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United States v. Morrison and the Civil Rights Remedy of the Violence against Women Act: A Civil Rights Law Struck Down in the Name of Federalism

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UNITED STATES v. MORRISON AND THE CIVIL RIGHTS REMEDY OF THE VIOLENCE AGAINST WOMEN ACT: A CIVIL RIGHTS LAW STRUCK DOWN IN THE NAME OF FEDERALISM

Julie Goldscheid†

By striking down the civil rights remedy of the 1994 Violence Against Women Act in United States v. Morrison, *the Supreme Court circumscribed Congress's power to enact federal civil rights laws pursuant to either the Commerce Clause or to Section 5 of the Fourteenth Amendment. Julie Goldscheid, coauthor of Petitioner Christy Brzonkala's Brief to the Supreme Court, argues that the Court's decision rested on an erroneous characterization of the VAWA civil rights remedy. The Court analyzed the statute as one regulating criminal conduct, rather than civil rights. Viewed as a civil rights statute, the law would not be subject to the Court's concerns about disturbing the proper federal/state balance, but instead reflects a carefully tailored, proper exercise of federal legislative power.*

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The majority's approach calls into question Congress's ability to legislate both civil rights in general and gender-motivated violence in particular. Ms. Goldscheid, however, points out the flaws in the majority's analysis under the Commerce Clause. She details an alternative approach that would recognize the legislation as a civil rights statute. Ms. Goldscheid also provides suggestions for ways in which Congress can revisit the legislation to address Congress's concerns without violating the principles articulated in Morrison. *She concludes that VAWA was designed to remedy ongoing violations of distinct federal interests, thus clearly warranting federal civil rights redress.*

INTRODUCTION

In 1994, Congress took the historic step of recognizing that gender-based violence can violate the victim's civil rights. It enacted a civil rights remedy as part of the Violence Against Women Act of 1994 (VAWA)[1] to provide redress for the resulting injuries.[2] However, in May 2000, the Supreme Court declared that law unconstitutional in *United States v. Morrison*.[3] The decision has been heralded as one of the Court's most "sweeping" rulings in its newly restrictive view of congressional power[4] and as a "resounding rebuke to Congress."[5] It follows on the heels of a series of decisions through which the Court has cut back on the scope of federal legislative authority and the reach of federal civil rights laws.[6] These decisions raise questions about the future of federal efforts to enact laws to redress civil rights in general

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1 42 U.S.C. §§ 13931-14040 (1994).

2 *Id.* § 13981.

3 United States v. Morrison, 120 S. Ct. 1740 (2000).

4 Linda Greenhouse, *Women Lose Right to Sue Attackers in Federal Court*, N.Y. TIMES, May 16, 2000, at A1.

5 Tony Mauro & Jonathan Ringel, *Supreme Court Rejects VAWA Civil Lawsuits*, N.Y. L.J., May 16, 2000, at 1.

6 *See, e.g.*, Kimel v. Fl. Bd. of Regents, 528 U.S. 62 (2000) (striking private right of action against states in federal court under Age Discrimination in Employment Act); Alden v. Maine, 527 U.S. 706 (1999) (striking private right of action against states in state court under Fair Labor Standards Act); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (holding that Congress could not abrogate state sovereign immunity from suit under federal patent law because that law was not constitutional exercise of Congress's authority under Section 5 of the Fourteenth Amendment); Printz v. United States, 521 U.S. 898 (1997) (striking Brady law requiring local jurisdictions to conduct background checks before handgun purchase); City of Boerne v. Flores, 521 U.S. 507 (1997) (striking Religious Freedom Restoration Act as beyond the scope of Congress's power under Section 5 of the Fourteenth Amendment); United States v. Lopez, 514 U.S. 549 (1995) (striking Gun-free School Zones Act as beyond Congress's Commerce Clause authority). Observers of the Court may have speculated about the result in *Morrison* based on the timing of the Court's rulings. For example, Justice O'Connor announced the Court's decision in *Kimel* that states could not be subject to suit under the federal Age Discrimination in Employment Act on the morning of the *Morrison* oral argument. *Morrison*, 120 S. Ct. at 1740; *Kimel*, 528 U.S. at 62.

as well as Congress's authority to legislate against gender-motivated violence.[7]

Congress enacted the civil rights remedy based on its authority under both the Commerce Clause and Section 5 of the Fourteenth Amendment.[8] The *Morrison* decision offers a limited discussion of the Court's rationale for striking the statute on both constitutional bases. However, the decision established that Congress cannot enact laws under the Commerce Clause that regulate noneconomic, violent criminal conduct based only on the conduct's aggregate effect on interstate commerce.[9] The decision also casts doubt on Congress's Section 5 authority to enact remedial federal legislation that regulates the conduct of private individuals.[10]

The decision makes clear the majority's concern about preserving "the Constitution's distinction between national and local authority."[11] Whether or not one agrees with the Court's insistence on the limited role of the federal government, the Rehnquist Court's conception of limited federal power is not the only workable approach. Various scholars have proposed analytic frameworks for preserving the limited role of the federal government with respect to the states, while also taking into account the realities of our modern economy.[12]

While the *Morrison* decision can be criticized from many perspectives, this Article will focus on an aspect of Commerce Clause analysis that the majority does not address—an aspect that could have provided a basis for upholding the law and that could provide a basis for analyzing similar laws, even under the *Morrison* Court's limited conception of federal power. The majority failed to take into account that, in enacting the VAWA civil rights remedy, Congress created a new civil rights law. From a civil rights perspective, it is apparent that

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7 For example, Senator Joseph Biden stated:

> To be very blunt about it, [the decision] is going to have a lot less impact on violence against women than on the role of the U.S. Congress in future issues. . . . The ruling is really about power—whether the court or Congress will determine whether a particular activity has an effect on interstate commerce.

Richard Willing, *Justices Address Who Has Right To Regulate Conduct*, USA TODAY, May 16, 2000, at 6A (alteration in original).

8 H.R. CONF. REP. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853.

9 *Morrison*, 120 S. Ct. at 1754.

10 *Id.* at 1758-59.

11 *Id.* at 1752.

12 *See, e.g.*, Ann Althouse, *Theoretical and Constitutional Issues: Enforcing Federalism after* United States v. Lopez, 38 ARIZ. L. REV. 793 (1996) (proposing evaluation of the benefits of federal versus state regulation); Erwin Chemerinsky, *Theories of Federalism: Federalism Not as Limits, But as Empowerment*, 45 U. KAN. L. REV. 1219 (1997) (proposing federalism doctrine based on functions of federal and state governments); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180 (1998) (urging a flexible and practical approach to evaluating scope of federal power).

the law covers a limited universe—discriminatory conduct—in which the federal government has a strong and historic national interest. Nowhere does the majority acknowledge that the law Congress enacted regulated discrimination and was therefore distinct in nature from a statute that authorizes wholesale federal regulation of criminal or family law. Had the Court analyzed the statute as civil rights legislation, it should have upheld the VAWA civil rights remedy as within the realm of traditional federal power.

To provide historical context, Part I of this Article will briefly review the legislative history that preceded the law's enactment. Part II will summarize the facts of the *Morrison* case to provide the background from which the decision arose. Part III will review the Supreme Court's decision in *Morrison*, examining the Court's reasoning for striking down the statute under both the Commerce Clause and Section 5. Part IV will contrast the Court's reasoning with an alternative analysis of the VAWA civil rights remedy as an exercise of Congress's Commerce Clause power to regulate civil rights violations that impact interstate commerce. Part V will conclude by examining the scope of possible future federal legislation addressing gender-motivated crimes in the aftermath of *Morrison*.

I

THE VAWA CIVIL RIGHTS REMEDY'S LEGISLATIVE HISTORY[13]

In considering the civil rights remedy's constitutionality, the Court had before it an extensive legislative record demonstrating that the law was aimed at eradicating a particularly pernicious form of discrimination. Congress enacted the Violence Against Women Act of 1994,[14] after more than four years of congressional deliberation, which included nine hearings with more than a hundred witnesses submitting testimony.[15] Through these proceedings, Congress ex-

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13 This legislative history was presented to the Court in Petitioner Christy Brzonkala's Brief, which this author drafted along with the following colleagues: Martha F. Davis and Risa Kaufman at NOW Legal Defense and Education Fund; Carter Phillips, Richard Bernstein, Katherine Adams, Jacqueline Cooper, Faith Gay, and Paul Hemmersbaugh of Sidley & Austin; and Professor Cass Sunstein. Brief of Petitioner Christy Brzonkala at 6-18, *Morrison* (Nos. 99-5, 99-29).

14 Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered sections of 8, 16, 18, 28, & 42 U.S.C.).

15 *Domestic Violence: Not Just a Family Matter: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong. (1994); *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. (1993) [hereinafter *1993 Crimes of Violence Hearing*]; *Violence Against Women: Fighting the Fear: Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. (1993) [hereinafter *1993 Violence Against Women Hearing*]; *Violent Crimes Against Women: Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. (1993) [hereinafter *1993 Violent Crimes Hearing*]; *Hearing on Domestic Violence Before the Senate Comm. on the Judiciary*, 103d Cong. (1993) [hereinafter *1993 Domestic Violence Hearing*]; *Violence Against Women:*

haustively explored the problem of violence against women, a problem that Congress termed "a national tragedy played out every day in the lives of millions of American women at home, in the workplace, and on the street."[16] Congress devised a multistrategic legislative response, including many provisions other than the civil rights law at issue in *Morrison*. For example, VAWA has provided 1.6 billion dollars over six years to fund a range of programs,[17] including new initiatives to improve law enforcement's response to crimes such as domestic violence and sexual assault, to improve victim services, and to create a national domestic violence hotline.[18] VAWA has also created new federal felonies to address acts of interstate domestic violence[19] and requires all states to give full faith and credit to protection orders issued by other states.[20] It contains important provisions to assist battered immigrant women in obtaining legal citizenship status without requiring the cooperation of abusive partners, who, as part of the cycle of abuse, frequently frustrate the women's efforts to obtain legal citizenship.[21] The comprehensive legislation also includes research provisions to advance our national understanding of the problem.[22]

Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 102d Cong. (1992) [hereinafter *1992 Hearing*]; *Violence Against Women: Victims of the System: Hearing on S. 15 Before the Senate Comm. on the Judiciary*, 102d Cong. (1991) [hereinafter *1991 Hearing*]; *Women and Violence: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong. (1990) [hereinafter *1990 Women and Violence Hearing*]; *Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Res.*, 101st Cong. (1990) [hereinafter *1990 Domestic Violence Hearing*]. For a summary of these hearings, see Brief of *Amici Curiae* Senator Joseph R. Biden, Jr. in Support of Petitioners at 7-15, 20-28, *Morrison* (Nos. 99-5, 99-29); Motion for Leave to File Brief *Amici Curiae* and Brief of *Amici Curiae* Equal Rights Advocates, et al. in Support of Petitioners *passim*, *Morrison* (Nos. 99-5, 99-29); Senator Joseph R. Biden, Jr., *The Civil Rights Remedy of the Violence Against Women Act: A Defense*, 37 HARV. J. ON LEG. 1, 2-6 (2000); Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 45-51, 60-65 (2000); 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, 18-23 (1996).

16 S. REP. No. 102-197, at 39 (1991).

17 Violence Against Women Act of 1994, Pub. L. No. 103-322, 109 Stat. 1902 (codified as amended in scattered sections of 8, 16, 18, 28, & 42 U.S.C.).

18 Violence Against Women Act of 1994, 42 U.S.C. §§ 13991-94 (1995) (providing funding for training of judges and court personnel in state courts); §§ 14001-02 (providing similar funding for federal judges and court personnel); § 300w-10 (authorizing funding to states for rape prevention and education); § 10416 (authorizing funding for a national hotline for domestic violence victims).

19 Violence Against Women Act § 40221, 108 Stat. at 1926-28 (codified as amended at 18 U.S.C. §§ 2261-62 (1994)).

20 *Id.*, 108 Stat. at 1930-31 (codified as amended at 18 U.S.C. § 2265).

21 *Id.* sec. 40701, §§ 204(a)(1) to (2), 108 Stat. at 1953-55 (codified as amended at 8 U.S.C. §§ 1154(a)(1)(A) to (B) (1999); *id.* sec. 40702, § 216(c)(4), 108 Stat. at 1955 (codified as amended at 8 U.S.C. § 1986a(c)(4)); *id.* sec. 40703, § 244(a), 108 Stat. at 1955 (codified as amended at 8 U.S.C. 1254).

22 42 U.S.C. §§ 13961-63, 14192-93.

The civil rights remedy[23] was the subject of much debate before its ultimate enactment.[24] Some might suggest that Chief Justice Rehnquist's public pronouncements opposing the law stacked the deck against its survival.[25] Nevertheless, the law was enacted after careful legislative review.[26] In its final form, the law declared that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender"[27] and created a private cause of action against any "person . . . who commits a crime of violence motivated by gender."[28] Plaintiffs had to establish two primary elements of proof: first, that the act was a "crime of violence" as the statute defined that term[29] and, second, that the act was gender-motivated.[30] The civil rights remedy permitted recovery of compensatory and punitive damages and other forms of relief.[31] The law mir-

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23 *Id.* § 13981.

24 *Supra* note 15 (listing relevant hearings). *See generally* Nourse, *supra* note 15, *passim* (narrating VAWA's legislative history).

25 138 CONG. REC. E746 (daily ed. Mar. 19, 1992) (statement of Sen. Smith) (quoting remarks of Chief Justice Rehnquist); *cf. 1993 Crimes of Violence Hearing*, *supra* note 15, at 75-76 (containing the Report of the Proceedings of the Judicial Conference of the United States, Sept. 23-24, 1991, expressing opposition to the civil rights remedy and federal felonies for interstate domestic violence); *1991 Hearing*, *supra* note 15, at 315 (statement by Conference of Chief Justices) (opposing civil rights remedy because it would "cause major state-federal jurisdictional problems and disruptions in the processing of domestic relations cases in state courts").

26 *See generally* Nourse, *supra* note 15 (discussing VAWA's legislative history).

27 42 U.S.C. § 13981(b).

28 *Id.* § 13981(c). Although gender-motivated violence disproportionately affects women, the law was drafted in gender-neutral terms. S. REP. NO. 103-138, at 37-38 (1993).

29 VAWA defines a "crime of violence" as an act or acts that would constitute a felony under existing federal or state law, "whether or not those acts have actually resulted in criminal charges, prosecution, or conviction." 42 U.S.C. § 13981(d)(2)(A).

30 A crime is "motivated by gender" if it is "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." *Id.* § 13981(d)(1). This Article will focus on the law's constitutionality and will not address the interpretation of its statutory elements. For a discussion of the meaning of "gender-motivation" under the law, see Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN'S L.J. 123 (1999).

31 42 U.S.C. § 13981(c) (authorizing compensatory and punitive damages as well as injunctive and declaratory relief). In addition, a four-year limitations period applies to VAWA civil rights claims under the federal "catch all" for civil rights remedy claims. *See* 28 U.S.C. § 1658 (1994); Grace v. Thomason Nissan, 76 F. Supp. 2d 1083, 1090 (D. Or. 1999) (applying four-year federal catch-all statute of limitations to VAWA civil rights remedy claim); *see also* DAVID FRAZEE ET AL., VIOLENCE AGAINST WOMEN LAW AND LITIGATION § 11:22 (1998) (stating that 28 U.S.C. § 1658 applies to VAWA claims); Lisa Barré-Quick & Shannon Matthew Kasley, *The Road Less Traveled: Obstacles in the Path of the Effective Use of the Civil Rights Provision of the Violence Against Women Act in the Employment Context*, 8 SETON HALL CONST. L.J. 415, 431 & n.61 (1998) (same); Betty Levinson, *The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications and Litigation Strategy*, 4 J.L. & POL'Y 401, 407-08 n.41 (1996) (same). By contrast, the limitations period in state intentional tort cases is frequently much shorter. LEONARD KARP & CHERYL L. KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE § 1.31 & app. B (Supp. 1999).

rored other federal civil rights laws that authorize recovery of damages upon circumstantial proof that the act was discriminatory.[32]

The civil rights remedy contained other provisions that reflected Congress's attempt to situate the law squarely within the realm of acceptable federal legislation. For example, addressing concerns raised by the Conference of Chief Justices and the Judicial Conference of the United States, Congress expressly limited the civil rights remedy so that it would reach only conduct that was already unlawful, would not interfere with the enforcement of existing state criminal and civil laws, and would preserve a proper role for state courts.[33] The remedy excluded any cause of action for "random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender."[34] It further prohibited federal courts from asserting supplemental jurisdiction over claims for "divorce, alimony, equitable distribution of marital property, or child custody decree[s]."[35] In addition, it permitted plaintiffs to bring civil rights remedy claims in either federal or state court[36] and also prohibited removal of actions filed in state court.[37] As Senator Hatch explained, the civil rights remedy "take[s] into consideration the role of the Federal Government versus the role of the State[s]."[38]

Congress clearly articulated its intent to create a "civil rights" cause of action for victims of crimes of violence motivated by gender.[39] It did so after hearing voluminous testimony both about the ways violence against women interferes with women's full participation in the economy and about the discriminatory manner in which states have treated gender-based crimes. Because the legislative re-

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32 Congress specifically drew the analogy to other forms of civil rights laws. It directed courts to draw on the type of circumstantial evidence used to prove discrimination in cases involving discrimination at work, Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2000e-17, civil rights violations committed by state actors, 42 U.S.C. § 1983, or analogous damages actions based on conspiracies to violate an individual's civil rights, which encompass damages recovery for acts of bias-motivated violence committed by more than one person, 42 U.S.C. § 1985(3).

33 After Congress made these changes, the Judicial Conference withdrew its opposition. *1993 Crimes of Violence Hearing, supra* note 15, at 70-71 (Letter from Stanley Marcus, Chairman, Ad Hoc Committee on Gender-Based Violence for the Judicial Conference). The National Association of Women Judges consistently endorsed VAWA, including the civil rights remedy, beginning in 1992. *Id.* at 30-32 (statement of the Honorable Judith Billings, President of the National Association of Women Judges).

34 42 U.S.C. § 13981(e)(1).

35 *Id.* § 13981(e)(4).

36 *Id.* § 13981(e)(3).

37 28 U.S.C. § 1445(d) (1994 & West Supp. 2000).

38 *1993 Violent Crimes Hearing, supra* note 15, at 81 (statement of Sen. Orrin G. Hatch).

39 42 U.S.C. § 13981(a).

cord has been summarized elsewhere, it will only briefly be reviewed here.[40]

A. Commerce Clause

Congress based the exercise of its Commerce Clause authority on substantial testimony about the specific ways gender-based violence, such as domestic violence, sexual assault, and stalking, impacts women's economic choices. In the 1994 Conference Report preceding the law's enactment, Congress summarized its findings that gender-motivated violence has pervasive effects on interstate commerce

> by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products; a Federal civil rights action . . . is necessary . . . to reduce the substantial adverse effects on interstate commerce caused by crimes of violence motivated by gender . . . .[41]

Notwithstanding the *Morrison* Court's ultimate rejection of Congress's Commerce Clause authority to enact the civil rights remedy, the Court recognized the "serious impact" of gender-based violence Congress detailed.[42] The legislative record detailed the effect of gender-based violence on women's employment, educational opportunities, and overall economic status. To give just a few examples, the record documents that almost fifty percent of rape victims lose their jobs or are forced to quit as a consequence of the crime and that the fear of gender-based violence deters women from taking jobs in certain areas or during hours that pose a significant risk of such violence.[43] Witness

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40 For additional summaries of the legislative history, see, for example, Brief of *Amicus Curiae* Senator Joseph R. Biden, Jr. in Support of Petitioners at 7-15, 20-28, United States v. Morrison, 120 S. Ct. 1740 (2000) (No. 99-5, 99-29); Motion for Leave to File Brief Amici Curiae and Brief of *Amici Curiae* Equal Rights Advocates et al. in Support of Petitioners *passim*, *Morrison* (No. 99-5, 99-29); Goldfarb, *supra* note 15; Nourse, *supra* note 15.

41 H.R. CONF. REP. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853; *see also* S. REP. No. 103-117, at 54 (1993) ("Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy."); S. REP. No. 102-197, at 53 (1991) (same).

42 *Morrison*, 120 S. Ct. at 1752.

43 Congress found that women justifiably "refuse higher paying night jobs in service/retail industries because of the fear of attack" and noted that homicide is the leading cause of women's death at work. S. REP. No. 103-138, at 54 n.70 (1993); *see also* S. REP. No. 102-197, at 38 ("[N]early 50 percent [of women] do not use public transit alone after dark" for fear of rape.); *id.* (noting that fear of violence "takes a substantial toll on the lives of all women," for example, "in lost work").

accounts detailed how batterers often prevent or interfere with their partners' jobs.[44]

Looking outside the workplace, Congress found that gender-motivated violence can force victims into poverty, forcing them to seek support from government benefits and social services.[45] Additional evidence revealed that violence against women gives rise to significant health care and government expenditures as well as other costs that affect the economy at large.[46]

Particularly relevant to the claim before the *Morrison* Court, Congress found that the "devastation" and potential economic and employment effects of gender-motivated violence are "often magnified for young women attending college."[47] Congress observed that it is not unusual for many student victims to "drop out of school altogether . . . [or] interrupt [their] college career[s] simply to avoid [their] attacker[s]."[48]

B. Section 5 of the Fourteenth Amendment

A similarly detailed legislative record supported Congress's conclusion that it had authority to enact the law under Section 5 of the Fourteenth Amendment.[49] Congress made extensive findings that States had discriminated in their treatment of gender-based crimes. For example, Congress expressly stated that

> State and Federal criminal laws do not adequately protect against the bias element of crimes of violence motivated by gender, which separates these crimes from acts of random violence, nor do these adequately provide victims of gender-motivated crimes the opportu-

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44 *1993 Domestic Violence Hearing*, *supra* note 15, at 17-18 (statement of James Hardeman, Manager, Counseling Department, Polaroid Corp.) (detailing impact of domestic violence on businesses' bottom line, including attendance, performance, and increased medical claims); *1991 Hearing*, *supra* note 15, at 235, 240 (statement of National Federation of Business and Professional Women) (noting that harassment by batterers "reduce[s] battered women's ability to maintain or secure employment"); S. REP. No. 101-545, at 33 (1990) (noting that gender-motivated violence causes "lost careers, decreased productivity"); *id.* at 37 (noting that gender-motivated violence "takes its toll in employee absenteeism and sick time for women who either cannot leave their homes or are afraid to show the physical effects of the violence").

45 *E.g.*, S. REP. No. 101-545, at 37 ("[A]s many as 50 percent of homeless women and children are fleeing domestic violence.").

46 S. REP. No. 103-138, at 41; *see also* S. REP. No. 101-545, at 33 ("*Partial* estimates show that violent crime against women costs this country at least 3 billion—not million, but billion—dollars a year." (emphasis added)).

47 S. REP. No. 101-545, at 44; *see also 1993 Violence Against Women Hearing*, *supra* note 15, at 41 (statement of Jennifer Tescher) (victim testimony recounting lost concentration and interest in school after sexual assault on campus); S. REP. No. 102-197, at 62 ("[R]ape on campus is widespread and poses a grave threat not only to students' physical well-being but also to their educational opportunities.").

48 S. REP. No. 101-545, at 44.

49 U.S. CONST. amend XIV, § 5.

> nity to vindicate their interests; existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled; . . . a Federal civil rights action as specified in this section is necessary to guarantee equal protection of the laws . . . and the victims of crimes of violence motivated by gender have a right to equal protection of the laws, including a system of justice that is unaffected by bias or discrimination and that, at every relevant stage, treats such crimes as seriously as other violent crimes.[50]

Congress based this conclusion on evidence of systemic discrimination against victims of gender-motivated violence embodied in formal and informal legal barriers to civil and criminal suits and rooted in a long history of discriminatory treatment. For example, as of 1990, seven states still did not permit prosecutions of marital rape; twenty-six additional states allowed marital rape prosecutions only under limited circumstances, such as when there is evidence of physical injury; numerous other states limited prosecutions of cohabitants or dating companions.[51] Ten states still formally barred women from bringing tort actions against their abusive husbands.[52] State laws limiting rape shield provisions to criminal prosecutions exposed women bringing tort actions for sexual assault to intrusive questioning about consensual sexual activity unrelated to the attack.[53] Further, although almost every state had enacted hate crime legislation, less than a dozen covered gender bias.[54]

Congress also found systemic discrimination reflected in a host of informal, but entrenched, discriminatory practices.[55] Reviewing states' own gender bias task force reports, Congress noted that, "[s]tudy after study commissioned by the highest courts of the States—from Florida to New York, California to New Jersey, Nevada to Minnesota—has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes against

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50 H.R. CONF. REP. No. 103-711, at 385-86 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853-59; *see also, e.g.*, S. REP. No. 103-138, at 55 (stating that the Act "provides a necessary remedy to fill the gaps and rectify the biases of existing State laws").

51 S. REP. No. 103-138, at 42; S. REP. No. 102-197, at 45 & nn.49-50, 54; S. REP. No. 101-545, at 41 n.78.

52 *1990 Women and Violence Hearing*, *supra* note 15, pt. 1, at 62, 64 (statement of Helen Neuborne, Executive Director, NOW Legal Defense and Education Fund).

53 *E.g.*, S. REP. No. 102-197, at 46 (citing Iowa civil case in which judge permitted questioning about victim's "sex life after the rape," her use of birth control, and her "reputation of having 'wild parties'").

54 S. REP. No. 103-138, at 48 n.47.

55 *Id.* at 42 ("[C]rimes against women are often treated differently and less seriously than other crimes.").

men."[56] For example, "[p]olice may refuse to take reports; prosecutors may encourage defendants to plead to minor offenses; judges may rule against victims on evidentiary matters; and juries too often focus on the behavior of the survivors—laying blame on the victims instead of on the attackers."[57] Discriminatory practices reduced the number of rape cases that resulted in arrest and increased the likelihood that the trial court would dismiss the case.[58] In sum, Congress concluded that these discriminatory practices preclude redress for a large proportion of victims of gender-motivated violence.

C. States' Support for the VAWA Civil Rights Remedy

Unlike the history of many other laws, the legislative record preceding enactment of the civil rights remedy documented states' candid acknowledgment that they were unable alone to provide adequate remedies to victims of gender-motivated violence.[59] Much of the legislative evidence of the states' institutional discrimination came directly from reports prepared by state courts and submitted for Congress's consideration.[60] Perhaps most striking is that forty-one state attorneys general from thirty-eight states, the District of Columbia, and two

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56 S. REP. No. 120-197, at 43; *see also* S. REP. No. 101-545, at 33-34, 41 (describing studies that portray the "double-victimization" of women who have been raped).

57 S. REP. No. 103-138, at 42; *see also 1991 Hearing*, *supra* note 15, at 135-36 (testimony of Gill Freeman, Chair, Florida Supreme Court Gender Bias Study Implementation Committee) (citing examples of state court judges' gender bias, including a judge's comment to a convicted rapist that he should learn to "'take the women out to dinner first, like the rest of us'"); S. REP. No. 103-138, at 41 (citing Washington, D.C. study finding that, in eighty-five percent of cases where police found a woman bleeding, they failed to arrest her attacker); *id.* at 44 ("State remedies are inadequate to fight bias crimes against women. . . .").

58 For example, Congress found that

> [O]ver 60 percent of rape reports do not result in arrests; and a rape case is more than twice as likely to be dismissed as a murder case and nearly 40 percent more likely to be dismissed than a robbery case. Less than half of the individuals arrested for rape are convicted of rape. In comparison, 69 percent of those arrested for murder are convicted of murder, and 61 percent of those arrested for robbery are convicted of robbery. Finally, over one-half of all convicted rapists serve an average of only 1 year or less in prison.

S. REP. No. 103-138, at 42 (footnotes omitted); *see also id.* at 38 ("Almost one-quarter of convicted rapists never go to prison and another quarter received sentences in local jails where the average sentence is 11 months.").

59 *E.g.*, *1993 Domestic Violence Hearing*, *supra* note 15, at 4 (statement of Sarah M. Buel, Director, Domestic Violence Unit, District Attorney's Office, Suffolk County, Massachusetts); *1993 Violent Crimes Hearing*, *supra* note 15, at 33-35 (statement of Kimberly Hornak, Salt Lake County Attorney's Office); *1992 Hearing*, *supra* note 15, at 70, 75 (statement of Margaret Rosenbaum, Assistant State Attorney, Miami, Florida); *id.* at 85, 86 (statement of Guy Pfeiffer, Chief Magistrate of Crisp City, Georgia); *1991 Hearing*, *supra* note 15, at 28, 33 (statement of Bonnie Campbell, Iowa Attorney General); *id.* at 65, 66 (statement of Roland Burris, Illinois, Attorney General); *1990 Domestic Violence Hearing*, *supra* note 15, at 90-93.

60 S. REP. No. 103-138, at 45 n.29, 46 n.35, 49 n.52 (citing numerous state task force reports); STAFF OF SENATE COMM. ON THE JUDICIARY, 103D CONG., THE RESPONSE TO RAPE:

United States territories urged Congress to enact the civil rights remedy, stating that

> the current system for dealing with violence against women is inadequate. Our experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership and federal funds. [VAWA] would begin to meet those needs by, *inter alia*, . . . creating a specific federal civil rights remedy for the victims of gender-based crimes . . . .[61]

Consistent with the states' views during the legislative process, nearly three-quarters of the states joined a brief urging the Court to uphold the law.[62]

II
CHRISTY BRZONKALA'S CLAIMS

The *Morrison* case involved a facial challenge to the constitutionality of the civil rights remedy. However, the underlying facts warrant brief review because they offer an example of the types of claims brought under the civil rights remedy.[63] Christy Brzonkala sought redress for the damages she suffered after two students gang-raped her in her college dorm shortly after she enrolled as a freshman at Virginia Polytechnic Institute ("Virginia Tech").[64] As set forth in her

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DETOURS ON THE ROAD TO EQUAL JUSTICE 5 n.7 (Comm. Print 1993) (same); S. REP. NO. 102-197, at 43-44 & n.40 (same).

61 *1993 Crimes of Violence Hearing*, *supra* note 15, at 34-36 (letter from Robert Abrams, Attorney General of New York) (presenting letter signed by thirty-seven attorneys general and supported by an additional four state attorneys general); *accord 1991 Hearing*, *supra* note 15, at 37-39 (Resolution adopted by the National Association of Attorneys General) (unanimously urging VAWA's passage).

62 Brief of *Amici Curiae* State of Arizona, et al. in Support of Petitioners, United States v. Morrison, 120 S. Ct. 1740 (2000) (No. 99-5, 99-29).

63 Many VAWA civil rights remedy claims involved gender-based violence that interfered with women's employment or education. *E.g.*, Burgess v. Cahall, 88 F. Supp. 2d 319 (D. Del. 2000) (involving employment); Ericson v. Syracuse Univ., 45 F. Supp. 2d 344 (S.D.N.Y. 1999) (involving education); Liu v. Striuli, 36 F. Supp. 2d 452 (D.R.I. 1999) (involving education); Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997) (involving employment); *see also* Brief of *Amici Curiae* Law Professors in Support of Petitioners at 13 n.18, *Morrison*, (No. 99-5, 99-29) (categorizing claims).

64 *Morrison*, 120 S. Ct. at 1745-46. The *Morrison* case originally was captioned *Brzonkala v. Virginia Polytechnic Institute*, reflecting the original claim brought by Christy Brzonkala against Virginia Tech under Title IX and against defendants Antonio Morrison and James Crawford under the VAWA civil rights remedy. Brzonkala v. Va. Polytechnic Inst. & State Univ., 935 F. Supp. 772 (W.D. Va. 1996). The parties settled the Title IX claim after the Fourth Circuit Court of Appeals ruled that the school's discriminatory response to the alleged gang rape could be actionable under Title IX. Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 827 n.2 (4th Cir. 1999) (en banc). The caption changed to *United States v. Morrison, Brzonkala v. Morrison* when the case reached the U.S. Supreme Court, reflecting the fact that the Court Clerk docketed the United States's petition for certiorari first.

pleadings, Brzonkala alleged that she was raped by defendants Antonio Morrison and James Crawford, Virginia Tech students and members of the school's varsity football team.[65] Thirty minutes after she met them, Morrison and Crawford raped her on a dormitory bed, disrobing her and forcing her to submit to unwanted vaginal intercourse three times while they pinned her down.[66] After the third rape, Morrison threatened Brzonkala by stating "you better not have any fucking diseases."[67] After finally releasing her, Morrison stalked Brzonkala, following her until she reached her dormitory room.[68]

Morrison made other comments after the assault that caused the lower courts to conclude that the rapes were "gender-motivated" as defined under the remedy.[69] For example, Morrison announced publicly in the dormitory dining hall that he "like[d] to get girls drunk and fuck the shit out of them."[70] After Brzonkala filed a complaint with the school alleging a violation of Virginia Tech's sexual assault policy, she learned that another male student-athlete had been overheard telling Crawford that he should have "killed the bitch."[71]

As a result of the sexual assaults, Brzonkala became depressed, stopped attending classes, and attempted to commit suicide.[72] She received psychiatric treatment, but the rape had rendered her unable to continue her education.[73] She withdrew from Virginia Tech.[74]

Christy Brzonkala filed suit in federal court against Morrison and Crawford under the civil rights remedy and against Virginia Tech under Title IX.[75] After the defendants challenged the law's constitutionality, the United States intervened to defend the law. The district court held that Brzonkala's complaint stated a civil rights remedy claim[76] but struck down the law as beyond Congress's authority under both the Commerce Clause and Section 5 of the Fourteenth Amendment.[77] A panel of the Fourth Circuit Court of Appeals upheld the

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65 *Morrison*, 120 S. Ct. at 1745-46.

66 *Id.* at 1746.

67 *Id.*

68 Pl.'s Am. Compl. ¶ 23, *Brzonkala*, 935 F. Supp. 772 (No. 95-1358-R).

69 *Morrison*, 120 S. Ct. at 1747; *Brzonkala*, 169 F.3d at 829-31; Brzonkala v. Va. Polytechnic Inst. & State Univ., 132 F.3d 949, 963-64 (4th Cir. 1997); *Brzonkala*, 935 F. Supp. at 784-85.

70 *Brzonkala*, 169 F.3d at 827, 830.

71 *Brzonkala*, 132 F.3d at 954; *Brzonkala*, 935 F. Supp. at 775, 778.

72 *Brzonkala*, 935 F. Supp. at 774.

73 *Morrison*, 120 S. Ct. at 1746.

74 *Id.*

75 *Id.* The Fourth Cricuit en banc upheld the Title IX claim which ultimately settled. *Brzonkala*, 169 F.3d at 827 n.2 (vacating district court's dismissal and remanding Title IX claim); *see also* Brzonkala v. Va. Polytechnic Inst. & State Univ., No. 95-1358 (W.D. Va. Mar. 20, 2000) (order dismissing action without prejudice as to Virginia Tech).

76 *Brzonkala*, 935 F. Supp. at 785.

77 *Id.* at 793, 800.

statute as a valid exercise of Congress's Commerce Clause power,[78] but the Fourth Circuit reversed that decision after rehearing by the en banc court.[79] In contrast to the decisions in this case, virtually every other court to address the question had upheld the law's constitutionality.[80]

III
THE *MORRISON* DECISION

A. The Court's Commerce Clause Analysis

The *Morrison* Court struck down the VAWA civil rights remedy as beyond Congress's power under both the Commerce Clause and Section 5 of the Fourteenth Amendment. The law's constitutionality under the Commerce Clause was challenged after the Court's decision in *United States v. Lopez*, which invalidated a federal law prohibiting gun possession near schools.[81] The *Lopez* decision marked the first time in sixty years that the Court invalidated Congress's exercise of its Commerce Clause power.[82] Like *Lopez*, the question before the Court in *Morrison* was whether the law fell beyond Congress's Commerce Clause power, which authorized Congress to regulate activities "having a substantial relation" to, or that "substantially affect," interstate commerce.[83]

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78 Brzonkala v. Va. Polytechnic Inst. & State Univ., 132 F.3d 949, 964-74 (4th Cir. 1997).

79 *Brzonkala*, 169 F.3d at 831-62.

80 *E.g.*, Williams v. Bd. of County Comm'r, No. 98-2485-JTM, 1999 U.S. Dist. LEXIS 13532 (D. Kan. Aug. 24, 1999); Kuhn v. Kuhn, No. 98-C-2395, 1999 U.S. Dist. LEXIS 11010 (N.D. Ill. July 14, 1999); Culberson v. Doan, 65 F. Supp. 2d 701 (S.D. Ohio 1999); Ericson v. Syracuse Univ., 45 F. Supp. 2d 344 (S.D.N.Y. 1999); Doe v. Mercer, 37 F. Supp. 2d 64 (D. Mass.), *rev'd on other grounds*, 193 F.3d 42 (1st Cir. 1999); Liu v. Striuli, 36 F. Supp. 2d 452 (D.R.I. 1999); C.R.K. v. Martin, No. 96-1431-MLB, 1998 U.S. Dist. LEXIS 22309 (D. Kan. Oct. 27, 1998); Ziegler v. Ziegler, 28 F. Supp. 2d 601 (E.D. Wash. 1998); Mattison v. Click Corp., No. 97-CV-2736, 1998 U.S. Dist. LEXIS 720 (E.D. Pa. Jan. 27, 1998); Crisonino v. New York City Hous. Auth., 985 F. Supp. 385 (S.D.N.Y. 1997); Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997); Seaton v. Seaton, 971 F. Supp. 1188 (D. Tenn. 1997); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997), *rev'd on other grounds*, 134 F.3d 1339 (8th Cir. 1998); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996). *But see* Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F. 3d 820 (4th Cir. 1999) (en banc), *aff'd sub nom.* United States v. Morrison, 120 S. Ct. 1740 (2000); Bergeron v. Bergeron, 48 F. Supp. 2d 628 (M.D. La. 1999).

81 United States v. Lopez, 514 U.S. 549 (1995).

82 In 1935, the Court struck down wage and hour regulations that affected a business the Court deemed indirectly related to interstate commerce. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935).

83 Congress's commerce power encompasses three broad categories of activity: (1) the power to regulate the use of the channels of interstate commerce; (2) the power to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. *Morrison*, 120 S. Ct. at 1749 (citing *Lopez*, 514 U.S. at 558-59). This case involved the scope of the third category.

The *Morrison* Court analyzed the civil rights remedy under four factors it identified in *Lopez*. First, the Court concluded that gender-motivated crime, like gun possession, was not an economic activity.[84] The Court explained that prior Commerce Clause case law had upheld regulation of intrastate activity only in cases in which the activity was economic in nature.[85] Although it declined to adopt a categorical rule against aggregating the effects of noneconomic activity, by interpreting prior case law as a limit on Congress's power to aggregate the effects of intrastate activity, the Court effectively created the categorical rule it expressly disclaimed.

The Court then observed that the civil rights remedy contained no jurisdictional element that would insure a sufficient link to interstate commerce in each case.[86] In this respect, the Court distinguished the civil rights remedy from VAWA's criminal provisions, which contain a jurisdictional element and have uniformly been upheld against constitutional scrutiny.[87]

Next, the Court addressed the adequacy of the legislative findings. In contrast to the Gun Free School Zones Act struck down in *Lopez*, the Court found that the civil rights remedy was supported by "numerous findings regarding the serious impact that gender-motivated violence has on victims and their families."[88] Nonetheless, the Court stated that the existence of congressional findings was not sufficient to sustain Commerce Clause legislation. It emphasized that the ultimate power to determine a law's constitutionality rests with the Court. Notably, the Court did not critique the findings that supported Congress's enactment of the civil rights remedy; it did not deem irrational Congress's conclusion that gender-based violence substantially affected interstate commerce.[89]

Instead, the majority took issue with the "method of reasoning" Congress used in enacting the law.[90] However, the decision offers little elaboration about how the majority identifies or categorizes that "method." The Court did not describe its view of the flaws in Congress's reasoning beyond stating that the reasoning "seeks to follow the but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce."[91] Presuma-

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84 *Id.* at 1751.

85 *Id.*

86 *Id.*

87 *Id.* at 1751-52 & n.5.

88 *Id.* at 1752.

89 *Id. But cf.* United States v. Lopez, 514 U.S. 549, 563 (1995) (asserting that no congressional findings supported the Gun-Free School Zone Act's impact on interstate commerce).

90 *Morrison*, 120 S. Ct. at 1752.

91 *Id.*

bly referencing the *Lopez* decision, the Court asserted that it had "already rejected as unworkable" the "but-for" method of reasoning because the method would disturb the separation of powers between the various branches of government.[92] The Court was concerned that upholding the reasoning leading to the civil rights remedy would "completely obliterate the Constitution's distinction between national and local authority."[93] The majority was particularly worried that upholding the civil rights remedy would authorize congressional legislation of any crime, which properly falls under the States' police power, and would open the door to wholesale federal regulation of family law.[94]

The Court acknowledged Congress's attempt to identify a proper and limited role for federal legislation by expressly precluding litigation of traditional family law matters in VAWA civil rights remedy cases.[95] The statute's exclusion of the family law cases, which the Court feared would creep into federal court under the auspices of VAWA, should have satisfied the Court's concern about the statute's potential overbreadth. But the Court found the statutory solution unpersuasive and reemphasized that the Court, not Congress, was the ultimate arbiter of a federal law's constitutionality.[96]

The Court concluded by rejecting Congress's regulation of "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[97] In its view, noneconomic, violent criminal conduct was a classic example of an area that should be reserved to the states under their police power. Thus, when the Court struck down the law under Congress's commerce power, it effectively relied on the nature of the conduct it perceived the statute to regulate.

Justice Thomas wrote a brief concurrence, expressing the position that the majority decision did not go far enough.[98] He took the view that the Court should entirely eliminate the "substantial effects" test, on which Congress relied in enacting the law under its Commerce Clause power.[99] He argued that the test was inconsistent with the Court's original understanding of the Constitution and that without a more defined standard, Congress would continue to appropriate state powers "under the guise of regulating commerce."[100]

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92 *Id.*
93 *Id.*
94 *Id.* at 1753.
95 *Id.* (referencing 42 U.S.C. § 13981(e)(4) (1995)).
96 *Id.*
97 *Id.* at 1754.
98 *Id.* at 1759 (Thomas, J., concurring).
99 *Id.* (Thomas, J., concurring).
100 *Id.* (Thomas, J., concurring).

Four Justices dissented. Justice Souter wrote the principle dissent that was joined by Justices Stevens, Ginsburg, and Breyer.[101] This opinion focused on the "mountain of data" on which Congress relied in enacting the law.[102] Justice Souter recounted the voluminous legislative record demonstrating the impact of gender-based violence on the economy.[103] He distinguished this case from those involving the federalization of traditional state crimes, which Justice Souter has opposed, and argued that the legislative record here was more substantial than that found sufficient in previous decisions upholding commerce clause legislation.[104] He questioned whether the Court was abandoning the rational basis standard of review that it had traditionally applied to Commerce Clause legislation, suggesting that the Court was "supplanting rational basis scrutiny with a new criterion of review."[105] Justice Souter objected that the Court's newly articulated standard for Congress's Commerce Clause power, based on the "method of analysis" Congress used in deciding to regulate activities that substantially affect commerce, had no support in the Court's case law. He critiqued the majority's analysis of early decisions articulating the respective roles of the Court and Congress, offering an alternative view of the judicial/legislative balance.[106]

Justice Souter took particular issue with the majority's resurrection of two previously rejected categorical approaches to analyzing Congress's commerce power: first, a distinction based on whether the conduct is economic or noneconomic and, second, whether the law regulated a matter of traditional state concern. Justice Souter warned that the Court's previous adherence to formalistic categories "in large measure provoked the judicial crisis of 1937."[107] He cautioned that "today's decision can only be seen as a step toward recapturing the prior mistakes."[108] The majority decision's inherent errors left Justice Souter "to doubt that the majority's view will prove to be enduring law."[109]

Justice Breyer also wrote a dissent, which Justice Stevens joined in full and Justices Souter and Ginsburg joined with respect to the Commerce Clause analysis.[110] In his analysis of the Commerce Clause, Jus-

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101 *Id.* (Souter, J., dissenting).
102 *Id.* at 1760 (Souter, J., dissenting).
103 *Id.* at 1760-63 (Souter, J., dissenting).
104 *Id.* at 1763 (Souter, J., dissenting) (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) and Katzenbach v. McClung, 379 U.S. 294 (1964)).
105 *Id.* at 1764 (Souter, J., dissenting).
106 *Id.* at 1765-66 (Souter, J., dissenting) (citing, for example, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) and THE FEDERALIST No. 45 (J. Madison)).
107 *Morrison*, 120 S. Ct. at 1767 (Souter, J., dissenting).
108 *Id.* (Souter, J., dissenting).
109 *Id.* at 1773 (Souter, J., dissenting).
110 *Id.* at 1774 (Breyer, J., dissenting).

tice Breyer focused on the unworkable nature of the majority's categorical "economic/noneconomic" distinction for assessing valid Commerce Clause legislation.[111] He suggested that analyzing the adequacy of the legislative process could assist courts in assessing whether Commerce Clause regulation of intrastate noneconomic activity preserved federalism values while avoiding the categorical distinctions previously found unworkable. In a section joined only by Justice Stevens, Justice Breyer additionally critiqued the majority's analysis under Section 5 of the Fourteenth Amendment.[112]

B. The Court's Section 5 Analysis

The Court's analysis of Section 5 rested on the authority of two cases from 1883 and a bald determination that the civil rights remedy did not remedy equal protection violations because it was directed at individuals rather than state actors.[113] The Court first recognized that VAWA's legislative record established that there was "pervasive bias in various state justice systems against victims of gender-motivated violence."[114] It cited evidence that state justice officials "perpetuat[e] an array of erroneous stereotypes and assumptions," leading Congress to conclude that "these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted."[115]

The Court's decision focused on whether Congress's Section 5 power could extend to the conduct of private individuals. The majority rested on its interpretation of the Reconstruction-era cases, *United States v. Harris*[116] and the *Civil Rights Cases*,[117] which involved predecessors to the current public accommodations law and the federal law criminalizing conspiracies to deprive individuals' civil rights. The *Harris* Court struck down the predecessor civil rights conspiracy law on the grounds that it was "directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers."[118] In the *Civil Rights Cases*, the Court similarly invalidated the public accommodations statute because it ap-

111 *Id.* (Breyer, J., dissenting).

112 *Id.* at 1778-80 (Breyer, J., dissenting). For discussion of the majority's analysis under Section 5 of the Fourteenth Amendment, see *infra* Part III.B.

113 *Id.* at 1755-59.

114 *Id.* at 1755.

115 *Id.*

116 106 U.S. 629 (1883).

117 109 U.S. 3 (1883).

118 *Harris*, 106 U.S. at 640.

plied to purely private conduct.[119] The *Morrison* Court interpreted those cases to preclude Section 5 regulation of private conduct.

The Court rejected arguments challenging both the vitality and the implications of those decisions. First, the vitality of both decisions had been questioned in dicta in two subsequent cases, *United States v. Guest*[120] and *District of Columbia v. Carter*.[121] Although the issue was not essential to the holding in either case, a plurality of the Court in *Guest* and a unanimous Court in *Carter* reasoned that Congress's Section 5 authority can extend to regulation of private conduct as a means to prevent state violations.[122] Neither the *Guest* nor *Carter* decision interpreted the Reconstruction-era cases as precluding Section 5 regulation of private conduct in appropriate circumstances. Nonetheless, the *Morrison* Court flatly rejected the modern decisions' reasoning as "naked dicta."[123] It reasserted that the Reconstruction-era cases controlled the outcome of *Morrison* and justified their doctrinal force by virtue of the "length of time they have been on the books."[124]

The Court also rejected arguments distinguishing the record underlying those Reconstruction-era cases from the record here. For example, the *Civil Rights Cases* sets forth Congress's Section 5 power to enact legislation that is "corrective in its character" and aimed to "counteract and redress" unconstitutional state action.[125] The Court in both *Harris* and the *Civil Rights Cases* struck down the statutes at issue because it concluded that they were not directed against state violations. By contrast, the legislative history underlying the VAWA civil rights remedy revealed that Congress expressly sought to remedy equal protection violations.[126] Specifically, after Congress found that gender-based discrimination by state officials denied victims of gender-based crimes access to judicial remedies, it sought to authorize a cause of action that victims could pursue without having to rely on those same officials.[127] The *Morrison* Court did not address that argument. It went beyond the Court's conclusions in *Harris* and the *Civil Rights Cases* that the statutes there were not remedial of state discrimi-

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119 *The Civil Rights Cases*, 109 U.S. at 11.

120 383 U.S. 745 (1966).

121 409 U.S. 418 (1973) *superseded by statute as stated in* Best v. District of Columbia, 743 F. Supp. 44, 46-47 (D.D.C. 1990). The decision in the *Civil Rights Cases* is subject to further critique because it rejected Congress's authority to enact the public accommodations law under the Thirteenth Amendment as well, under which there should be no question that Congress could reach private conduct. *The Civil Rights Cases*, 109 U.S. at 24-25.

122 *Carter*, 409 U.S. at 424 n.8; *Guest*, 383 U.S. at 759; *id.* at 762 (Clark, J., concurring); *id.* at 784 (Brennan, J., concurring in part, dissenting in part).

123 United States v. Morrison, 120 S. Ct. 1740, 1757 (2000).

124 *Id.* at 1756.

125 *Id.* (citing *The Civil Rights Cases*, 109 U.S. at 18).

126 *See supra* Part I.B.

127 *See id.*

nation and instead injected its own interpretation of the Reconstruction-era Congress's legislative intent.[128] The *Morrison* Court cited an example from the Reconstruction-era statutes' legislative history not discussed in *Harris* or the *Civil Rights Cases* to suggest that the Reconstruction Congress intended to redress states' discriminatory implementation of the laws.[129] The Court's substitution of its own historical account for the reasoning of the contemporaneous Court is particularly disingenuous given the *Morrison* majority's purported reliance on *stare decisis* in other parts of its reasoning.[130]

Notwithstanding that discussion of *Harris* and *Guest*, the Court declined to determine whether the Reconstruction-era statute's legislative history was distinguishable from that of the civil rights remedy. In addition, it never explained why legislation regulating individual conduct could not be corrective of state sponsored discrimination. Instead, the majority flatly concluded that the civil rights remedy was not sufficiently corrective in nature because it was directed at the actions of private individuals rather than state actors.[131]

In one final point, the Court noted that the civil rights remedy's nationwide application was problematic because Congress had not documented gender-based discriminatory practices in all states.[132] It contrasted the civil rights remedy with other Section 5 legislation, such as voting rights laws, which were directed at particular jurisdictions in which Congress had identified discriminatory policies of constitutional magnitude.[133] However, the *Morrison* Court's conclusion about the extent to which Congress documented the problem of gender bias misconstrues the nature of the congressional record. Congress had not sought to undertake a nationwide study of the problem. Nor does any precedent limit Congress to enacting Section 5 legislation that redresses a problem documented in all fifty states.[134]

Justice Breyer's dissent took issue with the majority's Section 5 analysis, although only Justice Stevens joined this part of the dissent. Justice Breyer "doubt[ed]" the Court's reasoning in interpreting *Harris* and the *Civil Rights Cases*.[135] In his view, those cases involved laws that the Court found were "directed exclusively" against state actors, which was different from the case here, because Congress sought to

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128 *Morrison*, 120 S. Ct. at 1758.

129 *Id.* (discussing excerpt from legislative history of Reconstruction-era statutes that was not referenced in *Harris* or the *Civil Rights Cases*).

130 *See id.* at 1756 (citing *stare decisis* as basis for relying on *Harris* and the *Civil Rights Cases*).

131 *Id.* at 1755-59.

132 *Id.* at 1759.

133 *Id.* at 1758-59.

134 *Id.* at 1779 (Breyer, J., dissenting).

135 *Id.* at 1778 (Breyer, J., dissenting).

redress discriminatory state action that left women without adequate state remedies.[136] Justice Breyer suggested that there is no reason to preclude Congress from providing a remedy against private actors and reasoned that such a law would not intrude unduly on states' authority.[137] He opined that this federal remedy could compel state actors to improve their remedial responses and found no reason why the law was "disproportionate" to the identified discriminatory practices.[138] Justice Breyer also pointed out the fallacy of the Court's conclusion that there was no gender-bias problem in all fifty states, noting Congress reported that at least twenty-one states had made findings of gender-based discrimination in state legal systems and the absence of similar findings in other states did not mean that those states were free from bias.[139]

IV

THE COURT'S FAILURE TO ANALYZE CIVIL RIGHTS LEGISLATION

The *Morrison* decision has been the subject of criticism and concern about both its implications for federal civil rights laws and its apparent return to a previously-rejected and unworkable categorical formulation of the commerce power.[140] The decision purports to be respectful of federalism and the limited nature of federal legislative power with respect to that of the states.[141] In at least one important respect, however, the decision is not consistent with the principle of limited federal power it endorsed. The Court ignored arguments, fully supported by the legislative record, that Congress sought to regulate a matter of civil rights, an area in which the federal government

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136 *Id.* at 1779 (Breyer, J., dissenting) (quoting United States v. Harris, 106 U.S. 629, 640 (1883)).

137 *Id.* (Breyer, J., dissenting).

138 *Id.* (Breyer, J., dissenting).

139 *Id.* (Breyer, J., dissenting)

140 Mauro & Ringel, *supra* note 5, at 1; *see also, e.g.*, Lyle Denniston, *Women Can't Sue Rapists, Court Says*, BALT. SUN, May 16, 2000, at A1; Jan Crawford Greenburg, *High Court Ruling Further Clips the Role of Congress*, CHI. TRIBUNE, May 15, 2000, § 1, at 1; Linda Greenhouse, *Battle on Federalism*, N.Y. TIMES, May 16, 2000, at A18; Greenhouse, *supra* note 4, at A1; *Long Shadow of Gender Crimes*, L.A. TIMES, May 19, 2000, at B8; *Violence Against the Constitution*, N.Y. TIMES, May 16, 2000, at A22. Among other grounds on which the majority decision could be criticized is its implicit rejection of the traditional rational basis standard for reviewing the adequacy of Congress's assessment of whether a law is constitutional commerce clause legislation. The Court rested on a rejection of the "method of reasoning" employed to uphold the law. *Morrison*, 120 S. Ct. 1752. As Justice Souter stated, this criterion is without precedent and supplants the traditional rational basis scrutiny. *Id.* at 1765 (Souter, J., dissenting). This repudiation of that time-honored approach is particularly ironic in light of the Court's insistence on the force of *stare decisis* in supporting its Section 5 analysis. *Id.* at 1756. The Court's reasoning casts doubt on the scope of permissible congressional action under the Commerce Clause, leaving legislators without adequate guidance in devising future legislation.

141 *See Morrison*, 120 S. Ct. at 1752-54.

has a strong historic and enduring interest. While the decision is undoubtedly vulnerable to criticism from a variety of perspectives, the Court's wholesale omission of the civil rights nature of the conduct Congress sought to regulate warrants careful review.[142]

A fundamental mischaracterization of the conduct regulated under the civil rights remedy premised the Court's Commerce Clause analysis. Throughout the opinion, the Court referred to the "criminal" nature of the conduct at issue.[143] While the civil rights remedy covered conduct that was undoubtedly criminal in nature, Congress made plain its intent to provide redress for acts of discrimination that violated the victims' civil rights. For example, the statute's plain language requires proof of discriminatory motivation in each case, specifically stating that the act was 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."[144] In answer to questions about how the law would be interpreted, Congress explicitly directed courts to other federal antidiscrimination laws for examples of how to assess whether the defendant's conduct was gender-motivated.[145] The statutory requirement that plaintiffs assert proof of discriminatory conduct in each case ensures that the law covers a limited category of conduct that is different in nature from all violent crime or all family law. Nowhere does the Court recognize that distinction.

The Court's concerns about the implications of upholding the VAWA civil rights remedy are simply inapplicable when the statute is viewed as a civil rights law. For example, in critiquing the "method of reasoning" Congress employed in enacting the law, the Court worried that upholding the VAWA civil rights remedy would open the door to federal regulation of "murder or any other type of violence" for which a national economic impact could undoubtedly be demonstrated.[146] The Court expressed a similar concern that the law would open the door to federal legislation of family law matters, brushing aside with virtually no analysis Congress's careful drafting to exclude family law matters from VAWA civil rights remedy cases.[147] These concerns re-

142 Justice Breyer's dissent suggests an additional approach through which the Court could have upheld the law consistent with its concern and respect for "federalism" values. Citing commentators who have analyzed the dilemmas posed by the expanding national economy and concerns about overreaching federal legislation, Justice Breyer suggested that the Court look to the thoroughness of the legislative process in assessing the validity of any particular Congressional action. *Id.* at 1778 (Breyer, J., dissenting).

143 *E.g., id.* at 1748, 1754, 1758.

144 42 U.S.C. § 13981 (d)(1) (1994).

145 *Supra* note 32 (explaining Congress's analogy of the civil rights remedy to other civil rights laws); *see also* Goldscheid, *supra* note 30, at 130 (noting that the wording of the civil rights remedy "directly tracks" statutory language of other civil rights legislation).

146 *Morrison*, 120 S. Ct. at 1753.

147 *See id.* The Court stated:

flect the majority's presumption that the civil rights remedy was a statute of general jurisdiction regulating an area of traditional state concern, like criminal or family law. In fact, the law covers a much narrower subset of conduct—acts of violence for which gender-based discriminatory motive can be proved.[148]

By ignoring that argument, the Court failed to distinguish prior caselaw recognizing the distinction between civil rights legislation and general tort law. In *Griffin v. Breckenridge*,[149] the Court considered whether 42 U.S.C. § 1985(3), the Reconstruction-era civil rights statute that prohibited conspiracies, could apply to acts of private individuals.[150] The Court upheld the statute's reach to private conspiracies and reasoned that the law would not apply to all tortious, conspiratorial interferences with others' rights.[151] Instead, it reasoned:

> The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the [statute].[152]

The Court further explained that the statute was suitable federal legislation provided that it redressed discrimination:

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.[153]

The *Morrison* Court refused to recognize the same distinction without offering a principled basis for rejecting the analogy.

Moreover, the *Morrison* Court ignored the traditional national interest in the uniform enforcement of civil rights.[154] For example, in

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> Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation .... Congress may have recognized this specter when it expressly precluded § 13981 from being used in the family law context .... [H]owever, the limitation of congressional authority is not solely a matter of legislative grace.

Id.

148 42 U.S.C. § 13981(d)(1).

149 403 U.S. 88 (1971).

150 *Id.* at 102.

151 *Id.*

152 *Id.* (citations omitted).

153 *Id.* (citations omitted).

154 While the Court purported to reject categorical distinctions based on the type of conduct the statute regulates, it was undoubtedly animated by the concern about respecting a principled distinction between federal and state legislative authority. Justice Souter asserted that the majority resurrected the previously rejected approach to Commerce

Wisconsin v. Mitchell,[155] the Court, in an opinion by Chief Justice Rehnquist, unanimously upheld against a First Amendment challenge the constitutionality of Wisconsin's statute authorizing enhanced sentencing for bias-inspired conduct.[156] In reaching that result, the Court recognized that bias-motivated conduct "is thought to inflict greater individual and societal harm" than other crimes.[157] The Court acknowledged that bias-motivated crimes have a distinct impact on their victims and on the community at large, noting that they "are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest."[158] Quoting Blackstone, the Court determined it is "reasonable" to punish these crimes more severely because they are "'the most destructive of the public safety and happiness.'"[159] Similarly, in her dissenting opinion in *Bray v. Alexandria Women's Health Clinic*, Justice O'Connor recognized that the federal interest in vindicating violence perpetrated against individuals because of their class membership implicated distinct federal interests that warranted federal civil rights redress.[160]

The *Morrison* Court's silence about the civil rights nature of the civil rights remedy is particularly striking in light of the Court's previous recognition that federal legislation may be needed to redress discriminatory conduct by the states.[161] In enacting the civil rights remedy, Congress similarly responded to the national interest in enforcing a uniform standard for civil rights protections.[162]

The Court's refusal to recognize the federal interest in civil rights legislation is also inconsistent with other previous rulings. The Court

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power that rested on whether a federal law covers an area of "traditional state concern." United States v. Morrison, 120 S. Ct. 1740, 1768-69 (2000) (Souter, J., dissenting). Even if the *Morrison* Court has effectively resurrected this principle, the civil rights remedy should survive review because, unlike federal murder or general family law provisions, it regulates civil rights, which is not an area of traditional exclusive state concern.

155 508 U.S. 476 (1993).

156 *Id.* at 483-90.

157 *Id.* at 487-88.

158 *Id.* at 488.

159 *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *16).

160 Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 348 (1993) (O'Connor, J., dissenting).

161 *E.g.*, Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 722 (1989) (discussing federal civil rights laws as responsive to local, uncurbed, discriminatory violence in the southern states); Patsy v. Bd. of Regents, 457 U.S. 496, 505-06 (1982) (recounting Congress's enactment of Reconstruction-era civil rights statutes in response to state law enforcement's failure to enforce civil rights laws); Monroe v. Pape, 365 U.S. 167, 174 (1961) (describing Congress's enactment of Reconstruction-era civil rights statutes in response to southern states' inability to curb discriminatory violence), *overruled by* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 665 (1978).

162 *E.g.*, S. REP. No. 103-138, at 44 (1993) ("State remedies are inadequate to fight bias crimes against women . . . ."); *id.* at 55 (noting that the civil rights remedy "provides a necessary remedy to fill the gaps and rectify the biases of existing State laws").

has recognized the national interest in providing uniform federal redress for the national economic impact of private racial discrimination.[163] The Court does not distinguish the legislative record here from that supporting the 1964 public accommodations laws, which were upheld based on the federal interest in redressing analogous evidence of the aggregate effect of private racial discrimination on the economy.[164]

The parallels between the legislative records underlying the civil rights remedy and the public accommodations laws are striking: both highlight Congress's concern with the impact of discrimination on travel, consumer spending, and the overall restriction on market activity. As Justice Souter pointed out, the record shows that gender-based violence, like racial discrimination, bars its targets from full participation in the economy.[165] For example, in *Heart of Atlanta*, the Court upheld the statute's prohibition of discrimination in public accommodations because the legislative record was "replete with evidence of the burdens that discrimination by race or color places upon interstate commerce."[166] Recognizing race discrimination as a "nationwide" problem, the Court relied on its "effect of discouraging travel on the part of a substantial portion of the Negro community."[167] The Court was concerned about the "disruptive effect" of racial discrimination on "commercial intercourse"[168] and identified the object of the legislation as vindicating the "deprivation of personal dignity" that accompanies discrimination.[169]

Similarly, in *Katzenbach v. McClung*, the Court recognized that the legislative record was "replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants."[170] The record specifically documented the "direct and highly restrictive effect" of discrimination on interstate travel by African Americans.[171] Congress had documented that discrimination depressed consumer spending in areas where discrimination was widely practiced.[172] It further documented that "discrimination deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be reluctant to establish there."[173]

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163 *E.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

164 *E.g.*, *McClung*, 379 U.S. at 300; *Heart of Atlanta*, 379 U.S. at 260-61.

165 United States v. Morrison, 120 S. Ct. 1740, 1763 (2000) (Souter, J., dissenting).

166 *Heart of Atlanta*, 379 U.S. at 252.

167 *Id.* at 253.

168 *Id.* at 257.

169 *Id.* at 250.

170 Katzenbach v. McClung, 379 U.S. 294, 299 (1964).

171 *Id.* at 300.

172 *Id.*

173 *Id.*

The VAWA civil rights remedy's legislative history shows that Congress was similarly responding to the effect of discriminatory gender-based violence on women's full participation in commerce. For example, Congress documented that gender-based violence deters women's movement, keeping them from walking at night, even in their own neighborhoods; restricting their use of public transportation; and limiting where and when they will travel.[174] Congress also documented the way gender-based violence reduces consumer spending, finding, for example, that women would not go to the movies alone after dark.[175] Like the impact of race discrimination on African Americans' choice of jobs, Congress documented that gender-based violence deters women from taking jobs in certain areas or at certain hours.[176] Overall, it concluded that gender-based crimes and fear of those crimes "restricts movement, reduces employment opportunities, and reduces consumer spending."[177]

As Justice Souter pointed out, the VAWA legislative record was more voluminous than the record supporting the 1964 civil rights law, and it revealed that gender-motivated violence operated in a manner quite similar to that of race discrimination in the 1960s.[178] Although racial discrimination in hotels, restaurants, and other public accommodations could be viewed as more inherently economic than gender-based violence, the *Heart of Atlanta* and *McClung* decisions reveal that the Court was concerned with the impact of private discrimination on the economy, not on whether the conduct itself was economic or non-economic. In addition, it is quite possible that, in the 1960s, the Court viewed race discrimination as a private, local concern, much like how the *Morrison* Court viewed discriminatory gender-based violence as private.[179]

Viewing the civil rights remedy in the context of other federal civil rights legislation, the Court's conclusion that upholding the law would eliminate the distinction between national and local authority seems particularly misplaced. Like laws such as Title VII, or 42 U.S.C. § 1983 or § 1985(3), the civil rights remedy provides redress for con-

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174 S. REP. No. 102-197, at 38-39 (1991).

175 *Id.* at 38.

176 S. REP. No. 103-138, at 54 (1993).

177 S. REP. No. 101-545, at 43 (1990).

178 United States v. Morrison, 120 S. Ct. 1740, 1763-64 (2000) (Souter, J., dissenting).

179 Much has been written about the long-standing belief that violence against women, particularly domestic violence committed by intimates, is a private matter, not to be treated in the public arena of the justice system. *See, e.g.*, Elizabeth M. Schneider, *The Violence of Privacy, in* THE PUBLIC NATURE OF PRIVATE VIOLENCE 36 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994); Amy Eppler, Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE L.J. 788, 791 (1986) ("The police non-arrest policy is most commonly justified by a belief in 'family privacy,' a doctrine dictating that the state should not intervene in domestic matters.").

duct that could be, and in many instances is, covered under state as well as federal law. For example, Title VII, in its coverage of sexual harassment claims, may redress harms flowing from conduct that could be the subject of assault or battery charges under state civil or criminal laws.[180] Similarly, cases brought under 42 U.S.C. § 1983 or §1985(3), based on claims of sexual assaults by state actors or racially motivated violence, may include supplemental state tort claims.[181] As Justice Ginsburg suggested at oral argument, state tort claims could supplement VAWA civil rights claims in the same manner as these other civil rights schemes.[182] The Constitution permits the federal government to exercise concurrent jurisdiction in areas that are of both national and local concern.[183] The majority opinion does not mention—never mind refute—the national interest in redressing the civil rights violation Congress identified as beyond the states' power to successfully address alone. Nor does it explain why the law should not be viewed as a model of cooperative federalism, a principle the Court previously has endorsed.[184]

In its Commerce Clause analysis, the majority's stated concern with limiting Commerce Clause legislation to conduct suited for federal intervention rings hollow when one considers Congress's attempt to redress civil rights violations through the VAWA civil rights remedy. The Court does not reconcile this tension.

V

IMPLICATIONS FOR FUTURE REFORM

The *Morrison* Court recognized both the economic impact of gender-based violence and the historic discrimination that precluded women from obtaining effective redress for acts of gender-motivated violence. Nonetheless, it found Congress's statutory formulation constitutionally infirm. Attempts to respond to the decision include new legislation that would avoid the elements that proved fatal in *Morrison.*

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180 *See, e.g.*, Swentek v. USAIR, Inc., 830 F.2d 552 (4th Cir. 1987) (alleging claims of sexual harassment, assault and battery, invasion of privacy, and intentional infliction of emotional distress).

181 *See, e.g.*, Haberthur v. City of Raymore, 119 F.3d 720 (8th Cir. 1997) (alleging claim under 42 U.S.C. § 1983 as well as claims of battery and intentional infliction of emotional distress).

182 Transcript of Oral Arguments, at *8-9, *Morrison* (Nos. 99-5, 99-29), *available at* 2000 U.S. Trans. LEXIS 22.

183 *E.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("Congress may legislate in areas traditionally regulated by the states.").

184 *E.g.*, Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289 (1981) (upholding statute providing for cooperative federalism); *cf.* FERC v. Mississippi, 456 U.S. 742, 783 n.12 (1982) (O'Connor, J., concurring in part and dissenting in part) ("A federal system implies a partnership, all members of which are effective players on the team and all of whom retain the capacity for independent action." (citation and internal quotation marks omitted)).

The *Morrison* decision leaves open several approaches to statutory reform that could reinstate federal civil rights redress for gender-motivated violence, albeit with a more limited reach. First, the Court noted that the civil rights remedy contained no jurisdictional element that would ensure an appropriate link with interstate commerce in each instance.[185] As Justice Breyer's dissent recognized, Congress apparently could rewrite the law consistent with the majority's decision and limit its application to commercial venues such as "restaurants, hotels, perhaps universities, and other places of public accommodation."[186] Jurisdictional elements could be modeled after other federal laws, including the VAWA felonies, which limit federal coverage to cases involving interstate activity.[187] Other jurisdictional elements that have withstood constitutional challenge require proof of an economic nexus in each instance.[188] A revised civil rights remedy that includes a similar jurisdictional element would undoubtedly limit the number of women who could seek redress but would provide a remedy that is constitutionally sound even under the majority's reasoning.

Other potential statutory approaches could respond to the decision's Section 5 analysis, although any resulting remedy likely would be extremely limited in scope. For example, the *Morrison* Court recognized that Congress enacted the civil rights remedy in response to a record of discriminatory state enforcement of gender-based crimes, but struck down the statute because it was not directed toward state actors. Subsequent legislation could authorize federal intervention in instances of discriminatory responses by local officials. Existing federal laws provide models for such an approach. For example, the Attorney General has discretionary authority under the Institutionalized Persons Act to bring a civil action against any state institution to redress practices that deprive people in state institutions of their civil

185 *Morrison*, 120 S. Ct. at 1751.

186 *Id.* at 1775 (Breyer, J., dissenting).

187 *E.g.*, 18 U.S.C. §§ 2261, 2262 (1994) (criminalizing interstate domestic violence and interstate violation of protective orders); *see also Morrison*, 120 S. Ct. at 1752 & n.5 (recognizing that interstate domestic violence statute has been uniformly upheld as within Congress's Commerce Clause authority to regulate the channels of interstate commerce).

188 *E.g.*, 18 U.S.C. § 247 (1994) (criminalizing intentional destruction of religious property or obstruction of individual's exercise of religious belief in circumstances that are "in or affect[ ] interstate or foreign commerce); Hobbs Act, 18 U.S.C. § 1951(a) (1994) (criminalizing robbery or extortion that "in any way or degree obstructs, delays, or affects commerce"); United States v. Jennings, 195 F.3d 795 (5th Cir. 1999) (upholding Hobbs Act's constitutionality), *cert. denied*, 120 S. Ct. 2694 (2000); *see also* Local Law Enforcement Enhancement Act of 2000, S. 2550, 106th Cong. (2000) (proposing amendment to 18 U.S.C. § 245 to criminalize hate crimes based on gender, sexual orientation, or disability provided that, for each offense, either the defendant or the victim traveled in interstate commerce, used an instrumentality of interstate commerce, or that the conduct "interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or otherwise affects interstate or foreign commerce").

rights.[189] Similarly, the Voting Rights Act authorizes the Attorney General to take action upon evidence of discriminatory voter registration practices.[190]

On July 27, 2000 Representative Conyers introduced a bill, House Bill 5021, that retains the essential elements of the 1994 VAWA civil rights remedy yet responds to the *Morrison* decision.[191] It includes both a jurisdictional element requiring a commercial link in each case and the authority for Department of Justice intervention upon a showing that local authorities discriminated based on gender in their response to gender-based crimes. Specifically, the proposal requires proof that:

> (1) in connection with the offense-
> (A) the defendant or the victim travels in interstate or foreign commerce;
> (B) the defendant or the victim uses a facility or instrumentality of interstate or foreign commerce; or
> (C) the defendant employs a firearm, explosive, incendiary device, or other weapon, or a narcotic or drug listed pursuant to section 202 of the Controlled Substances Act, or other noxious or dangerous substance, that has traveled in interstate or foreign commerce;
> (2) the offense interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or
> (3) the offense was committed with intent to interfere with the victim's commercial or other economic activity.[192]

In addition, the law authorizes the Attorney General to investigate and bring a civil action for equitable relief if she has "reasonable cause" to believe that the state or locality has "discriminated on the basis of gender in the investigation or prosecution of gender-based crimes," provided that the discrimination is part of a pattern or practice of "resistance to investigating or prosecuting" such crimes.[193]

In additional to the federal response, several states have introduced versions of the 1994 civil rights remedy that would authorize virtually the same cause of action in state court, although none have been enacted as of the date of this writing.[194] Of course, all states have some form of tort recovery that is available to victims of gender-

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189 See 42 U.S.C. § 1997a (1994).

190 *See* § 1973b(b). The *Morrison* Court discussed similar targeted remedies with approval. *Morrison*, 120 S. Ct. at 1759.

191 Violence Against Women Civil Rights Restoration Act of 2000, H.R. 5021, 106th Cong. (2000).

192 *Id.* § 2.

193 *Id.*

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

based crime.[195] However, as Congress found when it determined that state remedies were inadequate, recovery may be curtailed by restrictive statutes of limitations, the absence of rape shield protections in state evidence codes, and other procedural obstacles.[196] In addition, state remedies offer no relief for women whose claims are limited by local bias, for example, in cases in which the perpetrator is familiar with the local law enforcement officials.[197]

Other federal proposals would provide alternative responses to gender-based violence that avoid the infirmities found in the civil rights remedy. For example, proposed legislation directly aims to remove the economic barriers that gender-based violence creates. Title VII of the proposed 1999 Violence Against Women Act seeks to advance women's employment opportunities in the face of violence. For example, it contains provisions that would enable women to obtain time off from work to address domestic violence, sexual assault, or stalking.[198] Another provision would enable women who have had to leave their jobs due to domestic violence to obtain unemployment benefits.[199] Another would prohibit employers from discriminating against domestic violence, sexual assault, or stalking victims simply because of their status as survivors of those crimes.[200] Each of these provisions seeks to remedy the direct economic consequences gender-based violence inflicts on women's lives.

CONCLUSION

All of these responses indicate that there is a continued need for federal statutory redress for damages resulting from gender-based crimes. New remedies may fare better than the civil rights remedy as the constitutional debate over the respective roles of federal and state authority continues. The Court reviewed the civil rights remedy during a period of an ideological shift away from federal legislative authority. But this current trend has not always prevailed and may not

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195 *See generally* KARP & KARP, *supra* note 31, §§ 1.01-1.44 (discussing civil legal remedies for spousal abuse).

196 *E.g., 1993 Crimes of Violence Hearing, supra* note 15, at 8-9 (statement of Sally Goldfarb); *1990 Women and Violence Hearing, supra* note 15, at 58-59, 64 (statement of Helen Neuborne); S. REP. No. 101-545, at 41 (1990); S. REP. No. 102-197, at 46, 54 (1981).

197 *E.g., 1993 Violent Crimes Hearing, supra* note 15, at 61 (statement of Barbara Wood) (recounting that local officials in a rural communities "frequently know the perpetrators and/or are related to them" and take the accused "out for coffee" instead of addressing the violence); *see also, e.g.*, Soto v. Flores, 103 F.3d 1056 (1st Cir. 1997) (recounting a police officer's handling of a domestic violence complaint in which he was acquainted with the perpetrator).

198 Battered Women's Economic Security and Safety Act, S. 1069, 106th Cong, §§ 2044-48 (1999); Violence Against Women Act of 1999, H.R. 357, 106th Cong., §§ 744-748 (1999).

199 S. 1069, § 2043; H.R. 357, § 743.

200 S. 1069, §§ 2021-2026; H.R. 357, §§ 721-726.

prove enduring. For example, in his 1985 dissent in *Garcia v. San Antonio Metropolitan Transit Authority*,[201] the case in which the Court overturned *National League of Cities v. Usery*[202] and held that the minimum-wage and overtime requirements of the Fair Labor Standards Act applied to a public mass-transit authority, Chief Justice Rehnquist wrote that he was confident that the then-overturned deference to state autonomy would "in time again command the support of a majority of this Court."[203] The *Morrison* decision, following a line of recent decisions curtailing federal authority, signals that Chief Justice Rehnquist's prediction has come to fruition. With the federalism scale now tipped in the other direction, the words of Justice Souter's dissent, doubting that "the majority's view will prove to be enduring law," now echo Chief Justice Rehnquist's earlier prediction.[204]

The debate is far from over. The Court may have scaled back the scope of permissible federal legislation, but nowhere does it dispute that gender-based violence is a form of discrimination that can violate the victim's civil rights. While gender-based violence still takes an enormous toll on women's lives and on the nation's economic security, we cannot afford to lessen our commitment to take every step possible to ensure safety and equality for all.

201 469 U.S. 528 (1985).
202 426 U.S. 833 (1976).
203 *Garcia*, 469 U.S. at 580 (Rehnquist, C.J., dissenting).
204 United States v. Morrison, 120 S. Ct. 1740, 1773 (2000) (Souter, J., dissenting).