

NOTES

RESURRECTING A DEAD HORSE: THE CONSTITUTIONAL VIABILITY OF VAWA'S CIVIL RIGHTS REMEDY UNDER THE TREATY POWER

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I. INTRODUCTION

"Violence against women is a bad thing"—if this does not sound familiar, it should, at least, sound obvious. Precisely why the civil rights remedy (CRR) of the 1994 Violence Against Women Act (VAWA) actually ameliorates the problem is less obvious.¹

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1. Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1796, 1992-55 (codified at 42 U.S.C. § 13981) [hereinafter CRR]. The full text of the Civil Rights Remedy Provision (§ 40302) of the Violence Against Women Act of 1994 reads:

(a) Purpose. — Pursuant to the affirmative power of Congress to enact this subtitle under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this subtitle to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

(b) Right to be Free From Crimes of Violence. — All persons within the United States shall have the right to be free from crimes of violence motivated by gender (as defined in subsection (d)).

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

(d) Definition. — For the purpose of this section —

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

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

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

The vast majority of scholarly debate on the CRR has been targeted towards arguing or rebutting its constitutionality under the Commerce Clause² and the Fourteenth Amendment.³ Now that the Supreme Court has definitively resolved this battle against the CRR,⁴ further discussion may seem to amount to beating a dead horse. Yet, this Note aims to muster-up another round of the debate.

One desperate flaw pervades most of the scholarly VAWA discussion: distracted by the question of *how* the provision *can* survive constitutional challenges, scholars have failed to adequately explain *why* the provision *should* survive.⁵ What good will civil remedies do for victimized women? Why aren't the legal remedies presently available to women enough to solve the problem? Why must the solution be implemented at the federal level? These are just some of the questions infrequently and often inadequately addressed.

Whether its backers realize it or not, the VAWA bandwagon was a worth-while ride; behind all of the baton twirling accompanying VAWA is a sophisticated solution to a cumbersome problem. Since the Supreme Court began considering whether the CRR provision was a constitutional use of Congress's commerce and enforcement powers, scholars have pointed to the treaty power as an alternative source of authority for congressional enactment of the provision.⁶ Specifically, scholars have indicated that Amer-

prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

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

(e) Limitation and Procedures. —

(1) LIMITATION. — NOTHING IN THIS SECTION ENTITLES A PERSON TO A CAUSE OF ACTION UNDER SUBSECTION (C) 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 (WITHIN THE MEANING OF SUBSECTION (D)).

(2) No Prior Criminal Action. — Nothing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c).

(3) Concurrent Jurisdiction. — The Federal and State courts shall have concurrent jurisdiction over actions brought pursuant to this subtitle.

(4) Supplemental Jurisdiction. — Neither section 1367 of title 28 of the United States Code, nor subsection (c) of this section shall be construed, by reason of a claim arising under such subsection, to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree.

(5) Limitation on Removal. — Section 1445 of title 28, United States Code, is amended by adding at the end the following new subsection:

“(d) A civil action in any State court arising under section 40302 of the Violence Against Women Act of 1994 may not be removed to any district court of the United States.”

2. U.S. CONST. art. I, § 8, cl. 3 (“Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States . . .”).

3. U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”). For an indication of the nature of the scholarly work written on the CRR of VAWA, see Christopher Regan’s footnoted summary of the student works written before 1999. Christopher James Regan, Note, *A Whole Lot of Nothing Going On: The Civil Rights ‘Remedy’ of the Violence Against Women Act*, 75 NOTRE DAME L. REV. 797, 797 n.4 (1999).

4. 529 U.S. 598, 627 (2000).

5. See Regan, *supra* note 3, at 797-99 & n.1-4 (1999) (“When a law is referenced in more journal articles than court cases, both the writers and the lawmakers have made a mistake. One such mistake is the vaunted civil rights remedy provision of the 1994 Violence Against Women Act. The civil rights remedy was intended to be a federal response to the problem of violence against American women. Unfortunately, the civil rights remedy has proven to be a federal response to the problem of journal topic selection for American law students.” (citations omitted)).

6. See Brief Amici Curiae on Behalf of International Law Scholars and Human Rights Experts in Support of Petitioners at 3, *Brzonkala v. Morrison*, 529 U.S. 298 (Nos. 99-5, 99-29) [hereinafter *International*].

ica's obligation under the International Covenant on Civil and Political Rights (ICCPR)⁷ may obligate Congress to pass legislation, like the CRR, to bring America's laws up to international snuff.⁸ This note will retrace this argument, concluding not only that the CRR can be salvaged under the ICCPR, but also that it is worth salvaging, and, moreover, that it should be salvaged in accord with America's international obligations.

II. THE RISE AND FALL OF THE VIOLENCE AGAINST WOMEN ACT

A. *The Rise*

1. Identifying the Problem

Beginning in the early nineties, the United States Congress was confronted with staggering statistics evidencing the increase in violence against the nation's women: it "is the leading cause of injuries to women ages 15 to 44, more common than automobile accidents, muggings, and cancer deaths combined. . . . [Four] million women a year are the victims of domestic violence. Three out of four women will be the victim of a violent crime sometime during their life."⁹ Facts like these saturated reports and hearings on gender motivated crimes and led to one astounding conclusion: "As the general crime rate rises, women are bearing an increasingly disproportionate share of this epidemic of violence."¹⁰ The problem Congress faced, however, did not end with these statistics. Accompanying these chilling facts was also an institutional bias. The American legal system not only failed to adequately address the problem, but also tacitly endorsed violence against women: "Under English common law, the 'rule of thumb' stipulated that a man could only beat his wife with a 'rod not thicker than his thumb.'" The attitude exemplified by this rule is found throughout the criminal justice system."¹¹ Congressional hearings became national confessionals, as Congressmen like George Gekas revealed: "For a long time, I had been laboring under the false impression that we had made great strides in the arena of victimization of women."¹² The truth was plain: not only was the crime rate rising to disproportionately terrorize women, and not only was the justice system not adapting to counter this trend, but the historical biases against gender-motivated crimes that burdened the justice system were also compounding the problem.

Lawyers' Brief]. See also Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 166-167 (2000).

7. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966) [hereinafter ICCPR].

8. See International Lawyers' Brief, *supra* note 6, at 15.

9. S. REP. NO. 103-138, at 38 (1993).

10. *Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the Comm. on the Judiciary*, 102d Cong., 2d Sess. 1 (1992) [hereinafter 1992 *Hearing*] (opening statement of Chairman Schumer).

11. S. REP. NO. 103-395, at 27 (1993) (citing United States Commission on Civil Rights, "Under the Rule of Thumb: Battered Women and the Administration of Justice" 2 (Jan. 1982) (quoting Blackstone, "Commentaries on the Laws of England" (1765))). See also Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L. J. 1281 (1991).

12. 1992 *Hearing*, *supra* note 10, at 4. For more information and statistics on the problem of violence against women, see *Violence Against Women: Victims of the System: Hearing on S. 15 Before the Senate Comm. on the Judiciary*, 102d Cong. 189 (1991); *Women and Violence: Hearing Before the Senate Comm. on the Judiciary on Legislation to Reduce the Growing Problem of Violent Crime Against Women*, 101st Cong., 2d Sess. 77 (1990).

2. Proposing a Solution

Recognizing the problem was only the first step. In 1990, Senator Joseph Biden of Delaware proposed a solution: the Violence Against Women Act, a comprehensive congressional response to the “escalating problem of violence against women.”¹³

[The Act’s] goals [were] both symbolic and practical; the act [was] intended to educate the public and those within the justice system against the archaic prejudices that blame women for the beatings and the rapes they suffer; to [provide] women the support and the assurance that their attackers will be prosecuted; and to ensure that the focus of criminal proceedings will concentrate on the conduct of the attacker rather than the conduct of the victim.¹⁴

It aimed to achieve these goals through a multi-pronged approach. As The Congressional Research Service summarized, “VAWA established within the Department of Justice (DOJ) and Health and Human Service (HHS), a number of discretionary grant programs for state, local, and Indian tribal governments.”¹⁵ Most of these grant sources supplemented local law enforcement efforts:

[B]y providing assistance to State . . . agencies, by making interstate domestic violence . . . punishable by Federal prosecution, by encouraging arrest of domestic violence offenders,

[B]y funding rape education and prevention programs,

[B]y training judges to better handle [relevant] cases . . . ,

[B]y preventing violators of certain restraining orders from obtaining firearms, and

[B]y permitting battered immigrant women to leave their batterers without fearing deportation.¹⁶

Other components of VAWA, however, included “funds for battered women’s shelters, rape prevention and education, reduction of sexual abuse of runaway and homeless street youth, and community programs on domestic violence.”¹⁷

VAWA included the above arsenal of solutions and also, most controversially, “the act [provided], for the first time, a Federal civil rights remedy aimed at violent gender-based crimes.”¹⁸ Modeled after existing civil rights legislation, the section “covered . . .

13. S. REP. NO. 103-138, at 37 (1993).

14. *Id.* at 38.

15. Alison Siskin, *Congressional Research Service Report for Congress: Violence Against Women Act: History, Federal Funding, and Reauthorizing Legislation*, at Summary (2001), available at <http://usinfo.state.gov/usa/women/violence/r130871.pdf>.

16. S. REP. NO. 103-395, at 25 (1993).

17. Siskin, *supra* note 15. Later versions of VAWA, specifically the 2000 VAWA created additional “grant programs to prevent sexual assaults on campuses, assist victims of violence with civil legal concerns, create transitional housing for victims of domestic abuse, and enhance protections for elderly and disabled victims of domestic violence. [They] also [created] a pilot program for safe custody exchange for families of domestic violence . . . [and authorized] a number of studies on the effects of violence against women, [created] a domestic violence task force, and [included] changes in the federal criminal law relating to interstate stalking and immigration.” *Id.*

18. S. REP. NO. 103-138, at 38 (1993).

crimes of violence, including felony rape, sexual assault, kidnapping, and any other felonies against the person . . . motivated, at least in part, by an animus toward the victim's gender."¹⁹

3. Passing the Solution

In the three years following Senator Biden's 1990 introduction of VAWA, the bill underwent vast legislative scrutiny.²⁰ Testimonies of victims of violent acts, law enforcement officials, university scholars, and managers of women's shelters bombarded congressional committees and subcommittees. Through the same mandatory process by which bills are passed, Senator Biden spearheaded an impassioned drive to educate Congress and the public about the problems facing women. He first met with opposition, not only from traditionally conservative-minded congressmen, but also from those most likely to support the bill, like women's groups, whose priorities focus elsewhere. "Biden met initially with a lukewarm response from women's groups . . . and outright resistance from others. But over the years, opposition [fell] away, [and] women's groups . . . lined up solidly behind the legislation. . . . Biden [garnered] more than 60 cosponsors."²¹ While women's groups began lining up behind the bill from the left, years in committee also greeted the bill with support from the right; in 1993, extensive discussions between Senator Biden and Senator Hatch resulted in the refinement of the bill.²² As Senator Biden humorously noted in his testimony before the Subcommittee on Crime and Criminal Justice: "[VAWA] is bipartisan . . . Strom Thurmond and Joe Biden, the ultimate odd couple, both strongly support the legislation. Orrin Hatch and Ted Kennedy—I can go down the list."²³ What began as a reply to a little-known tragedy culminated in a popular solution that transgressed partisan lines. On July 28, 1994, Congress passed VAWA in the context of a \$30.2 billion piece of anti-crime legislation, a passage heralded as a personal victory for Senator Biden and a collective victory for the nation's women.²⁴ The first step in "forging a national consensus that our society will not tolerate [such] violence" had been taken.²⁵

4. Analyzing the Efficacy of the CRR

VAWA, the CRR in particular, was undoubtedly a popular solution to the problem. Questions arise as to whether the CRR was a step forward or a step back in the fight against violence against women. No one debates that there is a problem facing women and that something needed to be done; critics argue, however, that *this* something was not the best solution. The feared logic is as follows: "Something must be done; this is something; therefore this must be done."²⁶ The logical flaw is obvious.

19. *Id.* at 64.

20. For a detailed account of the bill's movement through the Senate and House committees and subcommittees, see S. REP. NO. 103-395, at 28-29 (1993).

21. Barbara Vobejda, *Battered Women's Cry Relayed Up From Grass Roots*, WASH. POST, July 6, 1994 at A1.

22. S. REP. NO. 103-138, at 40.

23. 1992 *Hearing*, *supra* note 10, at 9 (statement of Senator Joseph Biden).

24. Ann Devroy & Kenneth J. Cooper, *\$30 Billion Voted to Combat Crime; Clinton Seeks Credit for Toughest Bill*, WASH. POST, July 29, 1994, at A1.

25. S. REP. NO. 103-138, at 42 (1993).

26. Regan, *supra* note 3, at 811.

a. *Arguments for the CRR*

In the course of VAWA's passage, Congress has proffered many arguments in support of the Act, most focusing on the CRR's constitutionality and not upon its content. Although arguments for the CRR's constitutionality tangentially address why the CRR in particular is a good solution to the problem, these reasons must be underscored. The first justificatory argument for the CRR is negative in that it supports a *federal* remedy by pointing to the inefficiencies of state governments in addressing the problem. This first argument, insofar as it casts blame on criminal enforcement in general, also indirectly supports a *civil* remedy. The next argument similarly supports a *federal* remedy by explaining the psychological depth of the problem and the need for an efficient, wide-sweeping remedy. This argument dovetails into a justification of the federal CRR based upon the federal government's obligation to support oppressed local groups. The final argument presents positive justifications for the CRR, postulating that the symbolic importance of a federal remedy and the empowering effect the civil remedy has upon the victims of violence warrant the CRR.

Congress made negative arguments on behalf of the CRR, touting the ineffectiveness of local governments—in their laws, judiciary, and policing—in addressing violence facing women as the primary motivating factor behind creating a federal cause of action.²⁷ The bare statistics of the problem of violence against women, which escalated when under the sole dominion of local governments, certainly enforce the opinion that state solutions were not enough. Historical biases that allowed the perpetuation of violence against women pervaded the common law system adopted by the states, the “rule of thumb” being one example of such a bias.²⁸ More modern embarrassments in state laws, however, further evidence their ineffectiveness. For example, “States . . . fail[ed] to recognize rape of a spouse as a criminal act; other States do not prosecute husbands for rape unless a wife suffers ‘additional degrees of violence like kidnapping or being threatened with a weapon;’ others classify rape of a spouse as a less serious crime with lesser penalties.”²⁹ These laws were historical manifestations of societal prejudices still present in local judiciaries and police forces. A skeptical attitude of state judges and police toward female victims is not uncommon.³⁰ Moreover, even absent a skeptical attitude (conscious or unconscious) toward female victims, state police often fail to adequately address the problem at the scene of the crime.³¹ Insofar as federal agencies are also ill-equipped to handle the policing of all violence against women, this argument against state mechanisms is limited. However, VAWA did not suggest a complete-transfer-of-policing solution. Rather, VAWA addressed this problem by granting funds for state judicial and police training.³² Of course, in addition, VAWA created the CRR. By simply creating a federal remedy, the CRR both solves the problem of inadequate

27. S. REP. NO. 103-138, at 44 (“[The civil rights provision] recognizes that State remedies are inadequate to fight bias crimes against women.”).

28. See discussion, *supra* note 11.

29. S. REP. NO. 103-138, at 42.

30. See Alberto B. Lopez, *Forty Yeas and Five Nays—The Nays Have it: Morrison’s Blurred Political Accountability and the Defeat of the Civil Rights Provision of the Violence Against Women Act*, 69 GEO. WASH. L. REV. 251, 251 (2001).

31. See 1992 Hearing, *supra* note 10, at 74-75 (the prepared statement of Margaret Rosenbaum, Assistant State Attorney, Miami, Florida, and Division Chief, Domestic Crimes Unit).

32. See 1992 Hearing, *supra* note 10, at 16-18 (the prepared statement of Rep. Boxer).

state laws and creates an alternative to inadequate state criminal enforcement mechanisms.

To suggest that state laws could remedy the larger problem in a piecemeal fashion by fixing state inadequacies is not unfathomable. The psychological depth of the problem facing women, however, indicates that the dangers warrant a more immediate, wide-sweeping solution. As Senator Biden testified before Congress:

[O]ne-quarter of all the young men of junior high school age believed that if a man spends \$10 on a woman he is entitled to force sex on her. That is startling. What is even more startling is that one-fifth of the girls thought the same thing. Twenty percent of the girls . . . —seventh . . . , eighth . . . , and ninth grade—said that if a man spends \$10, he has a right to force sex. We have a cultural problem in this country.³³

These statistics reminisce of the facts that faced the Court in *Brown v. Board of Education*,³⁴ and illustrate how the problem of violence against women, like the problem of racism, runs so psychologically deep that the political process may be slow to remedy it. Indeed, the parallels between youth's perception of racism in the 1950s and gender-motivated violence in the 1990s underscore the gravity of the problem. The problem compounds the problem: not only are women victims, but because the problem is so culturally pervasive, they have grown complacent in their victimization. As Senator Biden testified: "no *one* State law . . . is likely to change nationwide attitudes."³⁵ By virtue of the scope of its jurisdiction, the federal government is in a position to fix this problem in a way that local governments cannot. The checks of federalism cut both ways: not only do they safeguard against the tyranny of the federal government, but they also prevent oppression by the local government. Groups potentially victimized by their status at the local level can still be assured "justice" and "tranquility" through federal legislation.³⁶ By creating a federal cause of action, the CRR allows for a universal solution to the problem.

A federal civil remedy has the additional bonus of placing symbolic importance upon the problem of gender-motivated violence. As Congress intended, the CRR "sen[t] a powerful message that violence due to gender bias affronts an ideal of equality shared by the entire Nation."³⁷ This argument, although true, can be tricky; insofar as it has the power to demote a civil remedy to a mere gesture, stressing the CRR's symbolic importance might unintentionally give rise to the inference that a civil remedy does not actually help in a substantive way. This, however, is a false inference. For supporters to say

33. 1992 Hearing, *supra* note 10, at 8.

34. 347 U.S. 483 (1954). In *Brown*, expert witness Dr. Kenneth Clark famously described an experiment he did with black children at a neighborhood elementary school. These children were asked a series of questions regarding two dolls identical in every way but skin color. These questions asked the children to choose between the dolls (e.g. "Show me the doll you would most like to play with," "Show me the bad doll."). The test revealed a deep inferiority complex among black children as young as six and seven years old. The conclusion drawn by the expert and the court was that this was the result of a cultural problem, specifically, state instituted segregated schooling. See generally, Gordon J. Beggs, *Novel Expert Evidence in Federal Civil Rights Litigation*, 45 AM. U.L. REV. 2, 9-16 (1995).

35. 1992 Hearing, *supra* note 10, at 8 (emphasis added).

36. U.S. CONST. pmbl. See generally Lopez, *supra* note 30, at 291 (concluding that "History demonstrates . . . that state governments use their sovereign rights as a proxy for state-sponsored discrimination, thereby leaving some without redress for discriminatory acts.").

37. S. REP. NO. 103-138, at 44 (1993).

that the CRR is symbolically important is not to make a “self-parody.”³⁸ Just as a civil remedy genuinely furthered the movement to eradicate racial discrimination, so too can the CRR aid in eliminating gender biases.³⁹ Congress, in fact, self-consciously likened the two movements, thereby placing gender-motivated crime on the same platform of moral repugnancy as racially-motivated crime.⁴⁰ Society outlines what is acceptable by prohibiting unacceptable behavior through the legal system. By creating a civil cause of action for gender-motivated violence, society voices the notion that violence motivated by gender is wrong in a way that ordinary violence is not. There is an additional and distinguishable element of culpability for the gender-motivated crime. The CRR recognizes this and in addition to creating a real cause of action for victims, it symbolizes a moral turning for society.

Beyond the significance of a federal remedy stand the benefits inherent in a civil remedy. It is important to note first and foremost that the civil remedy does not usurp criminal sanctions for gender-motivated crimes. Criminal sanctions are distinguishable from civil sanctions, at least in part, because criminal conduct is an affront to society. That is not to say that society does not have an interest in seeing civil justice done; it is only to say that crime strikes at human dignity in a way that traffic violations do not. To remove gender-motivated violence from the criminal sphere totally, then, would be a mistake. One drawback to the criminal system, however, is that it is society (through the prosecutors and judiciary) that is enacting retribution—on behalf of all victims, yes, but at the expense of the control of the particular victim of the action. Where society has an interest in empowering the victim, as is the case in gender-motivated crime, the additional remedy of civil sanctions are appropriate. “It is not sufficient that a woman merely be able to have the satisfaction that her attacker is punished under the criminal justice system. She does not control that process—as the prosecutors . . . can tell you—the prosecutor does.”⁴¹ Civil sanctions give the victim an element of control over the harm while imposing another element of punishment upon the offender (i.e., taking his or her possessions unrightfully retained while the victims incur the expenses associated with the harm). Because the mechanisms of criminal enforcement are riddled with biases, the control afforded to victims of gender-motivated violence becomes especially important.⁴² In summary, the civil remedy gives victims a more powerful voice in the legal setting, one that could potentially further eliminate the deeply embedded psychological misconceptions of the role of women lying at the heart of the problem.⁴³

38. See Regan, *supra* note 3, at 810.

39. To say that the civil rights movement against racial discrimination and the legislation enacted as a result of this movement, such as the Civil Rights Act of 1964, actually helped to eliminate racial discrimination is a controversial statement. For an argument on the merits of the civil rights legislation of the 1960s, see generally THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION (Robert D. Loevy ed., 1997).

40. See, e.g., S. REP. NO. 103-138, at 38 (“It is time for attacks motivated by gender basis to be considered as serious as crimes motivated by religious, racial, or political bias.”). See also S. REP. NO. 103-138, at 48 (“Congress has the power to recognize that violence motivated by gender bias ‘is not merely an individual crime or a personal injury, but is a form of discrimination.’” (citing Women and Violence: Hearings before the Comm. on the Judiciary, U.S. Senate, 101st Cong. (1990) (written testimony of Helen Neuborne)).

41. 1992 Hearing, *supra* note 10, at 9.

42. See MacKinnon, *supra* note 6, at 138 (“The civil remedy allowed survivors to initiate and control their own litigation against sex-based violations rather than leaving them at the mercy of police or prosecutorial discretion.”).

43. See 1992 Hearing, *supra* note 10, at 11 (“Every day we ignore the problem, thousands of women – literally thousands – are raped and battered in this country, and every day we fail to respond we help perpetu-

Congress's initial argument for the CRR stemming from the inadequacies of state solutions taken by itself would not seem enough to support the CRR as a good solution. However, perhaps the same reasons why local solutions have failed—the deep historical and psychological roots of the problem, the universal pervasiveness of the problem, the unique silence of the victims of the problem—support a wide-sweeping national, particularly civil, solution. Thus, a robust presentation of the negative arguments against state solutions only lends credence to the positive argument for a federal civil remedy.

b. Substantive Criticisms of the CRR as a Solution to Violence Against Women

Substantive criticisms of the CRR surround two themes: that the civil remedy itself is inappropriate and that a federal forum is ineffective. The first set of criticisms focus upon: (1) the perceived inappropriateness of a monetary remedy for gender-based violence; (2) the lack of plaintiffs due, in part, to the costs of litigation; and (3) the inability of most defendants to pay the monetary damages awarded by the court. The second set of criticisms focuses upon: (1) the availability of state civil remedies; and (2) the realities of federal courts' dockets and the purported inability of state courts to fairly adjudicate claims under the CRR. Both themes overlook arguments of the symbolic importance of the Act to expose concerns about the Act's practical implementation and direct ability to aid victims.

The criticisms of providing a civil remedy surround concerns about money. Fundamentally, critics question whether money is an appropriate measure of redress for such violations. The argument runs as follows: to suggest that gender-based violence can be punished through monetary sanctions or that victims of gender-based violence could ever possibly be compensated through monetary awards is to cheapen the gravity of the offense. It is worthwhile here to note that the civil remedy is not meant to replace criminal sanctions for perpetrators of gender-based violence with civil sanctions. Section (c) of the CRR reads: "A person . . . who commits a crime of violence motivated by gender and thus deprives another of the right [to be free from crimes of violence motivated by gender] shall be liable to the party injured."⁴⁴ Section (d) defines a "crime of violence motivated by gender" as "an act or series of acts that would constitute a felony against the person . . . within the meaning of State or Federal offenses."⁴⁵ As the language of the offense suggests, the civil remedy in no way derogates from the criminal nature of gender-based violence. Nevertheless, the CRR does allow for a civil remedy regardless of "whether or not those acts have actually resulted in criminal charges."⁴⁶ Thus there is a possible situation in which a person could receive civil damages absent any finding of criminal conduct. This is a situation not unique, however, to the CRR, but rather, a circumstance which permeates much of tort law. This is not to argue for or against the situation, but rather, to place the criticism in the context of the American legal system. After all, to reduce civil claims to the end of monetary damages is to ignore the additional purposes behind civil law, for example, to empower the victims of violence.⁴⁷

ate the *awful silence* of thousands more survivors who never tell anyone of these crimes.") (emphasis added).

44. *CRR*, *supra* note 1.

45. *Id.*

46. *Id.* at (d)(2)(A).

47. In addition, it is to ignore the social values placed upon civil litigation in American society. See generally Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic*

What is more, even if one rejected the notion that civil claims serve no ends outside of monetary outcomes, to deny a victim the costs of gender-based violence and allow the perpetrator to retain property would only compound the tragedy: not only was the person the victim of the assault, but then the person had to pay for it.

The second criticism of civil remedy recognizes the reality that it takes money to file a civil claim. The cost of civil litigation is expensive; this fact is known. Not only is civil litigation expensive, but many victims of gender-based violence are poor: "Violence against women predominates among poor women and women of average means."⁴⁸ The argument here goes as follows: what good is a cause of action if there can be no action? As is exemplified by Christy Brzonkala's case, which culminated in *Morrison*, public interest groups often step-up to fund litigation; however, these groups "can support only a few test cases."⁴⁹ What is more, it is often true that public interest groups are fighting not for the woman's rights in these cases, but for the viability of the law, which may negate the empowering effect of the law, at least in the particular cases adopted by the public interest groups.⁵⁰ Thus, it is questionable whether public interest groups' commandeering of the litigation actually helps individual women seek justice.

This second argument is quite forceful, especially in light of the statistics evidencing the relatively small number of cases actually brought before the court when the CRR was effective.⁵¹ The fact that the legal system, the civil system especially, is too expensive to deliver justice is a tremendous problem in America. It is a tragedy that people cannot always exercise their rights under the law. It does not seem to follow, however, that legislators should cease to acknowledge these rights. In 1959, just before the dawn of the modern civil rights movement, 55% of all black Americans lived below poverty level,⁵² and yet, the argument was not made that simply because most blacks could not afford civil remedies, they did not deserve them. Economic realities should indeed give rise to reform of the system—they are cause for alarm—but they should not give cause to withholding civil remedies.

The third concern with the *civil* nature of the remedy recognizes a dreadful reality: not only are many of the victims of gender-based crime poor, so are the perpetrators. Thus, even if a person can afford litigation, the impoverished perpetrator will have no money to pay the damages, not to mention legal expenses. This third concern completely undermines one of the above-mentioned justifications for allowing a civil remedy—the recognition that harm costs money, and this should not come at the victim's expense. "[B]atterers are no deep-pocketed corporations, government agencies or people who happen to be insured against damage awards for their intentional torts."⁵³ It is ar-

Remedies for International Human Rights Violations, 27 YALE J. INT'L L. 1 (2002) (for a defense of the benefits of civil litigation in cases of the gravest crimes, such as human rights violations).

48. Regan, *supra* note 3, at 803-04 ("The battered woman does not have enough money to pay an attorney if she loses."). Again, this criticism is a criticism of tort law in general, and yet, America has not decided to scrap the entire system.

49. *Id.* at 804.

50. *Id.*

51. See *id.* at 799 & n.6 (claiming that the CRR gave rise to fewer than ten cases per year after its 1995 enactment and listing those cases). It has been argued, however, that this funneling effect limiting the number of claims litigated is a characteristic funneling effect of the entire court, and particularly the tort system.

52. U.S. Bureau of the Census, Current Population Survey, Annual Demographic Supplements, Poverty Status of People by Family Relationship, Race, and Hispanic Origin: 1959 to 2001, at <http://www.census.gov/income/histpov/hstpov2.lst>.

53. Regan, *supra* note 3, at 803.

gued that, with rare exception, such as the university defendant in *Brzonkala*'s case, the perpetrators of violent acts against women are not able to pay for their harms. Thus, a cost/benefit analysis may conclude that the symbolic worth of an empty judgment may not outweigh the costs sunk into achieving that judgment.

Although this third concern highlights the restricted reach of a civil solution, it does not eliminate the power of the CRR entirely. After all, not all perpetrators *are* poor. As Senator Biden stated in his congressional testimony: "Rapists are doctors, they are lawyers, they are prominent businessmen, and they should be subjected not only to have their liberty taken but their property taken as well—their property."⁵⁴ Also, the defendant in *Brzonkala* is not an exceptional case, as rapes in the university setting occur all too frequently: "[C]ollege rapes occurred every 21 hours based on national statistics, with over 50 colleges, universities, and community centers throughout the five boroughs, you can understand the severity of the problem."⁵⁵ Finally, it serves well to reiterate the reminder that money is not all that is sought through the civil forum.

The second level of attacks against the CRR generally focuses upon the federalizing of the remedy. It is important to isolate these criticisms from ordinary criticisms of federalism, which focus upon the positive effects of a vertically divided government that has traditionally held acts of violence to be within the exclusive dominion of state regulation.⁵⁶ These arguments are not unimportant; however, they neglect to refute the CRR on its merits in a way that the following criticisms do not. The following criticisms go as follows: (1) the CRR adds nothing to state civil remedies already available, and (2) the federal government is even less equipped than state governments to handle the problem of violence against women.

The issue of available state remedies, such as battery, at first blush poses no serious threat to proponents of the CRR. This issue was discussed in the context of 42 U.S.C. § 1983 litigation in the famous case of *Monroe v. Pape*.⁵⁷ In *Monroe*, the City of Chicago argued that a federal provision should not be interpreted as awarding a remedy where state courts "are available to give petitioners that full redress which the common law affords for violence done to a person."⁵⁸ The United States Supreme Court, however, denied the City of Chicago's argument and held that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."⁵⁹ The primary reason underlying this decision of the Court was the purpose of 42 U.S.C. § 1983—to provide a federal remedy where state law was "in theory" or "in practice" unavailable.⁶⁰ As the *Monroe* Court demonstrated, the federal system has been seen as a historical alternative or supplement to state forums.

Beyond this historical analysis that recognizes the validity of federal forums for tort-like claims, there is a fundamental theoretical distinction that justifies a federal rem-

54. 1992 Hearing, *supra* note 10, at 10.

55. *Id.* at 115. See also, S. REP. NO. 103-138, at 44 (1993) ("According to some estimates, one in seven college women has been raped." (citing Violence Against Women: Victims of the System: Hearing before the Comm. on the Judiciary, 102nd Cong. 34 (1991) (testimony of Attorney General Bonnie Campbell, Iowa)).

56. See 1992 Hearing, *supra* note 10, at 31 ("The Federal Government does not have, in our traditional division of authority, the power of enforcement of law relating to the criminal justice system that do not have some nexus to interstate commerce." (testimony of Senator Joseph Biden)).

57. 365 U.S. 167 (1961).

58. *Id.*

59. *Id.*

60. *Id.*

edy. Just like there is a difference between the crimes of murder and manslaughter, there is a difference between the offenses of battery and gender-motivated violence. The distinction, of course, lies in the intent of the actor. The philosophical underpinnings of these distinctions harken to a retributive theory of law and maintain that for different wrongful intents there are different means of retribution. This theory may seem strange in the context of the civil sphere, which traditionally focuses not upon enacting retribution upon the offender, but allowing for the compensation of the victim. However, the unique nature of civil claims based on criminal offenses recognizes that for different criminal offenses, there must be different kinds of harm worthy of compensation. Thus, to award a victim of gender-motivated violence monetary damages for his or her injury under the claim of battery is to treat the symptoms only—acceptable, but not ideal and only temporarily helpful for society.⁶¹

The second set of complaints regarding the federal nature of the CRR take a “pot calling the kettle black” tone towards the federal government. That is, state courts may not be adequately addressing the problem of violence against women, but federal courts would be less equipped to handle the problem. A federal cause of action, such as the CRR, can be brought in courts of general jurisdiction, that is, state courts. However, if it is the case that state courts do not adjudicate cases involving gender-based violence fairly, then the only practical jurisdiction in which to bring a CRR claim is federal court.⁶² The criticism then arises: federal courts cannot handle the (theoretical) caseload.

The idea of 6000 more civil filings for each federal judge is, of course, ridiculous, but even if only one in ten abused women filed a CRR claim, that would be 600 additional civil cases per judge. In 1997, there was a total of 272,027 civil filings in the United States District Courts. That works out to about 421 filings per judge. If ten percent of abused women filed, their cases would be sixty percent of the federal civil docket. . . . If only two and half percent of the four million women abused each year filed, there would still be a back breaking 151 additional cases for every judge—an increase of about thirty-five percent. And all of this comes at a time when the Federal Judicial Center has concluded that the size of the federal docket is an ‘impending crisis.’⁶³

This argument leads one to conclude that a federal cause of action is worthless because it could never handle the purpose it would actually serve. Moreover, attempting to

61. The issue of state claims, however, becomes a bit more complicated when one considers the difficulty in proving the “gender-motivated” element of the CRR. In state courts, upon losing the “gender-motivated” element of the CRR, a person could resort to a state remedy of battery and still receive compensation for his or her injuries. In a federal court, however, such may not be the case. By bringing a federal CRR claim into a federal court, the victim runs the risk of losing the “gender-motivated” issue and not having a state civil remedy upon which to fall-back. At least, the defendant may not have a state remedy upon which to *easily* fall back. Because the advantage of bringing CRR claims in federal courts is large (in fact, it is one of the justifications for the federal remedy), this problem is significant. The inefficiencies of bringing different claims in different courts (federal and state) until the inadequacies of state courts are remedied may be inconvenient; however, they do not seem to be insurmountable objections to the CRR.

62. Regan, *supra* note 3, nn.21-24.

63. *Id.* at 806. See also 1992 Hearing, *supra* note 10, at 27-28 (“The Chief Justice articulated the concern. He said this legislation would be a vehicle, that title III of this legislation would be a vehicle that women would use in divorce proceedings to get into federal court—to use it as a bludgeon, as a threat, not unlike it’s been argued that RICO is used. . . . [T]hat was the context in which this concern was expressed, that it would ultimately overwork the courts.” (testimony of Senator Joseph Biden)).

handle the theoretically unwieldy burden the CRR would create compromises in the court's ability to deliver justice, and thereby sacrifice the integrity of the entire justice system. Of course, one could always avoid the federal courts' docket issues by filing in state court, but then one re-arrives at the original problem of local prejudices and a "damned if you do, damned if you don't" scenario. Thus, the federal remedy helps little to alleviate the problem, so the argument goes.

There are a few flaws with this argument. First of all, it requires accepting the notion that federal courts are overbooked, an argument some people simply do not buy.⁶⁴ Second of all, the argument seems to result in a critics circle—critics argue both that the CRR is unhelpful because it is unaffordable and therefore unused and that it is also unhelpful because if it was used to its fullest extent, it would not be helpful. The arguments seem circular: a person cannot both argue that the CRR fails because there are few plaintiffs and then say that it fails because the federal courts could not handle the case load. These arguments ignore the reality—that the passage of the CRR, as has already been demonstrated, will not result in a tidal wave of issues of gender-motivated crime hitting federal court. The demanding requirements of the text itself, that the victim actually prove his or her harm was motivated by gender-bias, would serve to buffer the blow of the case-flow.⁶⁵ In addition, this argument ignores the provisions intentionally added to appease the legislature's fear of docket-overload, such as the provision prohibiting removal to federal court of claims brought in state courts and the provision prohibiting supplemental jurisdiction of domestic issues in federal courts.⁶⁶ The flip-side of this point is, of course, that the CRR did not give rise to zero cases in federal court. Finally, the argument suggests an untenable conclusion: the court system is rubbish, so legislators should not recognize rights.

c. *A Modest Conclusion on the CRR's Efficacy*

In the end, the practical arguments, which range from caseload to costs, lack luster. They raise serious problems with the system, but they do not compel the conclusion that a civil remedy for gender-motivated violence is a bad idea. That the CRR is the best solution is still debatable, and the criticisms that the fight for the CRR has distracted interested persons from the real ends of helping victims can lend healthy perspective to the debate.⁶⁷ One could contend, however, that few in the debate had lost this perspective; that the CRR's original context, from which it was artificially extracted by academia, was one of the most comprehensive proposals to solving the problems of state court biases through judicial training, of state court enforcement through police training, of the roots of violence through grants for shelters, and so on.⁶⁸ The CRR was a good idea in the context of other (less controversial) ideas—perhaps a modest conclusion, but also an accurate one.

64. See 1992 Hearing, *supra* note 10, at 11 ("If they want to ease their workload, let's get new judges. I don't know a whole lot of Federal judges, with all due respect—and I have great respect for the court—that any of us would think are so overburdened with work that they are bent at the back and their brow is constantly occupied with beads of sweat." (statement of Sen. Biden)).

65. *Id.* at 25-26 (statement of Sen. Biden) (explaining the limitations the gender-motivated prong places upon the number of claims brought to court).

66. CRR, *supra* note 1, § 40302(e)(4) & (5).

67. See generally Regan, *supra* note 3.

68. See discussion *infra* at pp. 5-6.

B. The Fall: United States v. Morrison

1. In the Name of Federalism: Clamping Down on Congressional Authority

In 1937, a series of cases overruled previous law governing the commerce power and expansively redefined the scope of Congress's authority under the clause. In the 1937 case of *NLRB v. Jones & Laughlin Steel Corp.*, the Court held that the power of Congress to protect commerce is "plenary and may be exerted to protect interstate commerce no matter what the source of the dangers which threaten it."⁶⁹ This language in *Jones & Laughlin Steel* articulated a major change in gears in the Court's approach to the commerce clause, the full force of which was not completely felt until the Court's decision in *United States v. Darby*.⁷⁰ In *Darby*, the Court upheld an Act that prohibited interstate shipment of goods produced with labor paid below a minimum wage. In upholding this Act, the Court legitimated congressional regulation of intrastate production. Finally, in the 1941 case of *Wickard v. Filburn*,⁷¹ Filburn, a farmer, was fined for growing in excess of his yearly allotment of wheat. Filburn contested that because his wheat was grown only for his own farm's purposes and never entered interstate commerce, Congress lacked the authority to impose such fines. Despite Filburn's farming's negligible actual effect on interstate commerce, the Court held that Congress had the authority to regulate his activity. Because farmers growing excess of their allotment of wheat would, in the cumulative, directly effect the supply and demand in interstate commerce, Congress was authorized to regulate such activity. Thus, the expansive test was drawn, and "from 1937 until 1995, not one federal law was declared unconstitutional as exceeding the scope of Congress's commerce power."⁷²

In this span of time, some of the most significant laws in American history were passed under the commerce power, including the 1964 Civil Rights Act. Although § 5 of the Fourteenth Amendment would seem the logical power under which Congress would pass these laws, in the *Civil Rights Cases* of 1883, the Court held that this power could only regulate state, and not private, behavior.⁷³ Although this decision came only twenty years after the abolition of slavery, the Court rigorously upheld the notion that the Fourteenth Amendment was not intended to protect blacks from social prejudices: "[T]here must be some stage . . . when [a black man] takes the rank of a mere citizen and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected."⁷⁴

With this narrow and inveterate construal of the Fourteenth Amendment firmly in place, the legislature turned to the commerce power in 1964 to remedy the same problem that faced America over eighty years earlier. Among its provisions, the Civil Rights Act allowed federal civil remedies for private employment discrimination based on race, gender, or religious affiliation, and for discrimination by hotels, restaurants, and other venues of public accommodation.⁷⁵ The test of constitutionality under these laws asked

69. 301 U.S. 1, 37 (1937).

70. 312 U.S. 100 (1941).

71. 317 U.S. 111 (1942).

72. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 239 (2d ed. 2002).

73. The Civil Rights Cases, 109 U.S. 3, 24 (1883); See also CHEMERINSKY, *supra* note 72, at 282-83, 455-57.

74. 109 U.S. at 25.

75. See *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964) (holding that racial discrimina-

only whether: "(1) Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate."⁷⁶ This test emphasized the Court's holding that no matter Congress's primary intent in enacting the legislation, be it moral or otherwise, and no matter the nature of the regulated activity, be it local or national, "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."⁷⁷

The VAWA was passed only nine months prior to the Court's landmark *United States v. Lopez*⁷⁸ decision, on the eve of the end of Congress's heyday of commerce power legislation. In a 5-4 majority, the Court struck down the Gun-Free School Zones Act of 1990. Writing on behalf of the Court, Chief Justice Rehnquist reasoned that having a gun within 1,000 feet of a school was too tangentially related to interstate commerce to be regulated by Congress. Underlying this decision was the reasoning that implicit in the enumeration of powers is the notion that these powers are limited, and that, despite considerable overlap between governments, *some* powers are reserved to the states. The problem with allowing Congress to regulate gun possession, according to the Court, was that the logic was too expansive; if guns within school zones can be regulated under the commerce power, then any activity can be the subject of federal regulation.⁷⁹

The trick for the Court, then, was to discern an intelligible test for defining the line between state and federal activities. The test the Court adopted identified three types of activities or things that Congress can regulate under this power: (1) activities that used the channels of interstate commerce; (2) persons or things actually in interstate commerce; and (3) things that, in their aggregate, bear substantial relations to or substantially affect interstate commerce.⁸⁰ This "substantial effects" prong of the test considered a number of important factors, none of which were dispositive for the court in determining whether the activity or item is subject to regulation.⁸¹ These factors asked if the activity was economic in nature, if the statute under consideration had a legitimate jurisdictional element, if the activity in fact according to Congressional findings substantially burdened commerce, and if the causal link between the activity and the commercial effects were too attenuated so as to result in overly-expansive reasoning. The majority in *Lopez* notably rejected the claim that regulation of guns "was justified under the commerce clause because possession of a gun near a school may result in violent crime than can adversely affect the economy."⁸² Consequently, *Lopez* lost primarily on the final factor in the substantial effects test: the causal connection was too attenuated and the logic would prove too expansive to jibe with a commitment to a limited federal government. Thus, with one fell swoop, the Court significantly narrowed the power of Congress to legislate under the commerce power.

tion by motels affected interstate commerce); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that discrimination by restaurants cumulatively had an impact on interstate commerce).

76. 379 U.S. at 253.

77. *Id.* (citation omitted).

78. 514 U.S. 549 (1995).

79. *Id.* at 556-557.

80. *Id.* at 558-59.

81. *Id.* at 559-62.

82. CHEMERINSKY, *supra* note 72, at 262.

2. *United States v. Morrison*

Even before *Lopez* was decided, the death of the CRR was foreseeable. The Court had already challenged a duel over the matter,⁸³ eliciting impassioned responses from Senators like Joe Biden. In his congressional hearing on VAWA before the Subcommittee on Crime and Criminal Justice, Senator Biden “respectfully” suggested that the Chief Justice “[didn’t] know what he [was] talking about. . . .”⁸⁴ Attempting to assuage any fears regarding the legitimacy of Congress’s authority to pass the legislation, Senator Biden continued: “[T]he Chief Justice and others have suggested that the bill may burden the Federal courts unnecessarily. Let me tell you something.”⁸⁵ These fighting words foreshadowed a battle upon the horizon.

Soon after Congress’s 1994 passage of VAWA and shortly before the Court’s 1995 holding in *Lopez*, two football players allegedly raped young Christy Brzonkala in her freshman dorm room at Virginia Polytechnic Institute.⁸⁶ Following the incident, one of the men, Morrison, stood in the dormitory dining room and boasted about the liberties he liked to take with intoxicated women, liberties the Court was too polite to mention.⁸⁷ Following the alleged incident, Brzonkala became emotionally depressed, began taking prescribed anti-depressants, stopped attending classes, and withdrew from school.⁸⁸ In early 1995, Brzonkala instituted formal complaints under Virginia Tech’s Sexual Assault policy.⁸⁹ During the school hearing, Morrison “admitted [to] having sexual contact with her despite the fact that she had twice told him ‘no.’”⁹⁰ The Judicial Committee deemed the evidence insufficient to punish the other alleged offender, but found Morrison guilty of sexual assault, an offense for which he was only sentenced to two semesters suspension.⁹¹ Even this measly sentence was never enforced: in July of 1995, Brzonkala was informed that Morrison was initiating a court challenge to the school’s conviction. The school subsequently conducted a second hearing and, again, Morrison was found guilty; however, inexplicably, his offense was “changed from ‘sexual assault’ to ‘using abusive language.’”⁹² Shortly after this second conviction, Morrison again appealed, and without informing Brzonkala, the provost “set aside Morrison’s punishment.”⁹³ Upon reading in the paper that Morrison was to return to the university in the fall, Brzonkala dropped out of school.⁹⁴

In December of 1995, Brzonkala initiated proceedings against both alleged offenders under VAWA’s civil provision in the United States District Court for the Western District of Virginia. The court ultimately dismissed the claim because it concluded “that Congress lacked authority to enact the section under either the Commerce Clause or § 5 of the Fourteenth Amendment.”⁹⁵ A divided court reinstated Brzonkala’s claim in part,

83. See 1992 Hearing, *supra* note 10, at 9-11.

84. *Id.* at 7.

85. *Id.* at 8.

86. *United States v. Morrison*, 529 U.S. 598, 602 (2000).

87. *Id.* at 602.

88. *Id.* at 602-03.

89. *Id.* at 603.

90. *Id.*

91. *Id.*

92. *Morrison*, 529 U.S. at 603.

93. *Id.*

94. *Id.* at 603-04.

95. *Id.* at 604.

but the full Court of Appeals, hearing the case en banc, found that although Brzonkala stated a claim upon which relief could be granted, Congress's passage of the civil remedy exceeded the constitutional powers under which it was passed.⁹⁶ Thus, the Supreme Court was granted the final word, and in *United States v. Morrison*, Justice Rehnquist, writing on behalf of a 5-4 majority, placed the final nail in the coffin of VAWA's civil provision.⁹⁷

The *Morrison* decision did not simply follow in the wake of *Lopez*. It signaled that *Lopez* was not an aberration, but rather, the beginning of a forceful retrenchment into principles of federalism. The Court emphasized the point that: "even under our modern, expansive interpretation of the Commerce Clause, Congress's regulatory authority is not without effective bounds."⁹⁸ *Morrison* articulated the "substantial effects" framework set forth in *Lopez* in the following ways. First, the court emphasized that carrying a gun is not an inherently economic activity, "gender-motivated crimes of violence are not, in any sense of the phrase, economic activit[ies]."⁹⁹ The Court held this factor as "central" in its decision in *Lopez* and noted that "thus far in our Nation's history, our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."¹⁰⁰ Second, and more shockingly, the Court held that the presence of a Congressional finding indicating that the regulated activity substantially effects interstate commerce is not dispositive in their analysis.¹⁰¹ Thus, despite the voluminous congressional record indicating the astounding effects violence against women has upon the national economy, the Court deemed the effects too unsubstantial to legitimate legislature. Third, and finally, the Court indicated that when the link between the regulated activity and the economic effects, however substantial, is somehow attenuated, the Court will reject the constitutionality of the statute in favor of postulating theoretical limits.

In *Morrison*, however, the Court asserted its commitment to federalism beyond its analysis of the Commerce Clause "substantial effects" test. The Court also affirmed the century old interpretation of the Fourteenth Amendment. Despite dicta in case law indicating a shift in the contrary, the Court reaffirmed the 1883 holding of the *Civil Rights Cases* that the Fourteenth Amendment only regulates action by the state.¹⁰² Again, fueling the Court's analysis was the principle of a limited government: "[T]he language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government."¹⁰³ Fatal blow delivered, the Court concluded its VAWA dismantling: our government is limited, Q.E.D.

96. *Id.* at 604-05.

97. *Morrison*, 529 U.S. at 600-02 (After the District Court dismissed the claim, the United States intervened to defend the constitutionality of the act; hence the nature of the parties).

98. *Morrison*, 529 U.S. at 608.

99. *Id.* at 613.

100. *Id.*

101. *Id.* at 614.

102. *Id.* at 621.

103. *Id.* at 620.

III. CONGRESSIONAL AUTHORITY UNDER THE ICCPR: HOPE FOR THE CRR

The treaty power has been referred to by some as a saving grace for the CRR.¹⁰⁴ However, even this power is replete with perceived federalism limitations. Questions remain: to what extent do the arguments limiting legislative powers under the Commerce Clause and Fourteenth Amendments apply when interpreting the boundaries of the treaty power? If the driving force behind the Supreme Court's decision in *Morrison* were not the facts before it, facts that indicated a real connection between violence against women and interstate commerce, but rather, the principle that the authority of federal government had rigid (if often indiscernible) limits, then the treaty power seems also to be a target for the Court. As *Morrison* indicated, the Court's "neo-federalism movement is not aberrational . . . the Court is serious about scaling back the deference it previously has given to Congress's use of its enumerated power."¹⁰⁵ For this reason, perhaps, Congress has been reluctant to invoke the treaty power.¹⁰⁶ History and precedent indicate, however, that principles of federalism fall short when mounted against the treaty power.

A. The Scope of the Treaty Power

1. The Framers' Debate

In the beginning, there was the Constitution, Article VI of which provides that:

The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹⁰⁷

This language authorizes a dual mechanism for law making: legislation (made in pursuance of the Constitution) and treaty making (made under the authority of the United States). Within this founding document, the power to create laws via legislation was carefully balanced by a myriad of different checks, while its richer, spoiled brother, the treaty power dwelt relatively uninhibited amid the pages. The treaty power's potential to explode American notions of federalism was on the forefront of even the founding fathers' minds. In 1791, fears that a treaty might usurp treasured property rights were allayed by the adoption of the Bill of Rights, the "impenetrable bulwark against every

104. See *supra* note 7.

105. Troy Robert Rackham, Note, *Enumerated Limits, Normative Principles, and Congressional Overstepping: Why the Civil Rights Provision of the Violence Against Women Act is Unconstitutional*, 6 WM. & MARY J. WOMEN & L. 447, 449 (2000).

106. See, e.g., *Summary Record of the 1401st Meeting*, U.N. Hum. Rts. Comm., 53rd Sess., at 4, U.N. Doc. CCPR/C/SR.1401 (1995) ("The provision of the Covenant had been declared to be 'non-self-executing,' which meant that the Covenant did not create private rights enforceable in United States courts; that could be achieved only through federal legislation. However, . . . the executive branch and the United States Senate were reluctant to use the unicameral treaty power under the Constitution to introduce direct changes in domestic law." (statement of Mr. Harper, United States of America)).

107. U.S. CONST. art. VI.

assumption of power,"¹⁰⁸ and the Judiciary Act of 1791, which authorized the justice tribunals as "guardians of those rights."¹⁰⁹ The tenth of the amendments constituting the Bill of Rights read: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹¹⁰ Nestled among one of the most valiant attempts to ward tyrannical government, the Tenth Amendment explicated and enforced a principle implicit in the founding of an enumerated government. To what extent, however, it actually limited the Executive's power to create treaties remained unanswered.¹¹¹ The nineteenth century development of treaty power interpretation was, at best, ambiguous. Although the court implied some states-rights limitations,¹¹² it also emphasized that "treaties are supreme over state law."¹¹³ The Court would not address the limits of the treaty power head-on until the twentieth century.

2. The Wildfowl Act Controversy and *Missouri v. Holland*

The Court decisively formulated the modern treaty rule in the 1920 case of *Missouri v. Holland*,¹¹⁴ in which the State of Missouri challenged Congress's authority to enforce legislation passed under the Wildfowl Treaty of 1916.¹¹⁵ The controversy preceding this landmark decision began in 1913 when Congress passed an Act to protect from extinction various migratory birds whose flight pattern crossed many states.¹¹⁶ The Act restricted the taking and killing of these birds and authorized federal game wardens to enforce its guidelines. Shortly after its passage, persons charged with violating the law challenged its constitutionality. District Courts in both Arkansas¹¹⁷ and Kansas¹¹⁸ deemed the law unconstitutional, holding "migratory birds are not the property of the United States within the meaning of Article IV, Section 3, Clause 2, of the Constitution," and that states thereby reserved the power to regulate their conduct.¹¹⁹ Similarly,

108. JOSEPH PAIGE, *THE LAW NOBODY KNOWS* 27 (1st ed. 1977) (quoting James Madison) (citation omitted).

109. *Id.* at 27-28 (citation omitted).

110. U.S. CONST. amend. X.

111. See generally PAIGE, *supra* note 108, 1-26 (recounting the historical discussions on the treaty power from 1776-1796). See also David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1100-1258 (2000) (providing a detailed historical account of the formulation of the treaty power). But see Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 410 (1998) [hereinafter *Part I*] (claiming that "the only substantial discussions of the scope of the treaty power are contained in the records of the Virginia Ratifying Convention" (emphasis added)); Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98-99 (2000) (criticizing Golove's historical analysis).

112. E.g., In 1836, the Court heard the case of *New Orleans v. United States*, 35 U.S. (10 Pet.) 662 in which the Court suggested a states' rights limitation on the treaty power. See generally Bradley, *Part I, supra* note 111, at 419. In *New Orleans*, the controversy arose after United States acquired Louisiana from Spain through a treaty. Prior to the treaty, the King of Spain had held public properties in the city in trust. The issue was whether this trusteeship transferred to the federal government through the treaty, or if the property rights instead were transferred to the City itself. The Court held that the federal government's authority cannot be "enlarged under the treaty-making power," and that the rights therefore did not transfer to the government. *New Orleans*, 35 U.S. at 736.

113. Bradley, *Part I, supra* note 111, at 418.

114. 252 U.S. 416 (1920).

115. See PAIGE, *supra* note 108, at 32.

116. *Id.* at 31.

117. *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914).

118. *United States v. McCullagh*, 221 F. 288 (D. Kan. 1915).

119. PAIGE, *supra* note 108, at 32.

these courts noted that Congress must invoke some power delegated to it through the Constitution in order for the Wildfowl Act to be binding upon states. Because Congress had not done this, the act was not binding.¹²⁰

The United States and Great Britain subsequently signed the Wildfowl Treaty of 1916,¹²¹ which provided protection to migratory birds that traversed over the United States and Canada. In 1918, Congress reissued the Wildfowl Act in pursuance of the treaty.¹²² "Although the Congress was preoccupied with many matters concerning World War I at this time, the *Congressional Record* indicates a lengthy and heated debate on the consideration of this Act."¹²³ Predictably, the constitutionality of the act was again challenged, this time by the State of Missouri which sued to prevent United States Game Warden Holland from enforcing the act.

Missouri presented both positive and negative arguments against Holland.¹²⁴ The positive arguments were premised on notions of common ownership and state sovereignty: the state held the property of the people in trust for its residents; moreover the state's ability to police this property was an inherent attribute of its sovereignty. Missouri's negative argument stemmed in part from principles of bad faith: the federal government should not be permitted to control through the treaty power that which it was otherwise unauthorized to regulate. These arguments were the natural corollaries to principles of federalism embodied in the Tenth Amendment and surrounded one common point: if the federal government was permitted to regulate something otherwise reserved to state sovereignty under the rubric of the treaty power, then nothing was beyond the reach of the federal government. The safeguards against a tyrannical common government were in this regard a charade. In contrast, the Government's counterargument was quite simple: the Constitution grants the President the unqualified power to make treaties and Congress the power to give these treaties effect.¹²⁵ Thus, the power of Congress to give treaties effect is not limited to the ordinary powers of Congress to make laws.

Justice Holmes delivered the opinion of the Court, which, in its five short pages, outlined the treaty power doctrine. Justice Holmes affirmed the lower courts' rulings that the Act was outside of the legislature's commerce power, but restated the issue in the following words: "The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment."¹²⁶ Holmes concluded that the Tenth Amendment and its "indivisible radiation" does not prohibit the regulation of migratory birds, birds that "yesterday had not arrived, tomorrow may be in another State, and in a week a thousand miles away."¹²⁷ Holmes reasoned on a forceful, but permissive note: "No doubt the great body of private relations usually fall within the control of the State, but a treaty *may* override its power."¹²⁸ The wide-sweeping language of Justice Holmes's decision thus established the following: positive language of

120. *Id.*

121. *Id.* (citing *Congressional Record*, 62nd Cong., 3rd Sess., 1817-921).

122. *Id.* at 33.

123. *Id.* (citations omitted).

124. For a discussion of Missouri's arguments, see generally PAIGE, *supra* note 108, at 35-38.

125. For a discussion of the Government's arguments, see generally PAIGE, *supra* note 108, at 38-39.

126. *Missouri v. Holland*, 252 U.S. 416, 433-34 (1920).

127. *Id.* at 434.

128. *Id.* (emphasis added).

the Constitution limits the scope of the treaty power,¹²⁹ but the Tenth Amendment is not a *carte blanche* restriction on the treaty power,¹³⁰ and therefore laws enacted pursuant to treaties need not be restricted in the same manner that laws enacted through ordinary constitutional mechanisms must be. The *Holland* decision was thus chalked-up as a victory for those advocating a nationalist view of the treaty-power and correspondingly, a "death knell to the states'-rights view."¹³¹

3. The Changed Nature of Treaties and the Bricker Amendments

In the words of Justice Holmes, the treaty power "*may*" override states' powers, but *must it always*? This question gained importance as the nature of treaties changed over the course of the Twentieth Century. In the 1950s, a period immediately following the global upheaval of World War II, and narrowly preceding the national upheaval of the civil rights movement, Senator Bricker launched an effort to overturn *Holland* through constitutional amendment. There were many variations of the "Bricker Amendment," one of which read that "[a] treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty."¹³² Although one version of the amendment came quite close to passage, the Bricker debate lost momentum, leaving *Holland* the rule of the land.

The advent, or increase, of human rights treaties has been cited as one possible impetus of the demise of the Bricker amendments.¹³³ Human rights treaties were not an invention of the 1940s. In fact, human rights provisions (even if they were not expressly referred to in this terminology) were included in the Treaty of Versailles and were pending approval even when *Holland* was decided.¹³⁴ Their prominence and new importance following the atrocities of World War II and the creation of the United Nations, however, placed human rights treaties on the forefront of legislators' minds. The adoption of the United Nations Charter provided the possibility of self-executing treaties under human rights provisions, and in the 1948 case of *Oyama v. California*, the Court struck down California's anti-Japanese alien land laws on the grounds that they violated the United Nations Charter.¹³⁵ The Universal Declaration of Human Rights followed fast on the heels of the United Nations Charter. Even more than before, the potential for human rights treaties to reach far into the gullet of laws traditionally reserved only to states unsettled American federalist entrenchments. "The implications struck terror into the hearts of conservative Republicans and racist Southern Democrats, who immediately perceived the danger posed to racial segregation."¹³⁶ Even more specifically, the treaties sparked the fury of Senator Bricker's seven-year drive to overrule *Holland*.

It could be said that his failure to limit the treaty power, despite his valiant attempt, only reinforces the weight of the *Holland* holding and the expansive scope of the treaty

129. For example, a treaty that enslaved a portion of the population, something strictly forbidden by the Fourteenth Amendment, would be invalid. This point is implicit in Holmes's above quoted "prohibitory words" comment.

130. *Holland*, 252 U.S. at 434 ("[A] treaty may override [the Tenth Amendment's power].").

131. Bradley, *Part I*, *supra* note 111, at 423.

132. *Id.* at 427 (footnote omitted).

133. Bradley, *Part I*, *supra* note 111, at 427.

134. Golove, *supra* note 111, at 1274.

135. *Id.*

136. *Id.*

power as a parallel mechanism for authorizing law.¹³⁷ If there was one thing that could shake Americans' blind adhesion to principles of federalism, it was, perhaps, the torment of two world wars in twenty-five years. The necessity for a unified and powerful American voice in the foreign stage was more evident than ever. The following description of President Eisenhower's vehement reaction to Senator Bricker's drive dramatically captures this sentiment:

[The Bricker Amendment] would force the Administration to represent 49 governments in its dealings with foreign powers. . . . It would take the United States "back to the days 'when American Ambassadors were subject to ridicule abroad because [they] represented thirteen states, not one central government,'" and hence Eisenhower "would 'fight up and down [the] country . . . call names' . . . [and] denounce the amendment as a 'stupid, blind violation of the Constitution by stupid, blind isolationists.'"¹³⁸

Thus were the arguments that the treaty power "limited and enumerated the powers structure of the U.S. Constitution," and expanded the "range of treaty making"¹³⁹ drowned by a rejuvenated commitment to a "more perfect union."

B. The Enforcement of Human Rights Treaties in the United States

So far this Note has treated federalism primarily as an historical problem—a machine set in motion at the onset of the nation, nearly unhinged by the prospect of human rights treaties. Federalism, however, is not an idea isolated in time, but rather, it is a continuing protection against tyranny. Through a structural system of checks, federalism at its best ensures that all Americans have maximum opportunity to exercise their human rights. In this regard, despite the fact that history permits Congress to enact legislation pursuant to the treaty power, there is good cause for the legislature to self-impose restraints in using this power. Federalism in practice serves as a theoretical firewall in the American system—protecting the structure on the inside by precluding intrusions from the outside. Nevertheless, there is something unique about human rights treaties. These treaties warrant the removal of the federalism firewall in order to enact legislation pursuant to their cause. If the design of federalism is to protect fundamental liberties, then it would seem inappropriate to invoke federalism to prevent human rights treaties from better ensuring these freedoms. The United States' historical treatment of the treaty power allows for this reasoning, and its historical enforcement of human rights treaties reflects this. It is worthwhile now to focus on the United States' role in creating human rights treaties and its policy towards implementing them.

Although human rights principles existed in treaties prior to the 1940s, it was the post World War II world that witnessed the blossoming of human rights law. In 1945, the Charter of the United Nations "reaffirm[ed] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women."¹⁴⁰ Only three years later, the Universal Declaration of Human Rights echoed this determination.

137. For a more robust version of this argument, see Golove, *supra* note 111, at 1273-79.

138. Golove, *supra* note 111, at 1276 (footnotes omitted).

139. Bradley, *Part I*, *supra* note 111, at 98.

140. U.N. CHARTER pmbl.

These foundational documents laid the normative groundwork for a system of law that would seemingly turn international law on its head.¹⁴¹ Whereas international law traditionally held fast to consent-based theories of development, human rights invoked theories of natural law and natural rights. Where international law traditionally held only states accountable, human rights law famously recognized that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."¹⁴² Human rights law introduced new international actors, and therefore novel systems of enforcement. Senator Bricker had good reason to be alarmed.

In the late 1960s, the normative foundation began to sprout treaty-based human rights institutions.¹⁴³ Among the treaties adopted in 1966 alone were the International Covenant on Economic, Social, and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and finally, the International Covenant on Civil and Political Rights (ICCPR), which brought into being the United Nations Human Rights committee when it came into force in 1976. In addition to creating practical enforcement mechanisms and institutions, these documents helped to articulate the values and direction of human rights law.

Although America has historically contributed greatly to the cause of human rights,¹⁴⁴ the Cold War postponed America's ratification and implementation of the bulwark treaties on human rights law.¹⁴⁵ The ghost of Senator Bricker, the anxieties of segregationists in the South, the increasing xenophobia after the Korean War and as a result of the Cold War, and a consequent isolationist policy in the United States have also been cited as reasons why the United States was slow to move full-throttle into the international human rights movement.¹⁴⁶ However, as a game of catch-up swept the world in the post-Communism era, as nations were freed to adopt the conventions on human rights, America, too, chimed in. The 1980s and early 1990s marked a turning point in United States' policy. In 1984, the International Convention Against the Taking of Hostages came into force in the United States.¹⁴⁷ In 1988, the U.S. ratified the Convention on the Prevention and Punishment of the Crime of Genocide; in 1992, the U.S. ratified the ICCPR; and in 1994, the U.S. ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention on the Elimination of All Forms of Racial Discrimination.¹⁴⁸ The United

141. See Thomas Buergenthal, *The Normative and Institutional Evolution of International Human Rights*, 19 Human Rights Quarterly 703 (1997), found in INTERNATIONAL LAW: CASES AND COMMENTARY 356 (Mark W. Janis & John E. Noyes eds., 2nd ed. 2001) (terming the UN Charter and the Universal Declaration of Human Rights the "normative foundation").

142. *The Nuremberg Judgment*, 6 F.R.D. 69 (1946).

143. See Buergenthal, *supra* note 141, at 356-7.

144. See *Summary Record of the 1401st Meeting*, *supra* note 103, at 10 ("Mr. Ando paid tribute to the great contribution the United States of America had made to the cause of human rights throughout its history and to its involvement in the establishment of the United Nations and the drafting of its Charter and the Universal Declaration of Human Rights.").

145. Buergenthal, *supra* note 146, at 357-9 ("Implementation in the post Cold War Era.").

146. See, e.g., Stephen H. Klitzman et al., *Ratification of the Genocide Convention: From the Ashes of "Shoah" Past the Shoals of the Senate*, Federal Bar News & Journal, Vol. 33, No. 6, 257 (July-August, 1986), found in *Genocide Convention Implementation Act: Hearing Before the Subcomm. on Immigration, Refugees and International Law of the Comm. on the Judiciary*, 102nd Cong., 78-84 (1988) [hereinafter *Genocide Implementation Act Hearing*] (citation omitted).

147. The United States ratified the International Convention Against the Taking of Hostages on December 7, 1984, available at http://www.nti.org/e_research/official_docs/inventory/pdfs/apmunter.pdf.

148. See *Summary Record of the 1401st Meeting*, *supra* note 106, at 2.

States and worldwide endorsement of these conventions enabled the real enforcement of the normative foundations laid nearly fifty years before.¹⁴⁹

These treaties spurred legislative action in the federal government in areas traditionally reserved to the dominion of state courts, such as criminal law. The most notable example of this was Congress's implementation of the Genocide Convention.¹⁵⁰ It was thirty-seven years after America pioneered the Genocide Convention that the Senate finally got around to seriously considering its ratification—a delay that was called “a great embarrassment,” a tremendous “shame,” and that put at “stake [the] moral credibility” of the United States.¹⁵¹ Although the Genocide Implementation Act legislated functions traditionally reserved to the states, the United States enacted the legislation in 1987 in compliance with its international obligations. The Act made it a federal crime to “kill . . . , cause serious bodily injury . . . , cause permanent impairment of mental faculties . . . with specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group.”¹⁵² Having finally exorcised the ghost of Senator Bricker, the legislature recognized the demand that international obligations place upon its shoulders. The Genocide Implementation Act signaled that the firewall could be breached.

C. The CRR and the ICCPR

Four short years after the Genocide Convention's implementation, the United States ratified the ICCPR, a treaty which allows, perhaps even obligates, Congress to (re-)pass the CRR. Article 2(1) of the ICCPR states: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as . . . *sex*.”¹⁵³ Among those rights set forth is the right of “[a]ll persons” to be “equal before the law and . . . entitled without any discrimination to the equal protection of the law.”¹⁵⁴ “In this respect,” the treaty language explains, “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . *sex*.”¹⁵⁵ The ICCPR thus protects the right to be free from gender-based violence, the most egregious form of gender discrimination.¹⁵⁶ As the International Lawyer's Brief written in support of the petitioner in *United States v. Morrison* cites, this point is supported by the fact that the Declaration on the Elimination of Violence Against Women, unanimously approved by the United Nations General assembly, references the ICCPR “as the source of the State obligation to prohibit gender-based violence.”¹⁵⁷

149. See Buergenthal, *supra* note 141, at 357.

150. See, e.g., Hostage Taking Act, 18 U.S.C. § 1203 (1994) (enacted in compliance with obligations under the International Convention Against the Taking of Hostages. This section poses less vivid an example of America's turn in policy because its ratification of the document was largely the result of a unique set of self-interest policy priorities that followed the Iran Hostage Crisis).

151. *Genocide Implementation Act Hearing*, *supra* note 146, at 10, 12, 49 (statements of Rep. Frank, Sen. Proxmire, and Mr. Bookbinder (quoting Elie Wiesel)).

152. 18 U.S.C. § 1091(a) (1994).

153. ICCPR, art. 2(1) (emphasis added).

154. *Id.* art. 26.

155. *Id.*

156. See *International Lawyers' Brief*, *supra* note 6, at 7.

157. *Id.* at 6 (citing Declaration on the Elimination of Violence Against Women, G. A. Res. 104, U.N. GAOR, 48th Sess., U.N. Doc. A/Res/48/104 (1994)).

The ICCPR not only prohibits gender-based violence, but also requires that party states take measures to combat such violence. As the International Lawyer's Brief emphasized, "The Human Rights Committee," the body charged with interpreting the ICCPR, "explained . . . that the States' obligations under the treaty are 'not confined to the respect for human rights.'"¹⁵⁸ On the contrary, States Parties "have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction."¹⁵⁹ To paraphrase, parties to the ICCPR are obligated to *ensure* (not merely respect or refrain from violating) the rights recognized by the treaty. What is more, Article 2(2) of the ICCPR requires that "each . . . Party . . . undertakes the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."¹⁶⁰ It demands that each party "develop the possibilities of judicial remedy" for enforcement of the rights created by the ICCPR.¹⁶¹ Finally, beyond even its title, the Covenant specifically acknowledges the importance that *civil* rights play within the Covenant.¹⁶²

Insofar as the Violence Against Women Act, the CRR in particular, attempts to develop a "judicial remedy" for a historical and de facto bias present in the law, and insofar as it provides a remedy for gender-based discrimination, the CRR fulfills the above mentioned obligations of the ICCPR.

The brilliant part of this argument is that it was recognized by the United States in its report to the United Nations Human Rights Committee regarding the United States' obligations under the ICCPR. On April 17, 1995, the United States delegation stood before the Committee and explained that "[t]he ratification of the Covenant marked the beginning of an ongoing process of extensive consultation and coordination with all *federal, state, and local* authorities, with a view to its full implementation."¹⁶³ The delegation continued on by heralding the recent passage of VAWA as one of the ways in which the United States was fulfilling its obligations under the Covenant.¹⁶⁴

Even then, however, false barriers of federalism marred the delegation's mind, as they declared before the Committee that "the executive branch and the United States Senate were reluctant to use the unicameral treaty power under the Constitution to introduce direct changes in domestic law."¹⁶⁵ Even then, the United Nations delegation raised concerns about this reluctance. In the face of this argument, members expressed concern that "Covenant rights would actually be protected in cases where domestic law was not

158. *Id.* at 5 (quoting United Nations, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. DOC HRI/OEN/I/Rev.2 (29 March 1996) at Part I, Comment 3(1)).

159. *Id.*

160. ICCPR, *supra* note 7, art. 2(2).

161. *Id.* art. 2(3).

162. *Id.* art. 3 ("undertake to ensure the equal right of men and women to the enjoyment of all *civil* and political rights set forth in the present Covenant." (emphasis added)). See also *International Lawyers' Brief*, *supra* note 6, at 15 ("the Covenant envisions a VAWA-type cause of action, calling upon states 'to develop the possibilities of a judicial remedy.' The Declaration [on the Elimination of Violence Against Women] affirms this, endorsing 'civil . . . domestic legislation . . . to punish and redress the wrongs caused to women who are subjected to violence.' The [Covenant on the Elimination of Discrimination Against Women] Recommendation on violence against women likewise emphasizes 'civil remedies and compensatory provisions.' (citations omitted)).

163. *Summary Record of the 1401st Meeting*, *supra* note 106, at 3.

164. *Id.* at 7.

165. *Id.* at 4.

up to the standards set by the instrument.”¹⁶⁶ They “recalled that the purpose of treaties was for States to undertake *new* obligations, and in the case of the International Covenant on Civil and Political Rights, to conform domestic law to international standards enshrined in the Covenant.”¹⁶⁷ They “stressed that the Covenant” even within the domestic forum, “should serve to make the overall legal system more uniform.”¹⁶⁸ They feared, and rightly so, that the Covenant “might become a ‘dead letter’ in the United States,” a fear that would come to fruition if Congress failed to enact domestic legislation so clearly in conformance with the goals of the ICCPR.¹⁶⁹

IV. CONCLUSION

Retracing the steps of the argument, we come to a solid conclusion. There is a problem of violence against women in this country. Congress has the constitutional power to pass legislation to enforce international obligations. As history and reason dictate, principles of federalism do not prohibit this Congress from re-passing the CRR pursuant to human rights treaties. America has finally joined the international community’s commitment to universal principles of human rights.¹⁷⁰ This commitment is evidenced in the signing of multilateral treaties such as the ICCPR. In non-self-executing treaties, such as the ICCPR, Congress has the obligation to enact domestic legislation to allow the precepts of the treaty to penetrate the domestic sphere. The ICCPR requires domestic legislation to remedy the discriminatory problems facing victims of gender-motivated violence in American streets and American courtrooms. The CRR provides, at the very least, one possible solution to that problem, as was acknowledged by the United States delegation to the United Nations Human Rights Committee. In an era when America claims to be leading the international fight for the protection of human rights, when America is finally forced to concern itself with the opinions of the international community, this Congress cannot allow firewalls of federalism to prohibit its bringing America’s international promises to force.

166. *Id.* at 8.

167. *Id.* at 11 (emphasis added).

168. *Summary Record of the 1402nd Meeting*, U.N. Hum. Rts. Comm., 53rd Sess., at 7, U.N. Doc. CCPR/C/SR.1402 (1995).

169. *Summary Record of the 1401st Meeting*, *supra* note 106, at 11.

170. In fact, the case for the CRR stands stronger than the case for *Holland* in that the international obligation authorizing the CRR’s passage—the ICCPR—was ratified prior to the passing of VAWA.