

Spring 1997

Women's Powerless Tool: How Congress Overreached the Constitution with the Civil Rights Remedy of the Violence against Women Act, 30 J. Marshall L. Rev. 803 (1997)

Lisa A. Carroll

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), [Fourteenth Amendment Commons](#), [Law and Gender Commons](#), and the [Legislation Commons](#)

Recommended Citation

Lisa A. Carroll, Women's Powerless Tool: How Congress Overreached the Constitution with the Civil Rights Remedy of the Violence against Women Act, 30 J. Marshall L. Rev. 803 (1997)

<https://repository.law.uic.edu/lawreview/vol30/iss3/8>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

WOMEN'S POWERLESS TOOL: HOW CONGRESS OVERREACHED THE CONSTITUTION WITH THE CIVIL RIGHTS REMEDY OF THE VIOLENCE AGAINST WOMEN ACT

LISA A. CARROLL*

INTRODUCTION

In the time it takes to read this sentence, a man has beaten his wife or girlfriend somewhere in the United States.¹ In the time it takes to read this introduction, another woman has endured a forcible rape.² The horror, however, the battered woman or the rape victim undergoes has only just begun.³ If they become among the few who report such violence to law enforcement officials,⁴ their ordeal will continue. Police officers and prosecutors will subject these female victims to intense personal questioning.⁵ A

* J.D. Candidate, 1998.

1. See *Domestic Violence, Not Just a Family Matter: Hearing Before the House Judiciary Comm. on Crime and Criminal Justice*, 103d Cong. 1 (1994) (testimony of Vicki Coffey, Executive Director, Chicago Abused Women Coalition) [hereinafter *Hearing on Domestic Violence*] (asserting that a woman in the United States is battered every 13 seconds); see also S. REP. NO. 101-545, at 27 (1990) (citing National Coalition Against Domestic Violence fact sheets which state that a woman is beaten every 15 seconds).

2. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 7 (1988) (indexing the frequency of forcible rapes over a one year period). Of course, crimes do not occur one at a time with precise regularity. *Id.* If the 1988 number of forcible rapes had occurred one at a time over a fixed time interval, however, perpetrators would have forcibly raped a woman every six minutes in the United States during that year. *Id.*

3. See S. REP. NO. 102-197, at 39 (1991) (contending that female complainants in rape and domestic violence cases are victimized twice: once by the perpetrator and once by the state criminal justice system).

4. H.R. REP. NO. 103-395, at 25-26 (1993) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME 8 (1991)). The Bureau of Justice Statistics found that only 50% of all rapes were reported in 1990. *Id.*

5. See, e.g., S. REP. NO. 102-197, at 34 (quoting a Vermont probation officer who told a nine-year-old girl that he had heard she was a "tramp" and a Connecticut prosecutor who accused a 15-year-old of fabricating a rape charge because the girl feared being pregnant).

judge may impugn the character of these women by suggesting that they asked for it.⁶ A jury will scrutinize their every gesture and inflection to gauge their credibility.⁷

During nearly four years of hearings, Congress heard dramatic testimonials to such scenarios.⁸ Congress also compiled disturbing statistics indicating that "violence motivated by gender"⁹ is on the rise despite state action to curb it.¹⁰ In response, Congress enacted the Violence Against Women Act of 1994 ("VAWA"),¹¹ which President Clinton signed into law on September 13, 1994, as part of the much larger Violent Crime Control and Law Enforcement Act of 1994.¹²

The VAWA provides, *inter alia*, funding to the states "to combat violent crimes against women,"¹³ creates a national domestic violence hotline,¹⁴ modifies the Federal Rules of Evidence in sexual

6. See, e.g., *id.* (quoting a California judge who said in open court that a domestic violence victim probably deserved to be battered).

7. See, e.g., S. REP. NO. 101-545, at 34 (1990) (suggesting that jurors choose may not to convict an alleged rapist if they disapprove of what the victim wore when assaulted).

8. S. REP. NO. 103-138, at 39 (1993).

9. Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994) [hereinafter VAWA]. VAWA defines "violence motivated by gender" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." *Id.* § 13981(d)(1).

10. S. REP. NO. 101-545, at 38. Even before Senator Joseph Biden introduced VAWA in 1990, many states had enacted legal reforms to combat gender-based violence. *Id.* at 33. For example, most states stiffened their rules for admitting evidence of the victim's prior behavior so that defense attorneys cannot easily use such evidence to divert focus from the defendant's conduct. *Id.* Moreover, many large cities have created sex and domestic crime units as well as victim assistance programs. *Id.* Despite these efforts, the Senate Judiciary Committee found in 1993 that city and state police officers, state prosecutors, and state courts often still handled crimes against women differently and less seriously than other crimes. S. REP. NO. 103-138, at 49.

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

12. *Id.* VAWA is Subchapter III of the Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 2 U.S.C., 8 U.S.C., 12 U.S.C., 15 U.S.C., 16 U.S.C., 18 U.S.C., 20 U.S.C., 21 U.S.C., 26 U.S.C., 28 U.S.C., 31 U.S.C., 42 U.S.C., and 46 U.S.C.).

13. Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3711-3797 (1994), amended by 42 U.S.C. § 3796gg (1994). For example, any state, municipality, or local government which funds forensic medical exams in sexual assault cases and filing and service fees for domestic violence cases may apply for grants to supplement prosecution, law enforcement, and victim service programs. *Id.* §§ 3796gg-3796gg-1.

14. The Family Violence Prevention and Services Act, 42 U.S.C. §§ 10401-10416 (1994), amended by 42 U.S.C. § 10416 (1994). A non-profit organization actually runs the national hotline. *Id.* § 10416. Provided the organization meets several requirements, such as personnel training, the federal govern-

assault cases,¹⁵ and makes traveling across state lines to commit domestic violence a federal offense.¹⁶ Moreover, Subtitle C of the VAWA¹⁷ establishes a civil rights cause of action against any "person . . . who commits a crime of violence motivated by gender"¹⁸ This Comment focuses on the constitutionality of this civil rights provision.¹⁹

Under the VAWA Civil Rights Remedy, a rape or domestic violence victim²⁰ may recover from her assailant compensatory and punitive damages in addition to attorneys fees in a private civil action.²¹ Although a rape or domestic violence victim must prove by a preponderance of the evidence that gender partially motivated her assailant,²² she may bring such a suit whether or not her assailant dragged her across state lines²³ and whether or not her assailant acted in a solely private capacity.²⁴ The rape or domestic violence victim need not prove the existence of interstate activity or state action because to require her to do so would render the VAWA Civil Rights Remedy useless to all but a handful of vic-

ment will fund that organization for up to five years. *Id.*

15. 28 U.S.C. § 2074 (1994). Subtitle A of VAWA modified rule 412 of the Federal Rules of Evidence to prohibit, barring a few discrete exceptions, the admission of evidence offered to prove the victim's sexual history or sexual predisposition. *Id.*; FED. R. EVID. 412.

16. 18 U.S.C. § 110A (1994). The VAWA also extends full faith and credit to state-issued protection orders. *Id.*

17. Subtitle C of the VAWA is entitled "Civil Rights Remedies for Gender-Motivated Violence" [hereinafter the VAWA Civil Rights Remedy]. Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994).

18. *Id.* § 13981(c). The VAWA Civil Rights Remedy does not include "random acts of violence unrelated to gender." *Id.* § 13981(e)(1).

19. Many sections of VAWA deserve analysis. For example, the provisions creating new federal crimes, such as interstate domestic violence, have raised issues of federalization. See, e.g., Michelle W. Easterling, Note, *For Better or Worse: The Federalization of Domestic Violence*, 98 W. VA. L. REV. 933, 937 (1996) (arguing that Congress's efforts to combat violence against women should focus on financial assistance to the states, not creating another federal criminal offense). These issues are beyond the scope of this Comment.

20. Technically, any person victimized by a crime motivated by gender, as defined by VAWA, may utilize the VAWA Civil Rights Remedy. 42 U.S.C. § 13981(b). However, in creating this cause of action, Congress focused on rape and domestic violence against women. H.R. REP. NO. 103-395, at 25 (1993); S. REP. NO. 103-138, at 37 (1993); S. REP. NO. 102-197, at 33 (1991); S. REP. NO. 101-545, at 28 (1990). Accordingly, this Comment will also refer primarily to victims of these crimes.

21. VAWA, 42 U.S.C. § 13981(c).

22. *Id.* § 13981(e)(1).

23. See *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 779, 792 (W.D. Va. 1996) (noting the absence of a jurisdictional limitation in the VAWA Civil Rights Remedy requiring involvement of interstate activity).

24. See *id.* at 797 (observing that one of Congress's purposes in enacting the VAWA Civil Rights Remedy was to redress private acts of gender-motivated violence notwithstanding a lack of state action).

tims.²⁵ Congress intended the VAWA to sweep much more broadly.²⁶

Consequently, the VAWA Civil Rights Remedy does not require any proof of interstate activity, nor any state action.²⁷ Yet, by attempting to make the VAWA Civil Rights Remedy available to *more* victims, Congress has actually rendered this remedy unavailable to *all* victims.²⁸ Neither the Commerce Clause²⁹ nor the Fourteenth Amendment,³⁰ the clauses upon which Congress predicated the VAWA Civil Rights Remedy,³¹ empowers Congress to reach purely private conduct that does not substantially affect interstate commerce.³²

Two defendants recently raised this issue in actions brought under the VAWA Civil Rights Remedy. In these two separate cases, each defendant moved to dismiss the VAWA claim, arguing that neither the Commerce Clause nor the Fourteenth Amendment authorizes Congress to create a civil remedy for victims of domestic violence or rape against their assailants.³³ Their consti-

25. See Easterling, *supra* note 19, at 949 (characterizing the VAWA Interstate Domestic Violence provision as "a small Band-Aid on a massive wound" because only a few incidents of domestic violence occur in more than one state and consequently become prosecutable under that provision); see also *Brzonkala*, 935 F. Supp. at 797 (averring that due to state criminal laws prohibiting violence against women, a VAWA plaintiff cannot prove that a state caused or fostered the violent act against her).

26. See, e.g., *Hearing on Domestic Violence*, *supra* note 1, at 1 (statement of Charles Schumer, Representative, 10th Cong. Dist., N.Y.) (declaring that the purpose of the hearing was to help all of the four million women each year who are victimized by domestic violence).

27. See Violence Against Women Act of 1994, 42 U.S.C. § 13981(e)(1) (1994) (requiring only proof by a preponderance of the evidence that the alleged act of violence was motivated by gender).

28. See *infra* Part II for a discussion of the unconstitutionality of the VAWA Civil Rights Remedy.

29. U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause states that "[t]he Congress shall have power . . . to regulate commerce . . . among the several states . . ." *Id.* (emphasis added).

30. U.S. CONST. amend. XIV. The Fourteenth Amendment states that "No State shall . . . abridge the privileges or immunities of citizens of the United States; nor . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* § 1 (emphasis added). The Fourteenth Amendment empowers Congress to "enforce, by appropriate legislation, [these] provisions . . ." *Id.* § 5.

31. VAWA, 42 U.S.C. § 13981(a).

32. See *infra* Part II for a discussion regarding the constitutional implications of Congress attempting to reach purely private conduct which does not substantially affect interstate commerce.

33. *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 779, 783 (W.D. Va. 1996); *Doe v. Doe*, 929 F. Supp. 608, 610 (D. Conn. 1996). In *Brzonkala*, a female college student brought a VAWA Civil Rights claim against two fellow students who, she reported, had sexually assaulted her in a dormitory room. 935 F. Supp. at 781-82. In *Doe*, a battered wife sought

tutional challenges, however, have resulted in antithetical opinions.³⁴

On June 19, 1996, the District Court of Connecticut in *Doe v. Doe* handed down an opinion in which the court asserted that violence against women poses a serious problem to society,³⁵ despite current state and federal criminal and tort laws to prevent this violence.³⁶ From this apparent truism, the *Doe* Court concluded that the VAWA Civil Rights Remedy *must* be constitutional under the Commerce Clause³⁷ and never even analyzed its constitutionality under the Fourteenth Amendment.³⁸

One month later, another federal district court, the Western District Court of Virginia, repudiated the *Doe* Court's reasoning.³⁹ In *Brzonkala v. Virginia Polytechnic and State University*, the court analyzed the issue from the legal premise that the Constitution limits Congress's authority.⁴⁰ Accordingly, it painstakingly searched every vestige of power Congress enjoys under both the Commerce Clause and the Fourteenth Amendment.⁴¹ The *Brzonkala* Court found that no interpretation of either provision supported the VAWA Civil Rights Remedy and reluctantly resolved that the remedy was unconstitutional.⁴²

"damages for deprivation of her federal right to be free from her husband's alleged gender-based violence against her." 929 F. Supp. at 610.

34. Compare *Brzonkala*, 935 F. Supp. at 801 (holding that Congress misconstrued its power to enact the VAWA Civil Rights Remedy under either the Commerce Clause or the Fourteenth Amendment), with *Doe*, 929 F. Supp. at 617 (holding that Congress has power under the Commerce Clause to deter gender-motivated crimes and that a civil cause of action is a proper means to that end).

35. 929 F. Supp. at 610. Before addressing what authority Congress purported to exercise in enacting the VAWA Civil Rights Remedy, the *Doe* Court listed the most startling statistics compiled by the House and Senate. *Id.* at 611-12. Specifically, the *Doe* Court highlighted the tens of thousands of domestic crimes and rapes committed over a year and the millions of wives reportedly battered by their husbands each year. *Id.* at 611.

36. *Id.* at 616.

37. See *infra* notes 172 and 185 for a discussion of the analysis the *Doe* Court employed to reach this conclusion.

38. 929 F. Supp. at 617. Specifically, the *Doe* Court inferred that "[g]iven the important nature of the conduct sought to be prevented . . . this court concludes that the statutory scheme which creates a federal civil rights remedy for gender-motivated violence is . . . permitted by the Constitution." *Id.*

39. *Brzonkala*, 935 F. Supp. at 791 (finding untenable the manner in which the *Doe* opinion circumvented the United States Supreme Court's recent reinterpretation of the Commerce Clause in *United States v. Lopez*, 115 S. Ct. 1624 (1995)). See *infra* Part II for a description of the U.S. Supreme Court's analysis in *Lopez*.

40. 935 F. Supp. at 785-86.

41. *Id.* at 785-801. See *infra* Part II for a discussion of the *Brzonkala* Court's analysis of the constitutionality of the VAWA Civil Rights Remedy.

42. 935 F. Supp. at 801. The Western Virginia District Court agreed that violence against women poses a serious threat in America and requires attention. *Id.* Nevertheless, the court cautioned that "Congress is not invested

Thus, despite two district court opinions, the question whether Congress possesses the necessary constitutional authority under either the Commerce Clause or the Fourteenth Amendment to have enacted the VAWA Civil Rights Remedy remains unresolved. This Comment demonstrates that the final answer to this question must be a resounding "no", despite Congress' apparently noble intentions. As Part I of this Comment demonstrates, the threat of gender-motivated violence is a real one to which the states have not responded effectively and to which Congress sincerely felt compelled to respond. Part II illustrates that the *Brzonkala* Court, and not the *Doe* Court, has correctly decided the constitutionality of the VAWA Civil Rights Remedy. Finally, Part III proposes repealing or striking the VAWA Civil Rights Remedy provision, but fortifying the remaining provisions of the VAWA which comply with the Constitution and provide the much needed assistance to the states' individual wars on violence against women.⁴³

I. A PERVASIVE PROBLEM IN NEED OF EFFECTIVE SOLUTIONS: THE IMPETUS FOR THE VAWA

When Senator Joseph Biden introduced the VAWA in the Senate on June 19, 1990, he spoke of a "national outrage" and implored his fellow congresspersons to take "swift" action.⁴⁴ Four years, several House and Senate hearings, and numerous committee reports later,⁴⁵ the VAWA finally became federal law. The leg-

with the authority to cure all of the ills of mankind." *Id.*

43. The *Brzonkala* Court suggested that a revised version of the VAWA Civil Rights Remedy could pass constitutional muster under the Fourteenth Amendment. *Id.* Although the court did not specify how it would rewrite the provision, it discussed the legitimacy of Congress's purpose in remedying the denial of equal protection that rape and domestic violence victims reportedly experience in state criminal justice systems. *Id.* at 800. The *Brzonkala* Court thus implied that Congress should create a federal civil cause of action against the state criminal justice system directly. However, such a provision could raise Eleventh Amendment issues regarding state immunity. See U.S. CONST. amend. XI (stating that "the Judicial power of the United States [does not] extend" to suits against a state by a non-resident of that state). Such issues are beyond the scope of this Comment and therefore, this Comment does not address possible amendments to the VAWA Civil Rights Remedy.

At least one constitutional scholar, Professor Burt Neuborne, has suggested that Congress has authority to enact the VAWA Civil Rights Remedy as written under either the Thirteenth Amendment or the Privileges and Immunities Clause. *Violence Against Women: Victims of the System: Hearing on S. 15 Before the Senate Comm. on the Judiciary*, 102d Cong. 99-102 (1991) (statement of Burt Neuborne, Professor of Law, New York University School of Law) [hereinafter *Hearing on S. 15*]. As Congress did not predicate the VAWA Civil Rights Remedy on either of these constitutional provisions, this argument is also beyond the scope of this Comment.

44. S. REP. NO. 101-545, at 27-28 (1990).

45. S. REP. NO. 103-138, at 39 (1993) (cataloguing the several hearings re-

islative history compiled over those four years provides statistical and testimonial support for Senator Biden's assertion that gender-based violence is a serious problem in need of solutions.⁴⁶

The following Section reveals how pervasive this problem has become. Section B demonstrates that the states have contributed as much to the problem as to the solution. The final Section of this Part examines Congress's response as exemplified by the VAWA Civil Rights Remedy.

A. *The Prevalence of Violence Perpetrated Against Women*

As the Senate Judiciary Committee recognized in 1993, violence affects men and children, as well as women.⁴⁷ However, the likelihood that a crime will be perpetrated against a woman exceeds the same likelihood for men or children once rape and domestic violence statistics are included.⁴⁸ According to the U.S. Surgeon General, the probability that a woman age fifteen to forty-four will suffer a violent injury due to a crime exceeds the probability that she will crash her car, get mugged, or die of cancer combined.⁴⁹ In fact, seventy-five percent of all women will experience some type of criminal violence within their lifetime.⁵⁰

When the Senate first studied violence against women in 1990, the statistics it gathered primarily involved crimes perpetrated by strangers.⁵¹ During that study, the Senate Judiciary

garding VAWA held between 1990 and 1993).

46. *See generally id.* (drawing upon statistics and testimony gathered over the four years during which the Senate and the House considered the VAWA to support recommending that the Senate pass VAWA as amended).

47. *Id.* at 37. The Senate Judiciary Committee admitted that violence affects all members of society today at alarming rates. *Id.* However, as Helen Neuborne of the National Organization for Women [hereinafter NOW] told the committee, women not only risk muggings, burglaries, and all the other crimes that every citizen fears but also risk crimes like rape which primarily affect women. *Women and Violence, Part 1: Hearing on S. 2754 Before the Senate Comm. on the Judiciary*, 101st Cong. 58 (1990) (statement of Helen Neuborne, Executive Director, NOW Legal Defense and Education Fund) [hereinafter *Hearing on S. 2754 Pt. 1*].

48. *Hearing on S. 2754 Pt. 1, supra* note 47, at 58 (statement of Helen Neuborne); S. REP. NO. 103-138, at 37.

49. S. REP. NO. 103-138, at 38 (citing Surgeon General Antonio Novello, *From the Surgeon General, U.S. Public Health Services*, 267 J. AM. MED. ASS'N 3132 (1992)). Violence causes the majority of injuries inflicted on women ages 15 to 44. *Id.* Two to four million women a year suffer injuries due to domestic violence alone. *Women and Violence, Part 2: Hearings on S. 2754 Before the Senate Comm. on the Judiciary*, 101st Cong. 117 (1990) (testimony of Dr. Angela Browne, Public Sector Division, Department of Psychiatry, University of Massachusetts Medical School) [hereinafter *Hearings on S. 2754 Pt. 2*].

50. S. REP. NO. 103-138, at 38 (citing U.S. DEPT OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 29 (2d ed. 1988)).

51. *See* S. REP. NO. 101-545, at 29 (1990) (describing the hearings conducted in the 1990 consideration of the VAWA). The Senate Judiciary Com-

Committee calculated that the rape rate had risen "four times as fast" as the total crime rate over a ten year period.⁵² Moreover, the committee estimated that the number of assaults against young women had climbed fifty percent over the preceding fifteen years.⁵³

In subsequent considerations of the VAWA, the Senate Judiciary Committee focused on domestic violence as well as rape.⁵⁴ For example, the Committee highlighted in its 1993 Report to the Senate that four million women endure some sort of domestic violence every year.⁵⁵ In its 1991 Report, the Committee declared that more women were beaten than there were wives in 1990.⁵⁶ Furthermore, although the Committee estimated that only one in every three domestic violence victims reports the incident, it found that police in 1991 reportedly received at least 21,000 complaints of domestic crimes per week.⁵⁷

Assuming, *arguendo*, that these statistics accurately represent the level of violence that women in America face daily, Sena-

mittee held two hearings during the 1990 study. *Id.* The first included testimony from a prosecutor for the Manhattan District Attorney's Sex Crimes Prosecution Unit. *Hearing on S. 2754 Pt.1, supra* note 47, at 51-56 (written testimony of Linda Fairstein, Assistant District Attorney, New York County). The second hearing spotlighted the risk that acquaintance rape poses especially to young women. *Hearing on S. 2754 Pt. 2, supra* note 49, at 2 (opening statement of Chairman Biden) (moving focus of hearings from stranger rape to acquaintance rape at urging of a campus rape survivor).

52. S. REP. NO. 101-545, at 30. The Senate Judiciary Committee calculated this figure based upon statistics reported by the FBI. *Id.* at 30 n.6. The accuracy of this calculation may be questionable. The U.S. Department of Justice reported in 1994 that the rape rate had actually declined in 1984 for white victims and in 1989 for black victims and that the rate had remained steady for both groups through 1992. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES: 1973-92 TRENDS 1 (1994) [hereinafter JUST. REP.]. However, the Bureau of Justice Statistics also acknowledged difficulty in detecting rape trends because many rapes go unreported or unprosecuted. *Id.* Thus, these figures may be higher than reported by the Bureau.

53. S. REP. NO. 101-545, at 31. The Senate Judiciary Committee arrived at this estimate with numbers promulgated by the Bureau of Justice Statistics in 1988 and 1974. *Id.* at 31 n.11. The Bureau of Justice Statistics' 1994 accounts furthermore indicate that the total rate of violent crimes against women between 1973 and 1992 increased while the rate of violent crimes against men during that same time period decreased. JUST. REP., *supra* note 52, at 10.

54. *See, e.g.*, S. REP. NO. 102-197, at 37 (1991) (urging condemnation of domestic violence and date rape but omitting stranger rape or assault in its plea for action).

55. S. REP. NO. 103-138, at 38 (1993) (citing to *Hearings on S. 2754 Pt.2, supra* note 49, at 116-17 (testimony of Dr. Angela Browne)).

56. S. REP. NO. 102-197, at 36 (basing conclusion on figures from the National Coalition Against Domestic Violence, the National Women Abuse Prevention Project, and the testimony of Dr. Angela Browne, *Hearings on S. 2754 Pt. 2, supra* note 49, at 117).

57. MAJORITY STAFF OF SENATE COMM. ON THE JUDICIARY, 102D CONG., VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA 4 (Comm. Print 1992).

tor Biden's call to action is undoubtedly legitimate.⁵⁸ The question becomes, though, whether the states, the federal government or both should address the problem of violence against women. As the following Section reveals, the states acting alone have not sufficiently combatted the problem to date.

B. The States' Ineffective Response

Congress found during its consideration of the VAWA that although states are authorized through their police powers to combat the problem of gender-based violence, they have not responded as quickly or as effectively as required.⁵⁹ Moreover, testimony before House and Senate committees indicated that the state judicial systems may have actually exacerbated the problem.⁶⁰ Armed with what they perceived to be proof of indifferent law enforcement and of prejudicial state court systems, the Senate and House committees concluded that the states had ineffectively responded to the growing threat of violence against women.⁶¹

1. Lack of Diligent Law Enforcement

Despite the staggering number of rapes and domestic assaults against women, the House and Senate found that many police organizations have proven woefully inept at solving these crimes, much less deterring them.⁶² For example, less than forty percent of stranger rapists are apprehended.⁶³ Even more alarming, a 1986 study of the District of Columbia Police Department showed that of 19,000 domestic violence reports, less than forty-two resulted in arrests.⁶⁴

58. See S. REP. NO. 101-545, at 27 (1990) (stating that "the realization that the numbers of victims are growing [makes] swift committee consideration imperative.").

59. See, e.g., S. REP. NO. 102-197, at 43 (asserting that the VAWA Civil Rights Remedy is required because "state remedies are inadequate in practice and in theory").

60. See, e.g., *Hearing on S. 2754 Pt.1, supra* note 47, at 31 (written testimony of Marla Hanson, an assault victim) (asserting that "[t]he psychological violence [Hanson] endured throughout the trial of [her] attackers was far more traumatizing . . . than the attack on the street.").

61. H.R. REP. NO. 103-395, at 27 (1993); S. REP. NO. 102-197, at 48 (1991).

62. See, e.g., S. REP. NO. 101-545, at 38 (indicting the state legislatures and Congress for ignoring reports that "[a]rrest can stop abuse" but that only one percent of domestic violence incidents result in arrest).

63. MAJORITY STAFF OF SENATE COMM. ON THE JUDICIARY, 103D CONG., *THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE* 30 (1993). Moreover, of those rapists apprehended, less than half are convicted of rape, *id.* at 35, and of those convicted, most are incarcerated for only a year or less. *Id.* at 2.

64. *Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong. 98 (1992) (testimony of Sandra Sands, Office of General Counsel, Department of Health

However, as the Minneapolis Police Department and the National Police Foundation discovered in 1984, police can make a difference, especially in domestic violence cases.⁶⁵ These organizations found that where police responded to a domestic violence complaint and only gave the batterer a warning, the violence recurred thirty-seven percent of the time within six months.⁶⁶ By contrast, where police arrested the batterer, another incident occurred in only nineteen percent of the cases within six months.⁶⁷

Based on these statistics, several jurisdictions have implemented mandatory arrest policies in incidents of domestic violence.⁶⁸ It may seem odd that a police officer must be forced to make an arrest. These jurisdictions, however, have found that mandatory arrest policies are the best way to counter the attitudes shared by many law enforcement officers that domestic violence is "just a quarrel," not a real crime.⁶⁹ Unfortunately, this prejudice is deeply rooted in our judicial system as well.

2 Prejudicial Court Systems

A common law rule, often repeated during Congress's consideration of the VAWA, reveals the large hurdle facing rape and especially domestic violence victims who seek redress in our state court systems. As Blackstone reported it, a husband could "restrain" his wife provided he did not use "a stick thicker than a man's thumb."⁷⁰ The U.S. Supreme Court relied on this misogynous rule as late as 1868 in disavowing a wife's claim of assault and battery against her husband.⁷¹ Furthermore, some states do

and Human Services, D.C. and Past President, D.C. Coalition Against Domestic Violence). Of course, it is possible and perhaps highly likely that the approximately 18,960 reports of domestic violence which did not result in an arrest did not because the victim withdrew the complaint. Even if an explanation other than police apathy is proffered, however, one suspects that proponents of the VAWA would argue that the complaints were withdrawn because the victim lacked faith that the criminal justice system could adequately protect her from further victimization. See, e.g., *Hearing on S. 2754 Pt. 1, supra* note 47, at 33 (written testimony of Marla Hanson) (alleging that the courts have inhibited victims from coming forward by allowing victims to be treated as the guilty party at trial).

65. See H.R. REP. NO. 103-395, at 27 (reporting from Sherman & Berk, *The Minneapolis Domestic Violence Experiment*, in POLICE FOUNDATION REPORTS (1984) that recidivism directly correlates with police action or inaction in domestic violence cases). The Minneapolis Domestic Violence Experiment resulted from a joint study conducted by the Minneapolis Police Department and the National Police Foundation. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* (citing L. Lerman, *Expansion of Arrest Power: A Key to Effective Intervention*, 7 VT. L. REV. 59 (1982)).

69. S. REP. NO. 101-545, at 36 (1990).

70. S. REP. NO. 103-138, at 41 (1993); S. REP. NO. 101-545, at 36.

71. *Thompson v. Thompson*, 218 U.S. 611, 618 (1910). The *Thompson*

not recognize spousal rape as a crime to this day.⁷²

In those states that do acknowledge the criminality of rape and domestic violence, some still do not consider these acts to be serious crimes or those affected by them to be innocent victims.⁷³ Prosecutors in Maryland, for instance, purposely let domestic violence and rape complaints fall by the wayside.⁷⁴ In cases that did reach the Maryland courts, the victims then encountered judges who treated their suffering as "trivial or unimportant."⁷⁵

Other state studies have yielded similar results. A special judicial committee in Georgia that studied the attitudes of police, prosecutors, and judges discovered that gender-bias against female complainants still pervades its system.⁷⁶ A California Judicial Advisory Committee warned that domestic violence victims did not receive equal protection of the laws in that state's courts.⁷⁷

In Connecticut, similar results as those found in other states prompted a commission to make a cruelly ironic observation.⁷⁸ The commission report stated that "victim[s] of sexual assault suffer not only because of the crime, but frequently suffer psychological trauma from what they experience within the justice system."⁷⁹ Thus, the phrase "insult to injury" takes on significant meaning for rape and domestic violence victims relying on the courts for legal

Court held that a landmark statute permitting a wife to bring a civil action in her own name did not also permit a wife to bring an action against her own husband. *Id.* To permit a wife to sue her husband would have constituted a "radical changel]" in the law that the *Thompson* Court presumed the legislature did not intend absent express language indicating such. *Id.*

72. *Hearing on S. 2754 Pt.1, supra* note 47, at 64 (written statement of Helen Neuborne). In 1990, when Ms. Neuborne testified before the Senate Judiciary Committee, she explained that a majority of states at that time had not yet repealed their spousal immunity laws that prohibited the prosecution of a husband for raping his wife unless they were divorced or legally separated. *Id.* Furthermore, she averred that many states had similar prohibitions on acquaintance rape prosecutions where the victim lived with or dated the rapist. *Id.*

73. *See* H.R. REP. NO. 103-395, at 27-28 (1993) (citing the reports discussed *infra* notes 74-79).

74. MARYLAND SPECIAL JOINT COMMITTEE, GENDER BIAS IN THE COURTS 18 (1991) [hereinafter MD. REP.].

75. *Id.* at 27.

76. *Id.* at 28 (citing SUPREME COURT OF GEORGIA, GENDER AND JUSTICE IN THE COURTS: A REPORT TO THE SUPREME COURT OF GEORGIA BY THE COMMISSION ON GENDER BIAS IN THE JUDICIAL SYSTEM 34, 93 (1991) [hereinafter GA. REP.]).

77. *Id.* at 27 (citing ADMINISTRATIVE OFFICE OF THE COURTS OF CALIFORNIA, ACHIEVING EQUAL JUSTICE FOR WOMEN & MEN IN THE COURTS: REPORT JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS 2 (1991) [hereinafter CAL. REP.]).

78. *See id.* (citing CONNECTICUT JUDICIAL TASK FORCE ON GENDER BIAS, GENDER, JUSTICE AND THE COURTS 17 (1991) [hereinafter CONN. REP.]) (reporting on the psychological toll exacted on rape complainants by the criminal justice system).

79. H.R. REP. NO. 103-395, at 27 (1993) (citing CONN. REP.).

redress.

After several witnesses before Congress described this compounding of psychological injury upon psychological injury,⁸⁰ Congress gave the phenomenon a name: "double victimization."⁸¹ These witnesses also relayed to the House and Senate how "double victimization" feels.⁸² Marla Hanson told the Senate, "it never occurred to me to blame myself for my own attack; that is, until the courts, the press and society began to insinuate . . . [that] I [was] the architect of my own suffering."⁸³ A rape victim, in a letter to the Senate Judiciary Committee, admonished that "if the system continues to badger and blame women for the crimes they experience, it will not be long before we say, 'what's the point?'"⁸⁴

Hence, although violence affects every member of society, women appear not only more vulnerable to it, but also less capable to procure legal redress following it. From the responding police-officer, to the Assistant District Attorney, and finally to the judge and jury, female rape and domestic violence complainants fight an uphill battle for justice. Several states have actively pursued effective reformation of their criminal justice systems to eliminate this unfair situation.⁸⁵ The voluminous state-commissioned studies, to which the House and Senate cite in the legislative history of the VAWA, attest to the seriousness of the states' resolve to effectively combat the problem of gender-bias in their legal systems.⁸⁶ Nevertheless, Congress felt compelled to offer a significant legal reform of its own.⁸⁷

80. See, e.g., *Hearing on S. 15, supra* note 43, at 65 (testimony of Roland Burris, Attorney General, State of Illinois) (equating those men "who wear a robe and are called upon to judge the beating" with those men "who do the beating"); *Hearings on S. 2754 Pt.1, supra* note 47, at 33 (written testimony of Marla Hanson) (describing her feelings of violation by the system); *Id.* at 59 (statement of Helen Neuborne) (suggesting that even where state laws provide adequate redress, backward-thinking judges fail to properly implement them).

81. S. REP. NO. 102-197, at 39 (1991).

82. See, e.g., *Hearing on S. 2754 Pt.1, supra* note 47, at 33 (written testimony of Marla Hanson) ("I felt more violated by the court proceedings[] than by the actual assault").

83. *Id.* at 27 (statement of Marla Hanson).

84. S. REP. NO. 101-545, at 34 (1990).

85. See, e.g., *Hearing on S. 15, supra* note 43, at 67 (testimony of Roland Burris) (reporting that Illinois's revised sex crime statutes resulted in increased conviction rates within six months).

86. See, e.g., H.R. REP. NO. 103-395, at 27, 28 (1993) (citing reports from studies of gender bias in state criminal justice systems in Maryland, Georgia, California and Connecticut).

87. See, e.g., S. REP. NO. 102-197, at 48 (1991) (asserting superiority of federal court system and citing prejudices in state criminal court systems and "antiquated [s]tate procedural rules" to justify conclusion that "a [f]ederal, not a [s]tate, remedy for gender-biased crimes" would be more fair and equitable to gender-motivated crime victims). The Senate Judiciary Committee did not

C. Congress's Response with the VAWA

Congress's rationale for enacting the VAWA began with the presumption that violence against women poses a national threat.⁸⁸ From this premise, Congress then concluded that only a national showing of intolerance for gender-based violence could eradicate this threat.⁸⁹ Congress therefore resolved that federal legislation constituted an appropriate step toward eliminating gender-based violence.⁹⁰

In 1990, on a somewhat more definitive level, the Senate justified certain provisions of the VAWA with economic reasons.⁹¹ The Senate Judiciary Committee focused on the financial burden that many states and cities experienced due to its rising arrest and prosecution rates and its increasing numbers of shelter and counseling facilities.⁹² Thus, much of the VAWA concentrates on supplementing the states' efforts to combat violence against women. Some sections of the VAWA provide monetary and educational assistance to the states.⁹³ Other sections mandate Department of Justice studies to augment the states' independent investigations.⁹⁴

However, the provision that Congress most scrutinized, the Civil Rights Remedy,⁹⁵ intentionally avoids augmenting the states'

identify which state procedural rules it found "antiquated." *Id.*

88. S. REP. NO. 103-138, at 37 (1993). Although this presumption may be true, the legislative history of VAWA does not substantiate it except to report national crime figures. For example, the citations to these reports do not describe the collection method employed to gather the statistical data. Nor do they indicate whether the incidents reported occurred throughout the fifty states or whether they occurred in concentrated states or regions.

89. S. REP. NO. 103-138, at 42 (promising that the "[VAWA] is designed to remedy not only the violent effects of the problem, but the subtle prejudices that lurk behind it"); S. REP. NO. 102-197, at 35 (1991) (declaring that "[this] legislation is an important step . . . in the direction of developing what we need the most - a national consensus that this society will not tolerate this kind of violence . . .").

90. S. REP. NO. 103-138, at 42; S. REP. NO. 102-197, at 35.

91. S. REP. NO. 101-545, at 39 (1990). In fiscal year 1989, Congress allocated \$8.5 million, "just over [one percent] of the cost of a single B-2 bomber," to assist the fight against domestic violence. *Id.* at 40. Under the 1990 version of VAWA, that amount would have multiplied to \$125 million. *Id.*

92. *Id.* at 39 ("Progress has . . . created a whole host of new problems"). For example, Chicago was forced to open a third court in order to accommodate the overwhelming increase in domestic violence cases. *Id.*

93. *See, e.g.*, Violence Against Women Act of 1994, 42 U.S.C. § 13931 (1994) (providing grants to make public transportation facilities safer).

94. *See, e.g.*, VAWA, 42 U.S.C. § 14012 (appropriating funds for studying sexual assault on university campuses).

95. *See* S. REP. NO. 103-138, at 48 (recognizing that Congress' authority to create a civil rights cause of action for gender-motivated violence elicited several concerns); *see also* S. REP. NO. 102-197, at 35 (1991) (reporting that a special hearing was held in 1991 to explore Congress' power to enact a civil rights remedy).

authority.⁹⁶ Congress enacted the VAWA Civil Rights Remedy to give victims another avenue of legal redress.⁹⁷ Though, in doing so, Congress purposefully chose as its means a vaguely-worded federal civil action that eradicates the state's participation as a party.⁹⁸

1. *The Purpose*

Congress professed to enact the VAWA Civil Rights Remedy for two reasons. First, it intended to close "the gender gap" in civil rights legislation by providing a remedy for gender-motivated violence in much the same way that existing federal and state legislation reportedly provides for racially-motivated violence.⁹⁹ Second, Congress sought to remedy the inadequacies of the state courts that, according to numerous congressional witnesses, have deprived many female victims of equal protection of the laws.¹⁰⁰ As a catch-all, Congress also averred that gender-based violence negatively impacts interstate commerce in order to claim power to enact the VAWA Civil Rights Remedy under the Commerce Clause.¹⁰¹

In 1993, when the Senate Judiciary Committee sent the VAWA to the floor for passage, it reported that the Civil Rights Remedy was intended to close the "gender gap" in civil rights legislation.¹⁰² According to the Committee, the Fourteenth Amendment had empowered Congress and encouraged the states to create civil remedies against violent discrimination.¹⁰³ Nevertheless, by 1993 less than a dozen state laws and no federal laws specifically addressed gender-bias crime.¹⁰⁴ Therefore, the Senate Judiciary Committee characterized the VAWA Civil Rights Remedy as a long overdue and constitutionally permissible extension of civil rights

96. See *supra* notes 88-98 and accompanying text for a discussion of Congress's purpose in creating a federal civil rights action rather than relying on existing state tort and criminal laws.

97. S. REP. NO. 101-545, at 42 (1990).

98. *Id.*

99. S. REP. NO. 103-138, at 48-49 (1993).

100. *Id.* at 49.

101. *Id.* at 54.

102. *Id.* at 48 (citing the Ku Klux Klan Act of 1871 as establishing a prohibition against discriminatory attacks based on race, religion, or national origin but noting that Congress has enacted no such legislation against gender-based attacks).

103. *Id.* at 55. "This country has been using [f]ederal civil rights laws to fight discriminatory violence for 120 years. [The VAWA Civil Rights Remedy] is a logical extension of this tradition." *Id.* at 51.

104. *Id.* at 48 (reporting that in the past 10 years, many states have created civil causes of action for hate crimes, but few include gender-biased violence and noting that the federal Hate Crime Statistics Act of 1990 does not require collection of statistics regarding gender-biased crimes though it mandates gathering information regarding other hate crimes).

legislation.¹⁰⁵

In 1990, the Senate Judiciary Committee explained its motivations more thoroughly. First, the VAWA Civil Rights Remedy puts a "legal tool in victims' hands" that the victim alone manipulates without a state prosecutor's interference.¹⁰⁶ Second, according to the Senate Judiciary Committee, a defendant may not invoke his Fifth Amendment privilege in a civil cause of action; therefore, the victim may force the defendant to testify against himself.¹⁰⁷ Finally, "a [f]ederal remedy offers victims the best court system in the world,"¹⁰⁸ and an opportunity to choose a favorable jury rather than relying upon a prosecutor to do so.¹⁰⁹ Thus, Con-

105. S. REP. NO. 103-138, at 51 (1993). In asserting Congress' Fourteenth Amendment power to enact the VAWA Civil Rights Remedy, the Senate Judiciary Committee averred that the Fourteenth Amendment "authorizes Congress to pass appropriate legislation to enforce the . . . [A]mendment's guarantees of equal rights." *Id.* at 55. The Fourteenth Amendment does not explicitly guarantee equal rights, however. The Fourteenth Amendment guarantees "equal protection of the laws" by the state. U.S. CONST. amend. XIV § 1. Under the Fourteenth Amendment, a woman has a right to receive equal protection of the laws from the state but arguably does not have a right not to be assaulted, raped, or even murdered by a private actor. *See, e.g.,* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 15.5 (5th ed. 1995) (stating that "there has not yet been a Supreme Court case holding that Congress, by statute, may reach purely private actions" under the Fourteenth Amendment). *But see* JEROME BARRON ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 1311 (4th ed. 1992) (noting that Justice Brennan had argued that two Supreme Court cases do establish Congress' power to reach purely private action under the Fourteenth Amendment). Thus, by addressing the VAWA Civil Rights Remedy to the private perpetrator committing the violent act rather than to the state actors denying the victim equal protection of the laws prohibiting that violent act, the VAWA Civil Rights Remedy arguably is not appropriate Fourteenth Amendment legislation and, therefore, Congress has impermissibly extended civil rights legislation. *See infra* Part II for further discussion of the debate surrounding the Fourteenth Amendment state action requirement.

106. S. REP. NO. 101-545, at 42 (1990). "[This remedy is] important because [it] allow[s] survivors an opportunity for legal vindication that the survivor, not the [s]tate, controls." *Id.*

107. *Id.*

108. *Id.* (claiming that the federal court system is superior to those of the states because federal judges are "insulated from local political pressures"). Helen Neuborne of NOW espoused this view in her testimony before the Senate Judiciary Committee. *Hearing on S. 2754 Pt.1, supra* note 47, at 59 (statement of Helen Neuborne). Ms. Neuborne asserted that because federal judges are appointed for life, they therefore will discriminate less against female plaintiffs. *Id.* One might also argue that because federal judges are appointed for life and presumably therefore "insulated from local political pressure," they also do not feel pressured to be "politically correct" and thus are actually more likely to continue to treat women with disrespect.

109. S. REP. NO. 101-545, at 42 (hypothesizing that a victim will be more adept at "screen[ing] out jurors who harbor irrational prejudices against . . . rape [and domestic violence] victims" than prosecutors who have handled hundreds of such cases).

gress' "remedy" to inadequacies in state criminal justice systems consists of allowing female victims of gender-motivated violence to bypass the state criminal justice systems altogether. Moreover, the VAWA Civil Rights Remedy encourages the state criminal justice systems to cease denying rape and domestic violence victims equal protection by requiring the perpetrator, not the state, to pay the victim damages.¹¹⁰

Obviously anticipating a charge that Congress lacked power under the Fourteenth Amendment to reach purely private conduct, Congress, as an afterthought, also invoked its power under the Commerce Clause.¹¹¹ Without citing to any authority or testimony, the Senate Judiciary Committee surmised that violence against women "restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending."¹¹² The Committee inferred that gender-based violence affects the national economy which in turn affects interstate commerce.¹¹³ Accordingly, the Senate Judiciary Committee surmised that with its plenary power under the Commerce Clause, Congress may extend individual, civil rights legislation to victims of rape and domestic violence in order to eliminate the negative impact such violence purportedly has on interstate commerce.¹¹⁴

2. *The Means*

The VAWA Civil Rights provision does not address every rape or every battering.¹¹⁵ The provision encompasses only "crime[s] of

110. See *infra* Part II for an illustration of the lack of nexus between the equal protection violation in the state criminal justice system that the VAWA purports to remedy and the civil cause of action aimed at the individual rapist or batterer.

111. S. REP. NO. 103-138, at 54 (1993). The Senate Judiciary Committee, in fact, created a new test unarticulated by the Court: "The Commerce Clause is a broad grant of power allowing Congress to reach conduct that has even the slightest effect on interstate commerce . . ." *Id.* But see *United States v. Lopez*, 115 S. Ct. 1624, 1629 (1995) (stating unequivocally that Congress may regulate only "the use of channels of interstate commerce," "the instrumentalities of interstate commerce," and "those activities that substantially affect interstate commerce").

112. S. REP. NO. 103-138, at 54.

113. *Id.*

114. *Id.* at 54-55 (averring that the Supreme Court upheld the rationale that fear of violence affects the national economy and therefore interstate commerce when it held that the Civil Rights Act of 1964 was constitutional but failing to cite to any Supreme Court case so holding).

115. Violence Against Women Act of 1994, 42 U.S.C. § 13981(e)(1) (1994) ("Nothing in this section entitles a person to a cause of action under . . . this section for random acts of violence unrelated to gender . . ."). The VAWA Civil Rights Remedy "does not create a general [f]ederal law for all assaults or rapes against women". S. REP. NO. 103-138, at 51 (1993). In addition, this provision does not confer supplemental, federal jurisdiction over divorce, child custody, and other domestic relations claims. 42 U.S.C. § 13981(e)(4).

violence committed because of gender or on the basis of gender, and due, at least in part, to an animus¹¹⁶ based on the victim's gender."¹¹⁷ Moreover, only an act that the state or federal government has defined as a felony posing a "serious risk of physical injury to another" constitutes a "crime of violence" under the VAWA Civil Rights Remedy.¹¹⁸ Presumably to sidestep the spousal immunity laws still in existence in some states,¹¹⁹ the provision does not require a prior "criminal complaint, prosecution, or conviction."¹²⁰

The final version of the VAWA Civil Rights Remedy limits the cause of action much more than earlier drafts. In 1993, the Senate amended the proposed language of the VAWA in anticipation of a constitutional challenge.¹²¹ Originally, the VAWA Civil Rights Remedy did not require proof that gender animus motivated, at least in part, the violent act at issue.¹²² Moreover, early versions of the provision presumed that gender inherently motivates rape and sexual assault.¹²³ Under the enacted version, the plaintiff must prove gender-motivation by a preponderance of the evidence, irre-

116. BLACK'S defines "animus" as "[m]ind; soul; intention; disposition; design; will; [or] that which informs the body." BLACK'S LAW DICTIONARY 57 (abr. 6th ed. 1991). Witnesses before Congress defined "animus" as a hostile or malevolent intention. See, e.g., *Crimes of Violence Motivated by Gender: Hearing on H.R. 1133 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 101 (1993) (prepared statement of James Turner, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice) [hereinafter *Hearing on H.R. 1133*] (quoting Webster's dictionary as defining "animus" as "prejudiced and often spiteful").

117. VAWA, 42 U.S.C. § 13981(d)(1).

118. VAWA, 42 U.S.C. § 13981(d)(2)(A).

119. *Hearing on S. 2754 Pt.1, supra* note 47, at 64 (written statement of Helen Neuborne).

120. VAWA, 42 U.S.C. § 13981(e)(2).

121. See *Hearing on H.R. 1133, supra* note 116, at 2 (statement of Sally Goldfarb, Senior Staff Attorney, NOW Legal Defense and Education Fund) (contrasting differences between the House version of the VAWA Civil Rights Remedy which required proof only of a "crime of violence motivated by gender" and the Senate amended version which requires a showing that "the crime was due, at least in part, to an animus based on gender"); see also S. REP. NO. 103-138, at 50 (1993) (listing limitations added to the Senate version to narrow the remedy's scope to exclude random acts of violence). As Ms. Goldfarb reported to the House of Representatives, the Senate narrowed its version of the VAWA Civil Rights Remedy in response to advice from federal judges, civil liberties groups, and others. *Hearing on H.R. 1133, supra* note 116, at 3 (statement of Sally Goldfarb); See also *id.* at 82 (statement of the Honorable Vincent McKusick, President, Conference of Chief Justices) (reporting that the Conference of Chief Justices recommended the elimination of the Civil Rights Remedy in the VAWA). The Senate itself conceded that the constitutionality and wisdom of the Civil Rights Remedy had caused debate. S. REP. NO. 103-138, at 48.

122. *Hearing on H.R. 1133, supra* note 116, at 2 (statement of Sally Goldfarb).

123. *Id.*

spective of the type of violent act at issue.¹²⁴

Despite these limiting amendments, some have forewarned that the standard remains ambiguous and unworkable.¹²⁵ For example, an American Civil Liberties Union representative counseled the House of Representatives that the standard as modified does not clearly indicate whether "animus," as used in the VAWA Civil Rights Remedy, requires the defendant to have acted purposefully or with hostility.¹²⁶ Congress responded to this criticism by declaring that "animus" as used in the VAWA Civil Rights Remedy is synonymous with "motivated by," "because of," "on the basis of," or "based on" as the courts have defined these phrases in Title VII and other civil rights litigation.¹²⁷ Nevertheless, even the proponents of the VAWA Civil Rights Remedy concede that the "animus" element of this provision will require further "fleshing out" by the courts.¹²⁸ However, as the following Part will demonstrate, this "fleshing out" will prove unnecessary because the VAWA Civil Rights Remedy cannot pass constitutional muster.

II. THE UNCONSTITUTIONALITY OF THE VAWA CIVIL RIGHTS REMEDY

Although our constitutional jurisprudence has struggled to

124. VAWA, 42 U.S.C. § 13981(e)(1) (1994). Although the act at issue in a cause of action arising under this provision necessarily constitutes a felony under state and/or federal law, the plaintiff need not prove her claim beyond a reasonable doubt. *Id.* § 13981(d)(2)(A)-§ 13981(e)(1). The Senate Judiciary Committee supported the lower standard by referring to other, uncited, civil rights cases tried under the rules and standards of civil law. S. REP. NO. 103-138, at 53. Moreover, the lower standard was an essential ingredient to the VAWA Civil Rights Remedy's fulfillment of Congress's purpose in enacting it. *See Hearing on S. 2754 Pt. 1, supra* note 47, at 59 (statement of Helen Neuberger). By requiring a lower burden of proof, the provision removes one of the obstacles preventing victims of violence against women from prevailing in court. *Id.* Removing such obstacles greatly motivated many proponents of the provision to fight for its passage. *See id.*

125. *See, e.g., Hearing on H.R. 1133, supra* note 116, at 20 (prepared statement of Elizabeth Symonds, legislative counsel, American Civil Liberties Union) (averring that even if "gender animus" is sufficiently defined by Congress, such a standard does not define the prerequisite motive or intent that the defendant must be proved to have had).

126. *Id.* (prepared statement of Elizabeth Symonds). *See supra* note 116 for an illustration of the diverging definitions given "animus".

127. S. REP. NO. 103-138, at 52-53 (1993). *But see Hearing on H.R. 1133, supra* note 116, at 21 (prepared statement of Elizabeth Symonds) (illuminating the impracticability of applying Title VII definitions to cases of domestic violence by asking Congress, *inter alia*, "If a husband becomes furious with his wife because she crashed his car, and he proceeds to beat her, are his actions committed because of gender and due to animus based on her gender?").

128. *Hearing on H.R. 1133, supra* note 116, at 102 (statement of James Turner).

balance the preservation of our federalist system as envisioned by the framers¹²⁹ with the adaptation of the Constitution to the exigencies of the times,¹³⁰ one principle has remained constant: “[The federal] government is acknowledged by all to be one of enumerated powers.”¹³¹ Thus, any power that Congress has to enact legislation must be delegated to it by the Constitution.¹³² When Congress exceeds its constitutionally delegated power, the courts must intercede “to say what the law is.”¹³³

Congress predicated the VAWA Civil Rights Remedy on its powers under the Commerce Clause and the Fourteenth Amendment.¹³⁴ The *Doe* court found that Congress did have the prerequisite power for this enactment under the Commerce Clause.¹³⁵ However, the *Brzonkala* court found that Congress did not have power to enact the VAWA Civil Rights Remedy under either the Commerce Clause or the Fourteenth Amendment.¹³⁶ This Part analyzes the Commerce Clause and the Fourteenth Amendment and concludes that neither provision empowers Congress to enact the VAWA Civil Rights Remedy.

A. Lack of Authority Under the Commerce Clause

Article I of the U.S. Constitution empowers Congress to enact any “necessary and proper”¹³⁷ law “to regulate [c]ommerce . . . among the several [s]tates.”¹³⁸ In 1824, Chief Justice John Marshall in *Gibbons v. Ogden* defined this commerce power as a plenary one that Congress may exercise “to its utmost

129. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (avowing that “a healthy balance of power between the [s]tates and the [f]ederal government will reduce the risk of tyranny and abuse from either front”).

130. See, e.g., *McCulloch v. Maryland*, 17 U.S. (1 Wheat.) 316, 407 (1819) (counseling that “it is a constitution we are expounding”).

131. *McCulloch*, 17 U.S. at 405.

132. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (forewarning that Congress’ “powers . . . are defined and limited; and[] . . . those limits may not be mistaken or forgotten . . .”); See also *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824) (explaining that “enumeration presupposes something not enumerated . . .”).

133. *Marbury*, 5 U.S. at 177.

134. Violence Against Women Act of 1994, 42 U.S.C. § 13981(a) (1994). See *supra* Part II for a recitation of these constitutional provisions.

135. *Doe v. Doe*, 929 F. Supp 608, 617 (D. Conn. 1996).

136. *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 779, 801 (W.D. Va. 1996).

137. U.S. CONST. art. I, § 8, cl. 18. This clause states that “The Congress shall have [p]ower . . . [t]o make all [l]aws which shall be necessary and proper for carrying into [e]xecution the foregoing [p]owers” *Id.* One of the “foregoing powers” is the Commerce Clause contained in Article I, Section 8, Clause 3. U.S. CONST. art. I, § 8.

138. *Id.* cl. 3. This clause states that “The Congress shall have [p]ower . . . [t]o regulate [c]ommerce with foreign [n]ations, and among the several [s]tates, and with the Indian [t]ribes.” *Id.*

extent."¹³⁹ Since *Gibbons*, however, Congress has pushed the meaning of "necessary and proper" commerce regulation farther and farther.¹⁴⁰ With each push, Congress has enacted legislation designed less to regulate the trading of goods or transporting of people between the states¹⁴¹ and more to mask the exercise of a federal police power that the Constitution's framers intentionally did not grant to Congress.¹⁴² Moreover, with each push, Congress met an accommodating Supreme Court that reinterpreted Commerce Clause jurisprudence as required to uphold the constitutionality of the statute at issue.¹⁴³

The Court's unquestioning deference to Congress' commerce power has abruptly ended, however.¹⁴⁴ In 1995, the Court struck down the Gun-Free School Zones Act of 1990 because the Court found that Congress had surpassed its power under the Commerce Clause.¹⁴⁵ *United States v. Lopez* marked the first time in nearly sixty years that the Court recognized limits to Congress' plenary commerce power.¹⁴⁶ As a result of *Lopez*, the VAWA Civil Rights Remedy no longer finds authority under the Commerce Clause.¹⁴⁷

139. *Gibbons v. Ogden*, 22 U.S. (1 Wheat.) 1, 196 (1824).

140. See generally Richard A. Epstein, *Constitutional Faith and The Commerce Clause*, 71 NOTRE DAME L. REV. 167 (1996) (editorializing the history of Commerce Clause jurisprudence); See also Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719 (1996) (warning that an expanded Commerce Clause power threatens our system of federalism).

141. See BLACK'S LAW DICTIONARY 183 (6th ed. 1991) (defining "commerce" as "the exchange of goods, productions, or property of any kind; the buying, selling, and exchanging of articles[;] . . . [t]he transportation of persons and property by land, water, and air").

142. See, e.g., BERNARD SCHWARTZ, CONSTITUTIONAL LAW 54-55 (2d ed. 1979) (conceding that the federal government does not have a police power over the states but asserting that where the regulated activity can be said to fall within the scope of interstate commerce, Congress has power to regulate it even though Congress' purpose is to effectuate social or moral policy); See also Graglia, *supra* note 140, at 734-37 (noting that in several cases the Court has upheld federal legislation ultimately aimed at activities within the sphere of the states' police powers, like prostitution and food manufacturing, provided the legislation facially regulated commerce).

143. Epstein, *supra* note 140, at 169-74. Epstein gives a detailed history of the Commerce Clause, editorializes the dramatic shifts which the Court perpetrated with hardly a notice, and ultimately concludes that, until recently, "no subject worthy enough to attract Congress's[] attention failed to win the Court's blessing under the Commerce Clause." *Id.* at 173. With the exception of those discussed *infra* Part II.A.1,2, the individual tests that the Court manufactured and doctored in order to facilitate Congress's infiltration into the states' autonomy are beyond the scope of this Comment.

144. Epstein, *supra* note 140, at 168.

145. *United States v. Lopez*, 115 S. Ct. 1624, 1626 (1995).

146. Graglia, *supra* note 140, at 720.

147. See *infra* Part II.A.3 for a discussion of how the VAWA Civil Rights Remedy fails to pass constitutional muster under the Commerce Clause.

1. The "Cumulative Effects" Doctrine

Commerce power expansion reached an apex in 1942 with the development of the "cumulative" or "aggregated effects" doctrine.¹⁴⁸ This doctrine incorporated earlier rules that required the regulated activity to substantially affect interstate commerce although the regulated activity could do so indirectly.¹⁴⁹ Unlike those earlier rules, however, the cumulative effects doctrine does not require that each individual, minor, and solely interstate act substantially affect interstate commerce; rather, it requires that the sum or aggregate effect of several such acts substantially affects interstate commerce.¹⁵⁰

The cumulative effects doctrine opened the floodgates for Congress to enact social legislation under the Commerce Clause that the Constitution did not otherwise authorize.¹⁵¹ For example, a public accommodation could no longer constitutionally discriminate against an African-American traveler, regardless of whether the traveler resided in the state of the accommodation.¹⁵² Similarly, a lunch counter could no longer constitutionally discriminate due to race though the customer and counter were located in the same state.¹⁵³ Congress could not have reached such activity under the Fourteenth Amendment because the discriminators were private, rather than state actors.¹⁵⁴ Under the cumulative effects doc-

148. *Lopez*, 115 S. Ct. at 1630 (referring to *Wickard v. Filburn*, 317 U.S. 111 (1942)); *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 779, 787 (1996) (citing *Lopez* for the proposition that *Wickard* exemplifies the farthest stretch of commerce power); Epstein, *supra* note 140, at 172-73 (averring that *Wickard* established a limitless commerce power). *Wickard* involved an attempt to penalize an individual wheat farmer under the Agricultural Adjustment Act of 1938 whose harvest exceeded the federally mandated quota by 12 acres but who only wished to use the excess wheat himself. 317 U.S. at 114. Nevertheless, the Court held that the act was constitutional as applied to the farmer because although his "own contribution to the demand for wheat [was] trivial by itself . . . his contribution, taken together with that of many others similarly situated, [was] far from trivial." *Id.* at 127-28. The Court concluded that the cumulative effect of many farmers producing home-grown wheat in excess of their quotas would substantially affect interstate commerce, and that, therefore, each individual farmer fell within the reach of Congress's commerce power. *Id.* at 128.

149. Epstein, *supra* note 140, at 186.

150. *Id.*

151. See *Hearings on S. 15*, *supra* note 43, at 96 (statement of Burt Neuborne) (listing cases in which the Court upheld legislation targeted at private racial discrimination and other social concerns under the Commerce Clause); see also BARRON, *supra* note 105, at 106-07 (describing how the Civil Rights Act of 1964 succeeded in reaching private conduct whereas the Civil Rights Act of 1875 failed because Congress predicated its power to enact the 1964 Act on the Commerce Clause in addition to the Fourteenth Amendment).

152. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253 (1964).

153. *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964).

154. See SCHWARTZ, *supra* note 142, at 121 (emphasizing that by finding the

trine, though, Congress could reach this activity through its Commerce Clause power by demonstrating that the aggregate of all or many public accommodations and lunch counters discriminating on the basis of race would substantially affect interstate commerce.¹⁵⁵

However, the Court partially closed the floodgates in *Lopez* by refusing to extend the cumulative effects doctrine to the Gun-Free School Zones Act of 1990.¹⁵⁶ The Act prohibited possession of a gun in or near a school¹⁵⁷ but did not require a case-by-case connection between the defendant and interstate activity or between the gun and interstate commerce.¹⁵⁸ Moreover, the Act's legislative history did not even attempt to establish that possession of a gun in or near a school substantially affects interstate commerce.¹⁵⁹ Nevertheless, the government argued that the aggregate of gun-laden schools did substantially affect interstate commerce.¹⁶⁰ The Court rejected this argument, however, and held that the cumulative ef-

Civil Rights Act of 1964 constitutional under the Commerce Clause, the Court in *Heart of Atlanta* avoided deciding whether the act could constitutionally reach purely private conduct under the Fourteenth Amendment). One presumes that the *Doe* Court extrapolated this reasoning when it too avoided any Fourteenth Amendment analysis in finding the VAWA Civil Rights Remedy constitutional. See *Doe v. Doe*, 929 F. Supp. 608, 617 (1996).

155. *Heart of Atlanta*, 379 U.S. at 253; *McClung*, 379 U.S. at 294.

156. See *United States v. Lopez*, 115 S. Ct. 1624, 1630-31 (1995) (ruling that because the Gun-Free School Zones Act proscribes activity which facially "has nothing to do with 'commerce,'" the cumulative effects doctrine cannot support the Act).

157. *Id.* at 1626. The Gun-Free School Zones Act specifically outlawed "any individual to knowingly possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." *Id.*

158. *Id.* at 1631. The Court refers to this case-by-case connection as a "jurisdictional element." *Id.* The Court struck down the Gun-Free School Zones Act in part because it did not expressly include such an element limiting its scope to only those "firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.*

159. *Id.* The Court cannot require Congress to make legislative findings. *Id.* Moreover, even where Congress does record legislative findings in support of an enactment under the Commerce Clause, the Court will independently determine the sufficiency of those findings. *Id.* Nonetheless, the Court will look to the legislative history to reveal a substantial effect "not visible to the naked eye" before striking an enactment predicated on the Commerce Clause. *Id.* at 1632. In *Lopez*, though, the Court found that Congress did not record any finding of a nexus between gun possession in a school zone and interstate commerce, if Congress made such a finding at all. *Id.* at 1631.

160. *Id.* at 1632. The government argued, in a "cost of crime" theory, that the aggregate of guns in schools leads to violent crime which affects the national economy through increased insurance costs which trickle down to the citizenry and through restricted movement which depresses those areas deemed unsafe. *Id.* The government also argued, in a "national productivity" theory, that the aggregate of guns in schools threatens the learning environment, which in turn produces an ignorant citizenry, which in turn reduces the national productivity, which in turn substantially affects the national economy, which finally substantially affects interstate commerce. *Id.*

facts doctrine did not apply where the regulated activity does not "arise out of" or is not "connected with a commercial transaction."¹⁶¹ In so holding, the Court strained not to overrule precedent,¹⁶² but the Court in *Lopez* undeniably rolled back Commerce Clause jurisprudence.¹⁶³

161. *Id.* at 1631. Although the Court held in *Lopez* that the cumulative effects doctrine no longer applies to non-economic activity, or activity unrelated to a commercial transaction, the Court responded to the government's argument. *Id.* at 1632. Specifically, the Court criticized the government's "cost of crime" theory because under it Congress could regulate any form of violent crime no matter "how tenuously [it] relate[d] to interstate commerce." *Id.* Similarly, the Court disparaged the "national productivity" theory because it would license Congress to invade spheres of state sovereignty, like "family law," on a showing that the conduct at issue distracted a worker. *Id.* Congress asserted precisely these rationales in exercising its commerce power to enact the VAWA Civil Rights Remedy. See S. REP. NO. 103-138, at 54 (1993) (averring that gender-motivated violence "restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending").

162. Epstein, *supra* note 140, at 169. Epstein noted that unlike Justice Thomas, who in a concurring opinion expressly stated that he would revise all of Commerce Clause jurisprudence, Justice Rehnquist, writing for the majority, struggled to "domesticate" the precedents rather than to "defy" them. *Id.* Hence, the Court in *Lopez* distinguished *Wickard*, from which the cumulative effects doctrine developed, as upholding a statute regulating an economic activity: the production and marketing of wheat. *United States v. Lopez*, 115 S. Ct. 1624, 1630 (1995).

163. See Epstein, *supra* note 140, at 169 (criticizing Justice Rehnquist's attempt to reconcile *Lopez* with Commerce Clause precedent and calling the opinion "change under the mantle of continuity"). Whether or not the Court acknowledged its about-face regarding Commerce Clause jurisprudence in *Lopez*, the Court most definitely drew a line in the sand. See *Lopez*, 115 S. Ct. at 1634 (stating that "[t]he broad language in [previous commerce clause] opinions has suggested the possibility of additional expansion, but we decline here to proceed any further"). Nevertheless, the lower courts have treated *Lopez* disparately. Some, like the *Brzonkala* Court, have recognized that *Lopez* eliminated the cumulative effects doctrine where the legislation at issue is non-economic. See, e.g., *United States v. Mussari*, 894 F. Supp. 1360, 1363-64 (D. Ariz. 1995) (holding child support statute unconstitutional under *Lopez*); *Hoffman v. Hunt*, 923 F. Supp. 791, 807 (W.D.N.C. 1996) (holding abortion clinic access statute unconstitutional under *Lopez*). Other lower courts have limited *Lopez* to the Gun-Free School Zones Act. See, e.g., *United States v. Chesney*, 86 F.3d 564 (6th Cir. 1996) (upholding felonious possession of firearm statute); *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995) (upholding abortion clinic access statute); and *United States v. Leshuk*, 65 F.3d 1105 (4th Cir. 1995) (upholding car-jacking statute).

Clearly, news of *Lopez* has reached the prison population. The Sixth Circuit Court of Appeals recently reported that "[c]riminal defendants across the country have exploited [the] uncertainty [following *Lopez*], citing [it] in hopes that the statutes underlying their convictions will similarly be invalidated." *United States v. Wall*, 92 F.3d 1444, 1448 (6th Cir. 1996). Though one understands the lower courts' reluctance to venture into mass reversal of convictions, this Comment will proceed under the assumption that *Lopez* did discard the cumulative effects doctrine where the legislation at issue is non-economic.

2. Proving "Substantial Effect" After Lopez

The Supreme Court did not eradicate the cumulative effects doctrine but did narrow its applicability in *Lopez*.¹⁶⁴ The doctrine still applies where the legislation at issue regulates economic activity.¹⁶⁵ However, where the regulated activity does not "arise out of" or is not "connected with a commercial transaction"¹⁶⁶ and therefore is non-economic, Congress must evince a sufficient nexus between the regulated activity at issue in each case and interstate commerce.¹⁶⁷ This nexus exists where the legislation contains a jurisdictional element.¹⁶⁸ For example, the Gun-Free School Zones Act in *Lopez* would have withstood constitutional scrutiny if it had required the government to prove not only that the defendant brought a gun to school but also that the defendant or the gun had "recently moved in interstate commerce."¹⁶⁹

Absent a jurisdictional element the Court will not uphold Commerce Clause legislation that regulates non-economic activity unless the statute's legislative history demonstrates that the activity nevertheless substantially affects interstate commerce.¹⁷⁰ After *Lopez*, however, Congress will have difficulty convincing the Court that any non-economic activity occurring exclusively intrastate substantially affects interstate commerce.¹⁷¹ In rejecting the gov-

164. *Lopez*, 115 S. Ct. at 1630-31.

165. *Id.* at 1630. The Court also left two other categories of activity that Congress may reach under the Commerce Clause undisturbed. *Id.* at 1630. As developed through precedent, Congress may regulate activity pertaining to the channels or the instrumentalities of interstate commerce. *Id.* Because the Court summarily concluded that the Gun-Free School Zones Act did not address either the channels or the instrumentalities of interstate commerce, the Court did not review these categories of Commerce Clause jurisprudence in *Lopez*. *Id.* Similarly, the *Brzonkala* Court quickly recognized that gender-motivated violence does not pertain to channels or instrumentalities of interstate commerce. *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 779, 786 (1996). Thus, as in *Lopez*, the VAWA Civil Rights Remedy must regulate activity which substantially affects interstate commerce. *Id.*

166. *Lopez*, 115 S. Ct. at 1631.

167. *Id.* at 1626 (holding that Congress lacked authority to enact the Gun-Free School Zone Act of 1990 because the Act did not regulate economic activity nor include a jurisdictional element requiring a nexus between each gun possession and interstate commerce).

168. *Lopez*, 115 S. Ct. at 1631.

169. *Id.* at 1634.

170. *Id.* at 1631-32.

171. The Court repeated in *Lopez* that "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* at 1629 n.2 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring)). Moreover, the Court advised that the judiciary ultimately determines the degree of effect an activity may have on interstate commerce. *Id.* (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring)).

ernment's proffered "costs of crime" and "national productivity" rationales, the Court in *Lopez* warned that it would no longer "pile inference upon inference" to uphold legislation predicated on the Commerce Clause but really aimed at usurping the states' police power.¹⁷²

3. *The VAWA Civil Rights Remedy Under Lopez*

The VAWA Civil Rights Remedy does not include a jurisdictional element which limits its scope to acts of gender-motivated violence connected to interstate commerce.¹⁷³ A victim of gender-motivated violence need only prove that the defendant committed a "crime of violence"¹⁷⁴ and that the defendant committed the crime "due, at least in part, to an animus based on the victim's gender."¹⁷⁵ A VAWA Civil Rights Remedy plaintiff need not prove that the defendant "recently moved in interstate commerce."¹⁷⁶ Therefore, to survive *Lopez*, the VAWA Civil Rights Remedy must regulate economic activity or the provision's legislative history must evince that gender-motivated violence substantially affects interstate commerce nonetheless.¹⁷⁷

The fact that Congress purported to remedy gender-based violence with the VAWA Civil Rights Remedy is not dispositive of

172. *Id.* at 1632, 34. The *Doe* Court dismissed this warning as dictum. *Doe v. Doe*, 929 F. Supp. 608, 613 (1996). The *Doe* court did not regard the Court's advisement in *Lopez* as an indication of how the majority of the Court will rule in a future review of such reasoning. Given the current posture of the Court, this warning may not remain dictum for long. See, e.g., Epstein, *supra* note 140, at 168 (reporting that before the Court granted certiorari in *Lopez*, "at least four of the Justices were . . . gunning for the . . . Commerce Clause"). The U.S. District Court for the Southern District of New York recognized that the court may hold the "costs of crime" and the "national productivity" rationales too tenuous to support regulation of purely local activity under the Commerce Clause. *United States v. Gluzman*, 953 F.Supp. 84, 88-89 (S.D. N.Y. 1997). After reciting the legislative history surrounding the VAWA interstate domestic violence provision that echoed these rationales, the *Gluzman* Court nevertheless held that the provision was constitutional because the provision, unlike the Civil Rights Remedy, contains the element of crossing state lines. *Id.* at 89. Moreover, the *Gluzman* Court explicitly distinguished the *Brzonkala* and *Doe* opinions, as dealing with purely intrastate activity. *Id.* at 89 n.3.

173. Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994); *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 779, 792 (1996).

174. 42 U.S.C. § 13981(d)(1) (1994). The VAWA Civil Rights Remedy defines "a crime of violence" as "an act or series of acts that would constitute a felony . . . present[ing] a serious risk of physical injury to another . . . com[ing] within the meaning of State or Federal offenses" *Id.* § 13981(d)(2)(A).

175. *Id.* § 13981(d)(1).

176. *Cf. United States v. Lopez*, 115 S. Ct. 1624, 1634 (1995) (striking the Gun-Free School Zones Act in part for failing to require a similar jurisdictional element).

177. See *supra* Part II.A.2 for a recitation of *Lopez*.

whether it regulates economic activity. The Court in *Lopez* demonstrated that two cases upholding Congress' power to reach racial discrimination under the cumulative effects doctrine actually involved economic activity.¹⁷⁸ First, *Heart of Atlanta Motel, Inc. v. United States* concerned a public accommodation's refusal to engage in a business transaction with a patron.¹⁷⁹ Second, *Katzenbach v. McClung* concerned a lunch counter's refusal to engage in a business transaction with a patron.¹⁸⁰ Although Congress ultimately intended to proscribe racial discrimination with the Civil Rights Act of 1964, it regulated economic activity to effectuate that end in both cases.¹⁸¹

There is, however, nothing remotely economic about rape or domestic violence.¹⁸² Rape is the most personal of violations—the invasion of one's body. Domestic violence, by definition, occurs within a personal relationship. Yet the VAWA Civil Rights Remedy targets acts like rape and domestic violence.¹⁸³ Such acts do not “arise out of” and are not “connected with a commercial transaction.”¹⁸⁴ The VAWA Civil Rights Remedy therefore clearly does not regulate economic activity and the cumulative effects doctrine consequently cannot save it.¹⁸⁵

Moreover, the congressional committees' few findings regarding the effect of gender-motivated violence on interstate commerce are unpersuasive. The Senate Judiciary Committee, which compiled the majority of the documentation in support of the VAWA, made one unsupported declaration that gender-based violence indirectly impacts employment, health care, and retail sales, which consequently impact the national economy, which consequently impacts interstate commerce.¹⁸⁶ To conclude from this one unsubstantiated assertion that gender-motivated violence substantially affects interstate commerce, the Court must “pile inference upon inference.”¹⁸⁷ The Court has stated it will no longer do this.¹⁸⁸

178. *Lopez*, 115 S. Ct. at 1630.

179. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 244 (1964).

180. *Katzenbach v. McClung*, 379 U.S. 294, 297 (1964).

181. *Lopez*, 115 S. Ct. at 1630.

182. See *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 779, 791 (1996) (distinguishing gender-motivated violence from economic activities like crop production and goods shipping).

183. H.R. REP. NO. 103-395, at 25 (1993); S. REP. NO. 103-138, at 37 (1993); S. REP. NO. 102-197, at 33 (1991); S. REP. NO. 101-545, at 27-28 (1990).

184. *Lopez*, 115 S. Ct. at 1631.

185. The *Doe* Court nevertheless concluded that the aggregate of violence motivated by gender substantially affects interstate commerce. *Doe v. Doe*, 929 F. Supp. 608, 613 (1996). Following the Court's decision in *Lopez*, the *Brzonkala* Court rejected the application of the cumulative effects doctrine to non-economic activity. 935 F. Supp. at 786.

186. S. REP. NO. 103-138, at 54.

187. Cf. *Lopez*, 115 S. Ct. at 1634 (refusing to accept a long chain of causation to uphold the Gun-Free School Zones Act).

Thus, in light of the Supreme Court's recent, more limited reading of Congress' commerce power, the VAWA Civil Rights Remedy fails to pass constitutional muster under the Commerce Clause.

B. Lack of Authority Under Section 5 of the Fourteenth Amendment

Unlike the Thirteenth Amendment which prohibits slavery and involuntary servitude and which draws no distinction between private and governmental actors,¹⁸⁸ the Fourteenth Amendment specifically addresses state action "abridg[ing] the privileges or immunities of [national citizenship]," "depriv[ing] any person of . . . due process," or "deny[ing] . . . equal protection of the laws" to any person.¹⁸⁹ The VAWA Civil Rights Remedy, though predicated on the Fourteenth Amendment,¹⁹⁰ excludes any state action requirement.¹⁹¹ It remedies the private act of gender-motivated violence whether or not the defendant acted "under the color of any statute," and does not remedy the state criminal justice system's denial of equal protection.¹⁹²

Proponents of the VAWA Civil Rights Remedy assert that the Fourteenth Amendment nonetheless authorizes the provision.¹⁹³ They cite to cases such as *United States v. Guest*¹⁹⁴ and *Griffin v. Breckenridge*¹⁹⁵ to support their contention that the Supreme Court has abandoned the state action requirement where Congress affirmatively legislates to prohibit conduct violative of Fourteenth

188. *Id.* at 1634.

189. U.S. CONST. amend. XIII, § 1.

190. U.S. CONST. amend. XIV, § 1.

191. Violence Against Women Act of 1994, 42 U.S.C. § 13981(a) (1994).

192. *See Hearing on H.R. 1133, supra* note 116, at 82 (testimony of the Honorable Vincent McKusick) (observing that the VAWA Civil Rights Remedy "appears to eliminate, or at least to vitiate, the 'state action' requirement for civil rights litigation . . .").

193. VAWA, 42 U.S.C. § 13981(c) (directing the cause of action toward "[a] person [including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State]"). Thus, the provision, though including those perpetrators acting "under color of state law," does not require the defendant to have acted "under color of state law." *Hearing on H.R. 1133, supra* note 116, at 82 (statement of the Honorable Vincent McKusick). Moreover, the remedy does not address the state criminal justice system at all. *See Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 779, 800 (1996) (emphasizing the distinction between the perpetrator and the state criminal justice system and highlighting that the VAWA Civil Rights Remedy only addresses the perpetrator).

194. *See, e.g., Hearing on S. 15, supra* note 43, at 97 (statement of Burt Neuborne) (claiming that the state action requirement only applies to Section One of the Fourteenth Amendment and not to Congress's power to enact appropriate legislation under Section Five).

195. 383 U.S. 745 (1966).

196. 403 U.S. 88 (1971).

Amendment rights.¹⁹⁷ However, neither of these cases stands for that proposition.¹⁹⁸ In the alternative, advocates of the VAWA Civil Rights Remedy claim that the Fourteenth Amendment empowers Congress to create a new, substantive "right to be free from crimes of violence motivated by gender"¹⁹⁹ and empowers Congress to remedy the new right.²⁰⁰ This theory does not support the VAWA Civil Rights Remedy either because a "right to be free from crimes of violence motivated by gender"²⁰¹ does not further Fourteenth Amendment guarantees.²⁰²

1. State Action Is Required

In *Guest*, the Court did state that conduct prohibited by Congress under the Fourteenth Amendment need not involve "exclusive or direct" state action.²⁰³ Furthermore, while identifying the statute at issue as remedial, the *Guest* court intimated that Congress might reach private conduct with substantive legislation.²⁰⁴ Nonetheless, the Court predicated its holding that the pri-

197. See, e.g., *Hearing on S. 15, supra* note 43, at 98 (statement of Burt Neuborne) (assuring the Senate Judiciary Committee that "six members of the Supreme Court have explicitly approved the use of Section [Five] of the [Fourteenth] Amendment to enact legislation outlawing private interference with the enjoyment of equality values protected by Section [One]"). The six Justices to which Professor Neuborne referred, however, sat on the bench in 1966. *Id.* (citing *United States v. Guest*, 383 U.S. 745, 746 (1966)).

198. See *infra* Part II.B.1 for a discussion of *Guest* and *Griffin*. In fact, no Supreme Court majority opinion has annulled the state action requirement implicit in Section Five of the Fourteenth Amendment. NOWAK & ROTUNDA, *supra* note 105, § 15.5.

199. VAWA, 42 U.S.C. § 13981(b).

200. See, e.g., *Hearing on S. 15, supra* note 43, at 99 (statement of Burt Neuborne) (distinguishing cases in which the Supreme Court held that Congress cannot reach private action through the Fourteenth Amendment from the VAWA Civil Rights Remedy because the provision remedies a right that it creates).

201. VAWA, 42 U.S.C. § 13981(b).

202. See SCHWARTZ, *supra* note 142, at 415-16 (suggesting that under Section Five of the Fourteenth Amendment, Congress may legislate private conduct but recognizing that the clause contains limits on Congressional power nonetheless).

203. *United States v. Guest*, 383 U.S. 745, 755 (1966). However, the Court agreed that "rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under color of its authority". *Id.*

204. *Id.* at 754-55. Commentators have disagreed as to the significance of this statement. Compare, e.g., NOWAK & ROTUNDA, *supra* note 105, § 12.1 (explaining that although six justices in *Guest* insinuated in dictum that Congress may regulate non-state action under the Fourteenth Amendment, the Court has not held so by a majority), with SCHWARTZ, *supra* note 142, at 415-16 (claiming that Congress may proscribe any action, even if private, which it finds interferes with a Fourteenth Amendment right where full protection of the right necessitates such a proscription).

vate conduct at issue might have violated the Equal Protection Clause on allegations that police officials conspired with the defendants to falsify police reports.²⁰⁵ The Court ruled that such a conspiracy would constitute a sufficient degree of state action.²⁰⁶ Thus, despite its dalliance regarding substantive equal protection legislation, the *Guest* Court did not negate the state action requirement.²⁰⁷

In *Griffin*, the Court found that Congress intended to reach purely private conspiracies under the statute at issue.²⁰⁸ Nevertheless, the Court upheld the statute.²⁰⁹ Contrary to the assertions of the Senate Judiciary Committee and those testifying before it,²¹⁰ however, the *Griffin* court did not rely on Congress' Fourteenth Amendment power.²¹¹ Rather, it found authority in the Thirteenth Amendment and in the right of interstate travel which it purposely noted "does not necessarily rest on the Fourteenth Amendment."²¹² Moreover, it explicitly declined to consider the statute's constitutionality under the Fourteenth Amendment.²¹³ Subsequent cases dealing with the same statute at issue in *Griffin* have unequivocally asserted that the Fourteenth Amendment does not prohibit purely private acts of discrimination.²¹⁴ Thus, as the VAWA Civil Rights Remedy addresses purely private acts of discrimination, the provision does not find authority in the Fourteenth Amendment.²¹⁵

205. *Guest*, 383 U.S. at 756.

206. *Id.*

207. NOWAK & ROTUNDA, *supra* note 105, § 12.1.

208. *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971).

209. *Id.* at 105.

210. *See, e.g., Hearing on S. 15, supra* note 43, at 98 (statement of Burt Neuborne) (relating to the Senate Judiciary Committee that *Griffin* upheld the statute at issue there under Section Five of the Fourteenth Amendment).

211. *Griffin*, 403 U.S. at 107.

212. *Id.* at 104-06.

213. *Id.* at 107.

214. *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 384-85 (1979) (Stevens, J., concurring). Though the majority opinion in *Novotny* avoided ruling on the constitutionality of the statute at issue, Justice Stevens wrote separately to clarify the holding in *Griffin*. *Id.* at 381. He explained that "[s]ome privileges and immunities of citizenship, such as the right to engage in interstate travel and the right to be free of the badges of slavery, are protected by the Constitution against interference by private action . . .," *Id.* at 383. Stevens also stated that "[o]ther privileges and immunities of citizenship such as the right to due process of law and the right to the equal protection of the laws are protected by the Constitution only against state action." *Id.* at 384. Justice Stevens explicitly categorized discrimination against women which violates the Equal Protection Clause of the Fourteenth Amendment as a violation of the latter type of privilege and immunity. *Id.* Therefore, Justice Stevens unquestionably asserted, such a claim requires proof of "unfair treatment by the [s]tate, not by private parties." *Id.* (emphasis added).

215. *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 779, 799 (1996).

2. No Fourteenth Amendment Guarantee Against Private Violence

Undaunted by the weight of precedent, at least one constitutional expert advised the Senate Judiciary Committee that the VAWA Civil Rights Remedy can avoid the state action requirement because it creates a substantive right to be free from acts of gender-motivated violence rather than simply remedying rights found elsewhere.²¹⁶ However, even those commentators most disposed to negating the state action requirement agree that any substantive rights that Congress creates under the Fourteenth Amendment must be in furtherance of the guarantees expressed in that provision.²¹⁷ The Senate Judiciary Committee professed that the VAWA Civil Rights Remedy furthers a female victim's equal protection rights.²¹⁸

As the *Brzonkala* Court pointed out, though, the VAWA Civil Rights Remedy does not further the guarantee that the *state* will not deprive a victim of equal protection of the laws.²¹⁹ First, the gender-motivated act of violence does not itself deprive the victim of her equal protection of the laws.²²⁰ To the contrary, the act is illegal in most instances.²²¹ Second, the *Brzonkala* Court correctly recognized that any crime committed by the perpetrator does not force the criminal justice system to deny the female victim her equal protection rights any more than the criminal justice system forces the perpetrator to commit the crime.²²² To redress the crime, therefore, does not redress the denial of equal protection.²²³ They constitute two distinct injuries.²²⁴

Nevertheless, the provision addresses only the individual

216. *Hearings on S. 15, supra* note 43, at 99 (statement of Burt Neuborne).

217. SCHWARTZ, *supra* note 142, at 415-16. Schwartz maintains that *Guest* overruled the state action requirement as applied to congressional legislation under Section Five of the Fourteenth Amendment. *Id.* at 415. Nevertheless, Schwartz concedes that Congress' power under Section Five "is limited to the types of cases specified." *Id.*

218. S. REP. NO. 103-138, at 55 (1993).

219. *Brzonkala*, 935 F. Supp. at 801. In fact, the *Brzonkala* Court denied that the VAWA Civil Rights Remedy furthers due process rights or privileges and immunities either. *Id.* The court stated emphatically that "[n]o reasonable possibility exists that [the] VAWA [Civil Rights Remedy] will remedy any legitimate Fourteenth Amendment concern." *Id.* (emphasis added).

220. *Id.* at 797-98.

221. *Id.* at 797. "Even with the inadequate criminal remedy for gender-motivated crimes against women, the states do not permit individuals to commit violent gender-motivated acts against women . . . Such acts are unlawful both under state criminal and state tort laws" *Id.* (emphasis added).

222. *Id.* at 797-98. That a state might "pursue [its] criminal laws against rape and domestic abuse less vigorously than other laws" does not put the rapist or abuser and the state in concert. *Id.* at 797.

223. *Id.*

224. *Id.*

perpetrator and not the state criminal justice system.²²⁵ Two reasons may explain the misdirection of the VAWA Civil Rights Remedy. First, Congress might have believed that if it could deter rapists and abusers from committing their crimes by threat of federal civil liability, then the victim would not need to come before the state criminal justice system; thus, the state criminal justice system would not have the opportunity to deny her equal protection. To presume, however, that the VAWA Civil Rights Remedy will deter all gender-motivated violence, where criminal sanctions have not, is disingenuous.²²⁶ Some victims of gender-motivated violence will inevitably still face state criminal justice systems, and the VAWA Civil Rights Remedy has done nothing to ensure that those victims will not face the gender bias so well documented by the Senate and House committees.²²⁷

The second potential explanation for Congress addressing the VAWA Civil Rights Remedy to the perpetrator of gender-motivated violence is because it does not require a lengthy chain of causation. Congress just wanted to create another deterrence to rape and domestic violence. The legislative history overwhelmingly supports this explanation.²²⁸ Nonetheless, the Fourteenth Amendment does not empower Congress to create a right against private acts of violence, no matter how noble Congress' intentions.²²⁹

Thus, Congress has directed the VAWA Civil Rights Remedy toward the wrong party to further equal protection rights.²³⁰ Moreover, because Congress directed the provision toward the private rapist or abuser rather than the state criminal justice systems, the Fourteenth Amendment does not authorize the VAWA Civil Rights Remedy.²³¹ The Fourteenth Amendment still rectifies only state action violative of the Amendment's guarantees and any substantive rights created by Congress in furtherance of those

225. Violence Against Women Act of 1994, 42 U.S.C. § 13981(c) (1994).

226. See, e.g., S. REP. NO. 102-197, at 43 (1991) (proclaiming state criminal and tort laws inadequate to eliminate gender-motivated violence).

227. See *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 779, 800 (1996) (underscoring that the VAWA Civil Rights Remedy does not deter the state criminal justice systems from continuing to treat female victims of violence disparagingly nor does the provision hold the state criminal justice system accountable for its discrimination).

228. See *supra* Part I for evidence that the committees and witnesses before them wanted to cure the prevalent problem of violence against women first and foremost and that each provision of the VAWA constituted a step toward that ultimate goal.

229. See *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 384 (1979) (Stevens, J., concurring) (explicitly reiterating that the Fourteenth Amendment does not authorize Congress to create rights against private individuals even where the right created addresses gender discrimination).

230. *Brzonkala*, 935 F. Supp. at 800.

231. *Novotny*, 442 U.S. at 384 (Stevens, J., concurring).

guarantees must also rectify state action.²³² Despite the creation of a substantive right, Congress did not have power to enact the VAWA Civil Rights Remedy under the Fourteenth Amendment.

III. KEEP THE BABY BUT THROW OUT THE BATH WATER

As neither the Commerce Clause nor the Fourteenth Amendment authorizes the provision, the VAWA Civil Rights Remedy is unconstitutional. Arguably, Congress could amend the VAWA Civil Rights Remedy so that it passes constitutional muster.²³³ Congress could add a jurisdictional element as discussed in *Lopez*.²³⁴ Such an element would save the VAWA Civil Rights Remedy under the Commerce Clause.²³⁵ However, if the provision required proof of interstate activity, vast numbers of gender-motivated violence victims could not utilize the VAWA Civil Rights Remedy.²³⁶ Similarly, a remedy directed at the state criminal justice systems rather than the perpetrator would not further Congress' purpose to curb the rate of rape and domestic violence²³⁷ because such a remedy does not deter the perpetrator. Therefore, this Comment proposes that either Congress repeal the VAWA Civil Rights Remedy or the courts strike the provision as unconstitutional.

This proposal does not, however, encompass other provisions of the VAWA. The VAWA consists of much more than the Civil Rights Remedy. Through its spending powers and its vast resource of research capabilities, the federal government can still prove invaluable to the war on violence against women. The problems of gender-based violence and of discrimination in the criminal justice systems still exist and still require federal efforts to combat them.

Other VAWA remedies that confront the specific acts of violence include grants to the states available through the U.S. Attorney General.²³⁸ These grants accomplish two important goals. First, they provide funding for training state law enforcement and

232. NOWAK & ROTUNDA, *supra* note 105, at § 15.5.

233. See *Brzonkala*, 935 F. Supp. at 801 (suggesting that Congress has power under the Fourteenth Amendment to enact a revised version of the VAWA Civil Rights Remedy).

234. See *supra* Part II for a discussion of *Lopez*.

235. See *United States v. Lopez*, 115 S. Ct. 1624, 1626 (1995) (holding legislation regulating non-economic activity under the Commerce Clause must contain a jurisdictional element).

236. See Easterling, *supra* note 19, at 949 (averring that only a few incidents of domestic violence involve crossing state lines).

237. See *Hearing on Domestic Violence*, *supra* note 1, at 3 (statement of Representative Charles Schumer) (underscoring Congress's intent "combat [these] insidious crime[s]").

238. Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3711-3797 (1994), amended by 42 U.S.C. § 3796gg (1994).

prosecution personnel, for hiring more personnel, for creating or enlarging victim outreach and advocacy programs, and for collecting data.²³⁹ Second, they permit the U.S. Department of Justice to collect data on the various state programs through a reciprocal reporting requirement which, in turn, can be used to advise other states on effective plans.²⁴⁰ Similar provisions provide funding to non-profit rape prevention education and training programs²⁴¹ and to community domestic violence programs.²⁴²

Furthermore, Subtitle D of the VAWA, the Equal Justice for Women in the Courts Act, directly addresses the reported discrimination in the criminal justice systems.²⁴³ It provides funding for training and educating state and federal judges.²⁴⁴ In addition, the provision authorizes judicial studies on gender-bias in the federal courts similar to those conducted by many states.²⁴⁵

The VAWA provisions that fund state criminal law and victim-assistance efforts, that authorize judicial investigations and training, and that mandate national studies²⁴⁶ draw upon the strengths of a centralized government. These provisions recognize that the federal government has advantages that the individual state governments do not possess. The federal government, for instance, can analyze the problem of domestic violence on a broader scale by collecting data from all of the states, rather than relying on any one state's experience. Similarly, the federal government need not divide its efforts between increasing awareness of violence against women on the one hand and enlarging the criminal justice system to meet the demand generated by such awareness on the other.²⁴⁷ Most importantly, the provisions of the VAWA, other than the Civil Rights Remedy, create the concerted, national

239. *Id.*

240. *Id.*

241. Public Health and Human Services Act, 42 U.S.C. §§ 300w-300w-10 (1994), amended by 42 U.S.C. § 300w-10 (1994).

242. Family Violence Prevention and Services Act, 42 U.S.C. §§ 10401-10416 (1994), amended by 42 U.S.C. § 10416 (1994).

243. Equal Justice for Women in the Courts Act of 1994, 42 U.S.C. §§ 13701-14002 (1994).

244. *Id.* §§ 13991, 14001. The fact that Congress recognized that gender-bias may also exist in the federal criminal justice system arguably further repudiates its claim that the VAWA Civil Rights Remedy cures equal protection violations by opening "the best court system in the world" to victims of gender-motivated violence. See *supra* note 108 for a discussion of the assertion that the federal justice system is superior to the states' system.

245. *Id.* § 14001.

246. See, e.g., 42 U.S.C. § 14012 (ordering a study of campus rape); 42 U.S.C. § 14013 (requiring a report on battered women's syndrome).

247. See S. REP. NO. 101-545, at 39 (1990) (reporting the burdens placed on the state criminal justice systems by increased volumes of domestic violence and rape cases).

effort that Senator Biden called for²⁴⁸ without ignoring the Constitution or the states' autonomy.

CONCLUSION

Congress correctly identified violence against women and the subsequent bias that its victims experience in the criminal justice system as a serious problem. Congress also correctly recognized that the states cannot solve the problem alone. Nevertheless, Congress does not have constitutional authority to implement every idea it has.²⁴⁹ The Framers purposefully created a federal government of delegated powers²⁵⁰ which must not eclipse the states' sovereignty.²⁵¹

Many of the VAWA provisions recognize that the system the Framers created does not deter federal contribution to the war on violence against women, but rather ensures that the states and victims will not have to wage the war alone. The VAWA Civil Rights Remedy, however, eliminates the states' participation. This type of action that Constitution will not allow. Thus, although a well-intentioned attempt to empower individual victims, the VAWA Civil Rights Remedy proves too constitutionally infirm to survive meaningful scrutiny.

248. *See id.* at 28 (quoting Senator Biden's opening statement before the Senate Judiciary Committee's first hearing on violence against women).

249. *See United States v. Lopez*, 115 S. Ct. 1624, 1633 (1995); *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 779, 801 (1996).

250. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

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