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If Congress . . . enacted legislation that mandated an end to sexual discrimination, the Court would have to be less am-bivalent.”1

I. INTRODUCTION

Every year in the United States, violence by men kills women in numbers equivalent to the lives lost in the terrorist attacks of September 11, 2001.2 In fact, three of four women in the United States will be victims of at least one violent crime in their lifetimes.3 Yet, few of those who commit such violent acts are ever brought to justice.4 Such injustice is the result of a system that discounts the harms of violence against women by taking it less seriously than other crimes, characterizing it as “family law,” and offering little to no monetary relief to redress these
An example can be seen through the life of Christy Brzonkala, a freshman at the Virginia Polytechnic and State University in 1996 who was gang raped by two members of the University football team. After the rape, one of the boys bragged to other students about his conquest; Ms. Brzonkala dropped out of school, sought psychiatric help, and attempted suicide. She had reported the attack to the school, which investigated the charge against the student who had admitted to the rape. The school reduced the charge against him from sexual assault to “using abusive language” and allowed him to return to school without reprimand. After hearing about her assailant’s readmission to the University, Ms. Brzonkala cancelled her own plans to return to school.

Ms. Brzonkala’s rapists went unpunished and the state made no effort to protect her or hold even the confessed assailant responsible. In a final attempt for a remedy, Ms. Brzonkala filed a civil suit in federal court under the Violence Against Women Act (VAWA) of 1994. Title III of VAWA (hereinafter Title III) was modeled after other civil rights provisions and provided a civil rights remedy for victims of gender-based violence. Ms. Brzonkala’s case went all the way to the United States Supreme Court, which struck down Title III as an unconstitutional exercise of Congress’ Commerce Clause and Fourteenth Amendment powers.

Congress’ power to regulate commerce is granted through what is commonly known as the Commerce Clause. The clause

6. See Morrison, 529 U.S. at 602.
7. See id. at 602-03.
8. See id.
10. See id.
11. See id.
12. See id.
15. See generally Morrison, 529 U.S. 598. Although the Court discussed both the Commerce Clause and the Fourteenth Amendment as possible sources of Congress’ power to enact legislation, this comment is limited to the former.
grants Congress the authority "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes."\(^\text{17}\) Although there is much debate about the limitations of this power,\(^\text{18}\) the Supreme Court has held that Congress has the power to regulate channels of, instrumentalities in, or activities substantially affecting interstate commerce.\(^\text{19}\) After four years of research and hearings, Congress enacted VAWA because of extensive findings that violence against women is a national problem that seriously impedes women from full participation in the national economy.\(^\text{20}\)

Ms. Brzonkala's case reached the Supreme Court as United States v. Morrison.\(^\text{21}\) The majority in Morrison characterized Title III as aimed at conduct criminal in nature,\(^\text{22}\) not at economic activity appropriate for Commerce Clause regulation.\(^\text{23}\) The Court

\(^{17}\) Id.

\(^{18}\) See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 174 (1997).


\(^{21}\) In December 1995, Brzonkala filed a complaint against Antonio Morrison, James Crawford, the University, and its comptroller in Federal District Court in Virginia. See Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 775, 783 (W.D. Va. 1996) [hereinafter Brzonkala II]. She amended her complaint in March 1996 to allege that Morrison and Crawford acted out of gender animus in violation of Title III of the Violence Against Women Act (VAWA). See Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 956 (4th Cir. 1997) [hereinafter Brzonkala III]. The district court judge split the claims against the school from those against the students and granted the school's motion to dismiss because he felt Brzonkala failed to state a sufficient claim of gender bias. See Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 772, 778-79 (W.D. Va. 1996) [hereinafter Brzonkala I]. With respect to the claim against Morrison and Crawford, the judge found that the complaint sufficiently stated a claim, but that the civil rights remedy of the Violence Against Women Act was unconstitutional. See Brzonkala II at 779, 801. A divided panel of the Fourth Circuit Court of Appeals reversed the district court on both claims, see Brzonkala III at 949, and found the civil rights provision of VAWA constitutional. See id. at 970 (distinguishing Lopez based in part on the lack of Congressional findings in that case). However, the full Fourth Circuit Court of Appeals reheard the case en banc and vacated the panel's decision. See Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820 (4th Cir. 1999) [hereinafter Brzonkala IV]. That court found the civil rights provision of VAWA unconstitutional. See id. at 827-28 n.2. The case reached the Supreme Court on certiorari. See generally United States v. Morrison, 529 U.S. 598 (2000).

\(^{22}\) See Morrison, 529 U.S. at 615.

\(^{23}\) See id. at 613.
warned that Title III would bring issues of "family law" into the federal courts. However, Ms. Brzonkala's suit was a civil rights suit, not a criminal one, which sought compensation for her economic losses as the result of medical treatment, psychiatric care, and the education she was unable to complete after a gang rape by two strangers.

This comment analyzes the occurrence and reinforcement of male privilege and gender discrimination in the federal court system through systematic denial of the problem, using Title III of VAWA and the facts of U.S. v. Morrison as illustrations. Part II of this comment provides background, first by briefly reviewing the history of discrimination against women, then by outlining the connection between violence against women and discrimination. Part II also gives a brief synopsis of the past sixty years of Commerce Clause jurisprudence leading up to United States v. Morrison and provides the legislative history of VAWA. Part III provides an account of the widespread gender discrimination in the federal court system and identifies the systematic failure of the federal judiciary to recognize and remedy discrimination within its own walls. Part IV examines several forms of discrimination at work through the Morrison analysis of Title III. Finally, Part V suggests an approach to Commerce Clause-based legislation and other jurisprudence that compels the federal judiciary to avoid reinforcing gender discrimination.

24. See id. at 615.
25. See McTaggart, supra note 5, at 1123.
26. In 1990, Senator Joseph R. Biden, Jr. first introduced VAWA in response to the escalating problem of violence against women. See Vaughan, supra note 20, at 173 (citing Biden at 1, 3 (citing S. REP. NO. 103-138 (1993))). Over the next four years, Congress heard testimony on the issue from law enforcement officials, judges, social scientists, professors, physicians, and victims. See id. Congress concluded that violence against women is a national problem that seriously impedes women from participating fully in the commercial life of the nation. Moreover, Congress found that gender-based violence is a problem that state legal systems had proven unable and unwilling to remedy. See id. As a result, the United States House of Representatives unanimously passed VAWA at the end of the 1994 congressional session. The Act had strong bipartisan support in the Senate, and on September 13, 1994, President Clinton signed the bill into law. See id.
27. See infra Part II.
28. See infra Part II.
29. See infra Part III.
30. See infra Part IV.
31. This paper focuses primarily on gender, while recognizing the potential essentialist pitfalls in doing so. This concentration on gender is not to set aside the serious problems of racial (or other forms of) discrimination, but to give gender independent "recognition time." See STEPHANIE M. WILDMAN WITH CONTRIBUTIONS
through the courts.\textsuperscript{32}

II. BACKGROUND

A. The Historical Basis of Discrimination Against Women

During the era of the American Revolution, revolutionaries challenged the laws governing the relations between male subjects and the king and sought individual autonomy for themselves.\textsuperscript{33} At the same time, the old English law of domestic relations was left virtually untouched,\textsuperscript{34} including its traditional name—"the law of baron et feme"—the law of lord and woman.\textsuperscript{35} Central to that law was the practice of coverture, which transferred a woman's civic identity to her husband at marriage.\textsuperscript{36} As white men increasingly freed themselves from the constraints of public patriarchy, they sustained a fully developed, complex system of law that maintained the private privileges of patriarchy as if the Revolution had never even taken place.\textsuperscript{37}

Early legal studies consisted of reading law treatises and teachings by practitioners such as Tapping Reeve.\textsuperscript{38} Reeve taught that through marriage, the husband acquired absolute title to all the personal property of the wife, as well as extensive power over her real estate.\textsuperscript{39} Once such asymmetrical legal relations were established,\textsuperscript{40} personal implications wound their way through the law.\textsuperscript{41} The husband's control of all property gave him such economic and coercive power over the wife that she could not defy him.\textsuperscript{42} Under the old law of domestic relations, a woman's only freely chosen obligation was her husband.\textsuperscript{43} Once she made that choice, he controlled her body and her property;

\textsuperscript{32} See infra Part V.
\textsuperscript{33} See LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 11 (1998).
\textsuperscript{34} See id.
\textsuperscript{35} See id. at 12.
\textsuperscript{36} See id. at 11.
\textsuperscript{37} See id. at 12.
\textsuperscript{38} See id. at 13.
\textsuperscript{39} See KERBER, supra note 33, at 13.
\textsuperscript{40} See id.
\textsuperscript{41} See id.
\textsuperscript{42} See id.
\textsuperscript{43} See id.
there were relatively few constraints on what he could do with either.44

The laws as written have changed little even today.45 For example, married women in the United States had an obligation to permit their husbands sexual access to their bodies in every state until New York’s marital rape statute of 1975.46 Today’s laws defining rape within marriage remain complex and erratic.47 The demise of coverture has been slow, accompanied by an insistence by many scholars that the practice never really existed, or existed so long ago as to be antique.48 However, it was not until 1992 that the Supreme Court specifically announced that it would no longer recognize the power of husbands over the bodies of their wives.49

B. Violence Against Women & Discrimination

Violence against women has reached epidemic proportions in the United States.50 Studies indicate that a majority of women will be victimized by violent crime in their lifetimes.51 Unfortunately, the statistics are better for rapists, who stand only a 4% chance of ultimately being convicted.52 The effect of violence on women is substantial, with almost 50% of rape victims losing or quitting their jobs following the event.53

The justice system treats crimes against women differently than other crimes.54 This disparity is not a new trend, but a practice that dates back to the nation’s English roots.55 In England, murder of one spouse by another was criminalized differently depending on which spouse committed the crime.56

44. See id. at 15.
45. See Kerber, supra note 33, at 15.
46. See id. at 306.
47. See id.
48. See id.
49. See id. at 307.
51. See Vaughan, supra note 20, at 165.
52. See Morrison, 529 U.S. at 633 (citing S. Rep. No. 101-545, at 33, n.30 (quoting H. Feild & L. Bienen, Jurors and Rape: A Study in Psychology Law 95 (1980))).
54. See McTaggart, supra note 5, at 1150.
55. See Kerber, supra note 33, at 13.
56. See id.
killing of the husband by the wife was “petit treason,” analogous to killing a king, while the killing of the wife by the husband was murder. The penalties for petit treason were, of course, worse than those for murder. Further, early common law prevented married women from participating in the “public” economic world outside the “private” sphere of the home. The law declared the two spheres separate and opted to protect only the public. Remnants of this trend can be seen in the tendency of the federal judiciary to assume that all cases concerning women are family law issues, that is, private issues more fit for the state court system.

Crimes against women continue to be seen as private “hands-off” matters by the nations’ courts, even when such crimes have nothing to do with the family. This trend is stronger yet within families. Examples include judges trivializing domestic violence with comments such as “[l]et’s kiss and make up and get out of my court,” and situations where police officers urge abused wives to “patch things up” with their husbands. However, the reality is that violence against women has economic and nationwide effects, making it an area appro-

57. See id.
58. See id.
59. See id. at 22.
60. See id. at 28.
62. See, e.g., id. at 86 (regarding “the tendency to associate women with the private sphere in all its forms—the sphere of the domestic, the sphere of legal nonintervention, the sphere of civil society, and the sphere of the state courts.”).
63. See, e.g., Soto v. Flores, 103 F.3d 1056 (1st Cir. 1997). When Ms. Soto went to the police as the result of domestic abuse, she was referred to as “Rafi’s wife” and was urged to “patch things up,” the door was left open when she was interviewed; and she was not given any information about shelters or protective orders, nor was a domestic violence report filed. See Stephanie M. Wildman, Ending Male Privilege: Beyond the Reasonable Woman, 98 MICH. L. REV. 1797, 1813-14 (2000). Rafi later returned to the house and killed both of their children and himself. See id. at 1815. Ms. Soto alleged an Equal Protection violation in federal court, claiming that women threatened with violence in domestic disputes are treated differently from other complaints of violence. See id. The court ruled against her, holding that she had failed to show discriminatory purpose. See id.
64. See Goldfarb, supra note 61, at 46.
65. See id. at 47. Juries contribute to this bias as well. See Morrison, 529 U.S. at 633 (quoting S. REP. NO. 102-197, at 47). “[F]orty-one percent of judges surveyed believed that juries give sexual assault victims less credibility than other crime victims.” Id.
66. See Wildman, supra note 63, at 1813-14.
C. Summary of Commerce Clause Jurisprudence

The Commerce Clause of the United States Constitution grants Congress the power to enact legislation to regulate commerce. There have been several phases of Commerce Clause interpretation over the years. From 1937 to 1995 the Court gave more expansive deference to Congress' power under the Commerce Clause than before that time or since. The "test" of whether Congress had exceeded its Commerce Clause power during those years was whether the activity, taken cumulatively, had an affect upon interstate commerce. During these years, the Court did not find even one piece of legislation unconstitutionally enacted under the Commerce Clause.

The case most commentators consider the farthest reach of Congress' Commerce Clause power is Wickard v. Filburn, in which the Court upheld the application of a federal law regulating the growth of wheat for personal consumption. The Court upheld it because wheat had a cumulative effect on the national market. Also important to the Wickard decision was the Court's abandonment of strict categories of nomenclature such as "direct" effects and "production" as limiting categorizations under which Congress could regulate.

One of the "most important laws ever adopted" was the Civil Rights Act of 1964, which has been upheld twice by the Court as a valid exercise of the Commerce Clause. The cases in which it was upheld, Heart of Atlanta Motel, Inc. v. United States

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68. See id.
69. See U.S. CONST. art. I, § 8, cl. 3.
71. See Morrison, 529 U.S. at 607.
72. See CHEMERINSKY, supra note 18, at 190.
73. See id. at 187.
74. 317 U.S. 111 (1942).
75. See id.
76. See CHEMERINSKY, supra note 18, at 189.
77. See id.
78. See id. at 191.
and *Katzenbach v. McClung*,\(^{82}\) dealt with privately-owned businesses that discriminated on the basis of race.\(^{83}\) In those cases, the Court held that the analysis of whether Congress had exceeded its Commerce Clause power comprised two questions: (1) whether Congress had a rational basis for finding that the regulated activity affected interstate commerce, and (2) if it had such a basis, whether the means selected to eliminate that activity were reasonable and appropriate.\(^{84}\)

In 1995, the Court dramatically altered Commerce Clause jurisprudence in *United States v. Lopez*.\(^{85}\) In *Lopez*, by a 5-4 margin, the Court declared unconstitutional the Gun-Free School Zone Act of 1990.\(^{86}\) The Act had made it a federal crime to have a gun within 1,000 feet of a school zone.\(^{87}\) The Justices split along ideological lines, with the majority holding that the relationship between the activity regulated and interstate commerce was too tangential.\(^{88}\) The Court outlined three traditional areas of Commerce Clause regulation: (1) regulation of the channels of interstate commerce; (2) regulation of instrumentalities, people, or things in interstate commerce; and (3) regulation of activities "substantially affecting" interstate commerce.\(^{89}\) Further, under the "substantial affects" test, the Court said the proper inquiry was composed of three questions: (1) whether the regulated activity was economic or commercial, (2) whether the legislation included a jurisdictional element, and (3) whether legislative findings existed indicating a connection between the activity and interstate commerce.\(^{90}\) Under this test the Act in *Lopez* failed because the Court concluded that regulating guns in school zones was not commercial or economic "in any sense."\(^{91}\) Further, the statute contained no jurisdictional element and had few legislative findings to support it.\(^{92}\) The dissenting Justices criticized the

\(^{82}\) 379 U.S. 294 (1964).

\(^{83}\) See id. See also *Heart of Atlanta Motel*, 379 U.S. at 243.

\(^{84}\) See CHEMERINSKY, supra note 18, at 192 (citing *Heart of Atlanta Motel*, 379 U.S. at 258-59).


\(^{86}\) See id.

\(^{87}\) See CHEMERINSKY, supra note 18, at 194 (citing 18 U.S.C. § 922(q)(2)(a); § 921(a)(25)).

\(^{88}\) See id. at 194. The majority was composed of the Chief Justice and Justices O'Connor, Kennedy, Scalia, and Thomas. See id.

\(^{89}\) See *Lopez*, 514 U.S. at 560-62.

\(^{90}\) See id at 563.

\(^{91}\) See id. at 561.

\(^{92}\) See id. at 560-63.
majority for abandoning sixty years of precedent in Commerce Clause analysis, during which Congress’ authority was given “rational basis” review.93

The Court again addressed the Commerce Clause in United States v. Morrison.94 At issue in Morrison was Title III of the Violence Against Women Act (VAWA).95 Using the “substantial affects” test outlined in Lopez, the Court struck down Title III as unconstitutional in a 5-4 decision split along the same lines as Lopez.96 Similar to the holding in Lopez, the Court held that the statute at issue did not govern activity that was commercial or economic.97 Citing past cases, the majority indicated that “aggregating” the effects of an activity on commerce, as done to support congressional enactment of Title III, had been used only when the activity itself was economic in nature.98 The analysis was very similar to that in Lopez, except that Title III had four years of legislative findings to support it.99 Although the litigant could provide ample legislative history, the Court held that the judicial branch made the ultimate decision as to whether congressional legislation was constitutional.100 Here, the Court decided that Title III was not.101

D. The Civil Rights Remedy of the Violence Against Women Act

The Violence Against Women Act was a step toward equality for women in the courts.102 Comprised of five titles, VAWA included Title III, the civil rights provision.103 This provision
furthered one of the stated goals of VAWA—to provide victims of gender-motivated violence\textsuperscript{104} a civil remedy to redress violation of their civil rights.\textsuperscript{105} The statute was a civil rights law, modeled after existing civil rights laws.\textsuperscript{106}

Title III was limited in that it only applied to acts of violence "with a gender animus,"\textsuperscript{107} which the victim was required to prove, and supplemental jurisdiction was limited to certain state law claims.\textsuperscript{108} While pending in Congress, Title III was one of the most controversial provisions of VAWA, based on longstanding attitudes that violence against women was a "private" matter not suited for the federal courts.\textsuperscript{109} However, the drafters

42 U.S.C. §§ 13981(b)-(d).

104. Although the language of the statute deals with "gender-motivated" violence, it is commonly accepted that women are largely the victims of such violence. Violence against women is a form of sex discrimination. See Goldfarb, supra note 61, at 15. See Wildman, supra note 1, at 304 ("Women, not men, are the victims of sex discrimination, just as blacks and not whites are the victims of race discrimination."). For a later articulation of this idea emphasizing privilege rather than discrimination, see generally WILDMAN WITH ARMSTRONG, DAVIS AND GRILLO, supra note 31.

105. See Vaughan, supra note 20, at 174.

106. See Goldfarb, supra note 61, at 53 (citing, e.g., Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House of Representatives Comm. on the Judiciary, 103d Cong. 41-42 (1993) (hereinafter 1993 House Hearing)).

107. See 42 U.S.C. § 13981(e)(1). Section 13981 defines a crime of violence motivated by gender as one committed because of gender, on the basis of gender, and due, at least in part to an animus based on the victim's gender. See id.

108. See 42 U.S.C. § 13981(e)(4). Specifically, Title III excluded any state law claim to establish divorce, alimony, distribution of marital property, or child custody. See id.

109. See Goldfarb, supra note 61, at 7. The concern is that VAWA would disrupt the "traditional jurisdictional boundaries between the federal and state courts." Id.
overcame most objections by the inclusion of language limiting the scope of the remedy.\textsuperscript{110} In total, VAWA garnered unanimous support in the House,\textsuperscript{111} strong bipartisan support in the Senate,\textsuperscript{112} the signature of the President,\textsuperscript{113} support of the attorney generals of thirty-eight states,\textsuperscript{114} and nineteen separate courts upheld it.\textsuperscript{115}

### III. IDENTIFICATION OF THE PROBLEM

Courts are venues of discrimination, notwithstanding their insignias of "equal justice under law."\textsuperscript{116} Numerous task forces have studied discrimination in the courts\textsuperscript{117} and all have come to the same conclusion: equal treatment by the courts is myth, not reality.\textsuperscript{118} Discrimination against women involved in violent crimes is all but commonplace; women uniquely, disproportionately, and with unacceptable frequency must endure a climate of condescension, indifference, and hostility.\textsuperscript{119}

In its Commerce Clause jurisprudence, the Court has left uncertain what activities qualify as "economic" or "commercial."\textsuperscript{120} Dictionary definitions of these terms reveal a field so

\textsuperscript{10} See id. at 54. The Judicial Conference of the United States was satisfied with the inclusion of a requirement of proof of gender animus, restrictions on the types of crimes covered, and the exclusion of supplementary jurisdiction for cases involving family law. See id. at 55.


\textsuperscript{12} See id.


\textsuperscript{14} See Goldscheid, supra note 9, at 119 (citing 1993 House Hearing, supra note 106, at 34-36).

\textsuperscript{15} See Goldfarb, supra note 61, at 60.


\textsuperscript{17} See id. at 1529. Resnik documents a total of thirty different task forces as of 1993. See id. at 1528.

\textsuperscript{18} See id.

\textsuperscript{19} See id. at 1531 (quoting Report of the New York Task Force on Women in the Courts 5 (1986)).

broad that nearly any activity Congress might regulate would fit.\textsuperscript{121} Prior to \textit{Morrison}, the Court gave few guidelines. Case precedent held that growing wheat for personal consumption is considered "economic or commercial"\textsuperscript{122} but keeping guns out of school zones is not.\textsuperscript{123} The closest analogy to Title III of VAWA in previous Commerce Clause jurisprudence is the Civil Rights Act of 1964-creating a civil remedy to address discriminatory conduct-yet the cases reviewed for constitutionality under that Act had a very different fate.\textsuperscript{124} If Title III of VAWA is indeed analogous to other statutes upheld under a Commerce Clause analysis, something other than a strict Commerce Clause analysis must have played into the Court's decision. Absent this basis, discrimination against women and disregard of the seriousness of gender-based violence claims are left as the remaining reasons for not upholding the statute.\textsuperscript{125}

Those who seek to keep issues of violence against women out of the federal courts expose their acceptance of biased assumptions about women and help to affirm the private/public dichotomy.\textsuperscript{126} In a system where the higher echelons of the judiciary are largely filled with the privileged halves of social pairs (primarily white males),\textsuperscript{127} and in a society that listens to what is said by the dominant members of such dichotomies,\textsuperscript{128} the judiciary plays a crucial role in reinforcing incorrect assumptions about women and the law when it accedes to these views. The judiciary's failure to recognize and name harmful behavior as

\textsuperscript{121} See \textit{id}. Common definitions of "economic" include "[o]f or relating to the production, development, and management of material wealth," "[o]f or relating to the practical necessities of life," and "financially rewarding." \textit{Id.} (citing \textit{THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE} 583 (3d ed. 1992).


\textsuperscript{123} See \textit{id}.

\textsuperscript{124} Here, I compare gender to race cases in which the Court upheld the Civil Rights Act of 1964 to show how a gender-based statute, although analogous to a race-based statute, was construed differently by the Court. However, I acknowledge that "[w]hen white women analogize sexism to racism to emphasize disadvantages society imposes on women, they (we) must also remember the privileging granted to whites by that same society." \textit{See WILDMAN WITH ARMSTRONG, DAVIS AND GRILLO, supra note 31, at 97; see also infra note 260}. Throughout this paper I do my best to avoid the pitfalls of essentialism in my discussion of gender without making any claim of success. "Seeing the privilege of whiteness ... takes effort for those privileged; privilege is our norm." \textit{See supra note 31, at 171; see also infra note 260}.

\textsuperscript{125} See \textit{McTaggart, supra note 5, at 1150}.

\textsuperscript{126} See \textit{id} at 1143.

\textsuperscript{127} See \textit{Resnik, supra note 116, at 1531}.

\textsuperscript{128} See \textit{WILDMAN WITH ARMSTRONG, DAVIS AND GRILLO, supra note 31, at 96}.
discriminatory, even if commonplace, simply reinforces its power.129

Sex discrimination, like race discrimination, is a part of the world we live in.130 Congress has recognized this discrimination as illegal and spent four years conducting hearings and research and ultimately enacting legislation in an attempt to remedy this societal ill.131 However, the United States Supreme Court is not ready to recognize violence against women as a national problem "economic" enough to warrant protection under Congress' Commerce Clause power.132 When the Court characterizes violence against women as "family law,"133 describes a civil rights statute as a "criminal"134 law issue, and enacts inherently discriminatory standards of review,135 all in terms that appear gender-neutral, gender discrimination and the system of male privilege that support it go unnoticed and legitimized.136 This attempt to exclude women from the protection of federal law demeans the importance of women's issues and threatens to make women and their concerns invisible in a powerful, elite setting.137

IV. ANALYSIS

The Court's treatment of Title III of VAWA reveals three-fold discrimination: (1) legal analysis under an inherently discriminatory standard; (2) discriminatory application of the analysis; and (3) discriminatory timing in enacting the new analysis.

A. The Economic Standard Itself Is Discriminatory

The distinction between economic and non-economic regulation necessary to sustain power to act under the Commerce Clause appears gender-neutral. However, women have been paid less,138 been taxed more,139 received less recovery in tort,140

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129. See Wildman, supra note 1, at 304.
130. See id.
132. See infra Part IV.
133. See infra Part IV.C.
134. See infra Part IV.B.
135. See infra Part IV.A.
136. See infra Part IV.
137. See Goldfarb, supra note 61, at 34.
138. See Laura M. Padilla, Gendered Shades of Property: A Status Check on Gender, Race & Property, 9 (presented in part at the University of San Diego Journal of Con-
and had their income and harms undervalued by society and the court system. This economic discrimination remains veiled in the neutral economic/non-economic language.

Historically, early law gave husbands and fathers property rights over their wives' and daughters' bodies and property. Early law also restricted women's access to education and systematically excluded them from lucrative jobs. Traditional patriarchal rules not only reinforced women's economic dependence, but also reinforced women's specialization in care services. By maintaining women's dependence on their fathers and husbands, men provided powerful incentive to keep those fathers' and husbands' needs met. Further, family life was romanticized; by devoting themselves to their families, women could hold civilization together. The ideas behind such notions were to keep women in the domestic sphere and out of the market.

Overall, women have less money than men. In our society, money is a source of privilege, and importantly it is the most widely used yardstick of success and competence. Although the "wage gap" between men and women has decreased over time, that decrease has slowed in the past decade. At the current rate, the wage gap will not be closed for another 700

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temporary Legal Issues' 2000 Conference, and at the University of Iowa's Journal of Gender, Race & Justice's 5th Annual Symposium).


140. See MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 197 (1999). "Most empirical studies indicate that women of all races receive significantly lower damage rewards than what men." See id.

141. See id. at 199.

142. See supra Part II.


144. See id.

145. See id.

146. See id. at 12.

147. See id.

148. See Padilla, supra note 138, at 361.

149. See FOLBRE, supra note 143, at xvii.

150. See Padilla, supra note 138, at 9. To add to this, the amount of a woman's lifetime spent working is usually less than a man's, resulting in lower pensions and social security. See id. at 12. Such disparity may be seen in the wealthiest class, with just 11.5% of the Forbes 400 list being female. Remove women who receive their wealth by inheritance or divorce, and that number drops to 1.75%. See id. at 13. Similar numbers can be seen at the poverty end of the spectrum. Women's unpaid work further contributes to this gap. See id. at 371.
years. Tax rules developed in the 1930s and '40s disadvantage secondary wage earners, usually women, by taxing their income at a higher rate, resulting in disproportionately higher taxes for women. Women receive less compensation in tort than men receive in the aggregate. The trend in tort recovery favors or privileges reimbursement of pecuniary or economic losses, yet injuries in women's lives more often tend to be classified as lower-ranked harm or as non-economic loss. In addition, women's work in the home receives no economic value. This omission keeps women out of the economic sphere.

With these aspects of our economy in mind, the harms that Congress may protect against through the Commerce Clause have been narrowed by the Court's requirement that activity be "economic" to qualify as affecting commerce. This limitation on Congressional power is at women's expense. As illustrated above, women have less money, receive less compensation, and systematically have their harm classified as non-economic or of lesser economic consequence. As a result, such narrowing of Commerce Clause jurisprudence adversely, disproportionately, and discriminatorily affects women. Through this aspect of Commerce Clause jurisprudence, as amended by the Court in the Lopez holding, the Court not only fails to correct for traditional undervaluations of women's work and harms, but also reinforces and magnifies subordination by adding further discriminatory factors to its analysis.

151. See id. at 10.
152. See Dowd, supra note 139, at 588.
153. See CHAMALLAS, supra note 140, at 197. See also Goldfarb, supra note 61, at 71.
154. See id. at 199. Chamallas also notes that injuries sustained by women could just as easily be categorized as physical, property-like, or pecuniary, indicating that such legal characterization is socially constructed and formed by cognitive bias. See id. at 203. The bases for such biases come from the ancient concept of women as property. For example, just over a century ago, situations of adultery where the wife was unfaithful were seen as a property-like loss for the husband, yet when the husband was unfaithful, the woman's only losses were emotional. See id. at 203 (citing Lynch v. Knight, IX H.L. Cas. 576, 11 Eng. Rep. 854 (1861)). Even in a case of a victory over severely sexually explicit and degrading images of women in the workplace, the female plaintiff was denied monetary damages. See Wildman, supra note 63, at 1804 (citing Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1493-98 (M.D. Fla. 1991)).
155. See FOLBRE, supra note 143, at 12.
156. See id.
157. See supra Part II.
158. See generally FOLBRE, supra note 143.
B. Discriminatory Application of the Commerce Clause Analysis

The decision in many Supreme Court cases has turned upon how the Court opted to characterize the harm at issue. As a result, it is important to consider the Court’s characterization in Morrison of Title III as remedying a “non-economic,” “criminal” area of “family law.” These discriminatory characterizations are what ultimately disqualify the statute, not case precedent. Under the hypothetical assumption that the test in Lopez is the appropriate test, Title III should have been held constitutional.

1. “Non-economic”

In Lopez, the Court said whether a regulated activity was economic or commercial was the first essential component to finding congressional power to act. Pursuant to its Commerce Clause power, Congress enacted VAWA after finding that crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from interstate travel, from engaging in employment in interstate business, and from transacting business in interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products. Congress cited the annual cost of harm caused by domestic violence (a smaller subset of the whole of violence against women) as $3 billion in 1990 and $5 to $10 billion in 1993. Even with such convincing numbers to back up the economic impact and thus the necessity of enacting Title III, the Court characterized the reach of the statute as

159. For example, in Griswold v. Connecticut, 381 U.S. 479 (1965), the Court declared unconstitutional a state law that prohibited the use and distribution of contraceptives, characterizing the right as the right to privacy in the marital bedroom. However, in Bowers v. Hardwick, 478 U.S. 186 (1986), the Court declared constitutional a Georgia statute prohibiting sodomy. Instead of characterizing the right as privacy in the home and personal relationships (much like Griswold), the Court addressed it as the right to engage in homosexual sodomy. Needless to say, it is much more difficult to find precedent supporting the upholding of the rights of homosexuals than it is to find the right to privacy in the home. See Professor Bradley W. Joondeph, Lecture at Santa Clara University School of Law (Nov. 13, 2001) [hereinafter Joondeph Lecture].

161. See McTaggart, supra note 5, at 1123.
163. See Morrison, 529 U.S. at 634 (Souter, J., dissenting) (quoting H.R. CONF. REP. No. 103-711, p. 385 (1994)).
164. See id. at 635 (Souter, J., dissenting) (citing S. REP. 101-545).
165. See id. (citing S. REP. 103-138, at 41).
non-economic. The majority distinguished Title III using an artificial categorization plausible only through a retrospective, distorted reading of Commerce Clause precedent. Further, the Court held that the effects on commerce cited to support enactment of the statute were too tangential to the activity regulated.

In Morrison, the majority cites Wickard v. Filburn as a case in which the activity regulated qualified as "economic." The plaintiff in Wickard was a farmer and the "economic activity" at issue was sowing less than twelve acres of wheat. Termed "economic" (in hindsight) because the Agricultural Act at issue was meant to stabilize prices of wheat, the premise was that if Wickard did not grow wheat for his own consumption, he would have to buy it in the market. However, the lone farmer's activity itself cannot rightly be termed "economic" in the context of the Court's definition, as it was both private and non-commercial. It is only the effects of Wickard's activity on commerce, in the aggregate, that may rightly be termed economic. The majority in Morrison ignores this fact, claiming that in prior cases permitting "aggregating," the activity itself was always economic. Even a cursory reading of Wickard indicates that that statement is false.

Katzenbach v. McClung and Heart of Atlanta Motel, Inc. v. United States, which upheld the Civil Rights Act of 1964, were also said to be economic in retrospect, based upon the fact that the challenged provisions of the Act related to the activities of

166. See Morrison, 529 U.S. at 615.
167. See id.
169. See Morrison, 529 U.S. at 610.
170. See Vaughan, supra note 20, at 189.
171. See id.
172. See id. However, a similar thing could be said about something as seemingly "non-economic" as a woman's unpaid labor in the home: it must also be economic under this analysis, because if the woman did not perform them, such services would have to be purchased in the market as well. See id.
173. See Vaughan, supra note 20, at 190.
174. See id.
175. See U.S. v. Morrison, 529 U.S. 598, 615 (1995)(emphasis added). Ironically, it was in Wickard that the Court struck down such strict categories of nomenclature. See generally Wickard, 317 U.S. 111.
177. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256-58 (1964) (recognizing "the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse.").
restaurants and hotels.\textsuperscript{178} Although both cases presented a stronger finding of aggregated economic effects, whether the \textit{regulated activity} was economic was not central to the holding.\textsuperscript{179} The \textit{activity} regulated, namely discrimination, was both private and non-economic in the traditional meanings of those terms.\textsuperscript{180} These decisions were based on the fact that racial discrimination had been shown to have \textit{effects} that were economic.\textsuperscript{181}

The legislative record supporting VAWA was "far more voluminous" than that compiled and found sufficient in both \textit{Katzenbach} and \textit{Heart of Atlanta}.\textsuperscript{182} In fact, the Court upheld activities in prior cases with much smaller dollar figures than those Congress produced as support for VAWA.\textsuperscript{183} Equally important, Congress showed that gender-based violence in the 1990s operated in a manner similar to racial discrimination in the 1960s—reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce—activities not considered too remotely tangential in the Civil Rights Act cases.\textsuperscript{184}

The activities regulated by Title III are not less "economic" in nature than statutes in prior case law. The effects in \textit{Wickard}\textsuperscript{185} were just as tangential as those in \textit{Morrison}, if not more so, and the discrimination in \textit{Katzenbach} and \textit{Heart of Atlanta} were akin to that Congress sought to regulate by enacting VAWA.\textsuperscript{186} Congress chose to legislate in the field of gender motivated crimes for many of the same reasons as it chose to legislate over racial discrimination in the 1960s: the aggregate effects substantially affect the national economy.\textsuperscript{187} Further, the connection between violence against women and interstate commerce is no less attenuated than the connection between racial discrimination and

\textsuperscript{179} See Vaughan, supra note 20, at 190 (citing \textit{Heart of Atlanta Motel}, 379 U.S. 241 (1964)).
\textsuperscript{180} See McTaggart, supra note 5, at 1140.
\textsuperscript{181} See Vaughan, supra note 20, at 190.
\textsuperscript{182} See \textit{Morrison}, 529 U.S. at 635 (Souter, J., dissenting).
\textsuperscript{183} See id. at 635 (citing \textit{Hodel v. Indiana}, 452 U.S. 314, 325 n.11 (1981)) (stating that corn production with a value of $5.16 million "surely is not an insignificant amount of commerce").
\textsuperscript{184} See \textit{id.} at 635-36. Notably, the Court of today has a very different composition than the one in the 1960s.
\textsuperscript{185} See Vaughan, supra note 20, at 190.
\textsuperscript{186} See id. at 195.
\textsuperscript{187} See id. at 188.
interstate commerce. Following *Heart of Atlanta* and *Katzenbach*, the fact that fear of gender-based crime affects women’s full participation in interstate commerce means that they too will be deterred from staying at hotels and eating at restaurants. The majority in *Morrison* disregarded the magnitude of the problem of gender-based violence in society today, much in the same way the problem of racial discrimination went unnoticed by the Court for years. The Civil Rights Act of 1964 cases, namely *Heart of Atlanta* and *Katzenbach*, were upheld under the Commerce Clause because of a societal need for a federal remedy. Thus the same standard should apply for the equally pressing need for federal regulation with respect to gender-based violence.

If the "economic" distinctions between *Morrison* and Commerce Clause precedent do not hold up, it follows that something else must have governed the Court’s decision. As illustrated, a different standard was applied in *Morrison*, while the Court purported to use the same analysis it had in prior cases. More specifically, the Court changed the standard to require that the regulated activity be economic to aggregate the affects of an activity on commerce, whereas prior Commerce Clause jurisprudence allowed the effects themselves to be economic. By enacting and applying a different standard for discrimination against women through violence than it did for racial discrimination in the Civil Rights Act cases, the Court deems sex discrimination a less egregious social ill than race discrimination. This treatment of gender is in line with the Court’s disparate treatment of sex and race discrimination in its

188. See id. at 195.
189. See id.
190. See id. at 196. During attempts at racial segregation, the problems separation caused were ignored and only grossly belatedly provided for. In *Plessy v. Ferguson*, the Supreme Court refused to take notice of the effects of racial segregation, claiming that if "the enforced separation of the two races stamps the colored race with a badge of inferiority," it is "solely because the colored race chooses to put that construction upon it." See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896). Later, in *Brown v. Board of Education*, *Plessy* was overruled the Court finally recognized the harm of segregation. See generally *Brown v. Bd. of Educ.*, 349 U.S. 294 (1954).
191. See McTaggart, *supra* note 5, at 1141.
192. See id. In fact, the legislative findings under VAWA were greater than those for the Civil Rights Act of 1964. See Goldscheid, *supra* note 9, at 134.
194. See id.
195. See Wildman, *supra* note 1, at 286.
Equal Protection analyses. The Court's implicit belittling of the harm of sex discrimination, now expanded into Commerce Clause analysis, further perpetuates sex discriminatory attitudes.

2. "Criminal"

The Court characterized Title III as governing action criminal in nature, then used that characterization as a transition into a discussion of federalism, striking down the statute as an area reserved to the states by the Tenth Amendment. However, at issue was a civil rights provision, the protection of which historically has been within the purview of the federal government.

Recall the stated purpose of Title III to "protect the civil rights of victims of gender motivated violence . . . by establishing a [f]ederal civil rights cause of action for victims of crimes of violence motivated by gender." This provision allows victims of gender-motivated violence to sue to recover compensatory and punitive damages, as well as injunctive and declaratory relief. The majority in Morrison never addressed the fact that Title III was a civil remedy, not a criminal one. Further, a claimant may assert a claim under the statute regardless of whether she files a criminal claim. However, the majority likened Title III to the Gun-Free School Zone Act in Lopez, which made it a crime to possess a firearm in a school zone, the violation of which could result in a federal prison sentence. Specifically, the Court said that Lopez, as the most recent Supreme Court case dealing with this aspect of Commerce Clause jurisprudence, provided the "proper framework" for analyzing Title III. The majority in Morrison failed to discuss the difference between the remedies provided by these two statutes, one being criminal (prison), the other civil (damages or equitable relief).

196. See id.
197. See id.
198. See Morrison, 529 U.S. at 618. "The regulation and punishment of intrastate violence . . . has always been the province of the states." Id.
199. See Joondéph, supra note 120, at 1809.
201. See Vaughan, supra note 20, at 174.
202. See id. at 193.
204. See Vaughan, supra note 20, at 180, 190.
Therefore the Court's adherence to *Lopez* was erroneous in this respect.\textsuperscript{206}

Assuming, arguendo, that the statute at issue in *Morrison* did regulate activity criminal in nature, that alone should not have kept the Court from finding it suitable for federal regulatory power. In opposition by some federal judges, the federalization of criminal law\textsuperscript{207} is now a significant part of the federal system, leaving little in the area of criminal law that Congress has not or could not regulate.\textsuperscript{208} For example, in *Perez v. United States*,\textsuperscript{209} the Court upheld a federal statute criminalizing local loansharking under the Commerce Clause.\textsuperscript{210} If a violent result is the proper object of regulation in that case, it should be proper in other cases as well.\textsuperscript{211} As seen in *Morrison*, the Court chose to treat violence against women differently. The choice to stop the flood of federalization in (allegedly) criminal law at gender-based violence reflects a bias against women's claims.\textsuperscript{212}

Another challenge to Congress' Commerce Clause power more recently reached the Supreme Court in *Solid Waste Agency v. United States Army Corps of Engineers*.\textsuperscript{213} In the opinion, the Court used the canon of constitutional doubt to construe the Clean Water Act as not violating the "migratory bird rule."\textsuperscript{214} This canon reflects the idea that if there are two possible readings of congressional legislation, one constitutional and one not, the constitutional one is assumed to be what Congress intended.\textsuperscript{215} Chief Justice Rehnquist said that if otherwise construed, the Act would *raise a serious question as to whether Congress had exceeded its commerce power*.\textsuperscript{216} It was unclear in that case why the Court saw the province of the migratory bird rule as "land and water use" instead of "environmental protection," an area historically regulated by Congress.\textsuperscript{217} Similarly, it was unclear why the Court would deem Title III within criminal law

\begin{footnotes}
\footnoteref{206}{See Vaughan, supra note 20, at 190.}
\footnoteref{207}{See McTaggart, supra note 5, at 1147.}
\footnoteref{208}{See id. (citations omitted).}
\footnoteref{209}{402 U.S. 146 (1971).}
\footnoteref{210}{See Vaughan, supra note 20, at 190-91.}
\footnoteref{211}{See id.}
\footnoteref{212}{See McTaggart, supra note 5, at 1147.}
\footnoteref{213}{531 U.S. 159 (2001).}
\footnoteref{214}{See Joondeph, supra note 120, at 1809.}
\footnoteref{215}{See *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001).}
\footnoteref{216}{See id.}
\footnoteref{217}{See Joondeph, supra note 120, at 1809.}
\end{footnotes}
instead of civil rights. Tellingly, the Chief Justice did not invoke the canon of constitutional doubt in *Morrison*.

3. "Family Law"

When VAWA was first proposed, Chief Justice Rehnquist spoke out against it, warning that it "could involve federal courts in a whole host of domestic disputes." In the *Morrison* opinion, the Chief Justice further characterized the economic and commercial effects Congress found during four years of research and legislative hearings as a "serious impact . . . on victims and their families" when discussing the legislative findings that *Morrison* had as support, unlike *Lopez*. However, Congress did not spend four years studying what effects gender motivated violence had upon victims and their families. Rather, Congress examined the effects such violence had upon interstate commerce, such as the fact that almost 50% of rape victims lose their jobs or are forced to quit because of the crime’s severity. The *Morrison* majority discounted the congressional findings, mischaracterizing them as "private" and decided that questions of the character of such findings could "be settled finally only by this court" in one fell swoop.

Title III is not a family law statute. Further, the domestic-relations exception to federal court jurisdiction is limited to divorce, alimony, equitable distribution of property, and child custody decrees, areas specifically excluded from VAWA. However, opponents of VAWA have used the fact that the stat-

218. See id.
219. See Vaughan, supra note 20, at 186.
220. See United States v. *Morrison*, 529 U.S. 598, 614 (2000) (emphasis added). "In contrast with the lack of findings that we faced in *Lopez*, § 13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families." See id.
221. See generally *Morrison*, 529 U.S. at 628-36 (Souter, J., dissenting) (citing numerous Congressional findings).
223. See *Morrison*, 529 U.S. 614 (quoting *Lopez* and *Heart of Atlanta Motel*).
224. This is a far cry from the rational basis test of Commerce Clause precedent. See Joondeph, supra note 120, at 1808. At no point in either opinion (*Lopez* or *Morrison*), did the Court ask if Congress had a rational basis for deciding that activity at issue affected interstate commerce. Instead, they decided each upon an assumption that it was a decision for the Court de novo. See id.
225. See McTaggart, supra note 5, at 1144.
226. See id. (footnote omitted).
ute was limited in this manner as evidence of the danger of the statute’s influence on family law.227 These arguments reflect biased assumptions about women and seek to reaffirm the private/public dichotomy under the guise of federalism.228

The farthest reach of such bias is seen in the attitudes of judges who construe the sexual contact between the rapist and victim as an intimate relationship in itself.229 By viewing not only marriage, but also many other kinds of relationships, as domestic, private, and therefore less susceptible to legal scrutiny, the law fails to protect women from exactly the type of violence they are most likely to experience.230 Moreover, because violence occurs within a marriage does not transform it automatically into a family law issue.231 Even if the victim was or had been married to her abuser, it is the nature of the claim, not the nature of the relationship between the parties, which dictates jurisdiction.232 In Morrison, the facts were farther removed from the “family,” as the act at issue was a gang rape by strangers at a public university, making application of family law wrong as a matter of law and inappropriate as a matter of justice.233

C. Discriminatory Timing of the Change in Commerce Clause Jurisprudence

Citing similarities to the Lopez analysis, one commentator postulated that Morrison was granted certiorari to reinforce the congressional boundaries set in Lopez, as many courts had not followed them.234 However, another commented that Morrison might well have been decided before it ever reached the Su-

227. See Goldfarb, supra note 61, at 75; Vaughan, supra note 20, at 186. The lower court judge in Brzonkala I also commented on the possibility of regulation of “family law” in the federal courts as he declared Title III unconstitutional, noting that violence against women is a “troubling aspect of American life,” but one that Congress could not regulate. See McTaggart, supra note 5, at 1136-37 n.95.

228. See Vaughan, supra note 20, at 186 (quoting McTaggart, supra note 5, at 1143).

229. See Goldfarb, supra note 61, at 24.

230. See id.

231. See McTaggart, supra note 5, at 1144.

232. See id. at 1145.

233. See id. In addition, of the eighteen cases prior to Morrison in the lower courts, only five were between currently or formerly married couples. See Goldfarb, supra note 61, at 78 n.308.

234. See Vaughan, supra note 20, at 165-66. In fact, after Lopez, but before Morrison reached the Supreme Court, several lower courts validated Morrison under a Lopez analysis. See Goldfarb, supra note 61, at 78 n.308.
The latter seems a more likely possibility, considering the timeline of events relevant to the *Morrison* decision.

In 1990, the concept of VAWA was born. In 1991, Chief Justice Rehnquist vehemently spoke out against the statute. In 1994, VAWA was enacted. That same year, lower courts began to uphold the statute. In 1995, *U.S. v. Lopez* was decided upon writ of certiorari, in an opinion written by the Chief Justice, changing the standard for Commerce Clause jurisprudence. From 1995 to 1999, lower courts continued to uphold VAWA. In 1999, the Fourth Circuit was the first appellate court to reject Title III of VAWA. In 2000, *Morrison* went to the Supreme Court on writ of certiorari and was struck down in an opinion written by Chief Justice Rehnquist.

The combination of Rehnquist's view that a woman's civil right to be free from gender-motivated violence is "domestic relations" and the timing of the *Lopez* decision relative to VAWA's enactment suggest that the Chief Justice had VAWA in mind when deciding *Lopez*. This forward-looking activity is what is sometimes called "planting favorable precedent," marking an important shift in the way the Court characterizes the right at issue in anticipation of future cases.

It is doubtful that this change in Commerce Clause jurisprudence was necessary to limit congressional power as the Court desired. When *Lopez* came to the Supreme Court, the Court of Appeals for the Fifth Circuit had stuck down the Gun-

235. See Vaughan, supra note 20, at 186.
236. See id. at 173.
237. See id. at 186.
239. See Goldfarb, supra note 61, at 59-60 n.308.
240. See Vaughan, supra note 20, at 186.
241. See Goldfarb, supra note 61, at 59-60 n.308.
242. See id.
244. See Vaughan, supra note 20, at 186. "Morrison may well have been decided before it ever reached the Supreme Court." *Id.*
245. See Professor Bradley W. Joondeph, Lecture at Santa Clara University School of Law (Nov. 20, 2001).
246. See id. For example, when *Eisenstadt v. Baird*, 405 U.S. 438 (1972), was decided, *Roe v. Wade*, 410 U.S. 113 (1973), was just one year from being decided, and there is no doubt that Justice Brennan knew that *Roe* was coming. See id. Interestingly, a similar timeline can be seen with respect to the Equal Protection aspect of VAWA and *City of Boerne v. Flores*, 521 U.S. 507 (1997), with respect to a shift in Fourteenth Amendment jurisprudence. See Goldfarb, supra note 61, at 77-78.
247. See generally Joondeph, supra note 120.
Free School Zone Act, but for a different reason. The appeals court struck down the statute based on a lack of congressional findings indicating an adequate connection to interstate commerce. In taking on the case and reviewing it de novo, the Supreme Court did not ask the question, "Did the lower court err?" but rather, "Was the law substantially related to interstate commerce?" These questions set the stage to change the analysis used during sixty years of Commerce Clause precedent.

Had the Court maintained the established standard of Commerce Clause jurisprudence, Lopez would likely have had the same result because of sparse legislative findings, but the result in Morrison certainly would have been different. The Court openly admitted that Morrison had significant legislative findings that Lopez lacked. Consequently, it was important to change the "affects" test in Lopez to get the result Rehnquist had advocated, namely, to set a precedent that lower courts could follow to strike down VAWA as unconstitutional.

D. The Role Played by Systems of Privilege

Rehnquist could not strike down Title III alone. Morrison was a 5-4 decision, with the Court split along the same lines as it split in Lopez. Four of the five justices comprising the majority fell on the side of the Morrison decision that could easily be predicted from precedent, and four other justices ruled in a manner consistent with their past decisions. However, Justice O'Connor’s take on the case was less predictable. O'Connor has previously taken a stand for women’s rights and the problem of domestic violence as seen in the decision in Planned Parenthood v. Casey, which she co-authored. That opinion spoke of a woman’s ability to choose her destiny and place in society, affirmed that women do not lose their constitutionally protected

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248. See CHEMERINSKY, supra note 18, at 195.
249. See id.
250. See id.
251. See id.
253. See id. at 598.
254. Chief Justice Rehnquist openly spoke out against VAWA. See Vaughan, supra note 20, at 186. Further, the Chief Justice along with Justices Scalia, Thomas, and Kennedy, believe that even Roe v. Wade, 410 U.S. 113 (1973), should be overturned. See CHEMERINSKY, supra note 18, at 669.
256. See CHEMERINSKY, supra note 18, at 670.
rights when they marry, and noted the prevalence of domestic abuse, both physical and psychological. A comparison of Casey and Morrison exposes a seeming contradiction in the first woman Supreme Court justice’s jurisprudence.

In an effort to effectuate positive change for women, O’Connor may have fallen into what is commonly known as the essentialist trap. The criticism of essentialist gender critiques is that first men, and then women of relative power (in terms of access to means of publication) within the women’s movement, have used their platforms to explain, and therefore negate, erase, or appropriate the experiences of those unlike themselves. Many feminists have suggested that a notion of multiple consciousnesses is necessary to any analysis of gender. Identity is made of fragments of experience, often inseparable in the individual; this concept has been likened to that of a Koosh ball. Failing to recognize these many fragments co-existing within the individual clouds the picture of the whole Koosh ball, where multiple strands interrelate.

Such a failure to recognize different “strands” of privilege is one explanation for the seeming contradiction in Justice O’Connor’s decisions. Although the Justice is in the non-privileged position of being female, she is also in a position of

258. See id. at 897-98.
259. See id. at 891-93.
260. Essentialism is often understood as the overgeneralizations that attribute to all members of a group the characteristics of a dominant subset of that group. However, we live in a world where people are not oppressed only, or even primarily, on the basis of gender, but also on the bases of class, race, sexual orientation, or other categories, often inseparable because they simultaneously occur in one person. See Wildman, supra note 62, at 1811 (quoting KATHERINE T. BARTLETT & ANGELA P. HARRIS, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 1007-09 (2d ed. 1998)). See also supra note 123.
261. See Resnik, supra note 115, at 1538.
262. See Harris, supra note 101, at 587.
263. See id. at 613.
264. See WILDMAN WITH ARMSTRONG, DAVIS AND GRILLO, supra note 30, at 22-23.
265. See id. at 23.
privilege as a member of the country's highest judiciary. As a woman, she is concerned about women's place in society, maintaining rights upon marriage, and the problem of domestic abuse. However, as a well-educated white woman in a powerful position, she may have little personal concern for issues that disproportionately affect women in less privileged groups. Those with privilege rarely recognize it as such. As a woman with the privilege (and power) to make important decisions, Justice O'Connor may have negated the experiences of women unlike herself in her efforts to effectuate positive change for women.

The irony is that Justice O'Connor, one of the first women who deserves credit for helping put women's issues on the judicial agenda, was likely unaware of the discriminatory effect of her vote. Certain patterns of behavior are so integrated into our society, such as accepting the private/public dichotomy, that discriminatory acts are often done unconsciously, and we do not immediately perceive them as discriminatory. By forbidding violence against women de jure but permitting it de facto, the law has done little to reduce the frequency of such crimes and has conveyed the inaccurate impression that they are rare and deviant.

V. PROPOSAL

"Equality is our aspiration, the goal in our culture, but the fact is that our world does not treat [all] people... alike. Our dilemma is how to move from a world where we know the reality is non-equal treatment to the world of our aspirations." The Supreme Court, as the highest court of the nation, needs to take steps to remedy discrimination and prevent further reinforcement of existing discrimination. This process calls for a change in the way the Justices perceive discrimination in

267. Black women, for example. During slavery rape of a black woman by any man was not considered a crime, see Harris, supra note 101, at 599 (citing Jennifer Wrigins, Rape, Racism, and the Law, 6 HARV. WOMEN'S L.J. 103, 118 (1983)), and after the Civil War, rape laws were seldom used to protect black women, since they were seen as promiscuous by nature. See id.
268. See Wildman, supra note 62, at 1806.
269. See Resnik, supra note 115, at 1540.
270. See Wildman, supra note 1, at 304.
271. See Goldfarb, supra note 60, at 40 (footnote omitted).
272. See Wildman with Armstrong, Davis and Grillo, supra note 30, at 173.
general. The problem in the Supreme Court's current analysis of sex stereotyping is that it examines only discrimination and ignores privilege.\textsuperscript{273} The first step is to uncover systems of privilege by recognizing and naming their harms.\textsuperscript{274} The very danger of systems of privilege is that they are elusive and fugitive, deriving power from their invisibility.\textsuperscript{275} It is difficult to fight that which is invisible, which is why revealing systems of privilege (plural) is crucial to any attempt to combat them.\textsuperscript{276} An analysis that goes beyond stereotyping is necessary to examine the gender power system and how decisions based on it harm women.\textsuperscript{277}

The nation needs a judicial commitment to end sex discrimination against women\textsuperscript{278} equal to the commitment displayed by the legislature.\textsuperscript{279} The judiciary must remember that it is women who have been historically discriminated against.\textsuperscript{280} They must question seemingly neutral laws, with each justice keeping his or her own respective place of privilege in mind. The justices must ask themselves whether their respective decisions truly are based on case precedent, or informed, in part, by traditional ideas about women's roles. If the Court insignia of "equal justice under law" is to mean anything, legislation to achieve full participation in all aspects of society by all people\textsuperscript{281} must not be set aside lightly. A participatory perspective, aimed at ensuring full societal participation, would accomplish that goal.\textsuperscript{282}

From the standpoint of Commerce Clause jurisprudence, eliminating the "economic/non-economic" (or any other arbitrary) dichotomy is a starting point. A return to the true meaning of the "substantial affects" prong is desirable, through asking whether the activity regulated has a substantial effect on

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\item[273.] See id. at 39.
\item[274.] See Wildman, supra note 62, at 1851.
\item[275.] See id. at 1805 (internal quotations omitted).
\item[276.] See id. See also WILDMAN WITH ARMSTRONG, DAVIS AND GRILLO, supra note 30, at 7, 17.
\item[277.] See WILDMAN WITH ARMSTRONG, DAVIS AND GRILLO, supra note 30, at 7, 17.
\item[278.] See Wildman, supra note 1, at 307.
\item[279.] See, e.g., 42 U.S.C. § 13981 (2002).
\item[280.] See Wildman, supra note 1, at 307.
\item[281.] See Vaughan, supra note 19, at 173 (citing Senator Joseph R. Biden, Jr., The Civil Rights Remedy of the Violence Against Women Act: A Defense, 37 HARV. J. ON LEGIS. 1, 2 (2000) (citing numerous congressional hearings over the four-year period 1990-94)).
\item[282.] See Wildman, supra note 1, at 306.
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interstate commerce. This standard, supported by adequate legislative findings, would allow precedent to be maintained without the strained reading the Court applied in Morrison. Under this proposal, the statute in Lopez still would be held unconstitutional due to the lack of legislative findings to support the statute, but the statute in Morrison, as well as other statutes with sufficient legislative findings, would be upheld.

If the Court desires less deference to Congress, it must limit congressional power in a manner that is not discriminatory, and that is permitted under the U.S. Constitution. Further, the Court must give some weight to congressional findings, especially those with four years of hearings and studies supporting them.

Finally, the Court must aim for a stronger recognition of women's true role in commerce and the market, a proper valuation of women's work, and a recognition of the reality of the economic impact of violence on women. If the legal system places accurate values on these roles and harms, discrimination will automatically cease to exist. The quote from the beginning of this comment stated, "If Congress . . . enacted legislation that mandated an end to sexual discrimination, the Court would have to be less ambivalent." Unfortunately, this prediction has turned out to be not entirely accurate. Congress has taken the first step in recognizing the harms of discrimination against women through violence. Now the Court needs to follow suit.

VI. CONCLUSION

In the United States, violence by men against women kills thousands each year. Yet, relatively few of those who commit these violent acts are ever brought to justice because the courts of this nation take the harm of violence against women less seriously than other crimes. The analysis of Title III of VAWA in U.S. v. Morrison stands as an example of the severity and consequences of such discrimination. The majority opinion in Morrison uncovers the failure of the judiciary to recognize systematic
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discrimination as a problem and exemplifies the systems of privilege operating to reinforce such discrimination.290

As noted in the joint opinion in Planned Parenthood v. Casey,291 the old notions of women having no legal existence separate from their husbands are "no longer consistent with our understanding of the family, the individual, or the Constitution."292 Yet courts continue to be venues of discrimination,293 with a tendency to assume that all cases concerning women are really about the family.294 Treating violence against women as "family law,"295 characterizing a civil rights statute as "criminal" in nature,296 and setting up standards that are inherently discriminatory to women297 are blatant forms of discrimination that the Court may allow, but not while claiming to uphold the nation's Constitution.298 These mistaken characterizations are what ultimately disqualify Title III under the majority opinion in Morrison,299 and they legitimate and perpetuate sex discriminatory attitudes.300

Only when the Supreme Court recognizes its position of privilege and takes steps to remedy discrimination by recognizing and naming the harms at issue, questioning seemingly neutral laws, and asking if each decision furthers the claim of "equal justice under law"301 can we realize the sentiment set forth by the plurality opinion in Casey. "The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power."302

290. See id.
292. See id. at 897.
293. See Wildman, supra note 1, at 305.
294. See Goldfarb, supra note 60, at 46.
296. See id. at 617.
297. See supra Part IV.
298. See Goldscheid, supra note 8, at 134.
299. See McTaggart, supra note 5, at 1123.
300. See Wildman, supra note 1, at 304.
301. See supra Part V.