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The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism

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THE SUPREME COURT, THE VIOLENCE AGAINST WOMEN ACT, AND THE USE AND ABUSE OF FEDERALISM

*Sally F. Goldfarb**

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I. INTRODUCTION

In the wake of the September 11 attacks, the rush to seek federal solutions to a host of perceived problems has been remarkably widespread.¹ Calls for federal action and resources have come from quarters that, until recently, could be relied upon to champion state autonomy and denounce federal intervention.² This shift in tactics has given new life to claims that federalism itself is an empty concept and that arguments based on federalism are only window dressing designed to lend legitimacy to a desired substantive outcome.³ Regardless of whether one accepts this nihilist critique, it is clear that we are witnessing another stage in the ebb and flow that have characterized the interpretation and application of federalist principles throughout American history.

Just as federalism creates an intrinsic tension between federal and state power,⁴ so too it engenders tensions among competing schools of

1. The federal response to the attacks that occurred on September 11, 2001, has included not only measures uniquely within the federal government's control, such as military and national security operations, but also, for example, a federal takeover of security screening at airports, a federal bail-out of the airline industry, and a federally-funded and federally-administered alternative to tort recovery for victims. *See, e.g.*, Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001); Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001); September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42, 115 Stat. 237 (2001).

2. *See, e.g.*, Linda Greenhouse, *Will the Court Reassert National Authority?*, N.Y. Times, Sept. 30, 2001, at A4.

3. *See, e.g.*, Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 948 (1994) (stating that "claims of federalism are often nothing more than strategies to advance substantive positions"); Jack M. Balkin, *The Cloning Conundrum*, N.Y. Times, Jan. 30, 2002, at A31 ("Support for states' rights has often been opportunistic, driven by substantive goals . . .").

4. Daniel J. Elazar, *Exploring Federalism* 33 (1987) (stating that "federalism is concerned simultaneously with the diffusion of political power in the name of liberty

thought about the respective roles to be accorded to federal and state government. The term “federalism” denotes multiple constituent governments united within a single, viable government entity,⁵ but the question of how to strike a balance between the two has been a site of ongoing struggle in both the political and judicial arenas.⁶ As Woodrow Wilson wrote,

The question of the relation of the States to the federal government is the cardinal question of our constitutional system It cannot, indeed, be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question.⁷

Among the infinite variations on the theme of how to allocate federal and state authority that have emerged over time,⁸ it is possible to identify at least three basic conceptions of federalism in general, and of the proper scope of federal legislative authority in particular. The first view seeks to uphold limitations on national power⁹ in order to preserve a broad sphere of deference to the states.¹⁰ In Supreme Court adjudication of constitutional challenges to federal statutes, this

and its concentration on behalf of unity” and that therefore “[i]t is rather like wanting to have one’s cake and eat it too”); see also David L. Shapiro, *Federalism: A Dialogue* 137-39 (1995) (describing the tension within federalism between centripetal forces tending toward centralization of power and centrifugal forces tending toward decentralization).

5. See, e.g., Daniel J. Elazar, *American Federalism: A View From the States* 2 (3d ed. 1984) (“Federalism can be defined as the mode of political organization that unites separate polities within an overarching political system by distributing power among general and constituent governments in a manner designed to protect the existence and authority of both.” (emphasis omitted)).

6. See generally, e.g., John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 Rutgers L.J. 913 (1995).

7. Woodrow Wilson, *Constitutional Government in the United States* 173 (1908), quoted in Robert F. Williams, *State Constitutional Law* 97 (3d ed. 1999).

8. For a useful overview of arguments for and against varying views of federalism, see generally Shapiro, *supra* note 4.

9. There is considerable irony in the fact that the current majority of the Supreme Court, as well as some others, treat this stance as synonymous with “federalism,” because the term “federalist” was used by those who supported ratification of the new Constitution to convey support for a strong national government. See generally *The Federalist Papers* (Clinton Rossiter ed., 1961); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1426 n.9 (1987). But see Shapiro, *supra* note 4, at 10-11 (suggesting that the supporters of the Constitution who identified themselves as “federalists” were stretching the meaning of the term); Amar, *supra*, at 1426 n.9 (stating that the framers of the Constitution were arguably guilty of rhetorical sleight of hand by using the term “federalist” to describe a system with strong national elements).

10. Under this view, as applied by the Court, states’ rights are not absolute. For example, they do not extend to areas that the Court regards as subject to exclusive federal control, such as the military and foreign affairs. See, e.g., *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000) (holding that a state boycott of goods from Burma was preempted by federal legislation).

focus on states' rights attained particular prominence in a number of late nineteenth- and early twentieth-century cases,¹¹ and after a period of eclipse, it has been revived by the Court's current majority.¹² On a doctrinal level, this approach has been most closely identified with laissez-faire economics and the denial of racial equality.¹³ However, this conception of federalism has also been invoked by those who have sought to harness state legal authority, including state constitutional law, in order to expand individual rights beyond the limits of federal protections.¹⁴

The second view of federalism looks to the federal government as the "guarantor of basic federal rights against state power."¹⁵ According to this perspective, a central function of Congress is to act affirmatively to safeguard individual rights, especially in the face of state inaction or resistance.¹⁶ This vision of federalism gained ascendancy during Reconstruction and again during the civil rights era of the mid-twentieth century.¹⁷ Although this approach is primarily associated with the post-Civil War amendments and congressional enforcement of their terms, its implications extend to a broad reading of Congress's powers under other constitutional provisions as well.¹⁸

There is a third, less commonly articulated vision of federalism that

11. See *infra* Part IV.A-B.

12. See generally *infra* Part IV.

13. See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); *The Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Harris*, 106 U.S. 629 (1883).

14. See generally Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (1975); Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105, 1110-14 (1977) (describing the states' rights stance adopted by antislavery lawyers in reaction to federal fugitive slave laws and the Supreme Court's rejection of this strategy in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) and *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859)). Compare *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (holding that the Vermont Constitution requires the state to allow same-sex couples to obtain the same benefits available under state law to married different-sex couples), with *Defense of Marriage Act*, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C) (requiring the federal government and permitting the states to deny recognition of same-sex marriage).

15. *Mitchum v. Foster*, 407 U.S. 225, 239 (1972).

16. As used in this article, the definition of "individual rights" is necessarily inexact but includes, at a minimum, the rights guaranteed by the Constitution. Depending on the eye of the beholder, the right of a slave to freedom can be seen as violating the slaveholder's right to property; a woman's right to abortion can be seen as impairing a fetus's right to life; and protecting the rights of victims of gender-motivated violence can be seen as detracting from the rights of perpetrators. For purposes of this article, the phrase "individual rights" refers to measures that advance the rights of at least some individuals, regardless of whether an argument can be made that the same measure impairs the rights of others.

17. See generally Robert C. Post & Reva B. Siegel, *Equal Protection By Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 Yale L.J. 441 (2000).

18. See, e.g., Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 Stan. L. Rev. 1259 (2001) (arguing for a reading of the Commerce Clause that encompasses Congress's power to protect equality under the Fourteenth Amendment).

is in significant respects a synthesis of the other two. This vision, which I will call cooperative rights federalism, recognizes that under some circumstances, states' rights and individual rights are complementary rather than mutually exclusive, and federal legislative action can therefore enhance both the rights of the states and the rights of individuals. Federal legislation that follows a model of cooperative rights federalism has the potential for expanding, rather than constricting, the states' freedom of action while at the same time securing individual rights. Federal intervention that empowers the states as well as individuals can take many forms. Examples include federal civil rights legislation enacted at the request of the states, collaborative federal-state initiatives in support of individual rights, federal measures that relieve the states of existing obstacles that prevent them from protecting the rights of their own citizens to the extent that they wish to do so, and federal enactments that begin or continue a federal-state dialogue that contributes to the development of new ways of envisioning and enforcing individual rights.¹⁹

The civil rights provision of the federal Violence Against Women Act of 1994²⁰ epitomized cooperative rights federalism.²¹ The provision, which created a federal civil rights remedy for violent crimes motivated by gender, was carefully crafted to respect the autonomy of the states and to comply with the constitutional limits on Congress's powers under the Commerce Clause²² and Section 5 of the Fourteenth Amendment.²³ It was also a significant advance for women's equality.²⁴ Nevertheless, in *United States v. Morrison*,²⁵ the Supreme Court held that the Violence Against Women Act's civil rights provision was unconstitutional.

The *Morrison* decision typified the Court's tendency to focus exclusively on the "states' rights" version of federalism. The majority opinion ignored completely the second and third visions of federalism described above. Furthermore, the Court's application of its conception of federalism was deeply flawed. Although the Court asserted that its decision was necessary to preserve federalism, its claims that the civil rights provision would violate the principles of federalism were unpersuasive, and the *Morrison* holding, which

19. See generally *infra* Part III.

20. Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified in relevant part at 42 U.S.C. § 13981).

21. See *infra* Part III.A.

22. U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .").

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

24. See *infra* Part II.

25. 529 U.S. 598 (2000).

professed to uphold those principles, actually disserved them.²⁶

There has of course been extensive debate about which, if any, of these three conceptions of federalism is most faithful to the Constitution's text and history, most analytically persuasive, and most conducive to effective governance.²⁷ For purposes of the present discussion, however, it is not necessary to resolve this debate. This article assumes as a point of departure that all three have a valid contribution to make, deserve consideration on their own terms, and can shed light on each other. Moreover, the relative merits of the three approaches may depend upon the context—for example, which constitutional source of congressional authority is under discussion.²⁸ Additionally, to the extent that the third view of federalism described above incorporates fundamental concerns of the other two, it is particularly worthy of attention.

The civil rights remedy of the Violence Against Women Act was one in a long line of federal legislative measures that the Rehnquist Court has invalidated, in whole or in part, on federalism grounds during the past decade.²⁹ *Morrison* thus provides fertile ground for an examination of the Court's current mode of federalism analysis.³⁰ The *Morrison* decision is particularly significant because the Court used it as an opportunity to clarify and extend its application of federalism principles to both the Commerce Clause and Section 5 of the Fourteenth Amendment.

Part II of this article provides a brief history of the Violence Against Women Act's civil rights provision, including a description of the evidence compiled by Congress in support of its finding that it had authority to enact the civil rights remedy under both the Commerce

26. See generally *infra* Part IV.

27. There is also debate about what criteria should predominate when interpreting the Constitution's federalism-related provisions. For a discussion of formalist and functionalist methodology for deriving constitutional federalism doctrine, see *infra* notes 240-45 and accompanying text.

28. See *infra* Parts IV.B, IV.D, V (describing the primacy of Congress's role in protecting individual rights under the Fourteenth Amendment).

29. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *New York v. United States*, 505 U.S. 144 (1992).

30. Despite the recent political and popular clamor for expanded federal authority in the aftermath of September 11, see *supra* notes 1-3 and accompanying text, there is as yet no indication that the majority of the Court is willing to disavow its current trend of interpreting federalism as a source of constraints on congressional power and protection for state sovereignty. See *Greenhouse*, *supra* note 2; see also *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 122 S. Ct. 1864 (2002) (holding that sovereign immunity prohibits Congress from authorizing the Federal Maritime Commission to adjudicate a complaint by a private party against a state agency).

Clause and Section 5 of the Fourteenth Amendment. This part discusses the significance of the civil rights provision and describes the resistance it faced, both while it was pending in Congress and after it was enacted.

Part III explores the many ways in which the civil rights provision fulfilled federalism's positive potential. As this part describes, the civil rights remedy was a model of cooperative rights federalism, enhancing the rights of women at the same time that it met the states' own request for help in overcoming obstacles that prevented them from implementing an effective legal response to gender-motivated violence. The Violence Against Women Act's civil rights provision was part of an ongoing federal-state legislative dialogue, a process that is one of federalism's greatest strengths. In addition, it significantly advanced many of the values that federalism is commonly thought to serve.

Part IV argues that the Violence Against Women Act's civil rights provision was a valid exercise of Congress's powers under the Commerce Clause and Section 5 of the Fourteenth Amendment. After critiquing the Court's reasoning in *United States v. Morrison*, this part examines the decision's detrimental implications for federalism.

Finally, Part V proposes an alternative analysis that should have been adopted by the Court in *Morrison*. If the Court felt the need to supplement well-established constitutional tests under the Commerce Clause and Section 5 of the Fourteenth Amendment with an additional limiting factor to prevent Congress from assuming unlimited power, it should have done so by focusing on the question of whether the problem that Congress sought to address lay beyond the capacity of the states to handle. In the case of the civil rights provision, the fact that the states themselves were discriminating against victims of gender-motivated violence, and the fact that a basic right to gender equality is a fundamental characteristic of national citizenship, demonstrated the need for federal intervention. Unlike the Court's misguided reliance on a series of bright-line categorical distinctions, this approach to limiting congressional power accommodates both the states' interest in autonomy and individuals' right to equality. Although it is too late for the Violence Against Women Act's civil rights remedy, application of this standard in future cases could help the Court avoid the mistakes that it made in *Morrison*.

II. A BRIEF HISTORY OF THE VIOLENCE AGAINST WOMEN ACT'S CIVIL RIGHTS PROVISION

The Violence Against Women Act of 1994 ("VAWA")³¹ was the nation's first attempt at a wide-ranging federal response to the devastation caused by rape, domestic violence, and other forms of violence against women.³² The statute contains dozens of provisions attacking the problem of violence against women from a variety of different angles, including criminal punishment, improvement of the legal system, research and data collection, education and prevention, and direct assistance to victims. Among other things, the legislation makes it a federal crime to cross state lines in order to commit domestic violence or to violate a protection order, requires states to give full faith and credit to protection orders issued by other states, reforms immigration law to protect battered immigrant women who flee their abusers, and amends the Federal Rules of Evidence to restrict admissibility of evidence of a victim's sexual history in civil as well as criminal cases.³³ The statute authorized \$1.62 billion in federal funds over the course of six years to support a host of programs, including federal grants to increase the effectiveness of police, prosecutors, judges, and victim services agencies in cases of violent crime against women; federal funding for battered women's shelters and a national toll-free domestic violence hotline; rape and domestic violence education and prevention programs; and a national database to improve local, state and federal law enforcement agencies' ability to record and share information on domestic violence and stalking offenses.³⁴

The most significant and most controversial aspect of VAWA was the civil rights provision, which declared for the first time that gender-motivated violent crime is a violation of the victim's federal civil

31. Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 20, 28, and 42 U.S.C.). The Violence Against Women Act was originally enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). Subsequently, Congress amended, reauthorized, and expanded some of its provisions in 1996 and 2000. Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491 (2000); Pub. L. No. 104-201, 110 Stat. 2655 (1996) (codified as amended at 18 U.S.C. § 2261A). The 1996 and 2000 amendments did not affect the civil rights provision. References to VAWA in this article apply to the original legislation enacted in 1994. Apart from the civil rights provision, which was struck down in *Morrison*, all the other provisions of the 1994 legislation remain in effect, as amended.

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

33. See generally Pub. L. No. 103-322, 108 Stat. 1902 (1994).

34. *Id.* For a more detailed description of the provisions of the Violence Against Women Act of 1994, see Sally F. Goldfarb, "No Civilized System of Justice": *The Fate of the Violence Against Women Act*, 102 W. Va. L. Rev. 499, 504-06 (2000).

rights.³⁵ The provision created a private, civil right of action against any person, whether or not acting under color of state law, who committed a "crime of violence motivated by gender."³⁶ Successful plaintiffs in civil rights actions brought under VAWA could recover compensatory and punitive damages, injunctive and declaratory relief, attorney's fees, and "such other relief as the court may deem appropriate."³⁷ By definition, the civil rights remedy was available only in cases of violence where gender discrimination was present.³⁸

35. The civil rights provision reads in relevant part as follows:

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

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

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

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

(2) the term "crime of violence" means –

(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

42 U.S.C. § 13981 (1994).

36. "Crime of violence" was defined to include an act or series of acts that would constitute a felony against a person, or a felony against property that presents a serious risk of physical injury to a person. *Id.* § 13981(d)(2)(A). The definition of "crime of violence" also included acts that would meet the foregoing definition but for the relationship between the victim and the perpetrator. *Id.* § 13981(d)(2)(B). The "crime of violence" definition operated without regard to whether the defendant had been criminally charged, prosecuted, or convicted. *Id.* § 13981(e)(2). The phrase "motivated by gender" was defined as an act "committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." *Id.* § 13981(d)(1). For a discussion of the application of these definitions in cases decided under VAWA's civil rights provision, see, e.g., Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 Harv. Women's L.J. 123 (1999); 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, 28-33 (1996).

37. 42 U.S.C. § 1988, § 13981(c).

38. See *id.* § 13981(d)(1) ("[T]he term 'crime of violence motivated by gender' means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender."); see also *id.* §

In short, VAWA's civil rights provision provided an "anti-discrimination remedy for violently expressed gender prejudice."³⁹

VAWA's enactment was the culmination of a lengthy examination by Congress of the "national tragedy" inflicted by violence against women.⁴⁰ Over the course of more than four years, Congress held hearings, compiled evidence, and issued reports examining the impact of rape, domestic violence, and related crimes on women and society.⁴¹ Statistics assembled by Congress demonstrated that rape and domestic violence were occurring at epidemic levels and that rates of violent crimes against women were rising even while rates of many other crimes were dropping.⁴² Congress received evidence that domestic violence is a principal cause of injury and death to women, and that rape exacts an enormous toll from its victims and disrupts the lives of countless women who fear becoming victims.⁴³ In addition, Congress heard testimony that violence committed by men against women is often an expression of gender discrimination and a way to keep women "in their place."⁴⁴

Throughout the extended period when it was under consideration in Congress, VAWA's civil rights remedy received strong support from many quarters, including a broad range of women's rights and civil rights organizations, advocates for domestic violence and rape survivors, and labor, religious, and community groups.⁴⁵ State attorneys general from the vast majority of the states and other state and local law enforcement officials lobbied actively for its passage.⁴⁶

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

39. S. Rep. No. 103-138, at 38 (1993) [hereinafter 1993 Senate Report].

40. See S. Rep. No. 102-197, at 39 (1991) [hereinafter 1991 Senate Report].

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

42. See, e.g., S. Rep. No. 101-545, at 30-36 (1990) [hereinafter 1990 Senate Report].

43. See *Morrison*, 529 U.S. at 631-34 (Souter, J., dissenting) (summarizing evidence before Congress).

44. See *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary of the House of Representatives*, 103d Cong. 3, 5, 7 (1993) [hereinafter 1993 House Hearing] (statement of Sally Goldfarb); *Violence Against Women: Victims of the System: Hearing Before the Senate Judiciary Comm.*, 102d Cong. 262 (1991) [hereinafter 1991 Senate Hearing] (statement of Leslie R. Wolfe). Crimes such as rape and domestic violence are not committed exclusively by men against women. Accordingly, the VAWA civil rights remedy applied to crimes of violence motivated by gender, regardless of the sex of the victim and perpetrator. However, the overwhelming majority of rape and domestic violence is committed by men against women. Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, *Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey* 2, 8 (1998). Because of the predominance of this pattern, this article, like the legislative history of VAWA, focuses on male-against-female violence.

45. See Goldfarb, *supra* note 34, at 543.

46. See *infra* notes 172-87, 445-47 and accompanying text.

The civil rights remedy also encountered resistance. Among its most outspoken opponents were representatives of the federal and state judiciaries, including Chief Justice Rehnquist, the Judicial Conference of the United States, and the Conference of Chief Justices.⁴⁷ Their objections were largely framed in terms of federalism.⁴⁸ The judicial critics protested that the civil rights provision would “federalize” areas of law reserved to the states, particularly family law.⁴⁹ According to Chief Justice Rehnquist, VAWA’s civil rights remedy would “involve the federal courts in a whole host of domestic relations disputes.”⁵⁰

These arguments erroneously equated the civil rights claims created by VAWA with domestic relations claims, and compounded the error by supposing that domestic relations issues are alien to federal law. VAWA established a civil rights remedy that was entirely distinguishable from domestic relations actions available under state law, beginning with the fact that VAWA redressed a different injury, required different proof, and offered different relief.⁵¹ The civil rights provision applied to cases of sex-discriminatory violence, without regard to whether those cases arose within or outside the family.⁵² Although articulated in terms of federalism, the judges’ arguments reflected a set of traditional assumptions that have long operated to insulate violence against women from legal redress. As I have described at greater length elsewhere, these assumptions include the tendency to consider all legal matters involving women as domestic relations matters, the belief that issues concerning the family belong

47. See generally Goldfarb, *supra* note 34, at 510-12; Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 Ohio St. L.J. 1, 51-54 (2000); Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. Cal. L. Rev. 269 (2000). The judiciary was not united in opposing the civil rights provision, however. The National Association of Women Judges actively supported VAWA in its entirety. 1993 House Hearing, *supra* note 44, at 30-32.

48. See, e.g., Nourse, *supra* note 36, at 16.

49. See, e.g., 1993 House Hearing, *supra* note 44, at 70, 75 (statement of the Judicial Conference of the United States); *id.* at 80 (statement of the Conference of Chief Justices). To a lesser extent, the judicial opposition also rested on claims that the civil rights provision would contribute to the excessive federalization of criminal law. See *id.* at 71, 73 (statement of the Judicial Conference of the United States); *id.* at 83 (statement of the Conference of Chief Justices). The criminal law objection, like the family law objection, betrayed a misunderstanding of both the civil rights remedy and the relationship between federal and state law. See *infra* Parts III.A, IV.D.

50. William H. Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, The Third Branch, Jan. 1992, at 1, 3.

51. For further discussion of the differences between VAWA’s civil rights provision and state domestic relations law, see *infra* Parts III.A, IV.D.

52. In fact, close to half the VAWA civil rights cases resulting in reported decisions arose in commercial or educational settings. Brief of Law Professors as Amici Curiae at 12-14 & n.18, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29). *United States v. Morrison* arose from a gang rape at a university and involved no family relationships. *Morrison*, 529 U.S. 598.

exclusively in state court, and the idealization of family privacy and legal nonintervention in the family.⁵³ All of these assumptions can be traced to gender stereotypes that associate women with the private sphere.⁵⁴

VAWA's chief congressional sponsor responded to the judges' objections by pointing out the similarities between VAWA and other federal civil rights laws and asserting that the bill fell "within well established grounds for Federal jurisdiction."⁵⁵ However, in a major concession to the judiciary, the bill's sponsors ultimately agreed to adopt amendments narrowing the civil rights provision substantially.⁵⁶ The amendments included the addition of the animus requirement; restrictions on the types of felonies covered; language stating that federal courts hearing VAWA civil rights cases would not have supplemental jurisdiction over state law claims seeking establishment of divorce, alimony, marital property, or child custody decrees; and a prohibition on removal to federal court of any VAWA civil rights action filed in state court.⁵⁷ On the basis of these changes, the Judicial Conference withdrew its opposition to the civil rights remedy.⁵⁸ VAWA then passed by an overwhelming bipartisan majority and was signed into law.⁵⁹

When Congress enacted the civil rights provision, it explicitly based its authority to do so on both the Commerce Clause and Section 5 of the Fourteenth Amendment.⁶⁰ The extensive legislative record Congress compiled thoroughly documented the factual and legal foundation for its exercise of both of these constitutional powers.⁶¹

As the basis for its action under the Commerce Clause, Congress found that gender-motivated violence has massive effects on interstate commerce. Specifically, Congress found that

[c]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from

53. See generally Goldfarb, *supra* note 47.

54. See *id.*

55. *Violence Against Women: Hearing Before the Subcomm. on Crime & Criminal Justice of the House of Reps. Comm. on the Judiciary*, 102d Cong. 10 (1992) [hereinafter *1992 House Hearing*] (statement of Senator Joseph Biden).

56. See 1993 Senate Report, *supra* note 39, at 40, 64 (stating that amendments were the result of discussions with, *inter alia*, a representative of the Judicial Conference).

57. See 1993 *House Hearing*, *supra* note 44, at 71.

58. *Id.* at 70-73. The Conference of Chief Justices continued to oppose the civil rights measure. *Id.* at 74-77.

59. Nourse, *supra* note 36, at 34-36.

60. 42 U.S.C. § 13981(a) (1994).

61. On the legal basis for Congress's constitutional authority to enact the civil rights provision, see 1993 *House Hearing*, *supra* note 44, at 42-50 (statement of Burt Neuborne); *id.* at 51-68 (statement of Cass Sunstein); 1991 *Senate Hearing*, *supra* note 44, at 84-102, 126-30 (statement of Burt Neuborne); *id.* at 103-30 (statement of Cass Sunstein).

traveling interstate, from engaging in employment in interstate business, and from transacting . . . business . . . in interstate commerce; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products⁶²

Statistics presented to Congress estimated that the social costs of violence against women total as much as ten billion dollars per year.⁶³ Witnesses before Congress testified to the losses suffered by interstate businesses because of the impact of domestic violence on employees.⁶⁴

As the statistics compiled by Congress attest, rape and domestic violence have a disastrous economic impact on women, impairing their ability to participate in interstate commerce. As many as half of all homeless women and children are fleeing domestic violence.⁶⁵ Almost fifty percent of rape victims quit their jobs or are fired in the aftermath of the crime.⁶⁶ Fear of rape prevents women from taking otherwise desirable jobs that are perceived as unsafe because of their hours, location, or the need to use dangerous public transportation.⁶⁷ Many abusive spouses or partners use violence to prevent women from obtaining employment or education.⁶⁸ A battered woman who is employed often suffers from increased absenteeism, decreased productivity, physical and psychological injury, and the effects of the abuser's on-the-job harassment, all of which jeopardize her ability to

62. H.R. Conf. Rep. No. 103-711, at 385 (1994) [hereinafter House Conference Report]; see also 1993 Senate Report, *supra* note 39, at 54; 1991 Senate Report, *supra* note 40, at 53 ("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.").

63. 1993 Senate Report, *supra* note 39, at 41.

64. See *Hearing on Domestic Violence: Hearing Before the Senate Judiciary Comm.*, 103d Cong. 17-18 (1993) (statement of James Hardeman, describing the economic impact of domestic violence on employers' "bottom line" due to tardiness, poor job performance, increased medical claims, and interpersonal conflicts in the workplace); *Women and Violence: Hearing Before the Senate Judiciary Comm.*, 101st Cong., pt. 1, 58 [hereinafter 1990 Senate Hearing] (statement of Helen R. Neuborne, citing estimates that absenteeism due to domestic violence costs employers between three and five billion dollars a year).

65. 1990 Senate Report, *supra* note 42, at 37 (citation omitted).

66. 1993 Senate Report, *supra* note 39, at 54 (citation omitted).

67. See 1993 House Hearing, *supra* note 44, at 40-41 (statement of Burt Neuborne); 1993 Senate Report, *supra* note 39, at 54; 1991 Senate Report, *supra* note 40, at 38-39.

68. 1992 House Hearing, *supra* note 55, at 117 (statement of Marcella Maxwell, stating that "women cannot work because of possessive/abusive spouses, or they are limited to working in places where the spouse can maintain control or contact"); 1991 Senate Hearing, *supra* note 44, at 242 (statement of Elizabeth Athanasakos, citing study showing that one-third of women surveyed said that abusive husbands had prohibited them from working and one-quarter reported that abusive husbands had prevented them from going to school).

advance her career or even keep her job.⁶⁹ Thus, violence is a tool for maintaining women's economic inferiority to, and dependency on, men. As the Senate Judiciary Committee concluded, "[g]ender-based violence bars its most likely targets—women—from full [participation] in the national economy."⁷⁰

With regard to its legislative authority under Section 5 of the Fourteenth Amendment, Congress assembled a "voluminous congressional record" revealing "pervasive bias in various state justice systems against victims of gender-motivated violence."⁷¹ Congress found that the states' discrimination against women took several forms. Some states blocked women's access to the courts by continuing to enforce legal doctrines such as spousal tort immunity, which bars one spouse from suing the other, and marital rape exemptions, which eliminate or restrict criminal penalties in cases of husbands who rape their wives.⁷² These doctrines originated in, and are reflective of, an era when women were expressly denied legal equality.⁷³ States also erected barriers to justice for women by singling out domestic violence and rape cases for the imposition of burdensome procedural and evidentiary rules.⁷⁴ Finally, police, prosecutors, and judges routinely regarded crimes against women as less serious than comparable crimes against men and treated female victims with suspicion and disdain.⁷⁵ Much of the information on states' discriminatory treatment of female victims of violent crime

69. 1991 Senate Hearing, *supra* note 44, at 242-43 (statement of Elizabeth Athanasakos, citing studies indicating that approximately one-quarter to one-half of women interviewed reported losing a job at least in part because of abuse); 1990 Senate Hearing, *supra* note 64, at 68-69 (statement of Helen R. Neuborne, describing ways in which domestic violence causes women's absenteeism, reduced work performance, and difficulty in securing and maintaining employment); 1990 Senate Report, *supra* note 42, at 33 (stating that the costs of violent crime against women include "lost careers"); *id.* at 37 (stating that domestic violence "takes its toll in employee absenteeism and sick time").

70. 1993 Senate Report, *supra* note 39, at 54; see 1991 Senate Report, *supra* note 40, at 53.

71. *United States v. Morrison*, 529 U.S. 598, 619-20 (2000).

72. 1993 Senate Report, *supra* note 39, at 42; 1991 Senate Report, *supra* note 40, at 45, 54. Six states still bar intentional tort suits between spouses. See 6 Family Law & Practice 67A-1 to 67A-5 (Arnold H. Rutkin ed., 2001). The majority of states retain a partial exemption from criminal charges for husbands who rape their wives; their statutes typically impose lighter sentences for sexual offenses within marriage, create special procedural requirements for marital rape prosecutions, or consider certain acts to be sexual offenses only if they take place outside of marriage. See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Cal. L. Rev. 1373 (2000).

73. See generally Hasday, *supra* note 72; Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117 (1996).

74. 1993 Senate Report, *supra* note 39, at 44-47; 1991 Senate Report, *supra* note 40, at 44-46.

75. See 1993 Senate Report, *supra* note 39, at 41-42, 49; H.R. Rep. No. 103-395, at 27-28 (1993) [hereinafter 1993 House Report]; 1991 Senate Report, *supra* note 40, at 34, 43-48.

came from studies commissioned by the highest courts of the states to examine gender bias in the state courts.⁷⁶ These reports provided “overwhelming evidence that gender bias permeates the court system and that women are most often its victims.”⁷⁷ In summarizing its findings, Congress concluded that

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; . . . and the victims of crimes 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.⁷⁸

Congress found that the discriminatory treatment of women by the state justice systems was rooted in centuries-old patterns of sex discrimination and adherence to invidious stereotypes about women; these are the same attitudes that contribute to the epidemic of violence against women.⁷⁹ Thus, the discrimination practiced by state actors mirrored and compounded the discrimination committed by individual perpetrators of gender-motivated violence.⁸⁰ Many witnesses spoke of victims’ experiences of being “revictimized” by their discriminatory treatment within the state legal system.⁸¹ In passing the civil rights provision of VAWA, Congress sought to confront this phenomenon of mutually reinforcing private and public discrimination by providing a remedy that would simultaneously attack the bias inherent in gender-motivated violence and the bias inherent in the state justice systems.⁸²

76. See 1993 Senate Report, *supra* note 39, at 44-47, 49; 1993 House Report, *supra* note 75, at 27-28; 1991 Senate Report, *supra* note 40, at 34, 43-47.

77. 1993 Senate Report, *supra* note 39, at 49 (quoting Lynn Hecht Schafran, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, Trial, Feb. 1990, at 28).

78. House Conference Report, *supra* note 62, at 385-86.

79. 1993 Senate Report, *supra* note 39, at 38 (describing “archaic prejudices” against women by “the public and those within the justice system”); 1991 Senate Report, *supra* note 40, at 33-34 (describing lingering “prejudices” and “stereotypes” against female victims of rape and domestic violence); *id.* at 46 (stating that “law reform has failed to eradicate the stereotypes that drive the system” to treat female victims disadvantageously); 1990 Senate Report, *supra* note 42, at 34 (describing “negative attitudes” that lead those in the state criminal justice system to blame and devalue victims of rape and domestic violence, and stating that these attitudes “may reflect more general societal attitudes” that condone violence against women).

80. See 1993 House Hearing, *supra* note 44, at 67 (statement of Cass Sunstein, describing the “clear[]” involvement of the state justice system in private acts of gender-motivated violence).

81. See, e.g., 1991 Senate Hearing, *supra* note 44, at 148-49 (statement of Gill Freeman); 1990 Senate Report, *supra* note 42, at 33-34.

82. See 1993 Senate Report, *supra* note 39, at 38 (“[T]he act is intended to educate the public and those within the justice system against the archaic prejudices that blame women for the beatings and the rapes they suffer”); *id.* at 55 (“[F]irst, it attacks gender-motivated crimes that threaten women’s equal protection of the laws;

Despite the gender discrimination that marred the states' handling of rape and domestic violence cases, there was one sense in which the law of some states was ahead of federal law with regard to gender-motivated violence. When VAWA was under consideration, Congress noted that a handful of states had adopted criminal or civil remedies for bias crimes committed because of gender.⁸³ These state statutes recognized that violent crime motivated by gender bias is a form of discrimination, an insight not fully reflected in federal law at the time.⁸⁴ The state laws had a number of deficiencies, however. First, although the majority of states had adopted an anti-bias crime law, only a small number covered gender bias.⁸⁵ Second, some of the statutes covering gender bias provided only criminal remedies.⁸⁶ Although criminal law has an important role to play in combating violence against women, civil remedies for gender-motivated violence are critically important because they allow the plaintiff to control the litigation, provide an opportunity for recovery of monetary damages, and are subject to the preponderance of the evidence standard rather than the more demanding standard of proof beyond a reasonable doubt.⁸⁷ Additionally, some of the state civil statutes presented procedural and substantive obstacles that made them ill-suited to cases arising from rape and domestic violence.⁸⁸ As a result, the state civil statutes were rarely used in cases of gender-motivated violence.⁸⁹ Nevertheless, the state laws provided a useful, real-world model for the concept that gender-based acts of violence could be identified as an illegal denial of equality.

At the time VAWA was introduced, federal law lacked a generally applicable prohibition against gender-motivated violence, although federal civil rights legislation had prohibited many other types of discriminatory violence for 120 years.⁹⁰ The two principal federal statutes that address the issue of bias crimes omit gender-motivated crimes from their coverage.⁹¹ Other federal civil rights laws fail to

second, it provides a remedy to fill the gaps and rectify the biases of existing State laws."'). For a discussion of ways in which the VAWA civil rights remedy would redress and prevent discriminatory state action, see *infra* Part IV.B.

83. 1993 Senate Report, *supra* note 39, at 48 & n.47.

84. See *infra* notes 90-93 and accompanying text.

85. 1993 Senate Report, *supra* note 39, at 48 & n.47.

86. *Id.*; see also 1993 House Hearing, *supra* note 44, at 15 n.17 (statement of Sally Goldfarb, indicating that only eight states and the District of Columbia provided civil remedies for gender-motivated violence).

87. For discussion of the advantages of civil over criminal remedies for gender-motivated violence, see Goldfarb, *supra* note 34, at 539-40.

88. See, e.g., Andrea Brenneke, *Civil Rights Remedies for Battered Women: Axiomatic & Ignored*, 11 Law & Ineq. 1, 39-43 (1992) (describing the Massachusetts Civil Rights Act).

89. *Id.* at 36, 112-13.

90. See 1993 Senate Report, *supra* note 39, at 51.

91. See 18 U.S.C. § 245 (2000); Hate Crimes Statistics Act, 28 U.S.C. § 534 (1994). Efforts to include gender in these statutes have been unsuccessful. See Goldscheid,

provide a remedy in most cases of violence motivated by gender. For example, Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 forbid certain types of sex-discriminatory violence in the workplace and educational institutions respectively, but they do not apply to violence that occurs in other settings.⁹² Forty-two U.S.C. § 1983 provides a cause of action for discrimination committed under color of state law, and 42 U.S.C. § 1985(3) prohibits conspiracies to deprive someone of a federally protected right, but neither statute extends to most cases of rape and domestic violence, which involve individual, private defendants.

By enacting VAWA's civil rights remedy, Congress sought to close a gap in federal antidiscrimination law by treating violence motivated by gender bias as seriously as violence motivated by racial or religious prejudice.⁹³ Congress modeled the language of the new civil rights remedy on previous federal civil rights legislation.⁹⁴ The congressional committee reports pointed to existing federal civil rights laws as sources of guidance on how to interpret and apply the new legislation.⁹⁵

The passage of VAWA's civil rights provision represented a major expansion of legal protection for women's right to equality. The civil rights provision proclaimed that violence motivated by gender is not merely an assault on an individual; it is part of a social pattern of discrimination by members of one group against members of another.⁹⁶ This formulation is consistent with the feminist hypothesis that male violence against women is one of the main ways in which gender inequality is expressed and maintained.⁹⁷ Witnesses before Congress emphasized that women's disproportionate vulnerability to gender-motivated violence results in a form of second-class citizenship.⁹⁸ By declaring that such violence is a denial of the victim's

supra note 36, at 124, 131; W.H. Hallock, *The Violence Against Women Act: Civil Rights For Sexual Assault Victims*, 68 Ind. L.J. 577, 604 (1993). At the same time that it passed VAWA, Congress passed the Hate Crimes Sentencing Enhancement Act, which provides for increased sentences in cases of federal crimes committed because of bias, including gender bias. Pub. L. No. 103-322 § 280,003, 108 Stat. 2096 (codified at 28 U.S.C. § 994 note (1994)).

92. See Education Amendments of 1972, tit. IX, 20 U.S.C. §§ 1681-88; Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to 2000e-17.

93. See 1993 Senate Report, *supra* note 39, at 38, 49.

94. The phrase "because of gender or on the basis of gender" in 42 U.S.C. § 13981(d)(1) was derived from Title VII of the Civil Rights Act of 1964. See 1993 Senate Report, *supra* note 39, at 52-53. The term "animus" was based on Supreme Court case law interpreting 42 U.S.C. § 1985(3). See *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

95. 1993 Senate Report, *supra* note 39, at 52-54, 64; 1991 Senate Report, *supra* note 40, at 50-51.

96. See 1993 Senate Report, *supra* note 39, at 51.

97. See generally Goldfarb, *supra* note 47, at 14-18.

98. See, e.g., 1990 Senate Hearing, *supra* note 64, at 57 (statement of Helen R. Neuborne).

federal civil rights, the new legislation went far toward guaranteeing women equal status under the law.⁹⁹

On a more concrete level, the new civil rights remedy provided victims with a cause of action that was frequently a desirable substitute for or complement to existing legal alternatives. Plaintiffs in civil suits brought under VAWA could sidestep the restrictions of state laws establishing tort immunities, marital rape exemptions, and short statutes of limitations.¹⁰⁰ The option of filing in federal court afforded access to a potentially superior forum.¹⁰¹ VAWA differed from Title VII by offering unlimited damages awards, a far longer statute of limitations, and no requirement of exhaustion of administrative remedies; moreover, for acts of violence in workplaces employing fewer than fifteen people, a plaintiff could sue under VAWA but not under Title VII.¹⁰² Unlike most state tort claims, VAWA provided access to court-ordered attorney's fees¹⁰³ and redress for the discriminatory aspect of gender-motivated violence.¹⁰⁴ By providing a civil remedy, VAWA was in many ways more advantageous to plaintiffs than a criminal statute.¹⁰⁵

In the years following VAWA's enactment in 1994, plaintiffs invoked the new civil rights remedy in cases alleging various types of gender-motivated violence, including rape and sexual assault, sexual harassment in the workplace, domestic violence, and murder.¹⁰⁶ In

99. See 1993 Senate Report, *supra* note 39, at 44 (stating that the civil rights provision "sends a powerful message that violence due to gender bias affronts an ideal of equality shared by the entire Nation"); Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 Harv. L. Rev. 135, 138 (2000) ("[T]he Violence Against Women Act [civil rights provision] took an historic stand and hopeful step toward free and safe lives for women as equal citizens of this nation.").

100. The statute of limitations for VAWA civil rights claims was four years. See 28 U.S.C. § 1658 (1994); Julie Goldscheid & Susan Kraham, *The Civil Rights Remedy of the Violence Against Women Act*, 29 Clearinghouse Rev. 505, 523-24 (1995).

101. Plaintiffs could choose whether to file a VAWA claim in federal or state court. 42 U.S.C. § 13981(e)(3),(4) (1994). For a description of the potential advantages of bringing a VAWA suit in federal court, see Goldfarb, *supra* note 34, at 539; see also Goldscheid & Kraham, *supra* note 100, at 521 (discussing strategic considerations in choosing whether to file a VAWA claim in federal or state court).

102. See 3 Merrick T. Rossein, *Employment Discrimination Law and Litigation* § 35.3 (1998).

103. See 42 U.S.C. § 1988(b) (1994).

104. See 1993 Senate Report, *supra* note 39, at 50-51.

105. See *supra* note 87 and accompanying text.

106. See, e.g., *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820 (4th Cir. 1999) (en banc), *aff'd sub nom. United States v. Morrison*, 529 U.S. 598 (2000) (alleging gang rape by fellow students in university dormitory); *Santiago v. Alonso*, 96 F. Supp. 2d 58 (D.P.R. 2000) (alleging rape, domestic violence, and attempted homicide, as described in *Santiago v. Alonso*, No. 97-2737 (DRD), 1999 WL 688137 (D.P.R. Aug. 27, 1999)); *Burgess v. Cahall*, 88 F. Supp. 2d 319 (D. Del. 2000) (alleging sexual assault by employment supervisor); *Williams v. Bd. of County Comm'rs*, No. 98-2485-JTM, 1999 U.S. Dist. LEXIS 13532 (D. Kan. Aug. 24, 1999) (alleging rape by police officer); *Kuhn v. Kuhn*, No. 98-C2395, 1999 U.S. Dist. LEXIS 11010 (N.D. Ill. July 14, 1999) (alleging physical and sexual violence by husband); *Bergeron v.*

several decisions on a motion to dismiss or motion for summary judgment, the courts found that the plaintiff had made a sufficient showing of gender motivation by alleging factors such as the defendant's use of derogatory epithets, the absence of provocation, the fact that the crime alleged was a sexual assault, and the use of violence to perpetuate women's stereotypically submissive role.¹⁰⁷

Almost as soon as plaintiffs began filing claims under VAWA, defendants raised the argument that the legislation was unconstitutional. Challenging Congress's declaration that it had authority to enact the civil rights provision under both the Commerce Clause and Section 5 of the Fourteenth Amendment, defendants asserted that a civil rights remedy for gender-motivated violence exceeded Congress's constitutionally enumerated powers. Of the approximately two dozen cases in which state and lower federal courts decided this issue, all but three upheld the statute's constitutionality.¹⁰⁸

Bergeron, 48 F. Supp. 2d 628 (M.D. La. 1999) (alleging battery, assault, and attempted rape by husband); Wright v. Wright, No. Civ. 98-572-A (W.D. Okla. Apr. 27, 1999) (alleging physical violence by defendant against wife and daughter); Ericson v. Syracuse Univ., 45 F. Supp. 2d 344 (S.D.N.Y. 1999) (alleging sexual harassment by university tennis coach, as described in Ericson v. Syracuse Univ., No. 98 Civ. 3435 (JSR), 1999 U.S. Dist. LEXIS 691 (S.D.N.Y. Jan. 25, 1999)); Culberson v. Doan, 65 F. Supp. 2d 701 (S.D. Ohio 1999) (alleging that defendant beat and murdered girlfriend); Doe v. Mercer, 37 F. Supp. 2d 64 (D. Mass.) (alleging gang rape), *vacated and remanded on other grounds sub nom.* Doe v. Walker, 193 F.3d 42 (1st Cir. 1999); Liu v. Striuli, 36 F. Supp. 2d 452 (D.R.I. 1999) (alleging sexual harassment and rape by university advisor); Ziegler v. Ziegler, 28 F. Supp. 2d 601 (E.D. Wash. 1998) (alleging assault, threats, and harassment by husband); Griffin v. City of Opa-Locka, No. 98-1550-Civ-Highsmith (S.D. Fla. Aug. 27, 1998) (alleging sexual harassment and sexual assault by employment supervisor); C.R.K. v. Martin, No. 96-1431-MLB, 1998 U.S. Dist. LEXIS 22305 (D. Kan. July 10, 1998) (alleging rape and threats of physical violence by fellow student at plaintiff's high school); Timm v. DeLong, 59 F. Supp. 2d 944 (D. Neb. 1998) (alleging physical and sexual assault by husband); Mattison v. Click Corp. of Am., No. 97-CV-2736, 1998 U.S. Dist. LEXIS 720 (E.D. Pa. Jan. 27, 1998) (alleging sexual assault, battery, and harassment by employer); Crisonino v. N.Y. City Hous. Auth., 985 F. Supp. 385 (S.D.N.Y. 1997) (alleging nonsexual, gender-motivated assault by employment supervisor); Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997) (alleging assault, harassment, and rape by employer); Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997) (alleging physical and sexual abuse by husband); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997) (alleging sexual abuse by priest), *rev'd in part and vacated in part on other grounds*, 134 F.3d 1339 (8th Cir. 1998); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996) (alleging physical and mental abuse by husband).

107. See, e.g., Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000); Jugmohan v. Zola, No. 98 Civ. 1509, 2000 U.S. Dist. LEXIS 1910 (S.D.N.Y. Feb. 24, 2000); Kuhn, 1999 U.S. Dist. LEXIS 11010; Ziegler, 28 F. Supp. 2d 601; Crisonino, 985 F. Supp. 385; see also Julie Goldscheid & Risa E. Kaufman, *Seeking Redress for Gender-Based Bias Crimes: Charting New Ground in Familiar Legal Territory*, 6 Mich. J. Race & L. 265 (2001) (analyzing how courts have defined gender motivation); cf. Harris v. Franklin-Williamson Human Servs., Inc., 97 F. Supp. 2d 892 (S.D. Ill. 2000) (granting defendants' motion for summary judgment in the absence of allegations showing gender motivation).

108. Of the cases listed in note 106, all but *Brzonkala*, *Santiago*, and *Bergeron* held that the civil rights remedy was constitutional. See also Fisher v. Grimes, No. 98 CVD

The first case to hold VAWA's civil rights provision unconstitutional was *Brzonkala v. Virginia Polytechnic Institute and State University*.¹⁰⁹ In this case, plaintiff Christy Brzonkala alleged that soon after she arrived at Virginia Polytechnic Institute and State University (Virginia Tech) as an eighteen-year-old freshman, she was gang-raped in a university dormitory by two students whom she had just met, Antonio Morrison and James Crawford, both of whom were members of the school's nationally ranked football team.¹¹⁰ After the two men took turns forcing her onto a bed and raping her, Morrison warned her, "You better not have any fucking diseases."¹¹¹ Later, he announced publicly, "I like to get girls drunk and fuck the shit out of them."¹¹²

Brzonkala was severely traumatized by the attack and became depressed, suicidal, and unable to continue attending her classes.¹¹³ She filed a complaint against Morrison and Crawford under Virginia Tech's sexual assault policy.¹¹⁴ Although a university judicial committee found Morrison guilty of sexual assault and ordered him suspended for two semesters, the university convened a rehearing and eventually overturned Morrison's punishment, allowing him to continue his education, remain on the football team, and retain his full athletic scholarship.¹¹⁵ Humiliated and fearing for her safety,¹¹⁶ Brzonkala withdrew from the university and filed suit in federal district court. Her complaint claimed, *inter alia*, that Morrison and Crawford had violated her civil rights under VAWA.¹¹⁷

865 (N.C. Dist. Ct. July 22, 1999); *Young v. Johnson*, No. CV 97-90014 (Ariz. Sup. Ct. May 13, 1999) (written record of oral proceedings). For analysis of VAWA civil rights cases decided prior to *United States v. Morrison*, see, for example, Goldfarb, *supra* note 47, at 57-85.

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

110. Because the case was decided on a motion to dismiss, the factual allegations in plaintiff's complaint should be taken as true. *Brzonkala*, 935 F. Supp. at 783.

111. *Id.* at 782.

112. *Id.* Both the trial court and the Fourth Circuit en banc found that this statement helped demonstrate the gender-based "animus" required to state a claim under VAWA's civil rights remedy. *Brzonkala*, 169 F.3d at 830; *Brzonkala*, 935 F. Supp. at 785.

113. Plaintiff's Amended Complaint at 8, *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 935 F. Supp. 779 (No. 95-1358-R) [hereinafter Plaintiff's Amended Complaint].

114. *Morrison*, 529 U.S. at 603. Brzonkala initially did not pursue criminal remedies against her attackers because she had not preserved any physical evidence of the rapes and assumed that prosecution would be impossible. *Brzonkala*, 132 F.3d at 954. Later, she attempted to press criminal charges, but the grand jury refused to indict. See MacKinnon, *supra* note 99, at 140.

115. Plaintiff's Amended Complaint, *supra* note 113, at 15-18.

116. *Id.* at 10.

117. *Id.* at 2-3. Her complaint also raised claims under Title IX of the Education Amendments of 1972 and state tort and contract law. These claims were not before

The trial court held that Brzonkala had stated a valid claim under VAWA's civil rights provision, but granted the defendants' motion to dismiss on the ground that the civil rights provision fell outside the powers conferred on Congress by the Commerce Clause and Section 5 of the Fourteenth Amendment.¹¹⁸ A divided panel of the United States Court of Appeals for the Fourth Circuit reversed on the constitutional issue, finding that Congress had constitutional authority to enact the civil rights remedy under the Commerce Clause.¹¹⁹ After voting to vacate the panel's decision and rehear the case en banc, the Fourth Circuit affirmed the trial court over a vigorous dissenting opinion.¹²⁰ Finally, the case reached the Supreme Court under the name *United States v. Morrison*.¹²¹ The Court, by a vote of five to four, affirmed the decision of the Fourth Circuit en banc and invalidated the civil rights remedy as unconstitutional.¹²²

The decision in *Morrison* hinged on the Court's adoption of an extremely narrow reading of both the Commerce Clause and Section 5 of the Fourteenth Amendment. The Court claimed that its interpretations of the Constitution were dictated by the need to preserve the distinction between state and federal government and that the civil rights provision was antithetical to federalism. As Part IV of this article will describe, the Court's constitutional federalism analysis was unconvincing, and a contrary holding would have better advanced the goal of upholding the principles of federalism that the Court purported to serve. To set the stage for an examination of *Morrison's* constitutional analysis, the next part considers the extent to which VAWA's civil rights remedy was consistent with the positive

the Supreme Court in *United States v. Morrison* and are beyond the scope of this article.

118. *Brzonkala*, 935 F. Supp. 779.

119. *Brzonkala*, 132 F.3d 949. Judge Motz wrote the opinion for the panel, which Judge Hall joined. Judge Luttig wrote a dissenting opinion.

120. *Brzonkala*, 169 F.3d 820. The court of appeals en banc reached its decision by a vote of seven to four. Judge Luttig, who had dissented from the decision of the three-judge panel, wrote the opinion for the court of appeals en banc, which was joined by six other judges. Chief Judge Wilkinson and Judge Niemeyer wrote concurrences. Judge Motz, who had written the opinion for the panel, dissented and was joined by three other judges.

121. 529 U.S. 598 (2000). The case was known at the trial and intermediate appellate levels as *Brzonkala v. Virginia Polytechnic Institute and State University*. Virginia Tech was no longer a party when the case reached the Supreme Court, because the Title IX claim was not before the Court. See *Morrison*, 529 U.S. at 605 n.2. Beginning at the trial level, the United States intervened in the case to defend the constitutionality of the statute. See *Brzonkala*, 935 F. Supp. at 783. After the decision of the court of appeals en banc, both the United States and Brzonkala filed petitions for a writ of certiorari with the Supreme Court. The Court granted both petitions. See 527 U.S. 1068 (1999). The Court decided the two cases of *United States v. Morrison* and *Brzonkala v. Morrison* together. Because the United States' petition was docketed first, the name of the United States appears first in the caption. Therefore, the Supreme Court decision bears the name *United States v. Morrison*.

122. *Morrison*, 529 U.S. 598. See generally *infra* Part IV.

attributes of federalism.

III. THE VIOLENCE AGAINST WOMEN ACT AND FEDERALISM

In their constitutional challenges to the civil rights provision of the Violence Against Women Act, litigants typically argued that the new federal remedy would destroy the appropriate balance of federal and state power by granting excessive control to Congress at the expense of the states.¹²³ This argument was reminiscent of the objections raised by the judiciary while VAWA was pending in Congress.¹²⁴ Most of the lower court decisions addressing the issue rejected this argument.¹²⁵ However, in *Morrison*, the federalism-based attack on the civil rights provision was successful in the federal district court, the court of appeals en banc, and the Supreme Court. The trial court, in its opinion dismissing Christy Brzonkala's VAWA claim on the ground that Congress lacked constitutional authority to enact the civil rights provision, stated that upholding the civil rights provision "would have the practical result of excessively extending Congress's power and of inappropriately tipping the balance [of power] away from the states."¹²⁶ According to the Fourth Circuit en banc, the civil rights remedy "simply cannot be reconciled with the principles of limited federal government upon which this Nation is founded."¹²⁷ Finally, the Supreme Court held that VAWA's civil rights provision must be struck down to avoid "obliterat[ing] the distinction between what is national and what is local and creat[ing] a completely centralized government."¹²⁸

In fact, as the following discussion will show, the civil rights provision was carefully devised to create a limited federal role while preserving an appropriate sphere of state autonomy. Far from undermining the federal-state balance, VAWA's civil rights remedy was a model of cooperative rights federalism. The civil rights provision actually empowered the states in significant respects at the same time that it empowered women. The interaction between VAWA's civil rights remedy and state law exemplified federal-state legislative dialogue, which is one of federalism's greatest strengths. Also, VAWA's civil rights provision was supportive of many of the values that federalism is commonly assumed to serve.¹²⁹

123. See, e.g., *Ziegler v. Ziegler*, 28 F. Supp. 2d 601, 614 (E.D. Wash. 1998); *Doe v. Doe*, 929 F. Supp. 608, 615-16 (D. Conn. 1996).

124. See *supra* Part II.

125. See, e.g., *Ziegler*, 28 F. Supp. 2d at 614; *Doe*, 929 F. Supp. at 616. See generally *supra* note 108.

126. *Brzonkala*, 935 F. Supp. at 792.

127. *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 826 (4th Cir. 1999).

128. *United States v. Morrison*, 529 U.S. 598, 608 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 556-57 (1995)); *id.* at 608 n.3, 616 n.6; see *id.* at 615, 620.

129. Of course, the civil rights provision's relationship to the values served by

A. VAWA's Civil Rights Provision as a Model of Cooperative Rights Federalism

In its broadest sense, the term "cooperative federalism" applies to any "partnership between the States and the Federal Government, animated by a shared objective."¹³⁰ Cooperative federalism, in the sense of overlapping federal and state functions in the service of common goals, is a familiar feature of American government.¹³¹ The Supreme Court has held that while Congress may not compel the states or their officials to carry out a federal regulatory program,¹³² Congress is permitted to give states a choice between "regulating . . . according to federal standards or having state law preempted by federal regulation."¹³³ Congress may also use its conditional spending power to attract state participation in federal programs.¹³⁴ During the twentieth century, federal statutes created an extensive network of cooperative federalism ventures, including programs characterized by various combinations of federal and state funding and federal and state responsibility for implementation.¹³⁵ Some commentators have called for expanding the principles of cooperative federalism to new frontiers.¹³⁶

federalism would be irrelevant if it fell outside the scope of Congress's constitutionally enumerated powers. Part IV will critique the majority's constitutional analysis in *United States v. Morrison* and argue that the civil rights remedy was authorized by both the Commerce Clause and Section 5 of the Fourteenth Amendment.

130. See *New York v. United States*, 505 U.S. 144, 167 (1992) (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (describing the Clean Water Act)).

131. See, e.g., Thomas R. Dye, *American Federalism* 7 (1990); Richard P. Nathan, *The Role of the States in American Federalism in The State of the States* 15,16 (Carl E. Van Horn ed., 1989).

132. See, e.g., *Printz v. United States*, 521 U.S. 898, 933 (1997); *New York*, 505 U.S. at 188.

133. *New York*, 505 U.S. at 173-74 (citing *FERC v. Mississippi*, 456 U.S. 742, 764-65 (1982) (upholding challenged provisions of the Public Utilities Regulatory Policies Act); *Hodel v. Va. Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 288 (1981) (upholding the Surface Mining Control and Reclamation Act)).

134. See, e.g., *New York*, 505 U.S. at 167.

135. See, e.g., George Rutherglen, *Employment Discrimination: Visions of Equality in Theory and Doctrine* 229 (2001) (discussing the role of state agencies in the enforcement of Title VII); Stephen D. Sugarman, *Welfare Reform and the Cooperative Federalism of America's Public Income Transfer Programs*, 14 *Yale L. & Pol'y Rev.* 123 (1996) (describing federal and state roles in public assistance programs); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 *N.C. L. Rev.* 663, 669-70 (2001) (discussing cooperative elements of New Deal programs and environmental statutes such as the Clean Air Act); see also *New York*, 505 U.S. at 167-68 (citing statutes); *Hodel*, 452 U.S. at 289 n.30 (citing statutes).

136. See, e.g., Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 *Sup. Ct. Rev.* 61 (proposing a cooperative process among the Supreme Court, Congress, and the states to interpret the Constitution); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267 (1998) (urging the establishment of a system of "democratic

The Violence Against Women Act represents a unique form of cooperative federalism that can best be described as cooperative rights federalism. Unlike the more common forms of cooperative federalism, such as those that require state compliance with federal standards or provide federal funding for state-administered programs, the VAWA civil rights remedy was a federal effort to serve the joint federal and state interest in advancing individual rights, without impairing the rights of the states.

VAWA's civil rights provision entailed federal-state cooperation on a number of levels. As noted above, VAWA as a whole was a broad-ranging statute designed to respond in numerous ways to the national epidemic of rape, domestic violence, and other forms of violence against women.¹³⁷ This epidemic, and the difficulty of combating it, were a source of profound concern to the states as well as to the federal government.¹³⁸ Taken in its entirety, VAWA created a series of coordinated measures in which the federal and state governments worked in concert, with both playing indispensable roles. Many sections of VAWA were aimed at strengthening the ability of the states to provide their own civil and criminal legal remedies for violence against women.¹³⁹ Others created joint federal-state collaborations.¹⁴⁰ Still others addressed the distinctively federal aspects of a multifaceted problem that had both federal and state dimensions.¹⁴¹

The civil rights remedy was integrated with and complementary to VAWA's other provisions.¹⁴² The civil rights remedy enhanced the rest of the statute by condemning gender-motivated violence in the uniquely powerful terms of a federal civil rights guarantee.¹⁴³ This

experimentalism" to encourage the development and dissemination of local solutions to the question of how best to implement nationally-defined rights and objectives); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 Mich. L. Rev. 813 (1998) (suggesting that the federal government should use voluntary intergovernmental agreements to purchase state and local governments' assistance in implementing federal policy).

137. See *supra* Part II.

138. See *infra* notes 172-87 and accompanying text (discussing state support for VAWA).

139. Examples include federal funding to state law enforcement agencies and the requirement that states grant full faith and credit to protection orders issued in other states. See 18 U.S.C. § 2265 (2000); 42 U.S.C. §§ 3769gg, 13991-14002 (1994).

140. Examples include the provision establishing a joint federal, state, and local database on domestic violence and stalking offenses. See Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, subtitle F, 108 Stat. at 1950-53.

141. Examples include the provisions amending federal immigration law. See Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, subtitle G, 108 Stat. at 1953-55.

142. See 1991 Senate Report, *supra* note 40, at 34 (stating that the federal civil rights remedy and federal funding to states are "different complementary strategies").

143. See 1993 Senate Report, *supra* note 39, at 50 (stating that the civil rights remedy "provid[es] a special societal judgment that crimes motivated by gender bias

message had the potential to reinforce the educational and deterrent effects of other sections of the bill.¹⁴⁴ VAWA's civil rights remedy also had the potential to change attitudes among state actors and spur them to improve the states' legal response to violence against women.¹⁴⁵

The civil rights remedy left the laws of the states intact.¹⁴⁶ Contrary to the assertions of some judges,¹⁴⁷ the civil rights remedy did not usurp the role of the states in regulating family law, torts, or criminal law.¹⁴⁸ Rather, it established a parallel, alternative remedy for a different injury. The wrong for which VAWA provided redress was the discrimination inherent in gender-motivated violence,¹⁴⁹ as distinct from the interests that are remedied by traditional domestic relations, personal injury, or criminal proceedings under state law.¹⁵⁰

The civil rights provision of VAWA created an antidiscrimination claim of a type that is commonly found in federal law. Federal civil rights statutes often provide a cause of action for conduct that also contravenes state law.¹⁵¹ Whereas claims under conventional state

are unacceptable because they violate the victims' civil rights").

144. See *supra* Part II.

145. For further discussion of ways in which the civil rights provision would assist the states in combating violence against women, see *infra* Parts III.B-C, IV.B.

146. Of course, Congress is permitted to displace or preempt state laws when acting within its constitutional power to regulate interstate commerce. See, e.g., *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290-92 (1981). Congress may do the same when enforcing the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976). Although the civil rights provision was a legitimate exercise of both of these powers, Congress structured the remedy so as to minimize interference with state law. See *infra* Part IV; see also *infra* notes 168-90 and accompanying text (arguing that even if VAWA's civil rights remedy altered the legal climates in the states, it did so in ways that enhanced rather than eroded state autonomy).

147. See, e.g., 1993 *House Hearing*, *supra* note 44, at 77-84 (statement of Conference of Chief Justices).

148. See, e.g., 1993 *House Hearing*, *supra* note 44, at 31 (statement of National Association of Women Judges, endorsing VAWA and stating that the civil rights remedy would play a "complementary role" with respect to state criminal, personal injury, and domestic relations law).

149. See *supra* notes 36, 38 (defining "crime of violence motivated by gender").

150. See *Ziegler v. Ziegler*, 28 F. Supp. 2d 601, 612 (E.D. Wash. 1998) ("A civil rights remedy [such as VAWA] is recognized as distinct from that of a criminal conviction or a civil remedy for a tort. Criminal convictions vindicate the state interest in protecting its citizens while a civil tort addresses personal injury. A civil rights claim by contrast addresses equality, a victim's interest in equal treatment." (citations omitted)); *Doe v. Doe*, 929 F. Supp. 608, 616 (D. Conn. 1996) ("VAWA does not encroach on traditional areas of state law; it complements them by recognizing . . . a civil right to be free from gender-based violence . . ."); 1993 Senate Report, *supra* note 39, at 50-51 (distinguishing VAWA's civil rights remedy from state tort and criminal law).

151. See 1991 Senate Hearing, *supra* note 44, at 87, 93-94 (statement of Burt Neuborne); 1991 Senate Report, *supra* note 40, at 49. For example, a racially-motivated lynching that violates the Ku Klux Klan Act, 42 U.S.C. § 1985(3), would presumably also constitute a murder under state criminal law and wrongful death under state tort law.

tort, domestic relations, and criminal laws focus on the harm done to an individual.¹⁵² federal civil rights relief recognizes that discrimination targets an individual because of her membership in a disfavored group and therefore constitutes “an assault on a commonly shared ideal of equality.”¹⁵³ By vindicating interests different than those protected by the states’ legal response, VAWA’s civil rights remedy served to supplement, not supplant, the law of the states.¹⁵⁴

In addition to leaving criminal and civil remedies under state law unchanged, VAWA’s civil rights provision deferred in other significant respects to state law. The definition of “crime of violence” was based in part on the definition of a felony under applicable state law.¹⁵⁵ A conviction or guilty plea in a state criminal proceeding would presumably have a preclusive effect on a subsequent VAWA civil rights claim.¹⁵⁶ To minimize the possibility of interference with state domestic relations proceedings, the statute expressly stated that federal courts hearing VAWA cases would not have supplemental jurisdiction over state law claims seeking establishment of a divorce, alimony, marital property, or child custody decree.¹⁵⁷

Because VAWA’s civil rights remedy did not preempt, prohibit, or require any action by the states, it interfered with state autonomy significantly less than other federal statutes that the Court has recently struck down in the name of federalism. The civil rights provision did not “commandeer” the resources of the states by compelling them to “enact or administer a federal regulatory program.”¹⁵⁸ It did not authorize lawsuits against the states.¹⁵⁹ It was

152. As noted earlier, only a small number of states had civil or criminal remedies for gender-discriminatory violence when VAWA was enacted. *See supra* notes 83-89 and accompanying text. Congress found that state criminal laws “do not adequately protect against the bias element of crimes of violence motivated by gender.” *House Conference Report, supra* note 62, at 385.

153. 1993 Senate Report, *supra* note 39, at 51; *see also* 1991 Senate Report, *supra* note 40, at 49.

154. *See Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 930 (4th Cir. 1999) (en banc) (Motz, J., dissenting); *see also* Tr. of Oral Argument, *United States v. Morrison*, Nos. 99-5, 99-29, 2000 WL 41232, at *45-46, 52 (U.S. Jan. 11, 2000) (including Justice Ginsburg’s questions referring to VAWA’s civil rights remedy as an “alternate remedy in an alternate forum”; an “auxiliary action” that “complement[s] what the States do”; and an example of “harmonious,” “parallel State and Federal regulation”).

155. 42 U.S.C. § 13981(d)(2). However, the civil rights remedy diverged from state law by allowing a federal cause of action under circumstances where state civil or criminal relief would be barred by the spousal immunity doctrine or marital rape exemption. *See* 42 U.S.C. § 13981(c); *id.* § 13981(d)(2)(B). *See generally infra* notes 161-90 and accompanying text (discussing effects of the civil rights remedy in states with spousal immunity and marital rape doctrines).

156. *Goldscheid & Kraham, supra* note 100, at 526.

157. 42 U.S.C. § 13981(e)(4). This limitation on supplemental jurisdiction was adopted in response to concerns expressed by the federal and state judicial organizations. *See supra* notes 56-57 and accompanying text.

158. *Cf. Printz v. United States*, 521 U.S. 898, 925-33 (1997) (finding background

qualitatively less intrusive than the Gun-Free School Zones Act, the federal criminal statute invalidated in *United States v. Lopez*, which “effect[ed] a change in the sensitive relation between federal and state criminal jurisdiction” by creating potential conflicts between federal and state investigatory and prosecutorial authority.¹⁶⁰

It might be argued that even though VAWA’s civil rights remedy nominally left state law intact, it nevertheless altered the overall legal environment in the states.¹⁶¹ For example, consider a hypothetical state that strictly enforces a doctrine of interspousal immunity in its tort law and a complete marital rape exemption in its criminal law. As a result, acts of marital rape within the state are immune from legal penalties. The advent of VAWA meant that while the state laws remained unchanged, a man who committed marital rape in this state would now be subject to a federal civil rights action,¹⁶² such acts would no longer be devoid of legal consequences. Thus, it could be said that VAWA’s civil rights remedy displaced state policy choices indirectly, even if it did not do so directly.¹⁶³

There are several answers to this argument. First, it is well established that Congress may act within its enumerated powers to create causes of action that are enforceable in each state without running afoul of federalism principles.¹⁶⁴ Indeed, because virtually any federal statute creates a new legal environment in the states by adding to the corpus of applicable law on a given subject, treating every such statute as an impermissible “displacement” of state law would reduce Congress’s power almost to the vanishing point. In particular, forbidding federal statutes that touch even indirectly on

check provisions of the Brady Act unconstitutional); *New York v. United States*, 505 U.S. 144, 174-77, 188 (1992) (finding the take title provision of the Low-Level Radioactive Waste Policy Amendments Act unconstitutional).

159. *Cf.*, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Expense Bd.*, 527 U.S. 666 (1999); *Fla. Prepaid Postsecondary Educ. Expenses Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). Ironically, the *Morrison* decision implied that a federal cause of action against the states would be preferable to the cause of action against private parties provided by VAWA. *See infra* Part IV.C.

160. *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (citations and internal quotation marks omitted).

161. *See Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 840-42 (4th Cir. 1999) (en banc).

162. In order to overcome discrimination in the state legal systems that denied women equal protection of the laws, VAWA granted a federal cause of action under circumstances where a state’s spousal immunity or marital rape exemption would bar civil or criminal relief. *See* 42 U.S.C. § 13981(d)(2)(B); 1993 Senate Report, *supra* note 39, at 55; *see also supra* Part II (describing equal protection violations by the states); *infra* Part IV.B (same).

163. *See, e.g., Brzonkala*, 169 F.3d at 840-42.

164. *See New York v. United States*, 505 U.S. 144, 178-79 (1992). For an explanation of why VAWA’s civil rights provision was within Congress’s constitutionally enumerated powers, *see infra* Part IV.

areas covered by state law would effectively prevent enactment of any federal civil rights legislation.¹⁶⁵ Civil rights legislation is precisely designed to achieve a uniform level of minimum legal guarantees, applicable throughout the country despite variations in state law.¹⁶⁶ Even outside the civil rights area, the Court has approvingly applied the label “cooperative federalism” to a federal legislative scheme that allowed the states to enact and administer their own laws, within limits imposed by federal minimum standards.¹⁶⁷ VAWA’s civil rights provision went even further in the direction of deference to the states, by allowing them an entirely free hand to choose their own civil and criminal laws regarding gender-motivated violence, subject only to the presence of a parallel federal civil rights remedy.

Most importantly, it is a mistake to assume that federal legislative action that alters the status quo in the states is necessarily an infringement on state prerogatives.¹⁶⁸ The Court has consistently assumed, in *Morrison* and other recent cases, that the allocation of power between the federal and state governments is a zero-sum game.¹⁶⁹ But as the VAWA civil rights remedy illustrates, exercises of federal legislative authority can enhance, rather than impair, the authority of the states.¹⁷⁰ VAWA’s civil rights remedy met the states’ self-defined needs and assisted them in overcoming preexisting constraints on their policy choices.¹⁷¹

VAWA’s civil rights provision enjoyed enormous state support. The National Association of Attorneys General unanimously adopted

165. See 1991 Senate Hearing, *supra* note 44, at 87, 93-94 (statement of Burt Neuborne); 1991 Senate Report, *supra* note 40, at 49 (“Each and every one of the existing civil rights laws covers an area in which some aspects are also covered by State laws.”).

166. See William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535, 548 (1986) (“As is well known, federal preservation of civil liberties is a minimum, which the states may surpass so long as there is no clash with federal law.”); see also *infra* Parts III.C.2, V.

167. See *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 289 (1981) (describing the Surface Mining Control and Reclamation Act).

168. See generally David J. Barron, *A Localist Critique of the New Federalism*, 51 Duke L.J. 377 (2001).

169. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995).

170. See *Steward Mach. Co. v. Davis*, 301 U.S. 548, 587-88 (1937) (describing the joint federal-state unemployment tax scheme created by the federal Social Security Act as “not [a] constraint, but the creation of a larger freedom [for the states]” by relieving them from competitive pressures that had prevented them from establishing systems of unemployment insurance); Barron, *supra* note 168; Peter M. Shane, *Federalism’s “Old Deal”: What’s Right and Wrong With Conservative Judicial Activism*, 45 Vill. L. Rev. 201, 242-43 (2000).

171. The background constraints on the states’ policy choices took several forms, some of which are discussed in this subpart at notes 178-84 and accompanying text. For discussion of another form of background constraint that could be alleviated by VAWA’s civil rights remedy, see *infra* Part III.C.3 (describing collective action problems arising from interstate competition).

a resolution endorsing VAWA, including the civil rights remedy.¹⁷² Forty-one attorneys general signed a letter to Congress urging the enactment of VAWA in general and the civil rights provision in particular.¹⁷³ Later, thirty-six states and Puerto Rico joined an amicus curiae brief to the Supreme Court defending the statute's constitutionality;¹⁷⁴ only one state, Alabama, filed a brief on the other side.¹⁷⁵ The process that led to VAWA's adoption was characterized by an unusually high degree of collaboration and interchange between representatives of the state and federal governments.¹⁷⁶ A number of state and local law enforcement officials testified before Congress in favor of the civil rights remedy.¹⁷⁷

State officials acknowledged that they were not handling cases of violence against women effectively and pleaded for federal help.¹⁷⁸ By

172. 1991 Senate Hearing, *supra* note 44, at 27, 30 (statement of Bonnie J. Campbell, Attorney General, State of Iowa); *id.* at 37-38 (National Association of Attorneys General resolution).

173. 1993 House Hearing, *supra* note 44, at 34-36. The attorneys general signing the letter represented thirty-eight states, the District of Columbia, Guam, and the Virgin Islands. Although one might question whether attorneys general speak for their states, their active support for the civil rights remedy is highly significant from the point of view of assessing the legislation's effect on federalism. "It is difficult to imagine a group of officials who would be more concerned about the preservation of traditional areas of state control than the state officials charged with the enforcement of those areas." Cass Sunstein et al., *The Constitutionality of the Violence Against Women Act*, in *Violence Against Women: Law and Litigation* 6-30 n.5 (David Frazee et al. eds., 1998). A desire for federal funds cannot explain the position taken by the attorneys general, because they specifically endorsed VAWA's civil rights provision, which carried no funding whatsoever. Nor can their endorsement be seen as a strategic move to hasten passage of the bill as a whole; the civil rights measure was the most controversial portion of VAWA and slowed the bill's progress through Congress substantially. See, e.g., 1992 House Hearing, *supra* note 55, at 7-12 (statement of Senator Joseph Biden, describing the controversy over and opposition to the civil rights provision).

174. Brief of Amici Curiae State of Arizona et al., *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29) [hereinafter Brief of Arizona]. The states' brief specifically addressed and rejected the argument that the civil rights remedy infringed on state autonomy. See, e.g., *id.* at 21 ("Because the remedy . . . complements state and local efforts to combat violence against women without in any way compromising those efforts, it does not undermine federalism by intruding in an area of traditional state concern." (citation omitted)).

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

176. Even the Conference of Chief Justices, which opposed the legislation, sought and obtained several important amendments that reflected the priorities of the state judiciary. See *supra* Part II.

177. See, e.g., 1991 Senate Hearing, *supra* note 44, at 24-36 (Statement of Bonnie J. Campbell, Attorney General, State of Iowa); *id.* at 71-84 (statement of Roland W. Burris, Attorney General, State of Illinois); 1990 Senate Hearing, *supra* note 64, at 104 (statement of Roni Young, Director, Domestic Violence Unit, Office of the State's Attorney for Baltimore City, Maryland).

178. See, e.g., 1993 House Hearing, *supra* note 44, at 35 ("Our experiences as Attorneys General strengthen our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds."); Brief of Arizona, *supra* note 174, at 20 (stating that "States' longstanding efforts to

their own account, state officials seeking to combat violence against women in the absence of VAWA were operating under numerous pressures that constrained their freedom of action. State and local governments were straining to bear "the tremendous burdens caused by gender-based violence."¹⁷⁹ Gender-motivated violence caused the states to incur substantial costs for welfare and government-subsidized health care.¹⁸⁰ The states also suffered economic losses due to the impact of gender-motivated violence on state employees and on the demand for homeless shelters, domestic violence shelters, law enforcement, and court services.¹⁸¹ All of these costs siphoned money from the states' coffers that might otherwise have been available to fund more innovative, effective approaches to preventing gender-motivated violence.¹⁸²

Meanwhile, the attitudes of state and local police, prosecutors, judges, and court personnel, like the attitudes of the public, were shaped by deeply ingrained sex-discriminatory stereotypes that caused them to blame the victims of rape and domestic violence and condone and trivialize crimes against women.¹⁸³ These attitudes were so entrenched that even in states that had dramatically reformed their rape and domestic violence statutes, enforcement remained profoundly inadequate.¹⁸⁴ Thus, in the absence of VAWA, states seeking to bring about genuine improvements in their response to gender-motivated violence were largely stymied.

According to state officials, VAWA's civil rights remedy had the potential to relieve these background constraints significantly. Access to the federal civil rights remedy would provide victims with an alternative to overburdened state courts.¹⁸⁵ The educational impact of

address pervasive gender-based violence . . . have thus far fallen far short" and urging the Court to uphold the civil rights remedy).

179. 1993 *House Hearing*, *supra* note 44, at 34 (including a letter from forty-one attorneys general).

180. Brief of Arizona, *supra* note 174, at 10-12. Notably, these financial outlays by the states were required as a result of federal laws that antedated VAWA; therefore, even before VAWA was enacted, federal law was not neutral with respect to regulating the states' response to violence against women. Barron, *supra* note 168, at 425.

181. Brief of Arizona, *supra* note 174, at 8, 12.

182. See, e.g., 1991 *Senate Hearing*, *supra* note 44, at 138 (statement of Gill Freedman, indicating that the state of Florida could provide only enough funding to train fifty teachers per year in the entire state on how to incorporate prevention of sexual violence into sex education courses).

183. Brief of Arizona, *supra* note 174, at 17-20; see also *supra* Part II.

184. Brief of Arizona, *supra* note 174, at 15-20; see also 1991 *Senate Report*, *supra* note 40, at 39 ("Despite States' most fervent efforts at legislative reform, these stereotypes persist and continue to distort the criminal justice system's response to violence against women.").

185. See 1993 *House Hearing*, *supra* note 44, at 34-35 (reprinting a letter from forty-one attorneys general); see also *id.* at 31 (statement of National Association of Women Judges, describing the civil rights remedy as a "complement" to "the ever increasing work load of state courts").

a declaration that gender-motivated violence is a federal civil rights violation would help change the attitudes and behavior of potential offenders as well as of workers in the state justice system.¹⁸⁶ If these attitudinal and behavioral changes led to fewer offenses and better enforcement, the resulting savings to the states would permit them to budget more money for the programs that they would prefer to implement. Additionally, by reducing the volume of cases clogging state courts, institutions, and agencies, the civil rights remedy could create enough "breathing room" to free the states to contemplate new policy approaches, including the possible adoption of state civil rights legislation.¹⁸⁷

In sum, the presence of the federal civil rights remedy constrained the states' regulatory choices far less than the absence of it. The states are not free to alter the constitutional limits on congressional power to suit their purposes;¹⁸⁸ the fact that a federal statute meets the needs of the states does not make it constitutional. However, in the case of a statute like VAWA's civil rights provision that falls within the boundaries of Congress's enumerated powers,¹⁸⁹ extensive state support belies the argument that Congress has violated the precepts of federalism by infringing on the states' prerogatives. Congress enacted VAWA at the request of representatives of the states to help the states overcome obstacles to achieving their own goals. In the words of Justice Breyer's dissent in *Morrison*, VAWA's civil rights provision was "an instance, not of state/federal conflict, but of state/federal efforts to cooperate in order to help solve a mutually acknowledged national problem."¹⁹⁰

B. VAWA's Civil Rights Provision and State-Federal Legislative Dialogue

Over the course of American history, the task of protecting individual rights has fallen to both the state and federal governments.¹⁹¹ In fact, as discussed below, new definitions of individual rights have often arisen from a process of interaction between state and federal law. The Supreme Court's simplistic view that states must be allowed to regulate gender-motivated violence (or

186. See Brief of Arizona, *supra* note 174, at 21; 1991 Senate Hearing, *supra* note 44, at 34 (statement of Bonnie J. Campbell); 1990 Senate Hearing, *supra* note 64, at 86 (statement of Roni Young); see also *infra* Part IV.B.

187. See Brief of Arizona, *supra* note 174, at 21-22. On the role of the federal civil rights remedy as a model for similar state legislation and vice versa, see *infra* Part III.B.

188. *New York v. United States*, 505 U.S. 144, 182 (1992).

189. See generally *infra* Part IV.

190. *United States v. Morrison*, 529 U.S. 598, 662 (2000) (Breyer, J., dissenting).

191. See G. Alan Tarr and Ellis Katz, *Introduction*, in *Federalism and Rights* ix, xii-xiv (Ellis Katz & G. Alan Tarr eds. 1996) [hereinafter *Federalism and Rights*]; see also *supra* notes 14-18 and accompanying text.

not regulate it) as they see fit¹⁹² does an injustice not only to women, but to federalism. Under the federalist system, the states cannot handle civil rights issues alone, nor are they expected to.¹⁹³ Yet the federal government cannot do the job alone, either.¹⁹⁴ It is both necessary in practice, and desirable in principle, for federal and state law each to play a role in articulating and enforcing civil rights.

The essence of federalism is redundancy. With fifty state governments acting simultaneously to address many of the same concerns, duplication among their legal and policy efforts is inevitable. Moreover, despite important limitations placed on each level of government by the United States Constitution, vast areas of overlap between federal and state power remain.¹⁹⁵ Redundancy among the states, and between the state and federal governments, is not only unavoidable; it is also advantageous for a number of reasons.

First, a redundant system contains built-in security against the failure of a single element. Redundancy in the organs of the body, or in the safety features of cars and airplanes, avoids catastrophes that would otherwise occur when one part malfunctions.¹⁹⁶ As the Framers recognized, the same principle applies to governments.¹⁹⁷ Features like the veto, judicial review, and, above all, separate federal and state governments with overlapping mandates help avert disaster when one political actor or entity sets out on a destructive course.¹⁹⁸ Similarly, allowing one level of government to fill the gaps left by another's inaction provides a necessary corrective for failures that take the form of omission rather than commission. Although duplication of effort is

192. See *Morrison*, 529 U.S. at 627.

193. See, e.g., *infra* Part III.C.4, 5.

194. See, e.g., Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 Yale L.J. 619, 625 (2001) ("The collapse of both the first and the second Reconstructions illustrates that, without popular support at all levels, moments of national affiliation to widening norms of equality are fleeting.").

195. See generally *id.*

196. See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 Wm. & Mary L. Rev. 639, 649 (1981); Martin Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 Pub. Admin. Rev. 346 (1969).

197. See, e.g., The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.").

198. Cover, *supra* note 196; Landau, *supra* note 196. Redundancy provides an effective buffer against failure only if the redundant elements are sufficiently separate from each other. Otherwise, the failure of one may automatically cause the failure of the others. Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035, 1042 (1977). The Framers' design, with its system of checks and balances, separation of powers, and especially federalism, maintains the necessary separation among redundant elements.

commonly assumed to be inefficient,¹⁹⁹ the improved efficiency of a perfectly nonredundant system is more than offset by the increased likelihood of error.²⁰⁰

Second, the proliferation of government entities characteristic of a federal system multiplies opportunities for innovation. The federal government provides a separate setting for experimentation, in addition to those provided by the states and localities.²⁰¹

Third, and most important for the present discussion, redundancy among the states and between the state and federal governments creates room for dialogue and interchange that would not exist within a single governmental entity. Fifty states provide far more than fifty times the capacity for legal and policy development that a single state would provide; through a complex process of emulation and feedback, the states build on and alter each other's innovations, with the result that innovation increases geometrically rather than arithmetically.²⁰² In the same way, dialogue between federal law and the law of the states has the potential to create a synergy that leads to legal advances and refinements that neither could achieve alone.

Dialogue presupposes separate actors engaged in a shared communicative enterprise. According to one account, the conditions necessary for dialogue include "two or more entities capable of discourse[;] a physical or mental space between these entities, separating them, distinguishing them from each other[;] and a reciprocal exchange of meaning (*logos*) by these entities across this space."²⁰³ The relationship between the federal and state governments supplies these conditions. As with dialogue between individuals, dialogue between federal and state law entails not only the exchange of information, but a net increase in available information as the participants assimilate, reflect upon, and respond to input from each other. Thus, dialogue is "'an evolutionary process in which the parties are changed as they proceed.'"²⁰⁴

Much has been written about the virtues of state-federal redundancy in the adjudicative sphere. The legal literature on

199. See, e.g., Harry N. Scheiber, *Foreword: The Direct Ballot and State Constitutionalism*, 28 Rutgers L.J. 787, 806-07 (1997) (suggesting that specialization of labor between federal and state governments is necessary for the sake of efficiency).

200. Landau, *supra* note 196, at 347.

201. See generally *infra* Part III.C.1.

202. For varying perspectives on the process of diffusion of innovations among the states, see generally, for example, Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 Am. Pol. Sci. Rev. 1174 (1973); Robert L. Savage, *Diffusion Research Traditions and the Spread of Policy Innovations in a Federal System*, 15 Publius 1 (1985); Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 Am. Pol. Sci. Rev. 880 (1969).

203. Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 Hastings Const. L.Q. 93, 113-14 (2000) (citing Robert Grudin, *On Dialogue: An Essay in Free Thought* 11 (1996)).

204. *Id.* at 122 (quoting Grudin, *supra* note 203, at 12).

subjects such as parity between state and federal courts, habeas corpus, and state constitutional law is dominated to a significant degree by a debate over whether the advantages of providing access to both federal and state judicial resources are outweighed by the disadvantages.²⁰⁵ One of the most compelling arguments in support of this duplication of resources is that it permits the federal and state courts to engage in a dialectical process that is uniquely conducive to the development and refinement of legal rights.²⁰⁶ In a system where two levels of government are engaged in the joint process of defining legal norms, the resulting tension and indeterminacy provide fertile ground for creativity and self-examination on both their parts.²⁰⁷

This observation about the value of the state-federal dialectic should not be limited to adjudication, however. A similar interplay can operate between federal and state legislation. Federal civil rights laws are typically part of a complex *pas de deux* in which both federal and state law play leading roles. Sometimes, federal civil rights legislation fills a vacuum left by state legislative inaction, and states then follow suit by enacting their own versions of the federal statute. At other times, state statutes provide a model for federal civil rights legislation, which in turn inspires further state legislative activity. Regardless of which entity acts first, the general pattern consists of alternating and mutually responsive federal and state legislative action, with the federal statutes establishing a universal minimum level of legal protection.²⁰⁸

History affords numerous examples of this pattern.²⁰⁹ States began

205. Compare, e.g., Cover & Aleinikoff, *supra* note 198 (describing the importance of the federal role in habeas corpus review), and Neuborne, *supra* note 14 (arguing that the federal forum has distinct advantages for vindication of constitutional claims), with Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963) (arguing against federal habeas corpus review of constitutional claims that have been fully and fairly litigated in state courts); compare, e.g., William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977) (urging state courts to interpret state constitutional protections of individual liberties more broadly than the Supreme Court has interpreted similar guarantees under the federal constitution), with James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761 (1992) (arguing that state constitutions do not provide a valid basis for a distinct constitutional discourse).

206. Cover & Aleinikoff, *supra* note 198; see also, e.g., Lawrence Friedman, *supra* note 203 (describing state-federal judicial discourse concerning constitutional rights).

207. See Cover & Aleinikoff, *supra* note 198.

208. The role of federal law as a uniform national baseline is discussed *infra* at notes 278-80 and accompanying text; see also *infra* Part V.

209. Although the present discussion focuses on civil rights legislation, federal-state legislative dialogue has been a major force in other areas as well, including minimum wage and maximum hours laws, unemployment compensation, welfare reform, and environmental regulation, to name just a few examples. See generally, e.g., Elazar, *supra* note 5, at 111; A.E. Dick Howard, *Does Federalism Secure or Undermine Rights?*, in Katz & Tarr, *Federalism and Rights*, *supra* note 191, at 11, 17; Keith Boeckelman, *The Influence of States on Federal Policy Adoptions*, 20 Pol'y Stud. J.

to develop laws prohibiting employment discrimination decades before Congress enacted Title VII of the Civil Rights Act of 1964.²¹⁰ Title VII was modeled on those laws but went further than most of them, most notably by prohibiting sex discrimination.²¹¹ After Title VII was enacted, all of the states that previously lacked antidiscrimination statutes adopted them.²¹² Today, many state employment discrimination statutes are considerably more protective of employees' rights than the federal version; thus, they provide a roadmap for possible future reforms of federal law.²¹³ Similarly, many states and localities had legislation prohibiting discrimination in places of public accommodation before Congress enacted Title II of the Civil Rights Act of 1964.²¹⁴ In the aftermath of the federal statute, states and localities have continued to expand their legislation, in many instances adding new categories to the list of prohibited types of discrimination.²¹⁵ By the time Congress enacted the Americans With Disabilities Act in 1990, every state had enacted a similar measure, but the federal statute went further than a number of the state laws in requiring accommodation for the disabled.²¹⁶ The federal Age Discrimination in Employment Act inspired numerous states to adopt similar legislation.²¹⁷

The existence of dialogue between the state and federal governments does not mean that the two speak in identical voices. State legislatures, free of the limitations imposed on Congress by the federal constitution, have broader scope for their legal and policy

365 (1992). Such dialogue also occurs in the sphere of constitutional amendments, as illustrated by the Nineteenth Amendment (which was preceded by suffrage laws in several states) and the proposed federal Equal Rights Amendment (which spawned numerous state analogues). *See generally* Eleanor Flexner, *Century of Struggle: The Woman's Rights Movement in the United States* 256-85 (rev. ed. 1975) (describing adoption of state suffrage laws in the years leading up to ratification of the Nineteenth Amendment); Mary Frances Berry, *Why ERA Failed* 90-100 (1986) (describing the relationship between federal and state Equal Rights Amendments); Jane J. Mansbridge, *Why We Lost the ERA* 189-90 (1986) (same).

210. *See* Rutherglen, *supra* note 135, at 229 (stating that twenty-one states had laws against employment discrimination when Title VII was passed); Jackson, *supra* note 18, at 1302 n.160 (stating that states began to pass laws prohibiting employment discrimination during the 1940s).

211. Rutherglen, *supra* note 135, at 229.

212. *Id.*

213. *See id.* at 229-32.

214. *See* *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259 n.8 (1964) (listing statutes); *Bell v. Maryland*, 378 U.S. 226, 284-85 (1964) (Douglas, J., concurring in part) (listing states and localities with public accommodations legislation).

215. *See, e.g.,* Wayne van der Meide, *Legislating Equality: A Review of Laws Affecting Gay, Lesbian, Bisexual, and Transgendered People in the United States* 4 (2000) (stating that nine states and the District of Columbia prohibit discrimination based on sexual orientation in public accommodations).

216. *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 n.5 (2001).

217. *See* *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 n.1 (2000).

experiments.²¹⁸ Meanwhile, federal legislation can play a number of roles not open to its state counterparts. Under the doctrine of supremacy, the federal government can impose universal rules that are binding on the states.²¹⁹ Moreover, even aside from supremacy, federal law has a degree of visibility and persuasiveness that state law lacks. As a result, when a legislative innovation has been adopted at the federal level, states tend to adopt analogous innovations in their own laws more rapidly than if the innovation had been adopted only by other states.²²⁰

Federal law has a particularly crucial role to play in the establishment of equality rights. By definition, only federal law can provide a national standard. To the extent that certain concepts of equality are essential to our self-definition as a nation, a nationally uniform antidiscrimination law is not merely a shortcut to obtaining coverage in all fifty states, but bespeaks the fundamental nature of the guarantee being offered. Since the end of the Civil War, there has been widespread recognition of a unique federal interest in establishing equality norms precisely to express and enforce the view that such norms are a central feature of national citizenship.²²¹ VAWA's civil rights remedy was a product of this tradition.²²²

The interplay between federal and state legislation has been central to the effort to achieve gender equality. In the evolution of women's legal rights, federal and state statutes have often been at least as important as judicial decisions.²²³ Because of the inadequacy of existing legal protections against sex discrimination, a number of feminist theorists have argued that the enactment of new legislation is more likely than litigation to lead to the attainment of equality rights

218. In contrast to the United States Congress, which possesses only those powers enumerated in the United States Constitution, state legislatures generally enjoy plenary power. See Williams, *supra* note 7, at 793; see also The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

219. See U.S. Const. art. VI, cl. 2 (Supremacy Clause).

220. See Susan Welch & Kay Thompson, *The Impact of Federal Incentives on State Policy Innovation*, 24 Am. J. Pol. Sci. 715 (1980).

221. See generally *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 245-46 (1964) (tracing the history of federal civil rights enactments beginning in 1866).

222. For further discussion of VAWA's civil rights remedy in light of the unique role of federal civil rights legislation in establishing equality norms, see *infra* Part V.

223. See John J. Dinan, *Keeping the People's Liberties* 161-62, 218 n.95 (1998). Compare, e.g., *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (holding that discrimination on the basis of pregnancy does not violate Title VII), and *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that discrimination on the basis of pregnancy does not violate the Equal Protection Clause), with *Pregnancy Discrimination Act* of 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)) (defining sex discrimination prohibited by Title VII to include discrimination based on pregnancy and related conditions).

for women.²²⁴ Crucial legal protections for women have arisen from the interaction of state and federal legislation.²²⁵

VAWA illustrates the pattern of state-federal legislative dialogue in the development of new legal rights. The drafters of the federal legislation were aware that there were state statutes creating civil rights remedies for discriminatory violence motivated by gender.²²⁶ They were also aware that those remedies existed in only a few states and furnished inadequate relief.²²⁷ Furthermore, the state civil rights remedies were little known and rarely used.²²⁸ Once VAWA was introduced, the issue of civil rights protection from gender-motivated violence moved into the national spotlight for the first time. VAWA's civil rights remedy created a uniform baseline level of civil rights protection, applicable throughout the country—but its impact on the states did not end there. In 1990, when VAWA was introduced, only seven states had anti-bias crimes laws that included gender; by 1998, nineteen states did.²²⁹ One reason state officials gave for supporting VAWA's civil rights remedy was that it would free them to consider initiating similar civil rights legislation of their own.²³⁰ Indeed, as a result of VAWA, a number of states and localities introduced their own analogues of the federal civil rights remedy.²³¹ Just as VAWA's

224. See, e.g., Robin West, *Progressive Constitutionalism* 47-49 (1994); Ruth Colker, *The Anti-Subordination Principle: Applications*, 3 *Wis. Women's L.J.* 59, 60 (1987). VAWA's civil rights remedy is an example of a legal reform that could not have been achieved through the courts. See MacKinnon, *supra* note 99, at 150; Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 *Cal. L. Rev.* 751, 772 n.64 (1991).

225. See, e.g., Rutherglen, *supra* note 135, at 229 (describing Title VII's prohibition of sex discrimination in employment as an outgrowth of state antidiscrimination legislation).

226. 1993 Senate Report, *supra* note 39, at 48 & n.47.

227. *Id.*; see also *id.* at 55 (stating that VAWA "provides a necessary remedy to fill the gaps and rectify the biases of existing State laws").

228. See Brenneke, *supra* note 88, at 112-13; see also *id.* at 37.

229. Anti-Defamation League, 1999 Hate Crimes Laws 3 (1998). As one measure of the impact of VAWA's civil rights remedy, in 1996 the Anti-Defamation League, a national organization in the forefront of the fight against bias crimes, changed its model state anti-bias crimes legislation to include crimes motivated by gender bias, in part in response to the example set by VAWA. *Id.* at 2-3.

230. See Brief of Arizona, *supra* note 174, at 21-22.

231. New York City enacted the Victims of Gender-Motivated Violence Protection Act, which closely resembles VAWA's civil rights remedy. New York City, N.Y., Admin. Code tit. 8, §§ 8-901 to -907 (2000). Westchester County, New York, adopted a similar law. County Board of the County of Westchester, Local Law Intro. No. 10-2001 (2001) (enacting new Chapter 701 of the Laws of Westchester County). Several states have proposed analogous legislation. See, e.g., S.B. 1535, 44th Leg., 2d Reg. Sess. (Ariz. 2000); H.B. 1691, 83d Gen. Assem., Reg. Sess. (Ark. 2001); A.B. 1933, 2001-02 Reg. Sess. (Cal. 2002); H.B. 3279, 92d Gen. Assem. (Ill. 2001); H.B. 4407, 91st Gen. Assem. (Ill. 2000); A.B. 6223, 224th Leg. Sess. (N.Y. 2001); S.B. 7903, 223d Leg. Sess. (N.Y. 2000); S.B. 1321, 186th Gen. Assem. (Pa. 2002); S.B. 5451, 57th Leg., Reg. Sess. (Wash. 2001). Some of these state and local bills were introduced after *Morrison* was decided and therefore can be seen as replacements for the invalidated federal legislation. Nevertheless, the fact remains that they were inspired by the federal example.

civil rights provision departed significantly from the structure of preexisting state laws,²³² the state and local legislation that followed VAWA continued the process of reexamining the protections due to victims of gender-based violence and, in some instances, expanded on the federal model.²³³

It is not a coincidence that the evolution of civil rights law so often takes the form of a state-federal dialogue. Federalism itself is "a dialogue about government" that requires "continuing accommodation of competing, and in many instances, equally compelling considerations."²³⁴ The potential for a dialectic between the states and the federal government is one of the most valuable contributions of federalism.²³⁵ From the interchange between two levels of government, each with its own perspective, new understandings can emerge. In *Morrison*, the Court showed no awareness of the crucial purpose served by state and federal law as "co-conversationalists in norm development."²³⁶ Instead, the Court silenced the federal partner in an unfinished state-federal conversation.

What are the consequences of *Morrison* for the process of state-federal dialogue? Without access to a federal cause of action, many women now lack an effective legal remedy for acts of violence motivated by gender. State and local civil rights remedies for gender-discriminatory violence are nonexistent in most jurisdictions; where they do exist, they are inconsistent and often inadequate.²³⁷ With respect to gender-motivated violence, the states at least have a model provided by the now-unenforceable federal civil rights statute.²³⁸ The

232. See, e.g., Brenneke, *supra* note 88, at 37-43 (describing California, Massachusetts, and Vermont legislation).

233. For example, bills introduced in Illinois define the types of violent acts that are covered very broadly; they also expressly cover violent acts based on sexual orientation or gender role nonconformity. H.B. 3279, 92d Gen. Assem. (Ill. 2001); H.B. 4407, 91st Gen. Assem. (Ill. 2000). Bills introduced in New York State provide for treble damages. A.B. 6223, 224th Leg. Sess. (N.Y. 2001); S.B. 7903, 223d Leg. Sess. (N.Y. 2000). The New York City and Westchester County laws cover acts that are misdemeanors as well as felonies. County Board of the County of Westchester, Local Law Intro. No. 10-2001 (2001) (enacting new Chapter 701 of the Laws of Westchester County); New York City, N.Y., Admin. Code tit. 8, §§ 8-901 to -907 (2000). The New York City ordinance has a statute of limitations of at least seven years. New York City, N.Y., Admin. Code tit. 8, §§ 8-901 to -907 (2000).

234. Shapiro, *supra* note 4, at 108 & n.4.

235. *Id.* at 123.

236. Judith Resnik, *Afterword: Federalism's Options*, 14 Yale L. & Pol'y Rev. 465, 486 (1996) (citations omitted).

237. See generally Goldfarb, *supra* note 34, at 537-40; Goldscheid & Kaufman, *supra* note 107, at 270-71.

238. New federal legislation is still a possibility, but the stringent requirements imposed by the Court's decision in *Morrison* make it unlikely that Congress could pass a statute that will serve as a useful example to the states. See Violence Against Women Civil Rights Restoration Act, H.R. 5021, 106th Cong. (2000) (proposing a federal remedy for crimes of violence motivated by gender that is limited to

real price of *Morrison* will be paid in the form of the federal civil rights legislation that will never be drafted, introduced, or enacted, legislation that will never exist to inspire and challenge the states to take action of their own. Without federal participation in the civil rights dialogue, the states in turn will have less to say.

The *Morrison* case attempted to curtail redundancy, which is the hallmark of federalism, by reserving to the states the power to redress gender-motivated violence.²³⁹ Not only women, but also the states, are the poorer for it.

C. Judging VAWA's Civil Rights Provision According to the Values of Federalism

Although federalism is a pervasive presence in the Constitution, few constitutional provisions furnish a clear and unambiguous blueprint for how to realize the federalist vision.²⁴⁰ The process of interpreting the Constitution's mandates regarding the allocation of power between the federal and state governments is therefore far from straightforward. Formalism and functionalism provide two methodological approaches to this process. The formalist approach looks to the constitutional text, structure, history, or some combination of the three in order to define constitutional doctrine.²⁴¹ The functionalist approach instead looks to the values that a federalist system potentially serves and shapes doctrine in order to maximize the achievement of those values.²⁴² Despite their conceptual differences, formalism and functionalism are deeply interwoven in the development of constitutional doctrine concerning federalism. The ambiguities of the constitutional text, structure, and history are such that even the most devoted formalists typically define the Constitution's federalism precepts at least in part by reference to the goals that federalism ostensibly serves.²⁴³ The Supreme Court's decision in *Morrison* was no exception to this rule. Although framed

circumstances where specific types of ties to interstate commerce can be proven).

239. *United States v. Morrison*, 529 U.S. 598, 627 (2000) (stating that a remedy for gender-motivated violence may be provided only by the states).

240. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harv. L. Rev. 2180, 2215 (1998) (stating that although the Constitution does include some explicit constitutional protections for the states, standards for limiting congressional action "do not emerge clearly from the naked text of Congress's enumerated powers" (citation omitted)); Resnik, *supra* note 194 (arguing that courts do not discover federalism but rather construct it).

241. See, e.g., Evan H. Caminker, *Context and Complementarity Within Federalism Doctrine*, 22 Harv. J.L. & Pub. Pol'y 161, 161-62 (1998); William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism In Separation of Powers Cases*, 22 Harv. J.L. & Pub. Pol'y 21, 21-22 (1998).

242. See Caminker, *supra* note 241, at 162.

243. See *id.*; Burt Neuborne, *Formalism, Functionalism, and the Separation of Powers*, 22 Harv. J.L. & Pub. Pol'y 45, 47-48 (1998).

primarily in terms of formalism, the majority opinion also relied on arguments derived from the advantages that federalism is supposed to confer.²⁴⁴ Accordingly, before examining the *Morrison* decision's constitutional analysis,²⁴⁵ it is useful to consider the values associated with federalism and the extent to which VAWA's civil rights provision advanced those values.

American federalism's division of power between the state and federal governments—like its closely related corollary, the separation of powers among the legislative, judicial, and executive branches—was designed as “a check on abuses of government power.”²⁴⁶ By “split[ting] the atom of sovereignty,”²⁴⁷ the Framers intended to prevent the risk of tyranny resulting from the accumulation of power in a single level of government.²⁴⁸ As the Supreme Court has often reminded us, “The ‘constitutionally mandated balance of power’ between the States and the Federal Government was adopted by the Framers to ensure the protection of ‘our fundamental liberties.’”²⁴⁹

“[O]ur dual system of government”²⁵⁰ is widely viewed as providing a host of subsidiary benefits.²⁵¹ In addition to protecting citizens from over-concentration of political power, the federalist system is commonly described as encouraging innovation, diversity, and competition among states and localities; ensuring citizen involvement and political accessibility, while safeguarding against the dominance of local factions; and protecting the liberty and rights of individuals.²⁵²

244. See generally *infra* Part IV.

245. See *infra* Part IV (critiquing the *Morrison* decision and arguing that the civil rights provision should have been upheld as constitutional).

246. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

247. *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

248. See *The Federalist* No. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.”); *The Federalist* No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”), quoted in *United States v. Lopez*, 514 U.S. 549, 576 (Kennedy, J., concurring).

249. *Gregory*, 501 U.S. at 458 (citations omitted).

250. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

251. See, e.g., Erwin Chemerinsky, *The Values of Federalism*, 47 Fla. L. Rev. 499 (1995); Michael C. Dorf, *Instrumental and Non-Instrumental Federalism*, 28 Rutgers L.J. 825 (1997); Barry Friedman, *Valuing Federalism*, 82 Minn. L. Rev. 317 (1997).

252. See, e.g., *Gregory*, 501 U.S. at 458; *FERC v. Mississippi*, 456 U.S. 742, 787-90 (1982) (O'Connor, J., concurring in part and dissenting in part); Chemerinsky, *supra* note 251, at 525; Jackson, *supra* note 240, at 2213-14; Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1492-1510 (1987); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3-10 (1988); Shane, *supra* note

Adherents of all three visions of federalism discussed earlier in this article—namely, the states' rights view, the individual rights view, and the view I have described as cooperative rights federalism²⁵³—generally recognize the desirability of these values, although they differ in how they prioritize them.²⁵⁴ This subpart will examine the values commonly attributed to federalism and demonstrate that, on balance, VAWA's civil rights remedy advanced those values.

1. The Value of Innovation

Admirers of federalism often point to the autonomy accorded to the states as a source of beneficial creativity and experimentation.²⁵⁵ They agree with Justice Brandeis's famous statement that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."²⁵⁶ Those who regard the states as laboratories²⁵⁷ often assert that federal law should avoid imposing national solutions to important problems, in order to leave room for state and local innovation.²⁵⁸

Respect for the value of innovation dovetails neatly with the view that congressional power should be limited and state autonomy protected. One might therefore expect adherents of the states' rights view of federalism to argue against VAWA's civil rights remedy on the ground that it would impede policy experimentation by the states. In fact, however, opponents of the civil rights provision repeatedly

170, at 212, 221, 229, 242.

253. See generally *supra* Part I.

254. Some commentators have suggested that the advantages of federalism are largely illusory and that its purported benefits are actually attributable to decentralization rather than to federalism. See Rubin & Feeley, *supra* note 3, at 910-26 (describing public participation in government, citizen choice, competition among states, and experimentation as characteristics of decentralization that are not unique to federalism). But see, e.g., Friedman, *supra* note 251, at 378-412 (critiquing Rubin & Feeley and emphasizing the advantages of federalism); Jackson, *supra* note 240, at 2213-28 (same). For purposes of the present discussion, it is not necessary to resolve the question of whether the benefits attributed to federalism could also be achieved through a different political structure.

255. See, e.g., *FERC*, 456 U.S. at 788 (O'Connor, J., concurring in part and dissenting in part) (describing state innovation as one of "the most valuable aspects of our federalism").

256. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

257. Some commentators have questioned the empirical accuracy of the "states as laboratories" model. See, e.g., James A. Gardner, *The "States-As-Laboratories" Metaphor in State Constitutional Law*, 30 Val. U. L. Rev. 475 (1996); Susan Rose-Ackerman, *Risk Taking and Relection: Does Federalism Promote Innovation?*, 9 J. Legal Stud. 593 (1980); Rubin & Feeley, *supra* note 3. But see, e.g., Friedman, *supra* note 251, at 397-400; Merritt, *supra* note 252, at 9 n.47.

258. See, e.g., *United States v. Lopez*, 514 U.S. 549, 581, 583 (1995) (Kennedy, J., concurring); *FERC*, 456 U.S. at 787-89 (O'Connor, J., concurring in part and dissenting in part).

made the opposite argument. They claimed that the civil rights provision was undesirable because it would *promote* innovation. This argument emerged particularly clearly in the opponents' references to the ancient common-law doctrines of interspousal tort immunity and the marital rape exemption. Both of these doctrines owe their existence to the antiquated belief that the wife's legal identity merges into the husband's upon marriage, a belief grounded in pernicious gender stereotypes.²⁵⁹ Although one would not expect to find much support for these centuries-old doctrines designed to maintain women's subordinate role in marriage and society, they were vigorously defended as legitimate state prerogatives in the course of attacks on VAWA.²⁶⁰ The Fourth Circuit, in its en banc opinion in *Brzonkala*, criticized the civil rights provision for providing a remedy in cases where a state's interspousal tort immunity or marital rape exemption would deny relief.²⁶¹ The court wrote, "[T]hese policy choices have traditionally been made not by Congress, but by the States."²⁶² The court acknowledged that "Congress may well be correct . . . that such defenses represent regrettable public policy," but nevertheless asserted that the decision of whether to eliminate them belongs to the states.²⁶³ Similarly, in oral argument before the Supreme Court, the lawyer for Antonio Morrison decried the fact that VAWA would allow plaintiffs to avoid the effects of state tort immunities.²⁶⁴ Thus, opponents of the civil rights remedy chose to advance the cause of states' rights at the expense of the value of innovation, rather than in the service of that value.

Even if VAWA's civil rights provision could somehow be characterized as an interference with opportunities for innovation at the state level, a proponent of the second view of federalism, which emphasizes individual rights, would argue that this is no justification for allowing states to continue applying discriminatory doctrines that deprive women of access to the legal system. According to this perspective, when states lag in guaranteeing equal rights for their citizens, it is entirely fitting for federal law to enter the picture and impose a national standard. This is the very argument that supports Congress's authority to enact VAWA's civil rights remedy under the

259. See 1 William Blackstone, Commentaries *430-33; Hasday, *supra* note 72; Siegel, *supra* note 73.

260. See, e.g., Santiago v. Alonso, 96 F. Supp. 2d 58, 66-67 (D.P.R. 2000); 1993 House Hearing, *supra* note 44, at 81 (statement of Conference of Chief Justices).

261. See *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 843, 873 (4th Cir. 1999) (en banc).

262. *Id.* at 843.

263. *Id.*

264. Tr. of Oral Argument, *United States v. Morrison*, Nos. 99-5, 99-29, 2000 WL 41232, at *46-47, 52-54 (U.S. Jan. 11, 2000); see also *infra* Part III.C.2 (discussing testimony of Bruce Fein).

Fourteenth Amendment.²⁶⁵ State experimentation is not intrinsically good, if individual rights are sacrificed in the process.²⁶⁶

In fact, in the case of VAWA's civil rights remedy, there was no tradeoff between innovation and individual rights. Contrary to the assumption that federal statutes stifle innovation, VAWA's civil rights remedy both grew out of and stimulated innovation by the states. A handful of states had adopted some version of civil rights relief for gender-motivated violence before VAWA was enacted.²⁶⁷ Although these state laws were weak and rarely used, they provided a conceptual framework on which Congress could build.²⁶⁸ VAWA, in turn, inspired further innovative legislation at the state and local levels.²⁶⁹ Thus, far from foreclosing state experimentation, VAWA was part of a fruitful cycle of mutually reinforcing experimentation by the state and federal governments. Such interchanges are typical of the way in which civil rights are developed and expanded.²⁷⁰

It is true that innovations adopted by the federal government, unlike those adopted by a single state, apply to the entire country and therefore present greater risks in case of failure.²⁷¹ While this fact counsels that Congress should not occupy a field of regulation precipitously, it surely does not indicate that Congress should never do so. On the contrary, the scientific metaphor chosen by Brandeis suggests that once a policy experiment has proven successful in one state, its results can and should be generalized to other states, with a uniform national policy as the inevitable and desirable result.²⁷² Even Justice O'Connor, in her paean to state innovation in *FERC v. Mississippi*, praised the states for being pioneers in adopting female suffrage, unemployment insurance, and minimum wage laws,²⁷³ all of which were eventually adopted at the federal level.

2. The Value of Diversity

Because each state can adopt laws that reflect its local conditions and culture, federalism promotes legal pluralism. The resulting

265. See *supra* Part II, *infra* Parts IV.B, V.

266. See, e.g., *Gilliard v. Mississippi*, 464 U.S. 867, 869-73 (1983) (Marshall, J., dissenting); Brennan, *supra* note 166, at 550.

267. See *supra* Part II.

268. See *supra* Parts II, III.B.

269. See *supra* Part III.B.

270. See *supra* Part III.B.

271. Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (stating that a single state may "serve as a laboratory . . . without risk to the rest of the country"); *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting) (defending "social experiments" "in the insulated chambers afforded by the several States").

272. See G. Alan Tarr, *Laboratories of Democracy?: Brandeis, Federalism, and Scientific Management*, 31 *Publius* 37, 42-47 (2001).

273. *FERC v. Mississippi*, 456 U.S. 742, 788-89 (1982) (O'Connor, J., concurring in part and dissenting in part).

diversity is often cited as an advantage of the federalist system.²⁷⁴

When VAWA was pending in Congress, its opponents appealed directly to the value of diversity. In his testimony against the civil rights provision at a congressional hearing, Bruce Fein, a former Justice Department official under President Reagan, objected to the fact that VAWA would interfere with a state's choice not to make marital rape a crime. Fein characterized a state's decision about whether to criminalize marital rape as one that is "peculiarly local and responsive to local customs."²⁷⁵

At the outset, Fein was incorrect in claiming that VAWA would overturn states' marital rape exemptions.²⁷⁶ In reality, VAWA's civil rights remedy had no direct effect on state law. VAWA provided a federal civil cause of action in cases of gender-discriminatory violence—including some cases where no criminal remedy was available because of a state's marital rape exemption—but it did not require state criminal law to do away with such exemptions.

But what if the civil rights remedy did displace states' marital rape exemptions?²⁷⁷ To someone immersed in the individual rights view of federalism, Fein's invocation of diversity as an end in itself would still ring false. Holders of this viewpoint emphasize that unlimited diversity among state legal systems is clearly not contemplated by the federalist system. The principle of supremacy dictates that there is a line where diversity ends and uniformity begins.²⁷⁸ Since the end of the Civil War, the ground ceded to diversity has necessarily shrunk in direct proportion to the federal government's growing role in protecting individual rights. For example, the once common arguments that slavery and segregation are legitimate expressions of state and regional diversity have been thoroughly discredited.²⁷⁹ Like racial discrimination, gender discrimination is a subject on which local customs and the quest for diversity have repeatedly been forced to yield to a consistent level of basic federal equality guarantees.²⁸⁰ By its very nature, a federal civil rights measure creates a "floor" of legal protection that applies uniformly throughout the country. VAWA's

274. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1990); Merritt, *supra* note 252, at 10.

275. 1993 *House Hearing*, *supra* note 44, at 27-28 (statement of Bruce Fein).

276. See *id.* at 28 ("[I]t seems to me highly improper for the Federal Government to be instructing the States as to how they ought to grant or withhold spousal immunity [from rape charges].").

277. See *supra* Part III.A (discussing the argument that the civil rights remedy displaced state law indirectly).

278. See U.S. Const. art. VI, cl. 2 (Supremacy Clause).

279. See Jackson, *supra* note 240, at 2214 n.156.

280. See Akhil Reed Amar, *Race, Religion, Gender, and Interstate Federalism: Some Notes from History*, 16 *Quinnipiac L. Rev.* 19, 25 (1996) (observing that the federal government initially left the questions of slavery and female suffrage up to local option, but eventually was forced to adopt national guarantees of race and gender equality).

civil rights provision followed in that tradition. Although responsiveness to local conditions may generally be desirable, a "local custom" of permitting men to rape their wives hardly seems worth preserving.²⁸¹

Given the discriminatory purposes underlying the marital rape exemption,²⁸² Congress could arguably have acted within its Fourteenth Amendment powers by directly forbidding the states to include a marital rape exemption in their criminal codes.²⁸³ Alternatively, Congress could have made abrogation of the states' marital rape exemptions a condition for the receipt of federal funds under its Spending Clause powers.²⁸⁴ Instead, Congress chose a middle ground that respected the rights of the states as well as the rights of women. The VAWA civil rights provision allowed diverse approaches within state law to the problem of gender-motivated violence, while at the same time establishing a minimum baseline level of civil rights protection that could not be denied in any state. The civil rights provision thus made a significant concession to diversity, even as it created a new level of national protection for women's equality.

3. The Value of Competition

Closely related to the values of innovation and diversity is the argument that federalism enhances beneficial competition among the states. According to this argument, the states participate in a free market, competing for residents, businesses, and other resources; because of this competition, individuals and businesses enjoy greater variety among potential places to settle, and states are more likely to develop desirable policies in order to attract and maintain population and investment.²⁸⁵

Michael Greve, director of the Center for Individual Rights, which represented Antonio Morrison before the Supreme Court, has

281. Rape constitutes a particularly severe infringement of bodily autonomy. See, e.g., *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (describing rape as the ultimate violation of self, short of homicide). As a class of offenses, marital rape is at least as physically violent and psychologically damaging to its victims as rape by a stranger. See Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 St. John's L. Rev. 979, 1020-21 (1993); Lana Stermac et al., *Violence, Injury, and Presentation Patterns in Spousal Sexual Assaults*, 7 *Violence Against Women* 1218 (2001).

282. See *supra* notes 72-73, 259 and accompanying text.

283. See West, *supra* note 224, at 48-49, 69-71.

284. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987); see also *infra* notes 480-81 and accompanying text (discussing opportunities left open by *Morrison* for Congress to use its spending power to address gender-motivated violence).

285. See, e.g., Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. Cal. L. Rev. 745 (1995) (describing incentives for states to legalize same-sex marriage in order to take advantage of interstate competition); McConnell, *supra* note 252, at 1498-1500 (setting forth arguments in support of state and local competition).

explicitly endorsed the application of "competitive federalism" to civil rights and social welfare programs.²⁸⁶ He has argued that the Court must sharply curtail congressional action on social issues in order to further "federalism's purpose of mimicking, in the government sector, the advantages of private markets—variety, consumer choice, and competition."²⁸⁷ "Only when Congress is barred from imposing one-size-fits-all solutions will the states have to compete for their citizens' business, talents, assets, and affections," Greve wrote.²⁸⁸ "This would . . . allow citizens to sort themselves into the jurisdictions most to their liking."²⁸⁹ Greve's argument would suggest that VAWA went astray by preventing states from competing for residents on the basis of the legal rights they offer to victims of gender-motivated violence.

There are a number of flaws in Greve's analysis. Contrary to his analogy to private markets, people do not generally shop for a "package" of legal rights the way they shop for groceries or shoes.²⁹⁰ Most citizens are not aware of what legal rights are established by their own state's statutes and judicial decisions, much less those of other states.²⁹¹

Even if people were familiar with state laws affecting their rights, relatively few have the mobility to take advantage of differences among them. Most people live where they do for more pressing reasons, such as proximity to employment, family relationships, and availability and cost of housing.²⁹² To the extent that differences in state (or local) laws affect decisions of where to live, laws regulating economic matters such as welfare benefits, tax rates, and expenditures

286. See Michael Greve, *Real Federalism* 2, 8 (1999); Michael Greve, *Federalism Is More Than States' Rights*, *Wall St. J.*, July 1, 1999, at A22 [hereinafter *More Than States' Rights*].

287. Greve, *More Than States' Rights*, *supra* note 286, at A22.

288. *Id.*

289. *Id.*

290. *Cf. id.* ("[T]he court must confront federal entitlements head-on, thereby allowing us to pick and choose among the regulatory packages the various states or localities would create in their stead.").

291. A notable exception is the issue of legal recognition of same-sex relationships. Because this is a discrete legal question that has been highly publicized in recent years, most gay men and lesbians are probably aware of Vermont's recent adoption of a unique statute that grants to same-sex couples the right to enter into a status known as a civil union, which confers the same rights and obligations under Vermont law as marriage. *Vt. Stat. Ann. tit. 15, §§ 1201-07* (2001). In theory, this awareness opens up the possibility of moving to Vermont to take advantage of the civil union law in that state. See Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 *U. Miami L. Rev.* 1, 18-19 (2000); see also Brown, *supra* note 285. By contrast, a comparison of the relative merits of different states' legal protections for female victims of violence is a far more obscure and complex legal question. See Victoria Nourse, *The "Normal" Successes and Failures of Feminism and the Criminal Law*, 75 *Chi.-Kent L. Rev.* 951, 961-69 (2000) (describing state statutory schemes governing marital rape that are so complex that understanding them is "exhausting" for a criminal law scholar and impossible for the average citizen).

292. See, e.g., Friedman, *supra* note 251, at 387-88.

on public services are far more likely to be influential than civil rights laws.²⁹³ Practical and financial barriers to relocation are numerous.²⁹⁴ Without both information and mobility, meaningful competition among states cannot exist.

The assumption of mobility is particularly inapt where women are concerned. Poverty makes relocation especially difficult,²⁹⁵ and women are more likely than men to be poor.²⁹⁶ Until fairly recently, a married woman was legally unable to choose her domicile, because her domicile was automatically that of her husband.²⁹⁷ Even today, many married or cohabiting women live where they do because of their husband's or partner's job or preferences; this is especially likely to be true of battered women, whose abusers typically exercise total control over their living arrangements.²⁹⁸ The idea of an abused woman "shopping" for a state that provides vigorous legal remedies for battering and marital rape is absurd. Realistically, such women have little or no "right of exit."²⁹⁹

If we assume that problems with information and mobility could be overcome, and that competition among states on the basis of legal rights for female victims of violence were a reality, it is by no means clear that the result would be a competition among states to enhance those rights. Instead, the result might be the opposite. If states cared more about attracting male residents than female ones (a reasonable preference, because men on average have higher incomes than women), and if they assumed that men would be attracted to jurisdictions that impose few legal consequences for marital rape and domestic violence, the states would compete to weaken their laws on violence against women. Any state that would prefer to provide

293. See, e.g., Robert Moffitt, *Incentive Effects of the U.S. Welfare System: A Review*, 30 J. Econ. Literature 1, 31-36 (1992) (describing studies showing patterns of migration by welfare recipients to states with relatively high welfare rates). But see *Roe v. Anderson*, 966 F. Supp. 977, 982-83 (E.D. Cal. 1997) (describing evidence contradicting the "welfare magnet" hypothesis), *aff'd*, 134 F.3d 1400 (9th Cir. 1998), *aff'd sub nom.* *Saenz v. Roe*, 526 U.S. 489 (1999). See also Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956) (proposing a model under which an individual enjoying unlimited mobility would move to the locality best satisfying his or her preferred pattern of taxation and expenditures for public goods).

294. Friedman, *supra* note 251, at 387-88.

295. Shapiro, *supra* note 4, at 37.

296. See Katharine T. Bartlett et al., *Gender and Law* 1185-86 (3d ed. 2002).

297. See Barbara Allen Babcock et al., *Sex Discrimination and the Law* 1185 (2d ed. 1996).

298. See, e.g., Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 Alb. L. Rev. 973 (1995).

299. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1 (1991) (documenting the enormous barriers confronting battered women attempting to leave relationships, including increased risk of injury and death); cf. Shapiro, *supra* note 4, at 95-96 (arguing that right of exit, coupled with diversity among states, enhances individual freedom to live as one wishes).

vigorous protection for women would be trapped in a "prisoner's dilemma" situation.³⁰⁰ Competitive forces would compel such a state to lower its level of protection, even though it would prefer not to do so. The result would be a "race to the bottom" among the states.³⁰¹

Interstate competition can be injurious to individuals if it leads states to sacrifice their rights. Moreover, interstate competition can be detrimental to the states themselves if it forces them to abandon policy preferences in order to compete with other states. Avoiding this kind of "race to the bottom" has been recognized as a powerful justification for adoption of a uniform national standard.³⁰² A federal standard, such as that provided by VAWA's civil rights remedy,

300. The "Prisoner's Dilemma," a classic scenario used in game theory, has been summarized as follows:

[T]wo prisoners have the same two choices: to cooperate with each other by keeping silent with respect to his and the other prisoner's involvement in the crime or to "defect" by confessing his and the other prisoner's criminal act. Each prisoner must make his choice without knowing what the other prisoner will do. If both deny all involvement in the crime, each is sentenced to a light sentence; if both confess, each is given a sentence of medium-severity; if one confesses, the one confessing is released, but the other prisoner is handed a harsh sentence. Although collectively the prisoners would be best off if both denied the crime, each follows his own self-interest and confesses.

Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 Hastings L.J. 271, 301 (1997).

301. The phrase "race to the bottom" refers to the tendency of states to adopt suboptimal policies as a result of competition with other states to attract and retain desirable residents and businesses. See generally Friedman, *supra* note 251, at 408. An example of a "race to the bottom" would be a state's decision to set its welfare rates lower than it would prefer, in order to avoid attracting so many welfare recipients that they drive away taxpayers who are unwilling to bear the increased costs of the welfare program. See, e.g., Saenz v. Roe, 526 U.S. 489, 509-10 (1999) (considering and rejecting the argument made by the United States as amicus curiae that states should be permitted to impose durational residency requirements on welfare recipients in order to avoid a "race to the bottom" among states in setting benefit levels). Another example would be a state's decision to abandon the environmental standards that it would otherwise choose, and instead to adopt excessively lax standards, in order to compete for industry with other states. For varying perspectives on the "race to the bottom" phenomenon in the environmental context, compare, for example, Engel, *supra* note 300 (documenting the existence of a race to the bottom in state environmental regulation) with, for example, Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 Minn. L. Rev. 535 (1997) (claiming that the risk of a race to the bottom in state environmental regulation is exaggerated), and Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. Rev. 1210 (1992) (same).

302. See, e.g., Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 281-82 (1981) (describing "destructive interstate competition" as a justification for nationwide surface mining and reclamation standards); United States v. Darby, 312 U.S. 100, 115 (1941) (describing the federal Fair Labor Standards Act as a response to "injurious" competition among the states); Steward Mach. Co. v. Davis, 301 U.S. 548, 588 (1937) (describing the unemployment tax provisions of the Social Security Act as a solution to "paraly[sis]" among the states caused by interstate competitive pressures to keep labor costs low).

relieves both the states and individuals of the potentially deleterious effects of interstate competition.

4. The Value of Government Close to the People

A frequently cited advantage of the federalist system is the presence of governmental units on a small scale. State and local governance is said to enhance opportunities for citizen participation in the democratic process and to increase the accessibility and responsiveness of government officials.³⁰³

Assuming that this depiction of state and local government is accurate,³⁰⁴ the fact that state and local officials are more closely identified with and more easily influenced by their constituents is a double-edged sword. Governance close to the grass roots has consistently been viewed as a danger as well as a benefit. As Madison pointed out in *The Federalist* No. 10, factions are more likely to command a majority in a small rather than a large unit of government, and factions that command a local majority are likely to hold local government captive and oppress members of the minority.³⁰⁵ The solution to this problem, according to Madison, is to have a strong national government that can counterbalance the influence of factions at the subnational level.³⁰⁶ Thus, even for advocates of the states' rights view of federalism, small-scale governance is not an unqualified good.

Those who embrace the individual rights view of federalism are even more skeptical of the advantages of local governance. One does not have to look far to find historical evidence bearing out Madison's

303. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *FERC v. Mississippi*, 456 U.S. 742, 789-90 (1982) (O'Connor, J., concurring in part and dissenting in part); Chemerinsky, *supra* note 251, at 527; Merritt, *supra* note 252, at 7-8.

304. Scholars have questioned whether government becomes increasingly responsive and accessible as one moves from the federal to the state and local levels. See, e.g., Shapiro, *supra* note 4, at 93 (pointing out that many states are too large and heterogeneous to conform to the ideal of small, accessible governing units); Chemerinsky, *supra* note 251, at 528 (observing that citizen interest is greater in federal than in state and local elections); Resnik, *supra* note 194, at 669 n.234 (arguing that "the role of extra-local organizations in making local policy" calls into question the proposition that smaller units of government "permit[] more participation and enhance[] the ability of individuals to have impact" (citation omitted)); Shane, *supra* note 170, at 242 (suggesting that citizens can more easily monitor government activity at the federal level than at the state or local level).

305. *The Federalist* No. 10, at 78-81 (James Madison) (Clinton Rossiter ed., 1961). Madison defined a faction as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *Id.* at 78.

306. *Id.* at 82-84; see also *The Federalist* No. 51, at 324-25 (James Madison) (Clinton Rossiter ed., 1961). But see McConnell, *supra* note 252, at 1502 (arguing that Madison overestimated the influence of factions at the local level and underestimated their influence at the federal level).

prediction that federal power would prove to be necessary to offset oppressive local factions.³⁰⁷ VAWA's civil rights provision is a case in point. Congress acted to vindicate the equality rights of women in response to evidence of pervasive bias against female victims of violence within the state criminal and civil justice systems.

The fact that women's interests were sacrificed by government actors at the subnational level is not entirely surprising. To the extent that local government is predisposed to be accessible and responsive, the relevant question is, accessible and responsive to whom? Local police, judges, and other officials, predominantly male, are more likely to be acquainted with the perpetrators of violence against women than with its victims.³⁰⁸ As Professor Catharine MacKinnon has written, just as women are most likely to be victims of violence in or near their homes,³⁰⁹ they are also least likely to receive justice at the level of government closest to their homes.³¹⁰ According to MacKinnon,

One way to describe the process of change in women's legal status from chattel to citizen is as a process of leaving home. The closer to home women's injuries are addressed, the less power and fewer rights they seem to have; the further away from home the forum, the more power and rights women have gained³¹¹

Thus, women's quest for legal equality has taken them from the home to the state, federal, and international arenas.³¹² At each progressively higher level, if they succeed in gaining access to it,³¹³ genuine redress for violence becomes more likely.³¹⁴ "For physically and sexually violated women, going public with their injuries has meant seeking accountability and relief from higher sovereigns, men who have power over the men who abused them because they are above, removed from, hence less likely to be controlled by those

307. See, e.g., Friedman, *supra* note 251, at 367 (giving examples of nullification, slavery, the Civil War and Reconstruction, Jim Crow, and the civil rights struggle).

308. See *Culberson v. Doan*, 65 F. Supp. 2d 701 (S.D. Ohio 1999) (case brought under the VAWA civil rights provision alleging complicity between police and perpetrator); *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1526 (D. Conn. 1984) (alleging liability under the Fourteenth Amendment for a police department's discriminatory failure to protect the plaintiff from domestic violence committed by her husband, who was acquainted with many police officers); Julie Goldscheid, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 Cornell L. Rev. 109, 138 & n.197 (2000) (describing "cases in which the perpetrator is familiar with local law enforcement officials").

309. Unlike most violence against men, most violence against women takes place within family or intimate relationships. Tjaden & Thoennes, *supra* note 44, at 2, 8.

310. MacKinnon, *supra* note 99, at 173-76.

311. *Id.* at 174.

312. *Id.* at 174-76.

313. As MacKinnon points out, women's access to a higher forum is often obstructed, as it was in *Morrison*. *Id.* at 175-76.

314. *Id.* at 173-77.

abusers.”³¹⁵ On this account, where women are concerned, Madison’s assumption that citizens will more easily influence state and local government than national government should be turned on its head.

To recognize that women and members of many other vulnerable groups are often systematically disadvantaged by the denial of rights at the state and local levels does not mean that the protection of rights should be turned over wholesale to the federal government.³¹⁶ It does mean, however, that it is worth remembering that one of the purposes of federalism is to “enhanc[e] personal and group liberty [and] empowerment, by providing multiple layers of government to which citizens may appeal.”³¹⁷ Access to the federal government as an alternative to state and local government plays a crucial corrective role.³¹⁸

5. The Value of Individual Rights

The Court has frequently stated that federalism’s ultimate goal is to protect individual freedom, liberty, and rights.³¹⁹ Fundamentally, the reason to divide power between the state and federal governments, as well as among the coordinate branches³²⁰—indeed, the reason to have a government³²¹—is to defend the rights of the people. As Justice O’Connor wrote for the Court in *New York v. United States*,

The Constitution does not protect the sovereignty of the States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the

315. *Id.* at 175.

316. *See supra* Part III.B (describing the importance of state and federal participation in development of civil rights law).

317. Jackson, *supra* note 240, at 2214; *see also* Brennan, *supra* note 205, at 503 (“[It should not be] forgotten that one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled.”).

318. *See, e.g.,* Amar, *supra* note 9, at 1492-1519 (describing the federal and state governments as sources of redress for each other’s violations of individual rights).

319. *See, e.g.,* *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) (stating that the division of power between the states and federal government, as well as among the coordinate branches, creates “a double security . . . to the rights of the people” (quoting *The Federalist* No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961))); *Gregory v. Ashcroft* 501 U.S. 452, 458 (1991) (stating that the balance of power between the state and federal governments “was adopted by the Framers to ensure the protection of ‘our fundamental liberties’”) (citations omitted); *FERC v. Mississippi*, 456 U.S. 742, 790 (1982) (O’Connor, J., concurring in part and dissenting in part) (describing the federal system as the source of “the balance of power that buttresses our basic liberties”).

320. *United States v. Lopez*, 514 U.S. at 552 (“Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”) (quoting *Gregory*, 501 U.S. at 458)).

321. *See The Federalist* No. 52, at 324 (James Madison) (Clinton Rossiter ed., 1961) (“Justice is the end of government.”).

States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.³²²

The individual rights view of federalism obviously elevates this value above all others that the federalist system ostensibly serves. From this vantage point, VAWA's civil rights provision was a resounding success. As discussed earlier, the civil rights remedy was a significant advance for securing the rights of women in the face of widespread discrimination by the states.³²³ By providing federal protection for equality rights that were being violated by the states, the civil rights remedy advanced federalism's basic value of protecting individual rights.

From the viewpoint of defenders of the states' rights view of federalism, however, the fact that the civil rights provision expanded the rights of women is not enough to prove that the legislation truly served federalism's rights-protecting function. If VAWA protected women's rights at the cost of the continued vitality of the states as separate units of government, it would be open to the charge that it was actually detrimental to the goals of federalism—including, in the long run, the goal of protecting the rights of individuals.³²⁴ As Justice O'Connor explained, "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'"³²⁵ Seen in this light, any impairment of the states' autonomy weakens their ability to function as a bulwark against federal incursions on individual liberty.

In fact, however, VAWA's civil rights provision did not jeopardize the authority of the states. Rather, the civil rights remedy was carefully tailored to further the rights of women without infringing on legitimate state prerogatives; indeed, it actually expanded the states' range of policy choices by relieving them of preexisting constraints.³²⁶ In the true spirit of cooperative rights federalism, the civil rights provision neither protected states' rights at the expense of individual rights, nor protected individual rights at the expense of states' rights.

As the preceding discussion has shown, the civil rights provision of VAWA enhanced innovation, left room for diversity, alleviated

322. *New York v. United States*, 505 U.S. 144, 181 (1992).

323. See *supra* Part II; see also *infra* Parts IV.B, V.

324. See Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 *Duke L.J.* 979, 1009 (1993) (describing Justice O'Connor's strategy in *Gregory v. Ashcroft* as an attempt to "preserve the vigor of the state as a political entity independent of Congress, on the theory that strong states would have the ability to protect their citizens from encroachments on their rights by the national government" and stating that "[r]ather than siding with individual rights on a case-by-case basis, . . . [t]he *Gregory* Court chose to invigorate the states in a grand balance of power, trusting that over time benefits would flow to individuals").

325. *New York*, 505 U.S. at 181 (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

326. See *supra* Part III.A.

possible detrimental effects of interstate competition, utilized the federal government to counteract the bias of local factions, and promoted individual rights without sacrificing states' rights. Thus, the civil rights remedy was faithful to the values of federalism. The constitutional dimension of this issue—that is, whether the civil rights measure fell within Congress's constitutionally authorized powers—is the subject of the next part.

IV. *UNITED STATES V. MORRISON* AND FEDERALISM

In *United States v. Morrison*, the Supreme Court, by a vote of five to four, held that neither the Commerce Clause nor Section 5 of the Fourteenth Amendment authorized Congress to enact the civil rights provision of the Violence Against Women Act.³²⁷ The opinion for the Court insisted that the decision to strike down the civil rights remedy was required by the need to distinguish between “what is truly national and what is truly local.”³²⁸ The Court presented formalist arguments based on the text of the Constitution as interpreted in previous cases, as well as functionalist arguments focusing on the supposedly dire consequences for the functioning of federalism that would result from upholding the civil rights provision. Despite the majority's pervasive emphasis on federalism, however, the outcome in *Morrison* was dictated neither by the Constitution as interpreted in the Court's previous decisions, nor by the values of federalism that the Court claimed to serve.

A core weakness of the majority's reasoning was its failure to see beyond the “states' rights” conception of federalism. The Court assumed that its obligation was to curtail the power of Congress in order to permit the states to regulate violence against women—or not to do so—as they see fit. Missing from the Court's analysis was any recognition of the special federal role in protecting the rights of individuals; indeed, the Court barely alluded to the nature of the challenged legislation as a civil rights law and entirely omitted any discussion of the impact of gender-motivated violence on women's

327. *United States v. Morrison*, 529 U.S. 598 (2000). Chief Justice Rehnquist wrote the opinion for the majority, which was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Thomas wrote a concurring opinion rejecting the “substantial effects” test under the Commerce Clause as inconsistent with the “original understanding” and with early Commerce Clause cases. *Id.* at 627. Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, authored a dissent asserting that the civil rights provision was a legitimate exercise of Congress's commerce power. *Id.* at 628-55. Justice Breyer's dissent, joined by Justices Stevens, Souter, and Ginsburg, also argued for upholding the civil rights provision under the Commerce Clause. *Id.* at 655-61. Additionally, a section of Justice Breyer's dissent that was joined only by Justice Stevens expressed “doubt” about the majority's rejection of Section 5 of the Fourteenth Amendment as a constitutional basis for the civil rights provision. *Id.* at 664-66.

328. *Id.* at 617-18.

equality. Also missing from the majority opinion was a recognition that federal legislative intervention can add to, rather than detract from, the states' freedom at the same time that it enhances the freedom of individuals.

This part critiques the Court's analysis of the civil rights provision under the Commerce Clause and Fourteenth Amendment. It will then assess *Morrison's* impact on federalism and conclude with an examination of the categorical distinctions relied upon by the *Morrison* Court. The following section, Part V, will propose an alternative analysis that the Court could have used in *Morrison* to uphold VAWA's civil rights remedy. The linchpin of this analysis is the need for federal intervention in areas that the states are incapable of handling alone. This approach would maintain limits on Congress's power while preserving opportunities for cooperative rights federalism.

A. The Commerce Clause

The Supreme Court's interpretation of the Commerce Clause began in earnest with *Gibbons v. Ogden*, in which Chief Justice Marshall's opinion accorded broad power to Congress to control the regulation of interstate commerce.³²⁹ However, by the late nineteenth and early twentieth centuries, the Court had begun to curtail Congress's commerce powers, typically by finding that the challenged federal legislation was concerned not with interstate commerce but with issues subject to the states' police powers.³³⁰ The Court's narrow reading of Congress's powers under the Commerce Clause intensified in cases challenging New Deal legislation, such as *Schechter Poultry Co. v. United States*³³¹ and *Carter v. Carter Coal Co.*³³² In 1937, under a variety of pressures,³³³ the Court changed direction, upholding the

329. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In the earlier case of *McCulloch v. Maryland*, the Court had given a broad reading to Congress's power to enact legislation "necessary and proper" to carry out the powers conferred on it by the Constitution. 17 U.S. (4 Wheat.) 316, 411-21 (1819).

330. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). Even during this period, the Court did not consistently invalidate Congress's attempts to exercise its Commerce Clause powers. See, e.g., *Champion v. Ames* (The Lottery Case), 188 U.S. 321 (1903); see also Larry D. Kramer, *But When Exactly Was Judicially-Enforced Federalism "Born" In the First Place?*, 22 Harv. J.L. & Pub. Pol'y 123, 131-35 (1998) (stating that the Court "experimented" with invalidating congressional enactments in the name of federalism during the late nineteenth and early twentieth centuries but only adopted this approach consistently during the years 1935 and 1936).

331. 295 U.S. 495 (1935).

332. 298 U.S. 238 (1936).

333. The exact roles that President Roosevelt's court-packing plan and other forces played in bringing about the so-called "switch in time that saved nine" remain a matter of debate. See generally, e.g., Paul Brest et al., *Processes of Constitutional Decisionmaking* 426-28 (4th ed. 2000).

National Labor Relations Act in the watershed case of *NLRB v. Jones & Laughlin Steel Corp.*³³⁴ Subsequent cases established that Congress's commerce power extended to activities that were local and not overtly commercial but that substantially affected interstate commerce;³³⁵ that even an activity that was trivial in itself could be regulated by Congress if the aggregate effect of all such activities on interstate commerce was substantial;³³⁶ and that the Court would defer to Congress if there was a "rational basis" for concluding that a regulated activity sufficiently affected interstate commerce and Congress's legislative scheme was "reasonably adapted" to its constitutionally permissible purpose.³³⁷ These principles dominated the Court's Commerce Clause decisions throughout the next five decades.

The case of *United States v. Lopez*,³³⁸ which was decided after VAWA had been signed into law, marked the first time since 1937 that the Court invalidated an exercise of the commerce power. In *Lopez*, the same five-member majority that would later decide *Morrison*³³⁹ held that the Gun-Free School Zones Act, which created federal criminal penalties for knowingly possessing a firearm in a school zone, exceeded Congress's authority under the Commerce Clause. Although *Lopez* struck down a federal statute enacted under the Commerce Clause for the first time in almost sixty years, it did not overturn but rather reaffirmed previous cases that established highly deferential standards for evaluating the constitutionality of congressional exercises of the commerce power.³⁴⁰

For its Commerce Clause analysis, the *Morrison* decision relied heavily on *Lopez*. According to *Lopez*, there are "three broad categories of activity that Congress may regulate under its commerce power": the use of the channels of interstate commerce; instrumentalities of interstate commerce or persons or things in interstate commerce; and activities that substantially affect interstate

334. 301 U.S. 1 (1937).

335. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 124-25 (1942); *Darby*, 312 U.S. at 118-20.

336. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964); *Wickard*, 317 U.S. at 127-28.

337. See, e.g., *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981) (citations and internal quotation marks omitted); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62 (1964).

338. 514 U.S. 549 (1995).

339. 529 U.S. 598 (2000). Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy and Thomas constituted the majority in *Lopez* and *Morrison*, as they have in numerous other cases. See generally David G. Savage, *United They Sit*, A.B.A. J., Sept. 2001, at 34.

340. *Lopez*, 514 U.S. at 553-61 (citing, *inter alia*, *Hodel*, *McClung*, *Heart of Atlanta Motel*, *Wickard*, *Darby*, *Jones & Laughlin Steel*, and *Gibbons*); see also *id.* at 573-74 (Kennedy, J., concurring) (citing earlier cases that are "not called in question by our decision today").

commerce.³⁴¹ In both *Lopez* and *Morrison*, the Court's analysis focused on whether the challenged federal statute could be sustained under the third category, as a regulation of an activity that substantially affects interstate commerce.³⁴²

The *Morrison* Court devised a four-part "framework" for its Commerce Clause inquiry that purported to rest on the reasoning of *Lopez*.³⁴³ As its first "consideration[]" under this framework,³⁴⁴ the Court found that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."³⁴⁵ Leaving aside for the moment the advisability of creating a bright-line distinction between economic and noneconomic activity for Commerce Clause purposes,³⁴⁶ the Court erred for at least two reasons. First, Congress had assembled a "mountain of data"³⁴⁷ demonstrating the enormous impact of gender-motivated crime on interstate commerce and particularly on women's ability to function as economic actors. Gender-motivated crime *is* economic crime; it robs women of the ability to be economically self-sufficient, and that is often its purpose.³⁴⁸ Second, by apparently requiring that an activity be economic in nature in order to be regulated by the Commerce Clause,³⁴⁹ the Court diverged from the holding of *Lopez*. The *Lopez* Court quoted with approval the following statement from *Wickard v. Filburn*: "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . ."³⁵⁰ Although the *Lopez* opinion stated that the Gun-Free School Zones Act was "a criminal statute that by its terms has

341. *Lopez*, 514 U.S. at 558-59, quoted in *Morrison*, 529 U.S. at 608-09.

342. *Morrison*, 529 U.S. at 609; *Lopez*, 514 U.S. at 559.

343. *Morrison*, 529 U.S. at 609-16.

344. *Id.* at 609.

345. *Id.* at 613.

346. See *infra* Part IV.D.

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

348. See *supra* Part II; see also, e.g., Brief Amici Curiae of Equal Rights Advocates et al. at 10-12, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29) ("Exclusion from the workplace is often the intended result, not merely an unintended consequence, of violence against women.").

349. The *Morrison* Court stated that "we need not adopt a categorical rule" against congressional regulation of noneconomic activity that substantially affects interstate commerce. 529 U.S. at 613. However, the Court proceeded to state, "We . . . reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 617. This seemed to suggest the adoption of just such a categorical rule. On the *Morrison* opinion's questionable reliance on categorical distinctions, see *infra* Part IV.D.

350. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), quoted in *Lopez*, 514 U.S. 549, 556 (1995). *Wickard* held that a farmer's cultivation of homegrown wheat for consumption on the farm "overhangs the market" and "competes with wheat in commerce." 317 U.S. at 128. Gender-based violence, with its overt economic effects and often with economic motives as well, is at least as economic in nature as growing wheat for home consumption.

nothing to do with 'commerce' or any sort of economic enterprise,"³⁵¹ that characterization did not determine the outcome of the case. On the contrary, after observing that the Gun-Free School Zones Act did not regulate a commercial activity, the Court proceeded to consider at length whether Congress could rationally conclude that possession of a gun in a school zone substantially affected interstate commerce.³⁵²

The Court's second "consideration" in *Morrison* turned on the fact that VAWA, like the Gun-Free School Zones Act, contained no jurisdictional element requiring proof of a connection with or effect on interstate commerce in each case.³⁵³ Such a jurisdictional element would, the Court wrote, "lend support" to the argument that the activity regulated by Congress had a sufficient tie to interstate commerce.³⁵⁴ However, the *Morrison* majority did not suggest that a jurisdictional element is a constitutional requirement in cases involving the third category of Commerce Clause powers, nor would such a suggestion accurately reflect the holding in *Lopez*.³⁵⁵

As the third step in its Commerce Clause analysis, the *Morrison* Court conceded that in contrast to the lack of congressional findings in support of the Gun-Free School Zones Act, Congress made extensive findings showing that gender-motivated violence has a substantial effect on interstate commerce. *Lopez* had pointed out that "legislative findings, and indeed even congressional committee findings" are entitled to careful consideration as part of the Court's inquiry into a statute's constitutionality.³⁵⁶ The function of such findings, according to *Lopez*, is to help the Court see links between the regulated activity and interstate commerce that would not be "visible to the naked eye."³⁵⁷ The legislative history of VAWA was replete with findings that domestic violence, sexual assault, and other forms of violence against women have a massive effect on women's employment, workplace productivity, interstate travel, consumer spending, and health care expenses, as well as on other aspects of

351. *Lopez*, 514 U.S. at 561; see also *id.* at 608 (Souter, J., dissenting) (critiquing the majority's distinction between commercial and non-commercial activities); *id.* at 627-28 (Breyer, J., dissenting) (same).

352. *Id.* at 562-68.

353. *Morrison*, 529 U.S. at 613.

354. *Id.* at 613. The Court distinguished the criminal provisions of VAWA, which do contain a jurisdictional element and have been upheld by the courts of appeals as legitimate exercises of Congress's power under the first of the three *Lopez* categories. *Id.* at 613 n.5.

355. *Lopez* observed that the Gun-Free School Zones Act contained no jurisdictional element but did not indicate that a jurisdictional element is required. See *Lopez*, 514 U.S. at 561-62. On the related but distinct point that jurisdictional elements are neither necessary nor sufficient to safeguard federalism, see *infra* notes 476-79 and accompanying text.

356. *Lopez*, 514 U.S. at 562.

357. *Id.* at 563, quoted in *Morrison*, 529 U.S. at 612.

interstate commerce.³⁵⁸

The *Morrison* Court, however, hastened to undercut the significance of the legislative findings supporting VAWA's civil rights provision. Instead of approaching the legislative findings with the deference dictated by *Lopez*,³⁵⁹ the *Morrison* majority rejected those findings based on the assertion that they were "substantially weakened" by their reliance on "a method of reasoning" that the Court described as "unworkable."³⁶⁰ In so doing, the Court essentially allowed the fourth element in its Commerce Clause test to cancel out the third.

When it turned to the fourth element in its inquiry, the Court stated that the "method of reasoning" embodied in VAWA's legislative record was indistinguishable from the government's unsuccessful arguments in support of the Gun-Free School Zones Act in *Lopez*.³⁶¹ According to the Court, the links between gender-motivated violence and interstate commerce are equally "attenuated" as those connecting gun possession in school zones to interstate commerce.³⁶² In fact, the differences between the two statutes' demonstrated connections to interstate commerce are stark. Unlike the speculative, unsubstantiated arguments advanced by the government in *Lopez*,³⁶³ VAWA's passage was accompanied by specific, well-documented findings of the effects of gender-motivated violence on interstate

358. See *Morrison*, 529 U.S. at 614-15 (citing legislative history); *id.* at 628-36 (Souter, J., dissenting) (same).

359. The *Lopez* Court pointed out that a determination of constitutionality under the Commerce Clause is ultimately a judicial rather than a legislative question. *Lopez*, 514 U.S. at 557 n.2, quoted in *Morrison*, 529 U.S. at 614. It made that observation, however, in the context of endorsing the lenient "rational basis" test for deciding whether a regulated activity sufficiently affects interstate commerce. *Lopez*, 514 U.S. at 557. In keeping with the rational basis approach, *Lopez* suggested that congressional findings, were they available, would be treated as factually persuasive, even if not legally binding. See *id.* at 562-63.

360. *Morrison*, 529 U.S. at 615. Because legislative findings are statements of fact based on evidence received by Congress, it is difficult to see how such findings can legitimately be criticized as the product of a disfavored "method of reasoning," as if they were the result of congressional theorizing rather than fact-finding. See *id.* at 638 (Souter, J., dissenting).

361. *Id.* at 615.

362. *Id.* at 612, 615.

363. With no contemporaneous congressional findings on which to rely, the government defended the Gun-Free School Zones Act by hypothesizing that possession of guns may lead to violent crime and that violent crime is costly and reduces the willingness of individuals to travel to areas that are perceived as unsafe. See *Lopez*, 514 U.S. at 562-64. The government also argued that guns in schools pose a threat to the educational process, which threatens to produce a poorly educated workforce, which would negatively affect national productivity. *Id.* at 564; see also *Morrison*, 529 U.S. at 612-13 (summarizing "costs of crime" and "national productivity" arguments advanced by the government in *Lopez*). The *Lopez* Court found that accepting these arguments in the absence of any factual underpinnings would require it to "pile inference upon inference." *Lopez*, 514 U.S. at 567.

commerce.³⁶⁴ Furthermore, the economic consequences of gender-motivated violence include effects that are qualitatively different from the types of costs that are intrinsic to crime in general.³⁶⁵ Gender-motivated crime has a discriminatory economic impact, and it often has a discriminatory economic purpose.³⁶⁶ As the Senate Judiciary Committee reported,

Gender-based violence bars its most likely targets—women—from full [participation] in the national economy. For example, studies report that almost 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime. Even the fear of gender-based violence . . . deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence.³⁶⁷

This discriminatory element differentiates gender-motivated crime from most other crimes and provides additional justification for congressional action under the Commerce Clause.³⁶⁸

The legislative findings in support of the civil rights remedy were explicitly stated. They were based on empirical information. They demonstrated a massive and direct effect on interstate commerce, and revealed widespread economic discrimination against a disadvantaged group. All these facts rendered the chain of causation identified by the petitioners in *Morrison* far less “attenuated” than that advanced by the government in *Lopez*.

364. See *supra* Part II. Based on the extensive evidence it had gathered, Congress concluded that

crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with . . . business . . . in interstate commerce; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products

House Conference Report, *supra* note 62, at 385; see also, e.g., 1993 Senate Report, *supra* note 39, at 54 (“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 affects interstate commerce and the national economy.”).

365. Cf. *Morrison*, 529 U.S. at 615 (stating that “petitioners’ reasoning would allow Congress to regulate any crime”); *Lopez*, 514 U.S. at 564 (observing that the government’s “costs of crime” reasoning could apply to all violent crime).

366. See *supra* Part II; see also, e.g., Brief Amici Curiae of Equal Rights Advocates et al. at 10-12, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29) (describing men’s use of violence against women as a tactic to prevent women from gaining economic independence).

367. 1993 Senate Report, *supra* note 39, at 54.

368. For further discussion of the *Morrison* Court’s failure to recognize the significance of economic discrimination as a factor in establishing the civil rights provision’s constitutionality, see *infra* Part V.

B. The Fourteenth Amendment

Having found VAWA's civil rights provision invalid under the Commerce Clause, the Court proceeded to consider its constitutionality under Section 5 of the Fourteenth Amendment.³⁶⁹

Section 5 of the Fourteenth Amendment is a "positive grant of legislative power" authorizing Congress "to enforce, by appropriate legislation," the Fourteenth Amendment's substantive guarantees, including the guarantee of equal protection of the laws.³⁷⁰ Section 5 is part of a "vast transformation" in American federalism wrought by the Reconstruction Amendments, which were designed to expand Congress's power at the expense of state autonomy.³⁷¹ Although congressional power under Section 5 is not unlimited, "[i]t is for Congress in the first instance to 'determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference."³⁷²

After the Fourteenth Amendment was ratified, the Court initially responded favorably to federal legislation enacted under Section 5.³⁷³ However, as the tide turned against Reconstruction, the Court soon invalidated exercises of Congress's enforcement power.³⁷⁴ During the last quarter of the nineteenth century and first half of the twentieth, Congress did not attempt to legislate under the Fourteenth Amendment.³⁷⁵ With the advent of the civil rights era of the mid-twentieth century, Congress and the Court again turned their attention to congressional enforcement of the post-Civil War amendments.³⁷⁶ During this period, the Court demonstrated its willingness to interpret Section 5 of the Fourteenth Amendment expansively in order to permit Congress to take affirmative steps to protect individual rights.³⁷⁷

369. *Morrison*, 529 U.S. at 619-27.

370. *See id.* at 619 (internal quotation marks omitted) (citing *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

371. *See Mitchum v. Foster*, 407 U.S. 225, 238-39, 242 (1972); *see also City of Rome v. United States*, 446 U.S. 156, 178-80 (1980); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-56 (1976).

372. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80-81 (2000) (quoting *Boerne*, 521 U.S. at 536 (quoting *Morgan*, 384 U.S. at 651)).

373. *See Ex Parte Virginia*, 100 U.S. 339 (1879).

374. *See, e.g., The Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Harris*, 106 U.S. 629 (1883).

375. Laurence H. Tribe, 1 *American Constitutional Law* 922 (3d ed. 2000).

376. *See generally Post & Siegel, supra* note 17, at 486-502.

377. *See, e.g., Morgan*, 384 U.S. 641. The Court accorded a similarly broad reading to the enforcement clauses of the Thirteenth and Fifteenth Amendments. *See, e.g., City of Rome v. United States*, 446 U.S. 156 (1980); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). The Court has interpreted the enforcement clauses of the Fourteenth and Fifteenth Amendments as conferring "coextensive" powers on Congress. *City of Rome*, 446 U.S. at 208 n.1 (Rehnquist, J., dissenting); *see also, e.g., Morgan*, 384 U.S. at 650-51.

After VAWA was signed into law but before *Morrison* was decided, the Court decided four cases invalidating some or all applications of certain federal statutes enacted under Section 5. *City of Boerne v. Flores*³⁷⁸ struck down the Religious Freedom Restoration Act, which was Congress's attempt to override the constitutional standard previously adopted by the Court to govern claims brought under the Free Exercise Clause. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,³⁷⁹ the Court held that the federal Patent Remedy Act was not a valid exercise of Congress's power under Section 5 and therefore did not waive the states' Eleventh Amendment immunity. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*³⁸⁰ held that the Trademark Remedy Clarification Act cannot authorize suits against the states for false advertising of their own products because such activity is not a deprivation of property without due process of law and therefore is not a valid subject for legislation under Section 5. In *Kimel v. Florida Board of Regents*,³⁸¹ the Court upheld an Eleventh Amendment challenge to the application of the Age Discrimination in Employment Act ("ADEA") to the states, on the ground that Congress lacked authority to enact the ADEA under Section 5. In each of these cases, the Court emphasized that Congress's powers under Section 5 are "remedial and preventive" only, not "substantive."³⁸² Moreover, Congress faulted all four statutes for their failure to rest on a demonstrated record of constitutional violations that they were ostensibly intended to remedy or prevent.³⁸³

The civil rights provision of VAWA presented a very different picture from the statutes struck down in *Boerne*, *Florida Prepaid*, *College Savings Bank*, and *Kimel*. Unlike the Religious Freedom Restoration Act, VAWA made no attempt to redefine prevailing constitutional norms.³⁸⁴ VAWA was expressly designed to respond to the constitutionally recognized harm of gender discrimination.³⁸⁵

378. 521 U.S. 507 (1997).

379. 527 U.S. 627 (1999).

380. 527 U.S. 666 (1999).

381. 528 U.S. 62 (2000).

382. *Boerne*, 521 U.S. at 524-29. Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *Id.* at 519, quoted in *Fla. Prepaid*, 527 U.S. at 638 and *Kimel*, 528 U.S. at 81; see also *Coll. Sav. Bank*, 527 U.S. at 672-75 (holding that Congress may not validly legislate under Section 5 when the right it seeks to enforce is not protected by the Constitution).

383. *Kimel*, 528 U.S. at 89-91; *Coll. Sav. Bank*, 527 U.S. at 672-75; *Fla. Prepaid*, 527 U.S. at 640; *Boerne*, 521 U.S. at 530-31.

384. Cf. *Boerne*, 521 U.S. at 532 (describing RFRA as an attempt to create "a substantive change in constitutional protections"); see also *Coll. Sav. Bank*, 527 U.S. at 672-75 (rejecting Congress's attempt to legislate under Section 5 to prevent a harm that the Court does not recognize as a constitutional violation).

385. Sex discrimination has been accorded heightened scrutiny under the Equal Protection Clause. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976); cf.

After holding numerous hearings and issuing multiple reports, Congress amassed ample proof that states were violating the equal protection rights of female victims of violence on a widespread scale. Reports on gender bias in the state courts, prepared under the auspices of the states themselves, revealed "overwhelming evidence" of a vast pattern of glaring gender discrimination by actors in the state criminal and civil justice systems.³⁸⁶ In the words of the Senate Judiciary Committee,

[The civil rights remedy] takes aim at gender-discrimination of the type for which the 14th amendment provides heightened scrutiny Under the 14th amendment, there is no clearer case of Congress's power to legislate than when States have failed to protect equal rights "[T]he criminal justice system is not providing equal protection of the laws [to] women in the classic sense." For example, . . . in many States rape survivors must overcome barriers of proof and local prejudice that other crime victims need not hurdle; they bear the burden of painful and prejudicial attacks on their credibility that other crime victims do not shoulder; they may be forced to expose their private lives and intimate conduct to win a damage award; and finally, in some cases, they may be barred from suit altogether by tort immunity doctrines or marital exemptions.³⁸⁷

Based on the extensive legislative record it had compiled, Congress explicitly found that "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 that therefore "a Federal civil rights action . . . is necessary to guarantee equal protection of the laws."³⁸⁸

Kimel, 528 U.S. at 83-86 (invalidating the ADEA as applied to the states and discussing the application of rational relation scrutiny to age discrimination under the Equal Protection Clause).

386. 1993 Senate Report, *supra* note 39, at 45-47, 49 & n.52; 1991 Senate Report, *supra* note 40, at 43-44 & n.40.

387. 1993 Senate Report, *supra* note 39, at 55 (quoting testimony of Cass Sunstein).

388. House Conference Report, *supra* note 62, at 385. As noted in the text, many of the discriminatory policies and practices identified by Congress rose to the level of violations of the Equal Protection Clause. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that discriminatory enforcement of a facially neutral statute violates equal protection). However, Congress was justified in concluding that the difficulties of litigating individual cases alleging constitutional violations pointed to the need for federal antidiscrimination legislation as an alternative remedy. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (upholding a federal remedial statute to protect constitutional rights which proved difficult to vindicate through individual lawsuits). Some successful suits have been brought by female crime victims alleging that state actors have violated their constitutional rights. See, e.g., *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1531 (D. Conn. 1984) (denying motion to dismiss in case alleging equal protection violations by city police department). There are, however, numerous obstacles to such cases. The obstacles include restrictive standing doctrines, see, e.g., *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973); the requirement that non-facial discrimination must be intentional in order to give rise to heightened scrutiny, see *Pers. Adm'r v. Feeney*, 442 U.S. 256 (1979); the application of

In *Morrison*, the Court acknowledged that by enacting the civil rights provision, Congress was attempting to “remedy the States’ bias and deter future instances of discrimination in the state courts.”³⁸⁹ The Court also conceded that Congress had assembled a “voluminous . . . record” supporting its finding of pervasive bias against victims of gender-motivated violence in the state justice systems.³⁹⁰ Nevertheless, the Court held that the civil rights remedy could not be sustained under Section 5 for two reasons: because it authorized lawsuits against private actors³⁹¹ and because it was not “congruent and proportional” to the harm it sought to remedy and prevent.³⁹²

By apparently adopting a rule that legislation adopted under Section 5 may create remedies only against state actors,³⁹³ the *Morrison* Court betrays a puzzling failure to recognize the distinction between Section 1 and Section 5 of the Fourteenth Amendment. Although the self-enforcing Equal Protection Clause of Section 1 applies only to state action,³⁹⁴ its scope is not coextensive with that of Section 5, which confers broad powers on Congress “to enforce, by appropriate legislation, the provisions of this article.”³⁹⁵ The Court has repeatedly held that “[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress’s enforcement power [under Section 5] even if in the process it prohibits conduct which is not itself unconstitutional.”³⁹⁶ In *Katzenbach v. Morgan*, the Court confirmed that Congress had authority to enact

rational relation scrutiny to policies discriminating against victims of domestic violence that are found to be gender-neutral, *see, e.g.*, *Navarro v. Block*, 72 F.3d 712, 717 (9th Cir. 1995); and narrow interpretations of the due process guarantee, *see, e.g.*, *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189 (1989). On the difficulty of bringing constitutional claims arising from gender-motivated violence, *see generally*, for example, West, *supra* note 224, at 45-72; Siegel, *supra* note 73, at 2191-94.

389. *Morrison*, 529 U.S. at 620.

390. *Id.* at 619-20.

391. *Id.* at 620-25.

392. *Id.* at 625-27.

393. The *Morrison* opinion is not entirely clear on whether the applicability of the civil rights remedy to private actors was constitutionally fatal in itself, or whether it was only one factor to be considered in the context of the “congruence and proportionality” test. For an argument that the latter is the correct interpretation, *see Post & Siegel, supra* note 17; *see also infra* notes 521-27 and accompanying text (discussing the unclear implications of the categorical distinctions adopted in *Morrison*).

394. U.S. Const. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

395. U.S. Const. amend. XIV, § 5; *see also supra* notes 370-72 and accompanying text (describing the breadth of Congress’s enforcement power under Section 5). Among the reasons why the scope of Section 1 is narrower than that of Section 5 is the fact that the Court’s institutional role, unlike that of Congress, requires the exercise of judicial restraint. *See generally* Post & Siegel, *supra* note 17.

396. *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997); *see also, e.g.*, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000).

legislation under Section 5 in order to combat discrimination that the Court itself had held did not violate Section 1.³⁹⁷ Yet in *Morrison*, the Court inexplicably cited cases decided under Section 1 of the Fourteenth Amendment to establish the parameters for Congress's powers under Section 5.³⁹⁸

Given the longstanding view that Congress enjoys broad enforcement powers to enact prophylactic legislation under Section 5, it is by no means clear why legislation targeting private actors in order to remedy or prevent Section 1 violations, as VAWA attempted to do,³⁹⁹ should be prohibited.⁴⁰⁰ Several of the Court's twentieth-century decisions contained language suggesting that Congress could reach private acts of discrimination under Section 5.⁴⁰¹ Instead of relying on this modern precedent, the *Morrison* Court looked back to the nineteenth-century cases of *United States v. Harris*⁴⁰² and the *Civil Rights Cases*,⁴⁰³ which the Court viewed as standing for the principle that Congress's powers under Section 5 extend only to regulating state action.⁴⁰⁴ The Court's reliance on *Harris* and the *Civil Rights Cases* was misplaced, because both cases specifically addressed the constitutionality of federal statutes that were directed at the actions of private actors without reference to any alleged constitutional violations by the states or state officials.⁴⁰⁵ In marked contrast,

397. *Katzenbach v. Morgan*, 384 U.S. 641, 649 (1966); see also *City of Rome v. United States*, 446 U.S. 156 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

398. *Morrison*, 529 U.S. at 621 ("Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action. '[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.'" (emphasis added) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 & n.12 (1948))); *id.* at 621-22 (citing Section 1 cases in support of the proposition that Section 5 applies only to state action).

399. On the mechanisms by which VAWA would remedy and deter discrimination by state actors, see *infra* notes 417-22 and accompanying text.

400. See *Morrison*, 529 U.S. at 665 (Breyer, J., dissenting) ("[W]hy can Congress not provide a remedy against private actors?"); Evan H. Caminker, *Private Remedies for Public Wrongs Under Section 5*, 33 Loy. L.A. L. Rev. 1351, 1363 (2000) ("[I]f Congress may, as a prophylactic matter, prohibit conduct that is 'not itself unconstitutional' because *some of the activity* being proscribed is within constitutional boundaries, why cannot Congress prohibit conduct that is 'not itself unconstitutional' because *some of the actors whose activity is being proscribed* are not state actors?"); Post & Siegel, *supra* note 17.

401. See *District of Columbia v. Carter*, 409 U.S. 418, 424 n.8 (1973); *Griffin v. Breckenridge*, 403 U.S. 88, 97-98 (1971); *United States v. Guest*, 383 U.S. 745, 762 (1966) (Clark, J., concurring); *id.* at 782 (Brennan, J., concurring in part and dissenting in part). Because cases examining the constitutionality of twentieth-century civil rights legislation relied primarily on the Commerce Clause, relatively few such cases addressed the Section 5 issue. See generally Post & Siegel, *supra* note 17.

402. 106 U.S. 629 (1883).

403. 109 U.S. 3 (1883).

404. *Morrison*, 529 U.S. at 621-25.

405. *Id.* at 664-65 (Breyer, J., dissenting).

VAWA's civil rights remedy was passed in response to, and in order to remedy and deter, a proven pattern of inadequate legal remedies and outright gender bias by which the states have denied female crime victims equal protection of the laws.⁴⁰⁶ In a particularly discordant note, the *Morrison* Court asserted that *Harris* and the *Civil Rights Cases* deserve special weight because they were decided soon after ratification of the Fourteenth Amendment, by justices who were presumably familiar with the Amendment's adoption.⁴⁰⁷ Precisely because of the historical period during which they were decided (that is, the same period of sustained backlash against Reconstruction that also produced *Plessy v. Ferguson*),⁴⁰⁸ *Harris* and the *Civil Rights Cases* and their narrow reading of the Fourteenth Amendment are, if anything, suspect.⁴⁰⁹

"[E]ven if" the case at hand could be distinguished from *Harris* and the *Civil Rights Cases*, the Court wrote in *Morrison*, "we do not believe that it would save [the] civil remedy."⁴¹⁰ According to the Court, the civil rights provision also failed the test requiring that "prophylactic legislation under § 5 must have a 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"⁴¹¹ When this test was first announced in *Boerne*, the Court stated that it was designed to ensure that legislation that purports to enforce existing constitutional rights does not in fact create new ones.⁴¹² Although the Court has never defined the congruence and proportionality test with precision,⁴¹³ it appears to demand both that Congress was reacting to an actual, substantial constitutional violation, and that Congress's chosen solution was calibrated to correspond to the problem it sought to correct.⁴¹⁴

406. The majority in *Morrison* attempted to reinforce the analogy to *Harris* and the *Civil Rights Cases* by pointing out that the statutes challenged in those cases were likewise accompanied by legislative history revealing discriminatory state action. *Id.* at 624-25. However, the Court in *Harris* and the *Civil Rights Cases* made no mention of the portions of the legislative history cited in *Morrison* and instead treated both statutes as restrictions on purely private activity with no connection to state action. See Goldscheid, *supra* note 308, at 128.

407. *Morrison*, 529 U.S. at 622.

408. 163 U.S. 537 (1896).

409. See Akhil Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 104-07 (2000); Post & Siegel, *supra* note 17, at 481-82, 486, 501-03.

410. *Morrison*, 529 U.S. at 625.

411. *Id.* at 625-26 (citations omitted).

412. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (stating that legislation lacking congruence and proportionality "may become substantive"—rather than remedial or preventive—"in operation and effect").

413. For criticism of the test's lack of precision, see, for example, Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 Stan. L. Rev. 1127, 1153 (2001); Post & Siegel, *supra* note 17, at 458-59, 479-80, 510-11.

414. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000); *Fla. Prepaid v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999); *Boerne*, 521 U.S. at 530. This test has both qualitative and quantitative dimensions. Caminker, *supra* note 413, at 1153-56.

Unlike the other federal statutes previously struck down under this test,⁴¹⁵ VAWA's civil rights measure was tailored to "respond to a history of 'widespread and persisting deprivation of constitutional rights.'"⁴¹⁶ The civil rights provision was designed to "remedy" and "prevent" these violations of women's equal protection rights in several ways.

At the most basic level, the statute furnished a remedy for the states' unconstitutional discrimination by providing women with a cause of action for acts of violence that otherwise would not be adequately redressed because of gender discrimination in the state criminal and civil justice systems.⁴¹⁷ Another way in which the civil rights provision remedied unconstitutional discrimination in the states' legal systems was by counteracting the reassurance that those systems offered to rapists and batterers that gender-motivated violence is permissible and unlikely to result in punishment.⁴¹⁸

The civil rights measure was also aimed at deterring future constitutional violations by the states. While other portions of VAWA directly assist the states to improve their response to violence against women by providing federal funding and other federal resources, the civil rights provision complemented and reinforced that effort by setting an example of treating violence against women with the utmost seriousness.⁴¹⁹ Federal civil rights legislation is uniquely powerful in conveying the message that discriminatory behavior is

415. See *supra* notes 378-83 and accompanying text.

416. See *Fla. Prepaid*, 527 U.S. at 645 (quoting *Boerne*, 521 U.S. at 526).

417. Although the remedy provided did not take the form of a cause of action against the states, it nevertheless remedied (that is, made up for) the states' discriminatory failure to redress violence against women by providing victims with access to federal law to obtain compensation for their injuries. This can be expressed as a three-step process: (1) an assailant commits a gender-discriminatory act of violence; (2) because of unconstitutional gender discrimination in the state criminal and civil justice systems, the victim is denied adequate redress at the state level for the discriminatory act of violence; (3) to remedy the state's unconstitutional discrimination, VAWA provides the victim with an alternative source of redress for the discriminatory act of violence. See *Morrison*, 529 U.S. at 665 (Breyer, J., dissenting) ("[G]iven the relation between remedy and violation—the creation of a federal remedy to substitute for constitutionally inadequate state remedies—where is the lack of 'congruence?'"); see also Caminker, *supra* note 400, at 1358.

418. See *supra* Part II (describing mutually reinforcing attitudes of the general public and state actors that condone violence against women); see also MacKinnon, *supra* note 99, at 171 ("Although there are many explanations for violence against women, few think it would take place to the degree it does if it were not largely and predictably exempt from effective recourse.").

419. See *Morrison*, 529 U.S. at 665 (Breyer, J., dissenting) (stating that the civil rights remedy "may lead state actors to improve their own remedial systems, primarily through example"); 1991 *Senate Hearing*, *supra* note 44, at 156 (statement of Gill Freeman, indicating that the civil rights remedy will "by its very existence, increase the responsiveness of the states"); 1991 *Senate Report*, *supra* note 40, at 34 (describing the federal civil rights remedy and federal funding to states as "different complementary strategies").

unacceptable.⁴²⁰ By communicating this message to state officials, among others, the civil rights provision had the potential to change both their attitudes and their behavior.⁴²¹ Finally, VAWA's civil rights provision served as a model for states to improve their legal response to gender-motivated violence by adopting their own versions of the civil rights remedy.⁴²²

Morrison posited two reasons why the civil rights provision failed the congruence and proportionality test: first, the law authorized suits against individual assailants rather than against states or state officials, and second, it applied uniformly throughout the country.⁴²³ With regard to the first rationale, the *Morrison* Court was incorrect in stating that the civil rights measure was not "directed . . . at any State or state actor."⁴²⁴ On the contrary, although VAWA created a cause of action against individual perpetrators of gender-motivated violence,⁴²⁵ it was calculated to influence the states in myriad ways.⁴²⁶ As for the statute's national scope, this response was in keeping with the pervasiveness and intensity of the constitutional deprivations identified by Congress and therefore satisfied the requirement of proportionality.⁴²⁷ In light of the fact that Congress had evidence that states were not adequately responding to gender-motivated violence

420. See, e.g., *Women and Violence: Hearings Before the Senate Judiciary Comm.*, 101st Cong., pt. 2, 171 (1990) (statement of Senator Joseph Biden); 1993 Senate Report, *supra* note 39, at 50.

421. See 1993 Senate Report, *supra* note 39, at 38 (stating that "the act is intended to educate the public and those within the justice system" in order to overcome "the underlying attitude that this violence is somehow less serious than other crime and . . . the resulting failure of our criminal justice system to address such violence"; stating further that the message of the civil rights remedy is that "[i]t is time for attacks motivated by gender [bias] to be considered as serious as crimes motivated by religious, racial, or political bias"); see also Caminker, *supra* note 400, at 1356 (discussing the expressive function of the civil rights remedy as a source of new social norms for state actors).

422. See *supra* Part III.B.

423. *Morrison*, 529 U.S. at 626-27. The alternatives implicitly suggested by the Court—namely, that Congress enact legislation authorizing lawsuits directly against the states and/or create a federal statutory scheme targeting selected states for enforcement—would prove far more problematic from the point of view of federalism than the provision of VAWA that was struck down. See *infra* Part IV.C.

424. *Morrison*, 529 U.S. at 626.

425. It is worth noting that some perpetrators of gender-motivated violence are state actors, and in those instances, state actors were subject to suit under VAWA. See, e.g., *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (alleging attempted rape of a prisoner by a state prison guard). However, it is true that VAWA's definition of "crime of violence motivated by gender" did not require a showing of action taken under color of state law. 42 U.S.C. § 13981(d). Such a requirement would have excluded most cases of gender-motivated violence from the statute's coverage. See *supra* Part II.

426. See *supra* notes 186-87, 419-22 and accompanying text.

427. "The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000) (citations and internal quotation marks omitted).

in the form of official gender bias reports from twenty-one states, a letter of support from attorneys general of thirty-eight states, a unanimous resolution of the National Association of Attorneys General, and testimony from numerous state and local officials, it is difficult to imagine gender-motivated violence as anything other than a national problem requiring a national solution.⁴²⁸

The Court's doctrinal missteps in interpreting Section 5 reveal the extent of its failure to appreciate that Section 5 was expressly designed to empower Congress to override the states in order to protect individual rights.⁴²⁹ After the Civil War, as part of a "basic alteration in our federal system," the Fourteenth Amendment was adopted to ensure national consistency with respect to certain basic guarantees, including a guarantee of equal protection of the laws.⁴³⁰ Congressional action under Section 5 was intended to be a crucial means of translating this promise into reality. When Congress passes a statute like VAWA's civil rights remedy, it carries out the function assigned to it by Section 5: to act "as a guarantor of basic federal rights against state power."⁴³¹ By reflexively elevating states' rights over all other considerations,⁴³² the Court fundamentally misconceived Congress's role in enforcing the Fourteenth Amendment.⁴³³ Recognizing that there are some things that the states simply cannot do—and that establishing a nationally uniform set of equality rights is one of them—would have helped the Court to see VAWA's civil rights remedy for what it was: a legitimate exercise of Congress's Section 5 powers.⁴³⁴

428. See generally *supra* Part III.A. The majority opinion in *Morrison* was simply inaccurate in stating that "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States." *Morrison*, 529 U.S. at 626. Although Congress did not explicitly find that such discrimination is present in all states, it certainly did not find that such discrimination is *not* present in all states. See *id.* at 666 (Breyer, J., dissenting). In any event, requiring Congress to "document the existence of a problem in every State prior to proposing a national solution" would be both unprecedented and incompatible with the wide latitude accorded to Congress's actions under Section 5. *Id.*; see also *Oregon v. Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J., concurring in part and dissenting in part) (stating that "Congress was not required to make state-by-state findings" of racial discrimination arising from literacy tests for voters before enacting a nationwide ban on such tests).

429. See generally Post & Siegel, *supra* note 17.

430. *Mitchum v. Foster*, 407 U.S. 225, 238 (1972).

431. *Id.* at 239.

432. But see *supra* Part III.A; *infra* notes 437-49 and accompanying text (arguing that the *Morrison* decision actually undercut the interests of the states).

433. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976) (stating that the Civil War amendments authorize Congress to intrude into "spheres of autonomy previously reserved to the States" because the amendments were intended to expand Congress's powers "with the corresponding diminution of state sovereignty"); see also *supra* notes 370-72 and *infra* notes 503-06, 559-63 and accompanying text.

434. See generally *infra* Part V.

C. *The Implications of United States v. Morrison for Federalism*

Throughout its opinion in *Morrison*, the Court's five-member majority indicated that its overarching goal was to preserve "'our dual system of government.'"⁴³⁵ However, the decision reached by the Court in the name of federalism actually undermines federalism in a number of ways.⁴³⁶

First, in the guise of protecting the states, the Court struck down a statute that was enacted at the states' behest.⁴³⁷ In the process of drafting and passing the civil rights provision, Congress sought out and deferred to the views of state officials.⁴³⁸ As noted earlier, officials from a large majority of the states supported the civil rights remedy both when it was pending in Congress and when it was under review by the Supreme Court.⁴³⁹ As Justice Souter's dissent observed, "[t]he States will be forced to enjoy the new federalism whether they want it or not."⁴⁴⁰

Both dissenting opinions in *Morrison* argued that the political process, rather than judicial review, was the appropriate forum for consideration of whether VAWA's civil rights remedy unduly encroached on the prerogatives of the states.⁴⁴¹ This view, which was adopted by the Court in *Garcia v. San Antonio Metropolitan Transit Authority*,⁴⁴² recognizes the importance of protecting the states from federal overreaching but asserts that such protection is built into the political influence wielded by the states in the procedures by which the federal government is selected and conducts its business.⁴⁴³

435. *Morrison*, 529 U.S. at 608 n.3 (citation omitted).

436. Of course, it is not unusual for a constitutional doctrine to be over- or under-inclusive with respect to its background justification. See Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 54, 65-66 (1997). Nevertheless, when a constitutional decision like *Morrison* purports to be justified on functionalist grounds—and particularly when the decision fails on formalist grounds, as discussed *supra* in Parts IV.A and IV.B—it is relevant to consider the quality of the decision's "fit" with the values it seeks to serve. As will be discussed further below, the Court could have based its decision on other grounds that would have provided a better fit with the values of federalism. See *infra* Part V.

437. See *supra* Parts II, III.A.

438. See *Morrison*, 529 U.S. at 661-62 (Breyer, J., dissenting).

439. See *supra* Part III.A.

440. *Morrison*, 529 U.S. at 654 (Souter, J., dissenting); see *id.* (stating that "Antonio Morrison, like Carter Coal's James Carter before him, has 'won the states' rights plea against the states themselves'" (citation omitted)). See generally Peter M. Shane, *In Whose Best Interest? Not the States'*, Wash. Post, May 21, 2000, at B5.

441. See *Morrison*, 529 U.S. at 647-52 (Souter, J., dissenting); *id.* at 660-61 (Breyer, J., dissenting). But see *Morrison* at 616 n.7 (asserting that the political process is responsible for controlling Congress's exercise of the commerce power only within the outer bounds of that power, as established by judicial review).

442. 469 U.S. 528 (1985). Although *Garcia* has not been overruled, the Court's current majority has increasingly moved away from applying its holding. See, e.g., Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 Sup. Ct. Rev. 199, 243-45.

443. *Garcia*, 469 U.S. at 550-55 (citing, *inter alia*, Jesse H. Choper, *Judicial Review*

Among scholars, the view that the political process is sufficient to protect the interests of the states under federalism has its champions and its critics.⁴⁴⁴ Regardless of whether one believes that the political process is sufficient to safeguard the interests of the states as a general matter, it is clear that the process worked in just this way in the case of VAWA's civil rights remedy.⁴⁴⁵ In the political process that led to enactment of the civil rights provision, the states played a vital role, ranging from the state civil rights laws that served as prototypes for the federal statute, to the state gender bias reports that formed an important part of the legislative record, to the active lobbying of state attorneys general in support of the legislation and the successful agitation by state judges for changes in the bill's language.⁴⁴⁶ In large part, VAWA's civil rights remedy was a product of the states' own call for federal assistance with the challenges posed by violence against women.⁴⁴⁷

Of course, the states are not free to enlarge Congress's constitutionally enumerated powers even if doing so would suit their own purposes.⁴⁴⁸ Nevertheless, when the Court claims that it is striking down a statute in order to protect the states, the extent to which the statute itself incorporates the protection of the states' interests should be a highly relevant consideration.⁴⁴⁹ The majority opinion in *Morrison* failed even to mention the states' active support for the civil rights remedy. While the *Morrison* Court attempted to

and the National Political Process (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954)).

444. Compare, e.g., Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 Colum. L. Rev. 215 (2000) (emphasizing the role of political parties and the political process in protecting state interests), and Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485 (1994) (describing protections for the states arising from interdependence between state and federal officeholders), with, e.g., Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 Mich. L. Rev. 752, 790-99 (1995) (arguing that the political-safeguards theory is out of step with current conditions and provides insufficient protection to the states), and Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 Tex. L. Rev. 1459 (2001) (arguing that the political-safeguards theory is inconsistent with the constitutional text, structure, and original understanding).

445. See *United States v. Morrison*, 529 U.S. 598, 652-54 (2000) (Souter, J., dissenting); *id.* at 661-64 (Breyer, J., dissenting).

446. See *supra* Part II.

447. See generally *supra* Part III.A.

448. See *New York v. United States*, 505 U.S. 144, 182 (1992) ("Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the 'consent' of state officials State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution.").

449. See generally *Morrison*, 529 U.S. at 661-64 (Breyer, J., dissenting); see Resnik, *supra* note 194, at 675 n.259 (suggesting the possibility that "federal courts ought to be more reluctant to act in the name of federalism when congressional action is based on demands from specific kinds of state actors representing a majority of states").

portray Congress as riding roughshod over the states, that description actually applies to the Court's own action in overturning legislation that the states themselves had sought.

Second, in its attempt to uphold federalism, the Court infringed on the powers of Congress. The separation of powers among the executive, legislative, and judicial branches rests on the same rationale, and is equally as important, as the division of power between the federal and state governments.⁴⁵⁰ Although the *Morrison* Court professed "[d]ue respect for the decisions of a coordinate branch,"⁴⁵¹ it failed to demonstrate the deference owed to Congress's exercise of its legislative function. In its Commerce Clause analysis, as Justice Souter pointed out in dissent, the majority implicitly "supplant[ed] rational basis scrutiny with a new criterion of review" that is far more demanding and accords a larger role to the judiciary.⁴⁵² Similarly, in its discussion of Section 5 of the Fourteenth Amendment, the Court employed an approach that bears a closer resemblance to a presumption of unconstitutionality⁴⁵³ than it does to the Court's previously announced standard of "much deference" to congressional determinations of "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."⁴⁵⁴

Thus, in its zeal to protect the states from what it viewed as congressional overreaching, the Court engaged in judicial activism and invaded the province of the legislative branch. The *Morrison* majority's distrust of Congress is particularly out of place in light of the careful, deliberative process by which Congress adopted VAWA.⁴⁵⁵ The civil rights provision was under active consideration for more than four years, during which Congress painstakingly assembled a vast body of testimony and reports demonstrating the need for the legislation, the effects of gender-motivated violence on interstate commerce, and the connections between gender-motivated violence and discrimination by state actors.⁴⁵⁶ The resulting legislative

450. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991), cited in *New York v. United States*, 505 U.S. at 181; *FERC v. Mississippi*, 456 U.S. 742, 790 (1982) (O'Connor, J., concurring in part and dissenting in part); see also Samuel H. Beer, *To Make a Nation: The Rediscovery of American Federalism* 283 (1993) ("The two auxiliary precautions, federalism and separation of powers, had a common rationale: the principle of dividing power in order to protect republican liberty and to promote the excellence of popular government.").

451. *Morrison*, 529 U.S. at 607; see also *id.* at 608 (describing Congress's considerable latitude under the Commerce Clause); *id.* at 619 (discussing Congress's broad enforcement power under Section 5 of the Fourteenth Amendment).

452. *Id.* at 637-38 (Souter, J., dissenting).

453. See Caminker, *supra* note 413, at 1132.

454. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80-81 (2000). For further discussion of the judicial deference owed to congressional enactments under Section 5, see generally Caminker, *supra* note 413; Post & Siegel, *supra* note 17.

455. See generally *Morrison*, 529 U.S. at 661-64 (Breyer, J., dissenting).

456. See *supra* Part II.

record "is far more voluminous" than the record supporting Title II of the Civil Rights Act of 1964, which was twice unanimously upheld by the Court.⁴⁵⁷

Before *Morrison*, cases invalidating federal legislation under the Commerce Clause or Section 5 appeared to turn in large part on Congress's failure to document the elements required by the Court's constitutional tests.⁴⁵⁸ Commentators have suggested that the Court's recent spate of decisions invalidating federal statutes reflects an attempt to compel Congress to engage in a process of careful fact-finding and deliberation that grapples forthrightly with both the Court's precedents and the federalism implications of proposed legislation.⁴⁵⁹ That is exactly what Congress did when it enacted VAWA.⁴⁶⁰ In the course of considering the civil rights remedy, Congress not only tracked the requirements of the Court's constitutional precedents that were then in force but actually anticipated the stricter standards that the Court would adopt later.⁴⁶¹

457. *Morrison*, 529 U.S. at 635 (Souter, J., dissenting) (citing *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)).

458. See, e.g., *Kimel*, 528 U.S. 62 (finding that Congress did not compile adequate evidence of unconstitutional age discrimination by the states); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (finding that Congress did not compile adequate evidence of patent infringement by the states); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (finding that Congress did not compile adequate evidence of religious persecution by the states); *United States v. Lopez*, 514 U.S. 549 (1995) (finding that Congress did not compile adequate evidence of the effects on interstate commerce of gun possession in school zones). See generally A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 Cornell L. Rev. 328 (2001) (critiquing the Court's recent tendency, as exemplified by *Kimel* and *Florida Prepaid*, to strike down federal statutes because of the Court's conclusion that the legislative record was inadequate).

459. See, e.g., Caminker, *supra* note 413, at 1198-99; Vicki C. Jackson, *Federalism and the Court: Congress as the Audience?*, 574 Annals Am. Acad. Pol. & Soc. Sci. 145, 150-53 (2001).

460. Some recent commentary has suggested that Congress adopted VAWA's civil rights remedy in a sloppy or cavalier manner. See, e.g., Neal Devins, *Congress as Culpit: How Lawmakers Spurred On the Court's Anti-Congress Crusade*, 51 Duke L.J. 435, 453-54 (2001). Because the legislative history of the civil rights provision was far more exhaustive in its fact-finding, attention to the Constitution, and consideration of federalism than that of legislation that has been upheld (such as Title II of the Civil Rights Act of 1964), not to mention that of legislation that has been struck down (such as the statutes at issue in *Kimel*, *Florida Prepaid*, *Boerne*, and *Lopez*), this assertion lacks empirical support. See Jackson, *supra* note 459, at 154 (stating that Congress exercised "care and deliberation" when enacting VAWA's civil rights remedy).

461. Congress made explicit findings of the substantial effects of gender-motivated violence on interstate commerce before the Court expressed a preference for such findings in *Lopez*. Congress also made findings that the states were engaging in widespread unconstitutional discrimination against female victims of crime and that a federal cause of action was necessary to remedy the states' discrimination, before the Court adopted the congruence and proportionality test in *Boerne*.

Yet Congress's well-documented adherence to a thorough, reflective legislative process when adopting VAWA—a process in which deference to the Court⁴⁶² as well as to the states⁴⁶³ played a conspicuous role—had no apparent impact on the Court's decision to strike down the civil rights provision.

The weakness of the Court's reasoning concerning federalism is perhaps most clearly revealed by the alternatives that the Court implicitly suggested would be preferable to VAWA's civil rights remedy. In its Fourteenth Amendment discussion, the Court faulted VAWA for authorizing lawsuits against private parties and for failing to visit any direct consequences on the states or state officials.⁴⁶⁴ By implying that Congress should furnish redress to victims of gender-motivated violence by providing them with a cause of action against the states, the Court placed itself in the curious position of advocating a solution that would create a hostile relationship between Congress and the states rather than the cooperative relationship established by VAWA.⁴⁶⁵ In place of a civil rights remedy that was carefully limited to minimize any invasion into state prerogatives,⁴⁶⁶ the Court tacitly endorsed a federal cause of action that would directly interfere with state autonomy, clash with judicial and prosecutorial immunity, undermine the goals of sovereign immunity,⁴⁶⁷ and deplete state

462. A number of legislative hearings and congressional committee reports were devoted to identifying the Court's controlling case law decided under the Commerce Clause and Section 5 and ensuring that the civil rights remedy complied with that body of law. *See, e.g., 1993 House Hearing, supra* note 44, at 38-50 (statement of Burt Neuborne); *id.* at 51-68 (statement of Cass Sunstein); *1991 Senate Hearing, supra* note 44, at 84-102, 126-30 (statement of Burt Neuborne); *id.* at 103-30 (statement of Cass Sunstein); *1993 Senate Report, supra* note 39, at 48-55.

463. *See supra* Part III.A.

464. *Morrison*, 529 U.S. at 621-26.

465. The *Morrison* Court compared VAWA's civil rights provision unfavorably to the statutes upheld in *Katzenbach v. Morgan*, *South Carolina v. Katzenbach*, and *Ex Parte Virginia*, each of which created a cause of action against states or state officials. *Morrison*, 529 U.S. at 626 (citing *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Ex Parte Virginia*, 100 U.S. 339 (1879)). It should be remembered, however, that those earlier statutes were the products of the antagonistic relationship between Congress and intransigent state officials that characterized the Reconstruction period and the mid-twentieth century civil rights era. It is not clear why the *Morrison* Court would urge Congress to reinstate that adversarial relationship when Congress concluded that it was not necessary to do so. *See also infra* notes 473-75 and accompanying text (discussing the pitfalls of providing federal remedies administered against the states by the federal executive branch).

466. *See generally* Part III.A.

467. In other contexts, the Court has recently acted aggressively to widen the scope of the states' immunity from suit. *See generally, e.g., Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). This trend in the Court's sovereign immunity decisions not only suggests that *Morrison* is inconsistent in calling for a new cause of action against the states, but also raises the question of whether such a measure, once passed by Congress, would pass muster under the Court's increasingly expansive view of sovereign immunity.

treasuries.⁴⁶⁸ The Court itself had previously criticized federally-created private rights of action against the states for blurring the political accountability of the federal and state governments.⁴⁶⁹

The Court's suggestion that VAWA's civil rights remedy would be more likely to be upheld if it were targeted only at certain selected states is similarly counterproductive from the viewpoint of federalism.⁴⁷⁰ Although Congress is permitted to confine a remedy to designated states if it chooses,⁴⁷¹ there is a danger that singling out particular states for enforcement is more likely to engender conflict and distrust between the states and the federal government than a remedy directed at all states equally.⁴⁷² The adversarial nature of such an approach would be exacerbated if, as the Court seemingly recommended in *Morrison*, the remedy against the selected states took the form of an action brought against the states by the federal executive branch.⁴⁷³ Unlike VAWA's civil rights remedy, a federally-administered remedy against the states would expand the federal law enforcement bureaucracy⁴⁷⁴ and create an antagonistic relationship between the federal and state governments. From the standpoint of someone concerned about political accountability, the risks of federal enforcement would seem to be even greater than those of private enforcement, because direct imposition of federal authority to force states to change their policies and practices is likely to create

468. See, e.g., *Alden*, 527 U.S. at 750 ("Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States.").

469. See, e.g., *id.* at 750-51; see also *Morrison*, 529 U.S. at 653 n.21 (Souter, J., dissenting) (arguing that VAWA's civil rights remedy maintained clear boundaries between federal and state authority by making it evident to defendants "which of our dual sovereignties is attempting to regulate their behavior," but that a federal regulation of the states would blur those boundaries).

470. See *Morrison*, 529 U.S. at 626-27.

471. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

472. See *Oregon v. Mitchell*, 400 U.S. 112, 283-84 (1970) (Stewart, J., concurring in part and dissenting in part) ("Nationwide application reduces the danger that federal intervention will be perceived as unreasonable discrimination against particular States or particular regions of the country [D]rawing a line between those States where a problem is pressing enough to warrant federal intervention and those where it is not . . . may well appear discriminatory to those who think themselves on the wrong side of it.").

473. In *Morrison*, the Court criticized VAWA for deviating from the state-specific nature of the statutory scheme upheld in *Katzenbach v. Morgan* and *South Carolina v. Katzenbach*. *Morrison*, 529 U.S. at 626-27. Both of those cases concerned portions of the Voting Rights Act of 1965 that authorized enforcement against the states by the Attorney General of the United States.

474. In the absence of additional federal law enforcement personnel, it is difficult to imagine how the federal government could effectively enforce the right to be free from gender-motivated violence. See, e.g., *Alden*, 527 U.S. at 810 (Souter, J., dissenting) ("[U]nless Congress plans a significant expansion of the National Government's litigating forces to provide a lawyer whenever private litigation is barred by today's decision and *Seminole Tribe*, the allusion to enforcement of private rights by the National Government is probably not much more than whimsy.").

confusion among the electorate as to which sovereign should get credit for the results.⁴⁷⁵

The Court also suggested that the presence of a jurisdictional element, requiring proof in each case of a connection to or effect on interstate commerce, might have saved VAWA's civil rights remedy.⁴⁷⁶ Although a jurisdictional element ensures that there is a link between a regulated activity and interstate commerce, the nature of that link may be far more tenuous and insignificant than the substantial effects on interstate commerce that Congress found are caused by gender-motivated violence. A civil rights remedy that covers only acts of gender-motivated violence involving a person moving across state lines or a weapon transported in interstate commerce, to give two examples of typical jurisdictional elements,⁴⁷⁷ would bar many victims from receiving relief, while at the same time doing little to achieve the Court's goal of preventing Congress from regulating areas such as criminal law and family law that have traditionally been regarded as subject to the states' police power.⁴⁷⁸ In any event, given the current trend toward reading the Commerce Clause narrowly, it is not clear that such jurisdictional elements would suffice to immunize a federal statute from constitutional challenge.⁴⁷⁹

Another option left open to Congress by *Morrison* is the use of its conditional spending power to protect the victims of gender-motivated violence. Current Spending Clause doctrine, which remains unchanged by *Morrison*, would presumably allow Congress to condition the receipt of federal dollars on the states' willingness to abolish exceptions for marital rape in their criminal law and immunities for spouses in their tort law.⁴⁸⁰ Similarly, Congress could use its spending power to compel states to adopt a civil rights remedy

475. *But see Alden*, 527 U.S. at 756 ("Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States."); Ann Althouse, *The Alden Trilogy: Still Searching For a Way to Enforce Federalism*, 31 Rutgers L.J. 631, 659-60 (2000) (stating that placing enforcement powers against the states in the hands of "accountable, federal public officials" rather than private individuals demonstrates solicitude for the states).

476. *See Morrison*, 529 U.S. at 613.

477. *See id.* at 658-59 (Breyer, J., dissenting) (citing cases and statutes).

478. *See generally id.* at 658-59 (Breyer, J., dissenting); *see also infra* Part IV.D (discussing the *Morrison* Court's concern about congressional regulation of criminal and family law matters).

479. *See, e.g., United States v. Faasse*, 227 F.3d 660 (6th Cir. 2000) (holding that the Child Support Recovery Act, which makes failure to pay certain child support obligations across state lines a federal crime, is unconstitutional), *rev'd*, 265 F.3d 475 (6th Cir. 2001) (en banc).

480. *See, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987). *But see, e.g., Lynn A. Baker, Conditional Federal Spending After Lopez*, 95 Colum. L. Rev. 1911 (1995) (arguing that when Congress uses conditional offers of federal funds to regulate the states in ways that it could not do directly, the legislation should be presumed invalid).

for gender-motivated violence in order to receive federal funds for programs related to violence against women.⁴⁸¹ While requirements such as these would result in beneficial changes in state law, they would achieve that result through a mechanism that interferes more directly with state legislative decision-making than VAWA's civil rights provision did.

D. *United States v. Morrison As an Exercise in Line-Drawing*

As we have seen, the outcome in *Morrison* was justified neither on the formalist ground of adherence to constitutional text and Supreme Court precedent,⁴⁸² nor on the functionalist ground of advancing the interests of federalism.⁴⁸³ What, then, explains the Court's decision? This question requires us to reexamine the nature of the *Morrison* Court's concern about federalism. Although the *Morrison* decision in fact undercut the prospects for ideal functioning of the federalist system in several ways,⁴⁸⁴ the Court was clearly motivated by its perception that invalidating VAWA's civil rights provision was necessary in order to preserve *federalism itself*. According to the Court, a decision upholding the civil rights remedy under either the Commerce Clause or the Fourteenth Amendment would "obliterate" the distinction between national and local authority and thereby eradicate federalism altogether.⁴⁸⁵ Thus, the "function" the Court sought to serve was the perpetuation of federalism, rather than the perpetuation of its subsidiary benefits. Moreover, the version of federalism that the Court sought to preserve took a particular form. The Court's mission was to impose limits on federal power in order to safeguard a "supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit."⁴⁸⁶

In pursuit of this mission, the Court set aside the well-established, deferential standards applicable to assessing the constitutionality of federal legislation under the Commerce Clause and Section 5 of the Fourteenth Amendment. Instead, the Court framed its decision as a series of categorical distinctions. In the course of a fairly brief opinion, the Court set out at least a half-dozen such differentiations: between economic and noneconomic activity, between statutes that do and do not contain a jurisdictional element, between the presence and

481. See generally C. Quince Hopkins, *Rescripting Relationships: Towards a Nuanced Theory of Intimate Violence as Sex Discrimination*, 9 Va. J. Soc. Pol'y & Law 409 (2001).

482. See *supra* Part IV.A-B.

483. See *supra* Part IV.C.

484. See *supra* Part IV.C.

485. *United States v. Morrison*, 529 U.S. 598, 615, 616 n.6, 620 (2000); see also *id.* at 608 & n.3.

486. *Id.* at 644-45 (Souter, J., dissenting).

absence of legislative findings, between state actors and private actors, between remedies that are national in scope and those that are state-specific, and between areas of traditional state concern and areas of traditional federal concern. In the Court's view, drawing these lines was necessary in order to preserve the most important line of all: the line between the national and the local that lies at the heart of federalism.⁴⁸⁷

The existence and position of each of these lines is questionable on a number of levels. The dichotomy between economic and noneconomic activity, which the *Morrison* Court incorporated into its Commerce Clause analysis, is reminiscent of the artificial, limiting distinctions that characterized Commerce Clause jurisprudence in the years leading up to 1937.⁴⁸⁸ Those bright-line distinctions proved unworkable under modern economic conditions and were abandoned when the tide of Commerce Clause interpretation turned at the height of the New Deal. The Court specifically repudiated rigid categorization as a mechanism for resolving Commerce Clause disputes and adhered to this resolution for over half a century.⁴⁸⁹ Like its pre-1937 predecessors, the economic-noneconomic distinction is unwieldy, disregards the complexity of an interconnected national economy, and leads to irrational results.⁴⁹⁰ If the ultimate question is whether an activity regulated by Congress has a substantial effect on interstate commerce,⁴⁹¹ it is not at all clear why the nature of the activity as intrinsically commercial or non-commercial should be

487. *Id.* at 617-18.

488. *See id.* at 640-45 (Souter, J., dissenting); *see also* *United States v. Lopez*, 514 U.S. 549, 627-28 (1995) (Breyer, J., dissenting). The distinctions relied upon in pre-1937 Commerce Clause cases included a distinction between commerce and manufacture and between direct and indirect effects on interstate commerce. *See, e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

489. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942); *Darby*, 312 U.S. 100; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Even *Lopez*, which went further toward restricting the scope of the Commerce Clause than any other case decided in the sixty years before *Morrison*, acknowledged that "the question of congressional power under the Commerce Clause is necessarily one of degree" that cannot be measured by "precise formulations." *Lopez*, 514 U.S. at 566-67 (internal quotation marks omitted); *see also id.* at 579 (Kennedy, J., concurring) (stating that congressional power under the Commerce Clause is "not susceptible to the mechanical application of bright and clear lines"); *id.* at 573 (Kennedy, J., concurring) (stating that "mathematical or rigid formulas" are out of place in Commerce Clause analysis (quoting *Wickard*, 317 U.S. at 123 n.24)).

490. As Justice Breyer pointed out in his dissent in *Morrison*, the line between economic crime and noneconomic crime is difficult to draw. *Morrison*, 529 U.S. at 656 (Breyer, J., dissenting). Furthermore, if the Court's purpose was to allow the states regulatory autonomy in areas traditionally under their control, economic crime fits that description just as much as noneconomic crime. *Id.* at 658 (Breyer, J., dissenting).

491. *See supra* Part IV.A.

determinative.⁴⁹² “[T]he distinction between commercial and non-commercial activity does not map onto any value commonly associated with federalism.”⁴⁹³

Similarly, as discussed earlier, the Court’s distinctions between statutes that do and do not contain a jurisdictional element, remedies that target state actors and those that target private actors, and statutes that apply to the whole country and those that apply only to certain states, were not required by previous case law and invite consequences that are counterproductive from the viewpoint of preserving state autonomy.⁴⁹⁴ As for the polarity between legislative findings and no legislative findings, VAWA’s civil rights remedy actually fell on the positive side of this axis, but the Court chose to devalue this fact.⁴⁹⁵

A line on which the *Morrison* Court placed particular emphasis was the line demarcating “areas of traditional state regulation.”⁴⁹⁶ In its Commerce Clause discussion, the Court warned that the arguments in support of the civil rights remedy “would allow Congress to regulate any crime” and could “be applied equally as well to family law,” including “marriage, divorce, and childrearing.”⁴⁹⁷ Echoing *Lopez*, *Morrison* portrayed criminal and family law as epitomes of “truly local” concerns.⁴⁹⁸ By depicting VAWA as a congressional attempt to usurp control over criminal and family law and thereby invade “the province of the States,”⁴⁹⁹ the *Morrison* Court raised the specter of a “completely centralized government,” devoid of any division between state and federal powers.⁵⁰⁰ In other words, if Congress can regulate criminal and family law, it can regulate anything.

The Court’s concern about Congress invading areas “where States historically have been sovereign,”⁵⁰¹ although proclaimed most clearly in its Commerce Clause discussion, reverberated in its Fourteenth

492. *Morrison*, 529 U.S. at 657-58 (Breyer, J., dissenting). Of course, the Court may have concluded that permitting Congress to legislate regarding any matter that has a substantial effect on interstate commerce would accord Congress too broad a mandate. But that does not explain why the Court drew the line at noneconomic activities, particularly when other, more appropriate limiting principles were available. See *infra* Part V.

493. Shane, *supra* note 170, at 221.

494. See *supra* Part IV.C.

495. See *supra* notes 356-60 and accompanying text.

496. *Morrison*, 529 U.S. at 615. This distinction is reminiscent of the focus on traditional state functions in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which was repudiated in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1995).

497. *Morrison*, 529 U.S. at 615-16.

498. *Id.* at 613 (quoting *Lopez*, 514 U.S. at 564); *id.* at 618 (citing, *inter alia*, *Lopez*, 514 U.S. at 566).

499. *Id.* at 618.

500. *Id.* at 608 (quoting, *inter alia*, *Lopez*, 514 U.S. at 556-57) (internal quotation marks omitted).

501. *Id.* at 613 (quoting *Lopez*, 514 U.S. at 564).

Amendment analysis as well.⁵⁰² Any suggestion that Congress should refrain from legislating under Section 5 of the Fourteenth Amendment in areas that have traditionally been under state control is entirely misplaced.⁵⁰³ As the Court has repeatedly recognized, the Fourteenth Amendment permits congressional intrusion into “legislative spheres of autonomy previously reserved to the States.”⁵⁰⁴ As part of the “basic alteration in our federal system”⁵⁰⁵ that was achieved during Reconstruction, the Fourteenth Amendment was expressly designed to “expand[] federal power at the expense of state autonomy,”⁵⁰⁶ particularly in cases of discrimination by the states.

The Court’s attempt to carve out “a sacred province of state autonomy”⁵⁰⁷ in legal areas that have traditionally been subject to exclusive state control is unsound. Contrary to the Court’s assumption, criminal and family law have never been entrusted solely to the states.⁵⁰⁸ Furthermore, the civil rights provision of VAWA was not a criminal or family law statute;⁵⁰⁹ rather, to the extent that such categorization is possible or helpful,⁵¹⁰ it was a civil rights law.⁵¹¹ Moreover, despite the *Morrison* Court’s insistence to the contrary, overlapping federal and state control of a given subject is not tantamount to the breakdown of federalism.⁵¹² In fact, such

502. See *id.* at 620 (stating that limitations on congressional action under the Fourteenth Amendment “are necessary to prevent the Fourteenth Amendment from obliterating the Framers’ carefully crafted balance of power between the States and the National Government”).

503. See Caminker, *supra* note 413, at 1191-96; Post & Siegel, *supra* note 17, at 481-86, 507-13.

504. *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

505. *Mitchum v. Foster*, 407 U.S. 225, 238 (1972).

506. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996), *quoted in* *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 637 (1999).

507. *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983), *quoted in* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985).

508. See generally Resnik, *supra* note 194, at 642-56.

509. The *Morrison* Court repeatedly described the civil rights provision as a statute regulating crime. *United States v. Morrison*, 529 U.S. 598, 606, 615, 617-19 (2000). The Court acknowledged that Congress “expressly precluded [the civil rights remedy] from being used in the family law context.” *Id.* at 616 (citing 42 U.S.C. § 13981(e)(4) (1994)). Nevertheless, the Court concluded that it could not allow Congress to enact this non-family law statute without giving Congress unlimited power to enact family law statutes in the future. *Id.* at 615-16. This conclusion overlooked the presence of factors, such as the need for federal intervention because of state incompetence and discrimination, which distinguish VAWA’s civil rights remedy from a generic federal marriage or divorce law. See *infra* Part V.

510. See *infra* notes 515-20 and accompanying text.

511. On the distinctions between a civil rights law and state domestic relations and criminal law, see *supra* notes 146-54.

512. See *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (“As long as it is acting within the powers granted it under the Constitution . . . Congress may legislate in areas traditionally regulated by the States.”).

overlapping jurisdiction is typical of American federalism and is potentially one of its greatest strengths.⁵¹³ As VAWA illustrated, federal legislation in an area that is also governed by state law may be both welcomed by the states and conducive to their exercise of legislative authority.⁵¹⁴

The critique of the *Morrison* Court's attempt to draw a line between areas of traditional state and federal control also applies to the Court's use of categorical distinctions in general. The Court's reliance on bright-line distinctions is problematic, not only because it invites categorization errors,⁵¹⁵ but because it is employed in the service of a vision of federalism as a system of two clearly delineated, mutually exclusive spheres of government. As Professor Judith Resnik has argued, the Court's conception of "categorical federalism" is both inaccurate and harmful.⁵¹⁶ Although federalism presupposes the existence of two levels of government, it does not presuppose that the two realms are fixed and distinct.⁵¹⁷ With regard to many legal questions, concurrent federal and state authority is the rule rather than the exception.⁵¹⁸ Properly conceived, the task confronting the Court in *Morrison* was not to stake out an impenetrable boundary between the "truly national and . . . [the] truly local,"⁵¹⁹ but to encourage a dynamic, constructive interchange between federal and state law. Upholding VAWA's civil rights remedy would have fostered such an interchange; striking it down did the opposite.⁵²⁰

An additional criticism of the Court's line-drawing in *Morrison* is that it is not clear how the dichotomies presented by the Court relate to each other and which of them, if any, are determinative of the holding. The Court's four-part Commerce Clause inquiry, the first three parts of which are expressed as bright-line distinctions,⁵²¹ is more a set of "reference points" or "considerations" than a coherent legal

513. See generally Resnik, *supra* note 194.

514. See *supra* Part III.B.

515. See Resnik, *supra* note 194, at 629-34 (pointing out the danger of categorization errors arising from the Court's adoption of bright-line distinctions in the name of federalism). In *Morrison*, the Court committed categorization errors with respect to several of the dualisms featured in its opinion. The subject of VAWA's civil rights remedy should properly be regarded as economic, not noneconomic; the statute's attempt to remedy and prevent constitutional violations was aimed at state actors, not private actors; the problem the statute addressed was nationwide, not specific to certain states; and the civil rights provision fell under the rubric of civil rights legislation, not criminal law or family law. See *supra* Part IV.A-B.

516. See generally Resnik, *supra* note 194.

517. *Id.*

518. See *United States v. Morrison*, 529 U.S. 598, 639 (2000) (Souter, J., dissenting); Post & Siegel, *supra* note 17, at 484-85; see generally Resnik, *supra* note 194.

519. *Morrison*, 529 U.S. at 617-18.

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

521. See *supra* Part IV.A (discussing the distinctions between economic and noneconomic activities, the presence or absence of jurisdictional elements, and the presence or absence of legislative findings).

rule.⁵²² For example, the Court equivocated on whether it was adopting a requirement that legislation enacted under the Commerce Clause may regulate only economic activity.⁵²³ In the same manner, the Court seemed to establish an absolute prohibition against congressional regulation of private actors under Section 5 of the Fourteenth Amendment,⁵²⁴ but then suggested that this distinction was not necessarily dispositive⁵²⁵ and revisited the state action-private action dichotomy as merely one factor in the amorphous “congruence and proportionality” test.⁵²⁶ In sum, the lines drawn by the *Morrison* Court are rigid in themselves but vague in application.⁵²⁷

V. PRESERVING CIVIL RIGHTS LAWS WITHOUT SACRIFICING FEDERALISM: A PROPOSAL FOR AN ALTERNATIVE TO THE COURT’S ANALYSIS IN *MORRISON*

Central to the *Morrison* Court’s reasoning was the assumption that if Congress could pass VAWA’s civil rights remedy, it could pass anything; if the civil rights remedy survived, federalism was dead.⁵²⁸ The Court overlooked possible alternative approaches for preserving Congress’s ability to enact civil rights legislation without obliterating the distinction between federal and state government.

The most obvious alternative consists of relying on the basic standards that had been established in previous case law for determining the scope of Congress’s powers under the Commerce Clause and Section 5 of the Fourteenth Amendment.⁵²⁹ Properly applied, those traditional standards lead to the conclusion that VAWA’s civil rights remedy was a valid exercise of Congress’s

522. See *Morrison*, 529 U.S. at 609, 613; *id.* at 654-55 (Souter, J., dissenting) (criticizing the majority for embracing earlier Commerce Clause cases as sources of “considerations” rather than rules, failing to provide a workable definition of the commerce power, and leaving future cases to ad hoc decision-making).

523. Compare *id.* at 613 (stating that “we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases”), with *id.* at 617 (“We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”).

524. *Id.* at 621-25.

525. *Id.* at 625 (considering an alternative ground for decision that would invalidate VAWA’s civil rights provision even if it could be successfully distinguished from the statutes struck down in the *Civil Rights Cases* and *United States v. Harris*).

526. *Id.* at 625-26; see *supra* Part IV.B.

527. See, e.g., *Morrison*, 529 U.S. at 637, 645, 654 (Souter, J., dissenting) (describing the majority’s analysis as a series of “discounts” or “devaluations” superimposed on well-established Commerce Clause tests).

528. See *supra* Part IV.D.

529. Those standards include, *inter alia*, the requirement that Congress must have a rational basis for concluding that an activity regulated under the Commerce Clause has a substantial effect on interstate commerce, and the requirement that legislation enacted under Section 5 of the Fourteenth Amendment must be designed to remedy or prevent constitutional violations. See *supra* Part IV.A-B.

Commerce Clause and Section 5 powers.⁵³⁰ Additionally, a strong argument can be made that those standards are adequate to the task of preventing the federal government from amassing unlimited power, particularly in light of the role the states play in the formation and operations of the federal government.⁵³¹ However, the *Morrison* majority clearly disagreed with this position and felt that it needed to articulate additional limitations on congressional power in order to avoid the slippery slope toward “a completely centralized government.”⁵³²

Even if one accepts as valid the Court’s impulse to adopt additional limiting principles to protect “our dual system of government,”⁵³³ the limitations chosen by the Court were not an effective means of accomplishing that task. As demonstrated above, the categorical distinctions adopted in *Morrison*, together with the Court’s failure to defer to Congress and the expressed will of the states, were not conducive to advancing the values of federalism and were in many ways arbitrary or harmful when assessed according to those values.⁵³⁴

An alternative limiting principle—one that rests on concepts that lie at the core of federalism—was available to the Court in *Morrison*. If the Court felt the need to identify a discrete limiting principle to restrict congressional power, in addition to those already incorporated into well-established tests under the Commerce Clause and Section 5, it should have focused its inquiry on whether Congress could rationally have found that there was a demonstrated need for federal intervention based on the states’ innate incapability of addressing the problem at hand. In the case of VAWA’s civil rights remedy, the need for federal intervention was demonstrated by the fact that the states, by their own admission, were incompetent to solve the problem of gender-motivated violence; the fact that the states themselves were discriminating against victims of gender-motivated violence; and the fact that fundamental antidiscrimination norms, by their nature, require national application.⁵³⁵

This proposed approach is a logical expression of the legitimate federal interest in filling gaps left by state law’s inadequacies. Unlike the bright-line distinctions on which the *Morrison* majority relied, it has the advantage of addressing head-on the Court’s concern about avoiding total centralization of power in the federal government. It leaves room for consideration of both states’ rights and individual rights and is consistent with the fact that federal intervention can empower the states to solve otherwise insuperable problems; by

530. See generally *supra* Part IV.A-B.

531. See *supra* notes 441-45 and accompanying text.

532. *Morrison*, 529 U.S. at 608 (citations omitted).

533. *Id.* at 608 n.3 (citation omitted).

534. See *supra* Part IV.C-D.

535. See *infra* notes 546-70 and accompanying text.

contrast, the Court's analysis in *Morrison* focused solely on states' rights and simplistically assumed that federal intervention is always detrimental to the states' autonomy. In keeping with the deference due to congressional enactments under the Commerce Clause and Section 5 of the Fourteenth Amendment, the criterion proposed here should be interpreted broadly.⁵³⁶ By recognizing a robust but not unlimited role for federal intervention,⁵³⁷ this alternative analysis would allow both antidiscrimination statutes like the VAWA civil rights remedy and federalism to survive and flourish.

Channeling federal legislative power to areas that lie beyond the capabilities of the states has a long history that is reflected in both the Commerce Clause and the Fourteenth Amendment. The delegates to the Constitutional Convention in Philadelphia adopted a resolution to vest in Congress the power "to legislate in all cases for the general interests of the Union, and also in those to which the states are separately incompetent, or . . . in which the harmony of the United States may be interrupted by the exercise of individual legislation."⁵³⁸ The Committee of Detail was charged with the task of distilling these general principles into a document enumerating specific powers, and the Commerce Clause derived directly from this process.⁵³⁹ Thus, the Commerce Clause, from its inception, was intended to apply to matters in which federal action was needed because actions by the states would be inadequate or counterproductive.⁵⁴⁰ Likewise, Section 5 of the Fourteenth Amendment was enacted in recognition of the need for federal action to overcome state resistance to racial equality.⁵⁴¹ Under Section 5, Congress was empowered to provide a

536. See *supra* Part IV.A-B.

537. Even construed liberally, this inquiry would require more than a mere showing that the activity regulated by Congress is a nationwide problem or a topic on which national uniformity might be helpful or convenient. Thus, it would succeed in distinguishing VAWA's civil rights remedy, which would be upheld based on the ample available evidence of the states' inability to offer an adequate legal response, from the Gun-Free School Zones Act or a generic federal code of domestic relations or criminal law, which would be struck down in the absence of such evidence. If, however, evidence emerged that the states are as incompetent and discriminatory in their treatment of divorcing women as they are in their treatment of victims of gender-motivated violence, a federal statute targeted at protecting divorcing women's civil rights might be permissible under this approach. See MacKinnon, *supra* note 99, at 149 (suggesting that the states' record of sex discrimination in divorce is comparable to their record of unconstitutional discrimination against female victims of violence).

538. Robert Stern, *That Commerce Which Concerns More States Than One*, 47 Harv. L. Rev. 1335, 1338-40 (1934), quoted in Brest et al., *supra* note 333, at 134-35.

539. *Id.*

540. Indeed, a primary reason for adopting a Constitution was that the states proved incapable of coordinating their commercial affairs under the Articles of Confederation. See The Federalist No. 22, at 143-45 (Alexander Hamilton) (Clinton Rossiter ed., 1961); The Federalist No. 42, at 267 (James Madison) (Clinton Rossiter ed., 1961).

541. See generally Post & Siegel, *supra* note 17; see also *infra* notes 559-63 and

remedy where state law provided none, or where a state law remedy existed in theory but proved inadequate in practice.⁵⁴²

Even staunch opponents of broad congressional authority have acknowledged that congressional action is appropriate when a problem lies beyond the legislative ability of individual states.⁵⁴³ Chief Justice Rehnquist, in speeches criticizing Congress for creating too many new federal causes of action, has suggested that “demonstrated state failure” should serve as a litmus test for identifying topics suitable for federal intervention.⁵⁴⁴ In applying this test to the Violence Against Women Act, Chief Justice Rehnquist asserted—against the weight of the evidence—that state courts were “already competently handl[ing]” violence against women and that “one senses . . . that the question of whether the states were doing an adequate job in this particular area was never seriously asked” by Congress.⁵⁴⁵

Although the *Morrison* Court failed to recognize it, gender-motivated violence is an archetypal example of demonstrated state failure.⁵⁴⁶ As the courts have previously noted, the nature of problems that require federal legislation because they “defy local solution” can take varying forms.⁵⁴⁷ In the case of gender-motivated violence, there

accompanying text (discussing the need for national uniformity in equality norms).

542. See, e.g., *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961), *overruled on other grounds by Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978).

543. See, e.g., J. Harvie Wilkinson III, *Federalism for the Future*, 74 S. Cal. L. Rev. 523, 534 (2001) (“Instead of peering solely at phrases like ‘remedial and preventive’ or ‘commandeering’ or ‘substantial effects,’ the Court will need to ask whether a particular area is one where the uniform application of a rule is important.”).

544. William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary*, The Third Branch, Jan. 1999, at 1, 4; see also *id.* at 3 (“[M]atters that can be handled adequately by the states should be left to them; matters that cannot be so handled should be undertaken by the federal government.”); Rehnquist Discusses Long-Range Planning for U.S. Courts, 138 Cong. Rec. E747 (daily ed. Mar. 19, 1992) (stating that before Congress adds to the federal courts’ caseload, “the question should be asked as to whether the state courts presently deal, and deal with reasonable effectiveness, with these same matters”).

545. William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships*, 78 Va. L. Rev. 1657, 1660 (1992); Rehnquist: *Is Federalism Dead?*, Legal Times, May 18, 1998, at 12. The legislative record assembled by Congress in support of VAWA thoroughly belies the Chief Justice’s claims that the states were already handling the problem of violence against women and that Congress failed to consider whether the states were doing an adequate job. See *supra* Parts II, IV.A-B.

546. VAWA’s civil rights remedy is thus distinguishable from the string of federal statutes recently struck down in whole or in part by the Court on the basis of the Court’s finding that they were not enacted in response to widespread state inaction or misconduct. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); see also *supra* Part IV.A-B.

547. *United States v. Sage*, 92 F.3d 101, 105 (2d Cir. 1996) (upholding the Child Support Recovery Act). These forms include but are not limited to situations that span across state lines, see, e.g., *id.*, and situations that present collective action

was indisputable evidence that the states were systemically incapable of responding effectively to the problem because of a combination of inertia and entrenched discrimination. Congress determined that rape and domestic violence are committed on a huge and growing scale; arrest and conviction rates are abysmal; archaic state legal doctrines like interspousal tort immunity and marital rape exemptions bar women from obtaining legal relief; special evidentiary rules and jury instructions expose rape victims to scrutiny and humiliation not inflicted on victims of other crimes; and actors in the state criminal and civil justice systems routinely subject female victims of violent crime to indifference and hostility.⁵⁴⁸ These widespread state failures,⁵⁴⁹ and the consequent need to rectify them at the federal level, were among the primary reasons why VAWA's civil rights remedy was passed.⁵⁵⁰

Significantly, the admission of state incompetence as well as the call for federal intervention came from state officials themselves. Although active state participation of this kind is not essential to justify congressional action, it is certainly a relevant consideration from the viewpoint of concern about federalism.⁵⁵¹ Congress had before it twenty-one reports, produced by state-appointed task forces to examine gender bias in the state courts, which together provided "overwhelming evidence" of the states' failure to treat female crime victims fairly.⁵⁵² In a letter to Congress supporting VAWA, forty-one attorneys general stated,

We believe . . . 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 [VAWA] would begin to meet those needs by, *inter alia*, . . . creating a specific

problems among the states, *see, e.g.*, *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 281-82 (1981); *United States v. Darby*, 312 U.S. 100, 115 (1941); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 588 (1937). *See generally* *Perez v. United States*, 402 U.S. 146, 150 (upholding the Consumer Credit Protection Act based in part on a showing that loan-sharking "simply cannot be solved by the States alone") (citation omitted)).

548. *See, e.g.*, *Morrison*, 529 U.S. at 628-34 (Souter, J., dissenting); 1993 Senate Report, *supra* note 39, at 38, 42, 44-47, 49, 55.

549. Christy Brzonkala's experience illustrates the common phenomenon of state failure to redress gender-motivated violence. She received no tangible results from her efforts to seek justice through the internal disciplinary process at her state university and through her state's criminal justice system. *See supra* notes 109-17 and accompanying text.

550. *See* 1993 Senate Report, *supra* note 39, at 44 (stating that "State remedies are inadequate to fight bias crimes against women"); *id.* at 55 (stating that the civil rights provision "provides a necessary remedy to fill the gaps and rectify the biases of existing State laws").

551. *See Morrison*, 529 U.S. at 653-54 (Souter, J., dissenting).

552. *Id.* at 630 & n.7 (Souter, J., dissenting); 1993 Senate Report, *supra* note 39, at 49 & n.53.

federal civil rights remedy for the victims of gender-based crimes⁵⁵³

The brief in support of the civil rights remedy that was filed in the Supreme Court by thirty-six states and Puerto Rico was similarly unequivocal. It stated, "The States' own studies demonstrate that their efforts to combat gender-motivated violence, while substantial, are not sufficient by themselves to remedy the harm caused by such violence or to eliminate its occurrence."⁵⁵⁴ The brief described at length the deficiencies in the states' legal systems as revealed by the states' gender bias task force reports and concluded, "The States' own assessments of their legal responses to violence against women demonstrate that state protections remain inadequate, and thus support congressional enactment of VAWA's civil remedy."⁵⁵⁵

It is particularly noteworthy that a primary cause of the states' inability to address gender-motivated violence was rampant discrimination within the state legal systems.⁵⁵⁶ Discrimination by state officials is a classic scenario calling for the enactment of federal civil rights legislation.⁵⁵⁷ Just as the quest for racial justice cannot be entrusted to state courts that are perpetuating racism, it seems pointless to expect state courts to recognize and punish sex-discriminatory crimes of violence when they are unable to root out sex discrimination in their own midst. This type of double discrimination—discriminatory state action that effectively immunizes private discrimination from meaningful legal redress—is a powerful justification for federal intervention.⁵⁵⁸

553. 1993 House Hearing, *supra* note 44, at 35. The attorneys general signing the letter came from thirty-eight states, the District of Columbia, Guam, and the Virgin Islands. *Id.* at 36.

554. Brief of Arizona, *supra* note 174, at 2.

555. *Id.* at 15-16.

556. Congress found that

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; . . . 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.

House Conference Report, *supra* note 62, at 385-86.

557. See, e.g., *Monroe v. Pape*, 365 U.S. 167, 180 (1961) (explaining that one reason for enactment of 42 U.S.C. § 1983 was "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies"), *overruled on other grounds by Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978).

558. As Professor Burt Neuborne stated in testimony before Congress:

The common denominator that underlies [previous federal civil rights legislation] is a recognition that there are vulnerable people living at the State and local level, that State and local government have been unable to

There is another sense in which the discriminatory nature of gender-motivated violence cries out for a national solution in ways that are distinct from a host of other problems, such as gun possession in school zones. Basic equality rights must be declared and protected at the federal level, because only federal law can establish legal norms that are fundamental to national citizenship.⁵⁵⁹ If a right is fundamental to our national conception of justice, it must not disappear or diminish as one crosses state lines.⁵⁶⁰

Discrimination has long been recognized as a special case in which federal intervention is justified not only by state obstructionism but also by the conscious choice that was made in the aftermath of the Civil War to place certain types of equality at the center, rather than the periphery, of national self-definition. Almost 150 years ago, “[a]s a result of the new structure of law that emerged in the post-Civil War era—and especially of the Fourteenth Amendment, which was its centerpiece—the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established.”⁵⁶¹ A similar move took place with respect to sex discrimination with the ratification of the Nineteenth Amendment, which declared that women’s status as equal citizens is essential to our national identity and not contingent on state preferences.⁵⁶²

Thus, when Congress declared that crimes of violence motivated by gender constitute a federal civil rights violation, it was acting consistently with constitutional and statutory developments since the Civil War to enforce equality rights in a manner that explicitly and intentionally removes the power of the states to deny those rights.⁵⁶³ Recognizing the special role of federal law in combating

protect, and that Congress steps in with a backstop, with a reinforcement, with an exercise in cooperative federalism to try to help State and local government carry out their primary responsibility. That is what the civil rights cause of action in [VAWA] is.

1991 Senate Hearing, *supra* note 44, at 87 (testimony of Burt Neuborne).

559. See 1993 Senate Report, *supra* note 39, at 51 (“State laws do not provide, and by their nature cannot provide, a national antidiscrimination standard.”).

560. See, e.g., Howard, *supra* note 209, at 22-23.

561. *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972); see also *Oregon v. Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J., concurring in part and dissenting in part) (“A remedy for racial discrimination which applies in all the States underlines an awareness that the problem is a national one and reflects a national commitment to its solution.”).

562. See generally Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947 (2002). As Professor Siegel points out, the promise of the Nineteenth Amendment was not fully realized in litigation, and sex discrimination doctrine instead developed, much later and less satisfactorily, under the Equal Protection Clause of the Fourteenth Amendment. *Id.*

563. See generally, e.g., Caminker, *supra* note 413, at 1189-90; Post & Siegel, *supra* note 17, at 507-09. Of course, states remain free to pass their own laws that meet or exceed federal antidiscrimination protections. Federal civil rights laws, including VAWA’s civil rights remedy, play a valuable role by stimulating such state legislative activity. See generally *supra* Part III.B.

discrimination would have enabled the Court to uphold VAWA's civil rights remedy without removing all limitations on congressional power.

The argument for a special federal role in the recognition and enforcement of equality guarantees is most closely associated with legislation enacted under Section 5 of the Fourteenth Amendment. However, it is also relevant to enactments under the Commerce Clause.⁵⁶⁴ In twentieth-century cases upholding civil rights legislation on the basis of the commerce power,⁵⁶⁵ the Court has held that Congress may legitimately prohibit discrimination that prevents a disadvantaged group from being able to participate equally in interstate commerce.⁵⁶⁶ In the *Heart of Atlanta Motel* and *McClung* cases, the Court noted that Congress had acquired "voluminous" evidence of the burdens that discrimination placed upon African-Americans' participation in interstate commerce; specifically, the Court deferred to Congress's findings that racial discrimination discouraged its targets from traveling interstate, from making purchases in businesses engaged in interstate commerce, and from taking jobs in certain areas.⁵⁶⁷ With respect to VAWA's civil rights remedy, Congress correspondingly acquired voluminous evidence⁵⁶⁸ that gender-motivated violence deters women from engaging in interstate travel, from transacting with businesses involved in interstate commerce, and from accepting certain types of employment.⁵⁶⁹ Just as racial discrimination impaired African-Americans' economic equality, "[g]ender-based violence bars its most likely targets—women—from full [participation] in the national

564. Traditionally, Congress's powers under the Fourteenth Amendment and Commerce Clause have been analyzed separately. However, Professor Vicki Jackson has suggested reading the Commerce Clause and Fourteenth Amendment "holistically" in order to bring into clearer focus Congress's authority to remove the barriers preventing members of historically disadvantaged groups from participating as equals in the national economy. See Jackson, *supra* note 18; see also MacKinnon, *supra* note 99, at 150-51 (arguing that the Court should have adopted a rationale in *Morrison* based on a combination of the Commerce Clause and Fourteenth Amendment).

565. Although Congress invoked its powers under both the Commerce Clause and Section 5 of the Fourteenth Amendment when enacting Title II of the Civil Rights Act of 1964, the Court's decisions upholding that statute and similar legislation confined themselves to the Commerce Clause. See generally Post & Siegel, *supra* note 17, at 494, 503-05; see also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 279-86 (1964) (Douglas, J., concurring) (arguing that Title II of the Civil Rights Act should be upheld under the Fourteenth Amendment); *id.* at 291-93 (Goldberg, J., concurring) (arguing that Title II is constitutional under both the Fourteenth Amendment and the Commerce Clause).

566. *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta*, 379 U.S. 241.

567. See *McClung*, 379 U.S. at 299-300; *Heart of Atlanta*, 379 U.S. at 252-53.

568. In fact, the evidence supporting VAWA's civil rights provision exceeded that supporting Title II of the Civil Rights Act of 1964. *Morrison*, 529 U.S. at 635 (Souter, J., dissenting).

569. See, e.g., House Conference Report, *supra* note 62, at 385.

economy.”⁵⁷⁰ Thus, gender-motivated violence not only substantially affects interstate commerce; it does so by jeopardizing a fundamental right to equality, which only the federal government can fully protect.

Of course, the unique federal role in combating discrimination has never been universally accepted. During both the Reconstruction period and the civil rights era, opponents of antidiscrimination legislation argued that private establishments should not be subject to government mandates of racial equality, and that such matters are reserved to state law and lie outside Congress’s authority.⁵⁷¹ These two arguments are interrelated; the claim is that the states are “private” with respect to the federal government, just as individual discriminators are “private” with respect to government intervention generally. Although these arguments have been largely discredited with respect to racial discrimination, they were revived and directed against VAWA’s civil rights remedy.⁵⁷² The *Morrison* Court’s repeated denunciations of Congress’s purported meddling in areas of traditional state concern carry echoes of this appeal to state privacy, and by extension, the privacy of the individual rapist or batterer to carry on acts of gender-motivated violence.⁵⁷³

The connection between the privacy of the states and the privacy of individual discriminators is crystallized in *Morrison*’s closing sentences, which aver that any “civilized system of justice” would provide Christy Brzonkala with a remedy, “[b]ut under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States.”⁵⁷⁴ Because the Commonwealth of Virginia had already proven itself incapable of providing Brzonkala with a remedy, the practical result of the Court’s protection of state privacy was to protect the privacy of the individual perpetrator of gender-motivated violence as well. Just as with race discrimination, these misguided conceptions of privacy should give way to the recognition that when individuals are discriminating, and states are incapable of preventing or redressing that discrimination—in large part because of their own entrenched patterns of

570. 1993 Senate Report, *supra* note 39, at 54. Unlike VAWA, the statute at issue in *Heart of Atlanta* and *McClung* regulates commercial establishments such as motels and restaurants, and it applies only to those private enterprises whose operations affect commerce (a requirement that is weakened by an irrebuttable presumption that certain kinds of establishments affect commerce per se). *Heart of Atlanta*, 379 U.S. at 247-48. However, the Court’s decisions upholding the statute did not turn on either of those elements but rather relied on congressional findings of the impact of racial discrimination on interstate commerce. See *McClung*, 379 U.S. at 302, 304-05; *Heart of Atlanta*, 379 U.S. at 257-58.

571. Post & Siegel, *supra* note 17, at 486-502.

572. As applied against the civil rights remedy, the privacy arguments were predicated on gender-specific notions of public and private spheres. See *supra* notes 47-54 and accompanying text.

573. See generally MacKinnon, *supra* note 99.

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

discriminatory conduct—federal action is not only justified but is likely to be the only effective response.

The approach proposed here, which emphasizes the need for federal intervention in those areas that cannot be adequately managed at the state level, satisfies the *Morrison* Court's demand for an additional limiting factor to superimpose on the traditional tests for determining whether Congress has acted within its constitutionally enumerated powers under the Commerce Clause and Section 5 of the Fourteenth Amendment. It does so in a way that is far more consistent with the structure and goals of federalism than the various bright-line distinctions adopted in *Morrison*. In future cases, substituting this approach in place of the misguided analysis found in the *Morrison* opinion would permit the Court to preserve federal civil rights legislation without sacrificing federalism.

VI. CONCLUSION

By striking down the civil rights remedy of the Violence Against Women Act, the Supreme Court claimed to be serving the interests of federalism but in fact did the opposite. Like many federal civil rights statutes, VAWA was inspired in part by existing state civil rights laws, and in turn, it inspired other states to propose similar laws of their own. This interplay of federal and state legislative action is a common pattern for the development and diffusion of new legal rights. The opportunity for a constructive dialogue between federal and state legislation, which is a valuable feature of federalism, was both ignored and undermined by the *Morrison* decision.

United States v. Morrison was a setback not only for women, but also for an expansive and nuanced understanding of federalism. Instead of a vision of states' rights and individual rights as potentially complementary, the Court assumed that any action by Congress to protect individual rights is an imposition on the states. In the case of VAWA's civil rights remedy, the states themselves realized that they needed federal help to protect the rights of women. If the Court had made a similar realization, it could have upheld VAWA's civil rights remedy, secure in the knowledge that it was simultaneously enhancing the freedom of women, promoting the freedom of the states, and avoiding the risk of conferring unlimited power on Congress. Instead, the majority in *Morrison*, through a combination of faulty constitutional analysis and misguided conceptions about federalism, eliminated the nation's most effective legal remedy for acts of violence motivated by gender.

It remains to be seen whether the Court will eventually abandon its narrow understanding of federalism, in keeping with the push for an expanded federal role in the wake of the September 11 attacks. Such

an eventuality would bear out Justice Souter's prediction in his dissent that *Morrison* will ultimately prove not to be enduring law.⁵⁷⁵ Even if the Court continues to subscribe to the view that the risk of congressional overreaching requires it to exercise a level of scrutiny that goes beyond the traditional deferential tests for the constitutionality of congressional enactments, it should abandon the rigid and artificial categorical distinctions on which the *Morrison* decision relied. Instead, the Court should adopt an approach that focuses on whether Congress had a rational basis for concluding that federal intervention was justified because the problem being addressed lay beyond the capacity of the states to resolve. Legislation designed to combat widespread patterns of discrimination against members of a disadvantaged group is uniquely likely to satisfy this inquiry, in part because basic guarantees of equality require national consistency in order to be meaningful and effective. Thus, this approach would ensure that federal antidiscrimination laws like the civil rights remedy of the Violence Against Women Act would be upheld, while at the same time preserving limitations on congressional authority.

575. *Id.* at 654 (Souter, J., dissenting).

Notes & Observations