FEDERALISM AS DOCKET CONTROL

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INTRODUCTION

Twenty years ago, in United States v. Lopez, the Supreme Court struck down the federal Gun-Free Schools Zone Act of 1990, which prohibited possession of guns within one thousand feet of a school. As the first decision since the New Deal invalidating a federal statute as beyond Congress’s power under the Commerce Clause, Lopez generated intense interest. Commentators (including some judges) described Lopez in revolutionary terms. As the Court issued a series of additional decisions

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2 Id. at 567.
4 See, e.g., Alden v. Maine, 527 U.S. 706 (1999) (holding that Congress lacked the power to subject non-consenting states to suits in state court); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (holding that Congress could not abrogate state sovereign immunity when acting pursuant to the Commerce Clause); Printz v. United States, 521 U.S. 898 (1997) (holding that Congress could not require state officials to perform background checks on handgun purchasers pursuant to a federal program); New York v. United States, 505 U.S. 144 (1992) (holding that the “take title” provision of Low-Level Radioactive Waste Management Act Amendments of 1985 violated the Tenth Amendment by commandeering state governments into the service of federal regulatory program).
limiting national power—including *United States v. Morrison*, 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 Amendment—the only question seemed to be how far the federalism revolution would go. Some commentators cheered the Court’s new scrutiny of federal power and the revival of states rights. 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; once-reliable supporters of an activist judiciary called for “taking the Constitution away from the courts” and restoring power to “the People Themselves.” Yet within a short period, these hopes (on one side) and fears (on the other) had

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6 Id. at 616, 627.
7 See, e.g., 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.”); 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.”); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1054 (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.”).
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. 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* and overall sounded deferential and more nationalist than his former boss—the federalism revolution became a brief episode in a quickly receding past. Roberts has authored and joined majority opinions invalidating federal laws. But it is too early for an assessment of federalism in the Roberts Court. Our interest remains in making sense,

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13 See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary, 109th Cong. 225 & 271-72 (2005) (stating that Lopez and Morrison were 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 that Raich showed that Lopez and Morrison did not “junk all the cases that came before” them).

14 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.”).

15 Responding to Senator 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.

16 See, e.g., Shelby County v. Holder, 570 U.S. __ (2003) (holding coverage formula of section 4 of the Voting Rights Act of 1965 unconstitutional on federalism grounds); Citizens United v. FEC, 558 U.S. __ (2010) (holding provision of Bipartisan Campaign Reform Act of 2002 prohibiting corporations and unions from using general treasury funds for electioneering communications within 30 days before a primary or 60 days before a general election invalid under the First Amendment).

17 For some early speculation, see, e.g., Jonathan Adler, *Getting the Roberts Court Right: A Response to Chemerinsky*, 54 Wayne L. REV. 983, 1012 (2008) (“The Roberts Court . . . seems inclined to decide most cases as narrowly as possible, producing few seismic shifts in any direction.”); CHRISTOPHER P. BANKS & JOHN C. BLAKEMAN, THE U.S. SUPREME COURT AND NEW FEDERALISM: FROM THE REHNQUIST TO THE ROBERTS COURT 12 (2013) (“[I]t remains uncertain at best whether a . . . majority will coalesce to . . . erect
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 was to put limits on federal power and safeguard the interests of state governments and along with his like-minded colleagues he achieved this goal in a variety of areas. But given that federalism can mean different things and serve different purposes, making sense of the aims and achievements of the Court’s decisions requires more than a simplistic political explanation. Commentators have therefore offered sophisticated accounts of *Lopez*, *Morrison*, and other federalism decisions. 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.”

Ernest Young, on the other hand, casts the five-justice majority in *Lopez* and other Rehnquist-era federalism decisions as “aggressively new limits on federal authority that go beyond existing precedents.”

For commentators describing the Rehnquist Court’s federalism decisions as a product of conservative politicking, see, e.g., Bradley W. Joondeph, *Federalism, the Rehnquist Court, and the Modern Republican Party*, 87 OR. L. REV. 117, 168 (2008) (“Though 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.”); Erwin Chemerinsky, *Understanding the Rehnquist Court: An Admiring Reply to Professor Merrill*, 47 ST. LOUIS U. L.J. 659 (2003) (“[T]he reality is that the recent and current activism—as measured by invalidated laws and overruling precedent—is all in a conservative direction.”); Michael Wells, *Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments*, 47 EMORY L.J. 89, 122 (1998) (“The Justices' performance . . . suggests that crude politics is at least as important as theories of federalism in accounting for the two models [of “Nationalist” and “Federalist” theories]. For one thing, there is a strong correlation between Justices' general substantive orientations and their perspectives on Federal Courts law.”).


protect[ing] state sovereignty” (contrasted with state autonomy) via hard substantive limits on federal power.22

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 (and thus do not spend much time disputing other approaches). Rather, our goal is to set out a perspective that, we hope, will help make greater sense of the cases. While our analysis can usefully apply to a variety of decisions, we focus mostly on Lopez and Morrison. This focus is appropriate given the early significance of the two decisions and because the two cases have in particular puzzled commentators.23

This Article offers a modest and practical reading of Lopez and Morrison as cases about docket control. The Court’s main concern, we suggest, was with shielding the federal district courts from ever-expanding criminal and civil cases. 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.24 We provide for the first time compelling evidence of the impact of expanding federal causes of action upon the Rehnquist Court’s federalism decisions. Our approach is also novel because we show 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


23 See, e.g., Joshua A. Klein, 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.”); 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.”).

24 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.”).
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 spend their days presiding over garden-variety criminal offenses and civil disputes. Docket control was thus about protecting the integrity 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, we rely 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. 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 and submits to Congress its own annual appropriations request. In submitting its proposed budget to Congress, 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 budget. Given that the Court has a long record of budgetary modesty 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 of the district 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 helping to explain a single episode in the history of the Supreme Court. Once cast in terms of

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26 The first transcript of such an appearance we have identified is in [year] when Justice [ ] testified before the [ ].

27 The budget for the entire federal judiciary represents only 0.2% of the entire federal budget. The Supreme Court’s own budget represents 0.002% percent of the federal budget. For a detailed 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, 1789-2010 (2012), http://www.fjc.gov/public/pdf.nsf/lookup/Appropriations.pdf/$file/Appropriations.pdf. Committee members routinely applaud the Court’s thriftiness. See, e.g.,
docket control, we suggest, *Lopez* and *Morrison*, represent not a break—revolutionary or otherwise—but the culmination of a longer history of overburdened (and under-appreciated) federal judges pushing back.

More generally, apart from the federalism decisions of the Rehnquist Court, many cases—many landmark cases—might be understood in the new light of docket control. (Yes, 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 decision-making, the perspective we offer helps make sense of a good deal of what the Court does.

The first two parts of the 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 Court’s own 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 manage properly 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 the constitutional option in *Lopez* (on the criminal side) and *Morrison* (on the civil). These two cases, we suggest, make a good deal more sense—and have stronger constitutional grounding—when understood not in terms of 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 the amount and type of work of the federal judiciary and we identify some fruitful areas of additional inquiry.

I. THE EARLY DOCKETS OF THE FEDERAL COURTS

Prior historical commentary on *Lopez* and *Morrison* has focused on the original meaning of “commerce” in Article I, section 8 of the Constitution. We begin at a different place: with the historical structure and role of the judicial branch of the federal government.

The Constitution provides that the “judicial Power [of the United States]
shall extend to all Cases 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.” In the Judiciary Act of 1789, Congress assigned the Supreme Court original jurisdiction closely matching the constitutional allocation, but it gave the Court only limited appellate powers. The Supreme Court had no authority to hear appeals of criminal cases from the lower federal courts the Act created, and civil cases could only be appealed from the lower federal courts if they met a $2,000 amount in controversy requirement. 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. The Court could review a decision of a state's highest court invalidating a federal statute, treaty, or exercise of federal authority. The Court could also review state court decisions denying a title, right, privilege, or exemption claimed by a party under the Constitution, a treaty, a federal statute, or a federal commission. In cases in which a state law was challenged on federal constitutional grounds, the Supreme Court could review the state court decision if it rejected the constitutional claim and upheld the state law but not if the state court accepted the constitutional claim and invalidated the law. This basic distinction in the Judiciary Act of 1789 between state court decisions denying and upholding federal constitutional claims remained in place when it was amended in 1867 and reenacted in 1873 and 1911. Not until 1914 did the Supreme Court

29 Id. art III, §1.
30 Judiciary Act of 1789, ch. 20, 1 Stat. 73.
31 See id. §13, 1 Stat. at 80-81 (setting out the cases in which the Court would have original jurisdiction).
32 See id. However, the Supreme Court and the lower federal courts did have a power of habeas review with respect to prisoners held in federal custody. See id. §14, 1 Stat. at 81-82.
33 Id. §22, 1 Stat. 73, 84.
34 See id. §25, 1 Stat. 73, 85-86 (setting out the circumstances in which the Court could review state court decisions).
35 See id.
36 Id.
receive statutory authority to review state court decisions upholding federal claims against state government,\(^{41}\) and even then review was at the Court's discretion by a writ of certiorari.\(^{42}\)

As for the lower federal courts, the 1789 Act assigned them a jurisdiction that also fell short of the constitutional grant.\(^{43}\) 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.\(^{44}\) Apart from the short-lived Midnight Judges Act of 1801,\(^{45}\) only in 1875 did Congress assign the lower federal courts authority to hear all cases arising under federal law.\(^{46}\)

The early dockets of the federal courts reflected their limited statutory authority. The Supreme Court, which until 1860 operated mostly out of the basement of the Capitol,\(^{47}\) heard no cases in its first three terms.\(^{48}\) From

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\(^{42}\) Id. From 1916 to 1988, there was mandatory review (by writ of error) where a state court had upheld a state law against a federal constitutional claim, but discretionary review (by writ of certiorari) where the state court had invalidated the state law. Act of Sept. 6, 1916, Pub. L. No. 258, ch. 448, §2, 39 Stat. 726, 726-27; see 28 U.S.C.A §1257, Historical & Statutory Notes, Amendments (West 2006) (describing changes made by the 1988 law).

\(^{43}\) 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).

\(^{44}\) See, e.g., id. §9(b), 1 Stat. at 77 (codified at 28 U.S.C. §1350 (2006)) (giving the lower federal courts jurisdiction to hear alien tort claims); Act of Feb. 4, 1815, ch. 31, §§7-8, 3 Stat. 195, 197-98 (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).

\(^{45}\) 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, 2Stat. 132, 132.

\(^{46}\) 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).

\(^{47}\) 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, DC. Supreme Court Historical Society, History of the Court: Home of the Court, http://www.supremecourthistory.org/history/supremecourthistory_history_homes.htm (last visited Aug. 14, 2014).

1801 to 1829, the Court averaged about twenty-eight cases with signed opinions per year.\textsuperscript{49} The Court had 98 total cases docketed in 1810; 127 cases in 1820; 143 cases in 1830; 253 in 1850; and 310 cases in 1860.\textsuperscript{50} Relatively few early cases before the Court involved grand questions of federal constitutional law. In the 1825 Term, for example, the Supreme Court decided no cases involving the Bill of Rights or the constitutionality of federal or state laws under the Commerce or Contracts Clauses.\textsuperscript{51} Of the twenty-six cases that term, ten involved common law questions, and the remainder dealt with a mix of statutory, jurisdictional, maritime, and other matters.\textsuperscript{52}

As of 1840, the Court had found state laws unconstitutional in just nineteen cases.\textsuperscript{53} Between 1803, when the Court decided \textit{Marbury v. Madison},\textsuperscript{54} and 1857, the year of the decision in \textit{Scott v. Sandford},\textsuperscript{55} the Court did not hold unconstitutional a single federal statute.\textsuperscript{56} For much of the early period, the Justices spent a good portion of their time riding circuit in compliance with the Judiciary Act of 1789, which staffed the circuit courts with one district court judge and two Supreme Court Justices.\textsuperscript{57}

\textsuperscript{49} Averaging the number of cases per term provided for this period in \textit{Lee Epstein et al., The Supreme Court Compendium: Data, Decisions & Developments} 227 tbl.3-2 (4th ed. 2007), gives an average of 27.76 cases.

\textsuperscript{50} Statement of Senator David Davis, 13 CONG. REC. 3464 (May 1, 1882).

\textsuperscript{51} See Frankfurter & Landis, supra note __, at 302 tbl.I (reporting cases).

\textsuperscript{52} See id.

\textsuperscript{53} See Epstein et al., supra note __, at 181 tbls. 2-16 (listing cases).

\textsuperscript{54} 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{55} 60 U.S. (19 How.) 393 (1857).

\textsuperscript{56} See Morton J. Horwitz, Constitutional Transplants, 10 Theoretical Inquiries L. 535, 541 (2009).

\textsuperscript{57} See 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, 1763-71 (2003) (describing the challenges of riding circuit and the Justices' efforts to overhaul the circuit-riding system).
This brief 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 limited the tasks they were compelled or authorized to perform. The Justices’ principal complaint was with circuit riding—but that complaint was about the ardors of travel not of adjudication. As the nineteenth century drew to a close, however, caseloads increased dramatically and 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.

II. DOCKET GROWTH AND REFORM EFFORTS

As a result of limited assignments from Congress, for about a century, the Supreme Court’s docket stayed at manageable levels. 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. New cases were being 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. 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 on the Court initiated a century of efforts by the Court to reduce its workload. This Part traces those efforts, beginning with the interventions of Chief Justice Fuller.

A. Fuller

More than a century before Lopez, members of the Supreme Court actively sought ways to control the Court’s burgeoning caseload. At first, the Court relied upon Congress to take the initiative to cure a well-publicized problem. During the 1880’s, congressmen in both the House and

58 See sources cited infra note __.
59 Statement of Senator David Davis, 13 CONG. REC. 3464 (May 1, 1882).
60 In 1880, the Court disposed of 369 cases and 417 new cases were filed. Its total docket had about 1,200 cases, and each subsequent year (until 1891) the total number of docketed cases rose. See www.fjc.gov/history/caseload.nsf/page/caseloads_Sup_Ct_totals
the Senate introduced various bills to reorganize the federal judiciary in order to ease the caseload of the Supreme Court—yet each bill failed to secure the necessary votes.\(^61\) That 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.”\(^62\) After a decade of waiting for Congress to come up with a suitable solution to its caseload problem, the Court embarked on a more pro-active 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 relieve the size of the Court’s docket.\(^63\) Within a few weeks of that dinner-party pitch, the Judiciary Committee sent all then-pending legislation for Supreme Court relief to Fuller and formally solicited the Justices’ own proposal to reduce the Court’s caseload.\(^64\) 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.\(^65\) Responding to this proposal, in March of 1891, Congress enacted the Circuit Court of Appeals Act—known popularly as the Evarts Act after New York Senator (and Fuller dinner guest) William Evarts.

The 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.\(^66\) The Act also gave the Court for the first time a power of certiorari—as a “fallback provision” in case the new circuit courts proved “careless in deciding cases or issuing certificates.”\(^67\) While responsive to the Justices’ concerns, the Act was far from revolutionary. The Act retained mandatory appellate jurisdiction in cases

\(^61\) 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 (1925).

\(^62\) Id. at 64.


\(^64\) Id.

\(^65\) Edward A. Hartnett, Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill, 100 Colum. L. Rev. 1643, 1651-52 (2000).

\(^66\) See Judiciary Act of 1891, ch. 517, 26 Stat. 826.

\(^67\) Hartnett, supra note 2, 1656.
involving the constitutionality of a law,\textsuperscript{68} capital cases,\textsuperscript{69} and fourteen designated classes of civil suits;\textsuperscript{70} it also did not alter the rules governing review of state court decisions, an increasingly significant source of cases for the Court.\textsuperscript{71}

In practice, thus, the 1891 Act provided some relief to Chief Justice Fuller and his colleagues: while the Supreme Court docketed 636 new cases in the 1890 term, in 1892 the number dropped to 290.\textsuperscript{72} 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.\textsuperscript{73}

On the other hand, while the Evarts Act reduced in part the number of new cases the Court was obligated to decide, it did nothing to relieve the Court of its swollen backlog of cases. Prior to the Evarts Act, the Court’s appellate docket carried an “absurd total of 1,800” cases that it was obligated to decide.\textsuperscript{74} The situation was only slightly improved in the early twentieth century, with the Court managing a total of 1,170 appellate cases in 1911, 1,169 appellate cases in 1916, and 1,012 appellate cases in 1921.\textsuperscript{75} A large portion of these cases involved writs of error from state court decisions denying a federal claim.\textsuperscript{76}

Effectively, the reforms of the Evarts Act allowed the Court to break even on a yearly basis, resolving about as many cases as were added to its docket, but the Court remained roughly two years behind in hearing and disposing of the cases before it. Moreover, as the new century dawned new pressures, emerged: the number of petitions for certiorari increased steadily in the early twentieth century: 270 petitions in the 1916 term, for example, and 456 petitions in the 1924 term.\textsuperscript{77} Deciding those petitions proved time-

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\textsuperscript{68} Judiciary Act of 1891, at § 5.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Lee Epstein et al., The Supreme Court Compendium: Data, Decisions, and Developments 68 tbl. 2-2 (5th ed. 2012).
\textsuperscript{73} Am. Const. Co. v. Jacksonville, T. & K.W. Ry. Co., 148 U.S. 372, 383, 13 S. Ct. 758, 763, 37 L. Ed. 486 (1893) (“while 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 . . .”)
\textsuperscript{74} See Felix Frankfurter & James M. Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 86 (1928) [book version.]
\textsuperscript{75} Rep. of the Att. Gen. for the year 1922, 5.
\textsuperscript{76} Hartnett, supra note __, at 1658.
\textsuperscript{77} Felix Frankfurter & James M. Landis, The Business of the Supreme Court of the
consuming as the Justices individually reviewed each case before taking a vote on whether to grant review.\textsuperscript{78} In addition, there were new sources of cases that the Court could not dodge. In particular, ratification of the Eighteenth Amendment and enactment of the Volstead Act in 1919\textsuperscript{79} generated an eight percent increase in federal cases;\textsuperscript{80} World War I also generated prosecutions for espionage and placed a whole series of civil rights cases on the federal dockets.\textsuperscript{81} The partial fix of the Evarts Act, would not

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 reduce further the scope of the Court’s mandatory jurisdiction.\textsuperscript{82} After Taft ended his third term and joined the faculty of the Yale Law School his views took sharper form: writing that “[t]he most important function of the [C]ourt is the construction and application of the Constitution of the United States,” Taft recommended limiting mandatory jurisdiction to “questions of constitutional construction” with all other review by writ of certiorari.\textsuperscript{83} 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.\textsuperscript{84} Befitting his prior stint in the White House, Taft deemed it “the prerogative and even the duty of his office to take the lead in promoting judicial reform and to wait neither upon legislative initiation in Congress nor upon professional opinion.”\textsuperscript{85}

Taft wasted no time in moving along reform. Inspired by a trip to

\begin{footnotesize}
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\item Edward A. Hartnett, \textit{Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill}, 100 Colum. L. Rev. 1643, 1677 (2000).
\item National Prohibition Act of 1919, ch. 85, 41 Stat. 305.
\item David H. Burton, Taft, Homes, and the 1920s Court: An Appraisal 117 (19998).
\item See generally
\item \textit{See, e.g.}, 46 Cong. Rec. 25 (1910) (second annual address of William Howard Taft) (“No man ought to have, as a matter of right, a review of his case by the Supreme Court.”).
\item Edward A. Hartnett, \textit{Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill}, 100 Colum. L. Rev. 1643, 1648 (2000).
\end{enumerate}
\end{footnotesize}
study the practices of English courts, Taft, with the help of his colleagues (in particular Willis Van Devanter), drafted a bill that was introduced by Congressman Joseph Walsh of Massachusetts in 1922. This time Congress was on board, passing the so-called Judges’ Bill as the Judiciary Act of 1925. The Act relieved pressure on the Supreme Court by rendering a much greater portion of its jurisdiction subject to certiorari. Specifically, with respect to the decisions of the U.S. 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. Other decisions of the courts of appeals were subject to certiorari although the circuit courts nonetheless retained power to certify a case to the Supreme Court. 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. Other state court cases were subject to a petition for certiorari. Further, when exercising review, the Court was also empowered to determine which questions it would actually decide rather than having to hear anew an entire case. Notably, Act went further than Taft’s earlier proposal to retain mandatory review in all constitutional cases: now Taft’s view was that “there could be just as many frivolous cases on constitutional grounds as on other grounds,” and the Act did not require the Court to hear all constitutional questions.

The 1925 Act promised significant relief. Even though the number of certiorari petitions was likely to increase, the Justices could at least control to a greater degree the number of cases heard and decided on the merits. In Taft’s view, this change came with no cost to the system. Soon

86 Snyder v. Buck, 340 U.S. 15, 24 (1950) (“Mr. Justice Van Devanter, who, as is well known, was the chief draftsman of the Judiciary Act of 1925.”).
87 See Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearings on H.R. 10479 Before the H. Comm. on the Judiciary, 68th Cong. 3 (1922) (statement of C.J. William Taft).
90 Id. § 1.
91 Id.
92 Id.
93 Id.
94 Id. § 1.
95 Hartnett, supra note __, at 1665.
96 Indeed, the number of certiorari petitions grew substantially from 586 in 1926 to 726 in 1930. Lee Epstein et al., The Supreme Court Compendium: Data, Decisions, and Developments 68 tbl. 2-2 (5th ed. 2012).
after the 1925 Act, Taft reported that “[e]asily one-half of certiorari petitions now presented have no justification at all.” 97 Two other developments served to buttress the 1925 Act. One is that in 1928 the Court, acting on its own, issued Rule 12 requiring litigants seeking writ of error review to demonstrate a “substantial” federal question that was not settled by prior case law—and the Court used Rule 12 on occasion to refuse to hear cases. 98 The second is that with the rise in certiorari jurisdiction, the circuit courts largely stopped certifying questions for review, leaving it to the litigants instead to persuade the Court to hear their case. 99

In terms of numbers, the 1925 Act was remarkably effective. It stabilized the Court’s caseload for twenty-five years, allowing the Justices to maintain for the first time in a long period a docket that was basically current. 100 During that period, the Justices made only modest requests of Congress: for increased funding to print judicial opinions, 102 for example, and authorization for additional administrative support. 103 The Court’s pleas for large structural changes had subsided following what Justice Hugo Black described in 1947 as the “very valuable” reform initiated by Chief Justice Taft. 104

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97 William Howard Taft, The Jurisdiction of the Supreme Court Under the Act of February 13, 1925, 35 Yale L.J. 1, 3 (1925).
98 See Hartnett, supra note __ at 1708.
99 See Hartnett, supra note __, at 1710-11.
100 See Lee Epstein et al., The Supreme Court Compendium: Data, Decisions, and Developments 70 tbl. 2-2 (5th ed. 2012). From 1925 until 1950, the number of new cases filed to the Supreme Court increased an average of 2.1 percent per year; in the same period, the Court’s overall caseload increased an average of 0.5 percent per year.
102 The Judiciary Appropriation Bill for 1945: Hearing Before the Subcomm. of the H. Comm. on Appropriations, 78th Cong. 105 (1944) (written statement of Chief Justice Harlan Stone) (writing 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.”).
C. New Troubles: The Sixties

By the 1960s, however, 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. Writing as the decade came to a close, Paul D. 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.” 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.” Civil rights cases also occupied a growing proportion of the Supreme Court’s plenary docket, rising from 27 percent (32 out of 117 plenary decisions) in 1951 to 62 percent (80 cases out of 129 plenary decisions) by 1970.

In order to manage its own growing docket, the Court returned to Congress, this time asking for the ability to hire additional law clerks to assist the Justices. The lower federal courts likewise sought an increase in the number of their clerks and other staff members to handle their own caseload growth. In 1968, Congress authorized the district courts to hire 83 of 166 requested deputy clerks; the circuit courts were granted 55 additional law clerk positions. But Congress did not at that time also give

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106 Id.
107 Id.
109 See Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Bill, Fiscal Year 1968: Hearings Before the Subcomm. of the H. Comm. on Appropriations, 90th Cong. 6 (1967) (statement of Justice Byron White) (“I think the point is that [the Chief Justice] does need some more help. Each of us needs more help.”)
110 In 1965, Chief Judge Matthew McGuire of the U.S. District Court of the District of Columbia asked for about 136 clerks for the bankruptcy courts and 25 for U.S. district courts, saying, “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 Bill, Fiscal Year 1966: Hearings Before the Subcomm. of the H. Comm. on Appropriations, 89th Cong. 43 (1965).
111 See Public Law 90-470, Aug. 9, 1968.
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.\textsuperscript{112} This number remained fixed even though over that same period the Court’s caseload grew by 170 percent, with 1,437 petitions for review in 1952\textsuperscript{113} and 3,918 in 1968.\textsuperscript{114} Not surprisingly, the Justices felt shortchanged. Commenting in 1968 on the aid directed to the lower courts, Justice Potter Stewart said: “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.”\textsuperscript{115} As a result of a “special favor” in the summer of 1969 from Congressman John Rooney to newly-appointed Chief Justice Warren Burger, Congress gave the Court three additional law clerks.\textsuperscript{116} Inspired by that 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.”\textsuperscript{117} On that schedule, the Court had 28 law clerks in 1972 and the Court’s personnel requests shifted to adding staff in response to “the increased secretarial workload resulting from the ever expanding caseload with the Court.”\textsuperscript{118}

The problem, however, was that while law clerks (and other staff members) could provide assistance to the Justices, the task of resolving

\textsuperscript{112} Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation for Fiscal Year 1970: Hearings Before the Subcomm. of the H. Comm. on Appropriations, 91st Cong. 7 (1969) (statement of Justice Byron White) (“The number of law clerks employed by the Court has stood at 19 for the past 16 years. There 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.”)

\textsuperscript{113} Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation for Fiscal Year 1970: Hearings Before the Subcomm. of the H. Comm. on Appropriations, 91st Cong. 7 (1969) (statement of Justice Byron White).

\textsuperscript{114} See Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1971: Hearings Before the Subcomm. of the H. Comm. on Appropriations, 92d Cong. 16 (1970) (budget justification submitted on record).

\textsuperscript{115} Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Bill, 1969: Hearings Before the Subcomm. of the S. Comm. on Appropriations, 90th Cong. 162 (1968) (statement of Justice Potter Stewart).


\textsuperscript{118} Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1973: Hearings Before the Subcomm. of the H. Comm. on Appropriations, 92d Cong. 16 (1972) (budget justification on the record).
cases remained with the Justices themselves. So long as the caseload kept increasing, adding law clerks could only ever be a partial solution to the burgeoning docket;\footnote{As Justice White noted in 1972, adding to the corps of clerks was insufficient to get the Court “caught up with the avalanche [of cases] of the past few years.” \textit{Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1973: Hearings Before the Subcomm. of the S. Comm. on Appropriations}, 92d Cong. 12 (1972) (statement of Justice Byron White).} given the sheer nature of the Justices’ work, the number of law clerks who could even usefully be employed was capped.\footnote{Justice Lewis Powell noted in 1983, that the Justices “do our own work, and while most of us have four law clerks, I don’t think I can handle any more.” \textit{Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1984: Hearings Before the Subcomm. of the S. Comm. on Appropriations}, 98th Cong. 676 (1983) (statement of Justice Lewis Powell).} Moreover, while Congress could help the lower federal courts manage their dockets by creating additional judgeships,\footnote{See P.L. 91-272 (June 2, 1970) (creating 61 new district court judgeships).} that solution was unrealistic when it came to 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.”\footnote{Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1970: Hearings Before the Subcomm. of the H. Comm. on Appropriations, Part 1 The Judiciary, 91st Cong. 12 (1969) (statement of Justice Potter Stewart).} Further, given that all of the justices have by tradition participated in every case before the Court, adding new justices would not have the same payoff as 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. In conjunction with the regular requests for larger support staff,\footnote{Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1973: Hearings Before the Subcomm. of the S. Comm. on Appropriations, 92d Cong. 10 (1972) (statement of Justice Byron White).} the Court also asked Congress for technological fixes that could help the Court become more efficient.\footnote{Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1972: Hearings Before the Subcomm. of the H. Comm. on Appropriations, 92d Cong. 108-164 (1971) (statement of Justice Potter Stewart/ Byron White).} In 1970, the Court
requested $25,000 for a “computer application” feasibility study, effectively to allow the clerk to process filings automatically.\textsuperscript{125} Satisfied with the results of that study, the Court followed up a year later by including a “remote terminal computer application” in its budget request, which Justice Potter Stewart explained, “is an effort to try to plan ahead for what would otherwise be an extraordinary increase in the need for additional manpower.”\textsuperscript{126} Evidently, the request proved a sticking point for Congress because the Court over the next three years the Court reiterated its request with increased urgency.\textsuperscript{127}

In a context in which Chief Justice Burger complained of the “deferred maintenance of the total judicial machinery,”\textsuperscript{128} 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.”\textsuperscript{129} Like 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.\textsuperscript{130} Money could not solve everything. Thus, in 1971, Justice Stewart remarked: “[O]ver the last 20 years [the Justices] have approached our annual increase in terms of patchwork and

\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
Band-Aids rather than giving any real thought to the very sobering problems presented by the projection of our greatly increasing caseload.”

An old problem facing the Court demanded new and more dramatic remedies.

D. Burger and the FJC: Radical Reform

Two developments laid the groundwork for the pursuit of radical reform and ultimately the Supreme Court’s own response to the docket problem, 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.”

By statute, the Chief Justice serves as the Chair of the FJC’s supervisory board. Initially, the FJC focused its attention on the composition and operations of the federal district courts, issuing modest recommendations for improvements. After Warren Burger became Chief Justice in the summer of 1969, the FJC took on a more vocal role.

Burger was no wallflower. As Chief, he immediately began advocating for changes to the structure of the federal courts. At the ABA’s 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.”

Describing the creation of the FJC as “one of the few bright spots in the past 30 years,” Burger saw the Center as his partner for reshaping the federal judiciary. While in

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131 Id. at 162 (statement of Justice Stewart).
133 Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573-4 (1972) (“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 service.”)
135 Id at 13.
the short term that partnership’s efforts paid only modest dividends, those efforts created a framework for far-reaching reforms in later years.

In the summer of 1971, the FJC initiated a study group chaired by Professor Paul Freund to examine broadly the work of the Supreme Court and the federal appellate courts.137 The resulting 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.138

In light of this assessment, the report concluded, “significant remedial measures are required now.”139

The Freund Report marked a turning point. Following its publication, the Justices abandoned the prior focus on staffing, computers, and other small-scale administrative adjustments and became energetic public advocates for structural reform. The Justices used budgetary hearings as a forum to air their concerns about the problems the courts faced and the need for Congress’s help. Year-end reports, initiated by Chief Justice Warren Burger in 1970, likewise served as a vehicle for laying out the judiciary’s problems and pressing for change.140 Consistent with the tone of the Freund Report, going forward the Justices framed their concerns as problems of constitutional dimension—and with that development the road to Lopez and Morrison was paved.

137 Id.
139 Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573, 577 (1972)
The Freund Report gave Burger specific proposals to champion. 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 with more and more cases each year.”141 Reflecting that sentiment, the Freund Report weighed the merits of reforming internal Court policies, such as changing the rule of four (which allows a vote of four judges to bring a case before the full Court) or adding law clerks.142 The former proposal was dismissed as “untenable,” since it would not relieve the number of cases the Court has to review and, further, might be viewed as an “invidious effort to reduce access to the Court.”143 The study group also cast doubt on the benefit of adding law clerks, not merely because additional clerks would not necessarily relieve the “non-delegable” workload of the Justices, but because the Justices’ chambers were physically too small to accommodate larger staff.144

The key structural reform recommended by the Freund Report involved the creation of a National Court of Appeals, a new judicial body that would screen petitions for review and decide, on the merits, cases that would otherwise be resolved at the Supreme Court.145 Under the structure outlined in the Report, the National Court of Appeals could be composed of seven circuit court judges, serving limited, staggered terms, and could hear about 400 cases a year based on referrals from the Supreme Court.146 The Supreme Court would then retain discretionary powers to review cases decided by the National Court of Appeals.147 The Freund Report anticipated criticism of the proposal, but maintained it was the “least problematic” method of providing “imperative” relief to the Supreme Court.148

Burger seized on the proposal. Addressing the ABA, he said the Freund Report provided an “an analysis of the problems that is not open to serious challenge.” Although conceding that “[r]easonable men can disagree over the particular kind of intermediate court recommended by Professor

142 Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573, 606-611 (1972)
143 Id. at 606-7.
144 Id. at 582, 610.
145 Id. at 590.
146 Id. at 593.
147 Id.
148 Id. at 594.
Freund’s committee and the powers of that court, “149 Burger insisted that that “no person who looks at the facts” could conclude that the Court could continue to handle its increasing workload without basic reform.150 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.”151

The proposal for a new appellate court gained additional traction with the report of the Commission on Revision of the Federal Court Appellate System Structure and Internal Procedures chaired by Senator Roman L. Hruska. The Commission concluded that “the percentage of cases accorded review [has] dipped below the minimum necessary for effective monitoring [by the Supreme Court] of the nation’s courts on issues of federal statutory and constitutional law.”152 It thus recommended a National Court of Appeals consisting of seven judges. The Supreme Court would be empowered to refer cases to those judges for a decision on the merits or for a decision as to whether the National Court of Appeals should review the case. In addition, the circuit courts could under certain circumstances transfer cases to the National Court of Appeals for a nationally binding decision, subject to review by the Supreme Court.153

While Burger, as Chief, played the leading role in articulating the Court’s caseload problem and pushing for reform, other Justices also entered the debate. At the budgetary hearing in 1977, Justice Byron White urged that while the power to deny certiorari kept the Court current, a new national appellate court would “almost double [the Court’s] capacity”154 and this in his view would be a helpful development.

Discussion of legislative reform entered even judicial opinions. In an extraordinary dissent from the denial of certiorari in the otherwise unremarkable 1978 case of Brown Transport v. Atcon, Justice White, joined

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150 Id.
153 See id. at 238-47.
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.”

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. 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 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. The problem, White explained, 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.”

With some 4,000 filings each term—up from 2,800 in 1962—the percentage of cases the Court could hear had dropped to unacceptable levels. 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] the bill did not proceed beyond the hearing stage.”

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. Drawing on academic studies, Burger offered 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 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.”

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156 See id. at 1018-23.
157 Id. at 1023.
158 See id.
159 Id. at 1024.
160 Id. at 1029 (statement of Burger, C.J.).
161 Id. at 1030-31 (footnotes omitted).
crisis the Court faced was one Congress itself had created—and thus one Congress was obligated to remedy.

Nonetheless, the Court was not unanimous in endorsing a National Appellate Court. Justice William J. Brennan in particular opposed the idea. Brennan issued a short statement in Acton referencing his opinion expressed to the Hruska Report that he was “completely unpersuaded” about the need for an intermediate court. In a law review article, Brennan concluded flatly that the Supreme Court “is not overworked.” 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?”

Brennan said that non-frivolous cases were likewise easy to spot: a Justice “develops a ‘feel’ for such cases.” According to Bob Woodward and Scott Armstrong, Brennan viewed Burger’s constant characterization of the Court as overburdened to reflect the Chief’s “intellectual insecurity” in the face of a stack of certiorari petitions. Other justices offered more tempered views. Justice Rehnquist, for example, expressed “general agreement with the composition of the national court of appeals” but expressed reservations over some details of the plan.

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. Over and over 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 role then a solution was required. The point bears emphasis

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165 Id.


168 See Brown Transport Corp. v. Atcon, Inc., 439 U.S. 1014 (1978) (White, J., dissenting from denial of certiorari) (“There is no doubt that those concerned with the
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 perform that role—unable to even hear on the merits cases involving conflicting lower court decisions on federal law—then the Court was not performing its constitutionally-assigned role. (The same logic applied likely to cases the Court could not hear that presented important issues of federal law the Court was responsible for deciding.) This understanding helps explain why Burger and other members of the Court saw nothing inappropriate in their speaking publicly about the problem the Court faced and advocating for reform: 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—legislative—interfering with the constitutional role of another—the judiciary. The problem, in other words, was at bottom 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, might well be deemed obligatory on the part of the legislative branch. Docket control was a constitutional concern. We will see a similar dynamic in play when we take up *Lopez* and *Morrison*.

A decade after the Freund report, the proposal for a new national court of appeals remained stalled 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)\(^{169}\) and it decided 179 cases on the merits.\(^{170}\) While these figures represented only a 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.”); Comm’n on Revision of the Fed. Court Appellate Sys., Structure and Internal Procedures: Recommendations for Change, reprinted in 67 F.R.D. 195, 221 (1975) ("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 . . . on an issue of federal law. Often the conflicts are direct and frontal, arising because 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.").

\(^{169}\) *Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1985: Hearings Before the Subcomm. of the S. Comm. on Appropriations, 98th Cong. 143 (1984).*

\(^{170}\) Lee Epstein et al., *The Supreme Court Compendium: Data, Decisions, and Developments* 82 tbl. 2-6 (5th ed. 2012).*
modest increase from the 1970s (for example, the Court docketed 4,640 cases in the 1972 term, just after the Freund report was published), a problem that had not significantly worsened also had not been solved.

Alternatives to the national appellate court fared no better. Chief Justice Burger proposed the creation on a trial basis of an adjunct “inter-circuit tribunal” that would have primary jurisdiction over circuit court conflicts. That proposal generated mixed reactions. Justice O’Connor, at a budget hearing, allowed that the Court was “not of one mind” on the issue.\(^1\) The executive branch also divided on the issue. In response to the United States Attorney General’s recommendation that the Department of Justice support the creation of the inter-circuit tribunal, Associate Counsel to the President, one John G. Roberts, prepared a memorandum in which he called the inter-circuit tribunal “exceedingly ill-advised.”\(^2\) Associate Counsel Roberts added: “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.”\(^3\) While Chief Justice Burger continued to push for the inter-circuit tribunal—announcing that was 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”\(^4\)—without the full backing of the Court and without enthusiasm from the political branches, Burger’s proposal had little chance of success.

In the end, neither the ambitious plan for a national appellate court nor the more modest inter-circuit tribunal proposal made it through Congress. After Warren Burger stepped down as Chief Justice in 1986, his successor initially carried the baton forward. Writing in his first annual report, Chief Justice Rehnquist, who a decade earlier had expressed “general agreement” with the findings of the Hruska Commission,\(^5\) announced: “I am convinced that the need for this sort of [intermediate] court is present now,


\(^2\) Roberts was concerned that the proposal, as written, allowed the Chief Justice to appoint members of the intermediary court, and contended that “the President should not willingly yield authority to appoint the members of what would become the Nation’s second most powerful court.” Memorandum from John G. Roberts to Fred Fielding Regarding Proposal for an Intercircuit Court, Feb. 10, 1983, WHORM subject file FG51, Box 10, 13100-14999 Folder, Ronald Reagan Presidential Library.

\(^3\) Id.


and I urge Congress to enact appropriate legislation.”176 Yet after 1986 Rehnquist never again called on Congress to create any sort of intermediate court.

Amid the 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 statements” for “every piece of legislation creating new cases.”177 While some inroad was made—judicial impact statements were issued in “an ad hoc matter . . . [at] the discretion of each [congressional] committee”—there was little enthusiasm for a uniform practice given “significant technical and methodological problems” in predicting what the impact would even be.178

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 proposed new limits in section 1983 prisoner civil rights cases: in 1980, for example, some 12,000 such petitions were filed in the U.S. district courts.180 Burger’s proposed modification to section 1983 jurisdiction lacked the support of all the Justices. Justice O’Connor told the House Appropriations committee in 1982 that it “would be helpful” if Congress “require[d] exhaustion of administrative remedies at the state level in section 1983 cases.”181 Other Justices thought section 1983 reform unhelpful. Associate Justice Rehnquist contended that “it doesn’t take long with a lot of [Section 1983 cases]” and most inmate petitions were simply “frivolous.”182

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179 Id.
182 Id. (statement of Justice William Rehnquist).
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. Chief Justice Burger repeatedly asked Congress to allow the Court to decide which cases it would review from the lower federal courts and from the 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 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.  

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, not surprisingly, such decisions sometimes create more confusion than they seek to resolve.” 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

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184 Letter dated __.
185 Id.
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.”

In piecemeal legislation Congress did, by way of response, limit certain direct appeals to the Court. But 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 upheld a state statute challenged on federal grounds. 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.

Although some scholars have questioned whether the near-complete repeal of mandatory appellate jurisdiction materially affected the Court’s caseload, the Justices were enthusiastic about their discretionary docket. The change meant that whole categories of cases that once demanded a decision could be disposed of expeditiously. 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.” Both justices emphasized how the Court was able to return to workload levels of ten

186 Id.

187 In 1974 Congress narrowed, almost to the point of extinction, direct appeals to the Supreme Court in antitrust cases (15 U.S.C. § 29). In 1975 it eliminated the three-judge district courts and direct appeals in Interstate Commerce Commission cases (28 U.S.C. §§ 2342-2350), and in 1976 in the large class of suits challenging the constitutionality of state or federal statutes (28 U.S.C. §§ 2281-2282).


189 Id.

190 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.”).


years prior. In fact, the Court was doing better than that: in 1980, 154 cases were argued before the Court, while the 1990 term saw the number drop to 125. Even with large numbers of petitions arriving at the Court, curtailed mandatory jurisdiction allowed the Justices to avoid cases that, as Scalia put it, “were not really worthy of our attention, but [in the past] had to be taken” 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. 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**

The elimination of nearly all mandatory jurisdiction marked a shift in the Court’s priorities. After Congress expanded the Court’s powers of certiorari, the Justices were more or less satisfied that they could fend off all undeserving cases and exercise adequate control over their own caseload. 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

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


the curtailment of mandatory jurisdiction), 2,577 paid and 2,675 in forma pauperis petitions were filed with the Court: of those, the Court reviewed 157 and 23 cases respectively, for a total of 180 merits decisions.\textsuperscript{197} In the 1994 term, the Court heard 83 of 2,515 paid petitions and 10 of 5,574 in forma pauperis petitions, a total of 93 merits decisions.\textsuperscript{198} Thus, in just seven years the number of cases the Court was deciding on the merits had halved 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 significantly reduced merits docket.

The Supreme Court’s ability to manage its docket through expanded 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 culminated in \textit{Lopez} and \textit{Morrison}.

\textbf{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 a skyrocketing number of federal criminal prosecutions beginning in the early 1980s.\textsuperscript{199} Between 1980 and 1992 the number of criminal cases filed in federal court grew 70 percent from 27,968 to 47,472 cases.\textsuperscript{200} Drug prosecutions explained a significant part of this increase: drug cases accounted for 17 percent of federal defendants in 1979 and 37 percent of federal defendants by 1992.\textsuperscript{201} Prosecutions produce convictions and convictions generate appeals. In 1992, 56 percent of the appeals on the

\hspace{1em}\textsuperscript{197} Lee Epstein et al., The Supreme Court Compendium: Data, Decisions, and Developments 82 tbl. 2-6 (5th ed. 2012).

\hspace{1em}\textsuperscript{198} Id.

\hspace{1em}\textsuperscript{199} See \textit{generally} . . . The civil docket represented a more mixed pattern. For example, bankruptcy filings increased in 1991, while in that same 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, \textit{The 1991 Year-End Report on the Federal Judiciary}, 24 \textit{The Third Branch} 4 (1992).


dockets of the federal circuit cases were from drug-related convictions.\textsuperscript{202}

It was not that more people began violating pre-existing federal criminal laws—nor that federal prosecutors were going after more perpetrators. Instead, Congress was aggressively using the Commerce Clause to enact new laws targeting with hefty penalties a range of drug offenses\textsuperscript{203} along with other activities that previously had been left to the state criminal justice systems.\textsuperscript{204} Describing in a year-end report Congress’s penchant for “federaliz[ing] crimes already covered by state laws,” Chief Justice Rehnquist gave as 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.”\textsuperscript{205} Among other new federal criminal laws was the Gun-Free School Zones Act, enacted as part of the federal Crime Control Act of 1990.\textsuperscript{206} 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.\textsuperscript{207}

In 1988, Congress created the Federal Courts Study Committee to examine (among other things) the caseloads of the lower federal courts.\textsuperscript{208} Reporting back, that committee issued a stark conclusion: despite aggressive measures by judges to stem their ever-growing caseloads, the lower federal courts faced an “impending crisis.”\textsuperscript{209}


\textsuperscript{203} See, e.g.,


\textsuperscript{206} Gun-Free School Zones Act of 1990, Public Law 101-647, 18 U.S.C. § 922(q), \textit{invalidated by United States v. Lopez}, 514 U.S. 549 (1995) (amending section 922 of title 18 of the United States Code by adding that “it 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.”)

\textsuperscript{207} Sara Sun Beale, \textit{Federalizing Crime: Assessing the Impact on Federal Courts}, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 48 (1996) (“In 1970, the average length of a criminal 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.”).


\textsuperscript{209} \textit{Report of the Federal Courts Study Committee}, Apr. 2, 1990, 4-5. 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
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 securing relief for the lower federal courts. In so doing, the Justices’ concern was not simply with lessening the workload of fellow members of the federal judiciary. Rather, the Justices saw a need to act because they concluded that the third branch itself was under threat. Given this motivation, when efforts to persuade Congress to curb its own behavior failed, the Court took matter into its own hands, exercising, in *Lopez* (and later in *Morrison*) the constitutional option.

**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 court. 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.”

He told Congress that it needed to “conserve water, not think of building new subdivisions” that would tax the ailing city. Lest the analogy be lost, he said: “We must give serious attention to curtailing some federal jurisdiction”—adding that “we cannot add jurisdiction to the federal courts without asking the hard question of whether the addition is an appropriate means of using scarce resources.” Calling for Congress to exercise “self restraint,” 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.”

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appellate courts, reducing the time allotted for oral argument and deciding fewer cases by full opinions. Id.


211 Id.

212 Id. at 2-3.

213 Id. at 3 (“Modest curtailment of federal jurisdiction is important; equally important is self-restraint in adding new federal causes of action.”).

214 Id. at 3.
examples of ill-advised federal laws, Rehnquist cited two congressional bills both sponsored by then-Senator Biden.\textsuperscript{215} the Violent Crime Control Act of 1991\textsuperscript{216} and the Violence Against Women Act of 1990.\textsuperscript{217}

Rehnquist’s 1992 year-end report reiterated his “cautionary”\textsuperscript{218} message from the preceding year. Warning against a “substantial rejection of traditional concepts of federalism,” Rehnquist urged a commitment to “a vision of the federal courts as distinctive forums of limited jurisdiction, meant to complement state courts rather than supplant them.”\textsuperscript{219} In his 1993 report, Rehnquist again cited the Violent Crime Control Act (which by that time had been defeated in the House) as problematic for “vastly expand[ing] federal jurisdiction over crimes involving firearms.”\textsuperscript{220} Had that bill been enacted, Rehnquist stated, it “would have seriously skewed our traditional federalist structure — at great cost and with little probability of impact on the crime problem.”\textsuperscript{221} Writing in his 1994 year-end report, shortly after \textit{Lopez} had been argued, Rehnquist again expressed “a genuine concern about the erosion of federalism, and the traditional division of responsibility between federal courts and state courts.”\textsuperscript{222}

During this same pre-\textit{Lopez} period other members of the Court pressed similar concerns when they testified at congressional budgetary hearings.\textsuperscript{223} 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

\begin{footnotes}
\footnote{215}{Id. \textit{See generally} Dan Freedman, \textit{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.”).}
\footnote{216}{The Biden-Thurmond Violent Crime Control Act of 1991, S. 1241, 102d Cong. § 1201 (1991). Rehnquist’s principal complaint was with the provision of the proposed statute that made a federal offense possession of a firearm during commission of any violent crime.}
\footnote{219}{Id.}
\footnote{220}{Id. at 3.}
\footnote{221}{Id.}
\footnote{222}{William H. Rehnquist, \textit{The 1994 Year-End Report on the Federal Judiciary}, 27 \textsc{The Third Branch} 3 (1995).}
\footnote{223}{Rehnquist himself appeared at House and Senate budget hearings on only 6 occasions, between 1978 to 1981.}
\end{footnotes}
altering its character.”

Rejecting efforts by committee members to pin increased federal dockets 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.”

In Scalia’s view, the issue was simple: “It is a matter of self restraint.” In 1992, Scalia also followed the Chief Justice’s lead, citing the Violence Against Women Act and the Violent Crime Control 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. They cannot handle everything in the country that is important.

Significantly, in these statements there is an emphasis on courts—on federalism as dividing responsibilities between the federal courts and their state counterparts.

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228 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 more nuanced. Two years before Lopez was decided, 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
While the Justices were of course concerned about the sheer impracticality of a large increase in federal cases, they viewed the docket issue in terms of basic structural principles that went to the role of the federal judicial branch under the Constitution. Their interest was in protecting the federal judicial branch more than protecting the autonomy of state government. Justice Scalia thus told the appropriations committee that Congress was threatening to turn the federal courts into “police court” thereby undermining the “elite” character of the federal judiciary. On a similar note, Chief Justice Rehnquist argued that the federal judiciary had become “a victim of its own success.” Thus, while Congress’s expansion of federal causes of action reflected 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 state systems,” if the federal courts ended up with the same “potpourri of cases” as state courts, the federal judiciary would lose its “special competence.”

The Justices argued 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

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229 See, e.g., Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1993: Hearings Before the Subcomm. 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.”).


232 Id.
individuals competent to handle garden-variety criminal law but unable to preside over complex civil suits. Justice Scalia thus stated that federalization of offenses traditionally left to the states to prosecute would “attract a different group of people”\textsuperscript{233} to the federal bench. He said: “a police court judge . . . [is] not going to be able to handle the antitrust cases.”\textsuperscript{234} Likewise, Justice O’Connor bemoaned the “deleterious effect” on the composition of the federal bench that results from expanded federal criminal dockets.\textsuperscript{235} “[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.”\textsuperscript{236} As caseloads continued to increase, Justice Kennedy argued, Congress would be required to create additional judgeships but, he warned, more federal judges also meant a lower-quality bench. “There comes a point” Kennedy said, “at which you have so many judges that the job does not attract the people that it used to.”\textsuperscript{237} Adding judgeships in order to process new federal causes of action was, in his view “the way to kill a judicial system.”\textsuperscript{238}

The Justices also predicted a corresponding decline in the quality of state courts. According to Justice Souter, as more crime becomes a federal concern, Congress would at once be “incapacitating those [federal] courts from doing what they do well now” while also producing decline at the state court level as “the expectation of State responsibility evaporates.”\textsuperscript{239} 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.”\textsuperscript{240}


\textsuperscript{234} Id.


\textsuperscript{236} Id.


\textsuperscript{239} Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1995: Hearings Before the Subcomm. of the S. Comm. on Appropriations, 103d Cong. 103 (1994) (statement of Justice David Souter).

\textsuperscript{240} Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies
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.” When Rehnquist became Chief Justice in 1986, Ronald Reagan was in the White House and federalism rhetoric was ubiquitous. Federalism was thus a useful theme for the Court to invoke in pushing for judicial reform.

Yet as illustrated by the above statements from Rehnquist and his colleagues, their 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. That idea, that a federalist-based division of labor protected the federal judicial branch—preserved its constitutional status—was a defining element of the Justices’ approach.

That the Justices viewed the docket issue as a constitutional issue helps explain why they did not consider their statements to Congress to run afoul of principles of separation of powers. While in earlier eras, the Justices had couched their comments in terms of inter-branch dialog and cooperation, a constitutional problem justified a more strident response. Thus, 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.”

\[241\] Richard Nixon, Address to the Nation on Domestic Programs, Aug. 8, 1969, 1969 Public Papers of the Presidents No. 324 (1971).

\[242\] See, e.g., Ronald Reagan, Address Before a Joint Session of the Congress on the State of the Union, Jan. 25, 1983 (urging a “comprehensive federalism . . . that will . . . restore to States and local governments their roles as dynamic laboratories of change in a creative society.”).

\[243\] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1984: Hearings Before the Subcomm. of the H. Comm. on Appropriations, 98th Cong. 284 (1983) (statement of Justice Lewis Powell) (describing the docket issue as “enormously complex” and noting that “it was “encouraging to see that [congressmen] are addressing the problem, and Justices of our Court . . . also are now speaking out.”).

Justice Rehnquist thought “[j]udicial comment and proposals with respect to what might loosely be called ‘wages, hours, and working conditions’ seem obviously appropriate” 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.”

Nonetheless, even as they pressed their case, the members of the Court also sought to display respect for 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.” Likewise, on questions of federal criminal legislation, Scalia said that same year: “I 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.” The Chief Justice also at times sounded a note of deference: “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.”

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. The year of issuance is significant: it is the same year that Lopez was decided. And while the final version of the long-range

246 Id.  
plan was 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 deciding the *Lopez* case.

The 200-page final plan included 93 “recommendations” and 76 “implementation strategies,” all approved by the Judicial Conference, along with commentary designated as not necessarily reflective of the Judicial Conference’s views. The plan is a remarkable statement on the proper 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.”

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.

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 sets out the

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251 Id. at 51.
252 Id. at 60.
253 Id. at 61.
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 Constitution as “special purpose courts, designed and equipped to adjudicate small numbers of disputes involving important national interests.” The mission of the federal courts, the plan announced, 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.” This distinction, the plan stated, between the nature and duties of the federal and state courts, represents “judicial federalism:” just as Congress exercised limited powers, “the federal courts were never intended to handle more than a small percentage of the nation’s legal disputes.” Instead, as a constitutional matter, “the federal courts were to be a distinctive judicial forum of limited jurisdiction, performing the tasks that state courts, for political or structural reasons, could not.”

The plan repeated arguments the Justices themselves made that the quality of the federal judiciary depended upon limited dockets. The plan explained that “the federal courts have had to decide many of society’s most contentious and important issues . . . presenting a high level of factual, legal and administrative complexity.” Federal courts have fulfilled this role because “they have high standards of legal excellence, have obtained superior resources, and attract talented personnel.” In addition, federal judges have benefited from having “a limited enough jurisdiction so they can become sufficiently expert with subject matter and procedure,” from “the time available for contemplation and reasoned decision,” and from the overall “prestige of the office.” 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.”

Having framed the characteristic of the federal courts in constitutional terms, the plan turned to the problem of rising dockets. Announcing that

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254 Id. at 65.
255 Id. at 66.
256 Id. at 66-67.
257 Id. at 68.
258 Id. at 68.
259 Id. at 68.
260 Id. at 68-69.
huge burdens are now being placed on the federal courts,"261 the plan set out statistics demonstrating the extent of the rise 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% cases filed in the federal district courts—but, it noted, that figure does not capture the reality of the burden of the modern criminal docket.262 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.”263 Among other factors, the plan cited an increase in drug offenses (they comprised 40% of cases in 1994); a 47% 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 prosecutors (by 125%) that far outpaced the increase in the number of judges (18%) during the same period.264 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 1960.265 Finally, the plan reported, in the courts of appeals the number of cases had grown more than 3,800% since 1904.266

Observing that “recent legislative trends suggest that federal caseloads will continue to grow rapidly,”267 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 2020.268 Managing this 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 2020.269 Given these numbers, the plan said, without reform, two “unfortunate consequences” were 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

261 Id. at 69.
262 Id. at 71.
263 Id. at 71.
264 Id. at 72.
265 Id. at 69.
266 Id. at 69.
267 Id. at 69.
268 Id. at 77.
269 Id. at 75.
swiftly, inexpensively and fairly."

In order to drive home the “nightmarish” future of the federal judiciary, the plan asked readers to imagine the following 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 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.

According to the plan, avoiding this dark 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.” Under that system, the state courts are “the primary forums for resolving civil disputes and the chief tribunals for enforcing the criminal law” while the federal judiciary exercises “a much more limited jurisdiction,” consistent with the “fundamental view of the nature of our federal system of government” as limited. 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 discretion. Therein lay the cause of the identified disease: “Traditionally, Congress has

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270 Id. at 75.
271 Id. at 78.
272 Id. at 77.
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.” The problem was that Congress had departed from these past practices and in so doing was undermining the “distinctive role for the federal court system.” The trend required reversal: “as Congress continues to ‘federalize’ crimes previously prosecuted in the state courts and to create civil causes of action over matters previously resolved in the state courts, the viability of judicial federalism is unquestionably at risk.”

The bulk of the plan’s recommendations aimed to cut back, in quite dramatic ways, on the caseload of the federal courts. The very first recommendation called for “sensible limitations on federal criminal and civil jurisdiction.” Specifically, the plan said, “Congress should . . . conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism. Civil and criminal jurisdiction should be 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.”

With respect to criminal cases, the plan this recommended a sharp limit on prosecutions in federal courts: “criminal 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.” Spelling out this standard, the plan identified five circumstances in which federal criminal jurisdiction was appropriate: (a) offenses against the federal government specifically or its agents or against interests “unquestionably associated with a national government” or where “Congress has evinced a clear preference for uniform federal control;” (b) activities with “substantial multistate or international aspects;” (c) activities by “complex commercial or institutional enterprise[s] most effectively prosecuted by use of federal resources or expertise;” (d) “serious, high-level, or widespread state or local government corruption; and (e) activities that “raise[] highly sensitive issues in the local community so that federal prosecution is more objective.”

This list is extraordinary. For one thing, the list 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

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273 Id. at 81-82.
274 Id. at 83.
275 Id. at 83.
276 Id. at 84.
277 Id. at 85.
qualifications ("substantial," "serious," "highly" and so on) that must be met before jurisdiction is appropriate. Consider in this regard the commentary that accompanies category (b). 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." 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 analysis—but this extra element would not render the statute consistent with the approach Congress is meant to take in order to protect the constitutional role of the federal courts. In other words, the issue of Congress’s power was not the only constitutional question when it came to federal criminal statutes: the burden upon the judicial branch also needed to be considered. A final 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.

On the civil side, the plan likewise urged fundamental reforms. It recommended that federal jurisdiction should be limited to statutes that “further clearly defined and justified federal interests.” Accordingly, federal court jurisdiction should extend only to civil matters that (a) “arise under the United States Constitution;” (b) raise issues that “cannot be dealt with satisfactorily at the state level” and involve either “a strong need for uniformity” or “paramount federal interests;” (c) involve foreign relations of the United States; (d) involve the federal government as a party; (e) involve disputes between or among the states; or (f) affect substantial interstate or international disputes. 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.

278 Id. at 84.

279 See id. 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.”).

280 Id. at 89.
The commentary that accompanies category (b) above, bears highlighting. It explains 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.” The recommendation’s goal was thus 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” 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.” Patent, trademark, and copyright represent were areas that would “satisfy[] this high standard.”

The commentary further explains that the additional basis for federal lawmaking, pursuit of a “paramount interest,” was designed to ensure a federal forum in order to protect “certain societal values.” According to the commentary, environmental, antitrust, and civil rights laws arguably met this standard. But then follows a qualification: Congress should also recognize that all state judges take an oath to uphold the U.S. Constitution and the supremacy of federal law. 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 cause of action if accompanied by “a concomitant reduction of federal jurisdiction in other areas.” 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 proven that state courts are inadequate to the task and only do so after trimming some other area of federal jurisdiction to make space for the new class of claims.281 Much of this approach ends up in the decision in Morrison, discussed below.

Other recommendations in the plan included cutting back on federal diversity jurisdiction;282 increased use of agency screening and adjudication;283 elimination of federal jurisdiction over ERISA claims and workplace injury claims;284 controls on the growth of the federal judiciary (e.g. number of judges) so as to maintain its special character,285 measures to reduce the burdens of pro se litigation;286 and greater use of alternative

281 Id. at 88-89.
282 Id at 89-90.
283 Id. at 93-94.
284 Id. at 95.
285 Id. at 98-99.
286 Id. at 123.
D. The Constitutional Option: Lopez

On April 26, 1995, the Court issued its 5-4 decision in United States v. Lopez. Chief Justice Rehnquist wrote for the Court; Justices Kennedy and Thomas wrote concurring opinions. In his majority opinion invalidating the Gunn Free School Zone’s Act prohibition against “any individual knowingly . . . possess[ing] a firearm at a place that [he] knows . . . is a school zone,” Rehnquist observed that the law had “nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” Reviewing the Court’s precedents to identify three historically-recognized categories of permissible Commerce Clause regulation, Rehnquist found the statute to fall within none. Accepting the use of the Commerce Clause in this case would, Rehnquist explained, allow 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,” with the risk of federal power would displace “criminal law enforcement or education where States historically have been sovereign.” Rehnquist thus 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. For one thing, Rehnquist observed, Congress’s failure to develop a solid factual record rendered the causal chain speculative. In addition, accepting the government’s reasoning would require the Court 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.”

In his year-end report for 1995, Chief Justice Rehnquist focused on how the standoff between the President and Congress could affect the federal judiciary’s budget. As in prior reports, Rehnquist made no mention of

287 Id. at 130.
290 Id. at 564.
291 Id.
292 Id.
293 Id. at 567.
decided or pending cases. Yet at the end of the report, Chief Justice Rehnquist 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 order to work out common sense solutions to recognized problems.295

The statement echoed the themes Rehnquist had pressed in prior year-end reports and 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 calling for self-restraint on Congress’s behalf, with Lopez, the Court had shown it had the ability and the will to confront the docket issue itself.

E. A Note on Justice Kennedy

Justice Kennedy’s concurring opinion in Lopez merits special mention in light of his committee testimony preceding the decision. In March of 1994, Kennedy appeared before the appropriations committees of the House and the Senate. Although in his testimony Kennedy tied the docket control issue to federalism, he downplayed any role for the Court in policing either. Asked whether he saw any 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.”296 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.”297

295 Id. at 6.


297 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1995: Hearings Before the Subcomm. of the S. Comm. on
On March 8, 1995, a few weeks before the *Lopez* decision was announced (at which time it was surely clear 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.”

As for federalism, Kennedy said, 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.” 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.” 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 that burdened the federal courts. The other is that Kennedy was simply preparing members of Congress for what was about to come. In either case, the message 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” in reviewing a use of the Commerce Clause power and “gave him “some pause” about the Court’s holding in *Lopez*. 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. In addition, Kennedy identified a guiding lesson about the proper role of the

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299 Id at 16.

300 Id.

301 514 U.S. 549, 560 (Kennedy, J., concurring).

302 Id. at 570.
FEDERALISM AS DOCKET CONTROL

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 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.  

So far, then, Kennedy was adopting his earlier-announced approach of little or no role for the Court in setting boundaries. A few lines later, though, the approach 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.” 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 responsibility for protecting 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.” 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

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303 Id. at 574.
304 Id. at 575.
305 Id. at 577.
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 Government has tipped the scales too far.”

In this case, given that the statute had no nexus to commerce and education was a traditional area of state regulation, “we have a particular duty to ensure that the federal-state balance is not destroyed.” 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 the schools.

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 new kinds of 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 both the division of authority between the federal legislature and those of the states—and between the federal and state courts.

Lopez involved a criminal statute. Within a short period the Court extended its approach, in Morrison, to civil laws that likewise presented federalism and docket concerns.

F. From Lopez to Morrison

The first Violence Against Women Act, introduced in 1990 by then-Delaware Senator Joe Biden, never made it through Congress, but the legislation was ultimately enacted as part of the Violent Crime Control and Law Enforcement Act of 1994. 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 court, proved a sticking point with the Senate Judiciary Committee. At the insistence of the Judicial Conference of the United States, chaired by Chief Justice

306 Id. at 578.
307 Id. at 578.
308 Id. at 581.
309 Id. at 164.
Rehnquist, the civil remedy provision was removed in the Senate’s version of the bill; in response the Judicial Conference withdrew its objections to the bill but nonetheless refused to endorse it. However, the House version of the bill contained a civil remedy and at reconciliation the joint committee agreed to include the provision. The bill ultimately passed by both houses of Congress and signed into law by President Clinton on September 13, 1994, thus included a civil remedy provision.

The Court heard a constitutional challenge to the civil remedy provision of VAWA in 1999 but the Justices had long had an eye on the law. 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 (at that time pending in Congress). Rehnquist complained that the proposed bill featured a definition of criminal conduct that was “so open-ended,” and a private right to action that was “so sweeping,” that the result would be “a whole host of domestic relations disputes” working their way through the federal judiciary. Rehnquist thus urged Congress “to consider carefully these concerns, which are shared across the spectrum of the nation’s federal and state judiciary.”

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” of the three branches of government. “As presented in the last Congress,” he stated, “[VAWA’s] proposed [civil] remedy would have seriously encumbered the federal courts . . . [and] impacted adversely on federalism values.”

More broadly, after the Court’s decision in Lopez, the Justices continued to press their concern with the dockets of the federal courts. The impact of increased congressional lawmaking was now fully felt: 1997 saw the “largest federal criminal caseload in 60 years.”

Appearing before an appropriations committee in 1997, Justice Kennedy, urging respect for
traditional federalism values, lectured committee members that the framers of the Constitution “devised the federal systems 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.”

Kennedy also reminded 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.” That said, Kennedy also expressed hope, as he had in his concurring opinion in Lopez, 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.”

The issue, he said, is “almost completely committed to the political branch. [Congress] determine[s] what the Federal balance is.”

For his part, Chief Justice Rehnquist continued to press for 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.”

The Chief Justice hailed this as a firm “principle” that was “enunciated by Abraham Lincoln in the 19th century, and Dwight Eisenhower in the 20th century.” Repeating a standard message, he declared 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.”

Echoing the specific recommendations of the Judicial Conference’s Long-Range Plan, Rehnquist urged Congress to hold hearings in order to set standards for when activities should be made federal offenses.

After Lopez, Morrison was not unexpected. Writing for the Court,
Rehnquist held that the 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 five of the Fourteenth Amendment. 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. 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 reasoning that we have already rejected as unworkable” in Lopez. 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.” Congress’s section five power also did not support VAWA’s civil remedy because the remedy was directed at alleged private perpetrators of violence rather than state government.

While commentary on Lopez and Morrison often portrays a sharply divided court, the budgetary hearings present a more nuanced picture. Justice Souter—who dissented in Lopez and authored the principal dissent in Morrison—had also expressed concerns about the increasing number of federal statutes and the burden they placed upon the lower federal courts. At an appropriations hearing in 1999, Souter described his “basic conceptualization” of federalism with the following rule: “what 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.”

Testifying in March of 2000, he offered a candid opinion proper resolution of the present cases is clear.” United States v. Morrison, 529 U.S. 598, 613 (2000).

324 Id. (“Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”).
325 Id. at 615.
326 Id. at 615-16.
327 See id. at ___.
on the increasing federalization of crime: “[A]s a general proposition, I think that is a very unsound way to run a federal union.” Where Souter differed from Rehnquist was his degree of deference to Congress. In setting out how he viewed the scope of federal 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.

Souter would have upheld as proper uses of congressional power both the Gun Free Schools Zone Act and VAWA’s civil remedy. But once read in light of his congressional committee testimony, Souter’s dissenting opinion in *Lopez* and in *Morrison* place him much closer to the majority than is conventionally thought.

**G. Summary and Aftermath**

[Add brief summary of *Lopez* and *Morrison* as docket control cases and significance]

The explanatory power of our account does not depend upon whether the Supreme Court obtained relief for the lower federal courts. Nonetheless, developments after *Lopez* and *Morrison* merit discussion. Two questions suggest themselves: 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.

Looking at raw numbers, *Lopez* plainly did not lead to a reduction in the criminal caseloads of the federal courts. In 1992, there were 48,366 new federal criminal cases filed. That number dropped slightly to 46,786 new

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331 Id.
cases in 1993 and dropped again in 1994 to 45,484 new cases. But after two years of decline, in 1995, the year Lopez was decided, the number of new federal criminal cases rose to 45,788 cases. From there, the number has continued to increase. In 1998, there were 57,691 new cases filed (a 26% increase in three years after Lopez). In 2013, 69,449 new federal criminal cases were filed, representing an increase of 52% in the criminal docket of the federal courts since the Lopez decision. Of course, these numbers do not tell the whole story: they might well have been higher without the Court’s Lopez intervention.

It is also unlikely that Lopez and Morrison persuaded members of Congress to act with greater lawmaking restraint. The Gun Free School Zones Act is itself a testament to this conclusion. After being declared unconstitutional, the prohibition on gun possession near schools was rewritten and reenacted with a new Commerce Clause hook, superficially constraining the law’s application to any firearm “that has moved in or that otherwise affects interstate or foreign commerce.” This modest amendment has satisfied appellate courts.

On the civil side, the story after Morrison is mixed. In the years immediately after Morrison, the number of district court civil filings dropped significantly: from 290,271 cases in 1999 to 259,517 cases in 2000 and then 250,907 cases in 2001. Since then, the civil docket has yo-yoed between a low of 252,962 new cases (in 2003) to a high of 289,252 new cases (in 2011). In the circuit courts, the number of new civil cases filed rose steadily from 53,895 cases in 1999 to 70,375 cases in 2006.

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333 Id.
334 Id.
335 Id.
336 Id.
338 See e.g., United States v. Tait, 202 F.3d 1320 (11th Cir. 2000) (same).
339 id
340 For example, the civil docket was over 274,000 new cases filed in 2002; nearly 253,000 in 2003; over 281,000 in 2004, and then about 253,000 in 2005.
341 id
However, after 2006, appellate filings civil steadily receded to *Morrison*-era levels: in 2013, 56,453 new cases filed, representing a 20% decrease over a seven-year period.\(^{344}\) 

The predictions of the 1995 Long-Range Plan did not materialize. Recall that the plan concluded that, without substantial reform, federal district courts would docket 364,800 total cases (i.e. criminal and civil and other) in 2000, 610,800 cases in 2010, and 1,060,400 cases in 2020.\(^{345}\) In fact, the district courts had only about 360,000 total cases filed in 2010.\(^{346}\) In that same year, the Judicial Conference of the United States published an updated “Strategic Plan for the Federal Judiciary.”\(^{347}\) In just eighteen pages, the 2010 Strategic Plan proposed increasing judicial compensation to attract quality judges,\(^{348}\) making “more effective use” of senior judges,\(^{349}\) and modest efforts to improve the efficiency of the federal courts.

IV. BEYOND *LOPEZ* AND *MORRISON*

Docket control goes a long way in explaining the Court’s decision in *Lopez* and in *Morrison*. Docket control also sheds helpful light on other decisions including some that are not conventionally thought of as involving questions of federalism. In this Part, we explore some areas in which a docket control account makes considerable sense of what the Supreme Court has decided.

*A. The Rest of the Revolution*

[discussion to come of sovereign immunity; commandeering; *Raich*]

\(^{343}\) \url{http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2006/tables/B00Mar06.pdf}


\(^{345}\) 166 F.R.D. 49 at 75.


\(^{347}\) \url{http://www.uscourts.gov/uscourts/FederalCourts/Publications/StrategicPlan2010.pdf}

\(^{348}\) Id. at 7.

\(^{349}\) Id. at 8.
Docket control may also helpfully serve as the common thread in decisions of the Rehnquist Court across a wide range of other areas. For example, the Rehnquist Court has crafted broad rules of Eleventh Amendment state sovereign immunity. In several notable contexts it ruled that there existed no private right of action under federal law. It took a broad approach to the use of arbitration in lieu of judicial resolution of claims. It adopted generous rules of immunity shielding government officials from lawsuits. In each of these areas, the Court limited the possibilities of bringing a case to federal court. Other commentators have viewed many of these cases as reflecting the Court’s hostility to certain kinds of claims (particularly civil rights claims) or to litigation in

See, e.g., Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that Congress did not validly abrogate state sovereign immunity under Title I of the Americans with Disabilities Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding abrogation invalid under Age Discrimination in Employment Act); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (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 of Fla. 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).

See, e.g., 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); Correctional Services Corp. v. Malesko, 534 U.S. 61, 73 (2001) (holding that federal inmate cannot bring Eighth Amendment claim against private operator of correctional facility).

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, 490 U.S. 477, 485 (1989) (holding that an agreement to arbitrate claims under the Securities Act of 1933 is enforceable).

See, e.g., Brosseau v. Haugen, 543 U.S. 194, 197-98 (2004) (per curiam) (qualified immunity shields police officer from suit when officer makes decision that, even if constitutionally deficient, reasonably misapprehends law; here, it was not clearly established that use of deadly force against fleeing suspect violated Fourth Amendment and officer was therefore 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).

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”).
but docket control provides an alternative account. We do not mean to overstate our claim. The Court’s decisions in these areas, as in the context of federalism, are not all in one direction. Nonetheless, the overall effect is to trim some of the caseload of the lower federal courts.

B. Habeas Corpus

*Lopez* and *Morrison* coincided with a remarkable shift in the rules

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355 See, e.g., 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 (writing that the Rehnquist Court “launched a wholesale assault on one of the primary mechanisms Congress has used for enforcing civil rights: the private attorney general”).

356 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 “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.

357 See, e.g., Gonzales v. Raich, 125 S. Ct. 2195, 2201 (2005) (holding that the Commerce Clause permits the federal government to ban intra-state possession of marijuana for medicinal use).

358 See, e.g., Tennessee v. Lane, 541 U.S. 509, 533-34 (2004) (holding that 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); Hibbs v. Winn, 542 U.S. 88 (2004) (holding that the Tax Injunction Act did not bar Establishment Clause challenge in federal court to state tax credits); 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);

359 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 (1908). The Eleventh Amendment also has no application to cities or counties. Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 47 (1994).

360 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 causes of action) may merely be an unavoidable byproduct of protecting the dockets of the federal courts.
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, the Court also significantly expanded the opportunities for federal courts to review through habeas petitions state court convictions and sentences. From the time he arrived at the Court in 1972, Rehnquist took a strong position (one he had held as a law clerk) that federal habeas review of state court proceedings should instead be extremely limited. Initially, Rehnquist expressed this view most often in dissenting opinions. However, as like-minded colleagues joined the

361 See, e.g., Duncan v. Louisiana, 391 U.S. 145 (1968) (incorporating Sixth Amendment right to a jury trial against the states); Miranda v. Arizona, 384 U.S. 436 (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 (1963) (requiring appointment of counsel for indigent defendants charged with serious offenses in state court); Mapp v. Ohio, 367 U.S. 643 (1961) (applying Fourth Amendment exclusionary rule to state proceedings);

362 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.”); 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).

363 See Larry W. Yackle, The Habeas Hagioscope, 66 S. Cal. L. Rev. 2331, 2343 (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).

364 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 637 (“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.”) (quotation omitted).

365 See, e.g., Bounds v. Smith, 430 U.S. 817, 837, 838 (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.”); Estelle v. Jurek, 450 U.S. 1015, 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 “[h]e 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
Court, 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. As Chief Justice Rehnquist presided over a more dramatic curtailment of federal habeas review.

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. Among other efforts, in 1988, Rehnquist

carried out.


367 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”); Herrera v. Collins, 506 U.S. 390 (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); Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993) (rejecting “harmless error beyond a reasonable doubt” standard in habeas cases in favor of a test of whether an error had “substantial and injurious effect or influence in determining the jury’s verdict); Keeney v. Tamayo-Reyes, 504 U.S. 1 (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).

368 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. 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 change the [habeas] system. It was chaotic, wasteful, and an abuse of the people's right to have laws enforced, he contended in a series of speeches.”); Marcia Coyle et al., Rehnquist Is Still Hoping for Habeas Reform, NAT'L L.J., Jan. 14, 1991, at 5; William H. Rehnquist, Remarks, A.B.A. Midyear Meeting (Feb. 6, 1989).
appointed a committee chaired by Justice Powell to issue 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, triggering a statutory requirement that the chair of the Senate Judiciary Committee introduce reform legislation within fifteen days of transmittal of the report.\(^{369}\) That legislation did not succeed and other legislative efforts also stalled.\(^{370}\) However, one year after \textit{Lopez}, Congress delivered: Title I of the federal Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a law Rehnquist publicly supported, placed numerous restrictions on federal habeas review of state court convictions and sentences.\(^{371}\)

The combination of AEDPA and the habeas decisions of the Rehnquist Court has been dramatic.\(^{372}\) In his January 1, 1998, 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 1996.”\(^{373}\) More recent data confirm the effect of reform efforts. A study of a randomly selected sample of federal habeas petitions filed during 2003 and 2004 found that forty-two percent of petitions in noncapital cases and twenty-eight percent of the petitions in capital cases were dismissed without the courts reaching the merits.\(^{374}\) In just one out of 341 petitions studied did the petitioner receive relief; this figure represented a decrease from the pre-AEDPA rate of relief for noncapital filings of one


\(^{370}\) See id.

\(^{371}\) 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. See generally Larry W. Yackle, Yackle’s Federal Courts: Habeas Corpus (2d ed. 2009).


out of 100 petitions.\textsuperscript{375} Another study of death penalty cases found that prior to the 1996 law, forty percent of state capital prisoners who filed federal habeas petitions had their convictions or sentences overturned; the figure dropped to twelve percent in 2000-2006 and continues to fall.\textsuperscript{376}

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\textit{ Lopez} and\textit{ Morrison} we have offered. First, in case after case, there is concern with the burden habeas petitions from state inmates impose upon the lower federal courts\textsuperscript{377} even though such petitions have always represented a relatively small portion of the federal docket.\textsuperscript{378} As with\textit{ Lopez} and\textit{ Morrison}, however, docket concerns rested upon issues of constitutional structure. Strong federal habeas review of state court convictions and sentences risked 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 systems.\textsuperscript{379}

\begin{footnotes}
\item[375] Id. at 9.
\item[377] See, e.g., McCleskey v Zant, 499 U.S. 467, 491 (1991) (111 S. Ct. at 1469 ("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) ("The 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."); Withrow v Williams, 507 U.S. 680, 702 (1993) (O'Connor, J., concurring and dissenting in part) ("Despite its meager benefits, the relitigation of\textit{ Miranda} claims on habeas imposes substantial costs . . . consume[ing] scarce judicial resources on an issue unrelated to guilt or innocence.").
\item[378] See Linda Greenhouse, A Window on the Court; Limits on Inmates's Habeas Corpus Petitions Illuminate Mood and Agenda of the Justices, NY Times, May 6, 1992 (reporting that the 10,000 habeas petitions state inmates file each year in federal district court represent five percent of the civil cases filed). [Add most recent figures]
\item[379] Withrow v Williams, 507 U.S. 680, 702 (1993) (O'Connor, J., concurring and dissenting in part) ("[T]he relitigation of\textit{ 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 635 ("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."); Engle v Isaac, 456 U.S. 107, 126 (1992) ("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 1571["l]iberal allowance of the writ ... degrades the prominence of the trial itself.");
\end{footnotes}
Stepping back, on this account, it is one thing for the Supreme Court to announce—in cases like *Duncan, Miranda, Gideon,* and *Mapp*—constitutional rules that apply in criminal trials in state courts. But the task of implementing those rules falls on the state courts that conduct the trials: it is quite another thing for the lower federal courts to be enlisted via habeas as a forum for a second trial in ordinary criminal cases.

C. Marbury

[an account of Marbury as a docket control case to come]

CONCLUSION

[to come]