Yes, Virginia (Tech), Our Government is One of Limited Powers

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**RECENT DEVELOPMENTS**


**I. INTRODUCTION**

The Framers of the Constitution designed the national government to be one of limited powers. Distrustful of the accumulation of power in any single body, the Framers provided for the division of powers both within the national, or general, government, and between the national government and the state governments. The separation of powers among the national government's legislative, executive, and judicial branches requires each branch to secure the acquiescence of the other two for the successful implementation of any policy, while the federalism that divides power between the national and the state governments prevents either from obtaining totalitarian control over the citizenry by limiting the authority of each to particular realms.¹ In this sense, "a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself."²

The Constitution limits the national government by granting it certain enumerated legislative powers³ and providing that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁴ By giving the national government specific powers, and not a general

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¹. See, e.g., The Federalist No. 46, at 315 (James Madison) (Jacob Cooke ed., 1961) ("The Federal and State Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes."); The Federalist No. 45, at 313 (James Madison) (Jacob Cooke ed., 1961) ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.").


³. U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . ") (emphasis added).

⁴. U.S. Const. amend. X.
legislative power, the Framers made clear that "an act of Congress is invalid unless it is affirmatively authorized under the Constitution."\(^5\)

Last Term in *United States v. Morrison,\(^6\)* the United States Supreme Court reaffirmed this basic principle of American government. The Court, in a five-to-four opinion written by Chief Justice Rehnquist, held that the provision of the Violence Against Women Act ("VAWA" or "Act")\(^7\) giving victims of gender-motivated violence a private damages remedy\(^8\) was unconstitutional. The Court rejected arguments that VAWA was authorized under the Commerce Clause\(^9\) or Section 5 of the Fourteenth Amendment.\(^10\) The Court found that although violence against women affected the national economy, such violence was in no way "commercial." Penalizing those who committed violence thus lay beyond the powers of the national legislature to regulate interstate commerce.\(^11\) The Court also rejected the claim that the Act enforced the Fourteenth Amendment, reasoning that the Amendment protects against discriminatory action only by *states.* The protections of the Fourteenth Amendment "erect[...]

\(^{5}\) LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 298 (2d ed. 1988) (emphasis omitted).

\(^{6}\) 120 S. Ct. 1740 (2000).


\(^{9}\) U.S. CONST. art. I, § 8, cl. 3.

\(^{10}\) U.S. CONST. amend. XIV:

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Id.

\(^{11}\) Morrison, 120 S. Ct. at 1750 (2000) (noting that exertions of power under the Commerce Clause deal with "some sort of economic endeavor").

\(^{12}\) Id. at 1756 (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).

\(^{13}\) Id. at 1758 ("Section 13981 . . . is directed not at any State or state actor, but
Morrison reaffirmed that legislation justified under the Commerce Clause will be sustained if the legislation regulates "the channels of interstate commerce," "the instrumentalities of interstate commerce, or persons or things in interstate commerce," or "those activities having a substantial relation to interstate commerce." The Court thus declined to repudiate years of Commerce Clause jurisprudence that accepted national regulation of activities "substantially" affecting interstate commerce. As Justice Thomas argued in his Lopez concurrence, this position cannot be squared with the text of the Constitution. Article I, Section 8, Clause 3 allows Congress to regulate activities that are, not those that affect, interstate commerce.

The substantial effects test, however, raises the questions of how substantial an effect on interstate commerce is required for Congress to regulate a particular activity, and which body is to determine that sufficiency. In passing VAWA, Congress collected "a mountain of data . . . showing the effects of violence against women on interstate commerce." Morrison held that despite a presumption in favor of the constitutionality of congressional statutes, Congress's research and conclusion that violence against women substantially affected interstate commerce were insufficient to save VAWA from a constitutional challenge. Instead, the Supreme Court itself, consistent with its duty to "say what the law is," determined that violence against women was not economic activity, and thus the "substantial effects test" did not apply to the Act.

Congress has little incentive to adopt a principled interpretation of the limits of the Commerce Clause, and there is little evidence that Congress has done so. If the Court

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14. Id. at 1749 (quoting United States v. Lopez, 514 U.S. 549, 558-59 (1995) (internal citations omitted)).
17. Morrison, 120 S. Ct. at 1760 (Souter, J., dissenting).
19. Morrison, 120 S. Ct. at 1750 (stating that the substantial effects test has been applied only to regulations of economic activity).
allowed Congress to legislate with regard to every topic, the Court would effectively abdicate its responsibility to protect states from infringements on their sovereignty by the national government. Even with Morrison's pronouncement of limited government, the Court's retention of the substantial effects test (as opposed to its consideration of the original understanding of the Commerce Clause, as urged by Justice Thomas in Lopez) makes it difficult to predict whether, in the coming decades, the Commerce Clause will be interpreted as substantially limiting Congress's power.

The Court's refusal to allow Congress to adopt an ever-expanding interpretation of the Fourteenth Amendment gives hope to the idea that the national government will be constrained to a finite realm. Nevertheless, the Court has maintained the position that Congress's power to "enforce" the Fourteenth Amendment is not limited to punishing and deterring the conduct actually prohibited by that Amendment. The extent to which the Court will defer to congressional determinations about the scope of the national government's power is thus in doubt, despite the clarity with which the Court rejected Congress's determinations in Morrison.

II. THE FACTS OF THE CASE AND ITS PROCEDURAL HISTORY

A. Morrison's Alleged Assault of Brzonkala

In September 1994, while Christy Brzonkala was a student at Virginia Tech, she met Antonio Morrison and James Crawford.\(^{20}\) Immediately after their meeting, according to Brzonkala, Morrison and Crawford raped her.\(^ {21} \) Brzonkala reported that the rape caused her great emotional distress.\(^ {22} \) Brzonkala registered a complaint in accordance with Virginia Tech's Sexual Assault Policy. Virginia Tech conducted a hearing, at which "Morrison admitted having sexual contact with [Brzonkala] despite the fact that she had twice told him 'no.'"\(^ {23} \) The university's Judicial Committee "found Morrison

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\(^{20}\) See id. at 1745.
\(^{21}\) See id. at 1746.
\(^{22}\) See id.
\(^{23}\) Id.
guilty of sexual assault and sentenced him to immediate suspension for two semesters." On appeal, however, Virginia Tech's senior vice president and provost allowed Morrison readmittance to the university, finding the punishment "excessive." Upon discovering that Morrison would return to Virginia Tech, Brzonkala "dropped out of the university."

Failing to find satisfaction within the university's disciplinary system, Brzonkala sued under 42 U.S.C. § 13981. The district court held for Morrison, finding that Congress lacked the authority under the Commerce Clause and Section 5 of the Fourteenth Amendment to enact Section 13981. A panel of the Fourth Circuit reversed, reinstating Brzonkala's claim. The Fourth Circuit, however, sitting en banc, vacated the opinion of the panel and affirmed the district court, by a vote of 7-4, in an opinion written by Judge Luttig.

B. The Supreme Court's Opinion

1. The Majority Opinion

Chief Justice Rehnquist began the Court's affirmance of the Fourth Circuit's opinion by describing the Violence Against Women Act. The provision of VAWA at issue in Morrison gave each victim of gender-motivated violence a cause of action.

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24. Id.
25. Id. (quoting Brzonkala v. Va. Polytechnic Inst. & State Univ., 132 F.3d 949, 955 (4th Cir. 1997), vacated on reh'g en banc, 169 F.3d 820 (4th Cir. 1999)).
26. Id.
27. Brzonkala also sued under Title IX, 20 U.S.C. §§ 1681-1688. The Fourth Circuit held that Brzonkala's disparate treatment claim under Title IX did not state a claim, but her hostile environment claim was remanded pending the decision in Davis v. Monroe County Board of Education, 526 U.S. 629 (1999). See Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 827-28 n.2 (4th Cir. 1999) (en banc). The Supreme Court did not consider the Title IX claims in its opinion. See Morrison, 120 S. Ct. at 1747 n.2.
31. "[R]andom acts of violence unrelated to gender or ... acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender" are not covered by VAWA. 42 U.S.C. § 13981(e)(1) (2000). Brzonkala's alleged rape
for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.\textsuperscript{32} Congress specified the constitutional authority on which it relied in enacting VAWA, invoking the power of "section 5 of the Fourteenth Amendment to the Constitution, as well as ... section 8 of Article I of the Constitution."\textsuperscript{33} The Court then proceeded to examine whether VAWA could be sustained on either of those bases.

\textit{a. Commerce Clause}

The Court acknowledged that acts of Congress were granted a presumption of constitutionality. Accordingly, only "a plain showing that Congress has exceeded its constitutional bounds" would justify the Court's invalidation of the Act.\textsuperscript{34} Nevertheless, the Court would not acquiesce to a conception of the Commerce Clause that would "embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government."\textsuperscript{35} In short, the Court concluded that the enumeration of congressional powers in the Constitution "cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate."\textsuperscript{36}

In order to distinguish between national and local affairs, the Court in \textit{Lopez} described three categories of activity that Congress may constitutionally regulate under the Commerce Clause. Those three categories, which the Court in \textit{Morrison} reaffirmed as the extent of Congress's Commerce Clause power, are "the use of the channels of interstate commerce,

\textsuperscript{32} 42 U.S.C. § 13981(c) (2000).
\textsuperscript{33} 42 U.S.C. § 13981(a) (2000).
\textsuperscript{34} United States v. Morrison, 120 S. Ct. 1740, 1748 (2000).
\textsuperscript{35} \textit{Id.} at 1749 (quoting United States v. Lopez, 514 U.S. 549, 557 (1995), in turn quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).
\textsuperscript{36} \textit{Id.} at 1754 n.8.
"the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," and "those activities having a substantial relation to interstate commerce." Because VAWA obviously did not involve a regulation of either the instrumentalities of or persons or things in interstate commerce, the remainder of the Court's discussion of the Commerce Clause concerned the application of the "substantial effects" test.38

The Court reiterated the conclusion reached in Lopez that the substantial effects test has sustained regulation in the past only when "the activity in question has been some sort of economic endeavor."39 According to the Court, VAWA was not consistent with this history. "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."40

Congress, of course, concluded that gender-motivated violence did substantially affect interstate commerce. The Court acknowledged Congress's findings, but dismissed them just as quickly. In the Court's view, Congress's findings demonstrated that violence against women is the first link in a causal chain that affects interstate commerce. The Court found this "but-for" reasoning insufficient to support congressional power, holding that it is "unworkable if we are to maintain the Constitution's enumeration of powers."41 The Court expressed fear that because every intrastate activity has some effect on interstate commerce, Congress could federalize areas of traditional state concern merely by noting in the Congressional Record the eventual effect on interstate commerce.42 In fact, that is exactly what the Court thought Congress was doing with VAWA. According to the Court, "[t]he regulation and

37. Id. at 1749 (internal citations omitted).
38. See Lopez, 514 U.S. at 560 (1995) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").
39. Morrison, 120 S. Ct. at 1750; see also id. at 1751 ("[O]ur cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.").
40. Id. at 1751. The Court also noted that VAWA "contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce," which might have allowed the Court to sustain the Act. Id.
41. Id. at 1752.
42. Id. at 1752-53.
punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."

In sum, the Court concluded that the Violence Against Women Act could not be sustained under Congress's Commerce Clause authority. The problem of gender-motivated violence was held not to be commercial and not "substantially affecting" interstate commerce within the meaning of the Court's jurisprudence.

b. Section 5 of the Fourteenth Amendment

Because the Court rejected the Commerce Clause argument, Chief Justice Rehnquist next considered the question whether the Act could be sustained on the authority of Section 5 of the Fourteenth Amendment. The Fourteenth Amendment states that

Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. 44

The Amendment's text specifically proscribes certain actions when taken by states. VAWA, however, sought to penalize episodes of gender-motivated violence committed by private individuals by subjecting perpetrators of violence liability suits brought by their victim. The Court concluded that penalizing private conduct could not be interpreted as an "enforce[ment]" of the Fourteenth Amendment, because private conduct is not prohibited by the Amendment. The Court reaffirmed the limited reach of the Fourteenth Amendment by quoting language from Shelley v. Kraemer:

[T]he principle has become firmly embedded in our

43. Id. at 1754.
44. U.S. Const. amend. XIV.
constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.45

After the Court noted this basic principle, it considered the impact of two precedents from 1883, United States v. Harris46 and the Civil Rights Cases.47 In both Harris and the Civil Rights Cases, the Court concluded that congressional attempts to regulate private conduct were beyond the constitutional power of the national government under the Fourteenth Amendment.48 Section 2 of the Civil Rights Act of 1871, at issue in Harris, would have punished private parties for conspiring to deny persons the equal protection of the laws. The Court held that the Equal Protection Clause regulates the states rather than the individuals who may violate others' rights. Similarly, in the Civil Rights Cases, the Court held invalid public accommodation regulations in the Civil Rights Act of 1875 because they were directed against private conduct.

The Morrison Court acknowledged that six Justices49 in United States v. Guest50 had used language highly critical of the holding of the Civil Rights Cases.51 According to Chief Justice Rehnquist, however, this language was not enough "to cast any doubt upon the enduring vitality of the Civil Rights Cases and Harris."52 In addition to the fact that neither opinion carried the signatures of five Justices, the discussion of the Civil Rights Cases was wholly unnecessary to the decision in Guest. The Guest Court concluded that state action was present, so deciding whether state action was necessary to justify

45. Morrison, 120 S. Ct. at 1756 (quoting Shelley v. Kraemer, 334 U.S. 1, 13 & n.12 (1948)).
46. 106 U.S. 629 (1883).
47. 109 U.S. 3 (1883).
48. Harris, 106 U.S. at 640; Civil Rights Cases, 109 U.S. at 11.
49. The six were Chief Justice Warren, and Justices Black, Douglas, Clark, Brennan, and Fortas. Justices Clark and Brennan wrote the two concurring opinions, with two Justices joining each.
51. Id. at 762 (Clark, J., concurring) (stating that state action should not be a requirement when Congress is legislating to protect Fourteenth Amendment rights); id. at 774 (Brennan, J., concurring in part and dissenting in part) (arguing that the Civil Rights Cases were wrongly decided).
congressional legislation was irrelevant to the disposition of the case.\textsuperscript{53} In the \textit{Morrison} Court's view, moreover, Justice Clark's opinion on the question of the necessity of state action in \textit{Guest} should not be given the force of \textit{stare decisis} because he provided no explanation for his view, offering only the conclusion.\textsuperscript{54} Accordingly, the \textit{Morrison} Court felt unconstrained by the contrary position taken by the six members of the \textit{Guest} Court thirty-four years earlier.

Citing \textit{Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank},\textsuperscript{55} the Court declared that a regulation enacted pursuant to Section 5 must be congruent and proportional to the unconstitutional state conduct. The Court distinguished \textit{Katzenbach v. Morgan},\textsuperscript{56} \textit{South Carolina v. Katzenbach},\textsuperscript{57} and \textit{Ex Parte Virginia}\textsuperscript{58} on the ground that the legislation at issue in each of those cases was directed at state officials.\textsuperscript{59} By contrast, VAWA prohibited strictly private conduct. The Court also noted that while the other cases dealt with legislation that was targeted at those states that had discriminated in violation of the Fourteenth Amendment, VAWA applied to each of the states irrespective of the fact that "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States."\textsuperscript{60}

Thus, although "no civilized system of justice could fail to provide [Christy Brzonkala] a remedy for the conduct of respondent Morrison,"\textsuperscript{61} the Court held that the United States

\textsuperscript{53} \textit{Guest}, 383 U.S. at 756. As the \textit{Morrison} Court noted, this fact was not missed by Justice Clark, who mused that \textit{Guest} "avoid[ed] the question whether Congress . . . has the power to punish private conspiracies that interfere with Fourteenth Amendment rights . . . ." \textit{Morrison}, 120 S. Ct. at 1757 (quoting \textit{Guest}, 383 U.S. at 762 (1966) (Clark, J., concurring)).

\textsuperscript{54} \textit{Morrison}, 120 S. Ct. at 1757 ("This [failing to offer an explanation for a judgment] is simply not the way that reasoned constitutional adjudication proceeds.").

\textsuperscript{55} 527 U.S. 627 (1999).

\textsuperscript{56} 384 U.S. 641 (1966) (upholding Congress's power to prohibit a state from using literacy tests as a qualification for voting).

\textsuperscript{57} 383 U.S. 301 (1966) (upholding strict requirements imposed on states that had a history of discrimination).

\textsuperscript{58} 100 U.S. 339 (1880) (upholding a federal criminal punishment for state officials who discriminated in jury selection).

\textsuperscript{59} \textit{Morrison}, 120 S. Ct. at 1758-59.

\textsuperscript{60} \textit{Id.} at 1759.

\textsuperscript{61} \textit{Id.}
was powerless to provide such a remedy. Because neither the Commerce Clause nor Section 5 of the Fourteenth Amendment allowed Congress to penalize Morrison for raping Brzonkala, Brzonkala's "remedy must be provided by the Commonwealth of Virginia, and not by the United States."\(^\text{62}\)

2. The Concurrence

Justice Thomas, although joining the majority opinion of Chief Justice Rehnquist, wrote a brief concurring opinion. Justice Thomas reiterated the interpretation of the Commerce Clause that he articulated in *United States v. Lopez.*\(^\text{63}\) Justice Thomas would have refused to apply the "substantial effects" test, as it was, in his view, inconsistent with the original understanding of the Commerce Clause. He warned that unless the Court dismissed the "substantial effects" test, "we will continue to see Congress appropriating state police powers under the guise of regulating commerce."\(^\text{64}\)

3. The Dissents

a. Justice Souter's Dissent

Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, dissented. Justice Souter began with a nine-page discussion of "the mountain of data assembled by Congress . . . showing the effects of violence against women on interstate commerce."\(^\text{65}\) He stated that the discrimination against women by private actors affected commerce in the same way that discrimination against blacks did when the Court approved the constitutionality of the Civil Rights Act of 1964.\(^\text{66}\) To wit,

\[\text{\footnotesize \cite{Id.}}\]

\[\text{\footnotesize \cite{United States v. Lopez, 514 U.S. 549, 584-602 (1995) (Thomas, J., concurring).}}\]

\[\text{\footnotesize \cite{Morrison, 120 S. Ct. at 1759 (Thomas, J., concurring); cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).}}\]

\[\text{\footnotesize [S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.}}\]

\[\text{\footnotesize Id.}}\]

\[\text{\footnotesize Id. at 1760 (Souter, J., dissenting).}}\]

\[\text{\footnotesize See id. at 1763 (Souter, J., dissenting).}}\]
"gender-based violence in the 1990's was shown to operate in a manner similar to racial discrimination in the 1960's in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce."67

Justice Souter then turned to attack the substantial effects test as applied by the Court. Justice Souter saw the Court's distinction between activities that are commercial and those that are not as folly. Justice Souter wrote that such a distinction had already been abandoned in Heart of Atlanta Motel, Inc. v. United States,68 which sustained the power of Congress to ban racial discrimination in motels serving customers traveling in interstate commerce. According to Justice Souter, by giving weight to the character of the regulation, the Court was being intellectually dishonest. He complained that the Court's "nominal adherence to the substantial effects test is merely that."69

Justice Souter would have upheld regulation of "all activity that, when aggregated, has a substantial effect on interstate commerce."70 In his view, the Necessary and Proper Clause71 allows Congress to pass any law that it has a rational basis for believing affects interstate commerce.72 Justice Souter understood this to be the rule that the Court followed in Wickard v. Filburn,73 which allowed Congress to regulate the growing of wheat for home consumption because home consumption would decrease demand for wheat on the open market and thus affect interstate commerce. Justice Souter found no indication that the Wickard Court cared whether growing wheat could be called "commerce," because "[t]he characterization of home wheat production as 'commerce' or not is . . . ultimately beside the point. For if substantial effects

67. Id.
69. Morrison, 120 S. Ct. at 1764 (Souter, J., dissenting).
70. Id. Justice Souter admitted that "Congress may claim no authority . . . to address any subject that does not affect commerce" without specifying what activities do not affect commerce. Id. at 1765 (Souter, J., dissenting).
71. U.S. CONST. art. I, § 8, cl. 18 (Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States . . . ").
72. Morrison, 120 S. Ct. at 1766 (Souter, J., dissenting).
73. 317 U.S. 111 (1942).
on commerce are proper subjects of concern under the Commerce Clause, what difference should it make whether the causes of those effects are themselves commercial?"  

Justice Souter criticized the Court for promoting a vision of federalism through a Commerce Clause jurisprudence inconsistent with precedent. He rejected the federalism aims he attributed to the majority, citing *Garcia v. San Antonio Metropolitan Transit Authority* for the proposition that "special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority." He explicitly compared the *Morrison* majority to the *Lochner* era Court, which struck down economic paternalism as unconstitutional. Explaining why the *Morrison* Court chose to advance a formal distinction between economic and noneconomic activity, Justice Souter opined that "[j]ust as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism."

Justice Souter concluded by predicting a short life for the

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74. *Morrison*, 120 S. Ct. at 1768 n.13 (Souter, J., dissenting); accord id. at 1775 (Breyer, J., dissenting) ("[W]hy should we give critical constitutional importance to the economic, or noneconomic nature of an interstate-commerce-affecting cause?" (emphasis in original)).

75. Id. at 1768-69 (Souter, J., dissenting).

76. 469 U.S. 528 (1985). The four dissenters in *Garcia* included then-Justice Rehnquist and Justice O'Connor.

77. *Morrison*, 120 S. Ct at 1771 (Souter, J., dissenting) (quoting *Garcia*, 469 U.S. at 552). Justice Souter as much as admitted that this case was not one of "federal power over the States" (emphasis added) when, later in his dissent, he remarked that it was "not the least irony . . . that the States will be forced to enjoy the new federalism whether they want it or not." Id. at 1733 (Souter, J., dissenting). By using *Garcia's* analysis in *Morrison*, Justice Souter suggested that judicial limitations on the scope of federal power should be applied neither in the case of power exercised over states, who had direct representation in the Senate and presidency under the original Constitution, nor in the case of power exercised by Congress over individuals (as is the case in *Morrison*). While there may be reasons to tread more lightly over powers traditionally exercised by states, see *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia*, 469 U.S. 528 (1985) (holding unconstitutional the application of the (federal) Fair Labor Standards Act to state employees), the argument that Congress's limitations should be politically and not judicially enforced rests on the representation of States in the national government. Justice Souter thus significantly expands the reach of *Garcia* by using it in a context where the congressional action does not directly impinge the interests of states.


79. *Morrison*, 120 S. Ct. at 1768 (Souter, J., dissenting).
Commerce Clause doctrine advanced by the majority. He viewed the limits on the Commerce Clause as incapable of uniform application. According to Justice Souter, both the difficulties of separating economic from noneconomic activity in an integrated economy and the majority's unwillingness explicitly to overrule cases that require exceptions to a "substantial effects" test led him "to doubt that the majority's view will prove to be enduring law."\(^{80}\)

**b. Justice Breyer's Dissent**

Justice Breyer also dissented, in an opinion joined by Justice Stevens, and joined in part by Justices Souter and Ginsburg. He pointed out that requiring a jurisdictional hook for seemingly noneconomic congressional acts to be valid under the Commerce Clause (for example, regulating those items that have passed through interstate commerce, but leaving purely intrastate items unregulated) would result in "random[]" applications of those laws.\(^{81}\) In an interstate economic market, the items that would go unregulated under the majority's doctrine would neither be less severe violations of the law at issue nor would they "further the important federalist principles" that are the reason for limiting congressional power.\(^{82}\)

Justice Breyer concluded his analysis of the Commerce Clause question by stating that he, like Justice Souter, preferred allowing Congress to legislate whenever it has a rational basis for believing that the activity at issue, when aggregated, affects commerce.\(^{83}\) He acknowledged that taking into account the extent to which Congress has considered the question whether the activity substantially affects interstate commerce might provide a basis for distinguishing *Morrison* from *Lopez*. Justice Breyer, however, considered such a distinction hypothetically, for he did not "accept *Lopez* as an accurate statement of the law . . . .\(^{84}\)

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80. *Id.* at 1773 (Souter, J., dissenting).
81. *Id.* at 1776 (Breyer, J., dissenting).
82. *Id.* (Breyer, J., dissenting).
83. *Id.* at 1778 (Breyer, J., dissenting).
84. *Id.* at 1777 (Breyer, J., dissenting). Justice Breyer's phrasing raises several questions. First, is not a Supreme Court decision joined by five members of the
Justice Breyer went on to consider the holding of the Court with respect to Section 5 of the Fourteenth Amendment. Justice Breyer stated that he "d[id] not [purport to] answer the § 5 question," opting instead to "leave [it] for more thorough analysis if necessary on another occasion." Despite that caveat, Justice Breyer left little doubt that he thought the majority misguided on that question as well as on the Commerce Clause issue. Justice Breyer suggested that Congress might provide a remedy against private actors as a way of enforcing constitutional guarantees that themselves are directed merely at states. He would have found the burdens on private citizens to be constitutional as prophylaxis permitted in *Katzenbach v. Morgan*.

### III. ANALYSIS

The Supreme Court continued in *Morrison* the commendable steps toward limited federal government begun in *United States v. Lopez* and *City of Boerne v. Flores*. Unfortunately, the Court's unwillingness explicitly to repudiate misguided precedent of the New Deal and Warren Court eras still leaves Commerce Clause and Section 5 doctrines confusing, at best, or incoherent and short-lived, at worst. The Court should evaluate assertions of congressional power in light of the original understanding of the Constitution, under which both the Commerce Clause and Section 5 questions in *Morrison* should have been decided against the constitutionality of the assertion of congressional power.

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85. *Id.* at 1779-80 (Breyer, J., dissenting).
86. *Id.* at 1779 (Breyer, J., dissenting).
87. 384 U.S. 641 (1966) (upholding a federal law banning literacy tests for voting because the tests, though not themselves unconstitutional, had been used to discourage minorities from voting).
89. 521 U.S. 507 (1997).
A. Commerce Clause

One of the provisions often used to justify national legislation as "affirmatively authorized under the Constitution" is the Commerce Clause, which gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Under the Commerce Clause Congress has legislated, with the Supreme Court's approval, on such diverse subjects as regulating home-grown wheat production and mining, and prohibiting discrimination in hotels and restaurants.

From the Supreme Court's "revolution" of 1937 until the 1995 decision in United States v. Lopez, the Court had failed to use the Commerce Clause to limit Congress's power to legislate. Gone was the understanding, articulated by Charles Black, that "the concept of limitation [on governmental power] inheres not only in prohibitory language but also in the positive grants of power; . . . the government is not to travel

90. TRIBE, supra note 5, at 298 (emphasis omitted).
91. U.S. CONST. art. I, § 8, cl. 3.
96. The conventional wisdom is that President Franklin Roosevelt's 1937 plan to pack the Court with jurists sympathetic to the New Deal influenced Justice Owen Roberts to switch sides and vote with the "liberals" (Justices Louis D. Brandeis, Harlan F. Stone, and Benjamin N. Cardozo, plus Chief Justice Charles Evans Hughes, who occasionally voted with each ideological side prior to 1937) instead of with the "conservative" "Four Horsemen" (Justices Willis Van Devanter, James McReynolds, George Southerland, and Pierce Butler). Until that time, New Deal programs had often been declared unconstitutional by the Court as exceeding Congress's Article I powers. Carter v. Carter Coal Co., 298 U.S. 238 (1936), is a typical example of the Court's attitude toward the New Deal at that time. Roberts's change in voting pattern is known as the "Switch in Time that Saved Nine." Roosevelt lost his bid to increase the number of Justices on the Court, but he gained favorable rulings in subsequent New Deal cases. This was due in part to the Switch in Time and in part to Roosevelt's tenure in office, which eventually allowed him to replace all nine members of the Court. The changeover began in 1937 with the nomination of Hugo L. Black, who as a senator from Alabama supported the President's court-packing plan, to replace retiring Justice Willis Van Devanter. See generally WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN (1995); citations in Barry Cushman, Rethinking the New Deal Court, 80 VA. L. REV. 201, 202-03 (1994). But see generally BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998) (arguing that the Court's apparent change in jurisprudence was actually foreordained in pre-1937 Court opinions).
outside its allocated spheres, however wide these may be."\textsuperscript{97}
More generally, the Court had "abandoned any effort to articulate and enforce internal limits on congressional power."\textsuperscript{98} Beginning with \textit{NLRB v. Jones \& Laughlin Steel Corp.},\textsuperscript{99} the Commerce Clause ceased to be an impediment to Congress. Instead, because "virtually every kind of activity, no matter how local, genuinely can affect commerce,"\textsuperscript{100} Congress's power "[t]o regulate Commerce... among the several States'\textsuperscript{101} became a license to legislate regarding "virtually every kind of activity." In short, "the Court's approval of national control over purely local behavior eliminated the 'interstate' aspects of the 'interstate commerce' clause,"\textsuperscript{102} and the Court did not seem particularly interested in the "commerce" aspects, either.\textsuperscript{103}

Arguably the high point (or low point, depending on one's perspective) of this expansion of the Commerce Clause's scope was the Court's decision in \textit{Wickard v. Filburn.}\textsuperscript{104} There, in an opinion by Justice Jackson, the Court upheld congressional regulation of wheat farmers despite the fact that the wheat grown would be used solely for home consumption. The wheat not only would never be part of the interstate commerce market, it would never be part of any commercial market. The Court nonetheless upheld the exercise of congressional power because home consumption of wheat relieved the farmer of the need to participate in the commercial market, thus suppressing demand for commercially available wheat.

\textsuperscript{98} TRIBE, \textit{supra} note 5, at 297.
\textsuperscript{99} 301 U.S. 1 (1937).
\textsuperscript{100} United States v. Morrison, 120 S. Ct. 1740, 1776 (2000) (Breyer, J., dissenting).
\textsuperscript{101} U.S. CONST. art. I, § 8, cl. 3.
\textsuperscript{103} Judge David B. Sentelle of the United States Court of Appeals for the District of Columbia Circuit well described the Commerce Clause jurisprudence from 1937 to 1995 this way: by upholding legislation under the interstate Commerce Clause despite the lack of a reasonable interstate connection and any commercial character of the regulated conduct, courts got interstate commerce "without 'interstate' and without 'commerce.' It was like having ham and eggs without the ham and without the eggs." David B. Sentelle, Lopez: Listeners at Last?, Address to the Harvard Law School Chapter of the Federalist Society (Feb. 7, 2000).
\textsuperscript{104} 317 U.S. 111 (1942).
That posture changed in 1995, when the Supreme Court decided \textit{Lopez}. There the Court held that the Gun-Free School Zones Act of 1990\textsuperscript{105} exceeded Congress’s power under the Commerce Clause. Congress had attempted to criminalize the possession of a firearm around a school without requiring, for example, that the weapon had moved in interstate commerce or that the possession of the weapon was part of some economic endeavor. The \textit{Lopez} Court held that legislation will be sustained under the Commerce Clause if it regulates one of three categories of activity, none of which was involved in the Gun-Free School Zones Act. These three categories are regulations of: 1) the channels of interstate commerce; 2) the instrumentalities of, or persons or things in, interstate commerce; and 3) those activities that substantially affect interstate commerce.\textsuperscript{106} Dissenting Justices argued that the federal laws at issue in \textit{Lopez} and Morrison fit squarely into category three, the “substantial effects” category. The Court in both cases held that for legislation to be sustained under this test, however, the activity at issue must be “economic.”\textsuperscript{107}

\textit{Lopez} did not overrule \textit{Filburn}. Rather, the three categories noted in \textit{Lopez} were designed to reflect previous Commerce Clause jurisprudence. The \textit{Lopez} Court specifically mentioned \textit{Filburn} as an example of economic regulation upheld under the substantial effects test. This attempt to limit the reach of the Commerce Clause while retaining \textit{Filburn} as precedent, however, ultimately fails to achieve doctrinal coherence or fidelity to the text and original understanding of that Clause. The basic flaw in the Court’s analysis (introduced in \textit{Lopez} and followed in \textit{Morrison}) lies in its desire to draw a distinction between economic and noneconomic activities for purposes of the substantial effects test. Wheat production was economic only in the sense that wheat can be, and often is, sold for profit.\textsuperscript{108} Similarly, gender-motivated violence and firearm


\textsuperscript{107} \textit{Lopez}, 514 U.S. at 559-60; United States v. Morrison, 120 S. Ct. 1740, 1751 (2000). The Court refused to create a “categorical rule against aggregating the effects of any noneconomic activity” but noted that every Commerce Clause case to date had aggregated only economic activities. \textit{Id.}

\textsuperscript{108} \textit{Filburn} itself stated that wheat production “may not be regarded as commerce.” \textit{Filburn}, 317 U.S. at 125. The hook to allow congressional legislation
possession can be undertaken for profit.° There is nothing intrinsically economic about any activity. What makes something economic or noneconomic is the context in which it is viewed. If the context is one of a transaction, the activity is economic. If the context does not involve a transaction, the same activity is noneconomic. The Court's failure to take into account the context of the activity is likely to result in future difficulties. Whether the test asks if the activity is per se economic or, as in Filburn, if the activity has a discernible economic impact, it will involve fine line drawing.

Most importantly, the Commerce Clause does not allow Congress to regulate those activities that could be commerce, or those activities that result in commercial activities with some empirical frequency (i.e., are likely to be the subject of commerce). Instead, the clause permits Congress to regulate interstate commerce itself. While the text of the clause does not resolve every ambiguity about its application, it should be the starting point for answering questions about the limits of congressional power taken pursuant to the clause. The Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States . . . ." Filburn took that clause and the Necessary and Proper Clause together to mean that Congress may constitutionally regulate those activities that "exert a substantial economic effect on interstate commerce." Lopez and Morrison agreed with this interpretation, so long as the regulated activity is "economic" or

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° Id. 109. In this instance, there would be dual motives for the violence: gender and the profit. VAWA would apply to such conduct because the crime need only be motivated "in part, [by] an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1) (emphasis added). Mere possession of a firearm appears less likely to demand payment, though one can imagine instances where an owner of a firearm would pay someone to keep careful watch over it for a time, for example. To the extent that the Court could have maintained a distinction between possession and other activities (only the latter of which could be "economic"), it abandoned that path in Morrison.

110. Obvious questions are how immediate, discernable to whom, and under what level of scrutiny such an impact is to be discerned. The inquiry cannot be too searching under Lopez and Morrison, else the economic impact of gender-motivated violence and gun possession would have triggered congressional power.

111. U.S. CONST. art. I, § 8, cl. 3.

112. Filburn, 317 U.S. at 125; see also Morrison, 120 S. Ct. at 1766 (Souter, J., dissenting) (citing United States v. Darby, 312 U.S. 100, 118 (1941)).
"commercial." But "commercial" is not the same as "Commerce . . . among the several States," and every law governing an activity relating to commerce is not a "regulation" of Commerce.\textsuperscript{113}

The Supreme Court has repeatedly attempted to place limits on the exercise of national power absent a textual basis for those limits and without a sharp test to determine when those limits are reached.\textsuperscript{114} Accordingly, the nation has been left without a clear idea of what the Commerce Clause means, much less a clear reason why its meaning must be secured by way of the "substantial effects" test. Ensuring a division of authority between the national and state governments, with "the great and aggregate interests being referred to the national, the local and particular to the state[+] legislatures"\textsuperscript{115} is a worthy goal. As Justice Thomas emphasized in \textit{Lopez}, however, such a goal can be accomplished only through application of the original understanding of the Clause.\textsuperscript{116}

\textbf{B. Section 5}

The Fourteenth Amendment empowers Congress to "enforce" the Amendment's provisions.\textsuperscript{117} The Supreme Court's decision in \textit{City of Boerne v. Flores}\textsuperscript{118} held that in enforcing the Fourteenth Amendment, Congress may not "attempt a substantive change in constitutional protections."\textsuperscript{119} Nonetheless, the Court has left room for Congress to ban activities that are not themselves illegal under the Amendment.\textsuperscript{120} These concessions were necessary to avoid

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  \item \textsuperscript{113} See United States v. Lopez, 514 U.S. 549, 586 (1995) (Thomas, J., concurring) ("As one would expect, the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture.").
  \item \textsuperscript{114} See Thomas W. Merrill, Toward a Principled Interpretation of the Commerce Clause, 22 HARV. J.L. & PUB. POL'Y 31, 33 (1998) ("The majority opinion of the Chief Justice [in \textit{Lopez}] lacks any clear theory of the outer limits of the clause.").
  \item \textsuperscript{115} THE FEDERALIST NO. 10, at 63 (James Madison) (Jacob E. Cooke ed., 1961).
  \item \textsuperscript{116} Lopez, 514 U.S. at 585-89 (1995) (Thomas, J., concurring).
  \item \textsuperscript{117} U.S. CONST. amend. XIV, § 5.
  \item \textsuperscript{118} 521 U.S. 507 (1997).
  \item \textsuperscript{119} Id. at 532.
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repudiating civil rights cases in which the Court had accepted congressional prohibition of activities that, while not themselves unconstitutional, tended to impact rights protected by the Constitution.\textsuperscript{121}

VAWA penalized private acts of violence and made the perpetrators subject to liability in suits by their victims. Despite the evidence before Congress that states had been derelict in

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\item those cases arose under the Fifteenth Amendment instead of the Fourteenth appears to be of no moment. \textit{See also} Board of Trustees v. Garrett, 121 S. Ct. 955 (2001) (rejecting application of the Americans with Disabilities Act against states because such a remedy was not congruent with and proportional to discrimination by states, but accepting the Congress could use § 5 to ban activities beyond the Amendment's prohibitions); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (rejecting application of the Age Discrimination in Employment Act against states).
\item 121. The unwillingness of the Flores Court (and by extension, the Morrison Court) to repudiate Katzenbach v. Morgan has resulted in confusion over the constitutionality of the 1982 Amendments to Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (2000) ("VRA"). The VRA prohibits states from adopting voting qualifications that "result[]" in racial disenfranchisement, though the Constitution itself prohibits only those state actions that are taken with a discriminatory intent. \textit{See} City of Mobile v. Bolden, 446 U.S. 55, 62 (1980) (plurality opinion). The Second Circuit, confronted with the question whether New York's statute disenfranchising felons, N.Y. Elec. Law. § 5-106 (2)-(6), violated the VRA because of its disproportionate impact on blacks, split the second circuit evenly. \textit{See} Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996) (en banc). Five members of the court would have held that the Voting Rights Act did not reach felon disenfranchisement because to do so would raise a serious constitutional problem, while five other members of the court upheld the application of the VRA to the New York statute. Note that because the VRA is directed at states, the distinction drawn in Morrison disfavoring exercises of Congress's power that are directed at individuals would not be helpful.
\item Aside from the dispute over the constitutionality of the Voting Rights Act's effects test, the tension between Morgan and Flores raises questions of the VRA's power to reach vote dilution claims, which have used Section 2 of the VRA with notable success. Vote dilution claims, which assert that one group is not given the opportunity to elect candidates of its choice consistent with its proportion of the electorate, have been held to concern "voting" within the meaning of the VRA. \textit{See} Allen v. State Bd. of Elections, 393 U.S. 544, 565-66 (1969). Nevertheless, there remains considerable debate as to whether such an interpretation of the VRA is the wisest one and whether such an interpretation would bring the VRA in conflict with the term "voting" as used in the Fifteenth Amendment. \textit{See} Allen, 393 U.S. at 591 (Harlan, J., concurring in part and dissenting in part); Holder v. Hall, 512 U.S. 874, 892-93 (1994) (Thomas, J., concurring in judgment). If there is such a conflict, Flores would require a court to assess whether Section 2 of the VRA represents a congruent and proportional means to remedy violations of the Fifteenth Amendment. The VRA would seem to fail the test of congruence, as vote dilution is claimed \textit{precisely when the minority group is able to vote} (and those votes would be insufficient to elect enough candidates of the group's choice), thus negating a claim that members of the minority group were denied their right to cast a ballot and have it counted. At the very least, the principle that statutes should be construed to avoid a constitutional question, \textit{see}, \textit{e.g.}, Baker, 85 F.3d 919 (2d Cir. 1996) (en banc), should lead the Court, in an appropriate case, to reconsider Allen.
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the protection of women, the Act did not confer liability on the states themselves. Some supporters of the Act argued that even if there was no state action involved in the facts underlying *Morrison*, VAWA was still constitutional because it was meant to promote the equality of women. They argued that just as Congress was permitted in *Morgan* to protect the voting rights of Puerto Ricans by banning literacy tests, Congress should be able to penalize gender-motivated violence as a way of protecting women's equality.

The Court rejected this argument for two reasons. First, the Court found that, unlike the statute in *Morgan*, "Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals . . . ." Second, the Court noted that VAWA did not limit the remedy to those states found to have committed constitutional violations; rather it applied uniformly throughout the United States.

The first of these reasons appears to allow Congress latitude in prohibiting conduct not unconstitutional, so long as that prohibition is directed at state actors. The distinction lacks basis in the Fourteenth Amendment. VAWA exceeded its bounds under Section 5 because it attempted to "enforce" the Amendment by prohibiting conduct about which the Amendment does not speak. The Court provided no theoretical justification for basing its objection on the identity of the actor instead of on the substantive nature of the conduct. Instead, the Court should have repudiated *Morgan's* freewheeling view of Section 5 and adopted in its place the (seemingly) unremarkable proposition that enforcement of the Fourteenth Amendment should be restricted to punishing violations of that Amendment.

122. *See United States v. Morrison*, 120 S. Ct. 1740, 1755 (2000) (discussing "voluminous" evidence before Congress that "many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions").
123. Such a scheme would most likely be a valid abrogation of states' sovereign immunity per *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).
124. *Morrison*, 120 S. Ct. at 1758.
125. Id. at 1759.
C. The Respect Due Congress's Judgment

The Morrison and Lopez dissents suggested that questions of national power over the states should be resolved through the political process. They did not suggest, however, that Congress was likely to respect the limits that the Constitution places on it. Such an assertion would be incredible, and even the four dissenters seemed to recognize that Congress has passed the issue of constitutionality to the courts, abdicating its responsibility to ensure that its statutes comport with the Constitution. In light of this abdication of responsibility, the presumption of constitutionality given congressional statutes reflects an inaccurate and idealistic vision of lawmaking. The presumption should be abandoned.

The Court may be moving in the direction of weakening a "presumption of constitutionality," but Morrison continues the practice of paying at least lip service to the idea that congressional statutes should be struck down "only upon a plain showing that Congress has exceeded its constitutional bounds." Requiring this "plain showing" is, the Court announced, "demand[ed]" by "[d]ue respect for the decisions of a coordinate branch of government." "Due respect" fits well in an understanding of government where it is Congress's

126. Senator Mathias candidly remarked on this trend during the confirmation hearings of Justice Sandra Day O'Connor. He commented that members of Congress "will say: 'Well, I am not sure whether this is constitutional or not but I think it is a good idea and therefore I am going to vote for it because there is always the Supreme Court who will make the ultimate decision about the constitutionality.'" He went on to undermine the respect given his institution further: "[S]ometimes we make a jump in the dark on the constitutional question.


127. See, e.g., Robert A. Shapiro, Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law, 85 CORNELL L. REV. 655, 657 (2000) ("[I]n the 1990's, A]cross a broad range of legal doctrine, federal judicial deference to the constitutional interpretation of other branches of government declined markedly."); Tony Mauro, Split Branches, LEGAL TIMES, May 22, 2000, at 1 ("Since 1986, the Supreme Court under Chief Justice William Rehnquist has struck down 29 congressional acts, including 22 since 1995."). In fact, Mauro predicted that "more judicial disrespect for Congress is in the offing." Id. at 8.


129. Id.
"duty"\textsuperscript{130} to consider the constitutionality of its statutes.

Such respect is unwarranted, however, when Congress legislates with regard solely for political expediency and ignores the constraints of the Constitution. Put another way, the determination by Congress, as a coordinate branch of government, that a particular law is constitutional may be entitled to respect, but the mere passing of a statute no longer implies (assuming that such an implication was ever warranted) that Congress has, in fact, made such a determination. As Justice Scalia said in a speech at Michigan State University, "if Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution . . . then perhaps that presumption [of the constitutionality of congressional statutes] is unwarranted."\textsuperscript{131}

Congress cannot be expected to engage in impartial constitutional debate. The incentive for members of Congress is to vote for popular policies, with the courts at the ready to undo the popular will if required by the Constitution, without fear of political reprisal. What is more, having Congress seriously consider the constitutionality of statutes is not altogether desirable.\textsuperscript{132} Courts are the institutions trained in the interpretation of the Constitution. Legislators are generally not selected for their views of constitutional interpretation, and they have demands on their time other than sifting through

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\item[\textsuperscript{130}] City of Boerne v. Flores, 521 U.S. 507, 535 (1997).
\item[\textsuperscript{131}] Mauro, \textit{supra} note 127, at 8 (ellipsis in original). The Court itself may have contributed to the lackadaisical attitude toward the Constitution by Congress. If, as the Court said, "the federal judiciary is supreme in the exposition of the law of the Constitution," Cooper v. Aaron, 358 U.S. 1, 18 (1958) (per curiam), there is less of a reason for Congress to devote energy to resolving a constitutional ambiguity than if the Court had consistently maintained that legislatures' views of the Constitution were to be given weight.
\item[\textsuperscript{132}] In "political question" situations where the decision of Congress is not likely to be reviewed by Courts, Congress should engage in constitutional analysis. The point is merely that courts are likely to do a better job interpreting the Constitution than is Congress in those situations where courts can opine on the issues. Aside from the policy question whether having members of Congress analyze the Constitution is wise, such analysis may be required by the document itself (not that we can trust Congress to enforce that requirement, either). See U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives . . . shall be bound by Oath or Affirmation, to support this Constitution . . ."). I am not prepared to excuse members of Congress from their oaths to support the Constitution; I simply note that the electorate has already refused to enforce the oath against Congress.
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mountains of caselaw and commentary. Asking Congress to balk at a statute, otherwise grounded in good policy, for the reason of its questionable constitutionality would be detrimental to the public, which is entitled to have its legislators pursue creative solutions to national problems.

The presumption of constitutionality could theoretically rest on more than the assumption that Congress considered the constitutional issues before passing any given statute. To the extent that other factors weigh in favor of the presumption, Congress's "jump in the dark on the constitutional question" might weaken the presumption in favor of the statute. Such factors may include the stability interest in not having a high percentage of statutes overturned. It is difficult to see, however, much of an interest in retaining unconstitutional statutes, even if their demise would destabilize the legal system. Additionally, a presumption against the constitutionality of a statute would be disrespectful of Congress, as well as undemocratic, but that argument fails to demonstrate why there should be any presumption at all. Despite these possible reasons for retaining the presumption, the Court has explicitly declared that the only ample justification is that Congress "has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution . . . . Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy." The argument that Congress engages in a non-conclusory examination of the Constitution is questionable at best. The time has come for the Court to make good on its threat not to afford congressional statutes a presumption of validity. The divergence between Morrison's language and its result may indicate that the Court is giving Congress one final warning before removing the presumption altogether.

133. See Oregon v. Mitchell, 400 U.S. 112, 207 (1970) (Harlan, J., concurring in part and dissenting in part) (noting the value of "efficiency behind the presumption of validity of action by the political branches, whether of the states or the national government).  
IV. CONCLUSIONS

*United States v. Morrison* should not have been a hard case. The fact that four Justices voted to sustain the exercise of national power over quintessentially state-based criminal law is frightening testament to the continuing influence of the New Deal and the Warren Court.\textsuperscript{136} For the Supreme Court to return to an interpretation of the Constitution that affirmatively limits congressional power will be difficult given that the public clamors for national legislation to solve every problem, however local.\textsuperscript{137} Whether the public would expect so much from the national government absent the expansive precedent of the 1960s is an unanswerable question. The Court's failure in *Morrison* to construct a rule with clear limiting principles for the exercise of national power threatens to make *Lopez* and *Morrison* mere interruptions on the jurisprudential path to eliminating the doctrine of enumerated powers as a constraint on Congress.\textsuperscript{138} Maintaining that doctrine is necessary, as Chief Justice Marshall recognized, for we rest our government "on the premise that the 'powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written.'\textsuperscript{139} Would that we never be so mistaken.

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\textsuperscript{138} In fact, many lower courts after *Lopez* read the case narrowly and continued to give effect to broad interpretations of the Commerce Clause. See generally Deborah Jones Merritt, *Commercel*, 94 MICH. L. REV. 674, 713-30 (1995).

\textsuperscript{139} *Flores*, 521 U.S. at 516 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803)).