus among nations is great, state practice become *jus cogens*[50] or peremptory norms widely recognized as CIL.[51] Protection of human rights has been recognized as a fundamental norm of CIL.[52]

The Supreme Court has not explicitly recognized the binding effect of CIL on U.S. domestic law. However, strong evidence exists that CIL, particularly when accompanied by treaty obligations, provides sufficient authority for the enactment of legislation in compliance with these obligations.[53] As early as 1887, the Supreme Court held in *United States v. Arjona* that the law of nations may compel Congress to take necessary steps to conform U.S. domestic law to international norms.[54] In *Arjona*, the Supreme Court found that Congress had an interest, if not responsibility, to ensure the investigation and punishment of individuals engaged in counterfeiting money.[55] Chief Justice Waite argued that every nation had the right and expectation to rely on a foreign nation to protect its currency from fraud in order to ensure the viability of industry and business.[56]

Furthermore, the Supreme Court did not require Congress to use the law of nations as an explicit justification when enacting legislation to achieve the above purpose; the existence of a recognized international obligation alone sufficed.[57] The Supreme Court reaffirmed this premise one hundred years later by limiting the court's role to "discern[ing] some legislative purpose or factual

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48. *Id.* at 55–56.

49. Military and Parliamentary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 98 (June 27).

50. *Jus cogens* (literally, "compelling law") is defined as "[a] mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted." BLACK'S LAW DICTIONARY 864 (7th ed. 1999).

51. THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW 21–23, 123–24 (4th ed. 2007).

52. Brief for Int'l Law Scholars, *supra* note 38, at 24–25; BUERGENTHAL & MURPHY, *supra* note 51, at 81.

53. *See* United States v. Arjona, 120 U.S. 479, 486–87 (1887) (holding that Congress has the constitutional power to enact laws which protect the rights guaranteed by the Law of Nations).

54. *Id.*; Brief for Int'l Law Scholars, *supra* note 38, at 18.

55. *Arjona*, 120 U.S. at 484.

56. *Id.* at 486.

57. *Id.* at 484–86.

predicate that supports the exercise" of Congress's power to enact legislation.[58] This limited role of judicial oversight provides a reservoir of Congressional authority and responsibility. Congress may be bound to enact statutes complying with treaty obligations because "a law which is necessary and proper to afford this protection is one that Congress may enact, because it is one that is needed to carry into execution a power conferred by the Constitution on the Government of the United States exclusively."[59]

Additionally, *Arjona* pushed constitutional limits by recognizing Congressional authority to regulate private actors under the law of nations.[60] The result of this holding is that few restrictions exist on Congress's ability to enact legislation in response to CIL, unless the Supreme Court finds an express prohibition in the Constitution preventing the law's enactment.[61] In addition to limiting the court's oversight authority of Congress, federal courts have Article III jurisdiction to ensure that the "conduct of each state, relative to the laws of nations, and the performance of treaties," conforms to these laws.[62]

CIL has evolved to include "civil as well as criminal remedies."[63] Justice Kennedy's bold opinion in *Roper v. Simmons* could signal a move towards a new acceptance of international law as a benchmark for U.S. domestic law.[64] In striking down the imposition of the death penalty upon minors, Kennedy freely cited to international consensus and the increased importance of international norms in U.S. domestic judicial decisions.[65]

Building on this historical and constitutional framework, the remainder of this Note will explore U.S. obligations under international law and how these obligations necessitate upholding § 13,981 of VAWA. The Note outlines the relationship between the Solicitor General's decision not to characterize § 13,981 as a response to international duties and the current status of the U.S. role in the international human rights regime.

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58. Equal Employment Opportunity Comm'n v. Wyoming, 460 U.S. 226, 244 n.18 (1983); Brief for Int'l Law Scholars, *supra* note 38, at 4.

59. *Arjona*, 120 U.S. at 487.

60. *Id.* at 488.

61. Missouri v. Holland, 252 U.S. 416, 433 (1920); Paust, *supra* note 3, at 220–21.

62. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793).

63. Brief for Int'l Law Scholars, *supra* note 38, at 18.

64. Roper v. Simmons, 543 U.S. 551, 575–79 (2005).

65. *Id.*

III. IMPLICATIONS AND ANALYSIS: RESTORING U.S. HUMAN RIGHTS CREDIBILITY ON GENDER ISSUES AND ENSURING THE CONTINUING GROWTH OF THE INTERNATIONAL HUMAN RIGHTS REGIME

The international human rights regime continues to evolve—in both its scope and legal apparatus—at an unprecedented rate.[66] However, as many will concede—particularly nations other than the United States and the United Kingdom—the U.S. war on terror significantly damaged the moral leadership necessary for the United States to remain a powerful advocate for the human rights regime.[67] Unfortunately, other nations did not fill the human rights vacuum left by the United States. Rather, the United States' lack of human rights credibility threatens to truncate the much-needed development of a uniform international regime.[68]

The U.S. failure to ratify treaties such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the lack of legislative remedies such as § 13,981 undermine U.S. credibility on human rights issues—particularly on those issues related to gender equality and gender-motivated violence.[69] Part III of this Note attempts to describe the current status of U.S. human rights credibility on gender issues and the potential problems the failure to rebuild that credibility presents to the international human rights regime's continued evolution.

A. *The Changing International Perception*

Traditionally, human rights treaties are the most difficult and arduous treaties to enforce.[70] Given their typical status as non-self-executing devices, enforcement mechanisms in treaties are often impotent to initiate proceedings that carry the force of international

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66. James Crawford, *The UN Human Rights Treaty System: A System in Crisis?*, *in* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 1, 1–4 (Philip Alston & James Crawford eds., 2000).

67. Jeffrey K. Cassin, *United States' Moral Authority Undermined: The Foreign Affairs Costs of Abusive Detentions*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 421, 438–46 (2000).

68. David M. Malone & Yuen Foong Khong, *Unilateralism and U.S. Foreign Policy: International Perspectives*, *in* UNILATERALISM AND U.S. FOREIGN POLICY: INTERNATIONAL PERSPECTIVES 1, 7 (David M. Malone & Yuen Foong Khong eds., 2003).

69. Brief for Int'l Law Scholars, *supra* note 38, at 5–6; Stefanie Grant, *The United States and the International Human Rights Treaty System: For Export Only*, *in* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING, *supra* note 66, at 317, 326–29.

70. Martin Scheinin, *International Human Rights in National Law*, *in* AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 417, 420–25 (Raija Hanski & Markku Suksi eds., 1997).

law against a non-complying member state.[71] Even when violations by a member state are irrefutable, the international human rights regime is often powerless to pressure a sovereign nation into compliance. This difficulty is magnified when the need for compliance is particularly time-sensitive.[72] In these circumstances the international human rights regime often relies on an environment of transnational compliance among influential nations to essentially exert "peer pressure" on other member states to comply with treaty obligations and CIL.[73]

The United States is a crucial part of creating a human rights regime that exerts the necessary pressure to force nations to comply with fundamental human rights standards.[74] To put it slightly differently, the United States' participation in the development of international human rights laws is fundamental to the evolving human rights regime's credibility and legitimacy in a globalized community.[75] The United States cannot avail itself of its significant bully pulpit as long as the international community continues to question U.S. decisions to limit its participation in broadly recognized human rights norms, including a strong commitment to gender equality.[76]

To the average international observer, the United States has lost much of its credibility over the last decade to speak on human rights issues.[77] The U.S. desire for foreign sovereigns to accede to and enforce a variety of human rights principles is limited by this lack of authority.[78] In particular interest to this Note, U.S. support of global gender equality is undermined by the U.S. failure to ratify CEDAW,[79] the impact of the Supreme Court's decision on § 13,981, and the general perceived lack of interest in combating gender-motivated violence domestically.

The United States does not possess the moral and political capital necessary to sustain a position as a human rights leader on gender equality without signing the CEDAW, the most fundamental gender equality treaty, and fulfilling obligations mandated by the

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71. *Id.*

72. *Id.*

73. Nico Krisch, *Weak as Constraint, Strong as Tool: The Place of International Law in U.S. Foreign Policy*, *in* UNILATERALISM AND U.S. FOREIGN POLICY: INTERNATIONAL PERSPECTIVES, *supra* note 68, at 41, 63.

74. Grant, *supra* note 69, at 317–18.

75. *Id.*

76. Brief for Int'l Law Scholars, *supra* note 38, at 5–6; Grant, *supra* note 69, at 317–18.

77. Cassin, *supra* note 67, at 438–46.

78. *Id.*; Grant, *supra* note 69, at 317–18.

79. Julia Ernst, *U.S. Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 3 MICH. J. GENDER & L. 299, 361–62 (1995).

ICCPR.[80] Foreign nations will ignore U.S. calls to action on human rights issues so long as the United States ignores its own obligations.[81] Many of the most egregious gender equality and gender violence issues present in other countries (e.g., the right to vote and the right to be free from state violence) are not nearly as prevalent in the United States.[82] However, the strength of the American voice nonetheless wanes because the international community fails to distinguish between the different gradations of gender equality challenges when assigning moral weight to a nation's voice.[83]

A fundamental impasse arises when nations do not comply with international standards of gender equality. Then, not only does the United States' hypocrisy weaken its moral authority to persuade nations to combat gender-motivated violence but it provides the far more dangerous advantage of political cover.[84] The irony behind the U.S. refusal to ratify CEDAW and the Supreme Court's invalidation of § 13,981's civil remedy is that nations with far worse gender rights records than the United States use the U.S. inaction to serve as a shield against the criticism of other nations calling for change to oppressive domestic laws.

For example, much of the focus of gender equality activists and their national counterparts centers on the Islamic world.[85] Former President Bush initiated a war in Iraq partly out of a desire to provide freedom to a people oppressed by a tyrannical leader.[86] However, while fighting this war in the Middle East, U.S. moral authority on gender issues continued to atrophy, in part due to U.S. refusal to enact internationally recognized programs addressing gender-motivated violence and gender equality.[87]

In particular, the goals enshrined in CEDAW fail to emerge because many Middle Eastern nations attached reservations to the treaty as a condition of their ratification.[88] While these results may not legally undermine the object and purpose of CEDAW, reservations temper the treaty's effect. The propensity for these reservations "demonstrate[s] that many of these Islamic countries are actually 'persistent objectors' to the norms surrounding women's

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80. *Id.* at 357–59. Brief for Int'l Law Scholars, *supra* note 38, at 5–6.
81. Grant, *supra* note 69, at 326–29.
82. Ernst, *supra* note 79, at 300–02.
83. *Id.* at 366–67.
84. Grant, *supra* note 69, at 329.
85. *See* David J. Western, *Islamic "Purse Strings:" The Key to the Amelioration of Women's Legal Rights in the Middle East*, 61 A.F. L. REV. 79, 125 (2008) (noting that Islamic countries are a hotbed for CEDAW activists).
86. Joseph L. Falvey, Jr., *Our Cause is Just: An Analysis of Operation Iraqi Freedom Under International Law and the Just War Doctrine*, 2 AVE MARIA L. REV. 65, 65 (2004).
87. Ernst, *supra* note 79, at 355–67.
88. Western, *supra* note 85, at 125.

rights. Indeed, more treaty-modifying reservations have been made to CEDAW than to any other convention."[89] Egypt objected to CEDAW's "equalizing provisions regarding marriage and divorce."[90] Morocco's reservations to CEDAW send a broad signal that, for the most part, domestic law would remain unchanged despite the generalized efforts for the progression of gender equality present in the treaty's language.[91] In Jordan, the most fundamental of women's rights is at issue—the right to be free from honor killings.[92] Despite not proclaiming outright reservations similar to Egypt's and Morocco's, Jordan "does indicate that they are not bound to many portions of the treaty without giving a specific reason."[93] All the above examples of reservations and the implicit rejection of obligations frequently occur, despite the Islamic world's recognition of the doctrine of *pacta sunt servanda*, which demands a good faith effort to comply with the object and purpose of the treaty.[94]

The Middle East is only one example of the consequences of the U.S. failure to ratify a treaty such as CEDAW and to generate human rights credibility through mechanisms such as § 13,981. It becomes difficult for the United States to speak out on gender equality issues in the Middle East when the United States fails to comply with the gender equality obligations in treaties and CIL. Not only do Middle Eastern countries view U.S. actions as hypocritical but these countries use U.S. inaction as a political safe haven to fend off other Western critics of Islamic policy towards gender equality.[95] Even with reservations, most Middle Eastern countries are parties to CEDAW while the United States remains absent from the list of ratifying nations.[96] Indeed, the United States may be the crucial voice that could spark change and challenge the entrenched practices in the Islamic world due to its economic and diplomatic importance to the region.[97] Moreover, "[t]o encourage states to properly interpret Islamic law so as to protect the basic human rights of women, a mechanism is needed to change the underlying attitudes that halt such interpretations." The United States could play a pivotal role in

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89. *Id.*
90. *Id.*
91. *Id.* at 126.
92. *Id.* at 107–08.
93. *Id.*
94. *Id.* at 108.
95. Grant, *supra* note 69, at 329.
96. Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, Convention on the Elimination of All Forms of Discrimination Against Women, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-8&chapter=4&lang=en (last visited Mar. 30, 2010) (specifying the signatories to CEDAW).
97. Western, *supra* note 85, at 113.

that transition.[98] First, however, the United States must rebuild its own human rights credibility by complying with ICCPR treaty obligations, as well as CIL, to combat gender-motivated violence.

The United States can repair its human rights credibility—particularly on gender-related issues—by providing visible and creative domestic mechanisms for the victims of gender-motivated violence to confront and challenge their abusers.[99] Section § 13,981 of the VAWA is one possible strategy for achieving this goal.[100]

B. *A Renewed Congressional Commitment to Human Rights Treaties*

As discussed in Parts II and IV(A), the United States is party to many non-self-executing human rights treaties. These treaties require Congress to enact implementing legislation before treaty obligations are integrated into U.S. domestic law.[101] In many circumstances, Congress is negligent in its efforts to craft implementing legislation that fulfills international obligations under non-self-executing treaties. Congress's inaction is due to a lack of political momentum and to a lack of a clear understanding of U.S. obligations.[102] Recharging U.S. human rights credibility requires that Congress implement rights-based legislation and, just as importantly, link newly promulgated legislation to the non-self-executing treaty it fulfills.[103] Moreover, Congress could rebuild U.S. human rights credibility by relying, either implicitly or explicitly, on CIL when passing implementing legislation or human rights legislation generally.[104]

Part II outlined Congress's constitutional authority to enact legislation grounded in treaties or CIL.[105] If Congress invested significant effort and relied on both treaties and CIL reservoirs—and the judiciary deferred to Congress in fulfilling international human

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98. *Id.* at 113, 147.

99. Ernst, *supra* note 79, at 366–67.

100. Brief for Int'l Law Scholars, *supra* note 38, at 15–17; Paust, *supra* note 3, at 209.

101. *See supra* Part II.B (discussing non–self executing human rights treaties to which the United States is a party); infra Part IV.A (same).

102. Grant, *supra* note 69, at 317–29.

103. Rosemary Foot, *Credibility at Stake: Domestic Supremacy in U.S. Human Rights Policy*, *in* UNILATERALISM AND U.S. FOREIGN POLICY: INTERNATIONAL PERSPECTIVES, *supra* note 68, at 95, 111–12.

104. *See id.* (discussing the handling of CIL by U.S. courts); Michelle M. Kundmueller, Note, *The Application of Customary International Law in U.S. Courts: Custom, Convention, or Pseudolegislation?*, 28 J. LEGIS. 359, 372 (2002) (discussing the application of CIL by U.S. courts).

105. *See supra* Part II (outlining Congressional constitutional authority to enact legislation grounded in treaties or customary international law).

rights obligations—the United States could rebuild its human rights credibility with foreign governments and populations.[106]

Legislation geared at combating gender-motivated violence and ensuring gender equality offers a unique opportunity to construct a Congressional role in drafting implementing legislation. Part III(A) of this Note chronicled how U.S. failure to enact legislation addressing present gender equality disparities undermines the overall force of the U.S. voice on gender-related issues abroad.[107] Congressional action on gender issues substantially undermines the claims of hypocrisy.[108]

Moreover, linking gender-focused legislation to international human rights obligations, whether as implementing legislation or as a response to CIL obligations, removes U.S. non-compliance as a means of political cover for nations currently escaping criticism of their atrocious women's rights records. Removing this political cover forces nations to affirmatively answer charges of human rights abuses alleged by the international community.[109] These charges are most powerful when backed by the force of U.S. human rights legitimacy.[110]

A renewal of Congress's commitment to fulfilling international gender rights obligations could make significant strides towards repairing the damage to U.S human rights credibility. Congressional action creates an established precedent to address domestic human rights concerns that remain visible to the international community.[111] Part IV(C) will further develop the idea of Congressional momentum in the context of implementing legislation.[112]

Congressional activism on gender policy provides an avenue for shifting the image of the U.S. from one of military hard power to a moral and diplomatic leader.[113] This shift increases U.S. diplomatic capital, which can—in much the same way a President spends political capital to achieve policy objectives on Capitol Hill—translate into success for U.S. foreign policy goals.[114] Credibility in one human

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106. Grant, *supra* note 69, at 317–29; Krisch, *supra* note 73, at 63.

107. *See supra* Part III.A (describing the failure by the Congress to enact legislation addressing present gender equality disparities).

108. Ernst, *supra* note 79, at 362–64.

109. *Id.*

110. Krisch, *supra* note 73, at 62–63.

111. Ernst, *supra* note 79, at 361–64.

112. *See infra* Part IV.C (discussing Congressional momentum in the context of implementing legislation).

113. Ernst, *supra* note 79, at 361–64; Foot, *supra* note 103, at 111–13; Krisch, *supra* note 73, at 62–63.

114. JOSEPH S. NYE, JR., SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS 55–56, 60–61 (2004); Ernst, *supra* note 79, at 361–64; Foot, *supra* note 103, at 111–13; Krisch, *supra* note 73, at 62–63.

rights arena (e.g. gender equality) often serves to enhance credibility in an unrelated human rights arena (e.g. child labor).[115]

Professor Joseph Nye describes the above phenomenon as "soft power": "Soft power is the ability to get what you want through attraction rather than coercion or payments."[116] Nye argues that "[w]hen American policies lose their legitimacy and credibility in the eyes of others, attitudes of distrust tend to fester and further reduce our leverage."[117] "Problems arise for our soft power when we do not live up to our own standards," including international standards to which the United States committed.[118] Areas of legal and moral contradiction, such as those present in gender policy, create the loss of the legitimacy and credibility necessary to build soft power.[119]

Readers should be cautious not to overestimate the value of U.S. credibility on gender equality issues. Certainly, this Note does not mean to suggest that if Congress passes legislation that addresses gender problems in America, all of the damage currently spanning the U.S. moral ethos would dissipate. However, "[s]oft power grows out of our culture, out of our domestic values and policies," and reclaiming legitimacy by addressing domestic gender-motivated violence as a human rights issue can communicate this cultural value.[120] In particular, Congressional legislation serves the dual purpose of restoring the U.S. image as a champion of gender equality as well as signaling that Congress takes its responsibility for fulfilling international human rights obligations seriously. In this way, gender legislation advances U.S soft power interests.

IV. PROPOSAL: RETHINKING THE SOLICITOR GENERAL'S STRATEGY AND UNDERSTANDING THE § 13,981 PRIVATE RIGHT OF ACTION IN LIGHT OF INTERNATIONAL OBLIGATIONS

The Solicitor General should have relied upon § 13,981's critical stature in the web of U.S. human rights credibility when developing its legal strategy for *U.S. v. Morrison*. Two distinct reservoirs of authority existed for the Solicitor General to draw upon when designing Congress's defense of the private right of action: constitutional treaty powers and CIL.[121] As discussed above, both are

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115. NYE, *supra* note 114, at 55, 60–63.

116. Joseph S. Nye, Jr., *Soft Power and American Foreign Policy*, *in* THE DOMESTIC SOURCES OF AMERICAN FOREIGN POLICY: INSIGHTS & EVIDENCE 29, 30 (Eugene R. Wittkopf & James M. McCormick eds., 5th ed. 2008).

117. *Id.* at 31.

118. *Id.* at 39.

119. *Id.*

120. *Id.* at 38.

121. *See supra* Part II.B (describing these two reservoirs of authority).

well developed in U.S. law.[122] However, the Solicitor General's myopic argument, relying on unstable Commerce Clause jurisprudence and an equally tenuous Equal Protection claim, prevented the Supreme Court from reaffirming Congressional authority to comply with international human rights regimes.[123]

The Solicitor General should have described § 13,981 as necessary implementing legislation to fulfill U.S obligations under the ICCPR. Additionally, the Solicitor General should have put forth an international law argument addressing long-standing principles in international law requiring redress for the victims of gender-motivated violence. Redefining § 13,981 in an international context provides legitimacy to a failing international human rights project in desperate need of renewed U.S. leadership and the integration of international principles into domestic policy.[124]

A. *VAWA as Implementing Legislation for the International Covenant on Civil and Political Rights*

The Violence Against Women Act serves as implementing legislation for U.S obligations under the ICCPR. The United Nations General Assembly adopted the ICCPR in 1966, and it entered into force on March 23, 1976, following the necessary ratifications.[125] The United States ratified the ICCPR on June 8, 1992.[126] Because the ICCPR is a non-self-executing treaty,[127] each member state is obligated to implement laws ensuring the provisions of the treaty take effect.[128] The enactment of the 1994 VAWA represented one step in compliance with the human rights protections outlined in the ICCPR.[129]

The ICCPR's stated purpose to protect individual human rights supports member parties interpreting their obligations broadly to

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122. See *supra* Part II (discussing this development in U.S. case law).

123. Brief for the United States at 20–35, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99–5, 99–29). For previous Supreme Court precedent see Equal Employment Opportunity Comm'n v. Wyoming, 460 U.S. 226, 244 n.18 (1983); Missouri v. Holland, 252 U.S. 416, 433 (1920); United States v. Arjona, 120 U.S. 484, 486, 487–88 (1887); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793).

124. Ana Maria Merico-Stephens, *Of Federalism, Human Rights, and the Holland Caveat: Congressional Power to Implement Treaties*, 25 MICH. J. INT'L L. 265, 297–98 (2004).

125. Martin Scheinin, *The International Covenant on Civil and Political Rights*, *in* MAKING TREATIES WORK: HUMAN RIGHTS, ENVIRONMENT AND ARMS CONTROL 48, 48 (Geir Ulfstein et al. eds., 2007).

126. Russell G. Murphy, *Executing the Death Penalty: International Law Influences on United States Supreme Court Decision—Making in Capital Punishment Cases*, 32 SUFFOLK TRANSNAT'L L. REV. 599, 621 n.128 (2009).

127. Merico-Stephens, *supra* note 124, at 296–97.

128. ICCPR, *supra* note 7, arts. 1–2, 49.

129. Paust, *supra* note 3, at 211–12.

include the protection of victims of gender-motivated violence.[130] Moreover, the history and state practice of the States Party to the ICCPR confirm that prevention and redress of gender-motivated violence are integral to compliance with the treaty.[131] Finally, subsequent readings of the ICCPR by international organizations point to a transnational understanding that the ICCPR is one of the primary tools available to protect victims of gender-motivated violence from both private and state actors.[132]

Various treaties—particularly human rights treaties—are non-self-executing.[133] Non-self-executing treaties, such as the ICCPR, are not immediately binding in domestic law. Instead, Congress enacts implementing legislation as the enforcement mechanism.[134] However, both self-executing and non-self-executing treaties are U.S. law upon ratification.[135] After ratification, Congress has discretion to choose the best course of action in accordance with the provisions of the treaty.[136] The international law doctrine of *pacta sunt servanda* requires that the United States implement non-self-executing treaties in good faith: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[137] Furthermore, the Vienna Convention on the Law of Treaties requires independent legislation implementing treaty obligations stating, without reservation, that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[138]

Non-self-executing provisions drafted into treaties often create confusion in the international community. These provisions are blurred when member states enact the necessary statutes to fulfill its obligations as a signatory nation. Despite this result, the United States remains active in both signing and ratifying human rights treaties with non-self-executing provisions attached.[139] It should be no surprise that international confusion awaited the United States upon its ratification of the ICCPR.

The ICCPR guarantees rights to individuals analogous to the rights guaranteed under the Fourteenth Amendment.[140] However,

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130. ICCPR, *supra* note 7, pmbl.

131. Brief for Int'l Law Scholars, *supra* note 38, at 5–6.

132. *Id.*

133. *See* Virginia H. Johnson, *Application of the Rational Basis Test to Treaty-Implementing Legislation: The Need for a More Stringent Standard of Review*, 23 CARDOZO L. REV. 347, 348, 358 n.37 (2001) (touching on the difference between self-executing and non self-executing treaties).

134. *Id.* at 356–57.

135. *Id.* at 350.

136. *Id.* at 347–51.

137. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

138. *Id.* art. 27.

139. Johnson, *supra* note 133, at 358.

140. Brief for Int'l Law Scholars, *supra* note 38, at 7.

the ICCPR lacks the State Action Doctrine.[141] The Supreme Court has held that the Fourteenth Amendment and the Equal Protection Clause do not constrain private individuals, only state actors.[142] By ratifying the ICCPR, the United States agreed not only to protect individual human rights encroached upon by the state, but also to protect individual human rights violated by a private citizen.[143] Thus, the Supreme Court's numerous holdings that gender-motivated violence constitutes a violation of a woman's Equal Protection rights suggest that the ICCPR, because it lacks any State Action constraint, calls for a private right of action to redress gender-motivated violence.

The ICCPR "codifies in the form of a legally binding international treaty the human rights" recognized by the Universal Declaration of Human Rights.[144] Just as with statutory construction, the treaty interpreter garners a treaty's obligations from the plain meaning of the text in light of its purpose.[145] Article (2)(1) requires that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as . . . sex, . . . or other status."[146] Article 3 provides that each member nation "undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."[147] Additionally, the ICCPR requires that each individual have "the right to liberty and security of person."[148] And, perhaps most importantly, the ICCPR heralds that "[e]very human being has the inherent right to life" and that the law must, first and foremost, protect that right.[149] The ICCPR requires domestic legislative bodies, including Congress, "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." Legislation then, is the vehicle through which the rights encoded in the ICCPR are enacted.[150]

The plain meaning of the treaty requires the United States to implement legislation protecting the right of women to be free from

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141. ICCPR, *supra* note 7, art. 3.

142. United States v. Morrison, 529 U.S. 598, 620–21 (2000).

143. ICCPR, *supra* note 7, art. 3; Brief for Int'l Law Scholars, *supra* note 38, at 5–8.

144. Geir Ulfstein et al., *Introduction*, *in* MAKING TREATIES WORK: HUMAN RIGHTS, ENVIRONMENT AND ARMS CONTROL, *supra* note 125, at 3, 13. See also Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (embodying the same basic principles as the Universal Declaration of Human Rights).

145. Vienna Convention, *supra* note 137, art. 31.

146. ICCPR, *supra* note 7, art. 2(1).

147. *Id.* art. 3.

148. *Id.* art. 9(1).

149. *Id.* art. 6(1).

150. *Id.* art. 2(2).

violence. The ICCPR text is clear that the law must affect equality in both form and substance.[151] The success of this legislation is measured by the practical effect of these laws in society. Gender-motivated violence creates an unstable environment for women and also, in many tragic cases, results in a threat to their lives. Therefore, if violence exists at a level that disproportionally affects women,[152] then, regardless of current legislation, the United States is required to promulgate effective means to deter and remedy such violence.[153]

Moreover, the Human Rights Committee, through its general comment authority, interpreted the ICCPR as obligating states to ensure that each gender enjoys equal protection from harm. Under articles 28, 40(4) and 44, the ICCPR vests the Human Rights Committee with ultimate international authority to interpret its meaning.[154] While many nations do not recognize opinions of the Human Rights Committee as legally binding, the international community gives great weight to the findings and opinions of the Committee when interpreting a multilateral agreement.[155] The Human Rights Committee's General Comment No. 31, relying on the usage of "ensure" in the ICCPR, affirms the United States' duty to impose legislation that provides a remedy for victims of gender-motivated violence committed by non-state actors.[156] Additionally, the General Comment interprets the ICCPR to require "that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order."[157] Indeed, the ICCPR General Comments request reporting to the Human Rights Committee instances of discrimination by private parties, furthering the interpretation that ICCPR member nations must implement legislation redressing both

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151. *Id.* art. 2.

152. *See* United States. v. Morrison, 529 U.S. 598, 630–31 (2000) (Souter, J., dissenting) ("The [congressional] record includes reports on gender bias from task forces in 21 States, and we have the benefit of specific findings in the eight separate Reports issued by Congress and its committees over the long course leading to enactment.").

153. *See* Paust, *supra* note 3, at 221 ("Choice and power of our national political branches to effectuate international law, especially in view of the Supremacy Clause, provide an overriding constitutional propriety of the VAWA regardless of the reach of the commerce power.").

154. ICCPR, *supra* note 7, arts. 28, 40(4), 44.

155. Brief for Int'l Law Scholars, *supra* note 38, at 26 n.37.

156. ICCPR, *supra* note 7, arts. 3, 5–6, 8, 10, 12–13, 15, 18; U.N. Human Rights Comm'n, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the International Covenant on Civil and Political Rights, ¶¶ 2–4, 7, U.N. Doc. CCPR/C/21/Rev.1/Add.1 (May 26, 2004); Brief for Int'l Law Scholars, *supra* note 38, at 6–7.

157. U.N. Human Rights Comm'n, *supra* note 156, ¶ 13.

private and publicly linked occurrences of gender-motivated violence.[158]

Simply put, the right to pursue a civil remedy under § 13,981 is a tool for redressing the effects of gender-motivated violence stated in the international interpretation of the ICCPR. The UN Human Rights Committee considers the ICCPR instrumental in curbing international gender-based violence.[159] Subsequent UN Declarations go so far as to interpret the ICCPR as providing "a clear statement of the rights to be applied to ensure the elimination of violence against women in all its forms."[160] Both the plain meaning and interpretation of the ICCPR provide support for § 13,981 as a key step in Congress's attempt to combat the horrors of gender-motivated violence.

B. *VAWA as a Response to U.S. Obligations under Customary International Law*

Congress's enactment of § 13,981's civil remedy draws on authority from CIL norms. CIL recognizes gender-motivated violence as a violation of fundamental human rights.[161] Moreover, CIL places a positive obligation on the United States to promulgate legislation capable of attacking the continued human rights violations arising out of gender-motivated violence inflicted upon women.[162] The United States' failure to comply with the customary norms established through state practice and international recognition places the United States in direct breach of international law.[163] Section 13,981 represents a significant step to provide victims of gender-motivated violence with a remedy against private actors, thereby fulfilling obligations required as a moral leader in the international community and a nation legally bound by CIL.[164]

The obligation under CIL to address the problem of gender-motivated violence is rooted in the near complete recognition in human rights treaties of the pervasive unequal treatment of

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158. Brief for Int'l Law Scholars, *supra* note 38, at 6–7.

159. *See* Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, pmbl., U.N. Doc. A/RES/48/104 (Dec. 20, 1993) [hereinafter Declaration on the Elimination of Violence] ("Nothing that those rights and principles [relating to the rights of women] are enshrined in international instruments, including . . . the International Covenant on Civil and Political Rights.").

160. *Id.*

161. Brief for Int'l Law Scholars, *supra* note 38, at 24–27.

162. *Id.*

163. *See* Declaration on the Elimination of Violence, *supra* note 159, pmbl. (describing obligations of parties under various human rights treaties).

164. Paust, *supra* note 3, at 221.

women.[165] This Note has already discussed, at some length, how the ICCPR incorporates the goal of gender equality into its human rights regime.[166] The ICCPR provides significant evidence of an international commitment on behalf of nations to combat gender-motivated violence.[167] Moreover, state judicial systems often draw upon the ICCPR to establish and define CIL norms.[168]

Additionally, the almost unanimous ratification of CEDAW demonstrates the international community's recognition that nations are under a general obligation to take steps to alleviate gender-motivated violence.[169] CEDAW requires nations to "adopt appropriate legislative" initiatives and furthermore, to "establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals . . . the effective protection of women against any act of discrimination."[170] The language of CEDAW fundamentally requires a judicial avenue such as § 13,981 for women to seek justice from their violent abusers.[171] From Afghanistan to Iraq to the Russian Federation, most nations have ratified CEDAW.[172] While the United States has not ratified the CEDAW, it recognized the legitimacy of CEDAW's goals by being a signatory to the treaty.[173] Additionally, merely because the United States has not ratified CEDAW does not mean that CEDAW cannot be used to define a customary norm that legally binds the United States.[174] Moreover, wide scale ratification exhibits significant state practice of using remedies akin to § 13,981 to combat gender-motivated violence.[175]

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165. *See* Declaration on the Elimination of Violence, *supra* note 159, at pmbl. (noting that the problem of violence against women is addressed in many human rights treaties).

166. *See supra* Part IV.A (discussing the international community's interpretation of the plain meaning of the ICCPR and the U.N. Human Right's Committee's general comments to include the promulgation of legislation to combat gender–motivated violence committed by private actors).

167. *See* discussion *supra* Part IV.A.

168. *See, e.g.*, Merico-Stephens, *supra* note 124, at 291–94 (discussing the role of the ICCPR in shaping the United States' understanding of international law regarding violence against women).

169. Convention on the Elimination of All Forms of Discrimination against Women art. 6, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

170. *Id.* art. 2(c).

171. *Id.* art. 2.

172. Brief for Int'l Law Scholars, *supra* note 38, at 25.

173. *Id.*

174. *See* Paust, *supra* note 3, at 216–21 (discussing various ways international law becomes legally binding).

175. *See* Brief for Int'l Law Scholars, *supra* note 38, at 24 ("The widespread ratification . . . constitutes compelling evidence of a customary norm guaranteeing against all forms of gender–based violence and imposing responsibility on States to redress it through VAWA-type remedies.").

Additionally, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) outlines state responsibility to take all necessary measures preventing the degrading treatment of a particular class.[176] The international community accepts the CAT as CIL.[177] In fact, the CAT rises to the level of a *jus cogens* norm and is one of the most fundamental premises of the international legal order.[178] Accurate and accepted evidence suggests that gender-motivated violence subjects its victims to both physical and mental terror rising to the level of extraordinary inhuman and degrading treatment.[179] The CAT calls upon states to take legislative action to eliminate such behavior within its borders.[180] Under Article 2, the CAT grants nations wide latitude in determining what measures are necessary to ensure inhuman and degrading treatment is eliminated from a nation's territory.[181]

Moreover, the CAT and ICCPR rely extensively upon the demand in the Universal Declaration of Human Rights (Universal Declaration) for the protection of human dignity.[182] The Universal Declaration begins by establishing, as *jus cogens*, the proposition that all humans are "born free and equal in dignity and rights."[183] Additionally, the Universal Declaration states that entitlement to human dignity is "without distinction of any kind, such as race, colour, [or] sex."[184] No stronger source of CIL exists than the Universal Declaration.[185] As this Note has previously discussed, gender-motivated violence constitutes a violation of this most basic principle of international law.[186]

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176. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 [hereinafter CAT].

177. Brief for Int'l Law Scholars, *supra* note 38, at 25.

178. *Id.*

179. *See* United States v. Morrison, 529 U.S. 598, 630–31 (2000) (Souter, J., dissenting) (describing the voluminous record of serious violence against women occurring in the states); see also *supra* Part III.A (discussing the failure of states to enforce conventions protecting women).

180. CAT, *supra* note 176, art. 2.

181. *Id.*; Brief for Int'l Law Scholars, *supra* note 38, at 25.

182. Universal Declaration of Human Rights art. 1, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); Brief for Int'l Law Scholars, *supra* note 38, at 25.

183. Universal Declaration of Human Rights, *supra* note 182, art. 1.

184. *Id.* art. 2.

185. *See* Hurst Hannum, *The Status and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 289 (1996) ("The Universal Declaration remains the primary source of global human rights standards, and its recognition as a source of rights and law by states throughout the world distinguishes it from conventional obligations.").

186. *See supra* Part III.A (discussing customary international law norms condemning gender–motivated violence).

Additionally, wide ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in the General Assembly provides further evidence of state acceptance of a customary norm against gender-based violence.[187] Article 3 guarantees women "the enjoyment of all economic, social and cultural rights."[188] Strategies to combat gender-motivated violence and the social and economic discrimination that occurs as a result certainly garner support from the ICESCR's demand for social justice.

Finally, the Declaration on the Elimination of Violence against Women (Declaration on Violence against Women) chronicles the entrance of the prevention and redress of gender-motivated violence into the realm of customary law.[189] This Declaration relied upon and, in doing so, interpreted a series of treaties as a foundation calling on member nations to develop an international response to violence against women: the ICCPR, CEDAW, the CAT, and the ICESCR.[190] The Declaration on Violence against Women passed the UN General Assembly in a unanimous vote that codified each member nation's responsibility and commitment to provide women with an effective means to challenge gender-motivated violence.[191]

The Declaration on Violence against Women highlights "that violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms."[192] Moreover, the Declaration realizes that violence against women constitutes a serious impediment to women's security in a free society, ultimately resulting in an unequal power relationship between men and women.[193] The Declaration advises that "States should pursue by all appropriate means and without delay a policy of eliminating violence against women."[194] Furthermore, states must implement an avenue for achieving relief from abusers, "whether those acts are perpetrated by the State or by private persons."[195] Section 13,981 serves as the United States' affirmative recognition of the requirement to provide remedy and redress for private acts of gender-motivated violence

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187. International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR]. For a list of signatories to ICESCR, see Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, International Covenant on Economic, Social and Cultural Rights, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited Mar. 30, 2010).

188. ICESCR, *supra* note 187, art. 3.

189. Brief for Int'l Law Scholars, *supra* note 38, at 25–26.

190. Declaration on the Elimination of Violence, *supra* note 159, pmbl.

191. *Id.*; Brief for Int'l Law Scholars, *supra* note 38, at 25–26.

192. Declaration on the Elimination of Violence, *supra* note 159, pmbl.

193. *Id.*

194. *Id.* art. 4.

195. *Id.* art. 4(c).

present in CIL and codified in the Declaration on Violence against Women vote.[196]

The aforementioned evidence chronicles the roots of a customary norm against gender-motivated violence that has come into existence through wide recognition of state practice. On several occasions, the General Assembly unanimously recognized the need for member nations to provide an avenue of redress for private instances of gender-motivated violence.[197] Moreover, the above section proposes that not only is gender-motivated violence a recognized human rights violation under CIL but also that CIL obligates every state to provide a remedy for victims against public and private abusers.[198] From treaties the United States is a party to—ICCPR and CAT—to treaties that are widely ratified, such as CEDAW, a strong customary norm allowing victims of gender-motivated violence to take legal action against their abusers provides a foundation upon which Congress can justify § 13,981.[199]

Finally, even if there were any doubt as to the emergence of the prevention of gender-motivated violence as a customary norm, the United States must interpret its international obligations in good faith. Thus, if a customary legal basis for implementation exists for § 13,981, then Congressional action should be viewed, with significant deference, as fulfilling its good faith obligations under *pacta sunt servanda*.[200]

C. *Realizing the Chilling Effect of the Supreme Court's Striking Down of § 13,981*

Under the tenure of the late Chief Justice William Rehnquist, the Supreme Court embarked on a new mission to restore the essence of American federalism and curb Congressional authority under the Commerce Clause.[201] As a result of this revolution, Congress deferred passing legislation it feared the Supreme Court would strike

196. *See* Brief for Int'l Law Scholars, *supra* note 38, at 25–26 n.37.

197. Declaration on the Elimination of Violence, *supra* note 159, pmbl.; CAT, *supra* note 176, pmbl.; Universal Declaration of Human Rights, *supra* note 182, pmbl.

198. Brief for Int'l Law Scholars, *supra* note 38, at 25–26.

199. *See* Declaration on the Elimination of Violence, *supra* note 159, art. 4(c) (requiring states to "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women"); CAT, *supra* note 176 arts. 1–2 (mandating legal recourse for victims of violence); CEDAW, *supra* note 169, art. 2(f) (requiring states to take appropriate legislative steps to protect women); ICCPR, *supra* note 7, art. 2(1) (obligating the states to protect the civil and political rights of all citizens); Universal Declaration of Human Rights, *supra* note 182, pmbl. (reaffirming states' "faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women").

200. Vienna Convention, *supra* note 137, art. 26.

201. Merico–Stephens, *supra* note 124, at 267 n.6.

down.[202] Like most judges, Congress prefers to avoid appearing weak by having its legislation overturned. The *Morrison* decision, in particular, serves as a shot across the bow, informing Congress that the Supreme Court did not tolerate creative expansions of Congressional authority because a social problem, such as gender-motivated violence, existed on a national scale—a finding of fact the Court ultimately failed to dispute.[203] The *Morrison* decision sent ripple effects through both houses of Congress and the international community.[204]

The Supreme Court's ruling that § 13,981 exceeded Congress's authority had two distinct effects: deterring future legislation aimed at redressing domestic human rights concerns and entrenching an international perception that the United States disregards its legal obligations under international law and cannot be relied on in constructing new human rights treaties.[205] As discussed above, both implications are detrimental to the overall effectiveness of an international human rights regime.[206]

Following the ruling on § 13,981, a new debate arose over whether Congress would pursue future remedies for internationally identified social ills.[207] If Congress uses the various legal obligations present in U.S.-ratified treaties as a backdrop for implementing legislation, the question becomes whether Congress retains the necessary constitutional authority to begin fulfilling those obligations without running afoul of the Rehnquist—and now Roberts—Court's affinity for a strong federalism doctrine.[208]

Without a clear signal to the contrary, Congress may very well decide not to test the Supreme Court's federalism limits, opting instead for the politically safer route (at least in terms of domestic embarrassment) of ignoring international obligations. The striking down of § 13,981 cannot be divorced from its effects on the Court's treaty powers jurisprudence. "[A] limitation to the treaty power is not a unitary or isolated consideration" but rather hampers any

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202. *Id.* at 269–71.

203. *Id.* at 300–04.

204. *Id.* at 297–98.

205. *See* Brief for Int'l Law Scholars, *supra* note 38, at 29–30 (describing the potential impact of invalidating VAWA); Merico–Stephens, *supra* note 124, at 295–96, 299–301 ("Manifesting such concern for protection of human rights in other states, the United States ought to have the legislative capacity to bring its own domestic law in compliance with the international responsibilities it has acquired through the constitutionally established process.").

206. *See supra* Part III.A (arguing that both implications weaken the international human rights regime).

207. *See* Merico–Stephens, *supra* note 124, at 305 ("The constitutionality and/or acceptability of the doctrine on non–execution, a treaty justiciability question, has been extensively contested.").

208. *See id.* at 302–05 (discussing the role federalism plays in curbing Congressional power to implement treaties).

current and future Congressional commitment to promulgating legislation using constitutional treaty powers or international law as the sole basis for authority.[209]

The Supreme Court's ruling on § 13,981 presents a uniquely confusing situation because the Solicitor General did defend Congress's power to enact laws pursuant to international norms. The Solicitor General's decision created ambiguity in treaty jurisprudence. An open question exists as to whether the Court could have found Congressional authority for § 13,981 in international law or could have upheld the value of federalism as *a priori* over vague international legal requirements.[210]

The need to resolve this open question with deference to Congressional treaty and CIL authority is necessary before Congress takes any noticeable strides in fulfilling international obligations through remedies such as § 13,981.[211] This Note suggests that "[s]hould Congress choose to implement discreet provisions of human rights treaties, it should be able to do so unimpeded by structural concerns [such as federalism] that have no bearing on the nature of the matters embraced by the treaty power."[212] Until the Supreme Court has the opportunity to affirm Congressional treaty and CIL authority, *Morrison's* deterrent effect remains concretely in place.

Secondly, the *Morrison* decision chilled the development of a human rights regime with the United States as a major contributor in both doctrine and diplomatic muscle.[213] As Part III discussed at some length, the failure of § 13,981 implicated U.S. credibility on gender-related matters.[214] However, the impact is as much procedural as content-driven.[215] Without the ability to implement the mandates of non self-executing treaties and CIL obligations, the United States appears as a weak partner in the development of new treaties.[216] Governments traditionally willing to negotiate with the United States on human rights issues question Congress's ability to implement legislation, effectively leaving those governments party to a treaty

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209. *Id.* at 332.

210. *See* United States v. Morrison, 529 U.S. 598, 617 (2000) (articulating the central questions as related to the Commerce Clause and Equal Protection Clause of the U.S. Constitution).

211. Merico-Stephens, *supra* note 124, at 332.

212. *Id.*

213. *Promoting Human Rights and Democracy—Two Crises for the United States, Testimony before H. Comm. on International Relations*, 108th Cong. (2004) (statement of Tom Malinowski, Washington Advocacy Dir.), *available at* http://www.hrw.org/legacy/english/docs/2004/07/07/usint9009_txt.htm [hereinafter Malinowski Testimony]; Merico-Stephens, *supra* note 124, at 332.

214. *See supra* Part III (discussing how the failure of § 13,981 negatively impacted U.S. credibility on gender–related matters).

215. Merico-Stephens, *supra* note 124, at 300–04.

216. *Id.* at 317, 332.

that they will presumably have to enforce without the strength of United States' backing.[217]

The Supreme Court's ruling on § 13,981 created an impression in the international community that "judicial micro-managing of U.S. foreign policy" structurally prevents Congress from acting on obligations both the President and Congress were active in developing.[218] Had the Solicitor General used *Morrison* as a means of heralding the power of Congress to implement treaties and general international legal obligations, the international community's view of the U.S. government's commitment to a human rights regime might be more complimentary.

V. CONCLUSION

Section 13,981 of the Violence Against Women Act provided a civil remedy against private actors charged with committing gender-motivated violence.[219] Congress's bold move to include such a provision was heralded by many, both in the United States and across the globe, as a much-needed venue for victims of gender-motivated violence to confront their abusers—a remedy not currently provided by the Fourteenth Amendment due to its State Action Doctrine.[220] However, the United States Supreme Court held that § 13,981 exceeded Congress's authority under the Commerce Clause and violated the State Action Doctrine in *U.S. v. Morrison*.[221]

In a poor tactical decision, the Solicitor General failed to cast § 13,981 as fulfilling U.S. obligations under both the ICCPR and CIL, despite strong evidence that Congress intended § 13,981 to serve this legal obligation.[222] Congress retains constitutional authority under the law of nations and Article I to enact legislation for the sole purpose of complying with international human rights treaties and norms.[223] The Solicitor General should have used this authority to justify § 13,981 before the Court, and the Supreme Court should have upheld it on these grounds.

Given the current decline in U.S human rights credibility, this Note suggests a new strategy for resurrecting U.S. credibility on

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217. *See* Malinowski Testimony, *supra* note 213 (describing the detrimental effect the United States reputation is having on its ability to promote human rights abroad).

218. *Id.* at 304.

219. Violence Against Women Act, 42 U.S.C. § 13981 (1994).

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

221. *Id.* at 617.

222. *See* Brief for Int'l Law Scholars, *supra* note 38, at 5–6 (explaining how VAWA fulfills the United States' international legal obligation to pass legislation protecting women).

223. *See supra* Part II (arguing that Congress possesses this ability).

gender-related issues in the international community. Using § 13,981 as a primary example, this Note contends that Congress must recommit itself to enacting implementing legislation for non-self-executing treaties and CIL in an effort to restore U.S. human rights credibility. Section 13,981 provides a means by which Congress can restore U.S. credibility on gender equality issues. Restoring credibility in this area would positively impact U.S. diplomatic legitimacy on questions of international human rights law.[224]

Put simply, when the international community views the U.S. Congress as unable to enact implementing legislation, while simultaneously appearing to disregard more general obligations under CIL, other states' ability to achieve human rights goals is negatively affected.[225] Additionally, the Supreme Court's decision to strike down implementing legislation for a multilateral treaty further constructs an image of Congress as impotent to fulfill international obligations. Consequently, even when it musters the momentum to jump significant political hurdles, Congress appears a poor partner in devising new human rights norms, especially new human rights treaties.[226]

The United States is on the precipice of losing, perhaps fatally, its role in an ever-evolving international human rights regime. Reconstituting the way students, scholars, legislators, and judges approach § 13,981 offers an analytical template for revisiting the way Congress and the Supreme Court approach U.S. obligations under international law—particularly in context of implementing legislation. Only when the United States seriously considers these obligations and recommits to promulgating new legislation in the spirit of § 13,981 will its effectiveness as a human rights leader in an ever politicized international landscape be restored.[227]

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224. Brief for Int'l Law Scholars, *supra* note 38, at 5–6; Merico–Stephens, *supra* note 124, at 332; Nye, *supra* note 116, at 29–30.

225. Malinowski Testimony, *supra* note 213.

226. *See* Merico–Stephens, *supra* note 124, at 304 (noting that "commentators advocate that federalism limitations apply to the whole of the treaty power ").

227. *See* Brief for Int'l Law Scholars, *supra* note 38, at 5–6 (emphasizing the importance of fulfilling international obligations).

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