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NORTH CAROLINA LAW REVIEW

Volume 94 | Number 1

Article 2

12-1-2015

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FEDERALISM AS DOCKET CONTROL*

JASON MAZZONE** & CARL EMERY WOOCK***

On the twentieth anniversary of United States v. Lopez (1995), this Article revisits the Rehnquist Court's federalism revolution. Much of what has been said about the federalism cases of the Rehnquist Court misses a fundamental aspect of those decisions—one with profound implications for making sense not just of the Rehnquist era but a large component of the Supreme Court's work since the earliest days of the Republic. Focusing particularly on Lopez and the follow-up case of United States v. Morrison (2000), this Article offers a new perspective on what the Rehnquist Court was up to. We set forth a practical reading of Lopez and Morrison as cases about docket control. In both cases, we suggest, the Court was concerned, at least in part, with shielding the federal district courts from ever-expanding criminal and civil cases that resulted from new federal laws. This Article shows that, from the Court's perspective, docket control was not simply about keeping the caseloads of the district courts at a manageable level. Instead, quite apart from numbers, the Court was concerned with the particular types of cases Congress was requiring the district courts to handle. Congress, the Justices feared, was undermining the prestige of the federal judiciary by blurring the distinction between state and federal judges and turning federal judges into petty magistrates. Docket control was thus about protecting the integrity of the third branch of government—a mechanism, in other words, that began in federalism but also served separation of powers. While we draw on a variety of sources in presenting our account, this Article relies heavily on a rich and surprisingly underused resource: the annual testimony by Supreme Court Justices before congressional committees in support of the Court's annual budgetary requests. These hearings document candid comments by the Justices on a range of issues, including a deep concern with Congress's treatment of the lower federal courts. Indeed,

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read with the benefit of hindsight, the hearings show the Justices shortly prior to Lopez and Morrison forecasting the outcomes in those cases and articulating an overlooked rationale underlying the decisions.

Our account provokes a rethinking of the constitutional justification for Lopez and Morrison (and other federalism decisions of the Rehnquist Court). The two cases, we show, represented the culmination of more than a century of efforts by the Supreme Court to safeguard the role of the judicial branch in our constitutional system. Doctrinally, Lopez and Morrison involved questions of the scope of congressional power and the degree of deference courts owe to Congress when it legislates. By centering on these issues, however, debate over the outcomes in Lopez and Morrison has overlooked a more basic justification for the Court's rulings. When the Court acts to protect the judiciary—and particularly when it does so after repeated requests to Congress for help—it is on firmer constitutional ground than critics of Lopez and Morrison have recognized. At the time of Lopez and Morrison, the federal courts were under considerable stress and there was no indication that Congress—continuing to create new federal causes of action—would provide relief. Under those circumstances, the Court's response, invalidating one criminal statute (in Lopez) and one civil cause of action (in Morrison), was less revolutionary than preservationist.

The significance of our account extends beyond explaining a single episode in the history of the Supreme Court. Once cast in terms of docket control, Lopez and Morrison represent not a break—revolutionary or otherwise—but the culmination of a much longer history of overburdened (and underappreciated) federal judges pushing back against congressional demands to perform tasks that would distract them from their core functions under the Constitution. Apart from the federalism decisions of the Rehnquist Court, many cases—many landmark cases—are better understood in the new light of docket control. We even offer a new reading of Marbury v. Madison. While at first blush docket control may seem less exciting than other accounts of Supreme Court cases, it helps make sense of a good deal of the Court's role, and it provides a new lens through which to examine and assess judicial decision making.

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INTRODUCTION

Twenty years ago, in *United States v. Lopez*,¹ the Supreme Court struck down the Federal Gun-Free School Zones Act of 1990, which criminalized possession of guns within one thousand feet of a school.² As the first decision since the New Deal invalidating a federal statute as beyond Congress's power under the Commerce Clause,³ *Lopez* generated intense interest. Commentators (including some judges) described *Lopez* in revolutionary terms.⁴ As the Court issued a series

1. 514 U.S. 549 (1995).

2. *Id.* at 551.

3. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 31 (1999).

4. See *United States v. Bailey*, 115 F.3d 1222, 1233 (5th Cir. 1997) (Smith, J., dissenting) ("*Lopez* is a landmark, signaling the revival of federalism as a constitutional principle, and it must be acknowledged as a watershed decision in the history of the Commerce Clause."); *United States v. Bishop*, 66 F.3d 569, 591 (3d Cir. 1995) (Becker, J.,

of additional decisions⁵ limiting national power—including *United States v. Morrison*,⁶ which invalidated the civil remedy provision of the Violence Against Women Act as supported neither by the Commerce Clause nor by Section 5 of the Fourteenth Amendment⁷—the only question seemed to be just how far the federalism revolution would go.⁸ Some commentators cheered the Court’s new scrutiny of federal power and the revival of states’ rights.⁹ Critics, however, warned that the Court was on a path to invalidating bedrock statutes such as Title VII of the Civil Rights Act of 1964;¹⁰ once-reliable

concurring in part and dissenting in part) (“[*Lopez*] reflects a sea change . . .”); *United States v. Pappadopoulos*, 64 F.3d 522, 525 (9th Cir. 1995) (calling *Lopez* a “watershed opinion”); Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 168 (1996) (calling *Lopez* an “about-face”); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 130 (2001) (discussing the “revolution” in federalism doctrine).

5. See, e.g., *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that Congress lacked the power to subject nonconsenting states to suits in state court); *Printz v. United States*, 521 U.S. 898, 933 (1997) (holding that Congress could not require state officials to perform background checks on handgun purchasers pursuant to a federal program); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (holding that Congress could not abrogate state sovereign immunity when acting pursuant to the Indian Commerce Clause); *New York v. United States*, 505 U.S. 144, 149, 175–77 (1992) (holding that the “take title” provision of the Low-Level Radioactive Waste Management Act Amendments of 1985 violated the Tenth Amendment by commandeering state governments into the service of federal regulatory program).

6. 529 U.S. 598 (2000).

7. *Id.* at 627.

8. See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1052–54, 1057 (2001) (“In the past ten years, the Supreme Court of the United States has begun a systematic reappraisal of doctrines concerning federalism, racial equality, and civil rights that, if fully successful, will redraw the constitutional map as we have known it. . . . [W]e do not yet know the full contours of the present revolutionary situation. It could become much more radical and far ranging.”); Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 7 (2001) (“I have no doubt that when constitutional historians look back at the Rehnquist Court, they will say that the greatest changes in constitutional law were with regard to federalism.”); Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of United States v. Lopez and United States v. Morrison*, 68 TENN. L. REV. 605, 609 (2001) (“*Lopez* clearly marked a departure from the modern jurisprudential trend of recognizing a broad grant of power to Congress under the Commerce Clause; however, no one knew the precise extent of the departure.”).

9. See, e.g., Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793, 823 (1996) (hoping *Lopez* would “provide an opening for a new, well-considered Commerce Clause analysis, that takes into account the positive value of state and local government, the best uses of federal power, and the ideal allocation of cases between the state and federal courts”); Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 752 (1995) (describing *Lopez* as “a revolutionary and long overdue revival of the doctrine that the federal government is one of limited and enumerated powers”).

10. See, e.g., Sylvia A. Law, *In the Name of Federalism: The Supreme Court’s Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 385 (2002) (“[F]ederal legislative

supporters of an activist judiciary thus called for “taking the Constitution away from the courts”¹¹ and restoring power to “the People Themselves.”¹² Yet within a short period, these hopes (on one side) and fears (on the other) had tempered. Commentators who sounded alarms after *Lopez* and *Morrison* soon concluded that the Rehnquist Court’s revolution (if revolution there ever was) had come to a halt.¹³ With Chief Justice Rehnquist’s death in 2005 and the appointment in his place of John G. Roberts, Jr.—who, at his confirmation hearing, downplayed the significance of *Lopez* and *Morrison*¹⁴ and sounded overall deferential to the political branches¹⁵ and more nationalist¹⁶ than his former boss—the federalism

protection of civil rights and liberties will no longer be tolerated by the Supreme Court majority.”); Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1143–44 (2002) (“[A] good deal of the present Supreme Court’s groundbreaking constitutional case law makes better sense when viewed . . . in terms of an anti-antidiscrimination agenda . . .”); Louis J. Virelli III & David S. Leibowitz, “*Federalism Whether They Want It or Not*”: *The New Commerce Clause Doctrine and the Future of Federal Civil Rights Legislation After United States v. Morrison*, 3 U. PA. J. CONST. L. 926, 926 (2001) (“[T]he interpretive preferences of the *Morrison* Court squarely threaten future congressional attempts to address civil rights violations . . .”).

11. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 7 (1999).

12. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004).

13. See, e.g., Mark Tushnet, *Permissible Gun Regulations After Heller: Speculations About Method and Outcomes*, 56 UCLA L. REV. 1425, 1441 (2009) (“Even without any relevant change in the Court’s composition, the Federalism Revolution inaugurated by *Lopez* sputtered out.”).

14. At his confirmation hearing, Roberts described *Lopez* and *Morrison* as merely “two decisions in the more than 200-year sweep of decisions in which the Supreme Court has . . . recognized extremely broad authority on Congress’s part, going all the way back to *Gibbons v. Ogden* and Chief Justice John Marshall, when those Commerce Clause decisions were important in binding the Nation together as a single commercial unit,” and he observed that *Gonzalez v. Raich*, 545 U.S. 1, 18, 22 (2005) (holding that the Commerce Clause of the Constitution permits Congress to criminalize the production and use of home-grown marijuana even where approved by states for medical purposes), showed that *Lopez* and *Morrison* did not “junk all the cases that came before” them. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 225, 271–72 (2005).

15. See, e.g., *id.* at 158 (“I don’t think the courts should have a dominant role in society . . . [T]he Court has to appreciate that the reason they have that authority [to strike down unconstitutional legislative or executive action] is because they’re interpreting the law, they’re not making policy, and to the extent they go beyond their confined limits and make policy or execute the law, they lose their legitimacy . . .”).

16. Responding to Sen. Dianne Feinstein’s question (about *Lopez*), “[A]t what point does crime influence commerce?” Roberts stated: “I think it does . . . [The Act] didn’t have a requirement that the firearm be transported in interstate commerce . . . [If] the Act had required that, which I think . . . it’s fairly easy to show in almost every case . . . , then that would have been within the Congress’s power under the Commerce Clause.” *Id.* at 349.

revolution became a brief episode in a quickly receding past. Although Chief Justice Roberts has gone on to author and join majority opinions invalidating federal laws,¹⁷ it is too early for an assessment of federalism in the Roberts Court.¹⁸ Our interest remains in making sense, with the benefit of twenty years (since *Lopez*) of hindsight, of the Rehnquist Court's federalism revolution.

From one angle, there might seem little to say: Rehnquist's goal and that of his like-minded colleagues reflected a commitment to limiting federal power and safeguarding the interests of state governments.¹⁹ But given that federalism can mean different things²⁰

17. See, e.g., *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (holding the coverage formula of Section 4 of the Voting Rights Act of 1965 unconstitutional on federalism grounds); *Citizens United v. FEC*, 558 U.S. 310, 321, 356 (2010) (holding that the First Amendment invalidated a provision of the Bipartisan Campaign Reform Act of 2002 prohibiting corporations and unions from using general treasury funds for electioneering communications within thirty days before a primary or sixty days before a general election).

18. For some early speculation, see, for example, CHRISTOPHER P. BANKS & JOHN C. BLAKEMAN, *THE U.S. SUPREME COURT AND NEW FEDERALISM: FROM THE REHNQUIST TO THE ROBERTS COURT* 12 (2012), which notes that "it thus remains uncertain at best whether a . . . majority will coalesce to . . . erect new limits on federal authority that go beyond existing precedents"; LAURENCE TRIBE & JOSHUA MATZ, *UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION* 54 (2014), which argues that notwithstanding Roberts's vote in *NFIB v. Sebelius*, 132 S. Ct. 2566, 2577, 2601 (2012), to uphold the individual mandate provision of the Affordable Care Act, "the Chief shares his right-leaning colleagues' desire to limit the scope of federal power—and to craft new constitutional law in order to do so"; Jonathan H. Adler, *Getting the Roberts Court Right: A Response to Chemerinsky*, 54 WAYNE L. REV. 983, 1012 (2008), which suggests that "[t]he Roberts Court . . . seems inclined to decide most cases as narrowly as possible, producing few seismic shifts in any direction"; and Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 962 (2008), which describes the Roberts Court as "the most pro-business Court of any since the mid-1930s."

19. For commentators describing the Rehnquist Court's federalism decisions as a product of conservative politicking, see, for example, Erwin Chemerinsky, *Understanding the Rehnquist Court: An Admiring Reply to Professor Merrill*, 47 ST. LOUIS U. L.J. 659, 659 (2003), which argues that "the reality is that the recent and current activism—as measured by invalidated laws and overruling precedent—is all in a conservative direction"; Bradley W. Joondeph, *Federalism, the Rehnquist Court, and the Modern Republican Party*, 87 OR. L. REV. 117, 168 (2008), which suggests that "[t]hrough the Court's concern for state autonomy may have varied by context, the broad arc of its decisions reflected the priorities of [the] national political coalition that empowered and sustained most of the Justices"; and Michael Wells, *Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments*, 47 EMORY L.J. 89, 122 (1998), which notes that "[t]he Justices' performance . . . suggests that crude politics is at least as important as theories of federalism."

20. See generally Randy E. Barnett, *Three Federalisms*, 39 LOY. U. CHI. L.J. 285 (2008) (describing three different versions of federalism as the term has evolved since the founding era).

and serve different purposes,²¹ making sense of the aims and achievements of the Rehnquist Court's decisions requires going further than simply treating them as geared to shifting the balance between federal and state power. Commentators have therefore offered sophisticated accounts of *Lopez*, *Morrison*, and other federalism decisions of the Rehnquist era. John McGinnis, for example, has explored how the Rehnquist Court's decisions were geared to reviving civic engagement and other features of Tocquevillian America by (among other things) "restoring broad decision-making power to the states and localities."²² Ernest Young, on the other hand, casts the five-Justice majority in *Lopez* and other Rehnquist-era federalism decisions as "aggressively protect[ing] state sovereignty" (contrasted with state autonomy) via hard substantive limits on federal power.²³ At the same time, and consistent with the benefit of close examination, some commentators have expressed skepticism as to how *Lopez* and other cases could ever have served in practice to limit the reach of the federal government.²⁴

This Article takes a fresh look at the Rehnquist Court's federalism revolution and offers a new perspective on what the Court was up to. We do not pretend that our account is definitive in the sense of offering the singularly correct understanding of all of the Rehnquist-era decisions (and thus we do not spend much time disputing other approaches). Rather, our goal is to set out a perspective that, we hope, will refine the understanding of these cases. While our analysis can usefully apply to a variety of decisions,

21. See generally Jason Mazzone, *The Social Capital Argument for Federalism*, 11 S. CAL. INTERDISC. L.J. 27, 27–28 (2001) (summarizing commonly offered justifications for federalism).

22. John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CALIF. L. REV. 485, 521 (2002).

23. Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 23, 33, 39 (2004).

24. See, e.g., Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 5 (2003) ("[T]he Rehnquist Revolution thesis is weakened considerably by the fact that the Court has done nothing, and seems little inclined to do anything, to revise or even revisit its Spending Power and conditional-spending doctrines."); Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 767 (1996) (expressing doubt that the Court "will be able to muster five votes to invalidate a commerce power measure when Congress does not commit the oversight that explains *Lopez*"); Joshua A. Klein, Note, *Commerce Clause Questions After Morrison: Some Observations on the New Formalism and the New Realism*, 55 STAN. L. REV. 571, 594 (2002) (remarking that *Lopez* and *Morrison*, despite the Court's intention, "provided Congress with a roadmap for intruding into the traditional state concerns the Court claims to be protecting").

we focus mostly on *Lopez* and *Morrison* as early landmark cases in the federalism revolution.

This Article offers a practical reading of *Lopez* and *Morrison* as cases about docket control. In both cases, we suggest, the Court was concerned, at least in part, with shielding the federal district courts from ever-expanding criminal and civil caseloads. There have, of course, been many previous accounts of increased federal lawmaking, and in particular federal criminalization, and its impact upon the federal judiciary. Some commentators have even speculated in passing that these trends may help explain the *Lopez* and *Morrison* rulings.²⁵ We provide for the first time compelling evidence of the link between the Rehnquist Court's federalism decisions and Congress's expansion of federal causes of action. This Article's approach is also novel because it shows that, from the Court's perspective, docket control was not simply about keeping the caseloads of the district courts at a manageable level. Instead, quite apart from numbers, the Court was concerned with the particular *types* of cases Congress wanted the district courts to handle. Congress, the Justices feared, was undermining the prestige of the federal judiciary by blurring the distinction between state and federal judges and turning federal judges into petty magistrates who would spend their days presiding over garden-variety criminal offenses and civil disputes. Docket control was thus about protecting both the integrity and the time of the third branch of government—a mechanism, in other words, that began in federalism but (pre)served also separation of powers.

While we draw on a variety of sources in presenting our account, this Article relies heavily on a rich and surprisingly underused resource: the annual testimony, transcribed and in recent years recorded, by Supreme Court Justices before congressional committees in support of the Court's annual budgetary requests.²⁶

25. See Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641, 1646 (2002) ("*Lopez* and *Morrison* provide a doctrine with which the Supreme Court can prune back federal criminal jurisdiction, particularly in cases involving conduct the Court deems non-economic."); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 709 (1995) ("The Supreme Court . . . may have been concerned [in *Lopez*] about the dragging weight of criminal cases on the federal docket.").

26. In 1939, Congress created the Administrative Office of the U.S. Courts and gave it the task of developing and executing the annual budget for the federal circuit and district courts (a function previously performed by the Department of Justice) but not the budget of the Supreme Court, which therefore handles its own annual appropriations request. See Act of Aug. 7, 1939, ch. 501, §§ 302, 305, 308, 53 Stat. 1223–25 (codified as amended at 28 U.S.C. §§ 601, 605, 610 (2012)). One of the few studies of the budget process concludes, "Congress uses the budget as a device to signal its approval or disapproval to the Court."

The Office of the Marshal of the Court oversees the preparation of the Court's budget which, when approved by the Court, is submitted to the Office of Management and Budget for presentation to Congress.²⁷ In support of the Court's budgetary request, members of the Court—typically two Justices at a time—and of the Court's professional staff have appeared annually for many years before the Appropriations Committee of the House (and with less regularity of the Senate) to answer questions about the submitted budget.²⁸ Given that the Court has a long record of budgetary modesty²⁹ and that there are almost no other occasions on which the Justices submit to questioning, these sessions quickly turn to matters other than those financial. The hearings document candid comments by the Justices on a range of issues, including a deep concern with Congress's treatment

Eugenia Froedge Toma, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, 20 J. LEGAL STUD. 131, 145 (1991).

27. Thomas G. Walker, *Budget of the Court*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 117, 117 (Kermit L. Hall et al. eds., 2d ed. 2005).

28. The earliest transcript we located of Supreme Court Justices testifying in support of the Court's annual budget request is from March 3, 1943, when Justices Owen Roberts and Hugo L. Black appeared before the House Appropriations Committee in support of a budgetary request for \$484,200 for 1944. See *The Judiciary Appropriation Bill for 1944: Hearings Before the Subcomm. on Legis.-Judiciary Appropriations of the H. Comm. on Appropriations*, 78th Cong. 101–02 (1943). There are prior occasions on which the Justices testified in support of specific items. For example, in 1930, Justice Harlan F. Stone appeared before the House Committee in support of funding for law books for the Library of Congress (and by extension use of the Justices). See *Legislative Establishment Appropriations Bill, 1931: Hearings Before Subcomm. of H. Comm. on Appropriations*, 71st Cong. 232–33, 236 (1930).

29. For fiscal year 2015, the Supreme Court's budget (excluding salaries for the Justices) was \$72,625,000. Judiciary Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 199, 199. Chief Justice Roberts has observed that the entire federal judiciary, with an annual budget of around \$7 billion, "consumes only the tiniest sliver of federal revenues, just *two-tenths of one percent* of the federal government's total outlays." JOHN G. ROBERTS, JR., 2013 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3, 7 (2013), reprinted in STATE OF THE FEDERAL JUDICIARY: ANNUAL REPORTS OF THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES (Shelley L. Dowling ed., 2014) [hereinafter ANNUAL REPORTS]. For an accounting of the budgets of the Supreme Court and the lower federal courts beginning in fiscal year 1792, see Daniel S. Holt, *Federal Judiciary Appropriations, 1792–2010*, FED. JUD. CTR. (2012), [http://www.fjc.gov/public/pdf.nsf/lookup/Appropriations.pdf/\\$file/Appropriations.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Appropriations.pdf/$file/Appropriations.pdf) [<http://perma.cc/Z2D4-ZEGT>]. Congressional committee members routinely applaud the Court's thriftiness. See, e.g., *Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations for Fiscal Year 1995: Hearings Before the Subcomm. on Commerce, Justice, & State, the Judiciary, & Related Agencies of the S. Comm. on Appropriations*, 103d Cong. 95 (1994) (statement of Sen. Ernest Hollings) (noting that the "budget request for the Court is once again very modest this year"); *id.* at 96 (statement of Sen. Peter Domenici) ("Clearly, there isn't any question that we are operating with rather tight resources. But frankly, the Supreme Court's budget would be considered a frugal one . . .").

of the lower federal courts. Indeed, read with the benefit of hindsight, the hearings show the Justices shortly prior to *Lopez* and *Morrison* forecasting the Court's decisions in those cases—and articulating a rationale underlying the decisions.

The significance of our account extends beyond a single episode in the history of the Supreme Court. Once cast in terms of docket control, *Lopez* and *Morrison* represent not a break—revolutionary or otherwise—but rather the culmination of a much longer history of overburdened (and underappreciated) federal judges pushing back against demands to perform tasks that would distract them from their core functions under the Constitution.

More generally, apart from the federalism decisions of the Rehnquist Court, many cases—many landmark cases—might be better understood in the new light of docket control. We even offer a new reading of *Marbury v. Madison*.³⁰ While at first blush docket control may seem less exciting than other accounts of Supreme Court decision making, the perspective we offer helps make sense of a good deal of what the Court does. In particular, the framework helps to shift attention away from individual cases and single doctrines to identify unifying themes across multiple areas of case law not typically taken up together.

The first two parts of this Article provide historical context for our account of federalism as docket control in the modern period. Part I sets the stage with an overview of the limited jurisdiction and modest caseload of the federal courts during the antebellum period. In Part II, we take up the increases in the Supreme Court's caseload in the period after the Civil War and the century of efforts by the Justices to persuade Congress to provide the Court with tools to allow it to properly manage its docket. Once the Court achieved control over its own docket, we show in Part III, the Justices directed their energies to relieving the pressures upon the lower federal courts whose dockets had swollen largely as a result of federal lawmaking that produced new kinds of criminal and civil cases. When years of efforts to persuade Congress to exercise legislative restraint failed, the Justices turned to the only remaining remedy, invoking what we refer to as the constitutional option: invalidating criminal and civil laws, in *Lopez* and *Morrison* respectively, in order to shield the lower federal courts from ever-growing burdens. These two cases, we suggest, make a good deal more sense—and in fact have stronger constitutional grounding—when understood not simply in terms of

30. 5 U.S. (1 Cranch) 137 (1803).

federal and state legislative powers but in terms of the place of the third branch in the federal constitutional structure. We conclude Part III with a discussion of the significance and impact of *Lopez* and *Morrison* as docket control cases. In Part IV we extend our analysis beyond *Lopez* and *Morrison* to consider other cases—including *Marbury*—that can usefully be understood as reflecting concerns with controlling both the amount and type of work of the federal judiciary.

I. THE EARLY DOCKETS OF THE FEDERAL COURTS

Prior historical commentary on *Lopez* and *Morrison* has focused on the original meaning of “Commerce . . . among the several States”³¹ in Article I, Section 8 of the Constitution.³² This Article begins at a different place: the historical structure and role of the judicial branch of the federal government. By starting here, the route to *Lopez* and *Morrison* proceeds along a path that brings in view distinct interests of federal judges to help account for those decisions. This Article’s path to those two seminal decisions begins in this Part with a discussion of the Court’s originally limited caseload under the Constitution and the earliest legislation that set—and constrained—the Court’s workload.

The Constitution provides that the “judicial Power [of the United States] shall extend to all Cases”³³ arising under the Constitution and federal law, and the Constitution vests that power in “one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”³⁴ In the Judiciary Act of 1789,³⁵ Congress assigned the Supreme Court original jurisdiction closely matching the constitutional allocation,³⁶ but it gave the Court only limited appellate powers. The Supreme Court lacked appellate authority over criminal cases heard in lower federal courts created by

31. U.S. CONST. art. I, § 8, cl. 3.

32. See, e.g., Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 41–44 (2010); Daniel A. Farber, *The Constitution’s Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 626–50 (1995); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 555–57 (1995).

33. U.S. CONST. art. III, § 2, cl. 1.

34. *Id.* art. III, § 1.

35. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

36. See *id.* § 13, 1 Stat. at 80–81 (setting out the cases in which the Court would have original jurisdiction).

the Judiciary Act,³⁷ and could only hear appeals in civil cases where at least \$2,000 was in controversy.³⁸

Section 25 of the Judiciary Act also limited the circumstances under which the Court could review, by writ of error, the decisions of state courts on federal issues.³⁹ These circumstances included the power to review decisions of a state's highest court invalidating a federal statute, a treaty, or an exercise of federal authority.⁴⁰ The Court could also review state court decisions denying a title, a right, a privilege, or an exemption claimed by a party under the Constitution, a treaty, a federal statute, or a federal commission.⁴¹ In cases in which a state law was challenged on federal constitutional grounds, however, the Supreme Court could only review the state court decision if it rejected the constitutional claim and upheld the state law; there was no review if the state court accepted the constitutional claim and invalidated the law.⁴² This basic distinction in the Judiciary Act of 1789 between the power of review over state court decisions denying federal constitutional claims and those upholding them persisted when the Act was amended in 1867⁴³ and when it was reenacted in 1873⁴⁴ and 1911.⁴⁵ Prior to 1914 the Supreme Court had no statutory authority to review decisions of state courts that upheld a federal claim against state government.⁴⁶ Moreover, even when the Court was granted a power of review, it was subject to the Court's discretion pursuant to a writ of certiorari.⁴⁷

37. *See id.* However, the Supreme Court as well as the lower federal courts did have a power of habeas review for prisoners detained by the federal government. *See id.* § 14, 1 Stat. at 81–82.

38. *Id.* § 22, 1 Stat. at 84.

39. *See id.* § 25, 1 Stat. at 85–87 (setting out the circumstances in which the Court could review state court decisions). The writ of error limited the Court to reviewing questions of law (and not fact) and only from final judgments from the state's highest court or the lower federal court. *Id.* §§ 21–22, 25, 1 Stat. at 83–87.

40. *See id.* § 25, 1 Stat. at 85–87.

41. *Id.* § 25, 1 Stat. at 85–86. *But see* Kevin C. Walsh, *In the Beginning There Was None: Supreme Court Review of State Criminal Prosecutions*, 90 NOTRE DAME L. REV. 1867, 1875–94 (2015) (arguing that properly understood, Section 25 authorized Supreme Court appellate review of state court decisions in civil but not in criminal cases).

42. § 25, 1 Stat. at 85–87; *see also* Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 18–23 (2007) (describing the Court's review of state laws under Section 25 of the Judiciary Act of 1789 as “one-way”).

43. *See* Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 386–87.

44. *See* Act of Dec. 1, 1873, ch. 11, § 709, 18 Stat. 1, 132.

45. *See* Act of Mar. 3, 1911, Pub. L. No. 475, ch. 231, § 237, 36 Stat. 1087, 1156–57.

46. *See* Act of Dec. 23, 1914, Pub. L. No. 224, ch. 2, 38 Stat. 790, 790.

47. *Id.* Mandatory review, by writ of error, of state court decisions upholding a state law against a federal constitutional claim persisted from 1916 to 1988, while, at the same time, the Court had discretionary review, by writ of certiorari, of state court decisions that

As for the lower federal courts, the 1789 Act assigned them a jurisdiction that also fell short of the constitutional grant.⁴⁸ In particular, lower federal courts had no general federal question jurisdiction in civil cases and were thus dependent upon Congress's piecemeal allocation of cases to them.⁴⁹ Other than the short-lived Midnight Judges Act of 1801,⁵⁰ Congress did not give the lower federal courts authority to hear all cases arising under federal law until 1875.⁵¹

The early dockets of the federal courts reflected their limited statutory authority in both number and substance. The Supreme Court, which met in New York and then Philadelphia before moving to the Capitol basement in 1800,⁵² did not hear a single case in its first three terms.⁵³ Moreover, from 1801 to 1829, the Court averaged only

invalidated a state law on federal grounds. Act of Sept. 6, 1916, Pub. L. No. 258, ch. 448, § 2, 39 Stat. 726, 726–27; see 28 U.S.C. § 1257 Historical & Revision Notes, Amendments (2006) (describing changes made by the 1988 law).

48. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (specifying the jurisdiction of the federal district courts); *id.* § 11, 1 Stat. at 78–79 (specifying the original jurisdiction of the circuit courts); *id.* §§ 21–22, 1 Stat. at 83–85. (specifying the appellate jurisdiction of the circuit courts).

49. See, e.g., Act of Feb. 4, 1815, ch. 31, §§ 7–8, 3 Stat. 195, 197–99 (assigning lower federal courts jurisdiction in cases involving enforcement of federal customs laws); Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124–25 (repealed 1802) (giving the lower federal courts jurisdiction in copyright infringement cases); Judiciary Act of 1789, ch. 20, § 9, 1 Stat. at 77 (codified at 28 U.S.C. § 1350 (2012)) (giving the lower federal courts jurisdiction to hear alien tort claims).

50. See Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (repealed 1802). The Act, passed by the Federalist Congress of 1801, conferred federal question jurisdiction on the federal circuit courts. See *id.* § 11, 2 Stat. at 92 (giving the circuit courts “cognizance” of all cases “arising under” the Constitution and federal laws). The new Republican Congress repealed the law the next year. See Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132.

51. See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (giving the federal circuit courts jurisdiction over all civil cases “arising under” federal law, subject only to an amount-in-controversy requirement of \$500).

52. The Court held its first two terms in New York in 1790 and then met in Philadelphia until 1800, when it moved with the rest of the federal government to Washington, D.C. *Homes of the Court*, SUP. CT. HIST. SOC'Y, <http://supremecourthistory.org/history-of-the-court/home-of-the-court/> [<http://perma.cc/5YSQ-2LCA>].

53. See Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1294 (1985) (“As a practical matter, the Court had no need of a reporter . . . during its first three Terms, for its docket was empty. Not until the Court’s August 1791 Term was its first case, *West v. Barnes*, called for argument . . .”) (footnote omitted). Similarly, Congress cancelled both of the Court’s 1802 Terms and, accordingly, the Justices did not hear any cases. See *The Marshall Court, 1801–1835*, SUP. CT. HIST. SOC'Y, http://supremecourthistory.org/timeline_court_marshall.html [<http://perma.cc/L6CZ-NHTY>]; see also Act of Apr. 29, 1802, ch. 31, § 1, 2 Stat. 156, 156 (providing for the Court to have one term annually, beginning on the first Monday of February each year). The Court also heard no cases in the 1811 Term,

twenty-eight cases with signed opinions each year.⁵⁴ The Court had ninety-eight total cases docketed in 1810; 127 cases in 1820; 143 cases in 1830; 253 in 1850; and 310 cases in 1860.⁵⁵ With regard to substance, relatively few early cases before the Court involved grand questions of federal constitutional law. As one example, the Supreme Court did not decide a single case during the 1825 Term that concerned either the Bill of Rights or the constitutionality of federal or state laws under the Commerce or Contracts Clauses.⁵⁶ Of the twenty-six cases the Court heard that term, ten focused on questions of common law while the remainder considered a mix of statutory, jurisdictional, maritime, and other matters.⁵⁷ As of 1840, the Court had found state laws unconstitutional in just nineteen cases.⁵⁸ Between *Marbury v. Madison*,⁵⁹ decided in 1803, and the Court's 1857 decision in *Scott v. Sandford*,⁶⁰ the Court did not find a single federal statute unconstitutional.⁶¹

For much of this early period, the Justices spent a good portion of their time riding circuit. Instead of permanent circuit court judges, the Judiciary Act of 1789 assigned one district court judge and two Supreme Court Justices to each of the circuit courts, with each Justice travelling across a designated circuit twice annually.⁶² Riding circuit was unpopular with the Justices from the outset: after his first term, Justice James Iredell remarked that “no Judge can conscientiously undertake to ride the Southern Circuit constantly, and perform the other parts of his duty.”⁶³ For understandable reasons, the members

when, as a result of illness among its members, it lacked a quorum. See JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 400 (1996).

54. See LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 250 tbl.3-2 (5th ed. 2012) (listing the total number of cases for the period, the average of which is 27.76 cases per year).

55. 13 CONG. REC. 3464 (1882) (statement of Sen. David Davis).

56. See FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 302 tbl.I (1928) (reporting cases heard by the Court categorized by subject matter).

57. See *id.*

58. See EPSTEIN ET AL., *supra* note 54, at 193 tbl.2-16 (listing cases).

59. 5 U.S. (1 Cranch) 137 (1803).

60. 60 U.S. (19 How.) 393 (1857).

61. See Morton J. Horwitz, *Constitutional Transplants*, 10 THEORETICAL INQUIRIES L. 535, 541 (2009).

62. Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75. See generally Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1757–71 (2003) (describing the challenges of riding circuit and the Justices' efforts to overhaul the circuit-riding system).

63. Letter from James Iredell to John Jay, William Cushing, and James Wilson (Feb. 11, 1791), in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED

of the Court frequently complained about these burdensome, unglamorous trips. When Justice Thomas Johnson resigned from the Court after a brief tenure, he cited in his resignation letter to George Washington the “excessively fatiguing” nature of riding circuit.⁶⁴

In 1792, every member of the Court signed a letter asking Congress to relieve the Justices from “the toilsome Journies through different climates and seasons, which [the Justices] are called upon to undertake.”⁶⁵ One concern was the sheer ardor of lengthy trips by horse across miles of dirt roads: “[No] set of Judges, however robust, would be able to support and punctually execute such severe duties for any length of time.”⁶⁶ A separate concern was more plainly institutional: “[A]ppointing the same men finally to correct in one capacity, the errors which they themselves may have committed in another, is a distinction unfriendly to impartial justice, and to that confidence in the supreme Court, which it is so essential to the public Interest should be reposed in it.”⁶⁷ In other words, there was some question as to whether circuit riding was even consistent with the creation—by the Constitution—of a Supreme Court with designated appellate functions.

By way of response, Congress reduced the number of Supreme Court Justices required on the circuit courts to one.⁶⁸ Half a burden was a burden nonetheless, and so the Justices again communicated to Congress their view that, in addition to the personal physical toll, circuit riding was inconsistent with the sound administration of justice:

It has already happened, in more than one Instance, that different Judges sitting at different times in the same Court but in similar Causes have decided in direct opposition to each other, and that in cases in which the parties could not . . . have the benefit of Writs of Error. . . . [We] therefore . . . submit . . . whether this Evil, naturally tending to render the Law unsettled

STATES, 1789–1800, at 131–32 (Maeva Marcus ed., 1988) [hereinafter 2 DOCUMENTARY HISTORY].

64. Letter from Thomas Johnson to George Washington (Jan. 16, 1793), in 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 80 (Maeva Marcus & James Perry eds., 1985) [hereinafter 1 DOCUMENTARY HISTORY]. Justice Johnson added: “I cannot resolve to spend six Months in the Year of the few I may have left from my Family, on Roads at Taverns chiefly and often in Situations where the most moderate Desires are disappointed . . .” *Id.*

65. Letter from the Justices of the Supreme Court to the Congress of the United States (Aug. 9, 1792), in 2 DOCUMENTARY HISTORY, *supra* note 63, at 289–90.

66. *Id.*

67. *Id.* at 90.

68. Judiciary Act of 1793, ch. 22, § 1, 1 Stat. 333, 333–34.

and uncertain, and thereby to create apprehensions and diffidence in the public mind, does not require the Interposition of Congress.⁶⁹

Despite the plea, no further relief came.

Evidently, Congress believed circuit riding beneficial: it reduced the risk of the Supreme Court turning into “a centralized metropolitan Court.”⁷⁰ Keeping the Justices on the road kept them in touch with “the great mass of the community”⁷¹ and guarded against a consolidation of power that could result from the members of the Court remaining together in a single location. Thus, aside from the short-lived Midnight Judges Act of 1801,⁷² circuit riding remained a statutory duty of the Justices until 1891.⁷³

This condensed history makes a simple point: for a long period of time, the federal judicial branch looked quite different from how it looks today. The federal courts, including the Supreme Court, had limited duties and modest caseloads, largely because Congress carefully defined the tasks they were compelled or authorized to perform. The Justices’ principal complaint was with the burdens of circuit riding.

As the nineteenth century drew to a close, however, caseloads increased dramatically. As a result, the members of the Supreme Court, who saw themselves unable to fulfill their constitutionally assigned role, made reform a priority and turned to Congress for help. That history of reform efforts, the topic of Part II, set the Court on the path to *Lopez* and *Morrison*.

69. Letter from Justices of the Supreme Court to the Congress of the United States (Feb. 18, 1794), in 2 DOCUMENTARY HISTORY, *supra* note 63, at 443–44.

70. See 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 266–67 (1926).

71. CONG. GLOBE, 40th Cong., 3d Sess. 1487 (1869) (statement of Sen. Charles R. Buckalew).

72. Judiciary Act of 1801, ch. 4, § 7, 2 Stat. 89, 90–91 (creating six new circuit courts staffed with sixteen new circuit court judges) (repealed 1802).

73. The Evarts Act of 1891 established intermediate courts of appeals and specified that the Justices were “competent to sit as judges of the circuit court of appeals within their respective circuits.” Judiciary Act of 1891, ch. 517, §§ 2–3, 26 Stat. 826, 826–27. While under this provision some Justices continued to serve on the intermediate courts, the practice was abolished as a formal matter with the Judicial Code of 1911. Act of Mar. 3, 1911, ch. 231, § 289, 36 Stat. 1087, 1167; see David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1726 (2007) (discussing the formal abolishment of circuit riding).

II. DOCKET GROWTH AND REFORM EFFORTS

As a result of limited assignments from Congress, the Supreme Court's docket stayed at manageable levels during much of its first century. By 1880, however, the Court was under significant pressure. From 1870 to 1880 the number of cases on the Court's docket nearly doubled: the Court had 636 cases on its docket in 1870 and 1,202 in 1880.⁷⁴ New cases were filed at a faster pace than the Court could dispose of existing docketed cases, thus creating, for the first time in the Court's history, a backlog.⁷⁵ However, these developments are not surprising. In the latter half of the nineteenth century, a period of economic expansion, population increase, and technological innovation, there was simply more federal law than ever before and more disputes filed in court that would eventually work their way up to the Supreme Court. These increased demands upon the Court initiated a century of efforts by the Court to reduce its workload. This Part traces those efforts and their impact, beginning in Section A with the interventions of Chief Justice Melville Fuller and continuing in Section B with those of Chief Justice William Howard Taft. Section C then considers the further rise in the Court's workload during the 1960s. Section D details the extensive work of Chief Justice Warren Burger and the Federal Judicial Center to counteract this increase before finally turning in Section E to the congressional grant of discretionary review that represents the fruits of that labor. In seeking relief, the Court's principal—and highly successful—tactic was to call on Congress to help the Court reduce and manage its caseload. In so doing, the Justices formulated their concerns about the size and nature of the judicial docket as an issue of constitutional significance. That early formulation came to provide the Court with a powerful tool when, in the latter part of the twentieth century, the Court turned its attention to reducing the workload of the lower federal courts after help from Congress appeared unlikely.

A. *Fuller*

More than a century before *Lopez*, members of the Supreme Court actively sought ways to control the Court's burgeoning caseload. As shown in this Section, the Court's focus was on seeking

74. 13 CONG. REC. 3464 (1882) (statement of Sen. David Davis).

75. In 1880, the Court disposed of 369 cases and 417 new cases were filed. In 1880, the Court's total docket comprised over 1,200 cases; the figure rose until 1891. See *Supreme Court of the United States: Caseloads, 1878–2012*, FED. JUD. CTR., http://www.fjc.gov/history/caseload.nsf/page/caseloads_Sup_Ct_totals [<http://perma.cc/VG6X-9SHT>].

the help of Congress to cure a well-publicized problem. During the 1880s, congressmen in both the House and the Senate introduced various bills to reorganize the federal judiciary to ease the caseload of the Supreme Court—yet each bill failed to secure the necessary votes.⁷⁶ That chronic failure, according to Felix Frankfurter, was a product of “Congressional preoccupation with more popular issues, the inevitable drags upon legislative machinery, [and] the potent factor of inertia.”⁷⁷ After a decade of waiting for Congress to solve this caseload problem, the Court embarked on a more proactive approach.

In January of 1890, Chief Justice Melville Fuller hosted a dinner party for members of the Court and the Senate Judiciary Committee at which he pitched the urgent need for Congress to reduce the size of the Court’s docket.⁷⁸ Within a few weeks of that gathering, the Judiciary Committee sent all then-pending legislation for Supreme Court relief to Fuller and formally solicited a proposal from all the Justices to reduce the Court’s caseload.⁷⁹ In turn, the Court submitted a report to the Judiciary Committee advocating legislation that would require appellate court judges to certify questions of law warranting a final decision by the Supreme Court, with such certification mandated in the event of a circuit conflict.⁸⁰ Responding to this proposal, in March of 1891, Congress enacted the Circuit Court of Appeals Act⁸¹—known popularly as the Evarts Act after New York Senator (and Fuller dinner guest) William Evarts.

The Evarts Act created nine permanent circuit courts of appeals with power to issue final decisions in specified cases (thereby reducing the number of cases on the Court’s mandatory docket) and instituted the certification procedure the Court had advocated.⁸² The Act also gave the Court for the first time a power of certiorari, devised as a “fallback provision” in case the new circuit courts proved “careless in deciding cases or issuing certificates.”⁸³

76. For a historical summary of the several bills that failed during this time frame, see Felix Frankfurter, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 39 HARV. L. REV. 35, 56–65 (1926).

77. *Id.* at 64.

78. JAMES W. ELY, JR., *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910*, at 42–43 (Herbert A. Johnson ed., 1995).

79. *Id.*

80. Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1651–52 (2000).

81. Judiciary Act of 1891, ch. 517, 26 Stat. 826.

82. *Id.* §§ 3, 5–6, 26 Stat. 826, 827–28.

83. Hartnett, *supra* note 80, at 1656.

While responsive to the Justices' concerns, the Act was far from revolutionary. The Act retained mandatory appellate jurisdiction in cases involving the constitutionality of a law,⁸⁴ capital cases,⁸⁵ and fourteen designated classes of civil suits.⁸⁶ It also did not alter the rules governing review of state court decisions, an increasingly significant source of cases for the Court.⁸⁷

In practice, the 1891 Act provided relief to Chief Justice Fuller and his colleagues with respect to new filings: while the Supreme Court docketed 636 new cases in the 1890 Term, by 1892 the number had dropped to 290.⁸⁸ Particularly noteworthy is that, in the two years following the Evarts Act, the Court granted only two writs of certiorari, suggesting that the fallback provision warranted only limited use.⁸⁹ Yet even though the Evarts Act reduced the number of new cases the Court was obligated to decide, it did not relieve the Court of its swollen backlog of cases. Prior to the Evarts Act, the Court's appellate docket carried an "absurd total of 1800" cases that required a decision.⁹⁰ In the early twentieth century, the Court still had a substantial caseload: 1,170 appellate cases in 1911, 1,169 appellate cases in 1916, and 1,012 appellate cases in 1921.⁹¹ A large portion of these cases involved writs of error from state court decisions denying a federal claim.⁹²

The shortcomings of the Evarts Act became apparent as new pressures tested the Court's limited resources. The number of petitions for certiorari increased steadily in the early twentieth century: from 270 petitions in the 1916 Term, for example, to 456 petitions in the 1924 Term.⁹³ Deciding those petitions proved time-consuming as the Justices individually reviewed each case before taking a vote on whether to grant review.⁹⁴ In addition, there were new sources of cases that the Court could not dodge. Ratification of

84. § 5, 26 Stat. at 827–28.

85. *Id.*

86. *Id.*

87. *Id.*

88. EPSTEIN ET AL., *supra* note 54, at 70 tbl.2-2.

89. *Am. Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 383 (1893) (“[W]hile there have been many applications to this court for writs of *certiorari* to the Circuit Court of Appeals under this provision, two only have been granted . . .”).

90. FRANKFURTER & LANDIS, *supra* note 56, at 86.

91. DEP'T OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR 1922, at 5 (1922).

92. Hartnett, *supra* note 80, at 1658.

93. Felix Frankfurter & James M. Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 40 HARV. L. REV. 834, 835 (1927).

94. Hartnett, *supra* note 80, at 1677.

the Eighteenth Amendment⁹⁵ and enactment of the Volstead Act in 1919⁹⁶ generated an eight percent increase in federal cases,⁹⁷ while World War I generated prosecutions for anti-war activities and placed a series of civil rights cases on the federal dockets.⁹⁸ The Evarts Act therefore turned out to be only a partial remedy, leaving the Justices in need of long-term relief. Following Chief Justice Fuller's death in 1910, the Court was very much in need of someone to continue his work and maintain the push for reform.

B. Taft

The Fuller Court's growing workload attracted the attention of President William Howard Taft, who, soon after he took office in 1909, urged Congress to further reduce the scope of the Court's mandatory jurisdiction.⁹⁹ After Taft's unsuccessful campaign for reelection, he joined the faculty of the Yale Law School where his views took sharper form. Asserting that "[t]he most important function of the [Supreme C]ourt is the construction and application of the constitution of the United States," Taft recommended limiting the Court's mandatory jurisdiction to "questions of constitutional construction," with all other cases subject to writ of certiorari.¹⁰⁰ Although neither his efforts in the White House nor from Yale yielded fruit, Taft soon had a personal reason for staying with the cause. In 1921, Taft himself became Chief Justice, and in that role he undertook "unprecedented efforts" to scale back the Court's mandatory jurisdiction.¹⁰¹ Befitting his prior stint in the White House, Taft deemed it "the prerogative and even the duty of his office [of Chief Justice] to take the lead in promoting judicial reform and to

95. 40 Stat. 1941 (1919).

96. National Prohibition Act, ch. 85, 41 Stat. 305 (1919).

97. DAVID H. BURTON, TAFT, HOLMES, AND THE 1920S COURT: AN APPRAISAL 117 (1998). The Volstead Act was enacted shortly after ratification of the Eighteenth Amendment to provide legislative guidance on the upcoming prohibition of alcohol. See National Prohibition Act, ch. 85, 41 Stat. 305 (1919).

98. See, e.g., *Frohwerk v. United States*, 249 U.S. 204, 210 (1919) (upholding conviction of a newspaper editor for criticism of U.S. involvement in World War I); *Schenck v. United States*, 249 U.S. 47, 50 (1919) (upholding against First Amendment challenge conviction under Espionage Act of 1917 of defendants who distributed anti-draft leaflets).

99. See, e.g., 46 CONG. REC. 25 (1910) (Second Annual Address of President William Howard Taft) ("No man ought to have, as a matter of right, a review of his case by the Supreme Court.").

100. William Howard Taft, *The Attacks on the Courts and Legal Procedure*, 5 KY. L.J. 3, 18 (1916).

101. Hartnett, *supra* note 80, at 1648.

wait neither upon legislative initiation in Congress nor upon professional opinion.”¹⁰²

Chief Justice Taft wasted no time in moving along reform efforts. Inspired by a trip to study the practices of English courts and helped by his colleagues (in particular Willis Van Devanter),¹⁰³ Taft drafted a reform bill that was introduced by Congressman Joseph Walsh of Massachusetts in 1922.¹⁰⁴ Appearing before the House Judiciary Committee in support of the bill, Taft described the job of the Supreme Court as “expounding and stabilizing principles of law” and promoting uniformity—not vindicating the rights of individual litigants through error correction.¹⁰⁵ This time Congress was on board, passing the so-called Judges’ Bill as the Judiciary Act of 1925.¹⁰⁶

The Act relieved pressure on the Supreme Court by rendering a much greater portion of its jurisdiction subject to certiorari.¹⁰⁷ Specifically, with respect to the decisions of the intermediate courts of appeals, review by writ of error was limited to a small set of cases that included decisions of the circuit courts invalidating a state statute under federal law.¹⁰⁸ Other decisions of the courts of appeals were subject to certiorari, although those courts nonetheless retained power to certify a case to the Supreme Court.¹⁰⁹ The 1925 Act also limited appeals from the states’ highest courts to cases in which the state court had declared a federal law invalid or had denied a claim that a state law was unconstitutional.¹¹⁰ The remaining state court cases were subject to a petition for certiorari.¹¹¹ Further, when exercising review, the Supreme Court was empowered to determine which questions it would actually decide rather than having to hear anew an entire case.¹¹² Notably, the Act went further than Taft’s

102. Frankfurter & Landis, *supra* note 93, at 838–39 (citations omitted).

103. *Snyder v. Buck*, 340 U.S. 15, 24 (1950) (Frankfurter, J., dissenting) (“Mr. Justice Van Devanter, . . . as is well known, was the chief draftsman of the Judiciary Act of 1925.”).

104. See 62 CONG. REC. 2686, 2737 (1922); see also *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearings on H.R. 10479 Before the H. Comm. on the Judiciary*, 67th Cong. 3 (1922) (statement of Chief Justice William Howard Taft).

105. Hartnett, *supra* note 80, at 1664–65 (quoting *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearings on H.R. 10479 Before the H. Comm. on the Judiciary*, 67th Cong. 2 (1922) (statement of Chief Justice William Howard Taft)).

106. Act of February 13, 1925, Pub. L. No. 68-415, 43 Stat. 936; Frankfurter & Landis, *supra* note 93, at 852–53.

107. 43 Stat. 936.

108. *Id.* § 237, 43 Stat. at 937.

109. *Id.*

110. *Id.*

111. *Id.* § 237, 43 Stat. at 937–38.

112. *Id.*

earlier proposal to retain mandatory review in all constitutional cases: Taft now warned that “there could be just as many frivolous cases on constitutional grounds as on any other grounds,”¹¹³ and the Act did not require the Court to hear all constitutional questions.

Ultimately, the 1925 Act provided the Court with significant relief. Even though the number of certiorari petitions continued to increase, the Justices had greater control over the number of cases they heard and decided on the merits.¹¹⁴ In Taft’s view, this change came with no cost to the system: soon after the 1925 Act, Taft reported that “[e]asily one-half of the certiorari petitions now presented have no justification at all.”¹¹⁵

Two other developments served to buttress the 1925 Act. First, with the rise in certiorari jurisdiction, the circuit courts largely stopped certifying questions for review, leaving it up to the litigants to persuade the Court to hear their case.¹¹⁶ Second, in 1928 the Court, acting on its own, issued Rule 12 which required litigants seeking writ of error review to demonstrate a “substantial” federal question that was not settled by prior case law; the Court used Rule 12 on occasion to refuse to hear cases.¹¹⁷

Of these two developments, the Court’s willingness to engage in self-help by adopting Rule 12 merits particular comment. The rule was a jurisdictional rule, reflecting an idea developed after the Civil War that some cases were so lacking in merit that they did not present a true case or controversy for the Court to resolve. Prior to the Civil War, the Court simply decided on the merits all cases that appeared to be properly before it.¹¹⁸ Indeed, there was reluctance to investigate too carefully the issue of jurisdiction because, as Justice John Catron explained, questions of jurisdiction often proved “much more difficult

113. Hartnett, *supra* note 80, at 1665–66 (quoting *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearings on H.R. 10479 Before the H. Comm. on the Judiciary*, 67th Cong. 4 (1922) (statement of Chief Justice William Howard Taft)).

114. In just four years, the number of petitions for certiorari jumped twenty percent: from 586 petitions in 1926 to 726 petitions in 1930. EPSTEIN ET AL., *supra* note 54, at 70 tbl.2-2.

115. William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 3 (1925).

116. Hartnett, *supra* note 80, at 1710–11.

117. *Id.* at 1708.

118. See *Crowell v. Randell*, 35 U.S. (10 Pet.) 368, 368 (1836) (“In the interpretation of [Section 25] of the act of 1789, it has been uniformly held, that to give this court appellate jurisdiction, two things should have occurred and be apparent in the record: first, that some one of the questions stated in the section did arise in the court below; and secondly, that a decision was actually made thereon by the same court in the manner required by the section.”).

to settle” than the underlying issue the case presented.¹¹⁹ As docket loads increased, however, the Court began to insist on the existence of a *substantial* federal question, as a specific jurisdictional requirement, for it to resolve cases on appeal.¹²⁰ In this way, a court-created common-law rule served as a modest docket control mechanism.

The starting point in this regard was *Millingar v. Hartupee*,¹²¹ an 1867 case involving a dispute over ownership of cotton. The appellant, invoking Section 25 of the Judiciary Act, sought Supreme Court review of a state court decision that gave title to the cotton to his opponent in disregard of an earlier federal district court ruling on the matter.¹²² Rather than decide the case on the merits, the Court dismissed it “for want of jurisdiction” on the ground that the papers presented only a “bare assertion”¹²³ of jurisdiction under Section 25 without a more particularized statement of the Court’s power to hear the case.¹²⁴ *Millingar* did not, however, mark a new era in which the Court would henceforth scrutinize more carefully the basis for jurisdiction in all appeals it was asked to decide.¹²⁵ Instead, on the notion that “[b]oth parties have the right to be heard on the merits,”¹²⁶ the Court, for a period, continued to hear appeals even when the federal claim presented appeared weak.¹²⁷ The *Millingar* approach looked to be an aberration.

In 1891, the Court resurrected *Millingar* to dismiss a case involving an alleged violation of the Contracts Clause.¹²⁸ The dispute centered on a claim by a New Orleans corporation that the legislature had violated its preexisting charter to supply the city with water

119. *Kennedy v. Hunt’s Lessee*, 48 U.S. (7 How.) 586, 590 (1849) (“[T]o ascertain how far, if at all, the powers of this court can be called into exercise, the facts and the laws bearing on them must be stated in something of detail; as in this case, in common with many others, it is found much more difficult to settle the question of jurisdiction, and how far it extends, than it would have been to decide the merits of the controversy had the cause been brought here by writ of error to a court of the United States.”).

120. See Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1349 (1986) (attributing Court-created restrictions to appellate jurisdiction “largely to the increased business given to the federal courts after the Civil War”).

121. 73 U.S. (6 Wall.) 258 (1867).

122. *Id.* at 259–62.

123. *Id.* at 259, 261.

124. *Id.* at 258.

125. Matasar & Bruch, *supra* note 120, at 1347–48.

126. *Amory v. Amory*, 91 U.S. 356, 357 (1875).

127. Matasar & Bruch, *supra* note 120, at 1348.

128. *City of New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 87 (1891).

service.¹²⁹ Determining that there was not in fact a contract created by the charter, the Court ruled that there thus remained only a “bare averment of a Federal question” and that was insufficient to invoke the Court’s jurisdiction to review the state court’s decision in the case.¹³⁰ When the state later revoked the corporation’s charter for failing to perform as required and the case returned to the Court on new claims based on the Contracts Clause and Due Process Clause, the Court again dismissed, explaining that the federal issues were “so clearly without color of foundation that this court is without jurisdiction in this case.”¹³¹

Subsequently, the Court invoked the same logic to rid itself of other appeals, making clear in one such case that “[t]here must be a real substantive [federal] question” for an appeal to be heard.¹³² Shoring up this approach at the beginning of the twentieth century, the Court announced a substantive federal question standard that barred cases “explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy.”¹³³ Within two decades, the standard was an explicit requirement: in the 1922 case of *Zucht v. King*,¹³⁴ which involved a challenge to a city law requiring children to be vaccinated in order to attend school, the Court invoked its “duty to decline jurisdiction” whenever the constitutional question was resolved in prior decisions and thus “is not, and was not at the time of granting the writ, substantial in character.”¹³⁵

In light of these changes, the Court modified its own published rules to guide litigants who had prevailed below and sought to avoid a reversal at the Supreme Court. In 1878, the Court changed Rule 6 to provide:

There may be united, with a motion to dismiss a writ of error or appeal, a motion to affirm, on the ground that, although the record may show that this court has jurisdiction, it is manifest the appeal or writ was taken for delay only, or that the question

129. *Id.* at 80–81.

130. *Id.* at 87.

131. *New Orleans Waterworks Co. v. Louisiana*, 185 U.S. 336, 354 (1902).

132. *St. Joseph & Grand Island R.R. Co. v. Steele*, 167 U.S. 659, 662 (1897) (“Not every mere allegation of the existence of a Federal question in a controversy will suffice for that purpose. There must be a real substantive question, on which the case may be made to turn.”).

133. *Equitable Life Assurance Soc’y v. Brown*, 187 U.S. 308, 311 (1902) (citing *New Orleans Waterworks*, 185 U.S. at 352).

134. 260 U.S. 174 (1922).

135. *Id.* at 176.

on which the jurisdiction depends is so frivolous as not to need further argument.¹³⁶

Additional changes to the Court's rules followed the Judges' Bill of 1925, which had eliminated much of the Court's mandatory appellate jurisdiction,¹³⁷ and a 1928 statute abolishing the category of writs of error and designating all non-discretionary cases as appeals.¹³⁸ Those developments spurred the Court to strengthen the jurisdictional standards contained in its own published rules. Thus, in 1928, the Court adopted Rule 12, requiring that every appellant file with the appeal a jurisdictional statement "particularly disclosing the basis on which it is contended this court has jurisdiction to review on appeal the judgment or decree below."¹³⁹ Likewise, appellees could file a statement "disclosing any matter . . . making against the jurisdiction asserted by the appellant."¹⁴⁰ At that time, Rule 12 did not refer to the substantial federal question requirement the Court's cases had developed. However, in 1936, the Court added an additional paragraph to the jurisdictional statement requirement:

The statement shall show that the nature of the case and of the rulings of the court was such as to bring the case within the jurisdictional provisions relied on, including a statement of the grounds upon which it is contended the questions involved are substantial . . . and shall cite the cases believed to sustain the jurisdiction.¹⁴¹

With this change, it was clear that the Court "welcomed motions to dispose of appeals where the issues were foreclosed by prior decisions."¹⁴² As Professor Entin observed, the Court's invocation of its own discretionary power to dispose of cases on jurisdictional grounds "blurred the distinction between appeal and certiorari,"¹⁴³

136. 97 U.S. vii (1878). This modification expanded to cases coming from the federal courts a rule that the Court had issued two years previously with respect to motions to dismiss writs of error to a state court. 91 U.S. vii (1876); see *Hinckley v. Morton*, 103 U.S. 764, 765–66 (1880) (discussing the origins of Rule 6).

137. Act of Feb. 13, 1925, Pub. L. No. 68-415, 43 Stat. 936.

138. Act of Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; see also Frederick Bernays Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 37 (1954) (discussing the statutory changes).

139. SUP. CT. R. 12, 275 U.S. 603 (1928).

140. *Id.*

141. SUP. CT. R. 12, 297 U.S. 733 (1936) (citing *Zucht v. King*, 260 U.S. 174, 176–77 (1922)).

142. Jonathan L. Entin, *Insubstantial Questions and Federal Jurisdiction: A Footnote to the Term-Limits Debate*, 2 NEV. L.J. 608, 623 (2002).

143. *Id.* at 612.

fused issues of jurisdiction with the merits of the case,¹⁴⁴ and at times also generated confusion as to the precedential effect of the Court's dispositions.¹⁴⁵ Nonetheless, the upside was some additional measure of control on the part of the Court itself to manage independently the number and types of cases that made it to full briefing and argument.

In terms of numbers, the 1925 Act, coupled with the Court's own jurisdictional rules, proved remarkably effective. These measures stabilized the Court's caseload for twenty-five years,¹⁴⁶ allowing the Justices to maintain, for the first time in a long period, a docket that was basically current.¹⁴⁷ During that period, the Justices sought Congress's aid for relatively modest items, such as increased funding to print judicial opinions¹⁴⁸ and to add administrative support.¹⁴⁹ The Court's pleas for large structural changes had subsided following what Justice Hugo Black would describe in 1947 as the "very valuable" reforms initiated by Chief Justice Taft.¹⁵⁰ This period of relative stability was to be short-lived, however, as the number of federal cases again rose in the second half of the twentieth century.

C. *New Troubles: The Sixties*

By the 1960s, calm gave way to concern as the workload of the federal judiciary, and particularly of the appellate courts, surged. Federal criminal appeals, numbering 623 in 1960, shot up to 1,665 in 1967; civil appeals (excluding prisoner petitions) increased from 2,322 to 4,473 over the same period.¹⁵¹ Writing as the decade came to a

144. *Id.* at 620.

145. *Id.* at 626.

146. From 1925 until 1950, the number of new cases filed to the Supreme Court increased an average of 2.1% per year; in the same period, the Court's overall caseload increased an average of 0.5% per year. EPSTEIN ET AL., *supra* note 54, at 70 tbl.2-2.

147. The Court's carryover or backlog did, in fact, gradually grow from 146 in 1951 to 428 in 1961 and again to 864 in 1971. FED. JUDICIAL CTR., REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972), *reprinted in* 57 F.R.D. 573, 613 tbl.1 (1972).

148. *The Judiciary Appropriation Bill for 1945: Hearings Before the Subcomm. on Legis.-Judiciary Appropriations of the H. Comm. on Appropriations*, 78th Cong. 105 (1944) (statement of Justice Harlan F. Stone) (observing that the efficient disposition of cases "can only be accomplished if opinions are written and published promptly, and that is impossible without a highly efficient printer who gets out the work with great dispatch").

149. *The Judiciary Appropriation Bill for 1948: Hearings Before the Subcomm. on the Judiciary of the H. Comm. on Appropriations*, 80th Cong. 4 (1947) (statement of Justice Harold H. Burton) (discussing the overtime required of law clerks and citing "an obvious need for increased help").

150. *Id.* at 13-14 (statement of Justice Hugo L. Black).

151. Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 544 (1969).

close, Professor Carrington explained that the increased appellate caseload was “largely” attributable to mandated changes in criminal law and procedure such as “the requirement that counsel and free transcripts be provided for indigent defendants.”¹⁵² On the civil side of the equation, Professor Carrington noted a four-fold increase in civil rights litigation from 1959 to 1967, and suggested that the expanded appellate docket reflected the fact that “[l]osers in civil rights cases tend to appeal more often.”¹⁵³ Civil rights cases also occupied a growing proportion of the Supreme Court’s plenary docket, rising from twenty-seven percent (thirty-two cases out of 117) in 1951 to sixty-two percent (eighty cases out of 129) in 1970.¹⁵⁴

In order to manage its own growing docket, the Court once more appealed to Congress, this time asking for the ability to hire additional law clerks to assist the Justices.¹⁵⁵ At the same time, the lower federal courts likewise sought an increase in the number of their clerks and other staff members to handle their own caseload growth.¹⁵⁶ In 1968, Congress authorized the district courts to hire eighty-three of 166 requested deputy clerks while the circuit courts were granted fifty-five additional law clerk positions.¹⁵⁷ But Congress did not at that time also give the Supreme Court additional law clerks. Thus from 1952 through 1968, the Court’s law clerks numbered a constant nineteen—two for each associate Justice and three for the Chief Justice.¹⁵⁸

152. *Id.*

153. *Id.*

154. Arthur D. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970’s*, 91 HARV. L. REV. 1711, 1747 tbl.6 (1978).

155. See *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation for 1968: Hearings Before the Subcomm. on Dep’ts of State, Justice, & Commerce, the Judiciary, & Related Agencies Appropriations of the H. Comm. on Appropriations*, 90th Cong. 6 (1967) (statement of Justice Byron R. White) (“I think the point is that [the Chief Justice] does need some more help. Each of us needs more help.”).

156. In 1965, Chief Judge Matthew McGuire of the U.S. District Court for the District of Columbia, in seeking 134 new bankruptcy court clerks and twenty-five new district court clerks, stated: “The steady upward trend of litigation coming before the courts and causing a mounting pending caseload cannot be ignored when considering the amount of money and personnel estimated to be required for fiscal year 1966.” *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation for 1966: Hearings Before the Subcomm. on Dep’ts of State, Justice, & Commerce, the Judiciary, & Related Agencies Appropriations of the H. Comm. on Appropriations*, 89th Cong. 41–43 (1965).

157. See *Judiciary Appropriation Act of 1969*, Pub. L. No. 90-470, 82 Stat. 683, 683 (1968).

158. H.R. REP. NO. 91-384, at 6 (1969) (statement of Justice Byron R. White) (“The number of law clerks employed by the Court has stood at 19 for the past 16 years. There

Over that same period, the Court's caseload grew by 170%, with 1,437 petitions for review filed in 1952¹⁵⁹ and 3,918 petitions filed in 1968.¹⁶⁰ Not surprisingly, the Justices felt shortchanged. Commenting in 1968 on the aid directed to the lower courts, Justice Potter Stewart told Congress: "I am sure [the lower courts] need all that help, and more. But . . . our Court in that same 16-year period has had no additional clerical help at all."¹⁶¹ Justice Stewart said that the Court faced "urgent need" for clerical help, without which no Justice would "be able to do the kind of job that the American people and their representatives would expect him to do" in the face of an "overwhelming" workload.¹⁶²

As a result of a "special favor" in the summer of 1969 from Congressman John Rooney to newly appointed Chief Justice Warren Burger, Congress eventually allocated the Court three additional law clerks.¹⁶³ Inspired by that minor success the Justices immediately pressed for six more clerks—a request to which Representative Rooney responded that there was an "understanding we were going to take this in stages, three, three and three."¹⁶⁴ On that schedule, the Court had twenty-eight law clerks in 1972, at which point the Court's personnel requests shifted to adding other support staff in response to "the increased secretarial workload resulting from the ever expanding caseload with the Court."¹⁶⁵

The problem, however, was that while law clerks and other staff members could indeed provide assistance to the Justices, the task of resolving cases remained with the Justices themselves. So long as the

are assigned two to each Justice with an extra law clerk assigned to the Chief Justice by reason of additional burdens on him in connection with the miscellaneous docket.").

159. *Id.* at 21.

160. See *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1971: Hearings Before the Subcomm. on Dep'ts of State, Justice, & Commerce, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 91st Cong. 16 (1970) (reporting caseload as part of budget proposal).

161. *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Bill for Fiscal Year 1969: Hearings Before a Subcomm. of the S. Comm. on Appropriations*, 90th Cong. 162 (1968).

162. *Id.*

163. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 32 (1979).

164. *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1971: Hearings Before the Subcomm. on Dep'ts of State, Justice, & Commerce, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 91st Cong. 18 (1970) (statement of Rep. John Rooney).

165. *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1973: Hearings Before the Subcomm. on Dep'ts of State, Justice, & Commerce, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 92d Cong. 16 (1972).

caseload kept increasing, adding law clerks could only ever be a partial solution to the burgeoning docket,¹⁶⁶ given the sheer nature of the Justices' work, adding to the corps of law clerks would inevitably yield diminishing returns.¹⁶⁷ Likewise, while Congress could help the lower federal courts manage their dockets by creating additional judgeships,¹⁶⁸ that solution was less beneficial for the Supreme Court. There was no interest among the Justices in increasing the number of Justices: asked in 1969 about expanding the size of the Court, Potter Stewart said: "[It] might just add to [the Court's] problems."¹⁶⁹ Further, given that all of the Justices by tradition participated in every case before the Court, adding new Justices would not have the same impact as did increasing the number of lower federal court judgeships.

As steadily increasing filings chipped away at the protections once afforded by the Judiciary Act of 1925, the Court continued to look for new ways to keep its docket current. For a period, appropriated solutions remained the preferred remedy. Together with regular requests for a larger support staff,¹⁷⁰ the Court asked Congress for technological upgrades to help the Court become more efficient.¹⁷¹ In 1970, the Court requested \$25,000 to study the feasibility of a "computer application" to assist the clerk of the Court in managing

166. As Justice White noted in 1972, adding to the corps of clerks was insufficient to get the Court's staff "caught up with the avalanche [of cases] of the past few years." *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1973: Hearings Before a Subcomm. of the S. Comm. on Appropriations*, 92d Cong. 12 (1972).

167. Justice Lewis Powell explained that the Justices "do our own work, and while most of us have four law clerks, I don't think I could handle any more." *Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1984: Hearings Before the Subcomm. on Commerce, Justice, State, the Judiciary, & Related Agencies of the S. Comm. on Appropriations*, 98th Cong. 676 (1983).

168. See Act of June 2, 1970, Pub. L. No. 91-272, 84 Stat. 294 (creating sixty-one new district court judgeships).

169. H.R. REP. NO. 91-384, at 12 (1969).

170. *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1973: Hearings Before a Subcomm. of the S. Comm. on Appropriations*, 92d Cong. 10 (1972) (statement of Justice Byron R. White) ("To conserve that time and to permit concentration on the essentials of the judicial task, it is critical that we have adequate staff in our own offices, the Office of the Clerk, and other supporting offices.").

171. See, e.g., *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1972: Hearings Before the Subcomm. on Dep'ts of State, Justice, & Commerce, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 92d Cong. 108-64 (1971); *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation for 1971: Hearings Before the Subcomm. on Dep'ts of State, Justice, & Commerce, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 91st Cong. 35 (1970).

filings.¹⁷² Satisfied with the results of that study, the Court followed up a year later by including in its budget request a “remote terminal computer application”—as a way, Justice Potter Stewart explained, “to try to plan ahead for what would otherwise be an extraordinary increase in the need for additional manpower.”¹⁷³ Evidently, the computer request proved a sticking point for Congress because over the next three years the Court reiterated the same request with increased urgency.¹⁷⁴ In a context in which Chief Justice Burger complained of the “deferred maintenance of the total judicial machinery[.]”¹⁷⁵ the Court’s interest in technology reflected an optimism that, in managing the growing docket, “a long-range solution lies in the automation of many of the functions that are performed manually at present.”¹⁷⁶

As with law clerks, however, technological improvements could only achieve so much. With the Court docketing 4,412 cases in 1970, it was clear that appropriated solutions were far from adequate.¹⁷⁷ Money could not solve everything. In 1971, Justice Stewart remarked: “[O]ver the last 20 years [the Justices] have approached our annual increase in terms of patchwork and Band-Aids rather than giving any real thought to the very sobering problems presented by the projection of our greatly increasing caseload.”¹⁷⁸ An old problem facing the Court demanded new and more dramatic remedies, the

172. See *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation for 1971: Hearings Before the Subcomm. on Dep’ts of State, Justice, & Commerce, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 91st Cong. 35 (1970) (statement of Justice Potter Stewart).

173. *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1972: Hearings Before the Subcomm. on Dep’ts of State, Justice, & Commerce, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 92d Cong. 161 (1971).

174. See, e.g., *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1973: Hearings Before the Subcomm. on Dep’ts of State, Justice, & Commerce, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 92d Cong. 8 (1972) (“We feel this change is most important and any further delay will only add to the existing caseload problem and result in a more costly solution some time in the future.”).

175. See WARREN E. BURGER, 1970 YEAR-END REPORT ON THE STATE OF THE JUDICIARY 13 (1970), reprinted in ANNUAL REPORTS, *supra* note 29.

176. *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1973: Hearings Before the Subcomm. on Dep’ts of State, Justice, & Commerce, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 92d Cong. 28 (1972).

177. *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1972: Hearings Before the Subcomm. on Dep’ts of State, Justice, & Commerce, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 92d Cong. 115 (1971).

178. *Id.* at 162.

pursuit of which fell to the newly appointed Chief Justice, Warren Burger, and the newly created Federal Judicial Center.

D. Burger and the FJC: Radical Reform

Two developments laid the groundwork for the pursuit of radical reform and ultimately the Supreme Court's response to docket problems in *Lopez* and *Morrison*: the creation of the Federal Judicial Center and the appointment of Warren Burger as Chief Justice.

Congress established the Federal Judicial Center ("FJC") in 1967 in order to "further the development and adoption of improved administration in the courts of the United States."¹⁷⁹ By statute, the Chief Justice serves as the Chair of the FJC's supervisory board.¹⁸⁰ Initially, the FJC focused its attention on the composition and operations of the federal district courts, issuing modest recommendations for improvements.¹⁸¹ After Warren Burger became Chief Justice in the summer of 1969, the FJC assumed a more prominent role and pursued more comprehensive reforms.

Burger was no wallflower. Ignoring "pressures toward a cloistered judiciary," he immediately began advocating for changes to the overall structure of the judiciary.¹⁸² At the American Bar Association's ("ABA") annual meeting on August 10, 1970, Burger called on the organization to bring attention to the unmanageable workload of the federal courts: "The price we are now paying and will pay is partly because judges have been too timid and the bar has been too apathetic to make clear to the public and to Congress the needs of the courts."¹⁸³ Describing the creation of the FJC as "one of the few bright spots in the past 30 years,"¹⁸⁴ Burger saw the Center as his partner for reshaping the federal courts. While in the short term that partnership generated only modest changes, it created a framework for more sweeping reforms in later years.

179. Act of Dec. 20, 1967, Pub. L. 90-219, sec. 101, § 620, 81 Stat. 664, 664 (codified as amended at 28 U.S.C. § 620(a) (2012)).

180. *Id.* § 621(a)(1).

181. FED. JUDICIAL CTR., *supra* note 147, at 573-74 ("Most of the early studies initiated by the Center soon after it was organized in 1968 dealt with the many-faceted operations of the United States District Courts, beginning with such matters as causes of delay in the processing of cases and continuing with juror utilization, calendar problems, and court reporting services.").

182. Fred P. Graham, *Burger Expected to Stay Active in Off-Bench Activities Related to the Law*, N.Y. TIMES, June 20, 1969, at 17.

183. BURGER, *supra* note 175, at 16.

184. *Id.* at 13.

In the summer of 1971, the FJC convened a study group chaired by Professor Paul Freund to examine broadly the work of the Supreme Court and the federal appellate courts.¹⁸⁵ The group's resulting report (the "Freund Report") issued a startling conclusion:

The statistics of the Court's current workload, both in absolute terms and in the mounting trend, are impressive evidence that the conditions essential for the performance of the Court's mission do not exist. For an ordinary appellate court the burgeoning volume of cases would be a staggering burden; for the Supreme Court the pressures of the docket are incompatible with the appropriate fulfillment of its historic and essential functions.¹⁸⁶

In sum, the Supreme Court was no longer able to carry out the tasks assigned to it in the Constitution. In light of this assessment, the report concluded, "significant remedial measures are required now."¹⁸⁷

The Freund Report marked a turning point. Following its publication, the Justices abandoned their prior focus on staffing, computers, and other small-scale, piecemeal administrative adjustments. Under Burger's leadership, the Justices became energetic public advocates for structural reform. In particular, the Justices used budgetary hearings as a forum to air their concerns about the problems the judiciary faced and the need for Congress's help. Year-end reports, initiated by the Chief Justice in 1970, likewise served as a vehicle for laying out the judiciary's problems and for pressing for change.¹⁸⁸ Consistent with the tone of the Freund Report, going forward, the Justices began to frame their concerns as problems of a clear constitutional dimension—and with that development, the road to *Lopez* and *Morrison* was paved.

In many ways, Burger and the authors of the Freund Report were of one mind. Before the Report was published in late 1972, Burger had said that internal changes to Supreme Court operations "can be of small help in the face of the constant demand that we deal

185. *Id.*

186. FED. JUDICIAL CTR., *supra* note 147, at 581.

187. *Id.* at 577.

188. Chief Justice Burger began this practice with remarks about the "problems facing the federal judiciary" before the ABA in the summer of 1970. In January of 1976, he formalized these remarks as annual year-end reports issued from his office as the Chief Justice. See ANNUAL REPORTS, *supra* note 29.

with more and more cases each year.”¹⁸⁹ Reflecting that sentiment, the Freund Report weighed the merits of internal reforms such as changing the rule of four (which requires the vote of just four Justices to grant a petition for certiorari) and adding law clerks.¹⁹⁰ The former proposal was dismissed as “untenable” since it would likely not reduce the number of cases the Court had to review and, further, “might be viewed as an invidious effort to reduce access to the Court.”¹⁹¹ The study group also cast doubt on the benefit of adding law clerks not merely because additional clerks would not reduce the “non-delegable” workload of the Justices, but also because the Justices’ chambers were physically too small to accommodate a larger staff.¹⁹²

Looking instead to larger initiatives, the Freund Report gave Burger specific proposals to champion. The key structural reform recommended in the Freund Report was the establishment of a “National Court of Appeals,” comprised of seven judges drawn for three-year terms from the federal circuit courts, to screen all cases in which review by the Supreme Court was sought.¹⁹³ After conducting its own review of cases presented, the National Court of Appeals would refer the most meritorious cases to the Supreme Court while deciding the remaining cases (including cases involving conflicts among the circuits) itself.¹⁹⁴ The National Court of Appeals would also decide cases remanded to it by the Supreme Court.¹⁹⁵ The authors of the Report predicted that the National Court of Appeals could itself hear about four hundred cases per year.¹⁹⁶ Anticipating criticism of the proposal, the Report maintained that among the options, creating the National Court of Appeals and assigning it a screening function represented the “least problematic” method of providing “imperative” relief to the Supreme Court.¹⁹⁷

Burger seized on the proposal. Addressing the ABA, he said the Freund Report provided “an analysis of the problems that is not open

189. WARREN E. BURGER, REPORT ON PROBLEMS OF THE JUDICIARY 11 (1972), reprinted in ANNUAL REPORTS, *supra* note 29.

190. FED. JUDICIAL CTR., *supra* note 147, at 606–10.

191. *Id.* at 606–07.

192. *Id.* at 582–83, 610.

193. *Id.* at 590–91.

194. *Id.*

195. *Id.* at 593.

196. *Id.*

197. *Id.* at 594.

to serious challenge.”¹⁹⁸ Although he conceded that “[r]easonable men can disagree over the particular kind of intermediate court recommended by Professor Freund’s committee and the powers of that court,”¹⁹⁹ Burger insisted that “no person who looks at the facts” could conclude that the Supreme Court could continue to operate effectively without meaningful reform.²⁰⁰ Given the burdens the Court faced, Burger concluded, “it is the obligation of those who disagree with the solutions proposed to offer their own alternatives.”²⁰¹ Opposition to the Freund Report centered on the screening function the National Court of Appeals would perform. For example, Professor Charles L. Black deemed that function unconstitutional: “A court that can finally determine, *for the whole nation*, questions over the whole range of federal law, without the possibility of further review, is a ‘Supreme Court’ in everything but name, and the Constitution provides for *one* Supreme Court, quite as clearly as it provides for one President.”²⁰²

The proposal for a new appellate court gained traction with the 1975 report of the Commission on Revision of the Federal Court Appellate System, established by Congress in 1972.²⁰³ Chaired by Sen. Roman L. Hruska, the Commission also offered a grim assessment of the Supreme Court’s status: “[T]he percentage of cases accorded review [has] dipped below the minimum necessary for effective monitoring of the nation’s courts on issues of federal statutory and constitutional law.”²⁰⁴ Again, the problem was one of constitutional magnitude. The Commission likewise recommended the creation of a National Court of Appeals but under its proposal, the new court, staffed by seven permanent judges, would not perform the controversial screening function Freund’s group had recommended.²⁰⁵ Instead, the new National Court of Appeals would only hear cases referred to it by the Supreme Court and cases transferred to it from the other federal courts of appeals—and the Supreme Court would

198. WARREN E. BURGER, REPORT ON THE FEDERAL JUDICIAL BRANCH 15 (1973), reprinted in ANNUAL REPORTS, *supra* note 29.

199. *Id.* at 16.

200. *Id.*

201. *Id.* at 16–17.

202. Charles L. Black, Jr., *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883, 885 (1974).

203. Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807, amended by Act of Sept. 19, 1974, Pub. L. No. 93-420, 88 Stat. 1153.

204. COMM’N ON REVISION OF THE FED. COURT APPELLATE SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975) [hereinafter HRUSKA COMMISSION REPORT], reprinted in 67 F.R.D. 195, 217 (1976).

205. *Id.* at 236–38.

have power to review decisions of the National Court of Appeals along with decisions of other federal courts of appeals.²⁰⁶

While Burger, as Chief Justice, played the leading role in articulating the Court's caseload problem and pushing for reform, other Justices also contributed to the discussion. Justice Byron White, for example, was initially reluctant to make a public statement on these various proposals, saying in a 1974 budgetary hearing that he "[could not] speak to" the intermediate appellate court proposal since he had "not resolved the matter in [his] own mind."²⁰⁷ Three years later, Justice White was championing reform. At the budgetary hearing in 1977, he urged that while the power to deny certiorari kept the Court current on its docket, a new national appellate court would "almost double the Supreme Court[']s capacity,"²⁰⁸ thus allowing it to hear more cases in which review was warranted.

Justice White's newfound zeal for legislative reform entered even judicial opinions. In an extraordinary dissent from the denial of certiorari in the otherwise unremarkable 1978 case of *Brown Transport Corp. v. Atcon, Inc.*,²⁰⁹ Justice White, joined by Justice Blackmun, warned that given the Court's capacity limits, there was "grave doubt" that it was "function[ing] in the manner contemplated by the Constitution."²¹⁰ White, too, thus framed the docket problem as a constitutional issue. White contended that review was plainly warranted in *Atcon* because of the existence of a circuit split on an issue of federal law, but for capacity reasons the Court could not take the case.²¹¹ The bigger issue, White wrote, was that *Atcon* was just one of many cases the Court lacked the capacity to hear. White explained that among the 794 petitions for certiorari the Court had denied in its most recent post-summer conference were dozens of cases (White listed them) in which review was arguably warranted because of a circuit split, a conflict with a decision of the Supreme Court, or an important question of federal law.²¹² The problem, White explained,

206. *Id.* at 238, 246.

207. *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1975: Hearings Before the Subcomm. on Dep'ts of State, Justice, & Commerce, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 93d Cong. 321 (1974).

208. *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1978: Hearings Before the Subcomm. on the Dep'ts of State, Justice, & Commerce, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 95th Cong. 55 (1977).

209. 439 U.S. 1014 (1978).

210. *Id.* at 1024 (White, J., dissenting from denial of certiorari).

211. *Id.* at 1016, 1023.

212. *See id.* at 1017–23.

was that with the Court averaging 170 cases on the merits each term, it had reached full capacity: “[W]e are now extending plenary review to as many cases as we can adequately consider, decide and explain by full opinion.”²¹³ With some 4,000 filings each term—up from 2,800 in 1962—the percentage of cases the Court could hear had dropped to levels that in White’s view were unacceptable.²¹⁴ White ended his dissent by pinning responsibility for the current state of affairs on congressional inaction: “The [Hruska] Commission recommended the creation of a National Court of Appeals Legislation was proposed to implement the Commission’s recommendations . . . [but] [t]he bill did not proceed beyond the hearing stage.”²¹⁵

Chief Justice Burger also issued a statement in *Atcon*. He compared the burdens the Justices faced to the circuit-riding duties imposed under the 1789 Judiciary Act—a burden relieved only when Congress created permanent intermediate appellate courts.²¹⁶ Drawing on academic studies, Burger offered several reasons why the caseload of the federal judiciary had increased. Among the explanations he cited were: “the enactment of more than 50 statutes by Congress since 1969 increasing the jurisdiction of federal courts”; “the increasing tendency [of litigants] to bypass available state and municipal remedies in favor of assumed swifter remedies in federal courts”; and “the increasing perceived need for courts to become ‘problem solvers’ on great social and economic problems rather than the traditional resolvers of discrete, manageable disputes.”²¹⁷ The suggestion was clear: at least in part, the constitutional crisis the Court faced was one Congress itself had created and, thus, one Congress was obligated to remedy.²¹⁸

Nonetheless, the members of the Court were not unanimous in endorsing the solution of a National Court of Appeals. Justice William J. Brennan in particular opposed the idea. Brennan issued a short statement in *Atcon* referencing his opinion expressed to the Hruska Commission that he was “completely unpersuaded” about the

213. *Id.* at 1023–24.

214. *See id.*

215. *Id.* at 1025.

216. *Id.* at 1028–29 (statement of Burger, C.J.).

217. *Id.* at 1030–31 (footnotes omitted).

218. *See id.* at 1031 n.11 (“These, obviously, are policy matters for the political branches; but it is equally true that the Judiciary has an obligation to help focus attention on its needs as they are perceived by judges who must give effect to legislation relating to the administration of justice. It is for Congress to develop appropriate measures to accommodate the tension arising from contending demands on judicial resources.”).

need for a new intermediate court.²¹⁹ Brennan even penned a law review article in which he stated that “the Supreme Court is not overworked.”²²⁰ Dismissing the idea that petitions of certiorari were a burden on the Justices, he wrote that he could identify frivolous cases “from a mere reading of the question presented,” citing examples such as, “Does a ban on drivers turning right on a red light constitute an unreasonable burden on interstate commerce?”²²¹ Brennan said that meritorious cases were likewise easy to spot: a Justice “develops a ‘feel’ for such cases.”²²² According to Bob Woodward and Scott Armstrong, Brennan viewed Burger’s repeated characterization of the Court as overburdened to reflect the Chief’s “intellectual insecurity” in the face of a stack of certiorari petitions.²²³ Other Justices offered more tempered views. Justice Rehnquist, for example, told the Hruska Commission he was in “general agreement with the composition of the national court of appeals” but that he had reservations about some of the details of the proposal.²²⁴

Importantly, calls for a new appellate court centered less on the concern that the Supreme Court was overworked as a problem in and of itself and more on the resulting effect upon federal law. That is to say, reform was deemed necessary because of the need to keep federal law uniform around the country; if the Supreme Court lacked the capacity to perform that essential role, then a solution was required.²²⁵ The point bears emphasis because it helps explain why, for Burger and his allies, the docket issue was a constitutional issue. The Constitution required, they believed, consistency in federal law and assigned the principal role in producing that result to the Supreme Court. If, because of its caseload, the Court was unable to

219. *Id.* at 1025–32 (statement of Brennan, J.).

220. See William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 475–76 (1973).

221. *Id.* at 477–78.

222. *Id.* at 478.

223. WOODWARD & ARMSTRONG, *supra* note 163, at 273.

224. HRUSKA COMMISSION REPORT, *supra* note 204, at 408–09.

225. See *Brown Transp. Corp. v. Atcon, Inc.*, 439 U.S. 1014, 1024 (White, J., dissenting from denial of certiorari) (“There is no doubt that those concerned with the coherence of the federal law must carefully consider the various alternatives available to assure that the appellate system has the capacity to function in the manner contemplated by the Constitution. As others have already noted, there is grave doubt that this function is being adequately performed.”); HRUSKA COMMISSION REPORT, *supra* note 204, at 221 (“The need for additional appellate capacity to maintain the national law is most starkly manifested by the existence of unresolved conflicts between different courts of appeals Often . . . two or more courts have come to opposite conclusions in cases which cannot be distinguished. Less direct conflicts, however, can also produce uncertainty and confusion in the national law.”).

perform that role—unable even to hear on the merits cases involving conflicting lower court decisions on federal law (or other cases that presented important questions)—then the Court was not performing its constitutionally assigned role. This understanding accounts for why Burger and other members of the Court saw nothing inappropriate in their speaking publicly about the problem the Court faced: such efforts were in service of the Court’s ability to carry out its constitutional duty. Moreover, if the problem resulted from the burdens of increasing federal enactments, the docket issue presented a potential problem of one branch of government—the legislature—interfering with the constitutional role of another—the judiciary. At bottom, the problem was one of separation of powers. On this view, the Court was right to press Congress to provide relief—relief that, inasmuch as it resolved a separation of powers problem Congress had created, was obligatory on the part of the legislative branch. Docket control was, in essence, a constitutional concern.²²⁶

Yet change was not forthcoming. A decade after the Freund Report, the proposal for a new National Court of Appeals looked dead in the water²²⁷ and the Court continued to labor under a heavy caseload. During the 1982 Term, the Court had 5,079 cases on its docket (4,201 new cases and 878 carried over from the prior term)²²⁸ and it decided 179 cases on the merits.²²⁹ While these figures represented only a modest increase from the 1970s,²³⁰ a problem that had not significantly worsened also had not been solved.

Alternatives to the national appellate court fared no better. In the early 1980s, Chief Justice Burger advocated the creation on a trial basis of an adjunct “intercircuit tribunal” with jurisdiction over circuit court conflicts.²³¹ This proposal too generated mixed reactions. Circuit judges voiced opposition,²³² and Justice O’Connor, speaking at a

226. A similar dynamic also plays out in *Lopez* and *Morrison*. See *infra* Part III.

227. See generally WARREN E. BURGER, 1983 YEAR-END REPORT ON THE JUDICIARY (1983), reprinted in ANNUAL REPORTS, *supra* note 29 (omitting reference to a national court of appeals in favor of other reforms, including complete discretionary review and a temporary intercircuit tribunal).

228. *Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1985: Hearings on H.R. 5712 Before a Subcomm. of the S. Comm. on Appropriations*, 98th Cong. 143 (1984).

229. EPSTEIN ET AL., *supra* note 54, at 82 tbl.2-6.

230. For example, the Court docketed 4,619 cases in the 1972 Term, just after the Freund Report was published. See *id.*

231. BURGER, *supra* note 227, at 7.

232. Honorable Wilfred Feinberg, Chief Judge, U.S. Court of Appeals for the Second Circuit, Report on the Work of the Second Circuit, Address Before the Annual Judicial Conference of the Second Judicial Circuit of the United States (Sept. 6, 1985), in 109

budget hearing, reported that the members of the Supreme Court were “not of one mind” on the issue.²³³

The executive branch also divided on the issue. In response to the United States Attorney General’s recommendation that the Department of Justice (“DOJ”) support the creation of an intercircuit tribunal, an Associate Counsel to the President, one John G. Roberts Jr., called the proposal “exceedingly ill-advised.”²³⁴ Roberts evidently thought the whole docket problem overblown: “While some of the tales of woe emanating from the Court are enough to bring tears to the eyes, it is true that only Supreme Court Justices and schoolchildren are expected to and do take the entire summer off.”²³⁵ Roberts also viewed the Court’s docket concern from a separation of powers perspective, but he reached the opposite conclusion from that of Burger and his allies who thought the judiciary was under threat. Instead, Roberts thought that creation of a new intermediate court risked a dangerous increase in the power of the Supreme Court itself: “Creating a tribunal to relieve the Court of some cases—with the result that the Court will have the opportunity to fill the gap with new cases—augments the power of the judicial branch ineluctably at the expense of the executive branch.”²³⁶ Roberts also highlighted the risk that lay in the DOJ’s own proposal that the Chief Justice appoint members of the proposed intercircuit tribunal: “[T]he President,” Roberts argued, “should not willingly yield authority to appoint the members of what would become the Nation’s second most powerful court.”²³⁷ In Roberts’s view, any caseload burden was the Court’s own making: “The fault lies with the Justices themselves, who unnecessarily take too many cases and issue opinions so confusing that they often do not even resolve the question presented.”²³⁸ Although Chief Justice Burger continued to push for the intercircuit

F.R.D. 441, 453 (1986) (“There are less drastic ways of dealing with the problem of Supreme Court overload and the claimed need to resolve more intercircuit conflicts, before taking the radical step of creating a fourth tier of review, with the inevitable additional cost and delay that would follow.”).

233. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1986: Hearings Before the Subcomm. on the Dep’ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 99th Cong. 361 (1985).

234. Memorandum from John G. Roberts, Assoc. Counsel, Office of Gen. Counsel, to Fred F. Fielding, Gen. Counsel, Office of Gen. Counsel 1 (Apr. 19, 1983), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1084&context=historical> [<http://perma.cc/SR59-MSF5>].

235. *Id.* at 2.

236. *Id.*

237. *Id.* at 3.

238. *Id.* at 2.

tribunal—announcing that the country “cannot afford to allow the number and importance of circuit conflicts to escalate until we have rules of national law with more variations than we have time zones”²³⁹—without the full backing of the Court and without enthusiasm from the political branches, Burger’s proposal had little chance of success.

Amid these ultimately unsuccessful calls for significant structural changes to the federal courts, Chief Justice Burger, along with other members of the Court, offered a slew of minor reforms. In 1972, for example, Burger proposed that Congress prepare “court impact statement[s]” for “every piece of legislation creating new cases.”²⁴⁰ While some inroad was made—judicial impact statements were issued in “an *ad hoc* [manner] . . . [at] the discretion of each [congressional] committee”²⁴¹—there was little enthusiasm for a uniform practice given “significant technical and methodological problems” in predicting the actual impact of legislation.²⁴²

Other proposals focused on limiting the jurisdiction of the lower federal courts as a way to ease the flow of cases up to the Supreme Court. In particular, Chief Justice Burger long proposed new limits in § 1983 prisoner civil rights cases²⁴³ (12,000 such petitions were filed in the U.S. district courts in 1980, for example).²⁴⁴ Yet Burger’s proposed modification to § 1983 jurisdiction also lacked the support of all the Justices. Justice O’Connor told the House Appropriations Committee in 1983 that it “[c]ould be helpful” if Congress were to consider “tightening up on administrative exhaustion requirements for § 1983 cases”²⁴⁵ but did not endorse further limits. Other Justices

239. WARREN E. BURGER, 1985 YEAR-END REPORT ON THE JUDICIARY 17 (1985), reprinted in ANNUAL REPORTS, *supra* note 29.

240. BURGER, *supra* note 189, at 3.

241. WARREN E. BURGER, YEAR-END REPORT ON THE JUDICIARY 20–21 (1981), reprinted in ANNUAL REPORTS, *supra* note 29.

242. *Id.*

243. See, e.g., Warren E. Burger, 1973 REPORT ON THE FEDERAL JUDICIAL BRANCH 12–13 (1973), reprinted in ANNUAL REPORTS, *supra* note 29 (proposing the creation of “a statutory administrative procedure for federal prisons to provide for hearing prisoner complaints administratively . . . and require that these procedures be exhausted before any proceeding could be filed in federal courts,” the implementation of “informal grievance procedures [in the state systems] to hear prisoner complaints,” and the referral of prisoner civil rights claims to magistrate judges).

244. *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1982: Hearings on H.R. 4169 Before the Subcomm. on State, Justice, Commerce, the Judiciary, & Related Agencies of the S. Comm. on Appropriations*, 97th Cong. 66 (1981) (statement of Justice Lewis Powell).

245. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1984: Hearings Before the Subcomm. on State, Justice,*

thought § 1983 reform was not even needed. Associate Justice Rehnquist contended that “it doesn’t take long with a lot of [§ 1983 cases]” because most inmate petitions were simply “frivolous.”²⁴⁶ Lacking a stronger push from the Court as a whole, § 1983 reforms did not materialize as a solution to the Court’s docket problems.

In the end, neither the ambitious plan for a national appellate court nor the more modest intercircuit tribunal proposal made it through Congress. After Warren Burger stepped down as Chief Justice in 1986, his successor briefly carried the baton forward. In his first annual report, Chief Justice Rehnquist, who a decade earlier had expressed only “general agreement” with the findings of the Hruska Commission,²⁴⁷ announced: “I am convinced that the need for this sort of [intermediate] court is present now, and I urge Congress to enact appropriate legislation.”²⁴⁸ Yet after 1986, Rehnquist never again called on Congress to create any sort of intermediate court. Notwithstanding congressional inaction on the issue of an intermediate appellate court, legislative assistance of another form was on the horizon.

E. Salvation: Discretionary Review

While the Justices were divided on the wisdom of other reforms, they united behind one option: expanded certiorari power so as to give the Court complete discretionary review.²⁴⁹ Chief Justice Burger repeatedly asked Congress to allow the Court to decide which cases it would review from the lower federal courts and state courts and, comparable to the consensus that helped carry the Judiciary Act of 1925 to fruition, all nine Justices of the Supreme Court supported this change. In a 1982 letter to Congress signed by each member of the Court, the Justices wrote:

The present mandatory jurisdiction provisions permit litigants to require cases to be decided by the Supreme Court of the

Commerce, the Judiciary, & Related Agencies of the S. Comm. on Appropriations, 98th Cong. 676 (1983).

246. *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1982: Hearings on H.R. 4169 Before the Subcomm. on State, Justice, Commerce, the Judiciary, & Related Agencies of the S. Comm. on Appropriations*, 97th Cong. 68 (1981).

247. HRUSKA COMMISSION REPORT, *supra* note 204, at 408.

248. WILLIAM H. REHNQUIST, 1986 YEAR-END STATEMENT 5 (1986), *reprinted in ANNUAL REPORTS*, *supra* note 29.

249. BURGER, *supra* note 227, at 6 (“All nine Justices of the Supreme Court consistently have supported legislation to give the Supreme Court complete discretion over cases it will review from state and federal courts.”).

United States without regard to the importance of the issue presented or their impact on the general public. Unfortunately, there is no correlation between the difficulty of the legal issues presented in a case and the importance of the issue to the general public. For this reason, the Court must often call for full briefing and oral argument [on] difficult issues which are of little significance. . . . The more time the Court must devote to cases of this type the less time it has to spend on the more important cases facing the nation. Because the volume of complex and difficult cases continues to grow, it is even more important that the Court not be burdened by having to deal with cases that are of significance only to the individual litigants but of no “wide public importance.”²⁵⁰

The Justices further noted that while the Court had been able to dispose summarily of many mandatory appeals—without full briefing and oral argument—that approach created a new problem: “[S]ummary decisions are decisions on the merits which are binding on state courts and other federal courts. . . . Because they are summary in nature these dispositions . . . provide uncertain guidelines for the courts that are bound to follow them and . . . create more confusion than they seek to resolve.”²⁵¹ Given these considerations, the Justices identified a single remedy to the Court’s caseload burden: “The only solution to the problem, and one that is consistent with the intent of the Judiciary Act of 1925 to give the Supreme Court discretion to select those cases it deems most important, is to eliminate or curtail the Court’s mandatory jurisdiction.”²⁵²

In fragmented legislation Congress did, by way of response, limit certain direct appeals to the Court.²⁵³ But with a significant

250. Letter from Supreme Court Justices to Rep. Robert Kastenmeier (June 17, 1982), reprinted in *Mandatory Appellate Jurisdiction of the Supreme Court—Abolition of Civil Priorities—Jurors Rights: Hearing on H.R. 2406, 4395, & 4396 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. 22–23 (1982).

251. *Id.* at 23.

252. *Id.* at 23–24.

253. In 1974 Congress reduced direct appeals to the Supreme Court in antitrust cases. See Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706, 1709 (1974) (codified as amended at 15 U.S.C. § 29 (2012)). Congress also eliminated the three-judge district courts and direct appeals in Interstate Commerce Commission cases in 1975, Act of Jan. 2, 1975, Pub. L. No. 93-584, sec. 1, § 1336(a), 88 Stat. 1917, 1917 (current version at 28 U.S.C. § 2342 (2012)), as well as cases challenging the constitutionality of state or federal law in 1976, see 28 U.S.C. §§ 2281–82 (2012), repealed by Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119, 1119.

mandatory docket remaining,²⁵⁴ comprehensive discretionary jurisdiction remained out of reach until the era of the Rehnquist Court. In 1988, two years after Burger's retirement, the Supreme Court Case Selection Act eliminated appeals as a matter of right from state court decisions holding a federal statute or treaty invalid or upholding a state statute challenged on federal grounds.²⁵⁵ Going forward, the Court's appellate jurisdiction was discretionary, with the limited exception of mandatory appellate jurisdiction to review injunctions issued by three-judge district court panels specified by Congress to hear certain civil cases.²⁵⁶

Although some scholars have questioned whether the near-complete repeal of mandatory appellate jurisdiction materially affected the Court's caseload,²⁵⁷ the Justices themselves were enthusiastic about their discretionary docket. The change meant that whole categories of cases that once demanded a decision could be disposed of expeditiously.²⁵⁸ Appearing at an appropriations hearing in 1990, Justices O'Connor and Scalia lauded the benefits of the reform. O'Connor reported that the Court's ability to "take a few less argued cases" was a "welcome change."²⁵⁹ Both Justices emphasized that the Court was able to return to workload levels of ten years

254. The mandatory docket included: appeals from federal court decisions holding federal statutes unconstitutional, 28 U.S.C. § 1252 (2012), *repealed by* Act of June 27, 1988, Pub. L. No. 100-352, § 1, 102 Stat. 662, 662; decisions of state court decisions holding federal laws invalid or upholding state laws against a federal challenge, 28 U.S.C. § 1257(a) (2012), *amended by* Act of June 27, 1988, Pub. L. No. 100-352, sec. 3, § 1257, 102 Stat. 662; appeals from the judgments of three-judge district courts under the Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438 (codified as amended at 42 U.S.C. §§ 1970-71, 1973aa-2 (2012)); and appeals from three-judge courts under the Presidential Election Campaign Fund Act of 1971, Pub. L. No. 92-178, § 9011(b)(2), 85 Stat. 562, 570 (1971) (codified as amended at 26 U.S.C. §§ 9010(d)-11(b)(2) (2012)).

255. Supreme Court Case Selection Act, Pub. L. No. 100-352, §§ 2-5, 102 Stat. 662, 662-63 (1988) (codified as amended at 28 U.S.C. §§ 1254, 1257-58, 2104 (2012)).

256. *See, e.g.*, 42 U.S.C. §§ 1970-71, 1973; 26 U.S.C. §§ 9010-11.

257. *See, e.g.*, Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 758 (2001) ("The 1988 legislative changes thus seem to have had little or no effect on the Court's plenary docket."); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 412 (1996) (concluding that "the elimination of the mandatory jurisdiction played no more than a minuscule role in the shrinkage of the plenary docket in the 1990s").

258. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185-86 (1989) (discussing the potential benefits of discretionary jurisdiction in reviewing cases presenting Commerce Clause issues).

259. *See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1991: Hearings Before the Subcomm. on the Dep'ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 101st Cong. 16 (1990).

prior.²⁶⁰ In fact, the Court was doing better than that: in the 1980 Term, 154 cases were argued before the Court, while the 1990 Term saw the number drop to 125.²⁶¹ Even with large numbers of petitions arriving at the Court, curtailed mandatory jurisdiction allowed the Justices to avoid cases that, as Justice Scalia put it, “were not really worthy of our attention, but [in the past] had to be taken”²⁶² and to focus on those on the discretionary docket that warranted review.

F. Summary

A century of lobbying ultimately gave the Supreme Court the tools it needed to manage its docket. As the Court’s caseload grew, neither funding measures nor tweaks to the Court’s jurisdiction proved adequate reforms. With the failure of proposals to create a new intermediate appellate court, the only viable option was to cede to the Court’s request for (near) complete power of discretionary review—so as to allow the Court to fulfill its duties under the Constitution. Once the Justices gained control of their own docket, their focus turned to easing the caseload of the lower federal courts. The next Part of this Article examines those efforts.

III. THE PATH TO *LOPEZ* AND *MORRISON*

After Congress expanded the Supreme Court’s powers of certiorari, the Justices were more or less satisfied that they could fend off undeserving cases and exercise adequate control over their own caseload.²⁶³ The number of petitions filed to the Court continued to increase, but the Court granted review less frequently. During the Court’s 1987 Term (prior to the curtailment of mandatory jurisdiction), 2,577 paid and 2,675 in forma pauperis petitions were

260. *Id.* (reporting that the Court was “closer to the level of 1980 in terms of our workload”); *id.* at 16–17 (statement of Justice Antonin Scalia) (“[G]etting back to the level we were around in 1980 is some accomplishment, I think.”).

261. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1993: Hearings Before the Subcomm. on the Dep’ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 102d Cong. 3 tbl.2 (1992) (summarizing the Court’s docket).

262. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1991: Hearings Before the Subcomm. on the Dep’ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 101st Cong. 18 (1990).

263. *See, e.g., Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1990: Hearings Before the Subcomm. on the Dep’ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 101st Cong. 481 (1989) (statement of Justice Antonin Scalia) (reporting that the Court was “pretty much in control” of its docket).

filed with the Court. Of those, the Court reviewed 157 and twenty-eight cases respectively, for a total of 180 merits decisions.²⁶⁴ In the 1994 Term, the Court heard eighty-three of 2,515 paid petitions and ten of 5,574 in forma pauperis petitions, thus producing a total of ninety-three merits decisions.²⁶⁵ In sum, in just seven years the Court halved the number of cases decided on the merits despite a rising number of filed petitions. More petitions for certiorari generated, of course, more work at the screening stage, but the payoff came in a very significantly reduced merits docket.

The story of federal dockets does not end with the Supreme Court's expanded powers of discretionary review. Its ability to manage its own docket through enhanced powers of certiorari did nothing to help the lower federal courts, which continued to strain under an ever-expanding caseload. With their own problem resolved, the Justices turned their attention to the more complex question of relieving the workload of the entire federal judiciary. This Part traces those efforts—which harked back to the now-established notion that an overloaded docket was a constitutional problem and culminated in *Lopez* and *Morrison*. This Part begins in Section A by detailing the growth in the dockets of the lower federal courts, largely as a result of increased federal criminal prosecutions. Section B then discusses the growing federal docket in the broader context of constitutional structure and notions of federalism before turning to Chief Justice Rehnquist's plan to address the docket issue in the face of congressional inaction in Section C. It then focuses on the Court's response to the docket problem through *Lopez* in Section D—with a special note on Justice Kennedy in Section E—and *Morrison* in Section F. This Part then concludes in Section G by evaluating the impact of the *Lopez* and *Morrison* decisions on the dockets of the lower federal courts

A. *The Lower Federal Courts*

At the same time that the Supreme Court obtained the relief it sought in the form of discretionary review, the dockets of the lower federal courts swelled. The most significant source of this increase was the skyrocketing number of federal criminal prosecutions that began in the early 1980s.²⁶⁶ Between 1980 and 1992 the number of

264. EPSTEIN ET AL., *supra* note 54, at 82 tbl.2-6.

265. *Id.*

266. Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 45 (1996). The civil docket presented a more mixed pattern. For example, bankruptcy filings increased in 1991, while in that same

criminal cases filed in federal court grew seventy percent from 27,968 to 47,472 cases.²⁶⁷ Drug prosecutions explained a significant part of this increase, accounting for seventeen percent of federal defendants in 1979 and thirty-seven percent of federal defendants by 1992.²⁶⁸ Prosecutions produce convictions and convictions generate appeals. In 1991, fifty-six percent of the appeals on the dockets of the federal circuit courts involved drug-related convictions.²⁶⁹

The problem was not that more individuals were violating preexisting federal criminal laws or that federal prosecutors were going after more perpetrators. Instead, Congress was aggressively using the Commerce Clause to enact new laws targeting drug offenses, along with other activities that previously had been left to the state criminal justice systems.²⁷⁰ Among other new federal criminal laws was the Gun-Free School Zones Act, enacted as part of the Federal Crime Control Act of 1990.²⁷¹ Describing in a year-end report Congress's penchant for "federaliz[ing] crimes already covered by state laws," Chief Justice Rehnquist gave as further examples "the Anti-Car Theft Act of 1992, the Child Support Recovery Act of 1992, the Animal Enterprise Protection Act of 1992, and . . . arson provisions added to Title 18 in 1994."²⁷² In addition, many of the newly created federal criminal offenses involved complex elements, thus lengthening the average period of trials and otherwise consuming a disproportionate share of judicial resources.²⁷³ In 1988, Congress created the Federal Courts Study Committee to examine, among

year the number of other federal civil cases dropped (in large measure as a result of the consolidation of asbestos litigation). See WILLIAM H. REHNQUIST, 1991 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1 (1991), reprinted in ANNUAL REPORTS, *supra* note 29.

267. Beale, *supra* note 266, at 45.

268. William W. Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 STETSON L. REV. 651, 679 n.90 (1994).

269. REHNQUIST, *supra* note 266, at 7.

270. Beale, *supra* note 266, at 42.

271. Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4844, 4844-45 (amending § 922 of title 18 of the United States Code by adding that "[i]t shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone"), *invalidated by* United States v. Lopez, 514 U.S. 549 (1995).

272. WILLIAM H. REHNQUIST, THE 1998 YEAR-END REPORT OF THE FEDERAL JUDICIARY 4 (1999), reprinted in ANNUAL REPORTS, *supra* note 29.

273. Beale, *supra* note 266, at 48 ("In 1970, the average length of a criminal jury trial in federal court was 2.5 days; it is now [in 1996] 4.4 days. Very long trials have now become commonplace. The number of criminal trials in the 6- to 20-day range has more than doubled since 1973.").

other things, the caseloads of the lower federal courts.²⁷⁴ Reporting back to Congress in 1990, the committee issued a stark conclusion: despite aggressive measures by judges to stem their ever-growing caseloads, the lower federal courts faced an “impending crisis.”²⁷⁵

None of this escaped the attention of the Supreme Court. Satisfied with their ability to manage their own docket, the Justices turned their attention to the lower federal courts. The Justices’ concern was not simply with lessening the workload of fellow members of the federal judiciary. Rather, the Justices acted because they concluded—once again—that the constitutional role of the third branch was under threat. Given this motivation, when efforts to persuade Congress to ease up on lawmaking that generated new federal cases (or to otherwise provide docket relief) failed, the Court took matters into its own hands, making use in *Lopez* (and later in *Morrison*) of a constitutional option to safeguard the judicial branch.

B. Dockets and Constitutional Structure

The Supreme Court’s decision in *Lopez* came as a surprise but it should not have. In the years prior to the Court’s ruling, the Justices complained repeatedly to Congress about the burden new federal criminal laws were placing on the federal courts. The Justices also warned Congress that those burdens presented a problem of constitutional dimension—one that the Court itself could remedy, if needed, with a constitutional solution.

In each of the four years before *Lopez*, Chief Justice Rehnquist used his year-end report to complain about increased congressional lawmaking that added new cases to the dockets of the federal courts. In his 1991 report, Rehnquist likened the federal court system to a “city in the arid West which is using every bit of its water resources to supply current needs.”²⁷⁶ He told Congress that it needed to “conserve water, not think of building new subdivisions” that would tax the ailing city.²⁷⁷ Lest the analogy be lost, he stated: “[W]e must give serious attention to curtailing some federal jurisdiction”—adding that “we cannot add jurisdiction to the federal courts without asking

274. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 102, 102 Stat. 4642, 4644 (1988) (codified as amended at 28 U.S.C. § 331 (2012)).

275. FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 4-5 (Apr. 2, 1990). Such measures included, in the district courts, encouraging settlement, more regular granting of summary judgment motions, and reducing the number of civil jurors from twelve to six; and in the appellate courts, reducing the time allotted for oral argument and deciding fewer cases by full opinions. *Id.*

276. REHNQUIST, *supra* note 266, at 3.

277. *Id.*

the hard question of whether the addition is an appropriate means of using scarce resources.”²⁷⁸ Calling on Congress to exercise “self restraint,”²⁷⁹ Rehnquist advised that new federal causes of action “should not be made unless critical to meeting important national interests which cannot otherwise be satisfactorily addressed through non-judicial forums, alternative dispute resolution techniques, or the state courts.”²⁸⁰ As examples of ill-advised federal laws, Rehnquist cited two congressional bills both sponsored by then-Senator Joe Biden²⁸¹: the Violent Crime Control Act of 1991²⁸² and the Violence Against Women Act of 1990.²⁸³

Rehnquist’s 1992 year-end report reiterated his “cautionary” message from the preceding year.²⁸⁴ Warning against a “substantial rejection of traditional concepts of federalism,” Rehnquist urged a renewed commitment to “a vision of the federal courts as distinctive forums of limited jurisdiction, meant to complement state courts rather than supplant them.”²⁸⁵ In his 1992 report, Rehnquist again cited the Violent Crime Control Act, which at that time had failed to make it through the House, as problematic for “vastly expanding federal jurisdiction over crimes involving firearms.”²⁸⁶ Had the bill been enacted, Rehnquist predicted, it “would have seriously skewed our traditional federalist structure—at great cost and with little probability of impact on the crime problem.”²⁸⁷ Writing in his 1994

278. *Id.* at 4.

279. *Id.* at 5 (“Modest curtailment of federal jurisdiction is important; equally important is self-restraint in adding new federal causes of action.”).

280. *Id.*

281. *Id.*; see also Dan Freedman, *FBI Criticizes Trend Towards “Federalizing”—Agents Don’t Want To Be Street Cops*, HOUS. CHRON., Dec. 19, 1993, at A2 (“‘We federalize everything that walks, talks and moves,’ Biden recently told reporters. However, Biden himself has joined the trend, authoring a bill to make it a federal crime to travel between states to abuse a spouse or intimate partner.”).

282. Violent Crime Control Act of 1991, S. 1241, 102d Cong. (1991). Rehnquist’s principal complaint was with the provision of the proposed statute that “would have provided for federal prosecution of virtually any case in which a firearm was used to commit a murder.” REHNQUIST, *supra* note 266, at 5.

283. Violence Against Women Act of 1990, S. 2754, 101st Cong. For a discussion of the 1991 version of the bill, see *infra* Section III.F.

284. WILLIAM H. REHNQUIST, 1992 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1 (1992), reprinted in ANNUAL REPORTS, *supra* note 29.

285. *Id.*

286. *Id.* at 4.

287. *Id.* Likewise, in his 1993 year-end report, Justice Rehnquist voiced the concern that the federal judiciary was “ill-equipped to deal with those problems [involving juveniles and handgun murders] and will increasingly lack the resources in this era of austerity.” WILLIAM H. REHNQUIST, 1993 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (1993), reprinted in ANNUAL REPORTS, *supra* note 29.

year-end report, shortly after *Lopez* was argued, Rehnquist again expressed “a genuine concern about the erosion of federalism, and the traditional division of responsibility between federal courts and state courts.”²⁸⁸

During this pre-*Lopez* period, other members of the Court pressed similar concerns when they testified at congressional budgetary hearings. For example, in 1991, Justice Scalia stated that while “Congress doesn’t create new causes of action unthinkingly,” it remained the case that “there is really a limit to what the federal court system can bear without altering its character.”²⁸⁹ Rejecting efforts by committee members to pin the federal caseload problem on the increased litigiousness of the American public, Scalia said: “[F]actor number one [for the increased caseload] is that there’s just a lot more law out there, and more specifically a lot more Federal law.”²⁹⁰ Scalia’s recommendation echoed the Chief Justice’s year-end reports: “[I]t is a matter of self restraint.”²⁹¹ Scalia followed the Chief Justice’s lead in 1992 as well, citing the Violent Crime Control Act and the Violence Against Women Act as examples of congressional lawmaking that unduly burdened the federal courts. He said:

[B]oth . . . [federalize activities that] are really traditional state law matters. Without demeaning the importance of either of them as objects of criminal law, do they belong in the Federal courts? Is there some special reason why Federal courts have to handle them? There just isn’t. . . . I am afraid that Congress and maybe the people have come to think that if it is really an important matter, why, there ought to be a Federal law about it. If that attitude prevails, we can bid the Federal courts goodbye as the very special, high caliber courts that they have been.

288. WILLIAM H. REHNQUIST, 1994 YEAR-END REPORT ON THE FEDERAL JUDICIARY 8 (1994), reprinted in ANNUAL REPORTS, *supra* note 29.

289. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation for 1992: Hearings Before the Subcomm. on the Dep’ts of Commerce, Justice, & State, the Judiciary, Related Agencies of the H. Comm. on Appropriations*, 102d Cong. 488 (1991).

290. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1989: Hearings Before the Subcomm. on the Dep’ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 100th Cong. 365 (1988).

291. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1992: Hearings Before the Subcomm. on the Dep’ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 102d Cong. 493 (1991) (statement of Justice Antonin Scalia).

They cannot handle everything in the country that is important.²⁹²

Significantly, in these statements there is an emphasis on distinguishing the role of federal and state courts—that is to say, on the importance of federalism in dividing substantive responsibilities between the federal judiciary and its state counterpart.²⁹³

While the Justices were of course concerned about the administrative impracticality of a large increase in federal cases,²⁹⁴ they viewed the docket issue in terms of basic structural principles that went to the role of the federal judicial branch under the Constitution. Accordingly, their interest lay more in protecting the federal judicial branch than in protecting the autonomy of state government. Justice Scalia thus told the appropriations committee that Congress was threatening to turn the federal courts into “police courts,” thereby undermining the “elite” character of the federal judiciary.²⁹⁵ Striking a similar note, Chief Justice Rehnquist observed

292. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1993: Hearings Before the Subcomm. on the Dep'ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 102d Cong. 36–37 (1992).

293. We do not want to overstate our claim about the position the Justices took in these hearings. At times, the message from the Justices was nuanced. Two years before *Lopez* was decided, Justice Scalia, when asked at a budgetary hearing whether Congress's federalization of crimes posed “constitutional questions,” responded: “I would not say it poses constitutional questions, so long as there is a minimal connection to interstate commerce, which doesn't take much. You can criminalize what you want.” *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1994: Hearings Before the Subcomm. on the Dep'ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 103d Cong. 105 (1993) (statements of Rep. Jim Kolbe and of Justice Antonin Scalia). Justice Kennedy, at the same hearing, reinforced the point, stating that it was Congress's “prerogative” to federalize crime, but noting also that he remained concerned over the “essential and elemental constitutional consequences” of an overburdened federal judiciary. *Id.* (statement of Justice Anthony Kennedy). We know now, of course, that not all laws have the “minimal connection” to interstate commerce that Justice Scalia referred to and that congressional prerogative was not for Justice Kennedy the same as unlimited federal power. At the time these statements were made, however, the Court had not invalidated a statute enacted under the Commerce Clause in six decades. It is perhaps no surprise that the message the Justices brought to the budgetary hearing prior to *Lopez* fell on deaf ears.

294. See, e.g., *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1993: Hearings Before the Subcomm. on the Dep'ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 102d Cong. 43 (1992) (statement of Justice Antonin Scalia) (“[E]xpecting the Federal Courts to try a massive number of new criminal cases is quite another. It is not going to work.”).

295. *Id.* at 34.

that the federal judiciary had become “a victim of its own success.”²⁹⁶ He explained that while Congress’s expansion of federal causes of action reflected confidence in the ability of the federal courts to “render a brand of justice that is both more dependable and more efficient than that rendered by some of the state systems,”²⁹⁷ the problem was that if the federal courts ended up with the same “potpourri of cases” as the state courts, the federal judiciary would lose its “special competence.”²⁹⁸

The Justices asserted repeatedly in the budgetary hearings that expanding federal criminal jurisdiction risked fundamentally altering the quality of the federal courts. There would be, they contended, a change in the type of individual serving as a federal judge. Federal “police courts” would end up staffed by individuals competent to handle garden-variety criminal law but unable to preside over the more complex civil and criminal cases that were the specialty of the federal courthouse. Justice Scalia thus stated that federalization of offenses traditionally left to the states to prosecute would “attract a different group of people” to the federal bench.²⁹⁹ He said: “[A] police court judge . . . [is] not going to be able to handle the antitrust cases.”³⁰⁰ Likewise, Justice O’Connor bemoaned the “deleterious effect” on the composition of the federal bench that results from expanded federal criminal dockets.³⁰¹ “[T]here seems to be no end,” she complained, “to new legislation that is taking very traditional sorts of state criminal offenses and making them Federal offenses as well. That is an unfortunate trend”³⁰² As caseloads continued to increase, Justice Scalia argued, Congress would be required to create additional judgeships but, he warned, more federal judges also meant a lower-quality bench. “[T]here comes a point” Scalia said, “at which you have so many judges that the job does not attract the people that

296. WILLIAM H. REHNQUIST, THE 1997 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6 (1998), reprinted in ANNUAL REPORTS, *supra* note 29.

297. *Id.*

298. *See id.*

299. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1994: Hearings Before the Subcomm. on the Dep’ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 103d Cong. 105 (1993).

300. *Id.*

301. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1993: Hearings Before the Subcomm. on the Dep’ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 102d Cong. 33 (1992).

302. *Id.*

it used to.”³⁰³ Adding judgeships in order to process new federal causes of action was, in the view of Justice Kennedy, “the way to kill a judicial system.”³⁰⁴ In sum, there was no sense that it was in the interests of the federal judicial branch to engage in “empire-building”³⁰⁵ by expanding the number and type of matters the courts heard.

The Justices also predicted a corresponding decline in the quality of state courts. According to Justice Souter, as more crime is made a federal concern, Congress both “incapacitat[es] . . . [federal] courts from doing what they do well now” and undermines the state courts because “the expectation of State responsibility evaporates.”³⁰⁶ Likewise, Justice Scalia warned, “every time you load something else on to the Federal courts, you are reducing the quality of the Federal [and state] courts.”³⁰⁷

The Justices’ arguments against increasing the workload of the federal courts coincided with renewed enthusiasm for federalism in the political arena. William Rehnquist was named to the Court by Richard Nixon, the advocate of “New Federalism,” under which “power, funds, and responsibility will flow from Washington to the states and to the people.”³⁰⁸ When Rehnquist became Chief Justice in 1986, Ronald Reagan was in the White House and federalism rhetoric was ubiquitous.³⁰⁹ Federalism was thus a useful theme for the Court to invoke in pushing for judicial reform.

303. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1994: Hearings Before the Subcomm. on the Dep’ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 103d Cong. 103 (1993).

304. *Id.* at 106 (statement of Justice Anthony Kennedy).

305. See generally Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 916 (2005) (defining “empire-building” as “the self-aggrandizing pursuit of power or wealth”).

306. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1995: Hearings on H.R. 4603 Before the Subcomm. on Commerce, Justice, & State, the Judiciary, & Related Agencies of the S. Comm. on Appropriations*, 103d Cong. 103 (1994).

307. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1994: Hearings Before the Subcomm. on the Dep’ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 103d Cong. 103 (1993).

308. President Richard Nixon, Address to the Nation on Domestic Programs (Aug. 8, 1969), quoted in Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE L. & POL’Y REV. 227, 288 (1996).

309. See, e.g., Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 107 (Jan. 25, 1983) (urging a “comprehensive federalism . . . that

Yet, as illustrated by the above statements from Rehnquist and his colleagues, the Justices' notion of judicial-style federalism did not correspond precisely with political federalism. In advocating restraint on the part of Congress, the Justices were not simply concerned that federal power would displace that once held by the states. Rather, there was a deep concern that the federal judiciary itself would lose its defining characteristics if it assumed more responsibilities traditionally left to state courts. The idea that a federalist-based division of labor protected the federal judicial branch and preserved its constitutional status was a defining element of the Justices' approach.

That the Justices viewed the docket issue as a constitutional one helps explain why they did not consider their statements to Congress to run afoul of principles of separation of powers. Justice Scalia told the House Appropriations Committee that, while there are "questions of prudence," he "wouldn't say that the doctrine of separation of powers would prevent the Chief Justice or, for that matter, any judge from issuing a statement that the courts are suffering."³¹⁰ For his part, Chief Justice Rehnquist thought that "[j]udicial comment and proposals with respect to what might loosely be called 'wages, hours, and working conditions' seem obviously appropriate"³¹¹ and within this category fell "a similar interest [on the part of judges] in not having impossible demands made on them in terms of caseload."³¹²

Nonetheless, even as they pressed their case, the Justices also sought to display respect for the principle of separate governmental roles. Discussing sentencing guidelines at a budgetary hearing in 1991, Justice Scalia said: "I am not sure it would be appropriate for the Court to do anything except to warn you that it will increase the number of appeals. I think that warning was issued."³¹³ Likewise, on questions of federal criminal legislation, Scalia said that same year: "I

will . . . restore to States and local governments their roles as dynamic laboratories of change in a creative society").

310. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1989: Hearings Before the Subcomm. on the Dep'ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 100th Cong. 361 (1988).

311. REHNQUIST, *supra* note 287, at 5.

312. *Id.*

313. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation for 1992: Hearings Before the Subcomm. on the Dep'ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 102d Cong. 492 (1991).

don't think it is my job to tell you what it is important for the Federal Government to be involved in. But I can tell you it is affecting the character of the federal judicial system."³¹⁴ The Chief Justice also, at times, sounded a note of deference even as he assumed a prominent role in the debate: "Congress, of course, is the ultimate arbiter of these questions [about the federal balance] within constitutional limits, but the future shape and contours of the federal courts is surely a legitimate subject for judicial input to Congress."³¹⁵ Considering, as he did, the future of the federal judiciary to be the proper province of the Justices, it is no surprise that the Chief Justice would set in motion a plan to protect the dockets of the lower courts.

C. *Rehnquist's Plan*

The most comprehensive—and radical—statement of what ailed the lower federal courts and how to cure them was the "Long Range Plan for the Federal Courts" issued in December of 1995 by the Judicial Conference of the United States.³¹⁶ The year of issuance is significant; it is the same year that *Lopez* was decided. And while the final version of the long range plan was only released in December of 1995, the Judicial Conference had released a substantially similar draft in March of that same year. Thus, the views of the Judicial Conference were known at the time the Court was considering the *Lopez* case.

The 200-page final plan included ninety-three "recommendations" and seventy-six "implementation strategies," all approved by the Judicial Conference, along with commentary designated as not necessarily reflective of the Judicial Conference's views.³¹⁷ The plan is a remarkable statement on the role of the federal judiciary, one that tracked very closely the views of Chief Justice Rehnquist, the presiding officer of the Judicial Conference. According to the foreword, "[t]he central vision of this plan is to conserve the [federal] judicial branch's core values of the rule of law, equal justice, judicial independence, national courts of limited jurisdiction, excellence, and accountability."³¹⁸ In the first chapter, focus lands immediately on the conjoined issues of federalism and dockets:

314. *Id.* at 493.

315. REHNQUIST, *supra* note 287, at 9.

316. JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS (1995), reprinted in 166 F.R.D. 49 (1996).

317. *Id.* at 51.

318. *Id.* at 59.

Planning for the federal courts . . . requires an awareness of their unique role in the nation's justice system and the special context in which they operate. State courts exist to serve all the justice needs of a geographic area; their mission is relatively straight-forward. The federal courts, on the other hand, are creatures of a *federal* Constitution. The Constitution charges Congress with ensuring that the federal courts coexist with, supplement and only rarely supplant the role of their state counterparts. . . . Congress sets the courts' budgets and the scope of federal jurisdiction; the executive branch determines the government's prosecutorial and civil litigation strategies that have substantial impact on the courts' workload. The judicial branch has only a limited ability to influence these actors.³¹⁹

It is all there: the limited role of the federal courts, their derivation of duties from the Federal Constitution, their vulnerability to Congress (and the executive branch) when it comes to their workload, and their limited ability—but nonetheless their ability—to protect their own interests.

Moving from preliminaries, the first portion of the plan diagnoses the problems facing the federal courts. The plan sets out the ways in which “troublesome trends and developments of the last two decades,” and in particular, “competing views of the role of the federal courts vis-a-vis the state justice systems” have undermined the proper role of the federal courts under the Constitution³²⁰ as “special purpose courts, designed and equipped to adjudicate small numbers of disputes involving important national interests.”³²¹ According to the plan, fulfilling the true mission of the federal courts requires a commitment to “conserving the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism, leaving to the state courts the responsibility for adjudicating matters that, in the light of history and a sound division of authority, rightfully belong there.”³²² This distinction, the plan states, between the nature and duties of the federal and state courts, represents “judicial federalism”: just as Congress exercises limited powers, “the federal courts were never intended to handle more than a small percentage of the nation's legal disputes.”³²³ Instead, as a constitutional matter, “federal courts

319. *Id.* at 61–62.

320. *Id.* at 65.

321. *Id.* at 66.

322. *Id.* at 66–67.

323. *Id.* at 68.

were to be a distinctive judicial forum of limited jurisdiction, performing the tasks that state courts, for political or structural reasons, could not.”³²⁴

Echoing arguments the Justices themselves had previously made at budgetary hearings and in other contexts, the plan reiterates the sentiment that the quality of the federal judiciary depended upon limited dockets. The theme of special competency returns, as the plan explains that “the federal courts have had to decide many of society’s most contentious and important issues . . . present[ing] a high level of factual, legal and administrative complexity.”³²⁵ Federal courts have fulfilled this role because “they have high standards of legal excellence, have obtained superior resources, and attract talented personnel.”³²⁶ In addition, federal judges have benefited from having “a limited enough jurisdiction so they can become sufficiently expert with subject matter and procedure,”³²⁷ from “the time available for contemplation and reasoned decision,”³²⁸ and from the overall “prestige of the office.”³²⁹ Again, the point had a constitutional dimension: “Public confidence in the federal courts is a vital ingredient of our constitutional system. That confidence in large part depends upon the courts maintaining their standards of excellence.”³³⁰

Having framed the characteristic of the federal courts in constitutional terms, the plan turned to the problem of growing dockets. Announcing that “[h]uge burdens are now being placed on the federal courts,”³³¹ the plan set out statistics demonstrating the extent of the increase in cases—with data beginning at 1904. With respect to criminal cases, the plan noted, since 1904 there had been overall a “relatively modest” increase of 157% in cases filed in the federal district courts—but that figure does not capture the reality of the burden of the modern criminal docket.³³² According to the plan, the main problem was that during the prior twenty years, “the nature and complexity of the [criminal] caseload has changed dramatically.”³³³ Among other factors, the plan cited a sharp increase in drug offenses (comprising forty percent of federal cases in 1994); a

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.* at 68–69.

331. *Id.* at 69.

332. *Id.* at 70–71.

333. *Id.*

forty-seven percent increase since 1980 in cases involving multiple defendants; an increased conviction rate (requiring that judges spend additional time sentencing); a near doubling of the average length of criminal trials; and an increase (since 1980) in the number of federal prosecutors (by 125%) that far outpaced the increase in the number of judges (eighteen percent) during the same period.³³⁴ With respect to civil cases, the plan reported that filings in the district courts had increased 1,424% since 1904, with most of that growth occurring since 1960.³³⁵ Finally, the plan reported, in the courts of appeals the number of cases had grown more than 3,800% since 1904.³³⁶

Observing that “[r]ecent legislative trends suggest that federal caseloads will continue to grow rapidly,”³³⁷ the plan extrapolated from existing trends to predict dramatic increases in the dockets of the federal courts in ensuing years: from 283,197 cases in the district courts in 1995 to 364,800 in 2000 to 610,800 in 2010 and 1,060,400 in 2020.³³⁸ Managing such a large number of cases, the plan projected, would require an increase in federal district judges from 649 in 1995 to 1,430 in 2010 and to 2,410 in 2020.³³⁹ Given these numbers, the plan said, without preemptive reform, one of two “unfortunate consequences” was inevitable: “(1) an enormous, unwieldy federal court system that has lost its special nature; or (2) a larger system incapable, because of budgetary constraints, workload and shortage of resources, of dispensing justice swiftly, inexpensively and fairly.”³⁴⁰

In order to drive home the “nightmarish”³⁴¹ future the federal judiciary faced, the plan asked readers to imagine the following doomsday scenario:

The year is 2020. Congress has continued the federalization trends of the eighties and nineties, and federal court caseloads have grown at a rapid rate. In the United States Court of Appeals for the 21st Circuit, Lower Tier, a recently appointed federal judge arrives at her chambers, planning to consult the latest electronic advance sheets in Fed7th in order to determine the applicable law of her Circuit and the upper tier court of appeals for her region. With nearly a thousand court of appeals

334. *Id.* at 72.

335. *Id.* at 70.

336. *Id.*

337. *Id.* at 77.

338. *Id.* at 75.

339. *Id.* at 76.

340. *Id.* at 75.

341. *Id.* at 78.

judges writing opinions, federal law in 2020 has become vaster and more incoherent than ever.

This is only the judge's fourth month on the job, even though she was nominated by the President three years earlier; the appointment and confirmation process has bogged down even more than in 1995 because of the numbers of judicial candidates that the Senate Judiciary Committee must consider every year. Her predecessor was only on the bench for a year and a half before resigning in protest because he felt that he was only a small cog in what had become a vast wheel of justice.³⁴²

According to the plan, avoiding this dystopian future required an immediate return to the basic principle of "judicial federalism" in which "the state and federal courts together comprise an integrated system for the delivery of justice in the United States."³⁴³ Under that system, the state courts are "the primary forums for resolving civil disputes and the chief tribunals for enforcing the criminal law"³⁴⁴ while the federal judiciary exercises "a much more limited jurisdiction,"³⁴⁵ consistent with the "fundamental view of the nature of our federal system of government."³⁴⁶

The plan observed that while "the Constitution potentially extends federal judicial power to a wide range of 'cases and controversies,' the Framers wisely left the actual scope of lower federal court jurisdiction to Congress's discretion."³⁴⁷ But therein lay the cause of the identified disease: "Traditionally, Congress has refrained from disturbing the jurisdiction of state courts, allocating a narrower jurisdiction to the lower federal courts than the Constitution permits and allowing state courts to retain concurrent jurisdiction in numerous civil contexts."³⁴⁸ The problem then was that Congress had departed from these past practices and in so doing was undermining the "distinctive role for the federal court system."³⁴⁹ The trend required reversal: "As Congress continues to 'federalize' crimes previously prosecuted in the state courts and to create civil causes of

342. *Id.* at 77.

343. *Id.* at 81.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

action over matters previously resolved in the state courts, the viability of judicial federalism is unquestionably at risk.”³⁵⁰

The bulk of the plan’s recommendations aimed to cut back, in quite dramatic ways, on the caseloads of the federal courts. The very first recommendation called for “sensible limitations on federal criminal and civil jurisdiction.”³⁵¹ Specifically, the plan said, “Congress should . . . conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism.”³⁵² And that could be achieved if civil and criminal jurisdiction was “assigned to the federal courts only to further clearly defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters.”³⁵³

With respect to criminal cases, the plan thus recommended a sharp limit to federal prosecutions: “[C]riminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate or where federal interests are paramount.”³⁵⁴ Spelling out this standard, the plan identified five circumstances in which federal criminal jurisdiction was appropriate: (1) offenses against the federal government specifically or its agents or against interests “unquestionably associated with a national government”³⁵⁵ or where “Congress has evinced a clear preference for uniform federal control”;³⁵⁶ (2) activities with “substantial multistate or international aspects”;³⁵⁷ (3) activities by “complex commercial or institutional enterprise[s] most effectively prosecuted by use of federal resources or expertise”;³⁵⁸ (4) “serious, high-level, or widespread state or local government corruption”;³⁵⁹ and (5) activities that “raise[] highly sensitive issues in the local community” such that federal prosecution is perceived to be more objective.³⁶⁰ This list is indeed extraordinary. For one thing, the set of categories is extremely limited; many modern federal criminal statutes would not find a place on the list. In addition, within the categories, there are additional qualifications (“substantial,” “serious,” “highly,” and so on) that must

350. *Id.* at 82.

351. *Id.*

352. *Id.* at 83.

353. *Id.*

354. *Id.* at 84.

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.* at 85.

359. *Id.*

360. *Id.*

be met before jurisdiction is appropriate. Consider in this regard the commentary that accompanies category (2). It says:

Simply because criminal activity involves some incidental interstate movement does not mean that state prosecution is necessarily inappropriate or ineffective. Activity having some minor connection with and effect on interstate commerce might perhaps be constitutionally sufficient to permit federal intervention, but it should not be enough by itself to require a federal court forum.³⁶¹

The language seems almost tailored to the possible jurisdictional hook that might have saved the statute at issue in *Lopez*. Thus, requiring proof at trial that the gun possessed within the vicinity of a school had moved across a state line (or otherwise affected interstate commerce) would perhaps satisfy the Commerce Clause analysis³⁶²—but this extra element would not render the statute consistent with the approach Congress *should* take in order to protect the constitutional role of the federal courts. In other words, the scope of Congress’s power was not the only constitutional question when it came to federal criminal statutes: the resulting burden upon the judicial branch also needed to be considered. A further point bears mention. Beyond advocating limits on future federal criminal lawmaking, the plan also urged a complete review of all *existing* federal criminal statutes—with a view to repealing those that did not meet the plan’s own criteria.³⁶³

On the civil side, the plan likewise urged fundamental reforms. It recommended that federal jurisdiction be limited to statutes that “further clearly defined and justified federal interests.”³⁶⁴ Accordingly, federal court jurisdiction should extend only to civil matters that: (1) “arise under the United States Constitution”;³⁶⁵ (2) raise issues that “cannot be dealt with satisfactorily at the state

361. *Id.* at 84.

362. *See* *United States v. Lopez*, 514 U.S. 549, 560 (1995) (“[Section] 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.”).

363. *See* JUDICIAL CONFERENCE OF THE U.S., *supra* note 316, at 85 (“Congress should . . . review existing federal criminal statutes with the goal of eliminating provisions no longer serving an essential federal purpose. More broadly, a thorough revision of the federal criminal code should be undertaken so that it conforms to the principles set forth . . . above. In addition, Congress should be encouraged to consider use of ‘sunset’ provisions to require periodic reevaluation of the purpose and need for any new federal offenses that may be created.”).

364. *Id.* at 88.

365. *Id.*

level”³⁶⁶ and involve either “a strong need for uniformity”³⁶⁷ or “paramount federal interests”;³⁶⁸ (3) involve foreign relations of the United States; (4) involve the federal government as a party; (5) involve disputes between or among the states; or (6) affect substantial interstate or international disputes.³⁶⁹ Similar to the recommendation with respect to criminal jurisdiction, these categories are very limited and would push many civil cases out of federal court and into state forums.

The commentary to category (2) above deserves special mention. It explained that the civil dockets of the federal courts had grown “due in large part to the tendency of Congress to create additional federal causes of action and to provide a federal judicial forum.”³⁷⁰ The goal, then, was to cut back on this tendency. By offering a “strong need for uniformity” standard, the plan asked Congress “to be cautious in ‘federalizing’ every matter that captures the nation’s attention”³⁷¹ and to provide for a federal forum “only when uniform resolution is required on an issue that has not been, and clearly cannot be, resolved satisfactorily at the state level.”³⁷² Patent, trademark, and copyright represent areas that would “satisfy[] this high standard.”³⁷³

The commentary further explains that the additional identified basis for federal lawmaking under that second category, the pursuit of “paramount federal interests,”³⁷⁴ was designed to ensure a federal forum in order to protect “certain societal values.”³⁷⁵ According to the commentary, environmental, antitrust, and civil rights laws arguably met this standard.³⁷⁶ But then follows a qualification: Congress should also recognize that like their federal counterparts, state judges take an oath to uphold the U.S. Constitution and the supremacy of federal law.³⁷⁷ Thus, absent a showing that state courts *cannot* satisfactorily deal with an issue, Congress should avoid creating a civil cause of action in the federal courts—and it should *only* create a new civil

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.* at 89.

370. *Id.* at 88.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

cause of action if accompanied by “a concomitant reduction of federal jurisdiction in other areas.”³⁷⁸ In other words, even if Congress is tempted to confer jurisdiction on the federal courts in the name of protecting civil rights or other important federal interests, Congress should only do so if state courts are clearly inadequate to the task and, even then, only after trimming some other area of federal jurisdiction to make space for the new class of claims.³⁷⁹ This idea—that federal courts should not do what state courts can do perfectly well—is a prominent theme of Rehnquist’s opinion in *Morrison*.³⁸⁰

Other recommendations in the plan included cutting back on federal diversity jurisdiction;³⁸¹ increased use of agency screening and adjudication;³⁸² elimination of federal jurisdiction over ERISA claims and workplace injury claims;³⁸³ controls on the growth of the federal judiciary (e.g., number of judges) so as to maintain its special character;³⁸⁴ measures to reduce the burdens from pro se litigation;³⁸⁵ and greater use of alternative dispute resolution.³⁸⁶

The Long Range Plan for the Federal Courts is a remarkable document both because of its bleak assessment of the existing state of the federal judiciary and its vision of appropriate federal lawmaking. It is noteworthy, too, for the willingness of the Judicial Conference to engage in what Professor Resnik views as judicial “lobbying” of Congress.³⁸⁷ While in their judicial opinions, Rehnquist and other

378. *Id.* at 89.

379. *Id.* at 88–89.

380. *See infra* Section III.F.

381. JUDICIAL CONFERENCE OF THE U.S., *supra* note 316, at 89–90.

382. *Id.* at 93–94.

383. *Id.* at 95.

384. *Id.* at 98–99.

385. *Id.* at 123.

386. *Id.* at 130.

387. Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 230 (2003). Professor Resnik cites the Long Range Plan as an example of the judiciary, as a collective entity, improperly seeking to influence congressional decisions about the scope of federal jurisdiction. In her view, besides the fact that the judiciary “cannot know . . . the demands that new causes of action will impose” upon the courts, “using its collective voice to advise Congress on such policy matters enmeshes the judiciary in politics.” *Id.* at 228–29. She contends that because “the role of the judiciary as commentator cannot be kept discrete from the role of the judiciary as adjudicator,” *id.* at 291, the end result of advocacy efforts may well be “significant harm to the judiciary itself,” particularly if judicial decisions end up mirroring advocacy positions. *Id.* at 229–30. In addition, Professor Resnik observes, the judiciary itself can become a target of lobbying by other actors also seeking to influence Congress: “Once the Judicial Conference takes on the role of distinguishing among litigants—arguing against federal jurisdiction for [some] . . . but for federal jurisdiction for others—it becomes a place that lobbyists need to be.” *Id.* at 305.

members of the Court had written broadly about federalism as a constitutional and political value,³⁸⁸ the plan focused on a more specific dimension of expansive federal lawmaking: its consequent impact upon the judicial branch itself. Despite the intensity with which their arguments were made, the authors of the plan must have recognized that the core proposals had no chance of success; there was no likelihood that Congress would only legislate within the narrow parameters the plan described. Against that backdrop—of an urgent need for radical reform but no likelihood of congressional cooperation—the Court took up *Lopez*.

D. *The Constitutional Option: Lopez*

On April 26, 1995, the Supreme Court issued its 5-4 decision in *United States v. Lopez*.³⁸⁹ In his majority opinion invalidating the Gun-Free School Zones Act prohibition against “any individual knowingly . . . possess[ing] a firearm at a place that [he] knows . . . is a school zone,”³⁹⁰ Rehnquist observed that the law had “nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly

388. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 457–58 (1991) (O’Connor, J.) (“As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. . . . This federalist structure . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.”); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 571–72 (1985) (Powell, J., dissenting) (“The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective ‘counterpoise’ to the power of the Federal Government. . . . [B]y usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.”); *Nat’l League of Cities v. Usery*, 426 U.S. 833, 845 (1976) (Rehnquist, J.) (invalidating the application of the Fair Labor Standards Act to certain state government employees on the ground that the statute interferes with state sovereignty by imposing increased costs and necessitating curtailment of other state programs and displacing state decisions about structuring integral functions of state government and holding that “there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner”); *Fry v. United States*, 421 U.S. 542, 557 (1975) (Rehnquist, J., dissenting) (“[T]hose who drafted and ratified the Constitution [understood] that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation.”).

389. 514 U.S. 549 (1995). Chief Justice Rehnquist wrote for the Court; Justices Kennedy and Thomas wrote concurring opinions. *Id.*

390. *Id.* at 551.

one might define those terms.”³⁹¹ Reviewing the Court’s precedents to identify three historically recognized categories of permissible Commerce Clause regulation, Rehnquist found the statute to fall within none.³⁹² Accepting the use of the Commerce Clause in this case, Rehnquist explained, would invite the federal government to regulate “not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce,”³⁹³ with the attendant risk that federal power would displace “criminal law enforcement or education where States historically have been sovereign.”³⁹⁴ Rehnquist dismissed the government’s “cost of crime” argument—that cumulative harms of guns in the vicinity of schools disrupted the learning environment, made citizens less productive, and thus ultimately harmed the national economy.³⁹⁵ For one thing, Rehnquist observed, Congress’s failure to develop a solid factual record rendered the causal chain speculative.³⁹⁶ In order to accept the government’s reasoning, the Justices would need to “pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”³⁹⁷

In his year-end report for 1995, Chief Justice Rehnquist focused on how that year’s budgetary standoff between President Clinton and the Republican-controlled Congress could affect the federal judiciary’s operations.³⁹⁸ As in prior reports, Rehnquist made no mention of decided or pending cases. Yet at the end of the report, he had this to say:

No one doubts that it is Congress, and not the judiciary, which makes laws. No one doubts that it is the judiciary, and not Congress, which decides cases. But in the great gray area between these core functions, there must be give and take in

391. *Id.* at 561 (footnote omitted).

392. *Id.* at 560–61.

393. *Id.* at 563–64.

394. *Id.*

395. *Id.*

396. *Id.* at 562–63.

397. *Id.* at 567.

398. WILLIAM H. REHNQUIST, 1995 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3 (1996), reprinted in ANNUAL REPORTS, *supra* note 29 (requesting that Congress “separate the judiciary’s budget from the comprehensive appropriation for Commerce, Justice, State, and the Judiciary, of which it is traditionally a part”).

order to work out common sense solutions to recognized problems.³⁹⁹

The statement echoed the themes that Rehnquist had pressed in prior year-end reports and those that his colleagues had made to Congress during budgetary hearings. Now, however, coming as it did after *Lopez*, the message took on a new meaning. Yes, there would be deference to Congress. But there was also a role for the Court: Congress, at times, would have to—and could be made to—give. After years of asking Congress to exercise self-restraint, *Lopez* had shown the Court’s ability and willingness to confront the docket issue itself.

Rehnquist’s opinion in *Lopez* made no mention of the burden the Gun-Free School Zones Act (and other new federal criminal laws) placed on the federal judiciary. That, however, is not surprising. The court of appeals’ ruling that the Supreme Court was reviewing had struck down the statute as beyond the scope of the Commerce Clause⁴⁰⁰ and the question presented in the case was “whether the Commerce Clause . . . empowered Congress to enact”⁴⁰¹ the law. The *Lopez* opinion thus naturally was one of the extent of and limits to federal legislative power—what Rehnquist called “first principles”⁴⁰²—rather than the impact upon the operations and status of the federal courts. By the time *Lopez* was decided, Rehnquist and his colleagues had repeatedly criticized the Violent Crime Control Act on docket control grounds. That those criticisms were not repeated in the Court’s *Lopez* opinion does not mean the concern had lost its urgency. Rather, the doctrinal tools of federalism resolved the case in a way that addressed a concern the Justices plainly held and had articulated repeatedly in other settings.⁴⁰³

399. *Id.* at 16.

400. *United States v. Lopez*, 2 F.3d 1342, 1367–68 (5th Cir. 1993), *aff’d*, 514 U.S. 549 (1995).

401. Brief for Petitioner at 1, *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260), 1994 WL 242541, at *1.

402. *Lopez*, 514 U.S. at 552.

403. Here, it is worth noting that commentators have suggested that when a federal statute threatens to increase the work of the federal courts, the Court might read the statute narrowly to give it minimal effect. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 70–71 (1994) (“[W]e should expect the Court to react with hostility when Congress loads up the dockets of the already-swamped federal courts with criminal cases . . . especially when the crimes have no special national significance or regulatory interest. . . . If Congress wishes to federalize such crimes, it has the power to do so, but the Court may interpret the congressional command grudgingly, giving it only the scope compelled by a narrow parsing of its four corners.”). On this account, too, the Court uses doctrinal tools (of statutory interpretation) as a

E. A Note on Justice Kennedy

Justice Kennedy's concurring opinion in *Lopez* stands out in light of his appropriations committee testimony leading up to the decision. In March of 1994, before the Court had granted review in *Lopez*,⁴⁰⁴ Kennedy appeared before the appropriations committees of the House and the Senate to testify in support of the Court's budget request. Although in his testimony Kennedy discussed the problem of increased federal lawmaking upon the work of the courts, he downplayed any role for the Supreme Court in policing the scope of federal legislative initiatives. Asked whether he saw an end to the federalization of local crimes, he told the House Appropriations Committee: "Not at all. In fact, just the opposite. We see a steady upward progress. As you and the Committee well know, we are not in a position to control our workload."⁴⁰⁵ Testifying before the Senate Appropriations Committee, Kennedy said, "Federal judges cannot referee the boundaries of federalism. It is for you to decide at your discretion and your political power how far you wish to extend the power of the Federal Government."⁴⁰⁶ In sum, prior to *Lopez*, Kennedy's articulated position was that the Court could not itself stop the rising tide of federal cases.

On March 8, 1995, a few weeks before the *Lopez* decision was announced (at which time the Justices surely knew how the case would come out), Kennedy again appeared before the House Appropriations Committee. This time around, he sounded a subtly different note. Kennedy identified a stronger role for the Court in general on issues of judicial workload. He said that "the traditions, the constraints, the separation of powers compel us to remain on the sidelines most of the time" and that "we would prefer to have our viewpoint understood and considered by the Congress rather than going to the public directly."⁴⁰⁷ As for federalism, Kennedy said,

docket control device without (necessarily) mentioning any concern about or motivation based upon caseloads. *See id.*

404. *United States v. Lopez*, 511 U.S. 1029 (1994) (granting petition for certiorari).

405. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1995: Hearings Before the Subcomm. on the Dep'ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 103d Cong. 26 (1994).

406. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1995: Hearings on H.R. 4603 Before a Subcomm. of the S. Comm. on Appropriations*, 103d Cong. 102 (1994).

407. *Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations for 1996: Hearings Before the Subcomm. on the Dep'ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 104th Cong. 16 (1995).

maintenance of the boundaries between the national government and the states was not “automatic,” and the task of respecting the proper balance “primarily remains with the Congress.”⁴⁰⁸ He also warned that if Congress continued to create a “substantial amount of Federal crimes, [it] may affect the historic role of the Federal courts.”⁴⁰⁹ To close listeners, these nuances—“most of the time[,]” “we would prefer[,]” “primarily” with Congress—combined with the invocation of the historic role of the federal courts, signaled what the Court was about to do in *Lopez*.

The shift in tone on the part of Justice Kennedy suggests two possibilities. One is that during the period in which *Lopez* was pending, Kennedy changed his own view about the appropriateness of the Court putting a brake on congressional lawmaking. The other is that Kennedy’s own view did not change and that in his testimony he was simply describing, as a factual matter, the Court’s overall willingness to intervene to limit congressional power. In 1994, the Court was not in the business of striking down laws as beyond the scope of the Commerce Clause, but by March of 1995 the votes in *Lopez* had been cast. In either case, Kennedy’s message to Congress on the eve of *Lopez* was new.

Justice Kennedy’s concurrence in *Lopez* tracked the committee testimony he gave in the weeks before the Court’s decision. Kennedy began his opinion by stating that the checkered history of the Court’s Commerce Clause jurisprudence “counsels great restraint”⁴¹⁰ when the judicial branch reviews congressional uses of the Commerce Clause power and the need for such restraint gave him “some pause” about Rehnquist’s approach.⁴¹¹ In particular, Kennedy recalled that earlier efforts by the Court to use dichotomies—such as between commerce and manufacturing or between direct and indirect effects on interstate commerce—to limit the scope of federal power had proven unworkable.⁴¹² In addition, Kennedy identified a guiding lesson about the proper role of the Court in policing legislation under the Commerce Clause:

[T]he Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. *Stare decisis* operates with great force in counseling us not to call in question

408. *Id.* at 13.

409. *Id.*

410. *United State v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring).

411. *Id.*

412. *Id.* at 570.

the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature. That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy, dependent then upon production and trading practices that had changed but little over the preceding centuries; it also mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system.⁴¹³

So far, then, Kennedy's opinion reflected his earlier-announced approach of little or no role for the Court in setting boundaries. A few lines later though, the message shifted. Kennedy wrote:

It does not follow, however, that in every instance the Court lacks the authority and responsibility to review congressional attempts to alter the federal balance. This case requires us to consider our place in the design of the Government and to appreciate the significance of federalism in the whole structure of the Constitution.⁴¹⁴

In particular, Kennedy identified a role for the Court to correct a failure on the part of Congress itself to respect federalism boundaries. At his committee testimony, Kennedy had said that Congress had a special responsibility to protect the federalism balance. Now, however, came acknowledgment that Congress might not fulfill that responsibility: "[I]t would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance."⁴¹⁵ The risk of that happening, Kennedy explained, reflected the "absence of structural mechanisms to require those [political] officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so."⁴¹⁶ Thus the Court (which, recall, has an "immense stake" in the federalism balance) became constitutionally obligated to intervene: "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of

413. *Id.* at 574.

414. *Id.* at 575.

415. *Id.* at 577.

416. *Id.* at 578.

Government has tipped the scales too far.”⁴¹⁷ In this case, given that the statute had no nexus to commerce and that education was a traditional area of state regulation, “we have a particular duty to ensure that the federal-state balance is not destroyed.”⁴¹⁸ Shoring up the case for intervention, Kennedy noted that forty states already provided for prosecution—in state court—of possession of firearms in the vicinity of schools.⁴¹⁹

Kennedy’s opinion is significant because it reflects the culmination of efforts on the part of the Justices to persuade Congress to act with restraint in enacting federal criminal laws that required adjudication in the federal courts. Kennedy’s basic message was that despite repeated admonitions from the Justices, in committee hearings and elsewhere, members of Congress had failed to take seriously their duty to preserve the federalism balance. Given that failure, the Court itself had a constitutional obligation to keep Congress in check in order to preserve not just the division of legislative authority, but also the division of judicial power between the federal courts and the courts of the states. While *Lopez* involved only a criminal statute, within a short period the Court in *Morrison* would extend its approach to civil laws that likewise presented federalism and docket concerns.

F. *From Lopez to Morrison*

The first Violence Against Women Act (“VAWA”), introduced in 1990 by then-Senator Joe Biden, never made it through Congress,⁴²⁰ but the legislation was ultimately enacted as part of the Violent Crime Control and Law Enforcement Act of 1994.⁴²¹ From the outset, the resurrected bill’s civil remedy, which permitted victims of gender-motivated violence to sue their alleged attackers for monetary damages in federal (or state) court,⁴²² proved a sticking point with the Senate Judiciary Committee. At the insistence of the Judicial Conference of the United States—chaired by Chief Justice Rehnquist—the civil remedy provision was removed from the Senate’s version of the bill; in response, the Judicial Conference

417. *Id.*

418. *Id.* at 581.

419. *Id.*

420. See Violence Against Women Act of 1990, S. 2754, 101st Cong.

421. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified in relevant part at 42 U.S.C. § 13981 (2012)), held unconstitutional by *United States v. Morrison*, 529 U.S. 598 (2000).

422. *Id.* § 40302

withdrew its objections to the bill but nonetheless refused to endorse it.⁴²³ However, the House version of the bill still contained a civil remedy and at reconciliation the joint committee agreed to include the disputed provision.⁴²⁴ The bill that ultimately passed both houses of Congress and was signed into law by President Clinton on September 13, 1994 thus included a civil remedy provision.⁴²⁵

The Justices had an eye on VAWA long before they heard in *Morrison* the constitutional challenge to the law's civil remedy provision. In 1992, Chief Justice Rehnquist used his year-end report to call attention to the opposition of the Judicial Conference to key provisions of the (first) Violence Against Women Act, which was then pending in Congress. Rehnquist complained that the proposed bill featured a definition of criminal conduct that was "so open-ended,"⁴²⁶ and a private right to action that was "so sweeping,"⁴²⁷ that the result would be "a whole host of domestic relations disputes"⁴²⁸ ending up in federal court.⁴²⁹ Rehnquist thus urged Congress "to consider carefully these concerns, which are shared across the spectrum of the nation's federal and state judiciary."⁴³⁰ A year later (with *Lopez* still to come down), Rehnquist again invoked the link between federalism and the status of the federal judiciary to criticize VAWA as a threat to the "separateness but interdependence"⁴³¹ of the three branches of government. Rehnquist anticipated that if it had passed as written, "[VAWA's] proposed [civil] remedy would have seriously encumbered the federal courts . . . [and] impacted adversely on federalism values."⁴³²

More broadly, after the Court's decision in *Lopez*, the Justices continued to press their concern over the dockets of the lower federal courts. The effect of increased congressional lawmaking was now fully felt: 1997 saw the "largest federal criminal caseload in 60 years."⁴³³ Appearing before an appropriations committee in 1997, Justice

423. Gregg Ivers & David Kaib, *Congressional Power to Establish and Enforce Social Rights After United States v. Morrison: Limits and Possibilities*, in CONGRESS AND THE POLITICS OF EMERGING RIGHTS 17–18 (Colton C. Campbell & John F. Stack, Jr. eds., 2002).

424. *Id.* at 18.

425. *Id.*

426. REHNQUIST, *supra* note 266, at 5.

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. REHNQUIST, *supra* note 284, at 1.

432. *Id.* at 4.

433. REHNQUIST, *supra* note 296, at 4.

Kennedy urged respect for traditional federalism values and lectured committee members that the framers of the Constitution “devised the federal system not just as a workload division, but in order to preserve the freedom of the citizens, so that the citizen can have a very direct contact with his or her government. That’s the meaning of federalism.”⁴³⁴ Kennedy took care to remind the appropriations committee of the Court’s constitutional weapon should this message be ignored: “We have, in some of our recent cases, indicated that Congress must be very careful with reference to the federal balance.”⁴³⁵ That said, Kennedy also expressed hope, as he had in his concurring opinion in *Lopez*,⁴³⁶ that the judicial branch would not be required to get involved. He told the committee in 1998 that there are “few constraints” that the Court can impose to “police . . . [the federalism] balance”;⁴³⁷ the issue, he said, is “almost completely committed to the political branch. [Congress] determine[s] what the Federal balance is.”⁴³⁸

For his part, Chief Justice Rehnquist continued to urge legislative restraint in his year-end reports. In 1998, Rehnquist wrote: “While there certainly are areas in criminal law in which the federal government must act, the vast majority of localized criminal cases should be decided in the state courts which are equipped for such matters.”⁴³⁹ The Chief Justice declared this to be a firm “principle” that was “enunciated by Abraham Lincoln in the 19th century, and Dwight Eisenhower in the 20th century.”⁴⁴⁰ Repeating a standard message, he wrote that “matters that can be handled adequately by the states should be left to them; matters that cannot be so handled should be undertaken by the federal government.”⁴⁴¹ Echoing the specific recommendations of the Judicial Conference’s Long Range

434. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1998: Hearings Before the Subcomm. on the Dep’ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 105th Cong. 21 (1997).

435. *Id.*

436. *See supra* notes 410–13 and accompanying text.

437. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1999: Hearings Before the Subcomm. on the Dep’ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 105th Cong. 28 (1998).

438. *Id.*

439. REHNQUIST, *supra* note 272, at 5.

440. *Id.*

441. *Id.*

Plan,⁴⁴² Rehnquist urged Congress to hold hearings in order to set standards for when activities should be made federal offenses.⁴⁴³

After *Lopez*, the Court's May 15, 2000 decision in *Morrison* was not surprising.⁴⁴⁴ Writing for the Court, Rehnquist held that VAWA's civil remedy exceeded Congress's authority under the Commerce Clause and that the provision was also not supported by Congress's power under Section 5 of the Fourteenth Amendment.⁴⁴⁵ On the Commerce Clause issue, in contrast to the situation in *Lopez*, Congress had done its homework, generating a vast record of the economic impact of violent acts against women.⁴⁴⁶ No matter. For in Rehnquist's view, in generating this record, Congress had seemingly missed the whole point of *Lopez*: the congressional findings in support of the civil remedy were, Rehnquist explained, "substantially weakened by the fact that they rely so heavily on a method of [causal] reasoning that we have already rejected as unworkable" in *Lopez*.⁴⁴⁷ As in *Lopez*, Rehnquist emphasized the risk that upholding the civil remedy provision would invite Congress to legislate in the area of "family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."⁴⁴⁸ Congress's Section 5 power also did not support VAWA's civil remedy because that remedy was directed at alleged private perpetrators of violence rather than state government, the target of the Fourteenth Amendment.⁴⁴⁹ Dismissing the argument that a federal cause of action was justified because state judicial systems were biased against victims of gender-based violence,⁴⁵⁰ Rehnquist concluded that "under our federal system" a civil remedy scheme was the province of state government.⁴⁵¹

Like *Lopez*, *Morrison* was a 5-4 decision. While commentary on *Lopez* and *Morrison* typically portrays a sharply divided Court,⁴⁵² the

442. See *supra* Section III.C.

443. REHNQUIST, *supra* note 272, at 7.

444. Not to Rehnquist, at any rate, who wrote that in light of his opinion in *Lopez*, "the proper resolution of the present cases is clear." *United States v. Morrison*, 529 U.S. 598, 613 (2000).

445. *Id.* ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.").

446. See *id.* at 614.

447. *Id.* at 615.

448. *Id.* at 615-16.

449. *Id.* at 621-27.

450. *Id.* at 619-21.

451. *Id.* at 627.

452. See, e.g., Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV.

budgetary hearings present a more nuanced picture. In testifying on the Court's budget, Justice Souter—who dissented in *Lopez*⁴⁵³ and authored the principal dissent in *Morrison*⁴⁵⁴—told Congress he shared the concerns of his colleagues with the increasing number of federal statutes and the resulting burden upon the lower federal courts.⁴⁵⁵ At an appropriations hearing in 1999, Souter described his “basic conceptualization” of federalism and the courts as follows: “[W]hat the State courts and the State judicial systems can do they ought to do, and what the Federal courts and the Federal judicial system ought to do are those that the States cannot.”⁴⁵⁶ Souter's theory is virtually identical to that which Rehnquist articulated on multiple occasions. Likewise, when testifying in March of 2000, Souter again echoed Rehnquist's views on the increasing federalization of crime: “[A]s a general proposition, I think that is a very unsound way to run a Federal union.”⁴⁵⁷ Where Souter differed from Rehnquist was his degree of deference to Congress—and the role of the Court. In explaining his view of the scope of federal legislative power, Souter told the congressional committee:

The criterion ought to be, basically, is Federal prosecution needed because State prosecution for any number of reasons, including perhaps the interstate character of the activity, going to prove itself ineffective. If the Congress will ask that question, and abide by the answers to that question, I am not going to worry where this goes. But I do worry about indiscriminate federalization.⁴⁵⁸

Souter voted to uphold both the Gun-Free School Zones Act and VAWA's civil remedy as proper uses of congressional power.⁴⁵⁹ But once read in light of his congressional committee testimony,

1253, 1260 (2003) (calling *Morrison* “the product of a sharply-divided Court with trenchant dissents”); Young, *supra* note 23, at 163 (remarking that the Court is “sharply divided on federalism”).

453. *United States v. Lopez*, 514 U.S. 549, 602 (1995) (Souter, J., dissenting).

454. *Morrison*, 529 U.S. at 628 (Souter, J., dissenting).

455. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 2000: Hearings Before the Subcomm. on the Dep'ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 106th Cong. 33–34 (1999).

456. *Id.*

457. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 2001: Hearings Before the Subcomm. on the Dep'ts of Commerce, Justice, & State, the Judiciary, & Related Agencies of the H. Comm. on Appropriations*, 106th Cong. 6 (2000).

458. *Id.*

459. *See supra* notes 453–54 and accompanying text.

Souter's dissenting opinions in *Lopez* and in *Morrison* place him closer to the majority—and in particular closer to Justice Kennedy—than is conventionally thought. Souter's position was not that federalism did not constrain Congress nor was it that there was no role for the Court in policing limits on congressional power. Rather, in his judgment, a greater degree of deference was owed to congressional judgment when Congress invoked interstate commerce as a basis for lawmaking than the majority in *Lopez* and in *Morrison* had given. In *Lopez*, Souter explained at the outset of his opinion:

In reviewing congressional legislation under the Commerce Clause, we defer to what is often a merely implicit congressional judgment that its regulation addresses a subject substantially affecting interstate commerce “if there is any rational basis for such a finding.” If that congressional determination is within the realm of reason, “the only remaining question for judicial inquiry is whether ‘the means chosen by Congress are reasonably adapted to the end permitted by the Constitution.’”⁴⁶⁰

The practice of deferring to rationally based legislative judgments “is a paradigm of judicial restraint.” In judicial review under the Commerce Clause, it reflects our respect for the institutional competence of the Congress⁴⁶¹

Likewise, in *Morrison*, Souter wrote:

Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. The fact of such a substantial effect is not an issue for the courts in the first instance, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact.⁴⁶²

460. *United States v. Lopez*, 514 U.S. 549, 603 (1995) (Souter, J., dissenting) (footnote omitted) (citations omitted) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981)).

461. *Id.* at 604 (citations omitted) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993)).

462. *United States v. Morrison*, 529 U.S. 598, 628 (2000) (Souter, J., dissenting) (citations omitted).

It was not, then, *federalism* that set Souter apart from the five Justices in the majority in *Lopez* and *Morrison* but—to return to our basic theme—*separation of powers*: just as Congress needed to respect the constitutional role of the judicial branch, the Court needed to recognize that Congress is in a better position than is the Court to assess the impact of regulated activities upon interstate commerce.

G. *Aftermath*

The explanatory power of our account does not depend upon whether the Supreme Court actually obtained relief for the lower federal courts—in the form of fewer federal prosecutions, decreased federal lawmaking, or repeals of burdensome statutes. Nonetheless, developments after *Lopez* and *Morrison* merit some attention. Two questions suggest themselves: First, what happened to the dockets of the federal courts after *Lopez* and *Morrison*? Second, did Congress exercise the restraint that Rehnquist and his colleagues had urged and slow down the pace of federalization? We consider these questions in turn, and then offer a wider view of the influence of *Lopez* and *Morrison*.

Looking at raw numbers, *Lopez* plainly did not lead to a reduction in the overall criminal caseloads of the federal courts. In 1992, there were 48,366 new federal criminal cases filed in federal district court.⁴⁶³ That number dropped slightly in 1993 (to 46,786 new cases)⁴⁶⁴ and dropped again in 1994 (to 45,484 new cases),⁴⁶⁵ before regaining some lost ground in 1995 (45,788 new cases),⁴⁶⁶ the year of *Lopez*. Since then, the number of federal criminal cases has increased quite sharply. In 1998, there were 57,691 new criminal cases filed in federal district court, representing a twenty-six percent increase over just three years after the *Lopez* decision.⁴⁶⁷ The numbers have continued to climb: in 2014, 66,193 new federal criminal cases were filed,⁴⁶⁸ increasing the criminal docket forty-five percent since *Lopez*.

463. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 12 (1992).

464. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 12 (1997), <http://www.uscourts.gov/file/document/judicial-business-1997> [<http://perma.cc/2EP7-Q6FQ>].

465. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 16 (1998), <http://www.uscourts.gov/file/document/judicial-business-1998> [<http://perma.cc/2LCK-MAJ2>].

466. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES tbl.5.1 (2005), <http://www.uscourts.gov/file/13310/download> [<http://perma.cc/32BZ-4MRB>].

467. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 464, at 16.

468. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 192 tbl.D (2014), <http://www.uscourts.gov/file/12392/download> [<http://perma.cc/3Y5J-8MC7>].

Much of this growth resulted from increased numbers of drug and immigration prosecutions.⁴⁶⁹ *Lopez* did not, therefore, directly produce a drop in criminal cases. On the other hand, it remains possible that without *Lopez*, the increases in the criminal dockets of the federal courts would have been even higher.

With respect to weapons-related offenses specifically, the relevant figures also do not point to any dramatic impact of the *Lopez* decision. In 1994 there were three cases filed under the Gun-Free School Zones Act of 1990 (the statute at issue in *Lopez*).⁴⁷⁰ In 1995, seven new cases were filed under the statute in the months prior to invalidation of the law (in April of that year).⁴⁷¹ In response to *Lopez*, in September of 1996 Congress reenacted the invalidated statute with a new Commerce Clause hook that constrained the law's application to any firearm "that has moved in or that otherwise affects interstate or foreign commerce."⁴⁷² Prosecutors wasted no time in putting the revised statute to use: by the close of 1996, forty-two cases had been filed in federal district court.⁴⁷³ Since then, the number of new cases filed annually has varied from year to year but has remained quite low. The number of prosecutions under the revised statute hit its historical peak of eighty-two new cases in 1999—the year of the shooting at Columbine High School.⁴⁷⁴ In 2009, by contrast, there were just fourteen new cases under the revised statutory provision; in 2012, the number was thirty-five.⁴⁷⁵ Broadening the focus to include all firearms prosecutions in federal court shows a slight drop in prosecutions immediately after *Lopez*. In 1994 there were 3,112 new

469. Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 21 (2012) ("If we compare the number of federal criminal prosecutions in 1980 . . . to the number in 2011 . . . immigration and drug prosecutions . . . account for nearly . . . 83% of the increase.").

470. *Federal Criminal Case Processing Statistics*, BUREAU JUST. STAT., <http://www.bjs.gov/fjsrc/> (last visited Nov. 12, 2015) (under "U.S. Criminal Code: Choose a Statistic," select "Number of defendants in cases filed"; then select the correct "year" from the column; then choose "Select by chapter and section within U.S.C. Title 18"; then select "chapter 44-Firearms"; select as many of the following as available: "18 922 Q[.]" "18 922 Q1[.]" and "18 922 Q1A").

471. *Id.*

472. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 657, 110 Stat. 3009, 3009-269 to 271 (1996) (codified as amended in relevant part at 18 U.S.C. § 922(q)(2)(A) (2012)). While the Supreme Court has not ruled on whether the statute, as amended, is constitutional, lower courts have upheld it. *See, e.g.*, *United States v. Tait*, 202 F.3d 1320, 1324–25 (11th Cir. 2000) (holding the revised statute constitutional); *United States v. Danks*, 221 F.3d 1037, 1038 (8th Cir. 1999) (same).

473. *Federal Criminal Case Processing Statistics*, *supra* note 470.

474. *Id.*

475. *Id.*

firearms cases filed; that number grew to 3,621 in 1995.⁴⁷⁶ But in 1996, the number of new prosecutions dropped to 3,162—a fifteen percent decline from the prior year⁴⁷⁷—and the number held more or less steady through 1997.⁴⁷⁸ Beginning in 1998, however, the number of prosecutions ticked upward: 3,641 firearms cases in 1998;⁴⁷⁹ 4,367 cases in 1999;⁴⁸⁰ 5,387 cases in 2000;⁴⁸¹ and a whopping 9,246 new cases in 2004.⁴⁸² Keeping in mind that these figures represent all weapons-related offenses, at most, *Lopez* may have had an initial dampening effect upon prosecutorial zeal in such cases but one that wore off within a few years.

With respect to the civil dockets of the federal courts, developments since *Morrison* are mixed. The 1990s saw an overall increase in the federal district courts' civil dockets: from 217,879 new civil cases in 1990⁴⁸³ to 260,271 new cases in 1999.⁴⁸⁴ But that trend was not one of linear growth. Of particular note, in the period immediately after *Morrison*, the number of district court civil filings dropped: in 2001 there was a 3.3% decrease in cases from the number filed the previous year.⁴⁸⁵ Given that civil cases may involve only private parties, it would, however, be odd to suggest that the decision in *Morrison* somehow explains the decline. Since 2001, the civil

476. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS tbl.D-2 (1997), <http://www.uscourts.gov/file/12927/download> [<http://perma.cc/FYS2-HKEQ>].

477. *Id.*

478. *Id.* For 1997, the figure was 3,184 weapons and firearms offenses cases. *Id.*

479. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS tbl.D-2 (2000), <http://www.uscourts.gov/file/12930/download> [<http://perma.cc/KGW2-KPBS>].

480. *Id.*

481. *Id.*

482. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.D-2 (2004), <http://www.uscourts.gov/file/12921/download> [<http://perma.cc/MW4B-24KE>].

483. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES tbl.4.1 (2009), <http://www.uscourts.gov/file/13171/download> [<http://perma.cc/XQN4-G8X8>].

484. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS tbl.C (2000), <http://www.uscourts.gov/file/12214/download> [<http://perma.cc/KSH6-NHFG>].

485. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS tbl.C (2001), <http://www.uscourts.gov/file/12215/download> [<http://perma.cc/3CKY-ZHSZ>] (indicating that 259,517 civil cases were filed in 2000 and 250,907 cases were filed in 2001).

docket of the district courts has yo-yoed⁴⁸⁶ from a low of 252,962 new cases in 2003 to a recent high of 303,820 new cases in 2014.⁴⁸⁷

Appeals to the circuit courts (in both criminal and civil cases) rose steadily from 49,784 appeals in 1994 to 53,895 appeals in 1999⁴⁸⁸ and to 70,375 appeals in 2006.⁴⁸⁹ After 2006, however, appeals receded annually so that in 2014, just 55,623 new appeals were filed, producing a twenty-six percent decline over the course of seven years.⁴⁹⁰

In assessing the above statistics, the number of judges sharing this caseload affects how these figures reflect the actual work of the courts. Since 1994 (the year before *Lopez*), Congress has created thirty-one new permanent district court judgeships but no new circuit court judgeships.⁴⁹¹ Based simply on the numbers of cases, since 1994 the number of criminal cases per district court judgeship has increased by about forty-six percent.⁴⁹² Since 1999 (the year before *Morrison*) the number of civil cases per district court judgeship has increased by about six percent.⁴⁹³ The number of cases per appellate

486. For example, district court judges saw over 274,000 new cases filed in 2002; nearly 253,000 in 2003; over 281,000 in 2004, and back to about 253,000 in 2005. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 120 tbl.C (2003), <http://www.uscourts.gov/file/12217/download> [<http://perma.cc/D6PU-JEH3>]; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS tbl.C (2005), <http://www.uscourts.gov/file/12219/download> [<http://perma.cc/NG9T-5HVQ>].

487. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 120 tbl.C (2003), <http://www.uscourts.gov/file/12217/download> [<http://perma.cc/F7C3-8RQ5>]; ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.C (2014), <http://www.uscourts.gov/file/12201/download> [<http://perma.cc/Z2AG-GRDF>].

488. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.JCI (2003), <http://www.uscourts.gov/file/13500/download> [<http://perma.cc/W6B5-AK4G>].

489. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.B (2006), <http://www.uscourts.gov/file/12109/download> [<http://perma.cc/X27H-X3VX>].

490. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.B (2014), <http://www.uscourts.gov/file/12103/download> [<http://perma.cc/V8WY-E2B2>].

491. *Authorized Judgeships—From 1789 to Present*, ADMIN. OFFICE OF THE U.S. COURTS 7–8, <http://www.uscourts.gov/JudgesAndJudgeships/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/all-judgeships.pdf> [<http://perma.cc/U5U8-ZN3W>].

492. In 1994, there were 632 district court judgeships and 45,484 new criminal filings. *Id.* at 7; ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 464, at 16. In 2014, there were 663 district court judgeships and 66,193 new criminal filings. *Authorized Judgeships—From 1789 to Present*, *supra* note 491, at 8; ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 468, at tbl.D. This represents an increase from seventy-two new cases per judgeship to 100 new cases per judgeship, i.e. an increase of thirty-nine percent.

493. In 1999, there were 641 district court judgeships and 260,271 new civil filings. *Authorized Judgeships—From 1789 to Present*, *supra* note 491, at 7; ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 484, at tbl.C. In 2014, there were 663 district court judgeships and 303,820 new civil filings, an increase from 406 new cases per judgeship to 458 new cases per judgeship, i.e. an increase of thirteen percent. *Authorized Judgeships—From 1789 to Present*, *supra* note 491, at 8; ADMIN. OFFICE OF THE U.S. COURTS,

judgeship has risen by about thirteen percent since 1994.⁴⁹⁴ District courts and circuit courts thus have more cases than they did before *Lopez* and *Morrison*—with the largest increase occurring in the criminal dockets of the federal district courts. The added burden of additional cases is even higher than these numbers suggest because, as a result of delays in nominating and confirming judges to vacant seats, not all of the available judgeships are filled.⁴⁹⁵

Nonetheless, the more dire predictions of the 1995 Long Range Plan⁴⁹⁶ did not materialize. Recall that the plan concluded that the federal district courts were on a path to docketing 364,800 cases (criminal and civil) in 2000 and 610,800 cases in 2010.⁴⁹⁷ In fact, the numbers turned out to be only about 324,000⁴⁹⁸ cases and 360,000⁴⁹⁹ cases in those years respectively: the Plan’s predicted surge in the first decade of the new millennium simply did not occur. A further signal that crisis was averted—or its risk overstated—is the Judicial Conference’s 2010 “Strategic Plan for the Federal Judiciary.”⁵⁰⁰ In contrast to the doomsday calls for fundamental change in the 1995 plan, the 2010 plan offers in a breezy eighteen pages a few modest proposals: increasing judicial compensation in order to continue to attract high-quality judges;⁵⁰¹ making “more effective use” of senior judges;⁵⁰² and some minor modernizations to improve administrative efficiency.⁵⁰³ The most significant development since *Lopez* and

FEDERAL JUDICIAL CASELOAD STATISTICS tbl.C (2014), <http://www.uscourts.gov/file/12201/download> [<http://perma.cc/Z2AG-GRDF>].

494. In 1994, there were 167 appellate judgeships and 49,784 appeals. *Authorized Judgeships—From 1789 to Present*, *supra* note 491, at 7; ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 488, at tbl.JCI. In 2014, the number of judgeships remained at 167 but the number of appeals had increased to 55,623. This represents an increase from 298 cases per judgeship to 333 cases per judgeship, i.e. an increase of eleven percent. *Authorized Judgeships—From 1789 to Present*, *supra* note 491, at 8; ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 490, at tbl.B.

495. See *Current Judicial Vacancies*, U.S. COURTS: JUDGES & JUDGESHIPS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> (last updated Nov. 9, 2015) [<http://perma.cc/2R94-TJ6X>] (reporting sixty-seven lower federal court vacancies).

496. See *supra* note 342 and accompanying text.

497. JUDICIAL CONFERENCE OF THE U.S., *supra* note 316, at 75.

498. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.JCI (2001), <http://www.uscourts.gov/file/13494/download> [<http://perma.cc/WSX9-JWZ3>].

499. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.JCI (2010), <http://www.uscourts.gov/file/13491/download> [<http://perma.cc/63J7-VUCV>].

500. JUDICIAL CONFERENCE OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY (2010), <http://www.uscourts.gov/file/2748/download> [<http://perma.cc/59LN-LLFC>].

501. *Id.* at 7.

502. *Id.* at 8.

503. *Id.*

Morrison might, then, be the disappearance of a deep sense that something must be done in order to save the federal courts.

The decline in urgency on the judicial side may reflect developments on the legislative. There is at least some indication that since 2000 Congress (whether as a result of the Court's admonitions or not) has exercised more legislative restraint than it did in previous decades. Commentators report a slowdown in the rate of enactment of new federal criminal statutes.⁵⁰⁴ Between 2000 and 2011, Congress enacted fewer than fifty major federal criminal statutes, a drop from eighty such statutes in the previous decade,⁵⁰⁵ representing a return to a rate of federal criminal lawmaking last seen in the 1960s.⁵⁰⁶ This drop in the number of new federal criminal statutes tracks an overall decline in congressional lawmaking.⁵⁰⁷ More generally, members of Congress have recently shown a keener awareness of concerns Rehnquist repeatedly articulated: the House Committee on the Judiciary has formed an "Over-Criminalization Task Force" to address "the growing problem of over-criminalization and over-federalization."⁵⁰⁸ That said, it is well to remember that old habits die hard: within a year of the *Lopez* decision, Congress invoked the Commerce Clause as a basis for new criminal laws such as the Church Arson Prevention Act⁵⁰⁹ and the Child Pornography Prevention Act.⁵¹⁰

H. Summary

Lopez and *Morrison* represented the culmination of more than a century of efforts by the Supreme Court to safeguard the role of the

504. Klein & Grobey, *supra* note 469, at 14.

505. *Id.*

506. *Id.*

507. See Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1099, 1104 (2013) (identifying 650 new statutes from the 101st Congress (1989–1991) but just 377 new statutes from the 107th Congress (2001–2003) and attributing the decline to congressional gridlock).

508. *Defining the Problem and Scope of Over-Criminalization and Over-Federalization: Hearing Before the Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary*, 113th Cong. 1 (2013) (statement of Rep. Jim Sensenbrenner, Member, H. Comm. on the Judiciary).

509. Pub. L. No. 104-155, 110 Stat. 1392 (codified as amended at 18 U.S.C. § 247(b) (2012)) (prohibiting the destruction of religious real property that affects interstate or foreign commerce).

510. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-26 (1996) (codified as amended at 18 U.S.C. §§ 2251–2252, 2256 (2006)) (prohibiting the interstate distribution or receipt of sexually explicit visual depictions of minors). The Court ultimately held the Act unconstitutional on First Amendment grounds. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256 (2002).

judicial branch in our constitutional structure. Doctrinally, the cases involved questions of the scope of congressional power under the Commerce Clause and (in *Morrison*) the Fourteenth Amendment as well as the degree of deference courts owe to Congress when it legislates under those powers. By centering on these issues, however, debate over the outcomes in *Lopez* and *Morrison* has overlooked a more basic justification for the Court's rulings. When the Court acts to protect the judiciary—and particularly when it does so only after repeated requests to Congress for help—it is on firmer constitutional ground than critics of *Lopez* and *Morrison* have recognized. Federal lawmaking does not always present a docket issue and docket issues do not always undermine the security of the judicial branch. At the time of *Lopez* and *Morrison*, however, the judiciary viewed itself to be under considerable stress and there was no indication that Congress—continuing to create new federal causes of action—would provide relief. Under those circumstances, the Court's response—invalidating one criminal statute and one civil cause of action—was less revolutionary than preservationist.

IV. BEYOND *LOPEZ* AND *MORRISON*

Docket control goes a long way in explaining *Lopez* and *Morrison*. Docket control also sheds helpful light on other decisions of the Supreme Court, including decisions that are not conventionally thought of as involving questions of federalism. In this Part, we explore some areas in which a docket control account may prove useful, including further often-discussed examples from the Rehnquist Court and even extending the rationale as far back as *Marbury*.

A. *The Rest of the Rehnquist-Era Revolution*

Docket control may helpfully serve as a common thread in decisions of the Rehnquist Court across a wide range of topics. For example, the Rehnquist Court invoked Tenth Amendment principles to limit the application of federal law to state governments⁵¹¹ and it crafted broad rules of Eleventh Amendment state sovereign immunity.⁵¹² In several notable contexts it ruled that there existed no

511. See *Gregory v. Ashcroft*, 501 U.S. 452, 462, 470 (1991) (adopting a “plain statement” statutory requirement to hold that the Federal Age Discrimination in Employment Act did not apply to state judges).

512. See, e.g., *Bd. of Trs. v. Garrett*, 531 U.S. 356, 373–74 (2001) (holding that Congress did not validly abrogate state sovereign immunity in Title I of the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (holding abrogation

private right of action under federal law⁵¹³ or construed jurisdictional statutes so as to preclude a federal hearing⁵¹⁴ or to create concurrent state court jurisdiction.⁵¹⁵ It embraced broad understandings of the abstention doctrine (something Rehnquist had long championed)⁵¹⁶ as a basis for denying federal court intervention.⁵¹⁷ It took a broad approach to the use of arbitration in lieu of judicial resolution of

invalid in Age Discrimination in Employment Act); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 646–48 (1999) (holding that because Congress lacks power to abrogate state sovereign immunity under the Commerce Clause, abrogation by Patent and Plant Variety Protection Remedy Clarification Act was invalid); Seminole Tribe v. Florida, 517 U.S. 44, 72, 75–76 (1996) (holding that the Eleventh Amendment prevents Congress from authorizing suits by Indian tribes against states to enforce legislation enacted pursuant to the Indian Commerce Clause and that the doctrine of *Ex parte Young* could also not be used to enforce the law against a state official).

513. See, e.g., Gonzaga Univ. v. Doe, 536 U.S. 273, 287 (2002) (holding that the Family Educational Rights and Privacy Act's non-disclosure provisions confer no enforceable rights under § 1983); Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (holding that there is no private right of action to enforce disparate impact regulations under Title VI of the Civil Rights Act of 1964); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 73–74 (2001) (holding that federal inmate cannot bring Eighth Amendment claim against private operator of correctional facility); Suter v. Artist M., 503 U.S. 347, 363 (1992) (holding that the Adoption Assistance and Child Welfare Act does not create rights enforceable in an action under § 1983 and does not create an implied private cause of action).

514. See, e.g., Finley v. United States, 490 U.S. 545, 553 (1989) (holding that the FTCA does not provide federal district court with jurisdiction over defendants other than the United States). An additional important example, in the last term of the Burger Court, is the decision, joined by Rehnquist, in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), that an alleged violation of a federal statute, as part of a claim, is not sufficient for the federal courts to exercise federal question jurisdiction (under 28 U.S.C. § 1331) if the statute alleged to have been violated does not itself create a private cause of action. See *id.* at 810 (“We have consistently emphasized that, in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system.”).

We recognize, of course, that the construction of jurisdictional statutes to limit cases that could be brought in federal court did not begin with Rehnquist or the Rehnquist Court. The well-pleaded complaint rule is one much earlier example of the practice. See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 154 (1908) (holding that federal question jurisdiction can only arise if the plaintiff's own cause of action shows a federal statutory or constitutional claim independent of any anticipated defenses).

515. See, e.g., *Tafflin v. Levitt*, 493 U.S. 455, 467 (1990) (holding that state courts have concurrent jurisdiction over civil RICO claims because “[n]othing in the language, structure, legislative history, or underlying policies of RICO suggests that Congress intended otherwise”).

516. See, e.g., *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606–07 (1975) (Rehnquist, J.) (invoking “considerations of comity and federalism” to extend *Younger* abstention to certain state civil proceedings).

517. See, e.g., *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 2 (1987) (holding that *Younger* abstention applied where judgment debtor brought federal action to challenge the constitutionality of a Texas court judgment's application of lien and appeal bond).

claims.⁵¹⁸ It adopted generous rules of immunity shielding government officials from lawsuits.⁵¹⁹ Announcing that “[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action,’ ”⁵²⁰ it clarified, in a famous trilogy, the standards by which judges could resolve cases on summary judgment rather than have them to proceed to trial.⁵²¹ In each of these areas, the Court limited the possibilities of bringing a case to federal court in the first place or gave federal judges additional tools to dispose of cases before them. Some commentators have viewed many of these cases as reflecting the Court’s hostility to certain kinds of claims⁵²² (particularly civil rights claims)⁵²³ or to litigation in general,⁵²⁴ but

518. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding that a claim under the Federal Age Discrimination in Employment Act can be subjected to compulsory arbitration pursuant to an arbitration agreement); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485–86 (1989) (holding that an agreement to arbitrate claims under the Securities Act of 1933 is enforceable).

519. See, e.g., *Brosseau v. Haugen*, 543 U.S. 194, 197–98, 201 (2004) (per curiam) (holding that because it was not clearly established law that use of deadly force against fleeing suspect violated Fourth Amendment, officer was entitled to qualified immunity); *Saucier v. Katz*, 533 U.S. 194, 202, 206–08 (2001) (holding that “[i]f the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate” and therefore officer who reasonably but mistakenly believed amount of force used was lawful was entitled to qualified immunity), *abrogated by Pearson v. Callahan*, 555 U.S. 223 (2009).

520. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting FED. R. CIV. P. 1).

521. See, e.g., *id.* at 325–26 (clarifying the shifting allocations of burdens of production, persuasion, and proof at summary judgment and holding that the moving party need only point out an absence of evidence supporting the alleged claim such that there is no requirement that the moving party provide affidavits or other material); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255–56 (1986) (holding that in order to avoid a motion for summary judgment plaintiffs in a libel suit were required to meet the burden they would face at trial and they had failed to do so); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (holding in an antitrust conspiracy suit that in order to survive a motion for summary judgment, the nonmoving party was required to “do more than simply show that there is some metaphysical doubt as to the material facts”).

522. See, e.g., Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 711 (2000) (describing the Rehnquist Court as holding “a genuine antipathy to privately-initiated litigation as a mechanism to control government wrongdoing”).

523. See, e.g., LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 2 (1994) (“The Supreme Court’s decisions . . . have taken far too much decision-making away from the federal courts and given it to the courts of the states. . . . [T]he federal courts have lost the capacity to check the . . . power of government”); Erwin Chemerinsky, *Closing the Courthouse Doors to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537, 539 (2003) (describing a pattern of the Rehnquist Court in preventing civil rights litigants from accessing courts in order to seek relief); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 (2003) (writing that the Rehnquist Court “launched

docket control provides an alternative account. We do not mean to overstate the claim. The Court's decisions in these areas, as in the context of enumerated federal powers,⁵²⁵ do not share a single direction⁵²⁶ and there is debate about the actual impact of these cases on the workload of the federal courts.⁵²⁷ Nonetheless, the overall result is some additional tools to trim some⁵²⁸ of the caseload of the federal courts.⁵²⁹

a wholesale assault on one of the primary mechanisms Congress has used for enforcing civil rights: the private attorney general”).

524. See Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1107 (2006) (“In case after case and in wildly divergent areas of the law, the Rehnquist Court has expressed a profound hostility to litigation.”). That said, Professor Siegel ends up concluding that “the great bulk of the litigation-hostile decisions . . . forward the policies or social vision of modern American conservatism,” *id.* at 1199, by, among other things, “favor[ing] business interests by limiting damages, closing courts, or otherwise making it difficult for civil plaintiffs to prevail . . .” *Id.* at 1199 n.452.

525. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 2–3 (2005) (holding that the Commerce Clause permits the federal government to ban intra-state possession of marijuana for medicinal use). Notably in *Raich*, three of the Justices in the majority in *Lopez* and *Morrison* (O'Connor, Rehnquist, and Thomas) dissented. See *id.* at 34 (O'Connor, J., dissenting) (“[T]he case before us is materially indistinguishable from *Lopez* and *Morrison* . . .”).

526. See, e.g., *Hibbs v. Winn*, 542 U.S. 88, 89 (2004) (holding that the Tax Injunction Act did not bar Establishment Clause challenge in federal court to state tax credits); *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (holding abrogation of state sovereign immunity proper under Title II of the Americans with Disabilities Act with respect to right to access courtroom); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 739–40 (2003) (holding that Congress validly abrogated state sovereign immunity under the family-care provision of the Family and Medical Leave Act); *FEC v. Akins*, 524 U.S. 11, 13–14 (1998) (holding that a group of voters had standing to challenge ruling by Federal Election Committee on issue of disclosure requirement of federal election law).

527. For example, there has been considerable debate as to whether the summary judgment trilogy actually resulted in district courts resolving more cases on summary judgment. Compare Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1339 (2005) (proposing a link between the trilogy and declining jury trials), with Linda S. Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 LOY. U. CHI. L.J. 561, 561–62 (2012) (“[T]he trilogy has not resulted in federal judges granting or denying summary judgment in statistically significant ways than before the trilogy.”).

528. The qualification is important. The Eleventh Amendment, for example, does not protect the states from all litigation. Notably, it does not preclude seeking prospective injunctive relief against a state official. *Ex Parte Young*, 209 U.S. 123, 124–25 (1908), *superseded by statute*, Act of Oct. 21, 1976, Pub. L. No. 94-574, sec. 1, § 702, 90 Stat. 2721, 2721. The Eleventh Amendment also has no application to cities or counties. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994).

529. Some of the decisions, of course, do more than that: they also remove cases from state court. See, e.g., *Alden v. Maine*, 527 U.S. 706, 754–55 (1999) (holding that state sovereign immunity applies also in state court when a state is sued under federal law). But this effect (which might in any event be limited: there might well exist alternative state law

B. Habeas Corpus

Lopez and *Morrison* coincided with a remarkable shift in the rules governing federal habeas claims by state inmates. During the 1960s, a period in which the Supreme Court crafted and imposed upon state courts new rights for criminal defendants,⁵³⁰ the Court also significantly expanded the opportunities for federal courts to review through habeas petitions state court convictions and sentences.⁵³¹ From the time he arrived at the Court in 1972, Rehnquist took a strong position (one he had held as a law clerk)⁵³² that federal habeas review of state court proceedings should instead be extremely limited.⁵³³ Initially, Rehnquist expressed this view most often in dissenting opinions.⁵³⁴ However, as like-minded colleagues joined the

causes of action) may merely be an unavoidable byproduct of protecting the dockets of the federal courts.

530. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (incorporating Sixth Amendment right to a jury trial against the states); *Miranda v. Arizona*, 384 U.S. 436, 478 (1966) (requiring exclusion of statements made in the course of custodial interrogation unless suspect was warned of right to remain silent and right to counsel and voluntarily waived those rights); *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963) (requiring appointment of counsel for indigent defendants charged with serious offenses in state court); *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961) (applying Fourth Amendment exclusionary rule to state proceedings).

531. See, e.g., *Fay v. Noia*, 372 U.S. 391, 438 (1963) (holding that a federal habeas petitioner may raise claims not presented at trial in state court unless the petitioner “deliberately by-passed the orderly procedure of the state courts.”), *overruled by* *Wainwright v. Sykes*, 433 U.S. 72, 87–88 (1977); *Sanders v. United States*, 373 U.S. 1, 6 (1963) (allowing multiple habeas petitions); *Townsend v. Sain*, 372 U.S. 293, 312 (1963) (allowing development of factual record as part of federal habeas procedure), *overruled by* *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5 (1992).

532. See Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2343 n.52 (1993) (reporting on the memorandum with the title “Habeas Corpus Then and Now; Or, ‘If I Can Just Find the Right Judge, Over These Prison Walls I Shall Fly,’ ” that Rehnquist prepared as a law clerk to Justice Robert Jackson).

533. See, e.g., *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (“[T]he historic meaning of habeas corpus . . . [is] to afford relief to those whom society has ‘grievously wronged.’ ”); *id.* at 633 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) (“The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited [to state proceedings]. Federal courts are not forums in which to relitigate state trials.”)).

534. See, e.g., *Bounds v. Smith*, 430 U.S. 817, 837–39 (1977) (Rehnquist, J., dissenting) (dissenting from Court’s holding that inmates have a fundamental right of court access that includes a right to law books on the ground that “[t]he prisoners here in question have all pursued all avenues of direct appeal available to them from their judgments of conviction” and “there is nothing in the United States Constitution which requires that a convict serving a term of imprisonment in a state penal institution pursuant to a final judgment of a court of competent jurisdiction have a ‘right of access’ to the federal courts in order to attack his sentence”); see also *Coleman v. Balkcom*, 451 U.S. 949, 957, 958, 964 (1981) (Rehnquist, J., dissenting from denial of certiorari) (writing that by allowing “so many bites at the apple,” habeas corpus has produced a “mockery of our criminal justice

Court and as greater attention turned to the impact of habeas cases upon the dockets of federal courts and the resulting instability for state court processes, Rehnquist's position became more frequently that of the majority. The Burger Court cut back on some of the habeas innovations of the Warren Court.⁵³⁵ As Chief Justice, Rehnquist presided over a more dramatic curtailment of federal habeas review.⁵³⁶

Rehnquist's efforts to reform habeas extended beyond the courtroom. As Chief Justice, he repeatedly urged Congress to limit by statute the ability of state inmates to bring habeas petitions to federal court and the power of federal judges to hear them.⁵³⁷ Among other

system" and urging review of lower court decision in order to shut off all federal claims by petitioner such that "the jurisdiction of the federal courts over petitioner's sentence of death would be at an end, and . . . it would presumably be carried out"); *Estelle v. Jurek*, 450 U.S. 1014, 1019, 1021 (1981) (Rehnquist, J., dissenting from denial of certiorari) (writing in response to the Court's denial of review in a case in which the petitioner had obtained habeas relief from the Fifth Circuit on the ground that a confession he had made was involuntary, that "[t]he severity of a defendant's punishment . . . simply has no bearing on the extent to which federal habeas courts should defer to state-court findings[,] and that "[b]y overturning Jurek's conviction on the basis of a procedural nicety, the decision below . . . frustrates society's compelling interest in having its constitutionally valid laws swiftly and surely carried out").

535. See, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 85–91 (1977) (Rehnquist, J.) (holding that failure to present a claim in state court bars federal review of the claim absent a showing of cause and prejudice); *Stone v. Powell*, 428 U.S. 465, 494 (1976) (barring habeas review of Fourth Amendment issues). See generally Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 749 (1987) ("Perhaps the area where the Burger Court most dramatically departed from the Warren Court precedents was in the area of habeas corpus.").

536. See, e.g., *Schlup v. Delo*, 513 U.S. 298, 320–24, 327–28 (1995) (holding that a petitioner who defaulted in state court can proceed on the federal petition only if forfeiture would result in a miscarriage of justice because of the petitioner's "actual innocence," meaning "that it is more likely than not that no reasonable juror would have convicted him"); *Brecht*, 507 U.S. at 637–38 (rejecting "harmless error beyond a reasonable doubt" standard in habeas cases in favor of a test of whether an error had a "substantial and injurious effect or influence in determining the jury's verdict"); *Herrera v. Collins*, 506 U.S. 390, 391, 400 (1993) (holding that an actual claim of innocence is an insufficient basis for habeas relief unless the petitioner can show evidence of "an independent constitutional violation" in the state proceeding); *Keeney*, 504 U.S. at 2 (1992) (prohibiting subsequent petitions absent exceptional situations); *McCleskey v. Zant*, 499 U.S. 467, 494 (1991) (holding that negligence by an attorney is cause for a procedural default only if it rises to the level of ineffective assistance of counsel); *Teague v. Lane*, 489 U.S. 288, 299 (1989) (plurality) (holding that a new rule does not generally apply retroactively to cases on collateral review).

537. For example, speaking before the American Law Institute in 1990 about habeas review in capital cases, Rehnquist said that delays in carrying out executions created by collateral review has produced a system that "verges on the chaotic" and "cries out for reform." Chief Justice William H. Rehnquist, Address Before American Law Institute (May 16, 1990); see also DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 412–13 (1992) ("Rehnquist had become determined to

steps, in 1988, Rehnquist appointed a committee chaired by Justice Powell to propose reforms to habeas litigation in capital cases. Ignoring a vote by the Judicial Conference to defer action on the committee's report (which advocated significant reductionist measures), Rehnquist on his own submitted it to Congress. This action triggered a statutory requirement that the chair of the Senate Judiciary Committee introduce reform legislation within fifteen days of transmittal of the report.⁵³⁸ The resulting bill did not, however, pass Congress and other legislative efforts also stalled.⁵³⁹ However, one year after *Lopez*, Congress delivered: Title I of the Federal Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),⁵⁴⁰ a law Rehnquist had publicly supported, placed numerous restrictions on federal habeas review of state court convictions and sentences.⁵⁴¹

The combination of AEDPA and the habeas decisions of the Rehnquist Court worked a dramatic change.⁵⁴² In his 1997 annual report on the federal judiciary, Rehnquist stated approvingly: "As of June 1997, the number of habeas corpus applications has fallen well below the average number of monthly filings during the 15 months prior to the law's enactment in April of 1996."⁵⁴³ More recent data confirm the longer-term effect of the reform efforts Rehnquist led. A study of a randomly selected sample of federal habeas petitions found that forty-two percent of petitions in noncapital cases filed during 2003 and 2004 and twenty-eight percent of petitions in capital cases filed from 2000 and 2002 were dismissed without the courts reaching

change the [habeas] system. It was chaotic, wasteful, and an abuse of the people's right to have laws enforced, he contended in series of speeches.").

538. Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1, 56-61 (1991).

539. *Id.*

540. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. § 2254 (2012)).

541. Among other things, AEDPA requires deference to state court findings of fact; bars granting a habeas petition on the basis of an issue adjudicated in state court unless that state court decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; imposes a one-year time limit (from the date a conviction becomes final) for filing a habeas petition; and strictly limits subsequent petitions. *Id.*; see also LARRY W. YACKLE, FEDERAL COURTS 662-82 (3d ed. 2009) (discussing the consequences of AEDPA for federal habeas corpus jurisprudence).

542. Sue Davis, *The Chief Justice and Judicial Decision-Making: The Institutional Basis for Leadership on the Supreme Court*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 143 (Cornell W. Clayton & Howard Gillman eds., 1999) (describing Rehnquist's "victory in reducing habeas corpus").

543. REHNQUIST, *supra* note 296, at 5.

the merits.⁵⁴⁴ Of the 341 petitions in noncapital filings studied, the petitioner received the requested relief in only one; this is a significant departure from the rate of relief for noncapital filings prior to AEDPA where the petitioner received relief in one out of every one hundred petitions.⁵⁴⁵ In another study, forty percent of state capital prisoners who filed federal habeas petitions had their convictions or sentences overturned before the enactment of the 1996 law; between 2000 and 2006 that number dropped to twelve percent and it continues to decline.⁵⁴⁶

Throughout Rehnquist's own early opinions urging limits to habeas review and the later opinions of the Court imposing such limits, there is a focus that is consistent with the account of *Lopez* and *Morrison* offered in this Article. First, in case after case, there is concern with the burden habeas petitions from state inmates impose upon the lower federal courts⁵⁴⁷ (even though such petitions have always represented a relatively small portion of the overall federal docket).⁵⁴⁸ As with *Lopez* and *Morrison*, the docket concern rested upon issues of constitutional structure. Strong federal habeas review of state court convictions and sentences risks displacing the state courts as the place where criminal trials occur, alters the division of labor between the federal and state courts, and degrades both

544. NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS 2, 9 (2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf> [<http://perma.cc/9SD2-HK8N>].

545. *Id.* at 9.

546. David R. Dow & Eric M. Freedman, *The Effects of AEDPA on Justice*, in THE FUTURE OF AMERICA'S DEATH PENALTY 261, 265–67 (Charles S. Lanier et al. eds., 2009) (citing a study that examined every capital case in the United States between 1973 and 1995).

547. See, e.g., *Withrow v. Williams*, 507 U.S. 680, 704 (1993) (O'Connor, J., concurring in part and dissenting in part) (“Despite its meager benefits, the relitigation of *Miranda* claims on habeas imposes substantial costs . . . [by] consum[ing] scarce judicial resources on an issue unrelated to guilt or innocence.”); *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (“Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes.”); *Stone v. Powell*, 428 U.S. 465, 493 (1976) (“[T]he additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs.”).

548. See Linda Greenhouse, *A Window on the Court; Limits on Inmates' Habeas Corpus Petitions Illuminate Mood and Agenda of the Justices*, N.Y. TIMES, May 6, 1992, at A1 (reporting that the 10,000 habeas petitions state inmates file each year in federal district court represent five percent of the civil cases filed). In the twelve-month period ending March 31, 2013, there were 271,950 civil cases filed in the federal district courts of which 18,815 were habeas cases. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.C-2 (2013), <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/C02Mar13.pdf> [<http://perma.cc/45T2-FJ8F>].

systems.⁵⁴⁹ On this account, when the Supreme Court announces—in cases like *Duncan*, *Miranda*, *Gideon*, and *Mapp*⁵⁵⁰—constitutional rules that apply in criminal trials in state courts, the task of implementing those rules should fall on the state courts that conduct the trials (with the possibility of review at the end of the process by the U.S. Supreme Court). Having the lower federal courts oversee the application of federal constitutional rules in ordinary state criminal trials is inconsistent with the federalist division of labor in our judicial system.⁵⁵¹ In sum, the Rehnquist Court’s habeas decisions worked in tandem with *Lopez* as docket controlling devices. *Lopez* ensured traditional state law crimes—like gun possession—were prosecuted in state courts; the habeas decisions prevented those state court cases from later appearing in federal court after the state trial and conviction.

C. Marbury

A good test of an idea is its ability to shed new light on an issue thought firmly settled. To that end, our docket control account provides new insight into the most famous Supreme Court decision of all: *Marbury v. Madison*.⁵⁵²

549. See, e.g., *Withrow*, 507 U.S. at 704 (O’Connor, J., concurring and dissenting in part) (“[T]he relitigation of *Miranda* claims on habeas . . . creates tension between the state and federal courts. And it upsets the division of responsibilities that underlies our federal system.”); *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (referring to “comity and federalism” as reasons for limiting habeas review); *id.* at 636 (“State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process.”); *id.* at 637 (“Overturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless . . . infringes upon their sovereignty over criminal matters.”).

550. See *supra* note 530.

551. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 726 (1991) (“This is a case about federalism. It concerns the respect that federal courts owe the States and the States’ procedural rules when reviewing the claims of state prisoners in federal habeas corpus.”); *Engle v. Isaac*, 456 U.S. 107, 128 (1982) (“The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.”); *id.* at 127 (“Liberal allowance of the writ . . . degrades the prominence of the trial itself.”); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (“The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event. . . . To the greatest extent possible all issues . . . should be determined in this proceeding . . . [T]he state trial on the merits [should be] the ‘main event,’ . . . rather than a ‘tryout on the road’ for what will later be the determinative federal habeas hearing.”).

552. 5 U.S. (1 Cranch) 137 (1803).

Today, *Marbury* is routinely understood as the landmark case that established judicial review and judicial supremacy: the power of the Supreme Court to determine the meaning of the Federal Constitution in a way that binds other branches of government and to review laws (and government action more generally) for consistency with what the Constitution requires.⁵⁵³ Invoking *Marbury*, “judges, lawyers, politicians, and the general public today accept the principle of judicial supremacy—indeed, they assume it as a matter of course.”⁵⁵⁴ Yet that view of *Marbury* represents a modern understanding of the case.⁵⁵⁵ At the time it was decided, *Marbury* was viewed in more modest terms; indeed, the decision attracted relatively little attention.⁵⁵⁶ As Professor Paulsen has shown, the broad notion of judicial review and supremacy attributed to *Marbury* today is more a modern myth that has built up around the case than a reflection of what Chief Justice Marshall’s opinion accomplished.⁵⁵⁷

Instead of asserting a bold new claim to judicial supremacy, Marshall’s opinion may be alternatively understood as having reiterated the uncontroversial notion that courts have a “a *coordinate, coequal* power . . . to *judge for themselves* the conformity of acts of the other two branches with the fundamental law of the Constitution, and to refuse to give acts contradicting the Constitution any force or effect

553. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 833 n.40 (1988) (“That the task of interpreting the great, sweeping clauses of the Constitution ultimately falls to us has been for some time an accepted principle of American jurisprudence. See *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803) (‘It is emphatically the province and duty of the judicial department to say what the law is’.)”); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever been respected by the Court and the Country as a permanent and indispensable feature of our constitutional system.”); CLIFF SLOAN & DAVID MCKEAN, *THE GREAT DECISION: JEFFERSON, ADAMS, MARSHALL, AND THE BATTLE FOR THE SUPREME COURT* 190 (1st ed. 2009) (describing *Marbury* as “firmly establish[ing] the Supreme Court as the final arbiter of the Constitution”).

554. Kramer, *supra* note 4, at 6–7.

555. See generally ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 220 (1989) (attributing the Court’s adoption of a power of judicial supremacy grounded in *Marbury* to the efforts of the Warren Court in 1985); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 10 (2007) (“It is the modern Court, not the early Court, that has been most aggressive in asserting the reality of judicial supremacy.”).

556. See CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 48–49 (1996) (recounting muted response to *Marbury* at the time the case was decided).

557. Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2706–43 (2003).

insofar as application of the judicial power is concerned.”⁵⁵⁸ In other words, when asked to decide a case before it, a court is required to apply the law, and the law includes the Constitution. If forced to choose between a statutory provision and a constitutional requirement, a court gives effect to the Constitution. By the same token, because the other branches of government are also bound by the Constitution, when they carry out their tasks—enacting legislation (Congress) and implementing laws (the Executive)—they too necessarily engage in interpreting the Constitution’s meaning.⁵⁵⁹ Thus, rather than the Supreme Court serving as the ultimate arbiter of constitutional meaning, *Marbury* affirmed that “no branch has interpretive supremacy; that each branch has independent interpretive power within its own sphere.”⁵⁶⁰

This more modest understanding of *Marbury* makes considerable additional sense when the case is read in light of the docket concerns articulated in this Article. Although Marshall did not refer to the Supreme Court’s workload in his opinion, a concern with docket control tracks the facts of the case, aligns with much of the language of the opinion, and reflects the hazards the Court confronted in the early years of the Republic. Rather than establishing judicial supremacy or even a general power of judicial review, when viewed in terms of dockets, *Marbury* stands for the more limited proposition that the Court has particular constitutional authority to act in order to preserve its own status and role in the constitutional scheme. That is to say, whatever the merits of judicial review in general, the Court is on very firm constitutional ground when it refuses to give effect to laws that unduly burden the judiciary or when it otherwise resists actions by the other branches of government that would undermine the core role of the judicial branch.

On this approach, the problem with Section 13 of the Judiciary Act, which, as Marshall read it, expanded the Supreme Court’s original jurisdiction, was that it risked turning the Supreme Court into a go-to panel of low-level arbiters of citizen-official disputes. Mired in deciding original applications for writs of mandamus and perhaps other small-potato tasks Congress might assign in the future, the Court would face significant difficulties in fulfilling the roles the Constitution requires of it—including serving as a national appellate court. It was bad enough that the early Congress required the Justices

558. *Id.* at 2708–09.

559. *Id.* at 2725–27.

560. *Id.* at 2730.

to ride circuit and stubbornly refused to relieve them of that hardship.⁵⁶¹ If Congress could also force open the Court's door in the first instance to mandamus petitions, the Justices would never be much more than minor magistrates hearing potentially thousands of complaints about what government officials had done or failed to do. *Lopez* thus sheds light on *Marbury*, and *Marbury* in turn provides a solid justification for the *Lopez* ruling: the Court has particular constitutional authority to protect the judiciary from burdens imposed by the political branches that undermine the place of the judiciary in the constitutional scheme.

Many of the famous lines from *Marbury*, routinely cited as supporting judicial review and judicial supremacy, might well stand for the more basic idea that the Constitution protects the courts from incursions by the other branches of government. For example, Marshall states: "It is emphatically the province and duty of the judicial department to say what the law is."⁵⁶² Duty may indeed entail power (the conventional reading in support of a preeminent role for courts) but it also entails work: a duty, after all, is an unavoidable obligation. *Extra* duties assigned to the Court could make it harder to fulfill those that are, as a constitutional matter, its actual responsibilities. On this point, Marshall's invocation of the term "duty" in *Cohens v. Virginia*⁵⁶³ is illuminating. Holding, in *Cohens*, that the Court could review certain state court criminal convictions, Marshall wrote that the Court has

no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.⁵⁶⁴

Cohens is the bookend to *Marbury*. Because the Court has certain constitutionally assigned duties it must fulfill, it should be attentive to efforts on the part of Congress to give it other tasks to perform. The duty to hear some cases comes with the duty to refuse to hear others.

Additional language in *Marbury* addresses the tension between cases the Constitution compels the Court to hear and cases Congress instructs the Court to hear. Marshall wrote that "the framers of the

561. See *supra* notes 62–73 and accompanying text.

562. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

563. 19 U.S. (6 Wheat.) 264 (1821).

564. *Id.* at 404.

constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature.”⁵⁶⁵ This statement is also often understood to sustain powers of judicial review and judicial supremacy. Yet the conventional reading might well overlook the significance of the term “government” in Marshall’s statement—a term that suggests orderly operations, under a set of rules, without outside interference. As a mechanism for government, the Constitution—not Congress—sets the outer parameters of what the Court may do. A similar idea is reflected in Marshall’s rhetorical question: “If an act of the Legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the Courts and oblige them to give it effect?”⁵⁶⁶ The answer to this question makes clear that it pays to recognize that giving “effect” to a law adds to the workload of a court. Again, read through the lens of dockets, Marshall’s opinion is less about establishing what the Court can do and more about carefully limiting what it must do.

This Article does not contend that a concern with workload was all that is implied by these oft-cited statements: the point is that they comport with the basic concern of safeguarding the judicial branch from tasks that would undermine its capacity to perform its constitutional role. This docket-focused reading also brings to the fore some neglected portions of Marshall’s *Marbury* opinion that are focused specifically on the problem of Congress altering the workload of the Supreme Court. Marshall writes, for example:

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested.⁵⁶⁷

565. *Marbury*, 5 U.S. at 179–80.

566. *Id.* at 177.

567. *Id.* at 174. Marshall likewise writes:

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

In other words, the Constitution itself protects the courts from legislative “will” that could be exercised to reapportion judicial tasks.

Perhaps most tellingly, *Marbury* shows that Marshall was clearly aware that a decision in William Marbury’s favor could open the Supreme Court’s door to complaints against other federal officials who had failed to carry out a duty under federal law. In a lengthy portion of his opinion that receives little attention today, Marshall sets forth other potential claims against federal officials failing to carry out legal obligations. Marshall invokes, for example, the federal statute requiring the Secretary of War to compile a pension list of war veterans⁵⁶⁸ and the laws requiring the Secretary of State to issue patents to applicants who have satisfied statutory requirements.⁵⁶⁹ Both laws had an obvious potential to generate large numbers of applications to government officials to fulfill their statutorily-defined duties. In each instance, Marshall notes, a remedy would have to exist if the government official failed to act as the law required: “[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.”⁵⁷⁰ If that remedy lay with the Supreme Court in the first instance, it could quickly become overwhelmed. Granting Marbury’s petition, then, could flood the Court with like petitions for pensions, patents, and other entitlements. As Professor Pfander astutely observes, the Court’s decision in *Marbury* serves to limit “‘jurisdiction stuffing’—assignment to the Court of new, burdensome original business that could threaten its ability to discharge its important functions as a national court of appellate review.”⁵⁷¹

Marbury fits, then, with other decisions of the Marshall Court with docket implications. For example, three years after *Marbury*, in *Strawbridge v. Curtiss*,⁵⁷² Marshall read the Judiciary Act of 1789 to require complete diversity among the parties as a prerequisite to federal diversity jurisdiction.⁵⁷³ In 1812, in *United States v. Hudson &*

Id. at 175.

568. *Id.* at 164.

569. *Id.* at 165.

570. *Id.* at 166.

571. James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515, 1590–91 (2001).

572. 7 U.S. (3 Cranch) 267 (1806).

573. *Id.* at 267–68. Marshall’s reading has often baffled commentators. See, e.g., Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles”*, 78 VA. L. REV. 1769, 1803

Goodwin,⁵⁷⁴ the Court held there were no federal common law crimes; in order to exercise jurisdiction in criminal cases, the federal courts were dependent upon a federal criminal statute: “[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”⁵⁷⁵

As a historical matter, Marshall’s concern that Congress might neuter the Court by assigning it a slew of duties was not unwarranted. After the election of 1800, Jefferson took the White House and Republicans gained control of both houses of Congress, but the federal judiciary remained largely staffed by Federalist appointees—including the controversial “midnight judges” Adams had appointed to the new circuit courts created by the lame-duck Congress under the Judiciary Act of 1801.⁵⁷⁶ In addition to a general concern that Federalist judges would be hostile to reforms the new administration sought to undertake, Jefferson and his supporters were deeply critical of many specific practices of sitting federal judges. The list of complaints was long. For one thing, the Jeffersonians complained,

(1992) (deeming the decision as “[w]ithout any grounding in either constitutional or statutory text and with reasoning that charitably could be described as cryptic”).

574. 11 U.S. (7 Cranch) 32 (1812).

575. *Id.* at 34. In his opinion for the Court, Justice William Johnson, Jr. emphasized federalism concerns:

The powers of the general Government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions,—that power is to be exercised by Courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the Courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer.

Id. at 33.

576. Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (repealed 1802); GEORGE LEE HASKINS & HERBERT A. JOHNSON, 2 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–15, at 138–39 (Paul A. Freund ed., 1981). The events following the 1800 election have been the subject of extensive historical treatment. See generally BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY (2005) (describing the election of 1800, its Federalist and Republican participants, and the changing role of the presidency after the election); SLOAN & MCKEAN, *supra* note 553 (discussing the political schisms of the 1800 election and the events leading to *Marbury v. Madison*).

federal judges had enforced the notorious Sedition Act.⁵⁷⁷ For another, the judges had acted in ways that undermined both separation of powers and federalism. As to the former, by invoking English precedents and enforcing common law crimes, federal judges had engaged—as Jefferson himself put it—in “audacious, barefaced and sweeping pretension to a system of law for the U.S. without the adoption of their legislature, and so infinitively beyond their power to adopt.”⁵⁷⁸ With respect to the federalism balance, Republicans had long believed the national judiciary was consolidating power at the expense of the state courts. “Consequently, they wished to remodel the entire judicial system in order to check the flow of business to the Supreme Court and thereby counteract the growth of centralization and nationalism which the federal courts had helped to promote.”⁵⁷⁹ More generally, the judges (according to their critics) had strayed far from their appropriate judicial role: “Often rude, frequently partisan or intemperate, many . . . [federal judges] had . . . taken the opportunity—especially in charges to grand juries—to lecture and preach on morality, religion, and politics.”⁵⁸⁰ Finally, a personal element tainted the judiciary in the eyes of the new administration. While President Jefferson and Chief Justice Marshall were second cousins, they were “bitter political enemies,”⁵⁸¹ a point reinforced when Marshall, having administered the Presidential oath, turned his back to Jefferson as he delivered his inauguration address.⁵⁸²

Riding a wave of popular dissatisfaction with the federal courts,⁵⁸³ Republicans who took office wasted little time in seeking to challenge and reshape the federal judiciary. They repealed the 1801 statute under which Adams had appointed a new layer of federal

577. See JAMES F. SIMON, *WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES* 53 (2002) (“Once the Sedition Act was passed . . . Federalist-judges at the highest level . . . became actively engaged in the official process of stifling criticism of the Adams administration.”).

578. Letter from Thomas Jefferson to Edmund Randolph (Aug. 18, 1799), in 7 *THE WRITINGS OF THOMAS JEFFERSON* 383, 384 (Paul Leicester Ford ed., 1896). On power grabs, Chief Justice John Jay had also raised the ire of Republicans by his secret role in negotiating a treaty with Great Britain. HASKINS & JOHNSON, *supra* note 576, at 140 & n.22.

579. HASKINS & JOHNSON, *supra* note 576, at 146.

580. *Id.* at 140.

581. Alan Taylor, *John Adams*, in *THE AMERICAN PRESIDENCY* 30 (Alan Brinkley & Davis Dyer eds., 2004).

582. R. KENT NEWYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 148 (2001).

583. See HASKINS & JOHNSON, *supra* note 576, at 156 (“The Republican attack on the judiciary was facilitated in large measure by long-standing popular antagonism to the judicial system as a whole.”).

judges, thus removing the Adams appointees from their posts.⁵⁸⁴ They also restored the circuit-riding duties of the Supreme Court Justices, a move that kept Marshall and his colleagues out of the capital for much of the year.⁵⁸⁵ Concerned that the Supreme Court might actually intervene to restore the judges Adams had appointed to their positions, the Republican Congress cancelled the Supreme Court's upcoming term.⁵⁸⁶ In addition, at Jefferson's urging, impeachment proceedings were brought in 1804 against staunch Federalist Samuel Chase on the basis of vague charges of political bias; while Chase was ultimately acquitted in the Senate, the incident underscored the hostility towards the judicial branch.⁵⁸⁷

Marbury was thus decided in a context in which the judicial branch was under considerable threat. Keeping the Supreme Court focused on its core functions was a way to ensure it remained a significant part of the federal government. That required refusing to take on duties that would distract the Justices from their central tasks. From this perspective, the constitutional significance of *Marbury* lies less in the general idea of judicial review and judicial supremacy and more in the power of the Court to protect its own status from threats by the other branches of government. As a separation of powers case, *Marbury* is less about the Court's power to decide the meaning of the Constitution (our modern understanding) and more about ensuring the Court remains safe from efforts to undermine its role in the constitutional scheme.

CONCLUSION

Of the three branches of our federal government, the judicial branch is uniquely vulnerable. The security of its place in our constitutional scheme depends very much upon the support of the other two branches. From the earliest days of the Republic, the Supreme Court has sought to protect and preserve the judiciary's status and role. Most of those efforts have involved interbranch dialog and cooperation. On occasion, including in *Lopez* and *Morrison*, the Court has engaged in self-help. A focus on judicial self-preservation—through docket control measures and other mechanisms—offers a

584. See Judiciary Act of 1802, ch. 8, 2 Stat. 132.

585. Act of Apr. 29, 1802, ch. 31, § 4, 2 Stat. 156, 157.

586. See *id.* § 1, 2 stat. 156, 156 (replacing the Court's two annual sessions with one session to begin in February, effectively cancelling the 1803 summer session).

587. See generally WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992) (recounting the Chase impeachment episode).

new framework through which to understand the work of the Court and the activities of the Justices beyond the courtroom. The framework invites shifting our attention from individual cases and discrete doctrines to a search for common threads that motivate and unify decisions across multiple areas of case law. The framework offers a new way of thinking about relationships among the branches of federal government, turning our eyes from the political impact of judicial decisions to the impact of congressional and executive actions upon the courts themselves. The framework invites also new attention to the relationship between federalism and separation of powers and the ways in which these two structural elements operate in sync to safeguard the judicial branch. Finally, the framework invites a closer examination of the multiple roles of Supreme Court Justices—as jurists deciding cases, as lobbyists of Congress and the Executive, and as the public voice of the third branch—and the ways in which those roles might be in tension or, instead, be played in pursuit of a single goal.