Covering Women and Violence: Media Treatment of VAWA's Civil Rights Remedy

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COVERING WOMEN AND VIOLENCE: MEDIA TREATMENT OF VAWA'S CIVIL RIGHTS REMEDY

Sarah F. Russell*

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INTRODUCTION

In 1994, as part of the Violence Against Women Act, Congress enacted a provision entitled the "civil rights remedy." This remedy gave victims of "gender-motivated violence" a right to sue in federal court. Proponents of the remedy wanted to place violence against women in the context of federal civil rights law. Historically, states treated violence against women, especially violence that occurred within the home or by someone the woman knew, as a "private matter" and not an appropriate realm for legal intervention. By enacting the civil rights remedy, feminists attempted to re-categorize violence against women. Designers of the remedy characterized acts of rape and domestic violence as "civil rights" violations rather than "private" violence to show that gender-motivated violence affects women as a class, not just individually. By placing the matter in federal court, rather than in state courts where the violence often had been ignored or trivialized, supporters of the remedy sent a message that violence against women is a matter of public and national concern, and a federal civil rights issue.

It is possible to frame and understand the civil rights provision in a number of ways. The provision could be described as a discrimination and civil rights law, or a tort law, a rape law, a domestic violence law, or a law that regulates crime. Writers could have framed the provision as a large structural reform: emphasizing that it placed power in the hands of victims of violence rather than prosecutors. Or they could have focused on the economic aspects of the remedy, which offered victims an opportunity for financial relief.

Proponents of the remedy hoped to change attitudes about violence against women by categorizing gender-based violence as a civil rights issue. To change public attitudes, the meaning and scope of the civil rights remedy had to be communicated. Newspapers play a key role in forming public attitudes and understandings of the law; they describe, explain, and categorize laws and court decisions that most people will

2. A "crime of violence motivated by gender" was defined as a "crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1).
never read themselves. Debates about laws play out in papers through editorials and commentary pieces.

This Article analyzes how newspapers described and characterized the civil rights provision over the past decade and shaped the public discourse about the law. I examine how lower federal courts, and eventually the Supreme Court, categorized the VAWA remedy when deciding whether Congress had acted within its commerce powers. After considering why there may have been resistance in the press and in the courts to VAWA’s categorization of violence against women as a civil rights issue, I conclude by examining the remedies that have been introduced at the state and local level for victims of gender-motivated violence, and discuss the public debate that has surrounded these remedies thus far.

I begin my analysis by examining media coverage of the provision when it was first introduced in Congress and continue until after the Supreme Court’s May 2000 decision in United States v. Morrison to strike the civil rights remedy down. I demonstrate that reporters’ “objective” characterizations of the VAWA provision changed over time and argue that this affected public understanding of the remedy.

5. 529 U.S. 598 (2000). A five-person majority of the Supreme Court held in Morrison that Congress had exceeded its Commerce Clause power in enacting the civil rights remedy, and also lacked the power to enact the provision under section 5 of the Fourteenth Amendment. The petitioner in the case was Christy Brzonkala, a student at Virginia Polytechnic Institute. Brzonkala alleged that two athletes took turns raping her and one later claimed “I like to get girls drunk and fuck the shit out of them.” Brzonkala v. Va. Polytechnic Inst., 935 F. Supp. 779, 784 (W.D. Va. 1996). Initially, the university imposed an immediate two-semester suspension on one of the assailants but later reduced it to a deferred suspension (after graduation) and a required one-hour educational program. Brzonkala v. Va. Polytechnic Inst., 132 F.3d 949, 955 (4th Cir. 1997) (Motz J.). Brzonkala sued her alleged rapists, Antonio Morrison and James Crawford, as well as the school. The district court found that Brzonkala had stated a claim of gender-motivated violence, but held that the VAWA provision exceeded Congress’s Commerce Clause power. See Brzonkala, 935 F. Supp. at 784. A panel of the Fourth Circuit reversed the district court, upholding the constitutionality of the provision, Brzonkala, 132 F.3d 949, but the full Fourth Circuit reversed, holding the provision unconstitutional, Brzonkala, 169 F.3d 820, 826 (4th Cir. 1999) (en banc). The name of the case before the Supreme Court, United States v. Morrison, differs from the cases below because the United States intervened arguing that the provision should be upheld.

6. For the period between 1990 and 1995, when the Act was before Congress, I review articles in Lexis’s “major newspapers” database. To be in Lexis’s “major newspapers” database, a United States newspaper must be listed in the top 50 circulation in Editor & Publisher Year Book. Newspapers published outside the United States must be in the English language and listed as a national newspaper in Benn’s World Media Directory or be one of the top 5% in circulation for the country.
Several trends emerge from an examination of "objective" press coverage of the VAWA remedy. First, very few articles—either before the remedy was enacted or during the litigation regarding its constitutionality—explained in any depth the concept of "gender-motivated" violence or examined the scope of the remedy. These articles declared that the provision allowed rape victims to sue, but most did not explore the idea that some types of violence against women constitute gender-based discrimination. Second, there was a substantial difference in the way articles described the remedy before and shortly after it was enacted from the way they described it after the Supreme Court struck it down. Virtually all the articles called the remedy a "civil rights law" when it was before Congress. Very few articles, however, reported that the Supreme Court had struck down a civil rights law. What articles once referred to as a "civil rights remedy" they later called a "civil remedy."

Next, I examine arguments made in commentary pieces and newspaper editorials to demonstrate how proponents and opponents of the remedy also shaped the debate. I divide this debate into three time periods.

For the period after the enactment of the provision, but before the Court struck it down, I focus on six widely-circulated newspapers, as well as a Virginia paper that followed the development of the Morrison case from its beginning. I look at articles in USA Today, the New York Times, the Los Angeles Times, the Wall Street Journal, and the Washington Post which are the top five most widely-circulated papers in the United States. I do not discuss articles in the Daily News (New York), the sixth most widely-circulated paper because this paper carried little coverage of the VAWA provision. I look instead at articles in the Chicago Tribune, the seventh most widely-circulated paper. I also review articles in the Richmond Times Dispatch, a widely circulated Virginia paper that carried articles about the Morrison case as it progressed. Statistics about circulation were taken from the Audit Bureau of Circulations report. Audit Bureau of Circulations, Reader Profile: Top 100 Newspapers by Daily Circulation, http://www.accessabc.com/reader/top100.htm (Aug. 28, 2002).

For the days right after the Supreme Court's decision in Morrison, I look at articles in the "major newspapers" database to get a broad sample of how papers described the decision.

7. Contributors included regular newspaper columnists, members of Congress, and lawyers in the Morrison case. Newspapers editors also contributed to the debate by publishing editorials for or against the provision.

8. First, I look at commentary and editorials published from 1990 to 1995 when the remedy was before Congress. Next, I look at the debate in newspapers leading up to, but not including the Court's decision. The final part of this section considers commentary and editorials written after the Court handed down its decision. I draw commentary and editorials from newspapers in the "News Group File, All" Lexis database, which includes over a thousand publications.
Newspapers were split in their support of VAWA before it was enacted. Before the enactment, members of Congress and individuals from the National Organization for Women (NOW) wrote commentary pieces to gather support for the civil rights provision. Those writing against the provision, at this time, were mostly professional columnists. During this period both commentators supporting the remedy and those opposed to it made claims about discrimination and equal rights. Proponents of the remedy, including individuals from NOW, members of Congress, and others, emphasized that the remedy was needed to protect the rights of victims of gender-based violence. Opponents viewed the remedy as undermining the rights of men, the rights of defendants, or the rights of minorities. Neither side raised constitutional arguments at this time, but they did disagree about the appropriateness of the federal role from a policy perspective.

After the *Morrison* litigation began, but before the Supreme Court ruled on the case, some of the same arguments about the provision were repeated and some new arguments emerged. Individuals from NOW and other women’s organizations wrote commentary in support of the constitutionality of the provision. Opposition came from the same columnists who had opposed the law from the start. Joining these columnists were lawyers for the defendants in the *Morrison* case, members of conservative organizations, and other columnists. Debate centered around several axes: 1) whether the provision promoted the rights of women or undermined the rights of men and minorities; 2) whether the remedy was a civil rights law or a family law or a tort law or a law regulating crime; 3) whether the federal role was necessary and justified or unconstitutionally infringed on the states’ rights; and 4) whether the connection between gender-motivated violence and commerce was sufficiently strong to satisfy Commerce Clause requirements.

After the Court’s decision, many law professors wrote commentary on the Court’s ruling, as did many of the same people who had expressed opinions previously. A large number of newspapers also wrote editorials after the Court’s decision. Newspaper editors made their own determinations about whether Congress had “overstepped” its bounds

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9. Eight papers expressed support for the bill as a whole or for the civil rights remedy in particular. Six papers opposed the enactment of the civil rights remedy.

10. Some newspapers wrote editorials during this time period, although most editorials appeared after the Court’s decision. During the period before the Court’s decision, one newspaper supported the constitutionality of the provision and seven wrote against it.
or acted appropriately in enacting the civil rights provision. These editorials provide a sense of how effectively proponents and opponents of the remedy made their case to the public. Most papers supported the Court's decision, some expressed opposition to it, and one fell in between. Interestingly, several papers that had supported the enactment of VAWA originally switched sides and wrote in support of the Court's decision to strike down the civil rights provision.

Federal judges also contributed to the debate over the provision. Almost all of the lower federal courts that considered the constitutionality of the remedy concluded that Congress acted within its commerce powers. These courts accepted Congress's findings that gender-motivated violence deterred women from full participation in the economy. They chose to categorize gender-motivated violence as a civil rights matter and a matter of federal concern. The Supreme Court, however, held in *Morrison* that Congress had exceeded its authority under the Commerce Clause. The Court, refusing to accept the category shift that Congress and feminists attempted to make, categorized the VAWA provision as a criminal law rather than a civil rights or discrimination law. The Court said this form of criminal activity was "traditionally" a matter regulated by the states and held that federal regulation of the activity was unconstitutional. Despite Congress's ex-

11. Out of the 43 papers that wrote editorials, twenty-eight wrote in support of the Court's decision and fourteen papers expressed opposition to the decision.

12. I look at all federal cases that considered the constitutionality of the civil rights remedy and examine how judges understood and categorized the remedy.

13. Judith Resnik uses the phrase "categorical federalism" to describe the reasoning that the Court used in *Morrison* to decide which activities Congress has the power to regulate. Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 *Yale L.J.* 619 (2001). This method of reasoning first "assumes that a particular rule of law regulates a single aspect of human action: Laws are described as about 'the family,' 'crime,' or 'civil rights' as if laws were univocal and human interactions similarly one-dimensional." *Id.* at 620. Categorical federalism "relies on such identification to locate authority in state or national governments and then uses the identification as if to explain why power to regulate resides within one or another governmental structure." *Id.* Finally, categorical federalism "has a presumption of exclusive control—to wit, if it is family law, it belongs only to the states. Categories are thus constructed around two sets of human activities, the subject matter of regulation and the locus of governance, with each assumed to have intelligible boundaries and autonomous spheres." *Id.* Professor Resnik says that "the quaint tidiness of categorical federalism ought to prompt skepticism." *Id.* She argues that "many categories are intertwined in lawmaking enterprises" and "more than one source of legal regulation is likely to apply to any set of behaviors." *Id.* at 622. Professor Resnik offers evidence that the federal government has historically regulated "family law" and other areas that the Court claims have been the exclusive domain of the states. Professor Resnik's insights into categorization provide the foundation for this Article's examination of categorization of the VAWA remedy by newspapers and commentators.
tensive findings that gender-motivated violence deters women from participation in the economy, the Court held that violence against women is not "economic in nature" and that its link to commerce was too attenuated for Congress to reach under its commerce powers.

The attempt to re-categorize violence against women as a civil rights issue failed in the Supreme Court and was ultimately resisted by much of the press. Despite efforts by commentators to emphasize the civil rights issue at stake, most editorials sided with the Court, and most newspapers chose not to frame the Court's decision as a rejection of a civil rights statute. There was a lack of dialogue and discourse in the press about the idea of violence against women as a form of class-based discrimination. For some judges, reporters, commentators, and editors it was more "natural" to think of the VAWA provision as a "rape law," "criminal law," or "domestic relations law" and to associate these areas of law with the states. Because certain types of violence against women had so long been considered private and individual, rather than public and group-based, it was hard for some to accept the category shift. A greater exploration by the press of the concept of violence against women as gender discrimination would have challenged traditional categorizations and strengthened efforts at re-categorization.

Understanding the last decade of discourse and debate over the VAWA provision gives insight into current and future efforts to create and revise civil rights statutes. A number of states and localities are now considering enacting civil remedies for victims of gender-motivated violence. Drafters of these new statutes face choices about how to frame these remedies and how to shape the debate surrounding them. Enactment of statutes at the local level may help bring about the changes in attitude and practice that the drafters of VAWA wanted. Local remedies have the potential to be more far-reaching and effective than the federal civil rights remedy. But proponents of local remedies may have to confront some of the same arguments that were made against the VAWA remedy. Although federalism arguments cannot be raised against the local remedies, there is continued public resistance to labeling violence against women as discrimination or an issue of civil rights. Those who wish to create and revise rights for victims of gender-motivated violence must learn from the last decade of debate about VAWA's civil rights remedy. Drafters of new remedies must take steps to ensure that the press describes and categorizes the new laws accurately. Proponents of new remedies must shape the debate about the laws and counter the arguments against them—not only in the legislature and courts, but also in the press.
Part I of this Article examines objective press coverage of VAWA when it was before Congress, and during the litigation of its constitutionality, and draws two conclusions. First, very few articles explored the concept of gender-motivated violence in any depth or discussed what acts were covered by the Act. Second, while the press originally described the VAWA provision as a civil rights remedy when it was enacted by Congress, a shift occurred when articles reported on the Supreme Court’s decision in *Morrison*. Articles reporting on the decision instead characterized the provision as a “civil remedy” or a “rape law.” Part II looks at the subjective debate in the press over the VAWA remedy by analyzing commentary and editorials. Part III examines the contributions of federal judges to the debate over the provision and argues that, although the provision was struck down by the Supreme Court, an overwhelming majority of lower federal court judges found the provision to be constitutional and agreed with Congress’s characterization of the provision as a civil rights law. Part IV argues that the categorical shift in the press and courts away from a civil rights law and towards a civil remedy or a rape law could be attributed to cognitive processes. Part V concludes that state and local ordinances, by categorizing gender-motivated violence as a civil rights issue, present a viable alternative to the federal civil rights remedy envisioned by Congress.

I. PRESS COVERAGE

Two major conclusions can be drawn from my examination of the articles written about VAWA’s civil rights remedy. First, very few articles explored what “gender-motivated” violence is or what acts would fall within the scope of the remedy. Articles reported that the remedy was for victims of “gender-motivated” violence but did not explain what acts were covered. Second, articles described the remedy differently when the Supreme Court handed down its decision in *Morrison* than

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14. I look at articles written about the civil rights remedy beginning when the provision was introduced in Congress and continuing until the Supreme Court’s decision to strike down the law. For the period between 1990 and 1995, when the Act was before Congress, I review articles in Lexis’s “major newspapers” database. See supra note 6. For the period after enactment of the provision but before the Court struck it down, I focus on articles appearing in *USA Today*, the *New York Times*, the *Los Angeles Times*, the *Wall Street Journal*, the *Washington Post*, and the *Chicago Tribune*. I also review the *Richmond Times Dispatch*, a paper that had a number of articles on the *Morrison* case as it progressed. Finally, I look at articles in the “major newspapers” database that reported on the Supreme Court’s decision in *Morrison*.
they had before and shortly after it was enacted. Articles called the provision a “civil rights law” when it was enacted and a “civil remedy” or a “rape law” when the Court struck it down.

An understanding of the legislative history of the VAWA provision is essential to analyzing the press coverage of the remedy. In the original 1990 draft of the provision, a “crime of violence motivated by the victim’s gender” was defined as “any rape, sexual assault, or abusive sexual contact motivated by gender-based animus.” Before the bill was reported out of the Senate Judiciary Committee, however, new language was added that expanded the remedy to include all crimes of violence motivated by gender, not simply sexual violence. The new definition stated that “any rape, sexual assault, or abusive contact, motivated by gender” was included under the Act. Thus, this definition would cover gender-based violent acts without a sexual element, such as a crime like the incident in Canada in which a man shot a number of female engineering students while screaming, “I hate feminists.”

Before the bill was introduced in 1991, Senator Joseph Biden (D-DE), a chief sponsor of the remedy, made several changes to it that responded to questions raised about the scope of the bill by other senators and the Bush Justice Department. The new version of the bill defined a “crime of violence motivated by gender” as “any crime of violence...including rape, sexual assault, sexual abuse, abusive sexual conduct, or any other crime of violence committed because of gender or on the basis

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16. S. 2754, 101st Cong. § 301(d), 136 Cong. Rec., 14,569 (1990); see also Nourse, supra note 15, at 7.

17. S. 2754, 101st Cong. § 301(b)-(d) (1990), S. Rep. No. 101-545, at 23 (1990) (creating a cause of action covering “crime[s] of violence overwhelmingly motivated by the victim’s gender...including any rape, sexual assault, or abusive contact, motivated by gender”). Drafters later removed the requirement that the violence be “overwhelmingly” motivated by gender. See Nourse, supra note 15.


of gender." The bill also included a "limitations" section that specifically excluded "random" acts not motivated by gender. Later that year, the Judiciary Committee amended the bill to delete references to particular sexual crimes in the definition of "motivated by gender." Thus, the "premise that sexual crimes were gender-motivated was deleted from the bill.

Opposition to the VAWA remedy began to mount. The Conference of Chief Justices of State Supreme Courts voted to oppose the remedy in January 1991, stating that the bill would be used "as a bargaining tool within the context of divorce negotiations" and thus would cause problems in the processing of divorce cases. Chief Justice Rehnquist stated in his 1991 year-end report that VAWA's "definition of a new crime is so open-ended, and the new private right of action so sweeping, that the legislation could involve the federal courts in a whole host of domestic relations disputes." In February 1992, Senator Biden attempted to address these concerns when he testified at House hearings. Biden emphasized that the provision did not "federalize" every violent act against women—it did "not cover random beatings in the home or elsewhere. The only remedy [the provision] provides is for violent crimes motivated by gender discrimination." In April of 1993, Senator Biden and Senator Orrin Hatch (R-Utah), the then ranking minority member of the Judiciary Committee, agreed to negotiate before the bill was brought to the floor of the Senate for debate. The major change was the addition of the "animus requirement." To be covered under the act, crimes of violence had to be "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." The "animus" requirement was an intermediate position between a "malice"

21. Id. § 301(e)(1).
or an “animosity” standard—which would require a showing that the
defendant hated all members of a gender or intended to use the violence
as a message of gender hatred—and a “disparate impact” standard,
which would require only a demonstration of statistical disparity in the
impact of the act of violence on one gender.\footnote{28} VAWA’s animus standard
instead required a showing of “specific intent” or “purpose” to injure
based on gender.\footnote{29} This version of the VAWA remedy, with the animus
requirement, is the one that passed and became the law.

Looking at the legislative history of the civil rights remedy, it is
clear that much of the debate in Congress focused on the scope of the
remedy. The press, however, covered few of the changes, compromises,
and clarifications that were made. A reporter writing before October
1990 would be accurate in reporting that the bill was for victims of sex-
based crimes.\footnote{28} But after October 1990, non-sexual violence was also
included. After various limitations to the bill were added, it became less
clear whether the remedy actually would apply to all rapes or all sex-
related crimes.

For the most part, both before and after the enactment of the rem-
edy, the press did not discuss the scope of the remedy or explore the
meaning of “gender-motivated” violence. Few articles mentioned the
animus requirement or examined the ways it might be read to limit the
scope of the remedy. Similarly, during the litigation of \textit{Morrison}, many
articles reported that the remedy was for rape victims or victims of sexual
assault without exploring whether all victims of sex-related violence
were actually covered.\footnote{30} Articles also failed to explain that victims of
gender-related violence, without a sexual element, could have a cause of
action under the remedy.

\footnote{28} Nourse, \textit{supra} note 15, at 29–30.
\footnote{29} \textit{See} S. REP. No. 103-138, at 64 (1993) (stating that the animus requirement “eluci-
dates the committee’s intent that a victim alleging a violation under this section must
have been targeted on the basis of his or her gender. The defendant must have had a
specific intent or purpose, based on the victim’s gender, to injure the victim.”).
\footnote{30} There are only a few articles from this early date. \textit{See} Ruth Lopez, \textit{Landmark Bill
would make a sex crime a civil rights violation, enabling the victim to sue for dam-
gages.”); Erin Marcus, \textit{Justice Department Rape Statistics Called Unrealistically Low,
Wash. Post}, Aug. 30, 1990, at A9 (reporting that the bill would “extend civil rights
protection to victims of sex-related crimes so that they could seek compensatory and
punitive damages in federal courts”).
\footnote{31} For example, the \textit{Hartford Courant} said the Court “struck down a federal law that
allowed victims of sex-related violence to sue their attackers in federal court.” Michael
Remez, \textit{High Court Throws Out Law on Sex Crimes}, \textit{HARTFORD COURANT}, May 16,
The second major conclusion I draw from my examination of articles about the civil rights remedy is that articles, in general, described the remedy differently after the Supreme Court decided *Morrison* than they had when the remedy was before Congress. In particular, virtually all of the articles describing the remedy before and soon after it was enacted called it a “federal civil rights law” or reported that it provided civil rights protections. The use of this language of “civil rights” is striking because years later, when describing the Supreme Court’s decision in *Morrison*, very few articles described the Court as striking down a civil rights law. Instead, most articles from this period described the provision as allowing rape victims to sue in federal court and called the remedy a “civil remedy” rather than a “civil rights remedy.”

Most articles quoted NOW Legal Defense and Education Fund (NOWLDEF) lawyers as saying that the decision was a loss for civil rights and quoted the defendants’ attorneys stating that it was a victory for the Constitution. However, NOW’s statement about civil rights in this context did not appear objective. Readers of these articles would not know that Congress itself had categorized the law as a “civil rights remedy.” Unlike reporters who wrote articles when the remedy was first enacted, reporters who wrote about the *Morrison* decision did not categorize the remedy as a civil rights law. The label “civil rights” did not stick.

A. Pre-Litigation Press Coverage

In this section I examine press coverage of the VAWA remedy provision before litigation in *Morrison* began. Newspapers almost universally used the words “civil rights” to describe the remedy. *USA Today*, the *Chicago Tribune*, the *Buffalo News*, the *Independent* (London), and the *Chicago Sun-Times* all said that the bill would make

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32. For example, an article in the *New York Times* noted, “[t]he majority concluded that the civil remedy provision was neither a valid regulation of interstate commerce nor a proper means of enforcing the equal protection guarantee of the 14th Amendment.” Linda Greenhouse, *Women Lose Right to Sue Attackers in Federal Court*, *N.Y. Times*, May 16, 2001, at A1 (emphasis added).

33. The *New York Times*, for example, quoted Kathryn J. Rogers of NOWLDEF who said the decision took “the federal government out of the business of defining civil rights and creating remedies.” *Id.* The paper quoted Michael E. Rosman, general counsel of the Center for Individual Rights, which challenged VAWA on behalf of the defendants, remarking that “the decision was a welcome reminder that democratic majorities are limited by the text of the Constitution.” *Id.*

34. I review articles in the “major newspapers” database that mention the civil rights remedy from the time it was introduced until after it was enacted.
sexual assault and gender-based violence a "civil rights violation." The Star Tribune said that the law would make suits "civil rights cases," and the Washington Post, Orlando Sentinel Times, and Denver Post reported that the law would give "civil rights protection." The Houston Chronicle said that VAWA would create a "civil rights remedy," and the Christian Science Monitor reported that the Act would make

35. Emphasis is added to the following quotations. Penny Bender, Bill Targets Sex Assaults As Civil Rights Violation, CHI. SUN-TIMES, Feb. 25, 1993, at 7 (reporting that the "provision would make crimes such as rape and sexual assault civil rights violations, so they could be prosecuted federally"); Penny Bender, Panel Rips Law's View of Rape; Biden Backs Protection Act, CHI. SUN-TIMES, May 28, 1993, at 28 (stating that the bill "would make rape a crime of bias, entitling rape victims to sue their attackers for civil rights violations"); Crime-Bill, CHI. SUN-TIMES, Nov. 7, 1993, at 3 (reporting that the bill would "elevate sexual assaults to the level of civil rights offenses"); Mitchell Locin, Everyone Wants a Piece of Crime Bill, CHI. TRIB., June 23, 1994, at N1 (reporting that the "measure would . . . classify violence against women as a civil rights violation"); Lopez, supra note 30 ("The bill would make a sex crime a civil rights violation, enabling the victim to sue for damages."); Leslie Phillips, Bill Takes Aim at Crime Against Women, USA TODAY, Apr. 10, 1991, at 4A [hereinafter Phillips, Bill Takes Aim] ("Rapes, domestic beatings, and other violent crimes against women would be classified as civil rights violations under a proposal expected to pass a Senate committee Thursday."); Leslie Phillips, Crime Bill's Provision Targets Women's Issues, USA TODAY, July 27, 1994, at 3A [hereinafter Phillips, Crime Bills Provision] (reporting that the bill "includes civil rights protection for victims of gender crimes"); Phil Reeves, Wife Cuts to Heart of the Problem, THE INDEP. (London), Aug. 11, 1993, at 9 (stating the Act would "classify rape and wife-beating as potential civil rights violations"); Pat Swift, Funding the Dreams of Female Candidates on State, Local Levels, Buffalo News, Oct. 9, 1993, Lifestyles, at 9, LEXIS, News & Business, News, The Buffalo News (reporting that the remedy would "classify 'gender-motivated' violence as a civil rights violation").

36. Sharon Schmickle, Simpson Case Gives Urgency to Crime Bill, STAR TRIB. (Minneapolis, MN), June 23, 1994, at 1A (stating the Act "would allow victims of crimes motivated by gender to sue for damages or court-ordered injunctions, essentially making them civil rights cases in federal civil courts") (emphasis added).

37. Emphasis is added to the following quotations. Marcus, supra note 30, at A9 (reporting that the bill would "extend civil rights protection to victims of sex-related crimes so that they could seek compensatory and punitive damages in federal courts"); Loraine O'Connell, There is No Typical 'Profile' of Men Who Abuse Loved Ones, ORLANDO SENTINEL, June 23, 1994, at A1 (reporting the Act would "give civil rights protection to women who face gender-based violence"); Violence stalks Women Over 65, New Report Says, DENV. POST, June 29, 1994, at 2F (saying the Act "establishes civil-rights protections for victims of gender-based assaults"); Barbara Vobejda, Battered Women's Cry Relayed Up From Grass Roots, WASH. POST, July 6, 1994, at A1 (stating that the bill would "create a new category of civil rights protection, allowing women to sue an attacker if they were victimized because of their sex").

38. Meagan McGovern, Violence Against Women Act is Endorsed, Hous. CHRON., July 16, 1994, at 31 (reporting VAWA would "create a civil rights remedy for women who are victims of crime") (emphasis added).
gender-based crimes a violation of "a woman's civil rights." The New
York Times and the St. Louis-Dispatch said that under the law, gender-
based violence would be a "federal civil rights violation," and the
Boston Globe said victims would be able to sue under a "federal civil
rights statute." The St. Petersburg Times and the Baltimore Sun both
said that the law made gender-based assaults a violation of "federal civil
rights laws." Newsday said that the bill would give "federal civil rights
protections," and the Dallas Morning News said that the VAWA bill
made "abuse a federal civil rights offense."

39. Scott Armstrong, Colorado Offers Answers On Domestic Violence, CHRISTIAN SCI.
MONITOR, July 19, 1994, at 3 (stating "the act would make gender-biased crimes a
violation of a woman's civil rights") (emphasis added).
40. Maureen Balleza, Many Rape Victims Finding Justice Through Civil Courts, N.Y.
TIMES, Sept. 20, 1991, at A1 (stating that the remedy "would make sexual assault a
Federal civil rights violation") (emphasis added); Robert L. Koenig, Women at Risk,
Burris Testifies Tougher Federal Law Is Needed to Combat Sex, ST. LOUIS POST-
DISPATCH, Apr. 10, 1991, at 1A (stating the Act would "make sexual assault a federal
civil-rights violation") (emphasis added).
41. Bob Hohler, Pressure Builds for Bill to Counter Domestic Violence, BOSTON GLOBE,
June 29, 1994, at 12 (saying the bill would "permit abuse victims to sue their assail-
ants under a federal civil rights statute") (emphasis added); see also Ethan Bronner, The
Senate Panel to Address Rising Reports of Rape, BOSTON GLOBE, Apr. 11, 1991, at 3
(reporting the Act "would allow victims to bring civil rights lawsuits") (emphasis
added).
42. Emphasis is added to the following quotations. Roger Simon, Women Among Casual-
ties of Impasse on Crime Bill, BALT. SUN, July 20, 1994, at 2A (reporting the remedy
would "make gender based assaults a violation of federal civil rights law"); Women
Urge Congress to Pass Protection Act, ST. PETERSBURG TIMES, Feb. 7, 1992, at 6A
("[T]he new law would make gender-based assaults a violation of federal civil rights
laws."); see also Bill Pushed to Help Abused Women, ST. PETERSBURG TIMES, June 23,
1994, at 11A (reporting the bill would "give civil rights protection to women who face
gender-based violence."); Ann LoLordo & Bruce Reid, Tragedy May Raise Awareness
of Abuse, BALT. SUN, June 19, 1994, at 17A ("[D]omestic violence against women has
been established as a civil rights violation.").
43. Newsday said the bill would give "federal civil rights protections" and noted that it was
the "civil rights provision, modeled on laws prohibiting crimes based on race, that has
brought out strong opposition." Jack Sirica, Federal Protection of Women at Issue,
NEWSDAY, Feb. 16, 1992, at 17 (emphasis added).
44. Emphasis is added to the following quotations. Steve McGonigle & Anne Reifenberg,
House Rejects Debate on Crime Package, DALLAS MORNING NEWS, Aug. 12, 1994, at
1A ("[T]he Act makes abuse a federal civil rights offense."); Quick Hits, DALLAS MOR-
NING NEWS, June 8, 1994, at 5C (reporting the remedy "will make crimes against
women civil rights violations"); Anne Reifenberg, Brady Bill Dies in Senate; Chamber
Passes Anti-crime Package that Increases Police, DALLAS MORNING NEWS, Nov. 20,
1993, at A1 (stating the Act would "permit federal civil rights suits to be filed on be-
half of victims of crimes motivated by gender"); Barbara Whitaker, A battered Woman
Decides to Test the System, DALLAS MORNING NEWS, Dec. 29, 1994, at 1C ("The law
Some articles also reported that the remedy defined rape or domestic violence as a “hate crime.” The *Boston Globe* said that the Act would “define rape as a hate crime,” and the *Star Tribune* reported that the Act “would designate domestic violence and rape as hate crimes that would be prosecuted as violations of women’s civil rights.” The *Pittsburgh Post-Gazette* said that the law “treats gender-based violence as a hate crime and civil-rights offense.” The *New York Times* said that the remedy “would declare rape a ‘hate crime’ based on sex bias and allow victims to bring private civil rights lawsuits against their attackers.” The *Washington Post* said, “Biden’s bill would declare that rape is a ‘bias’ or ‘hate’ crime and provide civil rights remedies for victims.” The *Los Angeles Times* similarly reported that the provision “declares that rape is a ‘bias’ or ‘hate’ crime that violates federal civil rights law.”

As discussed above, the civil rights remedy was modified before it was enacted, first by expanding it to include non-sex related crimes, and then by adding various limitations and eliminating the presumption that all cases of rape and sexual assault were covered. Even after the definition was changed, however, a number of articles said simply that the remedy was for victims of “sexual assault” without mentioning that stipulates that a person who deprives another of a civil right through violence motivated by gender is liable to the injured person.”

46. Karin Winegar, *Ms. Editor Wages War on Domestic Violence*, STAR TRIB. (Minneapolis), Oct. 19, 1994, at 1E.
51. *See supra* notes 15–23 and accompanying text.
52. *See, e.g.*, Balleza, *supra* note 40 (stating that the remedy “would make sexual assault a Federal civil rights violation”); Koenig, *supra* note 40 (reporting the Act would “make sexual assault a federal civil-rights violation”).
victims of non-sexual, gender-based crime could also sue. Few articles specified that the provision might not cover all cases of sexual assault. Most articles about the civil rights remedy mentioned the provision in passing, while describing the rest of the crime bill, and did not examine the scope of the remedy in greater depth.

Only a few articles considered the scope of the remedy in any depth. The *St. Louis Post-Dispatch* described the remedy as part of an ongoing effort to redefine rape. The paper said that the "change in the legal definition of rape is part of an evolution in the nation's courtrooms that has mirrored the evolution in society's understanding of the crime."53 The *Post-Dispatch* continued: "Sen. Joseph R. Biden Jr., D-Del., chairman of the Senate Judiciary Committee, is trying to lay the groundwork for the next step in this legal change. His Violence Against Women Act would, for the first time, give federal civil rights protection to those assaulted because of their gender."54

A few papers talked about the possible limitations on the remedy's coverage. These papers described the "animus" language, of the 1993 negotiated compromise, as requiring the victim to show that the attack was motivated by "hatred" of women. In fact, the remedy did not require a showing of hatred or animosity against women in general. Instead, it required only a showing that the victim was targeted because of her gender, or that the defendant acted with a specific intent or purpose, based on the victim's gender, to injure the victim.55 The *St. Petersburg Times* reported that, "[a]lthough that provision would not apply to most domestic violence incidents, it would allow a woman to collect civil damages after proving that a crime was motivated specifically by a hatred of women."56 *Newsday* said the bill would "give federal civil rights protections to some female victims of violent crime."57 *Newsday* was one of the only papers to recognize that men could also use the remedy. The paper said that, "[i]n fact, the bill would allow both men and women to sue for gender-bias crimes. But more women would be expected to take advantage of the civil-court provisions since,

54. Id.
historically, they have been more likely to be victims of gender-related assaults."⁵⁸ *Newsday* continued:

Some feminists maintain that all rapes are motivated by hatred of women, and in time they could try to prove that in court. But under the bill, a rape victim would have to prove that her attacker had shown bias by deliberately seeking out a female victim, using excessive force, mutilating the victim or expressing his hatred of women during the crime.⁵⁹

B. Litigation Press Coverage

1. The Court's Decision

Although virtually all of the newspapers describing the VAWA provision between 1990 and 1995 (when the Act was before Congress) called the remedy a civil rights law, very few articles reported in May 2000 that the Supreme Court had struck down a civil rights law.⁶⁰ A number of articles quote NOWLDEF as saying that the decision was a "set-back for civil rights;" however, very few reporters themselves described the provision as a "civil rights law." After the Court's decision, NOWLDEF tried to categorize the remedy as a civil rights law (as Congress had done), but reporters called it a "civil remedy" or a "rape law."

The following quotations provide examples of newspapers that did not call the provision a "civil rights remedy" or say that the Court had thrown out a civil rights law. The *Chicago Sun-Times* said the Court ruled that Congress had "overstepped its power when it gave women the right to sue their attackers in federal courts."⁶¹ The *Chicago Tribune* reported that the Court "ruled that the federal government improperly intruded on matters traditionally handled by the states when it allowed

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⁵⁹. *Id.*
⁶⁰. I begin with a discussion of articles reporting on the Court's decision in *Morrison* to highlight the contrast between the language used to describe the remedy in these articles with the language used in articles reporting on the provision when it was before Congress. I look at reports by major newspapers on the Supreme Court's decision in *Morrison*.
rape victims to sue their attackers for damages in federal court.\footnote{Jan Crawford Greenburg, \textit{High Court Ruling Further Clips the Role of Congress}, CHI. TRIB., May 16, 2000, at 1.} The \textit{Christian Science Monitor} said that the Court “overturned a key portion of a federal law that empowered victims of gender-based violence to sue their attackers in federal court for civil damages,”\footnote{Warren Richey, \textit{Court Curtails Power of Congress}, CHRISTIAN SCI. MONITOR, May 16, 2000, at 1, LEXIS, News & Business, News, The Christian Science Monitor.} and the \textit{Columbus Dispatch} reported that the Court “struck down a law that allowed victims of rape and other gender-motivated attacks to sue their assailants in federal court.”\footnote{Roger K. Lowe, \textit{Victims of Sexual Assaults Lose Clout; 1994 Law Struck Down}, COLUMBUS DISPATCH, May 16, 2000, at A1.} The \textit{Hartford Courant} said that the Court “struck down a federal law that allowed victims of sex-related violence to sue their attackers in federal court.”\footnote{Remez, supra note 31.} The \textit{Houston Chronicle} reported that the Court “struck down a U.S. law that permitted rape and domestic-violence victims to sue their attackers in federal court.”\footnote{Steve Lash, \textit{Court Rejects U.S. Law on Rape Victims: Says Congress Went Too Far}, HOUS. CHRON., May 16, 2000, at 1.} \textit{Newsday} described the Court as ruling that “Congress trampled on states’ rights when it passed the Violence Against Women Act allowing rape victims to sue their attackers in federal court.”\footnote{Gaylord Shaw, \textit{High Court: Rape Cases Belong on State Level; 5–4 Ruling Eliminates Victims’ U.S. Civil Suits}, NEWSDAY (New York, NY) May 16, 2000, at A4.} The \textit{St. Louis Post-Dispatch} reported that, “[r]ape victims cannot sue their attackers for civil damages in federal court, the Supreme Court ruled . . . it is up to the states—not Congress—to decide to give such help to women victimized by violence.”\footnote{Court Limits Suits By Rape Victims Against Attackers; 5–4 Vote Advances States’ Rights \textit{vs.} Federal Government; Decision Angers Women’s Groups, ST. LOUIS POST-DISPATCH, May 16, 2000, at A1, LEXIS, News & Business, News, St. Louis Post-Dispatch.}

Although most newspapers did not report that the Court had struck down a “civil rights law” or a law called “the civil rights remedy,” there were a few exceptions. The \textit{Baltimore Sun} reported that, “[p]utting strict new limits on Congress’ power to protect civil rights and crime victims, the Supreme Court struck down . . . a key provision of a federal law that gave women who have been raped the right to sue their attackers. . . . The ruling marked the third time in three years that the court has found a federal \textit{civil rights law} unconstitutional.”\footnote{Gaylord Shaw, \textit{High Court: Rape Cases Belong on State Level; 5–4 Ruling Eliminates Victims’ U.S. Civil Suits}, NEWSDAY (New York, NY) May 16, 2000, at A4.} The \textit{Dallas Morning News} said that Christy Brzonkala, the petitioner in the case

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\item Jan Crawford Greenburg, \textit{High Court Ruling Further Clips the Role of Congress}, CHI. TRIB., May 16, 2000, at 1.
\item Remez, supra note 31.
\item Court Limits Suits By Rape Victims Against Attackers; 5–4 Vote Advances States’ Rights \textit{vs.} Federal Government; Decision Angers Women’s Groups, ST. LOUIS POST-DISPATCH, May 16, 2000, at A1, LEXIS, News & Business, News, St. Louis Post-Dispatch.
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before the Supreme Court, "went to federal court . . . under the civil-
rights section of the Violence Against Women Act. It permitted women to
sue for crimes 'motivated by gender,' such as domestic abuse and
rape." The Toronto Star reported that, "[a] sharply divided U.S.
Supreme Court has struck down a law that lets rape and other domestic-
violece victims sue their attackers in federal court for violating their
civil rights, ruling that Congress exceeded its powers in enacting the
measure." Notably, the title of this article was "U.S. Rape Victims Lose
Civil Rights Case." This Canadian newspaper appears to be the only
paper, reporting on the Court's decision, to use the words "civil rights" in
the title of its article about the decision.

Because they are void of civil rights language, the descriptions of
the civil rights remedy by most articles in May 2000 were a sharp con-
trast to articles describing the remedy from 1990 to 1995. When and
why did the press move from describing the provision as a civil rights
law to calling it a civil remedy? The next Section traces reporting on the
remedy by seven widely-circulated papers from after the enactment of
VAWA through the Court's decision.

2. Coverage Before the Court's Decision

a. The Richmond Times Dispatch

The Richmond Times Dispatch first reported on the Brzonkala case
when it was before the district court, and it described the VAWA
provision as a civil rights law. The paper said, VAWA "allows rapes
based on gender bias to be treated as civil rights cases." Articles in the
paper consistently used the phrase "civil rights" to describe the law:
"The Justice Department said it intends to defend the constitutionality

70. David Jackson, Justices Reject Federal Law Letting Women Sue Rapists 5–4 Ruling Con-
tinues Trend Favoring States' Rights, DALLAS MORNING NEWS, May 16, 2000, at 1A,
71. U.S. Rape Victims Lose Civil Rights Case, TORONTO STAR, May 16, 2000, at A15 (em-
phasis added).
72. From the period after the enactment of VAWA until the Supreme Court's decision in
Morrison, I review articles in six widely-circulated newspapers: USA Today, the Wall
Street Journal, the New York Times, the Washington Post, the Los Angeles Times, and
the Chicago Tribune. I also look at articles in the Richmond Times Dispatch, a paper
that reported on the litigation of Christy Brzonkala's case as it developed.
73. John Hoke, NOW Wants to File Brief in Rape Suit; Federal Law at Stake in Virginia
of the Violence Against Women Act, which allows victims of gender-based sexual assaults to contend their civil rights were violated and seek civil damages.\textsuperscript{74} The next month the paper said that VAWA "allows sexual assault to be considered a violation of federally protected civil rights."\textsuperscript{75} The paper's report on the district court's opinion reflects the reporter's confusion about the law: "Kiser's ruling also raises questions about the future of the 2-year-old federal Violence Against Women Act, that treats rape as a violation of a woman's constitutional rights, much like a hate crime."\textsuperscript{76} VAWA did not in fact treat rape as a violation of constitutional rights, but rather created a statutory cause of action. Hate crime laws are criminal statutes: they do not make crimes violations of "constitutional rights."

The Richmond Times Dispatch continued for several years to use the phrase "civil rights" to describe the law. In 1997, the paper said that the law "permits federal civil rights lawsuits for sexual assault and domestic violence cases."\textsuperscript{77} In 1998, the paper said that the provision "makes gender-motivated crimes a civil rights issue."\textsuperscript{78} In 1999, the Dispatch said that the provision "makes crimes motivated by the victim's sex a civil rights matter that can be litigated in the federal courts."\textsuperscript{79} Later that year the paper reported that the "high court will review the constitutionality of the act's provision that allows rape victims to sue their attackers in federal courts by making crimes motivated by the victim's sex civil rights matters."\textsuperscript{80}

After oral arguments in the case on January 11, 2000, however, the paper stopped using the phrase "civil rights." An article on January 12, 2000 said that the law "allows the victim of a violent crime motivated by the victim's sex to sue the alleged perpetrators in federal civil court."\textsuperscript{81} The article quoted NOW describing the provision as a civil rights law

\textsuperscript{78} Full Appeals Court to Hear Tech Case, Rich. Times Dispatch, Feb. 8, 1998, at C3.
\textsuperscript{79} Tom Campbell, Sex-Based Crimes Act is Voided; Ruling Stems From Ex-Tech Student's Suit, Rich. Times Dispatch, Mar. 6, 1999, at A1.
\textsuperscript{80} Tom Campbell, High Court Takes Appeal in Rape Case; Constitutionality of Victim's Right to Sue is Issue, Rich. Times Dispatch, Sept. 29, 1999, at A1.
but did not itself describe the provision as a civil rights law as it had in earlier articles. A February 2000 article said that the act “allows victims of a violent crime motivated by the victim’s sex to sue the alleged attackers in federal court,” and did not call the provision a civil rights law. Finally, reporting on the Supreme Court’s decision, the paper did not mention that the Court struck down a civil rights law: “The Court, on a 5–4 vote, said Congress usurped the states’ rights to protect citizens when it enacted the section of the Violence Against Women Act that provided a federal civil remedy for victims of gender-motivated violence.” What was once called a “federal civil rights law” was now called a “federal civil remedy.”

A review of articles in other papers, such as the New York Times and the Washington Post, reveals a similar trend. As discussed below, most newspapers initially called the provision a civil rights law, but by the time they reported on the Supreme Court’s decision, this label was missing.

b. The New York Times

The New York Times first reported in 1996 that a “Federal District Court judge has upheld the constitutionality of the Violence Against Women Act of 1994, a Federal law that made crimes against the opposite sex a violation of the victim’s civil rights.” The Times further stated that the “civil rights provision allows women—and men—to file civil suits for crimes against the opposite sex.” In 1999, the New York Times again used the phrase “civil rights”: “A 1994 law that allows rape victims to sue their attackers on grounds that their civil rights were violated was declared unconstitutional today by the Federal appeals court.” Notably, the headline of this article was “Court Voids Civil Rights Law on Rape Victims.”

82. Id.
86. Id.
Later that year, the *Times* said that, “[t]he Court will hear at least three other federalism cases in the next few months, including whether Congress had authority to pass the Violence Against Women Act, giving Federal courts jurisdiction to hear domestic violence cases that are traditionally matters of state court jurisdiction.” 88 This reporter categorized the activity regulated by the VAWA provision as “domestic violence”—rather than civil rights—and then reported that such activity was “traditionally” a matter of state jurisdiction. After the Court’s decision, the *New York Times* said that the Court “invalidated a . . . provision of federal law that permitted victims of rape, domestic violence and other crimes ‘motivated by gender’ to sue their attackers in federal court.” 89

The headline about the Supreme Court’s decision was, “Women Lose Right to Sue Attackers in Federal Court.” When this is compared to the 1999 headline about the Fourth Circuit’s decision, “Court Voids Civil Rights Law on Rape Victims,” the change in the paper’s characterization of the remedy is apparent.

c. The Washington Post

A 1998 *Washington Post* article said that the law “allows victims of gender-based crimes to sue their attackers in federal court for civil rights violations.” 90 A 1999 article reported: “A 1994 federal law that gave victims of rape and domestic violence the right to sue their attackers for violating their civil rights is unconstitutional, a U.S. appeals court . . . ruled yesterday.” The article further noted that the “Supreme Court also has traditionally upheld civil rights laws under the commerce provisions of the Constitution.” 91 A later article, reporting that the Supreme Court would hear the case, described the law as “permitting victims of gender-based violence to win money damages in civil litigation.” 92 A 2000 article said that the law “allows women to file civil lawsuits for money damages against their attackers.” 93 It stated that the question before the Court was: “Did Congress have the authority to pass the act, involving

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93. *A Look At . . . The Rehnquist Court; In Their Sights*, WASH. POST, Jan. 9, 2000, at B3.
itself in what traditionally had been a state matter.\textsuperscript{94} The Post, like the New York Times, stated that the activity regulated by the provision was traditionally a state issue without acknowledging the fact that its drafters viewed the provision as regulating discrimination—a traditionally federal area of regulation. The Post, reporting on the Court's decision, did not call the remedy a "civil rights law" as it had in earlier articles. Instead, it wrote: "A sharply divided Supreme Court struck down part of a law crafted to help survivors of rape and domestic violence, ruling . . . that Congress overstepped its power when it gave women a right to sue their attackers."\textsuperscript{95}

d. The Los Angeles Times

In 1999 the Los Angeles Times said, "[a] federal law that gave victims of rape and domestic violence the right to sue their attackers for violating their civil rights is unconstitutional."\textsuperscript{96} But later that year, when the Court took the case, the paper said, "[t]he justices . . . announced . . . that they will decide the fate of the Violence Against Women Act, a new type of hate-crime law that gives victims of sexual assaults and batterings a right to sue their attackers for money damages."\textsuperscript{97} Reporting on the Court's decision, The Los Angeles Times stated that the Supreme Court, "rejecting the notion of national laws against 'hate crimes,' struck down a federal measure . . . that gave battered spouses and victims of rape and other sexual violence a right to sue their attackers."\textsuperscript{98}

e. The Wall Street Journal

Reporting on VAWA in 1996, the Wall Street Journal stated, "[t]he act, which was passed by Congress as part of a 1994 crime bill, allows victims of sexual assaults to contend that their civil rights were violated

\textsuperscript{94} Id.
\textsuperscript{95} Joan Biskupic, Justices Reject Lawsuits For Rape; Court Again Limits Congress's Power, WASH. POST, May 16, 2000, at A1.
\textsuperscript{96} Court Restricts Rape Victims' Right to Sue, L.A. TIMES, Mar. 6, 1999, at A8.
and seek damages. In 1999, the *Wall Street Journal* again characterized the Act as protecting civil rights: "The Violence Against Women Act was struck down by a federal appeals court . . . The decision may lead to a Supreme Court review of the 1994 law letting rape victims sue for civil-rights violations." In 1999, however, the paper printed an inaccuracy, saying that the remedy had made gender-based violence a "federal crime." The paper reported: "Now, the court may use the 1994 Violence Against Women Act, which established gender-based violence as a federal crime, to further define its views on how far Congress may go to regulate noneconomic activity under the Commerce Clause." In fact, the VAWA provision at issue in the litigation created a civil cause of action for victims of gender-motivated crimes to sue in federal court. It did not make such violence a federal crime. Finally, when reporting on the Supreme Court's decision, the *Wall Street Journal* again inaccurately said that the remedy made gender-based violence a federal crime: "In a decision written . . . by Chief Justice Rehnquist, the majority ruled that Congress had exceeded its constitutional authority by making gender-based violence a federal crime."

f. The Chicago Tribune

The *Chicago Tribune* also initially reported that the *Brzonkala* litigation involved a civil rights law; however, the *Tribune*, like other papers, did not use this language to describe the remedy when reporting on the Supreme Court's decision. The *Chicago Tribune* reported in 1996, "a Virginia judge ruled unconstitutional a 1994 federal law defining rape as a violation of civil rights and allowing victims to sue their attackers." In 1999, the paper reported that the "4th U.S.
Circuit Court of Appeals voted 7–4 to uphold a lower court’s ruling against the Violence Against Women Act, which allows women to sue their sex attackers for damages in federal court for violating their civil rights. Later in 1999, however, when reporting that the Court would hear the case, the Chicago Tribune did not use civil rights language: “At issue is a 1994 federal law called the Violence Against Women Act, which allows rape victims to sue their attackers.” A January 2000 article said that the Morrison case “goes to the heart of Congress’ [sic] authority to pass laws that infringe on traditional state concerns.” The Chicago Tribune, like the New York Times and the Washington Post, reported as a fact that VAWA infringed on traditional state matters, rather than as an issue for debate. An article published later in January 2000 did, however, use the words “civil rights.” In this article, the paper described the remedy as giving “women the right to file civil rights lawsuits against men who sexually attack them.” But the Chicago Tribune dropped the “civil rights” label when reporting on the Court’s decision in May 2000 and said that the remedy “allowed rape victims to sue their attackers for damages in federal court.”

g. USA Today

Although USA Today called the VAWA provision a civil rights law when it was enacted by Congress, the paper did not refer to it as a civil rights remedy in its articles about the litigation of the provision’s constitutionality. In 1996, the paper reported that a Virginia judge found that a “groundbreaking federal law that lets rape victims sue their attackers for damages is unconstitutional.” In 1999, the paper stated, “[VAWA] lets women sue and recover punitive damages from their

110. See Phillips, Crime Bill Provision, supra note 35.
111. Tony Mauro, Judge Throws Out Historic Rape Lawsuit, USA Today, July 30, 1996, at 1A.
attakers if they can prove they were victimized because of their sex."

In January 2000, the paper said that the law permitted "victims of
gender-based violence to sue in federal courts," and that "[t]he case,
_Brzonkala vs. Morrison_, could permit the high court to continue to
define how far Congress can reach into areas traditionally left to the
states." Finally, when reporting on the Supreme Court's decision,
_USA Today_ said, "[a] divided Supreme Court threw out a key women's-
rights law Monday, ruling that Congress exceeded its constitutional
authority when it allowed rape victims to bypass state judicial systems
and sue their alleged assailants in federal court."

_C. Conclusions About the Press Coverage_

Why didn't the name "civil rights remedy" stick? Many of the
newspapers discussed above used the words "civil rights" to describe the
law up until around the time the Court took the case; yet very few
newspapers reported that the Court had struck down a civil rights law.
After the Court took the case, a number of newspapers characterized the
provision as an example of Congress "involving itself" or "infringing" on
an area "traditionally" left to the states. Newspapers reported this as a
fact rather than an issue for debate. The change in the language that
newspapers used to describe the remedy, and the way that articles
framed the issue before the Court, could reflect the success of a cam-


112. Tony Mauro, _Court will Review Laws of Protection: Validity of Safeguards for Women, Clinics Challenged_, USA TODAY, Sept. 29, 1999, at 4A.
113. Richard Willing, _Court: States are Exempt from Federal Age-bias Law; Justices Question Validity of Violence Against Women Act_, USA TODAY, Jan. 12, 2000, at 6A.
114. Richard Willing, _Case Could Redefine Reach of Congress_, USA TODAY, Jan. 11, 2000, at 4A.
115. Richard Willing, _Court Rejects Rape Law_, USA TODAY, May 16, 2000, at 1A.
116. See, e.g., _infra_ notes 136–43, 188–90 and accompanying text (statements of comment-
tators arguing against categorizing violence against women as discrimination); _see also infra_ notes 216–19 and accompanying text (commentators arguing VAWA provision improperly intruded on state matters).
constitutionality of 42 U.S.C. § 13981, which provides a federal civil remedy for the victims of gender-motivated violence.\footnote{117} Most reporters used the Court’s categorization of the law as a “civil remedy” rather than returning to the name Congress gave it.

The facts of the \textit{Morrison} case also shaped the discourse about the remedy. To the press, \textit{Morrison} was a “rape case.” For example, a headline in the \textit{Houston Chronicle} read, “Court Rejects U.S. Law on Rape Victims.”\footnote{118} The \textit{Chicago Sun-Times} wrote, “High Court Throws Out Right to Sue Rapists.”\footnote{119} \textit{Newsday} said, “High Court: Rape Cases Belong on State Level,”\footnote{120} and \textit{USA Today} said, “Court Rejects Rape Law.”\footnote{121} Papers saw that the alleged rape in the \textit{Morrison} case qualified as “gender-motivated” under the provision and did not consider further what acts of violence would or would not be covered. The press’s failure to explain the meaning of “gender-motivated violence” may indicate that reporters thought it was obvious that all acts of rape or sex-related violence would be considered “gender-motivated.” But by stating that Congress regulated “rape”—rather than explaining the definition of “gender-motivated violence”—the articles distanced the violence from the concept of discrimination. The concept of violence against women as gender-based discrimination might have been novel to many readers. Without an explanation of this concept, many readers likely would think of a “rape law” as more closely connected to criminal law than civil rights law. The press’s failure to explore the concept of violence as discrimination likely meant that much of the public did not conceptualize the remedy as a discrimination law.

Had the constitutional question about the remedy not been present, reporters might have explored the scope and meaning of the remedy in greater depth as courts examined whether particular crimes were indeed “gender-motivated.” Perhaps because the constitutional question appeared the most relevant, little attention was given to the scope of the provision. But in fact, the concept of “gender-motivated” violence did have constitutional implications. Under its recent categorical approach to the Commerce Clause, the Court considered what it viewed as “traditionally” state and “traditionally” federal in determining

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\item \footnote{117} United States v. Morrison, 529 U.S. 598, 601–02 (2000).
\item \footnote{118} Steve Lash, \textit{Court rejects U.S. law on rape victims}, \textit{Hous. Chron.}, May 16, 2000, at 1.
\item \footnote{119} Joan Biskupic, \textit{High Court Throws Out Right to Sue Rapists}, \textit{Chi. Sun-Times}, May 16, 2000, at 19.
\item \footnote{120} Gaylord Shaw, \textit{High Court: Rape Cases Belong on State Level/5–4 Ruling Eliminates Victims’ U.S. Civil Suits}, \textit{Newsday} (New York, NY), May 16, 2000, at A4.
\item \footnote{121} Willing, \textit{supra} note 115.
\end{itemize}
whether Congress exceeded its Commerce Clause powers. Since the Civil Rights era, combating discrimination has been a job for Congress, whereas regulating rape has historically been a job for the states. As revealed by the editorials and commentary described below, many viewed the provision as a “criminal” law not a “civil rights” law, and, therefore, as a matter for the states—not the federal government—to regulate. The facts of the Morrison case, a rape case, shaped newspapers’ reporting of the remedy and shaped the public’s understanding of the Court’s decision. We can imagine how different the discourse about the remedy would have been if, for example, the case litigated to the Supreme Court had been similar to the Canadian case of a man shooting a number of female engineering students instead of a rape on a college campus.

Finally, as an aside, it is worth noting that very few articles mentioned the race of Brzonkala (who is white) or the defendants (who are black). The only mention of race came very early on in the development of the case. The press could have focused more attention on the issue of race in this case, but, perhaps surprisingly, they did not. As discussed below, a number of commentators did, however, discuss the issue of race.

122. See Resnik, supra note 13, at 620.
123. In 1996, the New York Times reported: “Because the men are black and she is white, the case is caught in racial cross-currents that run as deep in Thomas Jefferson’s state as anywhere in the nation. But the vision of civil rights that shapes the lawsuit is colored by sex, not race.” Nina Bernstein, Civil Rights Lawsuit in Rape Case Challenges Integrity of a Campus, N.Y. TIMES, Feb. 11, 1996, at 1. The Richmond Times Dispatch never mentioned that the defendants were black. The Roanoke Times & World News and the Virginian-Pilot mentioned this fact after the grand jury failed to indict in the criminal case. The mention of race seems largely due to the statements made by defendants’ attorney, Joe Painter. The Roanoke Times & World News reported that Painter “said he believed the rape allegations were based on racism. Brzonkala is white and the three players are black.” Jan Vertefeuille, Players are not Indicted; Ed-Tech Student to Pursue Rape Claim in Federal Suit, ROANOKE TIMES & WORLD NEWS, Apr. 11, 1996, at A1. The Virginian-Pilot reported that “Painter claimed . . . that Brzonkala’s case is racially motivated, saying it’s ‘no mere coincidence’ that she is white and the three football players are black.” According to the paper, Painter said, “The cry of rape along with images of African-American males pitted against a white female is racism at its most base level . . . . This case is not about violence against women; this case is about money and race.” Grand Jury Declines to Indict Va. Tech Players; But the Athletes Still Face a Civil Suit, VIRGINIAN-PILOT, Apr. 11, 1996, at A1.
124. See infra notes 200–04, 247 and accompanying text.
II. The Debate in the Press

Next, I examine how debate about the civil rights remedy played out in the press. In the previous Part, I examined "objective" articles about the remedy. In this Part, I turn to commentary and editorial pieces—pieces which seek to persuade rather than simply report.  

Before VAWA was enacted, eight papers expressed support for the bill as a whole, or for the civil rights remedy in particular, and six papers opposed the enactment of the civil rights remedy. During the litigation of the case, only one paper, the New York Times, supported upholding the constitutionality of the provision, and seven opposed it. After the Supreme Court's decision, fourteen papers expressed opposition to the decision; twenty-eight expressed support for the decision; and one fell in between. During the course of the litigation, several

125. I look at editorials in newspapers that appear in Lexis's "News Group File, All" database, which includes over one thousand publications. I also look at opinion and commentary pieces written by individuals that appear in the same database. Various types of writers authored these pieces. Some commentators were regular columnists who wrote about VAWA repeatedly in their columns. Other pieces were written by individuals more directly connected to the remedy such as Senator Biden and other members of Congress, individuals from NOWLDEF, and lawyers for the defendants in the case.

126. USA Today, the Atlanta Journal and Constitution, the Christian Science Monitor, the Seattle Post-Intelligencer, the New York Times, the Dallas Morning News, the St. Louis Post-Dispatch, and the Boston Globe.

127. These papers were the Wall Street Journal, the Washington Post, the Denver Rocky News, the Pittsburgh Post-Gazette, the New Republic, and the News & Record (Greensboro, NC).

128. The Las Vegas Review-Journal, the Atlanta Journal and Constitution, the Richmond Times Dispatch, the Herald-Sun (Durham, NC), the Washington Post, the Augusta (GA), the News & Record (Greensboro, NC).

129. These papers included: the Ashley Park Press (Neptune, NJ), the Austin American-Statesman, the Baltimore Sun, the Boston Globe, the Buffalo News, the Kansas City Star, Milwaukee Journal Sentinel, the New York Times, the Press Enterprise, the Record (Bergen County, NJ), and the St. Louis Post-Dispatch, the San Francisco Chronicle, the Seattle Post-Intelligencer, and the University Wire.

130. The Atlanta Journal and Constitution, the Boston Herald, the Chicago Sun-Times, the Chicago Tribune, the Christian Science Monitor, the Courier Journal (Louisville, KY), the Denver Post, the Detroit News, the Herald Sun (Durham, NC), the Houston Chronicle, the Las Vegas Review-Journal, the National Review, the News & Observer (Raleigh, NC), the News & Record (Greensboro, NC), the News Tribune, the New York Post, the Omaha World Herald, the Pittsburgh Post-Gazette, the Plain Dealer, the Providence Journal-Bulletin, the Richmond Times Dispatch, the Seattle Times, the Sun Sentinel (Fort Lauderdale, FL), the Tampa Tribune, the Tennessean, the Virginian-Pilot (Norfolk, VA), the Washington Post, and the Washington Times.

131. The Los Angeles Times was the only paper to fall in between.
papers switched sides: initially they supported the enactment of VAWA but later they wrote in support of the Court’s decision to strike down the civil rights remedy.\footnote{The Atlanta Journal and Constitution and the Christian Science Monitor expressed general support for the enactment of VAWA (without specifically opposing the civil rights remedy) but later supported the Court’s decision to strike down the civil rights remedy. See \textit{Safe at Home? Not U.S. Women}, infra note 162 (supporting VAWA); \textit{High Court Wisely Keeps Limits on Federal Authority}, infra note 311 (supporting the Court’s decision to strike down the civil rights provision); see \textit{Domestic Violence}, infra note 163 (supporting VAWA); \textit{The Court Draws a Line}, infra note 321 (supporting the Court’s decision).}

In pieces written throughout the past decade, we can see commentators fighting over how the civil rights remedy would be understood. Some of these commentators were representatives of political organizations. Some were scholars. Others were lawyers for the parties in the \textit{Morrison} case, who acted as advocates in the courtroom and in the press. The Supreme Court ultimately decided the issue in the courtroom, but newspapers also acted as judges when deciding what side to take in their editorials. Proponents of the remedy lost not only in the Court but also in the press. One could imagine editorial outrage at the decision; instead, most editorials embraced the Court’s decision.

The examination of the debate in the press is divided into three time periods; this examination is further divided between editorials and commentary and the types of arguments made for and against the provision. Part A examines the debate about the provision in the press when Congress considered and enacted VAWA. Part B considers the time period beginning when the litigation of \textit{Morrison} began and continuing up until the Court’s decision. Finally, Part C looks at viewpoints about the Court’s decision.

\section*{A. Pre-Litigation Debate}

\subsection*{1. Commentary}

There were several areas of disagreement about the civil rights remedy before it was enacted. There were two major axes of debate. First, commentators argued about the “rights” at stake. Members of Congress and individuals from NOW, among others, wrote commentary to gather support for the enactment of the provision, arguing that the rights of women were at stake. Several widely-published columnists, however, argued that the provision undermined the rights of men, criminal defendants, and minorities. Both sides of this debate used the
language of civil rights and discrimination. The second major area of disagreement was whether the federal government’s role in regulating the violence was appropriate. Commentators who supported the Act framed the law as regulating civil rights and discrimination and said that the federal role in this realm was appropriate and needed. Others described the provision as regulating crime or domestic relations; they then claimed that the federal courts should not be burdened with these matters or intervene in areas of traditional state concern. The following sections describe in greater depth the debate about the bill before it was enacted.

a. Discrimination Claims

Before the enactment of VAWA, commentators debated whether some forms of violence against women are discriminatory and should therefore be classified as civil rights violations. They disagreed about whether the civil rights remedy provided needed rights to victims of violence or undermined the rights of men.

NOW was a strong proponent of the civil rights remedy—it lobbied Congress to enact the remedy, and NOWLDEF later defended the remedy’s constitutionality by representing Christy Brzonkala. Helen Neuborne of NOWLDEF argued that crimes of rape and domestic violence affect women as a class: “The provision says something many don’t want to admit: Violence against women is often motivated by a person’s gender and not by individual circumstances. That is why many more women are raped than men.”¹³³ According to Neuborne:

There are countless examples of how women—as a class—live differently than men do because of the threat of violence based solely on their gender.

Violence motivated by gender is not merely an individual crime or personal injury but a form of brutal discrimination, and assault on a publicly shared ideal of equality. When half of our citizens are not safe at home or in the streets because of

their sex, all of society suffers. This is clearly a civil rights is-

Several Representatives of Congress also wrote pieces arguing that

134. Id.

135. Senator Biden said, "[w]e must treat gender-based assaults on women as violations of

136. Cathy Young, Gender Poisoning In the Bobbitt Era, Facing the Real Truth About Male

John Leo, another columnist who consistently opposed classifying forms

tion protected by the new federal remedy is not self-limiting and unlikely to overwhelm the courts.

Eleanor Holmes Norton (D-D.C.), Editorial, Federalizing Feminism; Protection of the

Civil Rights of Women Against Criminal Attacks Needs the Force of Federal Law, Recorder, Aug. 11, 1994, at 8, LEXIS, News & Business, News, Recorder. See also Connie Morella, Editorial, It's No Fun When Violence Becomes a Game, CHI. TRIB., June 20, 1993, at 11 ("For the first time in our history, crimes committed because of gender will be treated in the same way as crimes committed because of racial, religious or ethnic hatred."). Connie Morella was one of the sponsors of VAWA.
of their sexual orientation: “Heterosexual rapists attack women (as opposed to a nondiscriminatory target group of 50 percent males and 50 percent females) because of their sexual orientation, not because they arbitrarily decide to single out just one of our two leading genders.”

Leo wrote, “[t]o bring rape and wife beating under the umbrella of civil-rights protection, it is necessary to argue that these are acts of prejudice and discrimination, like denying someone a job on the basis of race or sex.” But according to Leo, they “clearly aren’t, which is why all the verbal and logical gymnastics are required.” Leo contended, “[w]e are a long way here from the original model of civil-rights legislation: The long oppression of blacks by whites, based clearly on discrimination and nothing else.

Leo also argued that it would be difficult to distinguish between violence that would fit under the VAWA provision and violence that would not. He said, “[t]his approach would bog courts down in analysis of biased attitudes. . . . Like medieval theologians trying to classify angels, authorities would have to spend a lot of time classifying animuses, deciding which rapist’s animus was particular and which was generalized and aimed at all women.” Then, according to Leo, “different punishments would be dolled out in different courts on the basis of elaborate guesswork.”

Ruth Shalit, writing for the New Republic, was also highly critical of the remedy and the idea of inquiring into the motives and thoughts of attackers. Shalit pointed out the potential harm in distinguishing between “types” of rape. She wrote, “[b]y elevating motive over deed, anti-rape activists threaten to subvert their movement’s main premise: that rapes are crimes of violence; that no rapes are ‘better’ or ‘worse’ than others.” Shalit said, “[b]y asking politicians and juries to make difficult distinctions between ‘terrible’ and ‘much worse’ rapes, the gender feminists are in danger of reifying the very value judgments the date-rape movement sought to eviscerate.”

Those who opposed the remedy also argued that violence is a gender-based problem; but according to these writers, it is men, not
women, who are the subjects of greater abuse. For example, Cathy Young said, "[i]n one sense, it is a 'gendered' problem: Most violent offenders (nearly 90 percent) are men. And so, though in lesser proportion, are most victims."145 Young continued, "over 2 million men a year are assaulted by wives or girlfriends. And the women aren’t just striking back; they are as likely as men to be the aggressors, often using weapons to make up for their physical disadvantage."146 A letter from the Chairman of the Committee on Gender Bias in the Courts for the National Coalition of Free Men put forth a similar theory in a letter to the Washington Times: "Apparently Mr. Biden has not heard of our constitutional right to equal protection of the law and/or he approves of violence against men—the majority of victims of murder and violent crime."147 These claims about the equal protection rights of men mirror "reverse discrimination" claims made by whites in the affirmative action context.

Some columnists criticized the provision for undermining the civil rights of defendants. For example, John Leo said that the provision would “open the door to shakedowns based on a threat to sue for rape. A weak allegation that would be dismissed quickly by a criminal prosecutor might suffice in civil court. (Many falsely accused men would presumably pay off to avoid the publicity.)”148 Columnist Tom Teepen complained that under the provision “[e]ven suspects who never were charged and defendants who had been acquitted could be tried or retried under the civil courts’ lower threshold of proof.”149 Columnists also disagreed over whether or not the remedy would promote the rights of women at the expense of the rights of minorities.150 The ACLU spoke out against the remedy in Congress saying that the provision:

145. Young, supra note 136.
146. Id. Young said in a later piece that the remedy “defines many crimes against women as federal civil-rights offenses and allocates federal funds to areas with the highest rates of crime against women. Yet nearly 65 percent of violent-crime victims and 75 percent of homicide victims are male.” Cathy Young, Man Troubles: Making Sense of the Men’s Movement, REASON, July 1994, at 18–19.
148. Leo, supra note 141.
149. Tom Teepen, Editorial, Push for Gender-Based Civil Suits is Misguided, AUSTIN AMERICAN-STATESMAN, Apr. 18, 1994, at A7. Based in Atlanta, Tom Teepen is a national correspondent for Cox Newspapers.
150. Law Professor Jenny Rivera questioned the effectiveness of the civil rights remedy for women of color. Rivera pointed out that access to the courts "continues to be a major obstacle for women of color," and that the legal system has "not always served as a positive vehicle for reform with respect to the struggles of women of color." Rivera
might . . . adversely affect other civil rights lawsuits (including statutory claims and constitutional challenges) because of its impact on the federal courts. By creating a new federal civil cause of action, it will generate a series of new cases for the federal courts, whose dockets are already swelled by the increase in criminal (mostly drug-related) matters.¹⁵¹

The Dallas Morning News noted the ACLU’s complaints and the opposition of some lawmakers to the remedy. It wrote, “[l]ike the ACLU, these lawmakers . . . feared that by establishing a new cause of civil action with a standard open to interpretation, they might be creating difficulties for other civil rights lawsuits.”¹⁵²

b. Federal/State Jurisdiction

Commentators also debated whether gender-motivated violence should be regulated at the state or federal level. Before the enactment of VAWA, and before the Supreme Court’s decision in United States v. Lopez,¹⁵³ limited Congress’s commerce power, debate among columnists focused on the policy reasons for state or federal jurisdiction rather than


¹⁵². Anne Reifenberg, Domestic-violence Measure May Face Legislative Hurdles; Bill Popular, but ACLU, Others Say it’s Too Vague, DALLAS MORNING NEWS, Dec. 31, 1993, at 1A.

¹⁵³. 514 U.S. 549 (1995). In Lopez a five-person majority held unconstitutional a federal criminal statute permitting prosecution of individuals alleged to possess guns within 1000 feet of a schoolyard. The Court held that there was insufficient evidence in the congressional record that guns in schoolyards “substantially affected” interstate commerce and thus held that Congress had exceeded its Commerce Clause power in enacting the statute. The Lopez decision was the first time since 1936 that the Court found Congress had exceeded its Commerce Clause limits. See Charles Fried, The Supreme Court, 1994 Term—Foreword: Revolutions?, 109 HARV. L. REV. 13, 15 (1995).
what was constitutionally permissible. Through this debate, commentators revealed differing perceptions of the federal courts.

Some members of Congress who supported the remedy wrote commentary declaring the appropriateness of the federal role. Senator Biden wrote, "[p]rosecuting such cases in federal court sends a strong message that this country finally will treat family violence as a matter of public justice and no longer dismiss it as a private, personal matter... This is a major step forward in putting everyone on notice that we are finally taking violence against women seriously."

Representative Eleanor Holmes Norton (D-D.C.) defended the federal role, stating that the "provisions punishing gender-based violence against women... are in keeping with the responsibility of the federal courts to protect civil rights."

Helen Neuborne of NOWLDEF explained that states had failed in this area and that a federal solution was needed. She wrote, "[w]hat makes the Violence Against Women Act so effective in attacking the problem is its status as federal legislation. Without the Violence Against Women Act, women are still subject to loopholes in state laws that don't offer fair and full protection."

This view in support of the federal role was not, however, embraced by all. Columnists John Leo and James Kilpatrick, like the ACLU, both argued that the provision would overload the federal courts. Leo said that "[t]he bill further burdens an already bloated judicial system." Kilpatrick argued that "the Senate will want to think long and hard about the added burden the measure would place upon federal courts that are overburdened already."

These quotations reveal commentators' varying perceptions of the federal courts. First, federal courts were seen as more "important"
than state courts. Senator Biden indicated this when he stated that placing the lawsuits in federal court was a way to send a message that Congress was taking the violence seriously. On the other hand, columnists, like Leo and Kilpatrick, and the ACLU viewed the federal courts as "bloated," "swelled," and "burdened." They perceived the federal courts as too busy for the type of violence that the VAWA provision regulated.  

Not surprisingly, in the pre-Lopez era, few commentators asserted that Congress lacked the authority under the Commerce Clause to enact the remedy. With the exception of Kilpatrick, commentators did not argue that the remedy was unconstitutional, just that it was inadvisable. Although arguments that the provision was improper for the federal courts were advanced initially only on policy grounds, these arguments played a role later in the constitutional arguments against the provision. Commentators claimed that the activity regulated by the provision should be considered either criminal or family law, both of which they then classified as exclusively state matters. These arguments laid the groundwork for what became an essential part of the constitutional argument: the idea that Congress exceeded its power by infringing on an area of "traditional" state and local concern.

2. Editorials

Newspapers were split in their support of the civil rights remedy before it was enacted. Arguments made in newspaper editorials were similar to arguments made by commentators.

Several newspaper editorials expressed support for VAWA as a whole. The Atlanta Journal and Constitution wrote an editorial supporting VAWA. The Christian Science Monitor expressed general support

160. Symonds of the ACLU noted that the federal court "dockets are already swelled by the increase in criminal (mostly drug-related) matters." Symonds, supra note 151, at 22.

161. James J. Kilpatrick argued: "[T]his part of the bill rests upon a flimsy foundation of constitutional justification.... [T]his is constitutional hokum, and Biden surely knows it. The provision is of a piece with crime bills that would make every crime committed with a firearm a federal crime, because firearms move in interstate commerce." Kilpatrick, supra note 158.

162. Editorial, Safe at Home? Not U.S. Women, Atlanta J. & Const., Mar. 6, 1994, at F6 ("Congress is also drawing attention to the problem with the Violence Against Women Act, already approved by the Senate.... Society in general, and victims in particular, must understand that domestic violence can no longer be written off as a private family matter. It is a violent crime like any other.").
for VAWA on two occasions, as did USA Today. The Seattle Post-Intelligencer supported the crime bill in general, including specifically the VAWA provisions. Some newspapers' editorials specifically supported the civil rights provision. The New York Times wrote, "[t]he Senate version of the bill also extends civil rights protection to gender-based hate crimes like rape (98.9 percent of the victims are women)," and noted that ideally, the bill that ultimately emerged from Congress would include the civil rights and the immigrant provisions. The Dallas Morning News supported the enactment of VAWA generally and specifically supported the civil rights provision, expressing the hope that the final version would include both the civil rights remedy and an immigrant provision. The St. Louis Post-Dispatch also specifically supported the civil rights provision, linking it to international human rights efforts: "Such a provision . . . is a step in a long overdue but now growing international effort to link crimes against women with violations of human and civil rights." The Boston Globe supported the civil rights provision stating that it "would go a long way toward deflating the long-held myths that violent crimes against women are crimes of passion or sexual attraction gone awry."

163. The Christian Science Monitor said that "[a]fter years of failing to take the problem seriously, lawmakers, courts, and police officers are devising ways to help battered women." The editorial identified VAWA, a bill that "calls for stiffer laws against domestic abuse and permits women to bring civil cases for these attacks," as a "hopeful" sign. Domestic Violence, Editorial, Christian Sci. Monitor, Oct. 20, 1992, at 20. Two years later, the Christian Science Monitor wrote another editorial supporting VAWA. The 1994 editorial said, "it is heartening to have this one clear-cut issue also seem clear to everybody in Congress." Crime Bill and Women, Editorial, Christian Sci. Monitor, Aug. 29, 1994, at 18.

164. Law Can Help Fight Violence Against Women, Editorial, USA Today, June 3, 1993, at 12A ("The Violence Against Women Act aims to take the lead in changing that sorry record by taking an aggressive stance against gender-based crimes, such as rape, sexual assault or battery. . . . [T]he Violence Against Women Act declares an end to open season on woman. And that's a good start."); Real Crimes, Real Punishment, Editorial, USA Today, Mar. 1, 1994, at 10A ("The proper action now is plain if not simple: Senate lawmakers ought to strip the Violence Against Women Act out of the worthless crime bill and enact the legislation on its own, vastly superior merits.").


167. Id.


169. When Women Aren't Safe, Editorial, St. Louis Post-Dispatch, Apr. 13, 1991, at 2B.

As with the commentary pieces, editorials reveal different perceptions and conceptions of the federal courts. The *Washington Post* and the *Wall Street Journal* viewed the federal courts as busy and overburdened. The *Washington Post* wrote an editorial supporting Chief Justice Rehnquist's 1992 remark that Congress was burdening the federal courts. The *Washington Post* said that the federal courts could not perform their proper functions "if Congress loads on them new responsibilities that have traditionally been handled by state courts."\(^1\) The *Washington Post* said that the federal courts could not perform their proper functions "if Congress loads on them new responsibilities that have traditionally been handled by state courts."\(^1\) The *Wall Street Journal* said that the provision "may flood the federal courts with new suits,"\(^3\) and claimed that federal courts were "already awash in filings from the disability law."\(^4\)

The *Washington Post* and the *Denver Rocky News* viewed the type of activity that the VAWA provision regulated as a distraction for the federal courts. The *Washington Post* said that "the whole idea of putting street crimes, spouse abuse and other traditionally local matters into the national system is a distortion and a distraction."\(^5\) The *Denver Rocky News* said that "good arguments can be made that the federalization of a host of common crimes distracts federal courts from crimes that are uniquely their responsibility."\(^6\)

The *New Republic* viewed the federal court system as too punitive; it opposed the civil rights provision along with the crime bill as a whole. The paper cautioned that "Senator Joseph Biden’s ill-considered crusade appears to transform every rape accusation into a potential federal civil rights offense."\(^7\)

Several other newspapers objected to categorizing violence against women as class-based discrimination. For example, the *Wall Street Journal* said, "[t]he Biden act is mostly about embedding fringe theories of radical feminism in federal law."\(^8\) According to the *Journal*, the provision gave "a patina of congressional approval to the notion that rape and assault are 'systemic' terrorism perpetuated by men as a class to

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1. *See* Congressional Record, *supra* note 25, at 583 (reprinting a report on the state of the federal judiciary by Chief Justice Rehnquist, in which he identified the proposed VAWA provision as an unnecessary additional burden on the federal judiciary).
4. *Id.*
subjugate women as a class."79 "Such sentiments," the Journal contended, "abound in college classrooms, but they shouldn't be extended to the criminal law."80 The News & Record (Greensboro, NC) also objected to the class-based approach of the remedy, writing that "Sen. Joe Biden's bill [was] at its core a wrong-headed effort to turn sexual assault and rape into federal crimes and to transform them from individual acts of violence into symptoms of social pathology."81

Other papers, like the New Republic and the Washington Times, viewed the remedy as thought-policing. The Washington Times attacked the civil rights remedy as "[f]eminist thought-policing."82 The New Republic said that the remedy created thought crimes. It wrote, "[t]he only hope for civil libertarians is that the act, which creates an entirely new category of thought crimes, appears to be unconstitutional under Wisconsin v. Mitchell, the Supreme Court's recent hate crimes decision."83 These papers viewed the remedy as regulating thoughts because of the animus requirement, which demanded an inquiry into the motive of the attacker.

The Pittsburgh Post-Gazette argued that the provision would encourage women to avoid the criminal system. "Far from changing [the criminal justice] system," it cautioned, "this bill might encourage even more women to circumvent the criminal courts and take their chances in federal court, where the standard of proof is lower and the chance for monetary awards exists."84 The Post-Gazette concluded, "[i]t is in no one's interest for that to happen and in everyone's interest to focus more attention and effort at improving the way the criminal-justice system treats rape cases."85

B. Debate During the Litigation

This section looks at the debate in the press commencing at the beginning of the Morrison litigation. Commentators and editors made some of the same arguments as before the litigation, but new points of

179. Id.
180. Id.
183. Crime Dog, supra note 177, at 7 (identifying First Amendment problems, but failing to mention that the provision could be unconstitutional on federalism grounds).
185. Id.
disagreement also emerged. There were four main areas of disagreement:
1) whether the provision promoted the rights of women or undermined the rights of others; 2) whether the remedy was a civil rights law or a criminal or family law; 3) whether the provision was a needed and valid use of the federal power or whether it unconstitutionally infringed on states’ rights; and 4) whether gender-motivated violence was sufficiently linked to commerce for the remedy to be a permissible use of Congress’s Commerce Clause powers.

1. Commentary

a. Discrimination Claims

Throughout the litigation of *Morrison*, individuals writing commentary about the civil rights remedy continued to argue about the rights at stake in VAWA. Some emphasized that the rights of women were at stake; others stressed the rights of men, minorities or the accused.

NOWLDEF represented Christy Brzonkala, the plaintiff in *Morrison*, and defended the constitutionality of the remedy. Individuals from the group wrote a number of opinion pieces and letters to the editor emphasizing that the rights of women were at stake in the litigation. Kathy Rogers, the executive director of NOWLDEF, explained in a letter to the editor that the civil rights remedy regulated discrimination against women. She wrote, “[t]his kind of hatred results in discrimination based on gender, just as racial hatred results in racial discrimination.”186 Andrew G. Celli and Jennifer K. Brown, from the New York State Attorney General’s office, wrote a piece supporting the remedy. They said, “[t]he Violence Against Women Act’s civil remedy is civil rights legislation of the classic sort: motivated, at its core, by documented bias and discrimination.”187

Meanwhile, columnists who voiced concerns about VAWA before the remedy was enacted continued to raise these concerns. Columnist Cathy Young again argued against the categorization of some forms of

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violence against women as based on gender bias. She said that rape is not "gender-motivated" and does not constitute discrimination against women: "VAWA talks about 'gender-motivated violence'—meaning that victims of rape or wife abuse are supposedly attacked 'because of their sex,' much as victims of anti-black or anti-Asian violence are attacked because of racial prejudice."\(^\text{188}\) She argued, "[w]ithout a detailed dissection of this logic, suffice it to say that it can't explain why some men (and especially boys) are sexually assaulted too, or why there is battering in gay and lesbian couples, or why some women abuse their husbands."\(^\text{189}\) Jeremy Rabkin, a professor of government at Cornell University, wrote a number of columns against the civil rights remedy. Rabkin complained that it was hard to figure out which acts of violence are gender-motivated. He asked, "Did the husband beat his wife because she was female or because she was his wife?"\(^\text{190}\)

Columnists also argued that VAWA discriminated against men instead of combating discrimination against women. Cathy Young told readers "that in three-quarters of homicides in America, and nearly two-thirds of all violent crimes, the victims are men."\(^\text{191}\) Columnist Robyn Blumner argued, "the law's faulty premise is its greatest failing. Equality under the law—the clarion call of the early women's movement—means you apply the law uniformly irrespective of gender. There should be no presumptions that men's violent acts are more culpable than

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188. Cathy Young, Doing Violence to Equal Protection, Detroit News, Aug. 8, 1995, at 7E.
189. Id. Young said in a later piece, "[w]hen a man's sexual urges are directed toward women, his sexual aggression will be too." She noted, "[t]he interpretation of rape as inherently gender-motivated cannot explain sexual assaults on boys or sexual coercion among gays and lesbians." Cathy Young, Rape Suits Fuel Showdown Over State Rights, Violence and Gender Issues, Chi. Trib., Jan. 20, 2000, at N21.
190. Jeremy Rabkin, Christy on the Brink, Let's Hear it for a Landmark Ruling that Restrains the Feds, Am. Spectator, Jan. 1997, at 60–61 [hereinafter Rabkin, Christy on the Brink]. Rabkin said in another article, "[t]he statute is a monument to feminist ideology. It does not cover the stalker who loves women too much or the mugger who loves women's handbags too much, but only those who act from class-based hatred of women (or men)—as a federal court may come to understand this bizarre criminal sub-specialty." Jeremy Rabkin, Bill's Fickle Feminists: How Quickly They've Forgotten What They're All About, Am. Spectator, May 1998, at 60–61 [hereinafter Rabkin, Bill's Fickle Feminists].
191. Young, supra note 189, at N21. Young said in an earlier piece, "[m]en are victims of violent crime at almost twice the rate of women and are killed more than three times as often." Young concluded, "Congress should at least make sure that [VAWA] is enforced in a way that provides equal protection to both sexes—and that the money goes to help victims, not to fight 'patriarchy.'" Young, supra note 188.
women's." Rabkin questioned "who really suffers more from official 'gender bias' in this area," and characterized "the notion that family life is a special danger to women" as "a twisted feminist fantasy." According to Rabkin, "[i]n absolute numbers, moreover, far more men than women are killed each year by family members or 'romantic partners.' " If anyone needs protection from 'violence,' "he stated, "it is men. . . . If we are going to obsess about 'gender bias,' the most evident bias in the jury system is anti-male." Editorial writer Robert Keith Smith held out a similar view. He wrote that VAWA "legislates sexual inequality." He argued that "[m]en who feel their safety is as important as that of a woman's safety should protest such a sexist law" and that "[p]arents of sons should demand equal protection for them." Curt A. Levey, director of legal affairs at the Center for Individual Rights, and attorney for defendant Tony Morrison, wrote that the VAWA provision had nothing to do with promoting civil rights but in fact undermined the civil rights of defendants. Levey said, "[b]y singling out women as victims and men as predators, the statute ratifies the radical feminist view of men as the oppressor class. The rights of accused men suffer as a result."

Before the enactment of the civil rights remedy, commentators raised the issue of race in several ways. Supporters of the Act argued that

192. Robyn Blumner, Wrong to Let "Victim Feminists" Stack Deck Against Men, Hous. CHRON., Dec. 12, 1999, at 4C. Blumner also said, "[s]o when recent studies indicated that the arrest rate of women for domestic violence was creeping up, victim feminists scrambled to figure out how to blame men for the violence that women do. . . . With women entering the military, the world of professional boxing (even against male opponents) and other contact sports, the fact that women can be physically aggressive should not surprise anyone. . . . No one questions statistics on mothers arrested for child abuse. Why is it hard to believe that women abuse their spouses?" Id. Blumner is a columnist and editorial writer for the St. Petersburg Times.


194. Id.

195. Id.

196. Id.

197. Robert Keith Smith, Editorial, Violence Against Men is Also Crime, CHARLESTON GAZETTE, Apr. 28, 1995, at 4A.


199. Curt A. Levey, Feminist Ignore "Brzonkala" Facts, Nat'l. L. J., Feb. 7, 2000, at A20. Levey continued, "Ms. Brzonkala reigns as the act's poster girl, while the news media and the law's supporters brand Mr. Morrison a rapist. You'd never know that he has twice been cleared of the rape charges." Id.
women should have the same civil rights protections as minorities. The ACLU argued that the remedy would harm the rights of minorities by overloading the federal courts. During the *Morrison* litigation, however, race came up in a new way because the defendants were black and the plaintiff was white. Morrison’s attorney, Curt Levey, asserted, “Ms. Brzonkala and her supporters trumpet the law as essential protection for the civil rights of women. But what about Mr. Morrison’s rights? . . . It used to be that when a black man in the South faced unsubstantiated charges of raping a white woman, civil rights crusaders flocked to the black man’s defense. Now they flock to Christy Brzonkala.” Professor Jeremy Rabkin argued that it was the defendants’ civil rights at stake, not Christy Brzonkala’s:

If the case looks like the latest feminist fashion, it might appear on another level, however, as a tale out of the Old South. Brzonkala did not file charges (of any kind) until six months after the alleged event. She claimed not to know who the perpetrators were until she recognized their pictures in a football program given to her the following spring. At the administrative hearing before school authorities, Brzonkala was unable to recall much of anything about her assailants except that they were black. To spare her sensibilities, Brzonkala was allowed to testify by telephone, so as to avoid having to face the two men she was accusing of rape. Isn’t this the point where Gregory Peck arrives on the scene to defend the black men? . . . When the case was finally put to a grand jury, it refused to issue any

201. *See supra* note 151.
202. Levey, *supra* note 199. Levey said in a later piece, “after investigating her allegations, a Roanoke, Va., grand jury cleared both Morrison and Crawford, despite the region’s historically harsh treatment of black men accused of raping white women.” Curt A. Levey, *High Court Should Reaffirm Limits on Congressional Power*, LEGAL TIMES, Mar. 29, 1999, at 17. Lynn Hecht Schafran of NOW responded to a Center for Individual Rights press release mentioning the defendants’ race: “If CIR is so adverse to race-baiting, why does its Sept. 28, 1999, press release on the Supreme Court’s accepting the Violence Against Women Act (VAWA) case *U.S. v. Morrison* include the fact that the female plaintiff is white and the two men accused of raping her are black?” Schafran continued, “it is ironic that an organization devoted to dismantling the civil rights laws should be raising the specter of the Scottsboro boys.” Lynn Hecht Schafran, *CIR Not So High-Minded on Race*, NAT’L L. J., Feb. 7, 2000, at A19.
indictments against the students. The South is a bit different, after all, than it was in Gregory Peck's day.203

While these few individuals raised the issue of race, most writing about the Morrison case did not mention the race of the parties. No newspaper editorials mentioned the race of the parties, and only the New York Times, the Roanoke Times & World News, and the Virginian-Pilot reported this fact in articles about the case.204 These papers mentioned the race of the parties when the case was first brought but did not mention it after 1996. The Richmond Times Dispatch, a paper that covered Brzonkala's case from the start, never mentioned the race of the men or Brzonkala.205

b. Federal/State Jurisdiction

In United States v. Lopez,206 the Supreme Court held that Congress had exceeded its powers in enacting the Gun-Free School Zones Act. The Court found that the statute regulated crime, and said that in the area of “criminal law enforcement” states “historically have been sovereign.” The Court also described “family law” as within the scope of historic state regulation.207 Thus, whether “gender-motivated” violence was categorized as a “domestic relations” law, a “criminal” law or a “discrimination” law mattered greatly under the Court’s new federalism reasoning.208 Proponents of the remedy categorized VAWA as a civil rights law and argued that the federal role was appropriate in combating discrimination and protecting civil rights. They emphasized that civil rights was an area of traditional federal concern and that Congress had

203. Rabkin, Christy on the Brink, supra note 190, at 60. Rabkin said in another piece, “[i]n an earlier era, a white girl crying ‘rape’ might have harped on the fact that her ‘assailants’ were black.” Jeremy Rabkin, Federalism v. Feminism: The Supreme Court is Likely to Side with the Federalists, AM. SPECTATOR, Dec. 1999/Jan. 2000, at 60 [hereinafter Rabkin, Federalism vs. Feminism]. Rabkin said in a piece about the first Fourth Circuit opinion (which upheld the constitutionality of the provision): “The opinion mentions no fewer than six times that the defendants in the Brzonkala case were football players. The opinion rightly does not mention their race (they happen to be black, while Brzonkala is white).” Rabkin, Bill’s Fickle Feminists, supra note 190, at 61.
204. See supra note 123.
205. See supra note 123.
207. Id. at 564.
the authority to step in where the states had failed. Opponents of the remedy categorized it as regulating crime, domestic relations, or tort law and argued that these were matters for the states, not the federal government, to regulate. They maintained that federal intervention was both inappropriate and unconstitutional. Before *Lopez*, those opposed to VAWA argued that federal regulation of gender-motivated violence was inappropriate.\(^{209}\) After *Lopez*, they argued that the federal role was not just inappropriate on policy grounds, but actually unconstitutional.

In contrast, supporters of the legislation continued to characterize the remedy as a civil rights law. Andrew G. Celli and Jennifer K. Brown of the New York Attorney General’s office stated that, “[t]he Violence Against Women Act’s civil remedy is civil rights legislation of the classic sort: motivated, at its core, by documented bias and discrimination.”\(^{210}\) They emphasized that the provision complemented, not commandeered, state power: “[t]he Violence Against Women Act is that rare case in which, instead of competing for credit or blaming one another, the states and the federal government have joined hands to identify, understand and begin to address a truly national problem.”\(^{211}\)

Kathy Rogers of NOWLDEF also categorized VAWA as regulating discrimination. She wrote, “[t]his kind of hatred results in discrimination based on gender, just as racial hatred results in racial discrimination,” and the “federal government has a strong, indeed compelling, interest in preventing this debilitating discrimination.”\(^{212}\) She said in a later letter, “[f]ar from stepping into an area of state concern, VAWA invokes a strong, traditional federal interest—the civil rights of all its citizens.”\(^{213}\) Julie Goldscheild, a NOWLDEF lawyer, wrote in a letter to the editor that “Congress has full authority to enhance the VAWA civil rights remedy to combat gender-based violent crime that violates women’s civil rights, just as it passed Reconstruction-era civil rights laws and the Civil Rights Act of 1964 in a federal rejection of discrimination and civil rights violations.”\(^{214}\)

Opponents, however, continued to say that the federal role was improper. Edward McDonough, a lawyer from Salt Lake City, wrote in

\(^{209}\) See supra text accompanying notes 157–62.


\(^{211}\) Id.


the *Salt Lake City Tribune* that “[u]ntil relatively recently in this country’s history, it would have been unthinkable for Congress to enact legislation dealing with common tort law, damage suits for injuries due to another’s negligence or deliberate action.”215 He continued, “[s]uch matters, as well as common-law crimes such as burglary and rape, were considered strictly state matters and presumed so by constitutional interpretation.”216 Harvie Wilkinson, III, the Chief Judge of the Fourth Circuit who joined the majority’s opinion declaring the civil rights remedy unconstitutional, said in an opinion piece, “[t]he court will also take up the hotly debated question of whether Congress has the power to invade the province of domestic relations law through the Violence Against Women Act.”217 Columnist Joseph Sobran warned that “[e]very dispute between spouses can now escalate into a ‘civil rights’ case,” and “millions of divorce cases, traditionally local matters, may soon clog the federal courts.”218 Anita Blair, President of the Independent Women’s Forum, also categorized the VAWA remedy as a tort remedy. She argued that “the bottom-line difference between a federal ‘gender’ case and a traditional state tort action is how much the lawyers may get in fees.” According to Blair, “The Violence Against Women Act is only just one of many federal laws that benefit trial lawyers by making federal civil rights claims out of actions previously addressed as state tort claims.”219

c. Regulating Commerce or Crime?

Those writing in support of the constitutionality of the remedy emphasized the connection they saw between gender-motivated violence and commerce. They argued that the link between discrimination and interstate commerce was clear. Maureen M. Murphy, an attorney for the Connecticut Women’s Education and Legal Fund, said that “Congress’ extensive fact-finding concerning violence against women . . . provided compelling evidence of the substantial effect of this social problem on

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216. *Id.*
 interstate commerce.”220 In a letter to the editor, NOWLDEF's Julie Goldscheild asserted that the "legislative record documented what women's rights advocates have known all along: that gender-based crimes such as domestic violence, rape and sexual assault violate women's civil rights and have a direct impact on interstate commerce, just like other civil rights laws."221

Conversely, other commentators emphasized the lack of connection they saw between "rape" and "commerce." Columnist James Kilpatrick said that "Congress has the power to regulate commerce. It has no power to regulate rape."222 Columnist John Leo remarked, "[n]obody can say with a straight face that 'gender based' violence involves interstate commerce."223 Wendy Kaminer, in a piece for American Prospect, urged her readers to "[t]ry the common sense test: When you think of a rape in a college dormitory, do you think about interstate commerce?"224 Professor Jeremy Rabkin asserted, "[w]hatever else it is, 'a crime of violence motivated by gender' (in VAWA's weird phrasing) isn't 'commerce,' let alone interstate commerce."225 Dave Kopel, a policy

224. Wendy Kaminer, Comment, Sexual Congress, AM. PROSPECT, Feb. 14, 2000, at 8. Judith Resnik, a Professor at Yale Law School, responding to Kaminer’s piece, explained the connection between gender-motivated violence and commerce:

Since the 1960s, the Constitution has been understood as permitting Congress to remove obstacles to engaging in commerce—especially discriminatory obstacles. Before enacting VAWA, Congress heard testimony from both business executives and individuals detailing not only that violence has an economic effect on the GDP, but that violence against women limits women’s full participation as economic actors. Congress learned both that women were beaten to prevent them from going to work and that the threat of violence restricted women’s employment options.

225. Rabkin, Federalism v. Feminism, supra note 203, at 61. Rabkin argued in an earlier piece that “[o]n technical grounds, the argument for [Judge Kiser’s] holding is reasonably strong. After all, the effect of muttered remarks—even the very coarse and crude ones—on interstate commerce is, to say the least, rather indirect and remote.” Rabkin, Christy on the Brink, supra note 190, at 61.
analyzed, and Glenn Reynolds, a law professor, \(^{226}\) argued that it "is quite a stretch . . . to claim that the power to regulate the buying and selling of products across state lines includes the power to regulate drunken sex acts of college students."\(^{227}\) According to these commentators, "[u]nder the Constitution, all the other topics (like disputes between college students) are to be handled by the states, not the Federal government."\(^{228}\)

Kopel and Reynolds attempted to undermine Brzonkala's case by implying that the conduct at issue was not even a crime. According to their view of the facts, the regulated behavior was not a crime, but just a drunken interpersonal dispute, so it certainly was not something in which the federal government had to be involved. Professor Jeremy Rabkin took a similar approach and described the facts of Brzonkala's case to undermine the VAWA provision: "The undisputed facts are that Christy Brzonkala, a student at Virginia Tech, on her way home from another party, took herself up to the dorm room of two male students."\(^{229}\) According to Rabkin's view of the facts "she did not know these students and it was already two a.m. Brzonkala arrived with a female friend but she stayed behind when her friend left and also stayed behind when one of the male students did. Then there was sex."\(^{230}\) The truth of Brzonkala's allegations was not at issue before the Supreme Court; the Court took her allegations as true and determined whether the remedy itself was constitutional. Rabkin, like Kopel and Reynolds, appears to give his own account of the facts in order to undermine Brzonkala's case—even though what actually happened in the dorm room was not relevant to the issue before the Court.

\(^{226}\) Dave Kopel is an associate policy analyst, Cato Institute, Washington, D.C. Glenn Reynolds is Professor of Law, University of Tennessee, Knoxville.

\(^{227}\) Dave Kopel & Glenn Reynolds, Crime, Congress and the Interstate Commerce Clause, USA Today, May 1, 2000, Magazine, at 60. "Moreover, even though all crime has some economic effects, the impact of crimes like drunken sex on interstate commerce is insignificant, they continued." Id.

\(^{228}\) Id. Kopel and Reynolds gave the following account of the facts of the case: "[W]hen college student Christy Brzonkala got very drunk one night and, by her account, was date-raped by two other students, she got to sue in Federal, rather than state, court." Id.

\(^{229}\) Rabkin, Federalism v. Feminism, supra note 203, at 600.

\(^{230}\) Id. For another description of the facts by Rabkin, see Rabkin, Christy on the Brink, supra note 190, at 60–61.
2. Editorials

While most newspapers waited until after the Court's decision to print editorials about the *Morrison* case, some expressed opinions earlier. The *Richmond Times Dispatch* and the *News & Record* wrote editorials after the district court's decision to strike down the VAWA remedy as exceeding Congress's Commerce Clause power. The *Richmond Times Dispatch* agreed with the court's reasoning. "[I]f the standard for congressional action is this broad, then there is literally nothing in the world Congress cannot do: Theoretically, anything might affect interstate commerce, it wrote." The paper also complained that "[t]he Violence Against Women Act also relies on far-out sociology. Feminist writer Andrea Dworkin, who consulted with Joe Biden on the bill when he was sponsoring it in the Senate, contends that all sex is rape (and therefore, all men are rapists); men, she says, 'eroticize inequality.'" According to the *Richmond Times Dispatch*, "[t]he thinking behind the Violence Against Women Act is that rape is not merely an act of individual wickedness but a part of a society-wide attempt to oppress women." The *News & Record* of Greensboro, North Carolina also supported the district court's opinion. The paper opined that the "three defendants were little more than handy stage props—except for the inconvenience of having to defend themselves and their reputations." The *News & Record* gave the following view of the facts of the case:

Brzonkala, a student at Virginia Tech in Blacksburg, accused three Tech football players of raping her in their dormitory room late at night. But the evidence strongly pointed toward a consensual sexual encounter. Brzonkala never mentioned the incident for five months, and did not make a formal complaint until two months after that. Subsequent student disciplinary hearings found the charge of rape unsupported by fact. And a county grand jury declined to indict.
The News & Record, therefore, concluded that Congress had “created an ideological monster, an open invitation to mischief.” Georgia’s Augusta Chronicle also wrote in support of the district court’s decision to hold the VAWA remedy provision unconstitutional. It argued that “[l]aw-enforcement should be left to local and state police agencies . . . . Giving the federal government supremacy weakens local control and creates confusing overlapping jurisdictions.”

The New York Times, the Washington Post, the Herald Sun (Durham, N.C.), the Richmond Times Dispatch, the Atlanta Journal and Constitution, and the Las Vegas Review-Journal all wrote editorials after the Supreme Court decided to hear the case. The New York Times was the only one of these papers to write in support of the provision. It wrote an editorial when the Court started its session in the fall of 1999. The Times said that the VAWA decision, along with two other decisions—an age discrimination case and a Driver’s Privacy Protection Act case—would “tell whether the Court’s narrow but aggressive states’ rights majority intends to weaken Congress’s power to protect basic civil rights.”

When the Supreme Court took the case, the Washington Post said that the “question at issue is whether Congress can give rape victims the right to sue their alleged attackers in federal courts even if the attacks have no obvious interstate or commercial dimension.” The paper conceded that it “is not an easy call. If the law is valid, it is hard to imagine anything Congress cannot do under the guise of regulating commerce. On the other hand, striking down such a law could have implications for valuable government initiatives.”

The Herald-Sun of Durham, North Carolina, stated, “[t]his case will be a tough call for the high court, which must weigh the legitimate concerns about the civil rights of women, the rights of crime victims, and the constitutional

237. Id.
238. Wrong Crime Medicine, Editorial, AUGUSTA CHRON. (Georgia), Mar. 11, 1999, at A4.
239. The High Court Returns, Editorial, N.Y. TIMES, Oct. 4, 1999, at A26. The Times later wrote:

Americans concerned about preserving civil rights and Congress’s legitimate role in providing national remedies to national problems had best brace themselves. Yesterday the justices also heard arguments in another important federalism case, this one testing the constitutionality of the Violence Against Women Act. The employment decision could well be a harbinger of other damaging federalism rulings to come.

Another Loss on States’ Rights, Editorial, N.Y. TIMES, Jan. 12, 2000, at A22.
241. Id.
question of Congress' authority." But it concluded, "[t]he court ought to rule on the side of limiting further federal encroachment into state and local matters." The Richmond Times Dispatch wrote, "[n]ot every evil in the world is a job for Congress." It also advanced "rights" arguments that echo other commentary about the Act: "In focusing on crimes against women, Congress seems to treat those crimes as of greater moment than violent crime against men." The Atlanta Journal and Constitution, a publication that earlier supported the enactment of VAWA, changed its mind. The paper wrote, in January 2000, "[w]e predict this law's application to the states will not survive the court's scrutiny, imposing one more sensible limit on the breadth and the reach of federal power." The paper said that "[t]he Rehnquist Court is making a lasting and important contribution to the constitutional goal of keeping power away from Washington, and closest to the people." Finally, the Las Vegas Review-Journal, in April 2000, called the VAWA provision "a well-intentioned effort that twisted the Constitution's commerce clause to justify federal intervention in domestic violence."

C. Viewpoints After the Court's Decision

1. Commentary

a. Discrimination Claims

After the Court's decision, commentators raised the same discrimination claims they had raised before: that the provision discriminated against men and violated the rights of defendants. Columnist John Leo, who had argued from the start against categorizing violence as "gender-based," made this point again after the Court's decision. He said that even if the facts presented to Congress about the incidence of rape and domestic violence were true, "[t]hey still would fail to establish how

243. Id.
245. Id.
247. Id.
much male-on-female violence is motivated by gender bias.” Leo asserted that “[o]verwhelming evidence, in study after study, shows that men are victimized by domestic violence at least as often as, if not more than, women.” Columnist Stephen Chapman made the same point: “[V]iolence] does discriminate on the basis of gender: not against females but against males. . . . Violence against women is not an outgrowth of sexism but just one aspect of our high crime rate.”

Stuart Taylor, a writer at the National Journal, expressed concern about the rights of defendants: “The Framers confined Congress to certain enumerated powers, including the power to regulate interstate commerce, mainly to protect not states but individuals from a distant, overbearing national government. A corollary goal was to protect those accused of crimes from being pursued by both state and federal court systems.”

Leo, Chapman, and Taylor all viewed the VAWA provision as infringing on rights, rather than promoting rights. Leo and Chapman were concerned about the rights of male victims of violence; Taylor was concerned about the rights of defendants. Political analyst Phyllis Schlafly also focused on the rights of the defendants in Morrison. She was the only commentator to bring up the issue of the defendants’ race after the Court’s decision. She said that VAWA was passed under the “deceptive name of civil rights” when “[i]n fact, the VAWA provision did nothing to advance civil rights.” According to Schlafly, the “media and VAWA supporters persistently concealed the fact that the defendants in US v. Morrison were blacks who had been exonerated by the criminal justice system, yet were later subjected to civil allegations unjustified by any independent investigation.”

250. Id.
253. Id.
b. Federal/State Jurisdiction

As discussed above, most newspapers did not report that the Court had overturned a "civil rights law." Many commentators, however, defined the decision as a major loss for civil rights and emphasized that the provision had been an appropriate use of federal power. Professor Barbara Ransby said: "[I]n other words, states’ rights trump civil rights yet again."255 Cathy Rogers of NOWLDEF said that the decision was "a major triumph for a powerful movement aimed to strip the federal government of its authority to protect civil rights of Americans. . . . This 'New Federalism' is a euphemism for states rights, long the symbol and reality of second-class citizenship for women and minorities."256 After the Court’s decision, radio host Laura Flanders said that "we’re starting the 21" Century with our civil rights set back to before the New Deal."257 The Attorney General of Washington State, Christine Gregoire, and Senator Patty Murray (D-WA) said, "[t]his week, our nation took a huge step backward in our slow march to guarantee civil rights for all Americans."258

Several commentators emphasized that the civil rights remedy did not displace state law, but complemented it. "The VAWA provision expands civil rights, not federal meddling in state affairs," Gregoire and Murray said.259 Law Professor Peter M. Shane took a similar stance when he pointed out that Brzonkala’s "right [to bring suit] posed no tension between state and federal authorities,"260 and that "[f]rom the states’ point of view, this [federalism] campaign is often pointless and sometimes counterproductive."261 It was Shane’s opinion that most states were not hostile to the federal VAWA.262

259. Id.
260. Id.
261. Id.
262. This view is confirmed by the fact that thirty-nine state attorneys general supported the enactment of VAWA. See Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 103d Cong. 34 (1993) (letter from Robert Abrams, Attorney General of New York.
Other commentators, however, argued that VAWA was an impermissible federal "intervention" into "traditionally" state affairs. Commentators who categorized the civil rights provision as regulating crime, tort law, or domestic relations said that these matters were matters of state concern and should not be federalized. "[A]t issue [in Morrison] was whether the federal government can regulate aspects of marriage and domestic relations, which have always been within the exclusive domain of the states."263 Law Professor Bradley Gitz wrote that "the court acted to preserve the authority of state and local governments in the crucial area of law enforcement."264 The Los Angeles Times printed a letter saying that "matters such as rape are topics par excellence for state and local law."265 Andrea Neal, an editorial writer for the Indianapolis Star, said that "Congress should know better than to federalize state crimes."266 Lee Anderson, associate editor and publisher of the Chattanooga Free Press, commented: "Not everything should be made into 'a federal case.'"267

c. Regulating Commerce or Crime?

Like they had before the Court's ruling, a number of commentators remarked after the Court's decision in May 2000 that they saw no connection between gender-motivated violence and the Commerce Clause. Many who supported the Court's decision appealed to the

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263. Schlafy, supra note 254. "[T]his VAWA provision would have been a giant step toward a complete takeover of marriage and domestic relations law by the federal government." Id.


"commonsense" view that "rape" is not interstate commerce and therefore cannot be regulated pursuant to the Commerce Clause. They described the Court's decision as an obvious rejection of an unreasonable argument made by Congress. Most of these commentators failed to mention, however, that before Lopez the Court had not struck down a law enacted pursuant to the Commerce Clause since the New Deal.\footnote{268}{See supra note 153.}

Michael Kelly from the National Journal wrote that the Court rejected Congress's "almost comically expansionist view of federal powers."\footnote{269}{Michael Kelly, Cuomo's Thought Police, WASH. POST, May 17, 2000, at A27.} Todd Gaziano, a senior fellow in legal studies at the Heritage Foundation, called Congress's Commerce Clause reasoning a "chaos theory."\footnote{270}{Todd Gaziano, Rule of Law: Separation of Powers Lives, WASH. TIMES, May 16, 2000, at A21, LEXIS, News & Business, News, The Washington Post.} Columnist James Kilpatrick said, "I thought that [Wickard] was wrongly decided, but at least wheat has some connection to interstate commerce. Rape has none."\footnote{271}{James Kilpatrick, Lopez Lives, POST AND COURIER (Charleston, SC), May 20, 2000, at A11.} Columnist John Leo wrote that the Court had reached a "reasonable, even obvious, conclusion."\footnote{272}{Leo, supra note 249.} Leo said, "[G]ender-motivated' violence is not an economic activity. Pretending that it has something to do with commerce between states is legal poetry, not common sense or good law."\footnote{273}{Id.}

Anne M. Hayes, an attorney for the Pacific Legal Foundation, which urged the Court to strike down the VAWA provision, remarked that "[t]he five-justice majority and even (or perhaps especially) those who have no legal training are hard-pressed to identify a link between rape and interstate commerce."\footnote{274}{Anne M. Hayes, Some on Court Neglect Constitution, SCRIPPS HOWARD NEWS SERVICE, May 18, 2000, LEXIS, News & Business, News, Scripps Howard News Service.} According to Professor Bradley R. Gitz, Justice Souter "penned . . . perhaps the most embarrassing opinion in recent court history, making the bizarre argument that, since violence against women has at least some indirect economic consequences, the commerce clause of the Constitution gives Congress the right to regulate it."\footnote{275}{Gitz, supra note 264.} Gitz said that commerce "has no more to do with the crime of rape than it has to do with the status of children's dental habits or suburban lawn care," and that "the provision was struck down because it represented a blatantly unconstitutional extension of the powers of the federal government."\footnote{276}{Id.}
Lawyer Mark A. Perry concluded that "[t]he majority reasoning was straightforward and compelling" and that "[n]o one—including the four dissenters—seriously contends that rape constitutes economic activity." A letter to the editor published in the Washington Post said: "As the court majority pointed out, domestic violence is not commerce. Nor does it typically cross state lines." Attorney Bruce Fein, who testified against the provision when it was before Congress, said of the Court's ruling, "In other words, the theoretical cornerstone of VAWA was boundless. Any non-commercial behavior with a derivative impact on the national economy no matter how remote and featherlike would be exposed to congressional regulation."

Law Professor Peter M. Shane was one of the proponents of the VAWA remedy to counter the argument that rape is not commerce and therefore cannot be regulated under the Commerce Clause. "Yes, it is common sense that rape is not commerce," he said, "[b]ut it is hardly common sense that Congress's power to promote commerce is so limited that it cannot legislate against a practice that costs the national economy billions of dollars annually, including the burdens of absenteeism and lost productivity."

d. Judicial Activism

Some commentators said that by overturning Congress's statute, the Court had engaged in unacceptable judicial activism and undermined democratic decision-making. Librarian Sara D. Knapp said

278. Id.
280. In his testimony, Fein objected to the fact that VAWA would interfere with a state's choice not to criminalize spousal rape—a choice that, he said, states should be free to make based on "local customs." See Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House of Representatives Comm. on the Judiciary, 103d Cong. 27 (1993) (statement of Bruce Fein, attorney); see also Goldfarb, infra note 391.
282. Shane, supra note 260.
283. Id.
that it was the Supreme Court, not Congress, that overstepped. Law Professor Erwin Chemerinsky said that the “Reagan and Bush justices are engaged in aggressive conservative judicial activism.” Law Professor Susan Estrich contended that “Chief Justice Rehnquist becomes the sort of activist-jurist that conservatives are usually the first to criticize” when federalism is at issue. Another law professor, Herman Schwartz, asserted that “in a burst of judicial activism, the U.S. Supreme Court’s five conservative justices fired another salvo in their jihad against the federal government.” Law professor Larry Kramer found the ruling astonishing “from a court that professes to care about democratic majorities and respect the political process.” “This is radical stuff. Previous courts have exercised aggressive judicial review, but never like this.” Senator Biden accused the Court of being too eager to “substitute its own judgment for that of the political branches democratically elected by the people to do their business.” Stephen Pomper, writing for the Washington Monthly, remarked that “in more balanced times, the Republican bar might have been shamefaced about this sort of judicial activism.”

2. Editorials

a. Federal/State Jurisdiction

Editorials advanced arguments similar to those presented in commentary pieces. A number of newspapers viewed the decision as a

285. Id.
290. Id.
293. Forty-three papers printed editorials expressing their views on the Supreme Court’s decision in Morrison. After the Court’s decision, fourteen papers expressed opposition
loss for civil rights and said that the federal role had been appropriate. The New York Times said that the Court’s decision “provided confirmation that a narrow majority on the Court is determined to reconfigure the balance between state and federal authority, even at the expense of weakening civil rights.” The Times wrote that the Court’s decision undermined “Congress’s traditional power to identify problems that states cannot or will not adequately deal with and to fashion national remedies.” The Buffalo News said: “In its crusade to reclaim a lost form of federalism, the United States Supreme Court . . . made life harder for victims of sex crimes while calling into question the durability of federal laws governing civil rights and child labor.” The St. Louis Post-Dispatch accused the Court of putting states first “[i]n the battle between civil rights and states’ rights.” The Press Enterprise said that the “right to obtain a measure of justice through the federal courts is as important and as strongly rooted in the Constitution as states’ rights.” The Record, of Bergen County, New Jersey said, “In several recent rulings, including [Morrison], the five justices harken back to an era of state sovereignty that proceeded the federal civil rights and environmental movements. . . . Civil rights and environmental laws follow in the tradition of congressional action in other areas—child labor, minimum wage, workplace safety—where Congress has stepped in when states would not act.” The Baltimore Sun accused the Court of striking “a blow to the constitutional framework that for more than 50 years has provided a secure foundation for the federal government’s power to regulate the economy and combat discrimination.” The Kansas City Star said that the remedy “gave women a way to take matters into their own hands if local law enforcement officials turned their backs.” It wrote that by leaving relief for victims of gender-motivated crimes to the
to the decision, twenty-eight expressed support for the decision, and one fell in between. See supra notes 129–32.

295. Id.
299. The Court Goes Backwards: An Activist Majority Seeks a States Rights Era, Editorial, Record (Bergen County NJ), May 18, 2000, at L10.
state courts, “the Supreme Court is sanctioning a spotty system of justice for these victims.”

The Seattle Post Intelligencer said that the civil rights provision had provided “a similar extension of legal avenues for women who are raped and beaten” to the civil rights act for African Americans.

The Milwaukee Journal Sentinel took a somewhat different position from other supporters of the federal remedy. It categorized the VAWA provision as regulating crime but stated, nevertheless, that federal intervention was appropriate. The Milwaukee Journal Sentinel argued that “federal intervention in the criminal arena is sometimes apt, particularly when the national government is filling a conspicuous vacuum in local and state law enforcement.”

Quite a few editorials framed the provision as regulating crime rather than discrimination; yet most took a position contrary to the Milwaukee paper and argued that crime should not be federalized. The Atlanta Journal and Constitution said that “[r]ape is not discrimination; it is a crime.” An editorial in the Herald (Rock Hill, S.C.) called the remedy a “hate crime law” not a “civil rights law.” The Herald wrote, “[i]n the past, Congress has used that provision to exert its authority in enforcing laws, notably civil rights laws. But using the commerce clause to justify federal hate crime laws stretches the meaning of the clause beyond reason.”

The Herald-Sun (Durham, N.C.) said that the Court had “restrained once again federalization of local criminal offenses.” The Seattle Times said that the Court ruled correctly because “[t]he federalization of crime is an unwelcome trend.” The Boston Herald said that “[a]bsent a pressing national need, crimes should be dealt with where they occur.” The Atlanta Journal and Constitution claimed that “the Constitution has made it clear since 1789 that the federal government does not have the authority to legislate in the area of

302. Id.
304. Door Slammed On Rape Victims, Editorial, Milwaukee J. Sentinel, May 19, 2000, at 22A.
305. Do More to Protect Women From Rape, Editorial, Atlanta J. & Const., May 18, 2000, at 18A.
307. Id.
310. Rape Ruling is Right Thing, Editorial, Boston Herald, May 17, 2000, at 34.
ordinary, individual, local criminal conduct." Interestingly, the Atlanta Journal and Constitution had supported the enactment of VAWA. The Courier-Journal also put the VAWA provision in the category of "criminal," rather than "civil rights," legislation. It wrote: "Long ago, it was recognized that in some areas—and civil rights is one—federal authority is vital to ensure uniform protection. But criminal law historically has been a local matter. With limited exceptions ... it should remain that way. U.S. v. Morrison is confirmation of that view." Finally, the Providence-Journal-Bulletin argued that "these matters have been traditionally viewed as topics for the states to handle."

c. Regulating Commerce or Crime?

Another point of disagreement among editorials was whether the VAWA provision regulated an activity with a sufficient connection to interstate commerce. Some editorials emphasized the lack of connection that they saw between "rape"—what they categorized the civil rights provision as regulating—and "commerce." The National Review stated that "assaults have nothing to do with commerce." The Seattle Times agreed with the Court's ruling and said that "rape is not commerce." The Providence-Journal-Bulletin called Congress's justification for its Commerce Clause power to enact VAWA "far-fetched." The Atlanta Journal and Constitution called Congress's Commerce Clause argument "unreasonable."

Many other editorials said that the enactment of the civil rights remedy stretched Congress's power under the Commerce Clause. The Sun-Sentinel of Fort Lauderdale, Florida said that the government's argument "stretch[ed] the commerce clause beyond recognition."

312. Safe at Home?, supra note 162.
316. High Court Rape Ruling Sets Appropriate Limit, supra note 309.
317. The Federal-State Balance, supra note 314, at 4B.
318. High Court Wisely Keeps Limits on Federal Authority, supra note 311.
Tampa Tribune said the Commerce Clause reasoning was a “terrific stretch,” and the Christian Science Monitor said that the argument “clearly stretched Congress’s constitutional power.” The Christian Science Monitor, like the Atlanta Journal and Constitution, had supported the enactment of VAWA. The Las Vegas Review-Journal said that the Commerce Clause had been “stretched to justify the federal government’s intervention into virtually every aspect of modern life.” The Herald, of Rock Hill, South Carolina, also described Congress’s argument as a “stretch.”

But other newspapers disagreed. The Buffalo News pointed out that previous civil rights statutes were based on similar Commerce Clause reasoning and reminded readers that “the landmark Civil Rights Act of 1964 is also predicated on the Commerce Clause.” The Seattle Post-Intelligencer said:

Violent crime against women costs this country at least $3 billion a year. More than one million women seek medical assistance each year for injuries inflicted by their husbands or partners. This doesn’t amount to significant economic activity? And women, like blacks before them, aren’t hindered from fully participating in the national economy?

Similarly, the Austin American-Statesman wrote that “after four years of hearings, Congress recognized the volumes of evidence showing that violence against women had a negative effect on the national economy, with billions of dollars in lost jobs and lowered productivity.”

III. Conclusions by Courts

Although the Supreme Court ultimately rejected the categorization of gender-motivated violence as a civil rights issue and an issue of federal concern, most courts that considered the constitutionality of the

322. See supra note 163.
323. Limits on Power, Editorial, LAS VEGAS REVIEW-JOURNAL, May 16, 2000, at 6B.
324. Congress Overshoots Bounds, supra note 296.
325. An Erosion of Rights, supra note 287.
326. Court Misguided on States’ Rights, supra note 303.
provision found that Congress had acted within its Commerce Clause powers. Courts distinguished the VAWA provision from *Lopez*. They pointed out that the civil remedy was supplemental and did not supplant state criminal law. They also emphasized the similarities between the civil rights remedy and previous federal civil rights statutes.

### A. Lower Federal Courts

A number of lower federal courts upheld the constitutionality of VAWA and agreed with Congress's characterization of the law as regulating civil rights. These courts distinguished the remedy from the criminal provision at issue in *Lopez*. In *Timm v. Delong*, a woman brought a VAWA claim against her husband, alleging that he had physically and sexually assaulted her on multiple occasions. The court, upholding the constitutionality of the VAWA remedy, said that "[u]nlike the statutory provision in *Lopez*, the civil rights provision of VAWA is not a criminal statute and does not inhibit state criminal proceedings against those who commit violence against women."325 In contrast to "the statute invalidated in *Lopez*, VAWA does not occupy a legal realm where '[s]tates lay claim by right of history or expertise.'"330 In *Crisonino v. New York City Housing Authority*, a case where a woman brought a VAWA claim against her employer alleging that he physically assaulted her, the court stated that "unlike the law at issue in *Lopez*, which the Supreme Court characterized as a 'sharp break with the longstanding pattern of federal ... legislation,' the [provision] fits squarely within the tradition of federal civil rights legislation."331

Other courts stated that the federal civil rights provision supplemented, but did not displace, state criminal law by creating a civil remedy for survivors of gender-based violence. In *Doe v. Mercer*, the plaintiff sued three men, alleging that they had raped her. The court upheld the provision against the defendants' constitutional challenge stating: "The VAWA does not encroach on the police powers of the States or intrude in the execution of state criminal laws."332 The court continued, "Congress has not usurped the power of the States to

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329. *Id.* at 955-56.
330. *Id.*
    The plaintiff alleged that her employer called her a "dumb bitch" and shoved her, causing her to fall to the ground. *Id.* at 389.
provide parallel civil remedies.” The court in Doe v. Doe similarly said that the remedy “does nothing to infringe on a state’s authority to arrest and prosecute an alleged batterer on applicable criminal charges.” In this case, the plaintiff sued her husband, alleging that he had caused her extreme emotional distress by inflicting a violent pattern of physical and mental abuse and cruelty upon her and forcing her to perform manual labor. The court, rejecting a challenge to the constitutionality of the remedy stated, “VAWA does not encroach on traditional areas of state law; it complements them by recognizing a societal interest in ensuring that persons have a civil right to be free from gender-based violence.”

In Doe v. Hartz, a case in which a parishioner brought a VAWA action against her parish priest and the local catholic diocese, the court affirmed the categorization of the VAWA provision as a civil rights remedy. The court concluded that the remedy “has been cast as a civil rights statute, not a criminal statute, and thus falls within the traditional purview of federal regulation. Just as importantly, the statute defers to state definitions of crimes and clearly supplements rather than supplants state regulation of criminal and family law matters.” In Anisimov v. Lake, a woman brought a VAWA action against her employer. The court upheld the constitutionality of the VAWA provision stating that “[u]nlike the statute at issue in Lopez, the Civil Rights Remedy provided by the VAWA was not designed to duplicate or usurp the authority of the States.” The court said that the remedy was instead “designed to redress an area of civil rights violations that were not being adequately protected by the states. The Supreme Court has historically recognized that the power of Congress in the field of civil rights is broad and sweeping.”

333. Id.
335. Id.
337. Id. at 1423.
338. Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997). The plaintiff alleged that her employer made inappropriate sexual advances toward her including: fondling her; attempting to remove her clothing; grabbing her breasts; assaulting and attempting to rape her; and ultimately luring her to a deserted office site and raping her. Id. at 532.
339. Id. at 540.
340. Id. (quoting Katzenbach v. McClung, 379 U.S. 294, 305 (1964)).
defendant’s characterization of the provision “as dealing with state family law issues . . . belies the plain language of the statute and Congressional intent. The legislation is civil rights legislation, an area of historic federal action.”

Other courts stressed the connection between interstate commerce and gender-motivated violence and likened VAWA to earlier civil rights legislation enacted under Congress’s commerce powers. For example, in Culberson v. Doan, the court analogized gender-motivated violence to “the burdens on interstate commerce due to racial discrimination that necessitated congressional intervention in Heart of Atlanta Motel and Katzenbach.” The court agreed with Congress’s determination that “the aggregate effect of violence against women substantially burdens interstate commerce, namely by decreasing business activities, hindering women’s willingness to travel, and preventing women from full participation in the overall marketplace of the nation.” The court concluded that “VAWA is consistent with other civil rights legislation enacted by Congress and upheld by the courts as constitutional under the Commerce Clause.” In Liu v. Striuli, a graduate student brought suit against a professor at her university, alleging rape and sexual harassment. The court rejected the defendant’s challenge to the constitutionality of the remedy, concluding that the “method of enforcing civil rights statutes, granting private litigants the statutory power to protect their own civil rights through the courts, has been adopted by Congress in other statutory schemes and has continually received the approval of the federal courts.” In Ericson v. Syracuse University, two former players on the Syracuse University women’s tennis team brought a VAWA claim against their former coach. The court upheld the VAWA remedy stating

342. Id. at 612.
343. Culberson v. Doan, 65 F. Supp. 2d 701 (S.D. Ohio 1999). In this case the parents of a deceased woman brought a VAWA claim against her former boyfriend alleging physical abuse.
344. Id. at 713. In Katzenbach v. McClung, 379 U.S. 294 (1964), the Court upheld Title II of the Civil Rights Act of 1964 as a valid exercise of commerce power. The Court held it was within the power of Congress to prohibit racial discrimination in restaurants because the discrimination interfered with the ability of African Americans to travel and thus obstructed interstate commerce. In Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), decided the same day, the Court upheld the constitutionality of the Civil Rights Act against a challenge by hotels and motels.
345. Culberson, 65 F. Supp. 2d at 713.
346. Id. at 714.
348. Id. at 478.
that “[w]here the states fail to exercise their police powers to combat a form of anti-social activity—violence against women—that also negatively impacts interstate commerce, the federal government need not likewise default but may instead seek to remedy these indirect but substantial injuries to the functioning of the national economy.”

As these opinions demonstrate, the vast majority of courts to consider the Act accepted Congress’s characterization of the statute as a civil rights remedy. With the exception of the courts that considered the Brzonkala (Morrison) case, only one other court found the statute unconstitutional.

B. The Morrison/Brzonkala Cases

1. District Court Opinion

The district court in Brzonkala emphasized the similarities it saw between the VAWA provision and the statute at issue in Lopez. According to the court, although the characterization of the statute as civil is “technically a correct statement,” VAWA is, nonetheless, criminal in nature because it was “designed to address problems in the state criminal justice system.” The court said that the relevant categorization was not whether the remedy was a criminal or civil law, but whether the activity regulated was economic or non-economic in nature. The court reasoned that “whether a statute based on the Commerce Clause is civil or criminal is of limited relevance.” According to the court, “[w]ith statutes

350. Id. at 348.
351. Bergeron v. Bergeron, 48 F. Supp. 2d 628 (M.D. La. 1999). In Bergeron a woman brought a VAWA claim against her former husband alleging battery and attempted rape during their marriage. The court, considering the constitutionality of the VAWA remedy, agreed with the Fourth Circuit that the application of the provision would “constitute a ‘sweeping intrusion’ into areas of traditional state concern, particularly as the statute applies to domestic violence.” Id. at 635–36. The court noted that “[t]here can be no dispute that in the case at bar, plaintiff is attempting to apply the Act to a classic case of domestic violence since it involves a former husband and wife and incidents during marriage.” Id. at 636 n.10. The court said it agreed with the Fourth Circuit that “there is no manifest connection between the regulated conduct (particularly as it pertains to domestic violence) and interstate commerce,” id. at 637, and concluded that “Congress exceeded the bounds of its authority under the Commerce Clause by enacting § 13981. This law is legislation regulating domestic violence, not commerce.” Id. at 638.
353. Id.
regulating intrastate activities, the primary concern is whether the activity is economic.” The court concluded that if “VAWA is a permissible use of the commerce power because of the regulated activity’s effect on the national economy, which in turn affects interstate commerce, then it would be inconsistent to deny the commerce power’s extension into family law, most criminal laws, and even insomnia.” Despite the fact that there are many federal criminal laws and federal laws that regulate families, the court defined these categories of activities as outside of the proper realm of Congress.

2. Fourth Circuit Opinions

A panel on the Fourth Circuit reversed the district court’s holding. The court then heard the case en banc and reversed the panel’s decision. The en banc opinion began by describing the provision as a remedy that “federally punishes noncommercial intrastate violence.” The court referred to the remedy throughout the opinion as “section 13981,” thus de-emphasizing the fact that Congress had called it a civil rights remedy. The court first referenced the provision by the name Congress gave when it wrote, “[a]ppellants also argue that section 13981 is a ‘civil rights’ statute.” The court chose instead to categorize the remedy as regulating criminal conduct. It said that “although [the provision] provides a civil remedy, the underlying conduct to which the remedy attaches is violent crime, conduct that has traditionally been regulated by the States through their criminal codes and laws of

354. Id.
355. Id. at 793.

    VAWA legislates in an area—civil rights—that has been a federal responsibility since shortly after the Civil War. Furthermore, federal action is particularly appropriate when, as here, there is persuasive evidence that the States have not successfully protected the rights of a class of citizens. In passing VAWA Congress made extensive and convincing findings that state law had failed to successfully address gender-motivated violence against women.

Id. at 971.
359. Id. at 852.
intentional torts." The court continued, "it is clear that the balance between federal and state responsibility for the control of violent crime is implicated not only by federal criminal statutes, but also by any federal sanction for such crime, even in the form of civil remedy."

The Fourth Circuit also argued that the VAWA provision regulated a specific kind of violence—domestic violence—which, according to the court, is "a type of violence that, perhaps more than any other, has traditionally been regulated not by Congress, but by the several States." The court said that although "such violence is not itself an object of family law—an area of law that clearly rests at the heart of the traditional authority of the States ... issues of domestic violence frequently arise from the same facts that give rise to issues such as divorce and child custody, which lie at the very core of family law." The court argued for preserving the traditional responsibility of states for regulating violence within families: "Section 13981 also sharply curtails the States' responsibility for regulating the relationships between family members by abrogating interspousal and intrafamily tort immunity, the marital rape exemption, and other defenses that may exist under state law by virtue of the relationship that exists between the violent actor and victim." The court argued that states should be able to decide for themselves whether to intervene and stop violence within families. In the court's opinion, "the fact remains that these policy choices have traditionally been made not by Congress but by the States. By entering into this most traditional area of state concern, Congress has ... substantially reduced the States' ability to calibrate the extent of judicial supervision of intrafamily violence ...."

The Fourth Circuit additionally emphasized the lack of connection between gender-motivated violence and commerce arguing that "we can discern no such distinct nexus between violence motivated by gender animus and interstate commerce." The court described gender-motivated crime as "an activity that has nothing to do with commerce" and stressed the differences between the VAWA provision and previous federal civil rights laws.
3. Supreme Court Opinion

The district court, the Fourth Circuit, and finally the Supreme Court, resisted the attempt by activists and Congress to re-categorize violence against women as a civil rights issue. The Supreme Court majority began its opinion by noting that, "[i]n these cases we consider the constitutionality of 42 U.S.C. § 13981, which provides a federal civil remedy for the victims of gender-motivated violence." The Court also referred to the remedy throughout the opinion as "§ 13981." The only time the Court connected the words "civil rights" to the remedy was when it noted that Congress said that it was establishing a "[f]ederal civil rights cause of action." Justice Souter, on the other hand, referred to the remedy throughout his dissent by the name Congress gave it: "The civil rights remedy.

The Supreme Court categorized the activity regulated by VAWA as "crime" and emphasized that regulating crime was a traditional state function. The Court said that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity," and that the link between gender-motivated crime and commerce was too "attenuated." The Court said that if it upheld this provision, the reasoning could be "applied equally as well to family law and other areas of traditional state regulation." The Court concluded, "[w]e accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." For the Supreme Court, the relevant categories were "crime" and "noneconomic," not "discrimination" and "civil rights."

370. Id. at 601-27.
371. Id. at 607.
372. Id. at 628-54 (Souter, J., dissenting). Justices Stevens, Ginsburg, and Breyer joined this dissent.
373. Id. at 618 ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.").
374. Id. at 613.
375. Id. at 615.
376. Id. at 617.
IV. A Failed Category Change?

Why did commentators, newspaper editors, and finally the majority of the Supreme Court reject Congress's view that some types of violence against women are civil rights offenses and activities that the federal government can regulate? Opponents of the remedy were unable to accept the categorization of the VAWA provision as a civil rights law. This may have been due, in part, to the facts of the Morrison case itself. To many observers, the case looked like a "rape case."

The characterization of the remedy by some courts, commentators, and newspaper reporters as criminal and non-economic may have been a result of the process psychologists refer to as "categorization."

Richard Nisbett and Lee Ross discuss various heuristics or mental shortcuts, that people use to make decisions.377 The "representativeness heuristic" involves "the application of relatively simple resemblance or 'goodness of fit' criteria to problems of categorization."378 In making a judgment, people assess the degree to which features of the object are similar to features of the familiar category.379 Nisbett and Ross argue that the representative heuristic is "a legitimate, indeed absolutely essential cognitive tool."380

Although categorization may be a necessary cognitive tool, scholars have pointed out that the categories in which people place events do not preexist in the word but are created.381 Although putting an activity or event into a certain category may feel "natural," scholars argue that the ease one feels putting behavior into categories may be influenced by how accessible a certain category is.382 People may use "the felt ease of

378. Id. at 24.
379. Id.
380. Id. at 27. "Countless inferential tasks, especially those requiring induction or generalization, depend on deciding what class or category of event one is observing; such judgments inevitably hinge upon assessments of resemblance or representations." Id.
381. Douglas L. Medin, Concepts and Conceptual Structures, 44 Am. Psychologist 1469 (1989). "It is tempting to think of categories existing in the world" but it is "misleading" to do so because "people may impose rather than discover structure in the world." Id. at 1469.
382. The Handbook of Social Psychology 475 (Daniel T. Gilbert, Susan T. Fiske, & Gardner Lindzey eds., 4th ed. 1998). Analogous to the process of placing acts of "violence against women" in a category, is the process of assigning "traits" to people based on observed behavior. Regarding trait categorization the Handbook says:

What is important about trait construct accessibility is that it produces automatic behavior-to-trait encodings just as if the behavior was not ambiguous but instead clearly diagnostic. The individual is not aware of the
categorization as a cue to its validity, and trust perceptions that require little or no effort more than those that do.\(^3\) If the category is accessible, an individual may automatically assign behavior to it without thinking about other options. The “ease of categorization” makes the individual feel that the assignment of a particular behavior to a category is valid. Challenging old or traditional categorizations can be difficult.\(^4\)

Much of the violence that women experience is in the home or by people they know.\(^5\) Historically, states defined this violence as a “private” or “interpersonal” problem that was beyond the law’s reach.\(^6\) In more modern times, states began to prosecute these crimes. However, female victims of violence in many places still faced discriminatory practices by police, prosecutors, and other members of state legal systems.\(^7\) Drafters of VAWA’s civil rights remedy tried to challenge existing categorizations of domestic violence and sexual assault. They tried to redefine the violence as a matter of public and national concern; however, many resisted this category change. Pamela Coukos argues that “[d]efining violence that society has historically treated as interpersonal and private to be a matter of public concern like race discrimination

\(^{383}\) See generally Siegel, supra note 4.
\(^{384}\) Nisbett and Ross discuss the resistance to category changes, even in the face of data that challenge categorizations. Nisbett & Ross, supra note 377, at 167–92. Professor Resnik also explores categorical reasoning in the VAWA context and discusses the work of cognitive psychologists. Resnik, supra note 13, nn. 26–28; see also Rebecca M. Frumkina & Alexie V. Mikhejev, Meaning and Categorization (1996); Knowledge, Concepts & Categories (Koen Lamberts & David Shanks, eds. 1997).

\(^{385}\) See Susan A. MacManus & Nikki R. VanHightower, Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies, 49 PUB. ADMIN. REV. 269 (1989) (according to the Federal Bureau of Investigations, thirty percent of women murdered in the United States are killed by husbands or boyfriends; the United States Surgeon General reports battering as the leading cause of injury to women).

\(^{386}\) In the record before Congress, when it enacted VAWA, were reports on gender bias from task forces established by judiciaries in 21 states. These reports documented discriminatory practices against female victims of violence by police, prosecutors, judges, and jurors. See, e.g., H.R. Conf. Rep. No. 103-711, at 385–86 (1994); S. Rep. No. 103-138, at 41–55 (1993); S. Rep. No. 102-197, at 33–35, 41, 43–47 (1991); see also United States v. Morrison, 529 U.S. 598, 631 n.7 (2000) (Souter, J., dissenting) (listing the reports); Resnik, supra note 13, at 627 n.16.
forces a re-examination of deeply held views.\textsuperscript{388} According to Coukos, “[t]he private and interpersonal aspects of the violence . . . seem far from the very public principles that anti-discrimination statutes represent.”\textsuperscript{389} Some judges and individuals in the media were not accustomed to thinking of domestic violence and sexual assault as problems of group-based discrimination with economic consequences. Placing this violence in the categories of non-economic, local, or domestic relations law may have felt more natural for some. Sally Goldfarb examines how the civil rights remedy challenged the traditional distinction that the law made between the public and private spheres.\textsuperscript{390} Goldfarb says that the Commerce Clause challenge to VAWA affirmed that violence against women is too removed from the public sphere of the market. According to Goldfarb, the claim that the VAWA remedy was unconstitutional relied on the assumption that violence against women is private.\textsuperscript{391} Goldfarb explains that “while the marketplace was viewed as public and therefore an appropriate subject for legal intervention, the domestic sphere was idealized as a private realm in which affection, not law, would rule; therefore, the law adopted a policy of refusing to intrude in the family.”\textsuperscript{392} Goldfarb argues:

The claim that family issues exclusively inhabit the state courts is as inaccurate as the claim that women exclusively inhabit the domestic sphere. Characterizing family claims as devoid of monetary value is as false as characterizing family life as insulated from market forces. The view that the federal law does not intervene in family is as flawed as the view that the law in general does not do so.\textsuperscript{393}

The notion that violence against women is “private” and removed from the market makes it harder to see the civil rights remedy as analogous to other federal civil rights statutes, and proper for regulation under the Commerce Clause.

Victoria Nourse predicted, when the bill was before Congress, that many critics would not accept the analogy made between the VAWA

\textsuperscript{389} Id.
\textsuperscript{390} Sally Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 Ohio St. L.J. 1 (2000).
\textsuperscript{391} Id. at 20–21.
\textsuperscript{392} Id.
\textsuperscript{393} Id. at 33.
remedy and previous civil rights laws. 394 Nourse noted that, "[u]nlike the racially-motivated violence first outlawed by Congress in the Reconstruction era, violence perpetrated against women did not seem primarily conspiratorial, widely identified with organized political movements, or the product of publicly institutionalized slavery." 395 Nourse said that some VAWA critics found violence against women, as compared with race-based violence, "far less political and far more personal; the product of private relationships, not public discrimination." 396 She said that "its very commonness, its ubiquity, seemed to counsel against the idea that violence [against women] discriminated." 397 Some courts and commentators saw too many differences between gender-motivated violence and the model of race discrimination. Without a clear understanding of how violence against women can be discriminatory conduct, these individuals placed the violence in the categories in which it had been placed traditionally.

The discourse about the civil rights remedy could have been quite different had a case with a different set of facts made its way to the Supreme Court. For example, had a case such as the Canadian incident (where a man shot a number of female students while shouting "I hate feminists") been brought under the VAWA provision, it might have been easier for judges and the public to view the violence as discrimination and to categorize the VAWA remedy as a civil rights law. 398 But a primary purpose of the civil rights remedy was to show how cases that courts have treated as "trivial" or "ordinary"—such as a rape on a college campus—may be incidents of class-based discrimination and matters of public concern. Litigating an extraordinary case, such as the Canadian example, to the Supreme Court might have actually undermined the goals of the VAWA provision: drafters wanted to shift the understanding of violence against women so that all cases of violence against women would be taken seriously. The scope of the remedy could have been limited if such an extraordinary case was the "test" case because judges might have used VAWA's animus requirement to limit the scope of the remedy to cover only conduct that was as extreme, and as obviously motivated by gender, as the Canadian case.

Despite the Court's holding in Morrison, the attempt to categorize violence against women as a civil rights issue has not necessarily failed.

395. Id. at 4.
396. Id.
397. Id. at 4.
398. See supra note 18.
As explained above, many federal judges and a number of commentators and editors agreed with Congress and embraced the concept that some forms of violence against women are discriminatory. Now, several states and localities are considering enacting their own “civil rights” provisions to give victims of gender-motivated violence a remedy in state courts. The category shift that proponents of VAWA attempted is now being debated in state and local legislatures.

V. Local Efforts

In December 2000, New York City’s Council passed an ordinance giving victims of gender-motivated violence a civil remedy. In January 2001, Westchester County, NY, passed a similar ordinance. Illinois, New York State, Arizona, and Arkansas also have bills pending. The drafters of remedies in states and localities face questions about how to frame the rights and remedies they are creating. How broadly should these remedies be drafted? Should states make it easier for all women to sue or provide a remedy for only certain types of violence? Is structural reform of the whole system the primary goal, or is framing the remedy as a discrimination law most important?

Federalism arguments cannot be made against state and municipal remedies; however, other arguments against these remedies have emerged and will continue to emerge as more cities and states consider enacting similar remedies. As discussed above, many of the arguments made against the civil rights remedy were arguments against classifying forms of violence against women as discrimination. These arguments, and the arguments that VAWA discriminated against men and violated the civil rights of defendants, can also be made against local remedies. VAWA failed at the federal level in part because violence against women has been viewed traditionally as a private and interpersonal matter that the government should not regulate; some will not want to see the states involved in this type of regulation either.

Despite possible objections, statutes at the local level still have the potential to accomplish much more than a federal statute because the concern about jurisdiction does not exist. Before VAWA was enacted, critics complained that the remedy would overburden or flood the federal courts. Because of this concern, drafters added the animus requirement and also stated that the Act did not provide a cause of action “for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be

399. See supra Parts I.A, II.A.
motivated by gender.\textsuperscript{400} VAWA supporters emphasized that not all acts of violence against women would be within the scope of the Act. Only acts that were clearly based on gender discrimination would be covered.\textsuperscript{401}

In the state context, however, the concerns about the constitutionality of the remedy or of “flooding the federal courts” are not at issue.\textsuperscript{402} The state and local acts, therefore, have the potential to accomplish much more. Some of the local and state bills are more expansive than the federal Act, while others are almost identical. This Part examines the titles given to the bills, the language used in them, and the part of the state or local code they amend to determine how drafters categorize their efforts. Are these “civil rights” statutes or “domestic violence” statutes? Drafters of the federal VAWA attempted to reclassify acts of gender-motivated violence away from traditional tort and criminal law categories to a civil rights paradigm. We can now see legislators and activists attempting to make this shift at the local level as well.

\textsuperscript{400} 42 U.S.C. § 13981(e)(1) (1994).

\textsuperscript{401} For example, Eleanor Holmes Norton wrote:

\begin{quote}
[VAWA] continue[s] a course Congress has already begun: to bring women under civil rights protections similar to those blacks won as a result of the Civil War. . . . Violence against a black by a white is sometimes, but not always, a civil rights violation. The same is true of violence by a man against a woman. The civil rights concept is precisely what makes the new federal remedy self-limiting and unlikely to overwhelm the courts.
\end{quote}


VAWA supporters also had to convince critics that the provision was constitutional; thus, they emphasized the similarities between the VAWA provision and previous civil rights laws enacted by Congress. \textit{See}, e.g., Goldscheild, \textit{supra} note 214 (“Congress has full authority to enhance the VAWA civil rights remedy to combat gender-based violent crime that violates women’s civil rights, just as it passed Reconstruction-era civil rights laws and the Civil Rights Act of 1964 in a federal rejection of discrimination and civil rights violations.”).

\textsuperscript{402} There are, though, concerns about flooding the state courts. \textit{See} Byrne, \textit{infra} notes 423–29.
A. Description of Local Efforts

1. Enacted Ordinances

On December 19, 2000, the former Mayor of New York City, Rudolph W. Giuliani, signed a law passed by the City Council that gave victims of gender-motivated violence a civil remedy. This ordinance amended the “civil rights” title of New York City’s Administrative Code; thus signaling that the City Council intended the law to fit into the category of civil rights legislation. The New York City statute has the same “animus” requirement that the Federal VAWA contained. It also contains the limitation that no “random acts” of violence are included within the statute’s scope. Westchester County in New York has passed an almost identical ordinance creating a civil remedy for victims of gender-motivated violence.

The New York City ordinance received some media attention. A summary of the ordinance in the “Metro Briefing” section of the New York Times called the statute a “domestic violence bill.” The New York Law Journal’s headline read “Local Domestic Violence Law Elicits Applause and Questions.” These labels suggest that the media saw the legislation as a “domestic violence” law rather than a “civil rights” law. Other papers viewed the ordinance as hate-crime legislation; for example, the New York Post wrote in an editorial:

404. The law added Chapter 9 to Title 8 (“Civil Rights”) of the New York City Administrative Code. Id.
405. A “crime of violence motivated by gender” is defined 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.” N.Y., N.Y., ADMIN. CODE § 8-903(b) (2002).
406. Id. § 8-9054(b). (“[N]othing in this chapter entitles a person to a cause of action for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender. . . .”) Like the Federal VAWA, the statute awards attorneys fees and costs, id. § 8-904(3), and no criminal complaint is required to sue under the statute, id. § 8-905(c). The statute of limitations is seven years, id. § 8-905(a), which is longer than the federal VAWA’s statute of limitations (four years). The ordinance does not require the “crime of violence” to be a felony; misdemeanors also qualify. Id. § 8.903(a).
407. WESTCHESTER COUNTY, N.Y., LAWS OF WESTCHESTER COUNTY § 701.
[T]here are good reasons why this measure should not be enacted. Like all hate-crimes laws, it fosters the culture of victimization. And it creates a special protected class in which some victims are more equal than others. And it presupposes that any attack by a man against a woman was motivated primarily by gender bias. 410

This editorial raises opposition to the ordinance similar to the arguments made against the federal VAWA: 1) the remedy makes women appear as victims; 2) the statute makes some victims "more equal" than others; and 3) the statute incorrectly assumes that all male on female violence is gender-motivated.

2. Pending State Legislation

a. Illinois

The Illinois legislature is considering a bill to provide a civil remedy to victims of "gender-related" violence. The Illinois bill was first introduced before VAWA was declared unconstitutional. 411 The bill states that "gender-related violence" is "a form of sex discrimination." 412 Gender-related violence is defined as: 1) an act of violence or physical aggression satisfying Illinois's battery law 413 that is "committed, at least in part, on the basis of a person’s sex"; or 2) "a physical intrusion or

413. Id. § 5(1). Whether or not those acts have resulted in criminal charges, prosecution, or conviction.
physical invasion of a sexual nature under coercive conditions satisfying the elements of battery." \(^4\)

The Illinois bill contains no animus requirement. Acts of violence qualify, as long as they are either 1) on the "basis of a person’s sex"; or 2) a "physical intrusion or physical invasion of a sexual nature under coercive conditions satisfying the elements of battery." \(^4\) Therefore, it appears that all cases of rape or sexual assault would be covered. Finally, the bill contains no limitation that "random" acts of violence are precluded. \(^4\)

The Illinois bill has support from Governor George Ryan, \(^4\) the Governor’s Commission on the Status of Women, the Illinois Coalition Against Sexual Assault, and the Chicagoland Chamber of Commerce. \(^4\) There has been limited media commentary in support of the Illinois Gender Violence Act; \(^4\) some who opposed the federal statute support

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414. Id. § 5(2). A threat of an act described in § 5(1) or (2) is also covered. Id. § 5(3). The bill provides a ten-year statute of limitations. Id. § 20.

415. Id. § 5(2) (Ill. 2003).

416. An earlier version of the bill, H.B. 3279, 92d Gen. Assem. (Ill. 2001), defined "gender-related" violence as an act of violence "committed, at least in part, on the basis of a person’s sex, gender, or sexuality." The bill stated "sex, gender, or sexuality" includes, but is not limited to, "[a]ctual or attributed sexual orientation," "[a]ctual or attributed gender identity," or "[a]ctual or attributed sex or gender role conformity or nonconformity." H.B. 536, 93d Gen. Assem. § 5(2) (Ill. 2003) (engrossed version).


the local efforts. The *Chicago Sun Times* agreed with the Supreme Court's holding in *Morrison*: "This is a case where the federal government nosed its way into yet another area in which it does not belong." It did not, however, oppose the Gender Violence Act in Illinois. "[The Gender Violence Act's], value is mostly in making remedies already available to women and gays more explicit to the lock-step legal system. In the interest of justice for all, we can see no harm in that."

Some who opposed the civil rights remedy, however, also opposed Illinois's efforts. According to Kaethe Morris Hoffer, a member of the Governor's Commission on the Status of Women in Illinois, opposition to the bill came mainly from those opposed to including remedies for victims who are attacked because they are gay, perceived to be gay, "or who otherwise do not conform to gender roles." Some arguments made against the bill were similar to those arguments made against VAWA. Columnist Dennis Byrne, who supported the Supreme Court's ruling in *Morrison*, opposed the Gender Violence Act. Byrne said that the Illinois bill "is unfair because the remedies are excessive and precedent-setting, going beyond typical common law and many statutes," and that "[i]ts statute of limitations is too long." He also said the bill "undermines the process established by the Illinois Human Rights Act, aimed at keeping the courts from being flooded by sex and other discrimination claims, by requiring that they first be sent to the

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(Gold is Chairwoman of the Governor's Commission on the Status of Women in Illinois; Morris Hoffer is a Commission member).

421. *Id.*
422. Roger Miller, *Speaker at ISU Backs Measure on Gender Violence; Bill Would Create Civil Court Option*, Pantagraph (Bloomington, IL.), Sept. 21, 2000, at A3; see also Christi Parsons, *New Rape Suit Law Is Pushed*, Chi. Trib., May 17, 2000, at N6. The latest version of the bill does not cover crimes committed on the basis of sexual orientation.

> liberals will have to bring their agenda back to the states and the people. And in Illinois, that means the drums already are beating for the Gender Violence Act, a first-of-its-kind piece of legislation that I've previously noted is vague, unfair, unrealistic, poorly drafted, utterly useless and an assault on common law and possibly free speech. Thankfully, it hasn't gone anywhere in the Illinois Legislature.

*Id.*
425. *Id.*
Illinois Human Rights Commission." Byrne’s view that the statute goes beyond “typical common law,” and is an “assault on common law” is analogous to the federalism argument made by opponents of the federal VAWA. Reva Siegel has noted the similarities between arguments against legal intervention into intrafamily violence and federalism arguments made against the VAWA civil rights remedy. Because federalism arguments cannot be made against state civil rights remedies, common law arguments are now emerging. Byrne’s contention that we need to keep the courts “from being flooded by sex and other discrimination claims” is similar to the argument that federal courts should not be flooded with such matters; he thinks that state courts do not have room for these problems either.

Other opponents of the Illinois bill voiced concerns about the potential effects on men and defendants similar to those raised against VAWA. A letter to the editor published in the Chicago Sun-Times expressed the concern that men are victims of domestic violence: “The bill’s framers assume that victims must be either female or homosexual. Heterosexual men are implied as the abusers. Men are battered and sexually abused in large numbers, but society is afraid to talk about it.” The writer concluded that while the “Gender Violence Act is a good step . . . it should be made to help all victims—male and female. The definition of sex discrimination should be changed so that it is biologically neutral.” Concern about the rights of defendants has also been raised. The Pantagraph of Bloomington, Illinois wrote an editorial against the bill saying that “this vague and overly broad legislation . . . could trap in its net innocent parties who would be stuck with large attorney’s fees, time-consuming legal proceedings and the risk of large monetary judgments.”

426. Id.
427. Byrne, supra note 423.
428. Reva Siegel, supra note 4, at 2202 (“Federalism discourses about the family grew up in intimate entanglement with the common law of marital status. Indeed, as we examine the claim that marriage is a state-law concern, it begins to appear that federalism discourses about marriage bear strong family resemblances to common law privacy discourses about marriage, and in some instances are even direct descendants of the discourse of affective privacy.”).
430. Id. In fact, the language of the bill is gender-neutral.
431. Bill Willis, No Need for Special Lawsuits Related to ‘Gender Violence,’ PANTAGRAPH (Bloomington, IL), Feb. 18, 2000, at A16.
b. New York State

The proposed New York State bill would amend the state's civil rights law and provide a civil cause of action for both "domestic violence" and "gender motivated violence." "Domestic violence" is defined as a crime or violation of the penal law "which has been alleged to have been committed by any family or household member against any member of the same family or household." "Gender motivated violence" is defined as a crime "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." Filing of criminal charges is not required to bring a claim under the bill. The bill provides that any "person, entity, or enterprise" who commits an act of domestic violence or gender motivated violence shall be liable to the injured party for the "recovery of three times the compensatory and punitive damages, injunctive and declaratory relief" and attorney's fees and costs. The bill provides that no cause of action shall exist for "random acts of violence unrelated to domestic issues or gender or for acts that cannot be demonstrated by a preponderance of evidence to have been committed on the basis of domestic issues or gender and due at least in part to an animus based on the victim's domestic situation or on the victim's gender." The scope of the New York bill is not clear from its text. The bill appears to provide a cause of action for all victims of domestic violence; however, it also provides that no random acts of violence are covered.

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433. Id. § 3. The bill also prohibits certain activity: "It shall be unlawful for any person, enterprise or any person employed or associated with any person or enterprise to conspire to, attempt to, or otherwise employ domestic violence or gender motivated violence for any purpose." Id. § 2. Also introduced in New York is a bill that provides a civil cause of action for violations of the State's hate crime law, which includes hate crimes committed on the basis of sex and gender. S.B. 2776, 224th Ann. Leg. Sess. (N.Y. 2001). A person is civilly liable if he or she acts with "the intent to deprive an individual or group of individuals of the exercise of their civil rights because of the individual's or individuals' . . . gender, sex . . . ." Id. § 2. At least three states (California, Michigan, and Vermont) have passed hate crime statutes that include civil penalties for gender-motivated violence. See CTR. FOR WOMEN POL'Y STUD., VIOLENCE AGAINST WOMEN AS BIAS MOTIVATED HATE CRIMES: DEFINING THE ISSUE 15–17 (1991).
435. Id. § 1(b).
436. Id.
437. Id. § 3(a).
438. Id. § 3(c).
To be covered under the New York bill, the act must be “due at least in part to an animus based on the victim’s domestic situation.” It is not clear how courts would interpret this animus provision.\footnote{439}

c. Arizona

A bill was introduced in Arizona in 2000, but it did not pass.\footnote{440} A similar bill was introduced again in January 2001;\footnote{441} it passed the State Senate on March 7, 2001 by an 18-12 vote\footnote{442} but has not yet passed the House. The proposed bill “creates a state civil rights remedy for victims of gender-motivated violence.”\footnote{443} It defines an “act of violence motivated by gender” as “an act of violence committed in whole or in any part on the basis of gender and due in whole or in any part to an animus based on the victim’s gender.”\footnote{444} The bill includes a VAWA-like provision excluding a cause of action for “random acts of violence.”\footnote{445} There has been very little media coverage of this bill.\footnote{446}

\footnote{439. The definition of gender motivated violence under the New York bill differs from the VAWA definition: acts are gender motivated if they are “committed because of gender, or on the basis of gender, or on the basis of gender and due at least in part to an animus based on the victim’s gender.” \textit{Id.} § 3(b) (emphasis added). Because of the use of the word “or,” an act is gender motivated if it is simply on the basis of gender (with no showing of animus). However, section 3(c) appears to limit the cause of action to acts “due at least in part to an animus based on... the victim’s gender.” \textit{Id.} § 3(c).


441. S.B. 1550, 45th Leg., 1st Reg. Sess. (Ariz. 2001). The proposed bill would amend Title 12 (“Courts and Civil Proceedings”), Chapter 6 (“Special Actions and Proceedings by Individual Persons”), Article 12 (“Miscellaneous”) of the Arizona Revised Statute. The placement of the bill in this area of the code suggests that the remedy is viewed as “miscellaneous” and does not fit into any other existing category such as “civil rights” (unlike the New York City ordinance that amended the civil rights section of the code). The “civil rights” section of the Arizona code is in Title 41 “State Government,” Chapter 9 “Civil Rights.”

442. \textit{Capital Roundup}, \textit{Arizona Republic}, Mar. 8, 2001, at AB4. It does not appear that the bill has been introduced in the current legislative session.


444. S.B. 1550, § 1(E)(2). This definition is slightly different from the VAWA definition. The Arizona bill has a seven-year statute of limitations, \textit{id.} § 1(D), and does not require a prior criminal complaint. \textit{Id.} § 1(C).

445. \textit{Id.} § 1(B).

446. The only article in the Lexis database to mention the bill noted that it had passed the Senate. \textit{Capital Roundup, supra} note 442, at AB4.
d. Arkansas

A bill creating a civil remedy for victims of gender-motivated violence has been introduced also in Arkansas.447 This bill received little media attention.448 The Arkansas bill defines an “act of violence motivated by gender” as “an act 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.”449 An “act of violence means any violation of Arkansas law where a person purposefully or knowingly causes, or threatens to cause, death or physical injury to another person or persons, specifically including rape.”450 Although the Arkansas bill explicitly includes rape as an “act of violence,” this does not mean that all rape necessarily qualifies as “an act of violence motivated by gender.” The act of violence, the rape, still needs to be “motivated by gender”; it is unclear on the face of the Arkansas bill whether all rapes are considered motivated by gender. The bill explicitly provides that an “act of violence includes any violation of Arkansas law that would be a violent act as described in subdivision (A) but for the relationship between the person who commits the violation and the individual against whom the violation is committed.”451 As with the bills pending in other states, there is no requirement in the Arkansas bill that a criminal charge be filed.452

B. Potential for Local Remedies

The Supreme Court’s decision in Morrison encouraged a number of states and localities to propose remedies similar to the federal VAWA. These remedies, if enacted, could cover a broader range of conduct than the federal remedy did and therefore be available to more victims of violence. There also is an educational benefit derived from the consideration of this legislation at the state and local level. In addition

448. There is no mention of the bill in the Lexis database containing the major Arkansas newspapers.
449. H.B. 1691, § 1(b)(1). This is the same wording as the federal VAWA provision except that it uses the phrase “act of violence” rather than “crime of violence.”
450. Id. § 1(b)(2)(A).
451. Id. § 1(b)(2)(B). Presumably this clause clarifies that marital or familial exemptions do not apply.
452. Id. § 1(e).
to considering these specific civil remedies, states may also examine other aspects of their court systems in an attempt to eliminate gender bias. VAWA sought to provide a remedy to victims of gender-motivated violence at the federal level because victims were being denied adequate remedies at the local level. If localities now enact remedies and examine their systems, these changes would address the concerns of VAWA proponents and could be much more far reaching than VAWA ever could have been.

Statutes giving victims of gender-motivated violence a civil remedy can do more to transform attitudes about gender-motivated violence and the criminal justice system than state hate-crime statutes enhancing penalties for gender or sex-based crimes or attaching civil remedies to existing hate-crime statutes. Gender has been added to hate-crime statutes in a number of states. The addition of the word gender, unfortunately, tends to include little discussion about what a "gender-based" crime actually is. Furthermore, very few prosecutions have


455. Congress debated (and the Senate passed) a federal hate crime bill that adds gender as a protected category along with sexual orientation and disability. Although the inclusion of sexual orientation in the bill received a lot of attention, the inclusion of gender was rarely discussed. There was little discussion about the sort of crime that would actually qualify as a gender-based hate crime under the proposed legislation. Some writers said that the bill would make all rapes a federal crime, others noted Orrin Hatch’s comment that all rapes could be federal crimes under the bill. See, e.g., The Flaw in Hate Law, Editorial, Indianapolis Star, July 31, 2000, at A10 (“Sen. Orrin Hatch, R-Utah, chairman of the Senate Judiciary Committee, suggested the bill could allow all rapes to be tried as federal hate crimes.”). An incident in Central Park, where a group of men sexually assaulted women who walked by, was one of the few times that the concept of a “gender-based” hate crime was discussed in the media. Melissa Grace, Call for Laws to Protect Women, Daily News, June 17, 2000, at 4 (“The wolf pack attacks in Central Park were hate crimes against women, and federal laws need to be toughened to protect against gender-based crimes, Rep. Carolyn Maloney said yesterday.”).
been brought for gender-based hate-crimes.\footnote{Fewer than 10 cases charging a gender-based hate crime have been brought nationwide. Telephone Interview with Staff Member, Anti-Defamation League (Aug. 2000).} The low number of prosecutions for these crimes suggests that the definitions of these crimes are murky. The laws as they stand are ineffective both as symbolic measures and as practical tools. The consideration and enactment of civil remedies specifically aimed at gender-based violence has more potential to generate discussion and awareness of how violence against women affects women as a class than does the addition of gender to hate crime statutes.

Unfortunately, it seems unlikely that the states that most need reform will enact remedies for victims of gender-based violence. The federal VAWA had the benefit of reaching victims of gender-motivated violence everywhere in the U.S., not just in the more progressive jurisdictions. Interestingly, before the Civil Rights Act of 1964 was enacted, there were a number of anti-discrimination statutes in states around the country. The Supreme Court cited to these statutes in its \textit{Heart of Atlanta} opinion:\footnote{Heart of Atlanta Motel v. United States, 379 U.S. 241, 259 n.8 (1964).} “There is nothing novel about [the federal] legislation. Thirty-two States now have it on their books either by statute or executive order and many cities provide such regulation.”\footnote{\textit{Id.} at 259.} Although the enactment of federal civil rights legislation followed widespread acceptance of similar laws in the states, the federal remedy was still needed to reach victims of discrimination in states that refused to enact civil rights statutes.

The enactment of remedies for gender-motivated violence in more and more states will put pressure on other states to reform their systems. Resistance to change may yet require a federal solution. Although the solution will have to take a different form than the original VAWA provision, the argument that a federal remedy is necessary will become stronger as more states enact VAWA-like remedies.

Proponents of state remedies will have to overcome hurdles. The discourse about VAWA’s civil rights provision in newspaper articles, editorials, commentaries, and in court opinions gives insight into the challenges that proponents of remedies could face at the state level. Drafters of local remedies must be mindful that labeling the remedy a “civil rights law” does not ensure that the press, commentators, or courts will categorize and interpret the law as civil rights legislation. The press abandoned the use of the label “civil rights” in its description of the
VAWA remedy, and the Court rejected this classification. Editorials joined the Court in opposing the remedy, and the press framed the issue before the Court in a way that de-emphasized the civil rights issues at stake. Proponents of state and local remedies must, therefore, respond effectively to claims that the new provisions undermine the rights of men and defendants and invade the common law. There will be attempts to limit the scope of these remedies, and drafters will have to decide whether passing bills with strict limitations is worth the compromise. For state remedies to be successful, supporters must work to shape discourse about these remedies in legislatures, in the press, and in the courts.

CONCLUSION

Drafters of the Violence Against Women Act hoped to change attitudes about violence against women through the civil rights remedy. Historically, state legal systems have trivialized or ignored violence against women, especially when this violence is committed in the home or by someone the woman knows. By attempting to re-categorize violence against women as a civil rights issue, supporters of the VAWA remedy wanted to show how gender-motivated violence affects women as a class. Proponents of the remedy sought to provide a federal forum for victims of violence to find redress. By placing the matter in federal court, proponents also hoped to send a message that the violence was of national concern.

This Article reveals that the press initially called the VAWA provision a civil rights remedy, but shifted towards describing it as a rape law or a civil remedy. Ultimately, the Supreme Court rejected Congress's categorization of the remedy as a civil rights law and an appropriate area for federal regulation. Many commentators and newspaper editors supported the Morrison decision and argued against describing gender-motivated violence as discrimination. A number of federal court judges, newspaper editors, commentators, professors, and politicians, however, embraced the idea of the violence as a civil rights matter. The debate over the remedy helped educate the public about the discriminatory nature of some types of violence against women and the problems that victims of this violence faced in state legal systems.

A number of states and localities are now considering enacting their own civil rights provisions. Enactment of statutes at the local level can help bring about the changes in attitude and practice that the drafters of VAWA wanted. These remedies have the potential to be further reach-
ing and more effective than the federal VAWA. If the categorization of violence against women as a civil rights issue is to be successful at the local level, proponents of these remedies must understand the last decade of debate over the federal VAWA and work to shape the public discourse around these new remedies.