INSIDE THE FEDERALISM CASES:
CONCERN ABOUT THE FEDERAL COURTS

Ann Althouse

This article considers some of the Supreme Court's recent efforts at preserving the role of state and local government despite vigorous congressional attempts at regulating in areas that had traditionally been left to local policymaking. Focusing on the commerce clause cases and cases interpreting Section 5 of the Fourteenth Amendment, this article ties federalism interests to the Supreme Court's concerns about the function of the federal courts: the statutes that prompted the Court's new vigor in limiting congressional power imposed on the workload of the federal courts and on what the Court sees as the judiciary's exclusive role of constitutional interpretation.

The efforts of the conservative side of the Supreme Court to enforce federalism as a matter of constitutional law have drawn a good deal of criticism. Many observers had come to feel secure in the belief that it was well settled that Congress alone would decide which matters should be resolved at the national level and which would be left to the states. Thus Court watchers were surprised, even shocked, when, in 1995, United States v. Lopez struck down the federal Gun-Free School Zones Act (GFSZA). Further consternation ensued last summer when the Court, in Morrison v. United States, found part of the Violence Against Women Act (VAWA) unconstitutional. In both of these cases, a bare majority found that an act of Congress exceeded the power granted by the commerce clause.

Since 1937, commerce clause doctrine has allowed Congress to regulate matters that have a “substantial effect” on interstate commerce, and, until 1995, this doctrine had worked to accommodate every single matter Congress saw fit to regulate. For a brief period between 1976 and 1985, the Court had experimented with a doctrine that excepted “traditional state governmental functions” from this broadly expansive congressional power – Congress could, for example, impose a national minimum wage, but the state as an employer would be able to make some of its own wage decisions free of that federal mandate. But when the Court abandoned even that small excision from federal power in Garcia v. San Antonio Metropolitan Transit Authority, the sense that the Court had permanently retired from the business of enforcing federalism began to take hold. Garcia left us with something more than doctrine that seemed to create

---

* Ann Althouse is the Irma M. & Robert W. Arthur-Bascom Professor of Law at the University of Wisconsin Law School. She has written numerous articles on the subject of federalism and the federal courts.
† Copyright © 2001 by The American Academy of Political and Social Science; Ann Althouse.
unlimited national power; it articulated a theory to justify that power. Congress was quite properly the sole decision maker on issues of federalism because the Constitution had structured Congress to embody the interests of the states. With this so-called political safeguard for federalism values, congressional deliberation provided all the protection the states needed against losing legislative control over any given matter and all the protection the constitutional Framers intended to give them.

_Garcia_, combined with the post-1937 history of expansive commerce power interpretation, seemed to some observers to have permanently sealed the fate of the states. The states’ ability to “perform their separate functions in their separate ways,” to tailor legislative solutions to local problems and preferences, and to experiment and innovate would depend on whether or not Congress chose to substitute uniform federal law for the diverse, patchwork approach offered by state and local law.

_Garcia_ depended not merely on a recognition of Congressional power but also on a rather abject assessment of judicial capacity. Efforts at defining an area of traditional state governmental functions had not gone very well. There had been far too much burdensome litigation dogging the lower courts; there seemed no end to the questions about where to draw the line between traditional and nontraditional; and there were new questions about whether tradition ought to be the measure of federalism. Different federal courts of appeals had reached different conclusions about whether, say, an urban transit system was a traditional state function. Similarly, the commerce clause cases in the years before 1937 had shown the courts in disarray, obstructing democratic choice without having a confident, predictable method of sorting out what was properly reserved to the states and what could be the subject of federal law. With _Garcia_, there seemed to be a final resting point for federalism-based constitutional law: it was all a horrible mistake, an embarrassment that the Court now quite properly consigned to the doctrinal dustbin.

By contrast, Congress seemed to have won the respect that the case law had given it: its past choices about when to impose uniform national regulation inspired confidence. The economic regulation of the New Deal era had provided the context for the expansion of commerce clause doctrine. The value of this expansion was strongly confirmed when the Court was able to use the commerce clause to uphold the Civil Rights Act of 1964. _Garcia_ involved the application of minimum-wage laws to the states as employers. Unlike the bumbling judiciary, Congress stood out as a worthy institution that could reliably perform the task of setting the balance between federal and state power.

Why then did the conservative side of the Court disturb this perceived repose? One might say that the final resting point just described was never really very secure. The conservative members of the _Garcia_ Court, who numbered only four at the time, condemned the majority’s abdication of the judicial role and wrote of overturning the

---

5 469 U.S. at 551. The Garcia Court relied on the analysis in Wechsler 1954. See also Choper 1980.
6 Younger v. Harris, 401 U.S. 37 (1971) (“Our Federalism” entails a presumption that things work best “if the States and their institutions are left free to perform their separate functions in their separate ways.”).
decision at some future date. But, in fact, the conservatives, though they gained their majority when Justice Thomas replaced Justice Marshall in 1991, have not overruled Garcia.

I want to suggest here that the conservative side of the Court, like the Garcia majority,\(^8\) looks at the nature of the judicial role and the capacity of the judges to carry out their work to good effect. For this reason, it has not used its majority power to restore the doctrine that Garcia overruled. It has not opted to involve the courts once again in the task of defining traditional state functions, which had proven so intractable in the past. The conservative majority has designed its new federalism so that it works not merely to protect the states from intrusions of federal power but also to protect the role of the federal judiciary. This article examines the way federalism-based doctrine connects to concerns about the caseload and the “lawsaying” function of the federal courts.\(^9\)

**BURDENING THE FEDERAL COURTS**

Concern about burdens on the federal courts might explain the disinclination to overrule the doctrine established in Garcia, despite the fact that a majority of the justices does not subscribe to its foundational *belief in the ability of the national political process to protect the interests of the states.* More clearly, the concern about burdening the federal courts can help explain the Lopez and Morrison decisions. In those two cases, the Court found that an act of Congress exceeded the power granted by the commerce clause. Note the practical effect on the federal courts. GFSZA, challenged in Lopez, made it a federal crime to possess a gun within 1000 feet of a school zone. VAWA, at issue in Morrison, contained a section that created a federal tort claim that one individual could assert against another for “gender-motivated” violence. It should not strain credulity to say that the conservative majority viewed these statutes as cluttering the federal docket with ordinary crime and tort cases – the traditional work of the state courts.

The state courts far outnumber the federal courts, and many of the Court’s jurisdictional opinions reflect a concern for the rational allocation of judicial resources. Throughout the Burger-Rehnquist era, the Supreme Court has used jurisdictional doctrine to structure the workload of the federal courts, relegating various matters to the state courts, ostensibly in the name of federalism. Citing deference to state interests, the Court has developed doctrines, in areas like abstention, habeas corpus, and sovereign immunity, that have cleared many cases from the federal courts' dockets.\(^10\) As a matter of simple arithmetic, the great majority of cases must go to the state courts, so the

---

\(^8\) One member of the Garcia majority, Justice Stevens, remains on the Court. The rest of the Garcia majority has retired, but each of those justices— with the exception of Justice Marshall, replaced by Justice Thomas— has a successor with similar ideas about federalism and constitutional law.

\(^9\) “It is emphatically the province and duty of the judicial department to say what the law is.” Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

category of cases that belong in federal court must be kept comparatively small, though not everyone will agree about which ones should be excluded.

Federalism-based jurisdiction doctrine is open to the criticism that it undervalues federal constitutional rights by relegating them to state courts. Yet a doctrine that, for example, requires defendants in ongoing state criminal proceedings to present their federal constitutional defenses to the state court rather than initiating new cases in federal court may be justified on the ground that it enlists the much more numerous state courts in the process of enforcing federal law. One might contend that constitutional rights are too important to be entrusted to state courts, yet the routine bypassing of the state courts, with its attendant burden on the federal courts, might undermine the very sympathy toward rights that commentators tend to believe federal judges possess. State judges need to learn to enforce rights as they arise in the context of criminal cases; full protection of rights depends on their becoming deeply ingrained in state court practice. A federal court bypass short-circuits that process. Federal jurisdiction should be shaped to maintain pressure on the state courts to fulfill the obligation to enforce federal law. Thus, for example, habeas corpus access after the state criminal process has concluded should be preferred (as it is) to injunctions of ongoing criminal proceedings.

The jurisdiction cases interpret statutes and design interstitial common law: they do not strike down federal statutes. Since the federal courts remain subject to Congress's strong power over their jurisdiction, judicial notions about federalism and jurisdiction are subject to legislative override. The burdens on the federal courts, however, have come not through expansive jurisdiction statutes but through the congressional creation of new substantive claims. When this occurs, as it did with GFSZA and VAWA, no interpretation of jurisdictional doctrine can reallocate the caseload to the state courts: these cases fall squarely within federal question jurisdiction. The only options are to accept the new caseload or to begin to restrict Congress's legislative powers, by enforcing some restriction on the commerce power. The Court is currently split over these options. Though both sides of the Court have pleaded with Congress to refrain from “the federalization of traditional state crimes and the extension of federal remedies to problems for which the States have historically taken responsibility,” the liberal members of the Court adopt a position of judicial restraint when Congress proceeds to enact these statutes, whereas the conservative justices have taken up activism.

GFSZA and VAWA stirred judicial activism not only because they interfered with the legislative powers of state and local government but because they gave the federal

---

12 See, for example, Sheldon v. Sill, 49 U.S. 441 (1851).
15 Morrison, 120 S. Ct. at 1764, n. 10 (Souter, Stevens, Ginsburg, and Brennan, Js., dissenting) (citations omitted); U.S. Senate 1994, 100-107.
16 Morrison, 120 S. Ct. at 1764, n. 10 (Souter, J., dissenting) (“It should go without saying that my view of the limit of the congressional commerce power carries no implication about the wisdom of exercising it to the limit.”).
courts a new workload composed of cases that looked too much like the routine work of
the state courts. It is one thing for Congress to move into the area previously covered by
state law: Congress chooses to take on a new task and intrudes only on the state
legislative power. This is an aggrandizement of the federal government at the expense
of the states. But consider the jurisdictional effect: this is not necessarily an
agrandizement of federal judicial power at the expense of the state judiciaries. If the
new caseload were viewed as genuinely worthy of federal jurisdiction, the loss of state
power would translate to a gain in federal power. But to the extent that the new cases
are viewed as ordinary torts and crimes, the federal judiciary is diminished by the new
burden.

With the federalization of torts and crimes, the interests of the federal judiciary
converged with federalism interests. Although no jurisdictional doctrine was available
to express judicial resistance to these impositions on the federal courts, principles of
federalism did provide an argument to rein in Congress. We cannot know whether the
conservative side of the Court would have felt sufficient pressure to enforce limits on
the commerce power if only the interests of the states were at stake. But anyone
attempting to understand the Court's new federalism should take into account the way it
is interwoven with concern about the work of the federal courts.

NATIONAL PROBLEMS, LOCAL SOLUTIONS?

The problems of guns in schools and violence against women are easily perceived
as national problems, and there is some sense to the argument that Congress should be
left with the power to decide when the efficiency of a single, national *137 solution is
warranted. There is a counterargument that favors judicial intervention to preserve
room for the states to address their problems in their own ways. Background beliefs
will affect which argument one embraces: are the states likely to come up with good
ideas and to respond in helpful ways to local needs, or are they bastions of prejudice
and incompetence? Will Congress solve nationwide problems with efficiency and
expertise, or will it hastily grasp at the political gains that come from appearing to solve
conspicuous problems? The influence of these background beliefs contributes to the
conservative-liberal split over the judicial enforcement of federalism. It may be that the
liberal justices tolerate the added caseload that comes from letting Congress decide
when federal torts and crimes should be created because they are committed to
preserving congressional power to overcome the bad choices that they worry the states
will make. The conservative justices have no conflict at all: because they favor the
diversity and decentralization of state and local law and doubt the ability of Congress to
do better, they can rid the federal courts of the new caseload without a sense of
sacrifice.

The fact that Congress recognizes the existence of a particular problem does not
necessarily mean it should leap to solve it by committing scarce federal court resources.
Consider Lopez: one boy carrying a gun to school does not amount to the sort of crime
that ought to occupy a federal judge’s time. Similarly, though violence against women
is a serious matter, an endless stream of tort claims brought by one individual against another should not flow into the federal courts. Just as the Court developed abstention doctrine to prevent one criminal defendant after another from moving constitutional defenses to federal court and to motivate state judges to internalize the requirements of federal constitutional law,\(^\text{17}\) the Court has now developed commerce clause doctrine to prevent the use of the federal courts to bypass state judiciaries.

The “substantial effects” doctrine, interpreted broadly, left the federal courts unprotected. Any crime, aggregated with all other crimes of its type, has a “substantial effect” on interstate commerce. Victims of any sort of violence may lose time from their jobs, need to use medical services, and so on, and these effects, taken together, add up to a "substantial effect" on the economy. Quite apart from its impact on the federal courts, the “substantial effects” doctrine, as expansively interpreted by the Court, violated the fundamental constitutional principle of enumerated and reserved power. \(Lopez\) made the doctrine more restrictive, but only slightly. Although it could have scrapped the “substantial effects” test entirely,\(^\text{18}\) it merely limited that test to “activities that arise out of or are connected with a \(\text{commercial transaction}\), which viewed in the aggregate, substantially affects interstate commerce.”\(^\text{19}\)

The Congress that passed GFSZA did not address the question of its own power.\(^\text{20}\) The \(Lopez\) majority in the Supreme Court, however, unlike the lower court in \(Lopez\), did not rest \(*138\) its decision on that ground – the failure of Congress to make a formal demonstration of the facts establishing the commerce clause basis for its action. The Court wrote that Congress could at most supply additional information that might enable the Court “to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye.”\(^\text{21}\) Here, as elsewhere, the Chief Justice asserted a strong conception of judicial control over the definition of constitutional law – in this case, the meaning of substantial effect on commerce. Congress may make a first assessment of whether a particular matter meets that standard, but the Court would have the final word.

Justice Breyer, in his dissent, elaborated the connection between guns in schools and the economy. Indeed, it is easy to make this connection. The “naked eye” needs little help: visualize children as future workers, and everything that affects them affects the economy. This cannot be the test of congressional power, according to the conservative majority, precisely because of how well it works: it would transform Congress's limited powers into unlimited powers. It would enable Congress to act wherever it chose and make it especially easy to reach the very areas that tend to be

---


\(^{18}\) See Lopez, 514 U.S. at 584-602 (Thomas, J., concurring) (noting the more modest position taken in the other opinions and arguing that the “substantial effects” test is in fact an incorrect interpretation of the commerce clause).

\(^{19}\) 514 U.S. at 561 (emphasis added).

\(^{20}\) Congress did amend GFSZA after the Court of Appeals for the Fifth Circuit had stricken down the statute precisely for its lack of constitutional "findings" connecting gun possession to interstate commerce. See Lopez, 514 U.S. at 552.

\(^{21}\) Lopez, 514 U.S. at 563.
mentioned first when attempting to identify matters traditionally left to the states: education, family, marriage, and street-level violence.\textsuperscript{22}

The Congress that passed VAWA – a year before the \textit{Lopez} decision – did make an effort to amass evidence of the effect of violence against women on the economy. Yet this evidence relied on the same attenuated causal connection that Justice Breyer would use in his \textit{Lopez} dissent. Once the majority had repudiated that approach to causation, Congress’ attentiveness to constitutional law lost the weight it might have had if GFSZA, with its lack of even a nod to the Constitution, had not come first and provided the final push that led the Court to reinvigorate federalism.

Congress, after winning the respect the \textit{Garcia} Court gave it, proceeded to lose it by enacting statutes like GFSZA and VAWA. Tempted, perhaps, by the political gains to be won by demonstrating a concern for children, women, and violence, Congress took actions not justified by any real need for national uniformity. Individualized state and local approaches to problems were displaced or overshadowed without much consideration for whether a disuniform approach might be superior. Many problems, such as violence in schools, vary in nature and intensity from place to place. Variation in policy, moreover, can express local preferences and can work as an experiment, yielding a set of tested options that informs the policymaking of other states.\textsuperscript{23} To crush this variety and vitality is no small matter.

The congressional decision to displace local decision making about racial discrimination in places of public accommodations, so clearly a worthy decision, encouraged the Warren-era Court to take a generous \textit{\#139} view of the commerce power.\textsuperscript{24} GFSZA represented Congress at the opposite extreme, taking on a problem not because of the poor performance of the states or any demonstrated need for uniformity but out of a self-serving political recognition that voters care deeply about schools and violence. The one-size-fits-all GFSZA visited harsh criminal penalties on children, depriving the local polities of a free space in which to attempt more creative, more benevolent, more effective, or more preferred solutions. Whisking kids away into prison (with the help of federal judges) interfered with experiments like gun-surrender programs and sanctions aimed at parents.\textsuperscript{25}

The crude treatment of federalism values in GFSZA roused the Court from the deference it had been willing to give to Congress. Without \textit{Lopez}, VAWA might have looked like a worthy effort in the tradition of the Civil Rights Act of 1964. After \textit{Lopez}, at least to the conservative majority, VAWA seemed to be another unwarranted displacement of state diversity, another voter-pleasing gesture that threatened to crowd the federal courts with cases that really belonged in state court. One would need to accept the Breyer theory of causation to accept VAWA’s connection of gender-motivated violence to interstate commerce. Moreover, VAWA was not an attempt to regulate “activities that arise out of or are connected with a \textit{commercial transaction}.”

\textsuperscript{22} See id. at 564-65.
\textsuperscript{23} See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
\textsuperscript{25} See Lopez, 514 U.S. at 581-82.
Thus what was intended to serve as a dutiful demonstration of the basis for congressional power now appeared to be an attempt to rewrite the Court’s constitutional doctrine, a congressional usurpation of the Court’s prized constitutional lawsaying role.

THE LAWSAYING ROLE AND THE FOURTEENTH AMENDMENT

This struggle over the lawsaying role calls to mind City of Boerne v. Flores,26 the case that struck down the Religious Freedom Restoration Act (RFRA). The Court had recently changed its interpretation of the free exercise clause. No longer would states need to show a “compelling interest” in order to justify statutes of general applicability that may substantially burden but do not target religion.27 In RFRA, Congress attempted to restore the Court’s old doctrine, to rewrite constitutional law with a statute.

As authority for this action, Congress invoked Section 5 of the Fourteenth Amendment, empowering it “to enforce, by appropriate legislation, the provisions of this article.” Arguably this provision authorized the statutory expansion of rights. Just as the Civil Rights Act of 1964 had generated broad interpretations of the commerce clause, the Voting Rights Act of 1965 had led to the cases suggesting that Congress could enlarge rights using its enforcement power.28 Congress won deference because it had attended to a matter that genuinely deserved a uniform, national statement to displace the inadequate efforts of the states. But deference won can also be lost. RFRA proved to be the GFSZA of the Fourteenth Amendment. *140

Before Boerne, one might have thought that Section 5 gave Congress a role in articulating rights: the Court would begin a dialogue about rights, establishing their basic scope, but Congress could then choose to add to those rights. The Court might have given a narrow meaning to a right in order to leave room for democratic decision making, and then that democratic choice could be to enlarge the right. But there is a glaring federalism problem here: the majoritarian processes the Court accommodated by constraining the size of a Fourteenth Amendment right were the legislative processes of the states. The statutory expansion of rights embodied in RFRA was a national policy choice that restricted state lawmaking. Congress did not merely define the scope of the free exercise right; it also made a decision about what should be governed by federal law and what should be left to state lawmaking. It was redefining

28 See, for example, Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding five-year ban on voter literacy tests, despite Supreme Court opinion that literacy tests do not violate the Constitution); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (upholding ban on voter literacy tests related to persons schooled in Puerto Rico).
the right and also resetting the federalism balance. Moreover, it had dumped a large number of cases on the federal courts.  

In *Boerne*, the Supreme Court responded with a strong statement of its intent to preserve the judicial grip on the lawsaying function. The courts, not Congress, would control the interpretation of constitutional rights. The Court made Section 5 power much more difficult to tap. Henceforth, Section 5 legislation would need to be genuinely remedial of rights as defined by the federal courts. Any purported “enforcement” of those rights would need to be “congruent” with and “proportional” to judicially defined rights.  

The new doctrine would unmask “remedies” that reached beyond real-world problems as attempts at redefining rights, impermissibly encroaching on the judicial domain.  

*RFRA* openly displayed its intent to supplant judicial interpretation. Since *Boerne*, however, the Court has gone on to restrict the use of Section 5 power in subtler cases in which the Court perceived Congress to be creating remedies beyond the scope of judicially defined rights.  

Today, the Court closely polices congressional attempts to use the Fourteenth Amendment power. Even when a statute does not target a disfavored Supreme Court opinion the way *RFRA* did, the Court will not permit the enlargement of rights. Here, as in the commerce clause cases, the conservative majority has designed doctrine that works to protect not only states but the federal courts as well.

**THE LAWSAYING ROLE AND VAWA**

We have seen that *Morrison* rejected Congress’ attempt to connect violence against women to a substantial effect on the economy. Acts of violence committed by one person against another are not “activities that arise out of or are connected with a commercial transaction.” The reason for “federalizing” the violence – gender – makes it less of a “commercial transaction” than a robbery. Yet one might say that gender-motivated violence does have a greater claim to national attention than does robbery, because the states have traditionally taken robbery seriously, whereas there is a history of the states’ neglecting the problem of violence against women. A layperson who favored VAWA would probably see it as an easy case for federal authority because it addresses sex discrimination. One doubts that anyone unfamiliar with the case law would think to say that national attention is justified because of the effect on interstate

---

29 See Herman 1998 (noting large number of prisoner cases using RFRA and the Supreme Court’s general hostility to prisoner cases).

30 *Boerne* found the voting rights cases involved genuinely remedial statutory law, because that law responded to evidence that states had violated rights and tailored the provisions by limiting their duration and only to the states that had engaged in the “most flagrant” discrimination. Not only was Congress dealing with a problem that had resisted solution at the state level; Congress also tempered the application and effect of this law on the states. See *Boerne*, 521 U.S. at 525-27. This is the sort of deference to the states that gave rise to the belief in the political safeguards of federalism recognized in *Garcia*.

31 Cf. *Dickerson v. United States*, 120 S. Ct. 2326 (2000) (striking down the federal statute that attempted to replace the well-known Miranda warnings, on the ground that it was an attempt to redefine a constitutional right).

32 See *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act of 1967, 29 U.S.C.S. § 621 et seq., does not fit within the Section 5 power); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (Congress may not use Section 5 to provide for patent enforcement against the states). Note that Congress’s powers under Article I easily support employment discrimination and patent law. But Article I powers, unlike the Fourteenth Amendment power, do not authorize Congress to abrogate state sovereign immunity; so much of today’s litigation over the scope of the Fourteenth Amendment power really concerns the question of state immunity from retrospective relief.
commerce. VAWA would seem to fit neatly into Congress's long-standing concern with individual rights.

The private action provision of VAWA is different from the public accommodations governed by the 1964 Civil Rights Act: the latter statute covered only business establishments. One might wonder why the Fourteenth Amendment would not provide the basis for Congress' power. If the real reason for federalizing violence against women has to do with discrimination, that seems like the right place in the Constitution to look for the needed power.

The problem is the same one that kept the 1964 act from relying on Section 5: the Fourteenth Amendment refers only to state action. The only plausible way to have used Section 5 in *Morrison* would have been to say that the states were indeed violating equal protection and that a properly “congruent and proportional” remedy for those violations by the states would be to permit women to sue their attackers in federal court.

Congress did, in fact, gather evidence showing that some states did not treat gender-motivated violence as seriously as other violence, so it might seem genuinely remedial to permit victims to bypass the inadequate mechanisms of the states and to employ the federal courts as a friendly forum for suing attackers. Even though the Fourteenth Amendment, without legislative supplementation, permits suits only against state actors, one might argue that to authorize lawsuits against private citizens really is to tailor a remedy for the state's violation of rights. But the majority would not take that theory seriously: it simply saw the lack of state action as a congressional attempt to overrule the Court’s precedents imposing that requirement.

Moreover, Congress did not try to identify the states that had done poorly and to tailor a remedy designed to reach them. It had provided an all-purpose bypass of the state judicial system, to be used at the will of an individual plaintiff who, because she would only be suing her attacker and not any state actor, would not be using the federal courts as a way of ending the violation of constitutional rights. Under the VAWA private-action approach, all of the state actors were left alone to continue ignoring the problem of violence against women. The state court resource was left fallow, while the federal courts were enlisted in the ongoing work of providing remedies for victims of violence. There was no targeting of the states that had acted with particular hostility to women, and there was no remedy designed to force the states to change their ways. VAWA’s private right of action essentially wrote off the states, rewarding them for their own bad behavior by transferring the work of providing remedies to the federal courts. *142* Rather than pressuring the states to offer remedies and to take violence against women seriously, the private action provision of VAWA set up a mechanism for bypassing state processes, thus producing the convergence of federalism and federal jurisdiction problems that triggers the activism of the conservative side of the Supreme Court.
CONCLUSION

The Supreme Court's recent development of federalism-based doctrine reflects the interplay between Congress, the states, and the federal courts. The Court initially expanded its interpretation of congressional power in response to statutes that dealt with matters of great national concern and a need for a uniform national response. When Congress took advantage of these interpretations by going too far in the direction of federalizing crimes and torts, imposing not only on the interests of the states but on the resources of the federal courts, Congress lost the deference its earlier work had won.

Despite the clamor over the Court's new federalism doctrine, it has in fact only modestly trimmed congressional power. It has not reverted to its pre-1937 activism but merely alerted Congress to think more carefully about whether federal solutions and federal court access are really needed or whether to rely on state and local laws and state court adjudication. Congress could convince the Court once again that the political process can take full account of federalism concerns. But without key changes in Court personnel, continued legislation about matters traditionally left to the states, loading federal courts with cases that would otherwise go to state court, will tend to produce new case law expressing the convergent interests of the states and the federal courts.