UNITED STATES V. MORRISON: A CRITIQUE OF THE SUPREME COURT'S RESTRICTION OF CONGRESS' FOURTEENTH AMENDMENT POWERS*

I. INTRODUCTION

Congress passed the Violence Against Women Act ("VAWA") to address the overwhelming problem of gender-motivated violence.[1] In passing VAWA, Congress made extensive findings regarding the widespread existence of violence perpetrated by males on their female partners and the societal effects of such violence on a national level.[2] Congress predicated its authority to pass the Act on the Commerce Clause[3] and Section 5 of the Fourteenth Amendment to the United States Constitution.[4]

In 2000, the Supreme Court held in *United States v. Morrison* that by passing VAWA Congress exceeded its powers under both the Commerce Clause and the Fourteenth Amendment.[5] In its *Morrison* opinion, the Court invalidated section 13981 of VAWA, which allowed a civil rights remedy for victims of gender-motivated crime.[6]

This note critiques the holding and rationale of the *Morrison* opinion. Part II sets forth the factual and procedural background of *Brzonkala v. Virginia Polytechnic and State University*,[7] the case that touched off the line of decisions culminating in *United States v. Morrison*. Part III provides an overview of the Congressional findings which gave rise to passage of the Violence Against Women Act and outlines VAWA's general provisions. In Part IV, this note addresses the Supreme Court's decision in *Morrison*. Specifically, this note

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* The author would like to extend her thanks to Lore Rogers and to Veronica Serrato.

[1] *See* 42 U.S.C. § 13981 (1994).

[2] *See generally* H.R. REP. NO. 103-395 (1993).

[3] *See* U.S. CONST. art. I, § 8, cl. 3 ("[T he Congress shall have Power to] regulate Commerce . . . among the several states.").

[4] *See* U.S. CONST., amend. XIV, § 5 ("T he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

[5] 529 U.S. 598, 627 (2000).

[6] *See* 42 U.S.C. § 13981 (1994).

[7] 935 F. Supp. 779 (W.D. Va. 1996).

examines Congress' authority to enact remedial civil rights legislation pursuant to Section 5 of the Fourteenth Amendment and concludes that the Court erred in restricting Congressional power under Section 5. Finally, Part V offers a look at post-*Morrison* cases and legislation.

II. *BRZONKALA V. VIRGINIA POLYTECHNIC AND STATE UNIVERSITY*

Christy Brzonkala was a freshman at Virginia Polytechnic Institute in 1994 when she was gang raped in her dorm room.[8] Her attackers, Antonio Morrison and James Crawford, were fellow students.[9] After pinning her down and forcibly penetrating her, Morrison warned Brzonkala that she "b etter not have any fucking diseases."[10] On a subsequent occasion, Morrison announced to a group of people that he "lik ed to get girls drunk and fuck the shit out of them."[11]

Brzonkala filed a complaint against Morrison and Crawford under Virginia Tech's Sexual Assault Policy.[12] The university's Judicial Committee subsequently dismissed the charges against Crawford.[13] Morrison was found guilty of sexual assault after admitting that he had sexual contact with Brzonkala in spite of the fact that she twice told him "n o."[14] The Judicial Committee sentenced Morrison to an immediate two-semester suspension.[15]

In mid-1995, Brzonkala learned that Morrison intended to challenge his conviction under the Sexual Assault Policy, because the policy had not been widely circulated to students.[16] Due to this technicality, the university re-heard the case under its Abusive Conduct Policy.[17] The outcome of the second hearing was the same in terms of conviction and sentence, but Morrison's offense was changed from "sex ual assault" to "u sing abusive language."[18]

Virginia Tech's provost subsequently set aside Morrison's conviction, concluding that his sentence was excessive compared to other cases involving violations of the Abusive Conduct Policy.[19] Brzonkala learned of this through the university newspaper, rather than through official university channels.[20] Brzonkala dropped out of Virginia Tech and brought suit against Morrison, Crawford and the university in the United States District Court for the Western

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[8] *See* Brief of Petitioner at 11, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29).

[9] *Id.*

[10] *Id.* at 12.

[11] *Id.*

[12] *See* United States v. Morrison, 529 U.S. 598, 603 (2000).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *See* United States v. Morrison, 529 U.S. 598, 603 (2000).

[18] *Id.*

[19] *Id.*

[20] *Id.* at 603-04.

District of Virginia.[21] That case spawned a line of cases, culminating in the Supreme Court's su mmer 2000 opinion in *United States v. Morrison*.[22]

The District Court dismissed Brzonkala's complaint under section 13981 of the VAWA, holding that Congress lacked the authority to enact section 13981 under either its Commerce Clause or Fourteenth Amendment powers.[23] A divided panel of the Fourth Circuit Court of Appeals initially reversed the District Court's findings,[24] but the full Court of Appeals, sitting *en banc*, vacated the opinion and upheld the District Court.[25] The Supreme Court granted certiorari to address the invalidation of a federal statute on constitutional grounds.[26]

III. THE VIOLENCE AGAINST WOMEN ACT OF 1994

After four years of testimony by judges, law enforcement officials, social scientists, scholars, doctors and survivors of gender-motivated violence, Congress amassed a telling record evidencing the depth and breadth of the problem of violence against women in this country.[27] Studies estimate that four million American women are battered each year by their husbands or domestic partners.[28] Women account for approximately ninety-five percent of all domestic violence victims.[29] One-third of female murder victims are killed by their husbands or boyfriends.[30]

Gender-motivated violence is not limited to the home. Violence is the leading cause of injury to women ages fifteen to forty-four.[31] Approximately 12.1 million women in America, or one in every eight adult women, are victims of forcible rape during their lifetimes.[32] On college campuses, one in every four female students is the victim of some form of sexual assault.[33]

The problems associated with violence against women are not confined to the violent acts themselves. Congress made extensive findings regarding the systemic

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[21] *Id.* at 604.

[22] *Morrison*, 529 U.S. at 604-05.

[23] *See Brzonkala*, 935 F. Supp. at 801.

[24] *See* Brzonkala v. Virginia Polytechnic and State Univ., 132 F.3d 949, 974 (4th Cir. 1997).

[25] *See* Brzonkala v. Virginia Polytechnic and State Univ., 169 F.3d 820, 889 (4th Cir. 1999).

[26] *See Morrison*, 529 U.S. at 605.

[27] *See* Senator Joseph R. Biden, Jr., Essay, *The Civil Rights Remedy of the Violence Against Women Act: A Defense*, 37 HARV. J. ON LEGIS. 1, 3 (2000).

[28] *See* H.R. REP. NO. 103-395, at 25 (1993); S. REP. NO. 103-138, at 38 (1993).

[29] *See* H.R. REP. NO. 103-395, at 26; S. REP. NO. 103-138, at 38.

[30] *See* S. REP. NO. 103-138, at 41.

[31] *Id.* at 38.

[32] *See* D.G. KILPATRICK, ET AL., NATIONAL VICTIM CENTER & MEDICAL UNIVERSITY OF SOUTH CAROLINA, RAPE IN AMERICA: A REPORT TO THE NATION 2 (1992).

[33] *See Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong. (1991).

bias against victims of gender-motivated crimes at the state law enforcement level.[34]

Because of widespread gender bias, state legal systems institutionalized the historic prejudices against victims of rape or domestic violence by erecting "b arriers of law, or practice, and of prejudice not suffered by other victims of discrimination." Congress determined that this systemic bias in state systems deprived victims of gender-based violence of "equ al protection of the laws and the redress to which they are entitled."[35]

Against the backdrop of these findings, Congress enacted the Violence Against Women Act.

In addition to the civil remedies provision at issue in *Morrison*, the VAWA has a variety of provisions designed to protect women. Many of the provisions are criminal in nature, including sections addressing penalties for interstate domestic violence and interstate violation of protection orders.[36] The VAWA also mandates that protection orders receive full faith and credit in any state, regardless of where the orders were issued.[37] Additionally, the VAWA authorizes extensive funding for training officials at every level: state and federal judges, law enforcement officials, prosecuting attorneys, court personnel, and physicians.[38] Further, the VAWA grants funds for domestic violence advocates[39] and a national domestic violence hotline.[40] These, and other provisions, seek to reduce the effects of gender-motivated violence and provide a more comprehensive national response to this pervasive problem.

IV. *UNITED STATES V. MORRISON*

After invalidating section 13981 of the VAWA on Commerce Clause grounds, the Supreme Court, in *United States v. Morrison*, proceeded to examine Congress' authority to enact the VAWA's civil rights remedy under Section 5 of the Fourteenth Amendment.[41] Justice Rehnquist, writing for the 5-4 majority, held that Congress exceeded its Fourteenth Amendment powers in enacting section 13981.[42] The Court focused on VAWA's impact on states' autonomy.[43]

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[34] *See* Biden, *supra* note 27, at 5 (citing S. REP. NO. 103-138, at 49; S. REP. NO. 102-197, at 33 (1991); H.R. CONF. REP. NO. 103-711, at 385, *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853).

[35] *Id.*

[36] *See* 18 U.S.C. §§ 2261, 2262 (1994). "The term 'protection order' includes an injunction or any other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person . . . ." 42 U.S.C. § 14040 (1994).

[37] *See* 18 U.S.C. § 2265 (1994).

[38] *See* 42 U.S.C. § 3796gg (1994).

[39] *Id.*

[40] *See id.* § 10416.

[41] *See Morrison*, 529 U.S. at 619.

[42] *Id.*

In so doing, the Court ignored Congress' extensive findings of systematic state bias in the treatment of gender-motivated crimes.[44] Furthermore, the Court ignored the appropriateness of the civil rights remedy to address this bias.[45]

A. The State Action Requirement

Determining what constitutes state action is nebulous at best. The Supreme Court has continually found it "impossible" to set out an exact formula for determining state responsibility under equal protection.[46] Instead, the Court historically looked to the facts and circumstances of each case in order to ascertain the level of state involvement in private conduct.[47] The *Morrison* Court misunderstood the facts and circumstances supporting Congress' enactment of section 13981.

In invalidating section 13981 of the VAWA, the Court cited to some of its earliest Fourteenth Amendment cases as authority that Section 5 does not authorize Congress to legislate against the conduct of private actors.[48] In *United States v. Harris*, the Court invalidated a statute prohibiting private conspiracies because the statute was directed exclusively against private actors without reference to state officials' administration of the laws.[49] Similarly, in *The Civil Rights Cases*, involving a federal statute prohibiting private discrimination in public accommodations, the Court held that "[i]ndividual invasion of individual rights is not the subject matter of the [Fourteenth] [A]mendment."[50] The *Morrison* court pointed to these cases as exemplifying the notion that the Fourteenth Amendment prohibits only state action.[51] The "time-honored" state action requirement is a necessary limitation preventing the Fourteenth Amendment from "obliterating the Framers' carefully crafted balance of power between the States and the National Government."[52] The *Morrison* Court further stated that both *Harris* and *The Civil Rights Cases* are entitled to a great deal of deference due to the length of time they have served as precedent and because the Court decided them so shortly after the passage of the Fourteenth Amendment.[53]

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[43] *Id.* at 644-45.

[44] *See* Biden, *supra* note 27, at 5, 28.

[45] *Id.*

[46] *See, e.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961) (citing Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947)).

[47] *See id.* ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.").

[48] *See* United States v. Harris, 106 U.S. 629 (1883); The Civil Rights Cases, 109 U.S. 3 (1883).

[49] *See Harris*, 106 U.S. at 639-40.

[50] *The Civil Rights Cases*, 109 U.S. at 11.

[51] *See Morrison*, 529 U.S. at 621-22.

[52] *Id.* at 620.

[53] *See id.* at 622. One scholar recently rejected the precedential value of *Harris* and *The Civil Rights Cases*:

Congress designed the VAWA civil rights remedy to address the inequality inherent in state administration of laws with respect to gender-motivated crimes.[54] In this regard, neither *Harris* nor *The Civil Rights Cases* is analogous to the VAWA civil rights provision.[55] Congress made extensive findings about the pervasiveness of violence against women in American society, and about the hardships women face in attempting to redress their crimes at the state level.[56] Indeed, as Senator Joseph R. Biden, Jr. stated, "Co ngress was compelled to conclude: 'From the initial report to the police through prosecution, trial, and sentencing, crimes against women are often treated differently and less seriously than other crimes.'"[57] Senator Biden described the systemic bias in state legal systems as "d ouble victimization," because after a perpetrator victimizes a woman, the state re-victimizes her through unequal application of the laws.[58]

The notion of "do uble victimization" authorized Congress to enact section 13981 pursuant to Section 5 of the Fourteenth Amendment. Under recent Supreme Court precedent, Congress may legislate in areas of private conduct if there is sufficient nexus between private discrimination and state action.[59] *United States v. Guest* and *Katzenbach v. Morgan* broadened the scope of the Fourteenth Amendment to private conduct that constitutes state action.[60] The Court has

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> The Congress that passed the Fourteenth Amendment clearly intended thereby to ensure the constitutionality of legislation designed to reach racist atrocities committed by one citizen against another that the states were not addressing. Although the text of the Fourteenth Amendment addresses states, Congress incontestably intended to create authority for federal legislation against private as well as state acts that deprived citizens of equal rights on a racial basis.

Catherine A. MacKinnon, *Disputing Male Sovereignty: On* United States v. Morrison, 114 HARV. L. REV. 135, 153 (2000).

[54] *See* Biden, *supra* note 27, at 39. (" Neither *Harris* nor the *Civil Rights Cases* prohibits Congress from regulating private conduct, so long as Congress does so to remedy official discrimination.").

[55] *See* Reply Brief of Petitioner at 18-19, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29). Unlike VAWA, which extensively documented equal protection violations arising from historic gender discrimination, the statutes at issue in *Harris* and *The Civil Rights Cases* did not reference any form of state action that led to violations of the Fourteenth Amendment. *Id.*

[56] *See generally* H.R. REP. NO. 103-395 (1993).

[57] Biden, *supra* note 27, at 36 (quoting S. REP. NO. 103-138, at 55). Sen. Biden was the primary legislative sponsor of the VAWA.

[58] *Id.* at 5.

[59] *See* United States v. Guest, 383 U.S. 745 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966).

[60] *See* Jil L. Martin, United States v. Morrison: *Federalism Against the Will of the States*, 32 LOY. U. CHI. L.J. 243, 286 (2000); *see also,* Julie Goldscheid, United States v. Morrison *and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109, 127 (2000). "[A] plurality of the Court in *Guest*. . . reasoned that Congress's Section 5 authority can

developed a series of tests for determining if a sufficient nexus exists between the actions of a private individual and state action to authorize Congressional regulation under the Fourteenth Amendment.[61] However, the Court has never decided the minimum level of state involvement that triggers rights under the Equal Protection Clause.[62] Nevertheless, the Court has found that a range of activities is sufficient to satisfy the state action requirement.[63] In *Shelley v. Kraemer*, the Court found that judicial enforcement of racially restrictive housing covenants constituted state action.[64] State court intervention to enforce the discriminatory covenants denied petitioners their equal protection rights under the Fourteenth Amendment.[65]

In the case of gender-motivated violence, the lack of adequate arrests, prosecutions and deterrent sentencing of violent perpetrators effectively amounts to judicial enforcement of the right to commit violence against women.[66] State failure to enforce laws against violent conduct in an evenhanded manner leaves women vulnerable to assault.[67] There is no reason to assume that the federal government does not have a legitimate interest in regulating sex discrimination in the administration of criminal law.[68] As one commentator notes, "Co ngress has authority to reach the conduct of private perpetrators of violence against women because domestic and sexual violence are in no small part triggered by attitudes and reflexes that are relics of . . . unconstitutional state treatment of women."[69]

The Supreme Court held in *Moose Lodge No. 107 v. Irvis* that discriminatory conduct does not need to originate with the state or state officials to constitute an equal protection violation.[70] State enforcement of privately originated

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extend to regulation of private conduct as a means to prevent state violations." *Id.*

[61] *See* Martin, *supra* note 60, at 286 (citation omitted).

[62] *See Guest*, 383 U.S. at 756.

[63] *See* Shelley v. Kraemer, 334 U.S. 1, 20 (1948). State action "r efers to exertions of state power in all forms." *Id.*

[64] *Id.* at 19.

[65] *Id.* ("It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.").

[66] *See* Melinda M. Renshaw, *Choosing Between Principles of Federal Power: The Civil Rights Remedy of the Violence Against Women Act*, 47 EMORY L.J. 819, 854 (1998). "Not only does the application of existing state remedies have no practical effect, but state laws and criminal justice systems perpetuate this gender discrimination . . . . As ineffective remedies, these laws also perpetuate the stereotypes of gender that prevent equal treatment under the law." *Id.* (citing S. REP. NO. 102-197 (1991)).

[67] *See* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 450 (2000).

[68] *See id.*

[69] Lawrence G. Sager, Commentary, *A Letter to the Supreme Court Regarding the Missing Argument in* Brzonkala v. Morrison, 75 N.Y.U. L. REV. 150, 154 (2000).

[70] *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972) (citing *Shelley*, 334 U.S. at 13).

discrimination satisfies the state action requirement.[71] Even state encouragement of private discrimination may trigger a constitutional violation.[72]

The *Morrison* Court misconceived the mechanism by which the VAWA's section 13981 offered a remedy against state violations of equal protection rights. The *Morrison* Court held that section 13981 did not meet the state action requirement because it offered a remedy against private perpetrators of violent crime, not against states actors.[73] However, by permitting women to sue their attackers, the civil rights remedy addresses the lack of equality in state administration of laws.[74] Section 13981 was the only provision of the VAWA that gave a survivor of gender-motivated violence control over her opportunity for legal redress, rather than being at the mercy of state actors for the administration of justice.[75] Congress sought to authorize a cause of action for victims based specifically on findings that gender-based discrimination by state officials barred victims' access to judicial remedies.[76] The civil rights provision of the Violence Against Women Act served as an "an cillary remedy," providing women legal vindication in the absence of state action.[77]

B. The Remedial Nature of Legislation Under Section 5 of the Fourteenth Amendment

The Supreme Court recently affirmed the *South Carolina v. Katzenbach* holding that any legislation enacted pursuant to Congress' power under Section 5 must be remedial in nature, designed to "enforce" the provisions of the Fourteenth Amendment.[78] However, Section 5 is "a positive grant of legislative

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[71] *Id.*

[72] *See* Reitman v. Mulkey, 387 U.S. 369, 376 (1967) (upholding the California Supreme Court's finding that a state constitutional amendment permitting property owners to decline to sell, rent, or lease property on the basis of race or other discretionary criteria would "e ncourage and significantly involve the State in private racial discrimination." The Court found a constitutional violation where the state's actions effectively authorized state involvement in private discrimination.). *But see* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (holding that "cons titutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.").

[73] *See Morrison*, 529 U.S. at 626.

[74] *See* MacKinnon, *supra* note 53, at 165. ("The simple truth is that the sex-discriminatory harm of violence against women cannot be remedied without providing direct actions that women harmed by men across society can use themselves. . . . No law that does not reach private action will be truly remedial, that is, congruent with the problem.").

[75] *See* Biden, *supra* note 27, at 40 (quoting S. REP. NO. 101-545 at 42).

[76] *See* Goldscheid, *supra* note 60, at 127

[77] *See* Danielle M. Houck, Note, *VAWA After Lopez: Reconsidering Congressional Power Under the Fourteenth Amendment in Light of* Brzonkala v. Virginia Polytechnic and State University, 31 U.C. DAVIS L. REV. 625, 650 (1998).

[78] *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (citing South Carolina v.

power."[79] Because this is a positive grant, Congress's authority to enact remedial legislation should be viewed as broader than the Supreme Court's articulation of it in *Morrison*.

In *City of Boerne v. Flores*, the Court held that "[l]e gislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'leg islative spheres of autonomy previously reserved to the States.'"[80] The *Flores* Court distinguished between remedial legislation and substantive legislation.[81] Remedial legislation is based on Congress's power to *enforce* Fourteenth Amendment provisions; substantive legislation, by contrast, actually *defines* constitutional violations,[82] and seeks to declare the substance of Fourteenth Amendment rights.[83] The *Flores* Court held that Section 5 of the Fourteenth Amendment allows Congress to enact remedial, but not substantive legislation.[84]

Although the remedial/substantive distinction limits Congress's legislative authority, Congress should still have broad power to enact remedial legislation. It is difficult to discern the boundary between legislation designed to prevent constitutional violations and legislation that effects substantive changes in constitutional law.[85] Due to this difficulty, Congress deserves great deference to its decisions regarding how to legislate to protect Fourteenth Amendment guarantees.[86] Congressional authority extends beyond mere legislative prohibitions of constitutional violations.[87] Congress has power to decide what

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Katzenbach, 383 U.S. 301, 326 (1966)).

[79] *Id.* at 517 (quoting *Morgan*, 384 U.S. at 651 ("Correctly viewed, Section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the 14th Amendment.")).

[80] *Id.* at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

[81] *Id.*

[82] *See* Post & Siegel, *supra* note 67, at 453 (quoting *Flores*, 521 U.S. at 519).

[83] *Flores*, 521 U.S. at 518.

[84] *See id.* at 519. "Co ngress' s power under [Section] 5. . .extends only to 'enforcing' the provisions of the Fourteenth Amendment. The Court has described this power as 'remedial[.]' The design of the Amendment and the text of 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. . . . Congress does not enforce a constitutional rights by changing what the right is." *Id.*

[85] *See* Post & Siegel, *supra* note 67, at 454 (citing *Flores*, 521 U.S. at 519-20). The *Flores* Court did not specify what are considered constitutional violations for purposes of applying the remedial vs. substantive test. *Id.* at 458.

[86] *See Flores*, 521 U.S. at 536. " It is for Congress in the first instance to 'determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *Id.* (citing *Morgan*, 384 U.S. at 651).

[87] *See* Biden, *supra* note 27, at 37.

threatens Fourteenth Amendment principles of equal protection and fashion appropriate remedial legislation.[88]

In defining Congress's Section 5 powers, the *Flores* Court held that any remedial legislation enacted pursuant to the Fourteenth Amendment must be congruent and proportional to the constitutional violation addressed.[89] However, the Court did not specify how much congruence and proportionality is necessary between the remedy and the constitutional violation.[90] Thus it seems "th at Section 5 legislation need possess only so much congruence and proportionality as to render it plausible that the legislation was enacted for a purpose approved by the Court."[91] Ultimately, the *Flores* congruence and proportionality test seeks to determine Congress' in tent in enacting certain legislation; the test is not designed to restrict Congress' p ower when exercised for an appropriate purpose.[92]

The *Morrison* Court swept past this broad and deferential grant of legislative power, preferring to focus on the few and ambiguous limits to Congressional authority. The *Morrison* Court particularly focused on the *Flores* congruence and proportionality test.[93] However, the *Morrison* opinion applies the *Flores* test to limit Section 5 legislation that *Flores* would consider remedial and therefore allowable.[94] The VAWA civil rights remedy falls within the boundaries imposed by the congruence and proportionality requirement.[95] Section 13981 is carefully tailored to address an identified constitutional violation— the inability of victims of gender-motivated violence to seek redress for their injuries in an equal manner with victims of other types of violent crime.[96] Indeed, Congress designed section 13981 as "an across-the-board remedy to permit those victims [of gender-based violence] to bypass the state systems that too often had failed them."[97]

In constructing the VAWA, Congress took great pains to ensure that the civil rights provision would not intrude on areas of law traditionally reserved to the states.[98] The VAWA prohibits federal courts from exercising supplemental

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[88] *See* Houck, *supra* note 77, at 640.

[89] *See Flores*, 521 U.S. at 520.

[90] *See* Post & Siegel, *supra* note 67, at 458.

[91] *Id.*

[92] *Id.* at 457. Post and Siegel state that the *Flores* test for distinguishing substantive from remedial legislation serves basically to determine whether "Con gress, under the pretext of executing its powers, [has passed] laws for the accomplishment of objects not intrusted [sic] to the government." *Id.* (quoting McCulloch v. Maryland, 17 U.S. 316 (1819)).

[93] *See Morrison*, 529 U.S. at 625-26.

[94] *See* Post & Siegel, *supra* note 67, at 477. The *Morrison* Court attempts to articulate the congruence and proportionality test as a *per se* rule, where it is more appropriate to assess the fit between a particular statute and its target violation on a case-by-case basis. *Id.* at 480.

[95] *Id.* at 477-81.

[96] *See* Biden, *supra* note 27, at 40.

[97] *Id.* at 42.

[98] *See* Reply Brief of Petitioner, *supra* note 55, at 16-17. "[T]h e Civil Rights Remedy

jurisdiction over divorce and custody actions.[99] In addition, federal courts may only hear claims pursuant to section 13981 if the victim can prove that the perpetrator acted with gender-motivated animus.[100]

Despite these safeguards, the *Morrison* Court found that the VAWA civil rights remedy failed the *Flores* congruence and proportionality test.[101] Specifically, the Court faulted Congress for directing section 13981 at individual perpetrators, rather than at the states.[102] The Court implied that Congress should have addressed the civil rights provision specifically to the states and state officials themselves.[103] However, Congress intentionally restricted the reach of section 13981 so as not to unconstitutionally intrude on state autonomy.[104] There was no reason to strike the statute for lack of congruence because Congress could constitutionally have legislated even further into the domain of state sovereignty.[105]

C. Congressional Power Broader Under Section 5 than Section 1 of the Fourteenth Amendment

In spite of the limitations on Congress' authority to enact legislation pursuant to Section 5 of the Fourteenth Amendment, the Court and commentators have agreed that, in some instances, Congress has broader power under Section 5 than it does under Section 1.[106] In *Bell v. Maryland*, the Court held that Congress has the power to reach further into the private sphere under Section 5 than under Section 1.[107] Congress in its enforcement capacity under Section 5 can legislate regarding conduct that would not qualify as a violation of Section 1 of the

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contains important limitations that 'ensure Congress' means are proportionate' to legitimate ends. . . . [T]he Remedy stays far away from the 'constitutional shoals' of 'a general federal tort law.'" *Id.*

[99] *See* 42 U.S.C. § 13981(e)(4).

[100] *See id.* § 13981(e)(1).

[101] *See Morrison*, 529 U.S. at 62-66.

[102] *Id.* The Court distinguished *Brzonkala* from *Morgan*, 384 U.S. 641, *Katzenbach*, 383 U.S. 301, and *Ex parte Virginia*, 100 U.S. 339 (1880), all cases in which the Court upheld legislation directed at the discriminatory conduct of the state or state officials. *Id.*

[103] *See Morrison*, 529 U.S. at 626-27.

[104] *See* Biden, *supra* note 27, at 41.

[105] *Id.* Senator Biden goes on to state: "Instead of penalizing the states, Congress adopted the private attorney general model, in which private individuals sue to vindicate their rights while, at the same time motivating states to do a better job of protecting those rights." *Id.* (citing City of Riverside v. Riviera, 477 U.S. 561, 574 (1986)). "Motivating states to do a better job" is the ultimate goal of granting survivors of gender-motivated violence a private civil cause of action against their perpetrators. *Id.* at 11-15.

[106] *See* Bell v. Maryland, 378 U.S. 226 (1964) (Black, J., dissenting); Johanna R. Shargel, Note, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 YALE L.J. 1849, 1876 (1997).

[107] 378 U.S. 226.

Fourteenth Amendment.[108]

D. A National Problem

In the conclusion of the *Morrison* Court's analysis of the congruence and proportionality requirement for Congressional remedial legislation, Chief Justice Rehnquist stated that the VAWA civil remedy is invalid because it applies uniformly across the nation.[109] The Chief Justice suggested that the remedy should only apply in states where Congress made specific findings of discrimination against victims of gender-motivated crime.[110] Chief Justice Rehnquist contrasted the VAWA provision with the constitutionally permissible remedies in *Katzenbach v. Morgan* and *South Carolina v. Katzenbach*, which were directed at states where Congress specifically found discrimination.[111]

Nothing suggests that Congress needs to find instances of discrimination in every state to enact national legislation regulating discriminatory conduct. In *Oregon v. Mitchell*, for example, the Court upheld a nationwide prohibition on literacy tests, though Congress made no state-by-state findings regarding the discriminatory impact of literacy tests on African-American citizens' ability to vote.[112] In his concurrence, Justice Stewart found nationwide remedies advantageous "when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country."[113]

Gender discrimination, like racial discrimination, manifests itself in a variety of forms in every part of the country. Attorneys general from thirty-eight states signed a letter urging Congress to pass the VAWA because "the problem of

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[108] *See* Shargel, *supra* note 106, at 1876 (citing *Katzenbach*, 383 U.S. at 326; City of Rome v. United States, 446 U.S. 156 (1980) ("*Katzenbach* and *Morgan* stand for the proposition that the range of conduct that Congress is permitted to legislate against pursuant to its enforcement power surpasses the scope of the activity that would constitute a violation of the self-executing provisions of the Fourteenth and Fifteenth Amendments.")); *see also* Houck, *supra* note 77, at 638-39; MacKinnon, *supra* note 53, at 161 ("Congress has the authority to legislate to prevent and redress inequality, and courts may uphold under § 5 legislation that reaches beyond acts courts would be required to prohibit under § 1 if states were sued for engaging in them on the same factual record. . . . On this reading, under the Fourteenth Amendment, the federal legislative power to create equality in society is broader than the judicial power to destroy inequality under law – at least where the Supreme Court has not ruled at all or has not ruled to the contrary.").

[109] *See Morrison*, 529 U.S. at 626.

[110] *Id.* at 626-27.

[111] *Id.*

[112] 400 U.S. 112 (1970).

[113] *Id.* at 284 (Stewart, J., concurring in part and dissenting in part). Justice Stewart further stated: "In the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records." *Id.*

violence against women is a national one, requiring federal attention."[114]

V. POST-*MORRISON* DECISIONS AND OTHER IMPLICATIONS

A. Culberson v. Doan - *A Case in Point*

Cases decided since the Supreme Court's *Morrison* decision, such as *Culberson v. Doan*,[115] illustrate at least part of the impact of the Supreme Court's invalidation of the VAWA civil rights remedy. An Ohio jury convicted Vincent Doan of murdering his girlfriend, Carrie Culberson.[116] The jury also convicted Doan's b rother, Tracey Baker, on charges in association with the murder.[117] The murder followed a year-long relationship between Doan and Culberson that included incidents of severe abuse.[118] Culberson filed reports with the local police on more than one occasion, but the police never charged and the district attorney never prosecuted Doan for his actions.[119]

Carrie Culberson's parents reported her missing in August 1996.[120] Richard Payton, Chief of Police in the Village of Blanchester, Ohio allegedly delayed the investigation and search for Culberson's body.[121] As a result, Carrie Culberson's body was never found.[122] Her parents filed suit in the Southern District Court of Ohio seeking, among other things, relief under the VAWA section 13981 for the harm Doan, Baker and Payton caused.[123]

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[114] Post & Siegel, *supra* note 67, at 479 (quoting letter from Robert Abrams, Attorney General of New York, et al., to Jack Brooks, Chair, House Judiciary Committee (July 22, 1993), *reprinted in Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 34-36 (1993)).

[115] 125 F. Supp. 2d 252 (S.D. Ohio 2000).

[116] *Id.* at 257.

[117] *Id.* Charges included two counts of obstruction of justice and one count of tampering with evidence. *Id.*

[118] *Id.* at 256-57. Plaintiffs in *Culberson* alleged that Doan injured Carrie's head and kidneys in one assault. During another incident, Doan struck Carrie with a metal object, causing her to need surgical staples in her scalp. *Id.*

[119] *See id.* at 256.

[120] Culberson v. Doan, 125 F. Supp. 2d 252, 256 (S.D. Ohio 2000).

[121] *Id.* at 257. During the search for Culberson's body, cadaver dogs alerted the police to the possible presence of a body in a pond located on the property of Doan's father, Lawrence Baker. The police requested that the pond be drained, but Chief Payton called off the search and ordered everyone off the property. Lawrence Baker was present during the search and at its conclusion. Police drained the pond the following day, but did not discover the body; however, they did find footprints on the bottom of the pond. In addition, they discovered a muddy path of weeds leading away from the pond, indicating that something had recently been dragged from the pond. *Id.*

[122] *Id.*

[123] *Id.* at 258.

In April 1999, the United States District Court for the Southern District of Ohio, Western Division, joining other federal courts, upheld the constitutionality of section 13981 and allowed the Culbersons to proceed with their lawsuit.[124] In the wake of the *Morrison* decision, however the Culbersons were forced to forgo their claims against Doan, Baker and Payton.[125]

Carrie Culberson's tragic situation exemplifies exactly the type of case that section 13981 of the VAWA should be available to address. The law enforcement system failed Carrie Culberson and her family. The local Chief of Police essentially aided Carrie Culberson's murderer in disposing of her body, yet the Culbersons were left without a means of obtaining redress. In their complaint, Carrie Culberson's parents alleged that Chief Payton was "a close, personal friend" of Vincent Doan, his brother and his father.[126] By allowing claims against perpetrators in a federal forum, section 13981 would help alleviate the effects of local bias in the administration of criminal laws.[127]

B. Alternatives to Section 13981 of the Violence Against Women Act

Section 13981 offered the promise of an important means of redress for victims of gender-motivated crime. It is important that Congress enact new legislation to address these problems, tailored to survive the Supreme Court's strict interpretation of Congressional authority. Under its Fourteenth Amendment powers, Congress has authority to enact a statute authorizing a federal cause of action in situations involving discriminatory responses by local and/or state officials.[128] On February 6, 2001, Congress enacted the Violence Against Women Civil Rights Restoration Act of 2001.[129] This statute authorizes the United States Attorney General to file suit upon a reasonable showing that the state, political subdivision of a state, or state agent "d iscriminated on the basis of gender in the investigation or prosecution of gender-based crimes. . . ."[130] The

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[124] *Id.* at 259 (citing Culberson v. Doan, 65 F. Supp. 2d 701, 714 (S.D. Ohio 1999)).

[125] *Culberson*, 125 F. Supp. 2d at 256, 259. The Culbersons proceeded with claims against Chief Payton and the Village of Blanchester pursuant to 42 U.S.C. § 1983 and for the intentional infliction of emotional distress and obstruction of justice. *Id.*

[126] *Id.* at 256.

[127] *See* Reply Brief of Petitioner, *supra* note 55, at 17. "Ev en if . . . gender bias infects federal as well as state courts, an alternative forum removed from local politics may provide the only vehicle for meaningful relief, particularly in cases where familiarity compounds bias. *Id.* (citing Brief of Respondent at 48, U.S. v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29); Brief of Petitioner, *supra* note 8, at 46).

[128] *See* Goldscheid, *supra* note 60, at 136. This form of a civil rights statute would be modeled on existing federal statutes authorizing federal intervention based on discriminatory practices. For example, the Voting Rights Act authorizes the Attorney General to bring suit if he finds evidence of discriminatory voter registration practices. *Id.* at 136-37 (citing 42 U.S.C. § 1973b(b)).

[129] H.R. 429, 107th Cong. (2001).

[130] *Id.*

Attorney General must prove "th at the discrimination is pursuant to a pattern or practice of resistance to investigating or prosecuting gender-based crimes. . . ."[131] Because this legislation targets state actors specifically, it is much more likely to survive Supreme Court scrutiny.[132] By its nature, however, this remedy is far more limited in scope than the original VAWA civil rights provision because it does not authorize a cause of action against individual perpetrators.

VI. CONCLUSION

The Supreme Court restricted Congress' power by declaring section 13981 of the Violence Against Women Act unconstitutional. In so doing, the Court ignored Congress' findings that gender-motivated violence negatively impacts our nation. Supreme Court precedent makes clear that, although there are limitations on Congressional authority to enact legislation pursuant to the Fourteenth Amendment, Congress has broad power to pass statutes designed to remedy a particular evil. In the case of the VAWA, Congress responded to extensive findings of a widespread bias in the administration of laws dealing with gender-motivated violence.

It is too late to save section 13981 as enacted in 1994. However, current and future legislation, combined with efforts of domestic violence advocates and communities nationwide, can continue to erode the effects of gender bias and increase safety for victims of gender-motivated violence.

Deena Hausner

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[131] *Id.*

[132] *Morrison*, 529 U.S. at 626. "Section 13981 is not aimed at proscribing discrimination by officials . . .; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias. In [*Brzonkala*], for example, § 13981 visits no consequence whatever on any Virginia public official involved in investigating or prosecuting Brzonkala's assault." *Id.* This statement by Chief Justice Rehnquist implies that a statute directed at states or state actors would survive the Court's interpretation of Congress' F ourteenth Amendment powers.