DOCKET CONTROL AS CONSTITUTIONAL LAW: A RESPONSE TO MAZZONE AND WOOCK*

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In Volume 94 of the *North Carolina Law Review*, Jason Mazzone and Carl Emery Woock proposed a new explanation for the Supreme Court's decisions in *United States v. Lopez*[1] and *United States v. Morrison*[2]: the Court was attempting to protect lower federal courts for the important tasks that the Constitution contemplates for them in light of an increasingly aggressive Congress ("Mazzone-Woock hypothesis").[3] To support this hypothesis, the "[a]rticle relies heavily on a rich and surprisingly underused resource: the annual testimony . . . by Supreme Court Justices before congressional committees in support of the Court's annual budgetary requests."[4] This brief response examines the Mazzone-Woock hypothesis. I conclude that the hypothesis is inherently difficult to prove and that the authors, despite their efforts, have not yet done so.

Part I of this Response describes the decisions in *Lopez* and *Morrison*. Part II presents the Mazzone-Woock hypothesis. Part III identifies some of the difficulties with the hypothesis, including the difficulty in testing its explanatory power, the weakness of the evidence supporting its contention that the Court's concern with docket control was a constitutional concern, and some significant evidence contrary to the hypothesis.

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

2. 529 U.S. 598 (2000).

3. Jason Mazzone & Carl Emery Woock, *Federalism As Docket Control*, 94 N.C. L. REV. 7, 14 (2015) ("Docket control was thus about protecting both the integrity and the time of the third branch of government . . . .").

4. *Id.*

I. *LOPEZ* AND *MORRISON*

In *United States v. Lopez*, the Court considered an appeal by a defendant who had been convicted under the federal Gun Free School Zones Act ("GFSZA")[5] and who challenged that statute as being beyond Congress's power to "regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes[.]"[6] The GFSZA made it illegal for anyone "knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[7]

Chief Justice Rehnquist identified Congress's power to regulate "three broad categories of activity . . . under its commerce power."[8] Rehnquist's third category, "activities having a substantial relation to interstate commerce," is of particular note.[9] The Court concluded that the GFSZA could not be justified as a valid exercise of Congress's commerce clause power to regulate this third category.[10] In so holding, the Court noted that, in the absence of a jurisdictional element tying the activity to interstate commerce in each particular case, the third category of power is limited to instances in which Congress regulated intrastate economic activity that "substantially affects" interstate commerce or is an essential part of a larger scheme of regulating economic activity that affects interstate commerce.[11]

In *United States v. Morrison*, the Court considered an appeal by a plaintiff in a civil lawsuit (and the United States as intervenor) who alleged that she had been sexually assaulted.[12] She claimed a violation of, and entitlement to damages pursuant to, 42 U.S.C. § 13981 ("section 13981"), which was passed as part of subtitle C to the Violence Against Women Act ("VAWA").[13] The statute provided that the perpetrator of any "crime of violence motivated by gender"

5. 18 U.S.C. § 922(q) (1994).

6. U.S. CONST. art. I, § 8, cl. 3; *Lopez*, 514 U.S. at 551–52.

7. 18 U.S.C. § 922(q)(2)(A) (1994).

8. *Lopez*, 514 U.S. at 558–59 (identifying Congress's power to "regulate the use of the channels of interstate commerce[,]" its power "to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce," and its "authority . . . to regulate those activities having a substantial relation to interstate commerce").

9. *Id.*

10. *Id.* at 559–61.

11. *Id.*

12. United States v. Morrison, 529 U.S. 598, 598 (2000).

13. *Id.* at 598, 605–07 (citing and describing 42 U.S.C. § 13981 (2000)).

could be sued by an injured party in a civil lawsuit.[14] Congress specifically identified both the commerce clause and section 5 of the Fourteenth Amendment as its sources of authority when passing the statute,[15] but the United States Court of Appeals for the Fourth Circuit, sitting en banc, concluded that neither source authorized Congress to pass the law.[16]

In the opinion, also authored by Chief Justice Rehnquist, the Court affirmed the Fourth Circuit's holding.[17] Relying heavily upon *Lopez* in its commerce clause analysis, the Court again concluded that the statute could be sustained only if it regulated intrastate economic activity that had "a substantial relationship to interstate commerce[.]"[18] The violence regulated by section 13981, however, was noneconomic in nature, and section 13981 had no jurisdictional element; accordingly, these *Lopez* factors weighed against the statute's constitutionality.[19] Indeed, the primary difference between section 13981 and the GFSZA was that, in passing section 13981, Congress had made "numerous findings regarding the serious impact that gender-motivated violence has on victims and their families[,]"[20] whereas Congress did not make contemporaneous factual findings in passing the GFSZA.[21] The Court found this difference insufficient because Congress's factual findings were about the general economic effects of violence, such as "deterring potential victims from traveling

14. 42 U.S.C. § 13981(c) (2000). The statute defined a "crime of violence motivated by gender" as one "committed because of gender . . . and due, at least in part, to an animus based on the victim's gender[.]" *Id.* § 13981(d)(1).

15. *Id.* § 13981(a) (stating Congress's authority "to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution" and identifying a purpose of the statute to be "promot[ing] public safety, health, and activities affecting interstate commerce").

16. Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 826 (4th Cir. 1999) (en banc), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000).

17. *Morrison*, 529 U.S. at 601–02.

18. *Id.* at 609.

19. *Id.* at 613.

20. *Id.* at 614. This is a rather curious description of the findings, which stated that the violence in question had substantial effects on interstate commerce. Violence can have a "serious impact" on "victims and their families" without necessarily affecting their ability to participate in the economy or interstate commerce.

21. *See* United States v. Lopez, 514 U.S. 549, 563 (1995) ("But to the extent that congressional findings would enable us 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, they are lacking here."); *id.* at 563 n.4 (noting that Congress subsequently amended the GFSZA to add findings, but that "[t]he Government does not rely upon these subsequent findings as a substitute for the absence of findings in the first instance").

interstate[.]"[22] Relying on these "attenuated effect[s] upon interstate commerce" was "a method of reasoning that [the Court had] already rejected as unworkable."[23]

The Court also concluded that section 13981 could not be sustained under section 5 of the Fourteenth Amendment, relying upon "the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action"[24] and the fact that the statute was not "corrective in its character, adapted to counteract and redress the operation of such prohibited [s]tate laws or proceedings or [s]tate officers."[25]

II. THE MAZZONE-WOOCK HYPOTHESIS: DOCKET CONTROL AS IMPETUS

Mazzone and Woock argue that docket control considerations motivated the Court in *Lopez* and *Morrison*. The authors emphasize that "docket" includes not merely the numbers of cases that were before the lower courts but the kinds of cases as well.[26] In their analysis, Mazzone and Woock posit that the Court believed, not only that Congress was passing a large number of laws that would overwhelm federal judges, but also that the cases that would be brought under these laws would not utilize the unique talents and attributes of federal judges and, instead, would dilute the special quality of federal courts.[27] The Court, the authors argue, viewed this docket control issue as a constitutional problem because the Constitution contemplates a certain role for lower federal courts and statutes such as the GFSZA and section 13981 would prevent them from playing that role.[28] Therefore, in response, the Court exercised the "constitutional option" of fixing this docket control problem,

22. *See Morrison*, 529 U.S. at 615 (quoting H.R. REP. NO. 103-711, at 385 (1994) (Conf. Rep.)).

23. *Id.*

24. *Id.* at 621.

25. *Id.* at 625 (alteration in original) (quoting The Civil Rights Cases, 109 U.S. 3, 18 (1883)).

26. Mazzone & Woock, *supra* note 3, at 14 ("[D]ocket control was not simply about keeping the caseloads of the district courts at a manageable level. Instead, quite apart from numbers, the Court was concerned with the particular *types* of cases Congress wanted the district courts to handle.").

27. *Id.*

28. *Id.* at 53 ("[T]he Justices acted because they concluded . . . that the constitutional role of the third branch was under threat."); *id.* ("The Justices . . . warned Congress that those burdens [from new federal criminal laws] presented a problem of constitutional dimension—one that the Court itself could remedy, if needed, with a constitutional solution."); *id.* at 59 ("[T]he Justices viewed the docket issue as a constitutional one . . . .").

which entailed "invalidating criminal and civil laws, in *Lopez* and *Morrison* respectively, in order to shield the lower federal courts from ever-growing burdens."[29]

At the outset, it is not entirely clear how much weight the authors believe the Court gave to docket control factors in those cases. They write that the Court was concerned "at least in part" with docket control factors.[30] The authors "do not pretend that [their] account is definitive" and hope only to "refine the understanding of these cases."[31] On the other hand, they later assert that "[d]ocket control goes a long way in explaining *Lopez* and *Morrison*."[32] Further, they claim that a focus on legal issues such as the scope of congressional power "overlook[s] a more basic justification for the Court's rulings."[33] Thus, it seems fair to conclude that the authors believe docket control was a significant, non-trivial motivation for the Supreme Court in deciding both *Lopez* and *Morrison*.

III. PROBLEMS WITH THE MAZZONE-WOOCK HYPOTHESIS

There are several significant problems with the Mazzone-Woock hypothesis. First, it is difficult to prove or disprove, and the evidence used to support the hypothesis seems to be based primarily on a temporal connection between certain statements by the Justices and the decisions in *Lopez* and *Morrison*. Second, the evidence supporting the proposition that the Justices believed that the docket problems created by the laws addressed in *Lopez* and *Morrison* were a separate and distinct constitutional problem is not convincing. Third, the fact that neither *Lopez* nor *Morrison* lessened lower courts' dockets, combined with the Court's failure to take other action to do so, substantially weakens the hypothesis that docket control was a goal of those cases. Fourth, the evidence supporting the Justices' posited concern with the civil docket is unconvincing, and—because so many civil cases of the kind the authors believe the Court viewed as inappropriate for federal courts are within the lower courts' diversity jurisdiction—the posited motivation of the Court seems unlikely.

29. *Id.* at 16.

30. *Id.* at 7, 14. The purpose of the words "at least" in this phrase is unclear. These words could imply that *perhaps* the Court was *only* concerned with docket control factors, a proposition that I think even Mazzone and Woock would find difficult to defend.

31. *Id.* at 13.

32. *Id.* at 87.

33. *Id.*

A. Testability and the Post Hoc *Fallacy*

The foremost problem with the theory is that it cannot be tested. We cannot read the minds of the Justices, and they are notably reluctant to discuss any rationale for their judgments outside of the Supreme Court building, much less rationales not stated in their opinions.[34]

Perhaps if the rationale provided in the opinion is ludicrous or very poorly reasoned, we have some evidence that the Justices were not motivated by that legal rationale, and it might be appropriate at that point to start looking around for another possible explanation.[35] This strategy was the tactic of the Legal Realists in the first part of the twentieth century. In attacking the view that the law was a process whereby results in cases were obtained logically by deductions from widely held and unassailable propositions, they stressed the logical flaws in the reasoning.[36] The Legal Realists suggested that the motivations for the opinions were values hidden in the propositions or standards that were being employed.[37]

This is not the authors' tack. They do not attack the logic or reasoning in the opinions in *Lopez* and *Morrison*. They give us no reason to doubt that the Justices who joined the opinions meant exactly what they said.

Instead, the authors point to other evidence suggesting that the Justices were concerned with docket control factors both before and

34. *See How the Court Works: The Justices' Conference*, SUP. CT. HIST. SOC'Y, http://supremecourthistory.org/htcw_justiceconference.html [http://perma.cc/T77B-W7CY] (quoting Justice Blackmun as saying the Court "could not function . . . if our conferences were public").

35. Of course, people will not always agree about the quality of the reasoning in a judicial opinion. *See, e.g.*, Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 CARDOZO L. REV. 1219, 1221 (2002) ("Partisans on both sides accused judges of manipulating the law in order to assist the candidate they favored . . . .").

36. *See* Thomas Hayes, *A Goode Judge Is Hard to Find: An Essay on Legal Realism and Law School Casebooks*, 54 J. LEGAL EDUC. 216, 218 (2004) ("[Legal Realist] Professor Llewellyn . . . reached his conclusion that contract doctrine in schools does not adequately represent the case law by reading the case law and lots of it."); *id.* at 219 ("[A] key proposition of legal realism [was] slipshod judging.").

37. Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 693 (1989) (reviewing HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1st ed. 1953)) ("According to the legal realists, adjudication was not, and could never be, wholly mechanical and apolitical."); *id.* at 694 ("[T]he realists insisted [that judicial] decisions often turned on controversial policy choices . . . ."); Martin H. Redish, *Legal Realism and the Confirmation Process: A Comment on Professor Nagel's Thesis*, 84 NW. U. L. REV. 886, 886 (1990) ("Legal Realists . . . recognized that law is more (or less, depending on your perspective) than merely the objective ascertainment of conceptual and logical rules developed in the abstract and without social context; that it is, rather, largely dominated by the personal, social, and political predilections of the judge making the decision.").

around the time that *Lopez* and *Morrison* were being decided. Mazzone and Woock particularly highlight the testimony of the Justices at hearings held by appropriations subcommittees on the budget for the Court, which they refer to as a "rich and surprisingly underused resource[.]"[38] This and other similar sources supposedly "provide for the first time compelling evidence of the link between the Rehnquist Court's federalism decisions and Congress's expansion of federal causes of action."[39]

The problem with this reasoning should be familiar to most students of law: it is the *post hoc* fallacy.[40] Under the fallacy, if B followed A in time, A must have caused B. But closeness in time does not equate to causation. That the Justices expressed some concern in congressional testimony does not mean that those concerns motivated them in deciding legal cases. Perhaps they did, but the mere fact of temporal proximity is not enough to draw that conclusion.

The difficulty of using temporal proximity to draw conclusions about the Court's motivation is best illustrated by the last section of the authors' article.[41] There, they apply their docket control theory to explain other cases and doctrine including, perhaps most notably, *Marbury v. Madison*.[42] *Marbury*, of course, was decided long before the congressional testimony of the Justices in the 1990s that the authors use as compelling evidence supporting their hypothesis.

Despite this rather expansive view of the explanatory powers of their theory, the authors are, if anything, underinclusive in identifying the breadth of cases that could conceivably be explained by a docket control thesis. If one believes that the Justices are motivated by docket control, there really is no reason why it cannot explain a whole

38. Mazzone & Woock, *supra* note 3, at 14.

39. *Id.* Of course, the link between "the Rehnquist Court's federalism decisions" and "Congress's expansion of federal causes of action" needs no additional evidence beyond the opinions themselves. *Id.* Congress passed laws that had expansive federal causes of action; the Rehnquist Court declared the laws unconstitutional. The authors are presumably trying to prove something else with this evidence, viz., their docket control theory.

40. "The *post hoc ergo propter hoc* fallacy assumes causality from temporal sequence. It literally means 'after this, because of this.' " McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1243 (11th Cir. 2005) (quoting *Post Hoc Ergo Propter Hoc*, BLACK'S LAW DICTIONARY (7th ed. 1999)).

41. Mazzone & Woock, *supra* note 3, at 87–103.

42. 5 U.S. (1 Cranch) 137 (1803). Indeed, the authors claim that their account "extends beyond a single episode in the history of the Supreme Court[,]" and that "many cases—many landmark cases—might be better understood in the new light of docket control." Mazzone & Woock, *supra* note 3, at 16.

host of different decisions.[43] One could argue that docket control is a motivation every time the Court declares a federal statute unconstitutional, for whatever reason, or interprets a federal statute narrowly.[44] These decisions certainly *result* in a reduction in the scope of cases that may be heard by federal courts, and some of them are surely the kinds of cases that could be heard in state court. Even more so, docket control can be posited as a motivation when the Court concludes that an administrative remedy provides the exclusive remedy for a certain wrong,[45] compels arbitration on state law claims that otherwise would be heard in federal court,[46] or just interprets jurisdictional statutes in a way that makes diversity jurisdiction less likely.[47] But given all of these kinds of cases that could be explained by a docket control theory, the theory must provide a reason (or reasons) why the Court ever rules in the opposite direction. The docket control theory does not have that reason yet.

B. "Docket Control" as a "Constitutional" Remedy

As noted previously, the authors assert that the problems created by the GFSZA and section 13981 for the lower courts' dockets were not just an administrative problem for the Court but also a constitutional problem.[48] By assigning federal courts to hear cases closely resembling matters usually heard in state courts, "Congress,

43. *See* Mazzone & Woock, *supra* note 3, at 104 ("The framework invites shifting our attention from individual cases and discrete doctrines to a search for common threads that motivate and unify decisions across multiple areas of case law.").

44. *See, e.g.*, Nichols v. United States, 136 S. Ct. 1113, 1114 (2016) (holding that the Sex Offender Registration and Notification Act did not require a sex offender who left the United States to update his registration); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 273 (2010) (holding that the Securities Exchange Act of 1934 did not apply to overseas securities transactions); Reno v. ACLU, 521 U.S. 844, 844 (1997) (holding that the Communications Decency Act of 1996 violated the First Amendment).

45. *See, e.g.*, Elgin v. Dep't of Treasury, 132 S. Ct. 2126, 2141 (2013) (holding that the Civil Service Reform Act was the exclusive remedy for federal employees who were fired because of their failure to register for the Selective Service System).

46. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (holding that an arbitration agreement that precluded class claims was not unconscionable and should have been enforced by the district court).

47. *See, e.g.*, Americold Realty Tr. v. Conagra Foods, Inc., 136 S. Ct. 1012, 1015–16 (2016) (holding that the citizenship of a real estate investment trust is the citizenship of each of its members); Carden v. Arkoma Assocs., 494 U.S. 185, 192–96 (1990) (same for limited partnerships). The authors mention Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), which held that the diversity provision of the Judiciary Act of 1789 required complete diversity, as a case supporting the docket control theory. Mazzone & Woock, *supra* note 3, at 100. Whatever else may be true, *Strawbridge* certainly has had far greater effects on the scope of the workload of federal courts than *Lopez* and *Morrison*.

48. *See* Mazzone & Woock, *supra* note 3, at 75–81.

the Justices feared, was undermining the prestige of the federal judiciary by blurring the distinction between state and federal judges and turning federal judges into petty magistrates who would spend their days presiding over garden-variety criminal offenses and civil disputes."[49]

The first difficulty with this hypothesis is identifying the constitutional provision (aside from one stated by the Court, viz., the enumerated powers doctrine) that overburdened and misused lower federal courts violate. The closest that the authors get to identifying that provision is this: *Lopez* and *Morrison* were cases that "began in federalism but (pre)served also separation of powers."[50] But the separation of powers doctrine is about division of responsibility among the three branches.[51] It is unclear how separation of powers can be violated every time Congress passes a law that requires the lower federal courts to hear cases pursuant to a law that lies outside Congress's power, be it because Congress lacks an enumerated power to pass the law or because it violates some affirmative prohibition in the Constitution. Furthermore, if such laws do violate the separation

49. *Id.* at 14. The authors offer little evidence to support the belief that the Justices have such a condescending view of the role of state court judges that the phrase "petty magistrates" conjures up. My impression is just the opposite. The Justices have repeatedly said—including in *Lopez*—that the states have the primary role for enforcing criminal law. United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) ("Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.' " (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993))). The authors' quotations from the Justices suggest the Justices do not think criminal law is unimportant. Mazzone & Woock, *supra* note 3, at 55–56 (referring to Justice Scalia's testimony regarding certain federal laws that regulated "traditional state law matters. *Without demeaning the importance of . . . them as objects of criminal law*, do they belong in the Federal courts?" (emphasis added) (quoting *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1993: Hearings Before the Subcomm. on the Dep'ts of Commerce, Justice & State, the Judiciary & Related Agencies of the H. Comm. on Appropriations*, 102d Cong. 36–37 (1992) (statement of Scalia, J.))).

50. Mazzone & Woock, *supra* note 3, at 14; *see also id.* at 81 (asserting that Justice Souter's greater willingness to defer to Congress's findings on the effect of the regulated activity on interstate commerce was a separation of powers issue). If the amount of deference owed to Congress's factual findings and conclusions actually falls under the rubric of "separation of powers," then many cases in which the Court concludes that Congress failed to make its case would actually be "separation of powers" cases. *E.g.*, Shelby Cty. v. Holder, 133 S. Ct. 2612, 2629–31 (2013) (holding that coverage formula for section 5 of the Voting Rights Act was unconstitutional because, *inter alia*, "Congress did not use the record it compiled to shape a coverage formula grounded in current conditions"); Reno v. ACLU, 521 U.S. 844, 879 (1997) (holding Communications Decency Act provisions unconstitutional "[p]articularly in . . . light of the absence of any detailed findings by the Congress").

51. *See* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1326 (2016) (explaining that Congress cannot interfere with the judiciary's ability to interpret and apply the law).

of powers, or some other constitutional provision, why doesn't the Court ever mention it? One would think that a second constitutional flaw in a law would be something that the majority would use to bolster its case to the dissenters and the public.

The second difficulty with the authors' contention that the Justices viewed overburdened and misused courts as a "constitutional" problem is that the evidence provided is unconvincing. The authors do provide quotes from the Justices that certainly expressed concerns about the *wisdom* and *propriety* of having cases involving conduct that seemed very similar to state law crimes heard in the lower federal courts. They quote Chief Justice Rehnquist to the effect that Congress should have a different "vision" for the lower federal courts[52] and respect the "traditional division of responsibility between federal courts and state courts."[53] The authors cite Justice Scalia's concern that Congress's lack of restraint could alter the "character" of the federal courts[54] and undermine their "elite" status.[55] They note that Justice O'Connor said that Congress's profligate legislation would have a " 'deleterious effect' on the composition of the federal bench."[56] They quote Justice Kennedy's statement that "[a]dding judgeships in order to process new federal causes of action was . . . 'the way to kill a judicial system.' "[57] And they point out that Justice Souter opined that "as more crime is made a

52. Mazzone & Woock, *supra* note 3, at 54 (quoting WILLIAM H. REHNQUIST, 1992 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1 (1992), *reprinted in* STATE OF THE FEDERAL JUDICIARY: ANNUAL REPORTS OF THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES (Shelley L. Dowling ed., 2014)).

53. *Id.* at 55 (quoting WILLIAM H. REHNQUIST, 1992 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1 (1992), *reprinted in* STATE OF THE FEDERAL JUDICIARY: ANNUAL REPORTS OF THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES (Shelley L. Dowling ed., 2014)).

54. *Id.* at 55 (quoting *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1992: Hearings Before the Subcomm. on the Dep'ts of Commerce, Justice & State, the Judiciary & Related Agencies of the H. Comm. on Appropriations*, 102d Cong. 488 (1991) (statement of Scalia, J.)).

55. *Id.* at 56 (quoting *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1993: Hearings Before the Subcomm. on the Dep'ts of Commerce, Justice & State, the Judiciary & Related Agencies of the H. Comm. on Appropriations*, 102d Cong. 43 (1992) (statement of Scalia, J.)).

56. *Id.* at 57 (quoting *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1993: Hearings Before the Subcomm. on the Dep'ts of Commerce, Justice & State, the Judiciary & Related Agencies of the H. Comm. on Appropriations*, 102d Cong. 33 (1992) (statement of O'Connor, J.)).

57. *Id.* at 58 (quoting *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1994: Hearings Before the Subcomm. on the Dep'ts of Commerce, Justice & State, the Judiciary & Related Agencies of the H. Comm. on Appropriations*, 103d Cong. 106 (1993) (statement of Kennedy, J.)).

federal concern, Congress . . . 'incapacitat[es] . . . [federal] courts from doing what they do well now[.]' "[58] Yet there is no quote in which a Justice asserts that there is a specific constitutional flaw in Congress's profligate legislating. The article cites only a cryptic quote from a written statement of Justice Kennedy stating that he was "concerned over the 'essential and elemental constitutional consequences' " of Congress federalizing crime.[59] In the same footnote in which this quote appears, the authors quote Justice Scalia stating that Congress's federalizing crimes did not pose a constitutional question provided the law had some minimal connection to interstate commerce.[60]

In addition to the quotes from congressional hearings, the authors substantially rely on the "Long Range Plan for the Federal Courts" ("Long Range Plan"), which was issued by the Judicial Conference of the United States in December 1995.[61] The Long Range Plan had a wide variety of prescriptions for Congress, including the substantial reduction in the diversity jurisdiction of federal courts.[62] Although the authors refer to it as "Rehnquist's Plan" because the Chief Justice is the presiding officer of the Judicial

58. *Id.* (quoting *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1995: Hearings on H.R. 4603 Before the Subcomm. on Commerce, Justice & State, the Judiciary & Related Agencies of the S. Comm. on Appropriations*, 103d Cong. 103 (1994) (statement of Souter, J.)).

59. *Id.* at 56 n.293 (quoting *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1994: Hearings Before the Subcomm. on the Dep'ts of Commerce, Justice & State, the Judiciary & Related Agencies of the H. Comm. on Appropriations*, 103d Cong. 105 (1993) (statement of Kennedy, J.)).

60. *Id.* (quoting *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1994: Hearings Before the Subcomm. on the Dep'ts of Commerce, Justice & State, the Judiciary & Related Agencies of the H. Comm. on Appropriations*, 103d Cong. 105 (1993) (statement of Scalia, J.)). Justice Scalia was a strong advocate of separation of powers. Minstretta v. United States, 488 U.S. 361, 422–26 (1989) (Scalia, J., dissenting) (arguing, in a lone dissent, that law creating the United States Sentencing Commission violated separation of powers); Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (arguing, in a lone dissent, that law authorizing an independent counsel was unconstitutional as a violation of separation of powers, evidenced by his statement that "[t]he Framers of the Federal Constitution . . . viewed the principle of the separation of powers as the absolutely central guarantee of a just Government"). That Scalia did not detect a separation of powers problem in the over-federalization of crime could imply that one did not exist.

61. Mazzone & Woock, *supra* note 3, at 60–69 (discussing JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS, *reprinted in* 166 F.R.D. 49 (1995)).

62. JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS, *reprinted in* 166 F.R.D. 49, 89–90 (1995) [hereinafter LONG RANGE PLAN] (recommending, *inter alia*, the elimination of diversity jurisdiction where plaintiff is a citizen of the state in which the district court is located, raising the amount in controversy standard, and indexing that standard to inflation).

Conference of the United States,[63] it is questionable to assume that Chief Justice Rehnquist personally approved of all those prescriptions. Even if he did, the Long Range Plan hardly makes a case for the unconstitutionality of Congress's overburdening the federal courts. While it occasionally refers to the "role" that the Constitution "assigns" to the federal courts,[64] it never mentions where this assignment can be found. Moreover, as the authors acknowledge, the Long Range Plan makes clear that the Constitution leaves the jurisdiction of the federal courts to Congress.[65] Indeed, at its very outset, the Long Range Plan conceded that "[a]nswering th[e] question" of the role that federal courts should play

> is difficult, because no single "constitutionally correct" role exists for the federal courts. Perhaps because they could not agree on what role the federal courts should play, or perhaps because they saw that the changing needs of the country would require differing roles for the federal courts over time, the framers of the Constitution largely left such questions for Congress.[66]

And this is the crux of the problem when speaking of the Constitution's limits on the dockets of lower federal courts: there are none relevant here. Of course, lower federal courts are limited to deciding "cases" and "controversies"[67] and cannot entertain cases that are not identified in the description of the judicial power for federal courts generally, the most important of which is the power to hear cases "arising under th[e] Constitution, the Laws of the United States, and Treaties."[68] But beyond that, the Constitution does not even insist that lower federal courts exist, much less that they should play some specific role in our system.[69]

63. Mazzone & Woock, *supra* note 3, at 60.

64. LONG RANGE PLAN, *supra* note 62, at 65.

65. Mazzone & Woock, *supra* note 3, at 64 ("The plan observed that while 'the Constitution potentially extends federal judicial power to a wide range of "cases and controversies," the Framers wisely left the actual scope of lower federal court jurisdiction to Congress's discretion.' " (quoting LONG RANGE PLAN, *supra* note 62, at 81)).

66. LONG RANGE PLAN, *supra* note 62, at 66. The Long Range Plan does state that the framers provided two "guideposts" for Congress: that "[f]ederal courts were intended to complement state court systems, not supplant them" and that "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." *Id.* at 68. It does not state where in the Constitution these guideposts can be found.

67. U.S. CONST. art. III, § 2.

68. *Id.*

69. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353, 366–67 (2001) ("[T]he Constitution . . . leaves to Congress the decision whether to create lower federal courts at

To be sure, it is plausible that the framers believed that any federal courts that Congress chose to create would have a fairly limited role in our society—because they believed that the federal *government* would have a fairly limited role.[70] But these visions of what our government or our courts would look like are not based on the Constitution, but rather on history and tradition.[71] The Court has noted that the federal government engages in activities today "that would have been unimaginable to the Framers."[72] Despite this, the Justices have given no indication that they believe the expansion of the role of either the federal government or the federal courts beyond that contemplated by the framers creates, by itself, a constitutional problem.[73]

To the extent one could say that the Constitution contemplates a limited or special role for federal courts, it is part and parcel of the Constitution's assumption that the federal government would be limited. This is a point that the Long Range Plan makes quite well.[74] But then, if there is a constitutional basis at all for the idea that

all."); Ankenbrandt v. Richards, 504 U.S. 689, 698 (1992) ("[T]he judicial power of the United States . . . is . . . dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possesses the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845))); Gillis v. California, 293 U.S. 62, 66 (1934) ("The accepted doctrine is that the lower federal courts were created by the Acts of Congress and their powers and duties depend upon the acts which called them into existence . . . .").

70. New York v. United States, 505 U.S. 144, 157 (1992).

71. *See id.* ("Th[e] framework [set forth in the Constitution] has been sufficiently flexible over the past two centuries to allow for enormous changes in the nature of government.").

72. *Id.* The Court explained that the activities of the modern federal government "would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities." *Id.*

73. *Id.* (noting that "the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role").

74. LONG RANGE PLAN, *supra* note 62, at 81 ("[T]he notion of a limited federal court jurisdiction is premised on the more fundamental constitutional principle that the national government is a government of delegated powers in which the residual power remains in the states."). The Long Range Plan goes on to assert that the nature of a federal system of government means that "the jurisdiction of the federal courts should complement, not supplant, that of the state courts." *Id.* But, of course, one could say the same thing about the federal and state governments. The plethora of areas in which both the federal and state governments regulate the same activities demonstrates that the Justices surely do not view that overlap as unconstitutional.

federal courts have a specific and limited role, it is not a *different* constitutional idea from the one articulated in *Morrison* and *Lopez* but the same one. A Congress of enumerated and defined powers can only pass a limited number of federal laws, thus limiting the cases that can "arise under" those laws in a case or controversy. In that way, a limited Congress will likely lead to limited jurisdiction of federal courts. But that understanding does not support the theory that there is a separate constitutional basis for a limited docket.

C. The Limited Effect of Morrison *and* Lopez *on, and the Court's Lack of Other Efforts To Control, the Lower Courts' Dockets*

In assessing the Mazzone-Woock hypothesis, one can also look to the actual effect that the cases had on the lower courts' dockets and whether the Court made any other efforts to achieve its purported goal. Both considerations militate against the authors' theory.

As to the first, Mazzone and Woock claim that the explanatory power of their theory "does not depend upon whether the Supreme Court actually obtained relief for the lower federal courts[.]"[75] But why should the ineffectiveness of the actions taken by the Court pursuant to a hypothesized motivation not count against the hypothesis? If we hypothesize that someone went to law school so that she could make a lot of money and she ends up working at a public interest law firm, does that not tend to undermine the attributed motivation? Of course, it could be that the Justices are just bad prognosticators or that the law student underestimated how difficult it would be to get a high-paying law job. But another distinct possibility is that the Justices are reasonably familiar with the federal court system, understood that their decisions would not substantially change the dockets of the lower courts much, and did not decide the cases for that purpose. This possibility would become even more probable if the Court has taken little other action to pursue a docket control objective.

The decisions in *Lopez* and *Morrison* did not have a substantial effect on the dockets of the lower federal courts. The authors provide much of this evidence themselves.[76] They point out that "the number of federal criminal cases has increased quite sharply[,]"[77] including

75. Mazzone & Woock, *supra* note 3, at 81. *See id.* at 90 (conceding that "there is debate about the actual impact of these cases on the workload of the federal courts").

76. *Id.* at 81–86.

77. *Id.* at 81.

cases involving weapons-related crimes.[78] The number of civil filings has fluctuated, but there is no strong downward trend.[79] If the Court's goal was to change the dockets of the lower courts, it has not succeeded.

Since the authors' theory involves attributing a motivation to the Justices, it is equally important to look at what the Court has done since the *Morrison* decision in 2000. In areas where the Court has an interest in developing an area of law, it uses its discretionary power to take additional cases.[80] For example, in an area that often is grouped with *Lopez* and *Morrison* under the broad rubric of "federalism" subject matter, the Court took many cases in the late 1990s and early 2000s to expound upon the scope of the Eleventh Amendment and related immunity doctrines.[81]

Such is not the case with enumerated powers. *Lopez* and *Morrison* were both cases in which a lower court declared a federal

78. *Id.* at 82–83 (stating that "*Lopez* may have had an initial dampening effect upon prosecutorial zeal in [weapons-related] cases but one that wore off within a few years").

79. *Id.* at 83–84 ("With respect to the civil dockets of the federal courts, developments since *Morrison* are mixed.").

80. *See* Robert M. Lawless & Dylan Lager Murray, *An Empirical Analysis of Bankruptcy Certiorari*, 62 MO. L. REV. 101, 133 & n.90 (1997) (showing that, at the very least, justices choose cases based on their personal interests).

81. *E.g.*, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 724–25 (2003) (holding that the Family and Medical Leave Act properly abrogated the states' Eleventh Amendment protection from money damages); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363–64 (2001) (holding that Title I of the Americans with Disabilities Act could not abrogate the states' Eleventh Amendment protection from money damages); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (holding that the extension of the Age Discrimination and Employment Act to state employees could not abrogate the states' Eleventh Amendment protection from money damages); Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999) (holding that the Trademark Remedy Clarification Act, subjecting states to suits under the Lanham Act for unfair competition, could not abrogate the states' Eleventh Amendment protection from money damages and that Florida had not waived such protection by engaging in commerce); Alden v. Maine, 527 U.S. 706, 712 (1999) (holding that sovereign immunity principles precluded Congress from authorizing a suit against the states in state court under the Fair Labor Standards Act); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank, 527 U.S. 627, 647–48 (1999) (holding that the Patent and Plant Variety Protection Remedy Clarification Act could not abrogate the states' Eleventh Amendment protection from money damages); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 76 (1996) (holding that Congress could not abrogate a state's Eleventh Amendment immunity through legislation passed pursuant to Congress's commerce clause authority to regulate commerce with Indians); *see also* Kevin S. Schwartz, *Applying Section 5:* Tennessee v. Lane *and Judicial Conditions on the Congressional Enforcement Power*, 114 YALE L.J. 1133, 1134 n.3 (2005) (identifying four cases in which the Supreme Court had granted certiorari to assess the constitutionality of Title II of the Americans with Disabilities Act against the Eleventh Amendment).

law unconstitutional.[82] The Court feels a special obligation to hear cases under such circumstances.[83] There are no cases in modern times in which a lower court upheld an act of Congress under the commerce clause, the Supreme Court granted a petition for writ of certiorari, and then reversed.[84] This indicates that enforcing limits on Congress's commerce clause authority does not seem to be a high priority for the Court.

Moreover, this apparent indifference has come in the face of a Congress that is not backing down. Congress amended the GFSZA shortly after *Lopez* to add a "jurisdictional element" requiring that

82. *See supra* Part I; *see also* NFIB v. Sebelius, 132 S. Ct. 2566, 2608 (2012) (reversing lower court judgment that declared federal Affordable Care Act unconstitutional). One of the ironies of the Mazzone-Woock thesis is that it posits that the Supreme Court was concerned about the welfare of lower federal courts in an area where those courts seemed to lack any such concern for themselves. Thus, for example, in *Morrison*, every other lower court (other than those issuing the judgments being reviewed) concluded that the statute was a proper exercise of the commerce clause. *See* Petition for Writ of Certiorari at 18 n.8, United States v. Morrison, 529 U.S. 598 (2000) (No. 99-5), https://www.justice.gov/osg/brief/united-states-v-morrison-petition [https://perma.cc/7DFF-P9KA] (listing fourteen cases in which lower courts relied on Congress's commerce clause power in considering section 13981).

83. EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 264 (9th ed. 2007) ("Where the decision below holds a federal statute unconstitutional . . . certiorari is usually granted because of the obvious importance of the case."); Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1215 n.60 (2012) ("The Supreme Court will generally grant certiorari in such circumstances."); *see also* United States v. Morrison, 529 U.S. 598, 605 (2000) ("Because the Court of Appeals invalidated a federal statute on constitutional grounds, we granted certiorari.").

84. Indeed, I can think of only one case since *Morrison* in which the Court arguably reversed a lower court judgment holding that a statute was within *any* of Congress's enumerated powers. *See* Shelby Cty. v. Holder, 133 S. Ct. 2612, 2631 (2013) (holding that the coverage formula in section 4(b) of the Voting Rights Act was unconstitutional), *rev'g* 679 F.3d 848 (D.C. Cir. 2012). The decision in *Shelby County* relied on a principle of "equal sovereignty" that limited Congress's power under section 2 of the Fifteenth Amendment. *Id.* Of course, in *Sebelius*, five Justices concluded that the individual mandate to purchase insurance in the Affordable Care Act was not within Congress's commerce clause power, even enhanced by the necessary and proper clause. 132 S. Ct. at 2587–93; *id.* at 2644–50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). I have elsewhere asked whether the opinions of those five Justices constitute a "holding" of the Court. Michael E. Rosman, *The Decision (with Apologies to Lebron James)*, POINTOFLAW.COM (June 28, 2012, 5:55 PM), http://www.pointoflaw.com/feature/archives/2012/06/the-decision-with-apologies-to-lebron-james.php [https://perma.cc/FHB6-5XYP]. Given that the Court upheld the individual mandate on another ground and that the individual mandate was very unlike the statutes at issue in *Lopez* and *Morrison*, it seems unlikely that the Justices were motivated by docket control in *Sebelius*. This conclusion is strengthened by Mazzone and Woock's rather brief mention of *Sebelius*. Mazzone & Woock, *supra* note 3, at 12 n.18 (referring to *Sebelius* in a parenthetical describing another source's theory on Justice Roberts's "desire to limit the scope of federal power—and to craft new constitutional law in order to do so.").

the gun have a connection to interstate commerce.[85] The authors point out that the revised statute "constrained the law's application to any firearm 'that has moved in or that otherwise affects interstate or foreign commerce.' "[86] But under this "constraint," any gun that has ever crossed a state line—that is, almost all of them—is subject to the law's prohibition on possession.[87]

Perhaps this obvious attempt to circumvent the decision in *Lopez* is itself unconstitutional,[88] but the relevant issue here is the Court's lack of action. Either the Supreme Court is allowing Congress to burden the lower courts with unworthy cases in violation of the Court's alleged docket control agenda or *Lopez* did not have any real docket control effect at all because its holding is so easily circumvented.[89] In either case, it is evidence against attributing a docket control motive to the Court.

Nor has the Court taken the opportunity to consider Congress's other aggressive uses of the commerce clause. The authors point out that Congress's new enactments have slowed a bit since 2000, but concede that this occurrence may not be related to the Court's decisions.[90] They further point out that Congress has invoked the commerce clause to create new criminal laws regulating arson and child pornography.[91] Moreover, although not mentioned by the

85. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 657, 110 Stat. 3009, 3009-269 to -271 (1996) (codified as amended in relevant part at 18 U.S.C. § 922(q)(2)(A) (2012)).

86. Mazzone & Woock, *supra* note 3, at 82 (quoting Omnibus Consolidated Appropriations Act of 1997 § 657, 110 Stat. at 3009-269 to -271).

87. *See* Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1293 n.97 (11th Cir. 2011) (stating that "a staggering proportion" of guns have traveled in interstate commerce), *aff'd in part, rev'd in part*, *Sebelius*, 132 S. Ct. at 2566. Indeed, even without an explicit reference to guns that have "moved in" interstate commerce, various courts have interpreted other jurisdictional elements regarding gun possession to include all guns that have ever crossed a state line. *E.g.*, United States v. Williams, 445 F.3d 724, 740 (4th Cir. 2006); United States v. Gateward, 84 F.3d 670, 671 (3d Cir. 1996).

88. I have suggested elsewhere that the constitutionality of very weak jurisdictional elements is questionable. Michael E. Rosman, *Facial Challenges and the Commerce Clause: Rethinking* Lopez *and* Morrison, 4 FAULKNER L. REV. 1, 25–26 (2012).

89. The Court's inaction in this area is also seen in its denials of petitions for writ of certiorari challenging expansive jurisdictional elements. *E.g.*, United States v. Gateward, 84 F.3d 670 (3d Cir. 1996) (holding Congress had the authority to regulate possession of a weapon that had crossed a state line), *cert. denied*, 519 U.S. 907 (1996).

90. Mazzone & Woock, *supra* note 3, at 86 ("There is at least some indication that since 2000 Congress (whether as a result of the Court's admonitions or not) has exercised more legislative restraint than it did in previous decades.").

91. *Id.* ("That said, it is well to remember that old habits die hard: within a year of the *Lopez* decision, Congress invoked the commerce clause as a basis for new criminal laws such as the Church Arson Prevention Act and the Child Pornography Prevention Act."); *see also* Gonzales v. Carhart, 550 U.S. 124, 141–43 (2007) (discussing how the Partial-Birth

authors, in 2009, Congress passed the Matthew Shepard Hate Crimes Prevention Act.[92] Among other things, this Act makes it a federal crime to intentionally cause injury using a dangerous weapon when such conduct is motivated by any person's gender.[93] Since many sex crimes—a very traditional state criminal law area—are motivated by the gender of the victim, the perpetrator, or both, many of these could be prosecuted as federal crimes under this law.[94] Further, the jurisdictional elements of the statute are incredibly broad.[95] District courts have disagreed about the constitutionality of the Act,[96] but the Court has not yet expressed any interest in it.

Finally, the Court's other reported decisions may shed light on whether the Court is concerned with docket control. The authors concede that "[t]he Court's decisions in . . . the context of enumerated federal powers[] do not share a single direction[.]"[97] Indeed, since *Morrison*, the Court has upheld a federal law banning the possession of marijuana.[98] This is particularly relevant to a docket control theory given the large number of federal drug prosecutions and their

Abortion Ban Act prohibits physicians from performing certain kinds of abortions "in or affecting interstate or foreign commerce" (quoting Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006))); *id.* at 169 (Thomas, J., concurring) (noting that the question of whether the Act was constitutional under the commerce clause was not before the Court).

92. Pub. L. 111-84, div. E, § 4707(a), Oct. 28, 2009, 123 Stat. 2838 (codified at 18 U.S.C. § 249 (2012)).

93. 18 U.S.C. § 249(a)(2) (2012). Thus, unlike the provision that was at issue in *Morrison*, section 249(a)(2) has no requirement that the act be motivated by a gender-based animus.

94. *See* Lapka v. Chertoff, 517 F.3d 974, 983 (7th Cir. 2008) ("Rape is also, by definition, a form of harassment based on sex.").

95. *See* § 249(a)(2)(B). The U.S. government has taken the position that any use of a car would be the use of an instrumentality of interstate commerce sufficient under the statute. *See* Brief for the United States as Appellee at 93–95, United States v. Miller, 767 F.3d 585 (6th Cir. 2014) (No. 13-3177). In the same case, the U.S. government argued that hair clippers that had crossed a state or national line were a dangerous weapon sufficient to satisfy the jurisdictional element. *Id.* at 80.

96. *Compare* United States v. Mullet, 868 F. Supp. 2d 618, 622–23 (N.D. Ohio. 2012) (upholding the constitutionality of the Hate Crimes Prevention Act), *with* United States v. Hill, No. 3:16-cr-00009-JAG, 2016 WL 1650767, at *7 (E.D. Va. April 22, 2016) (holding that the Hate Crimes Prevention Act is unconstitutional as applied to an assault taking place at an Amazon warehouse that the government claimed affected interstate commerce).

97. Mazzone & Woock, *supra* note 3, at 90.

98. Gonzales v. Raich, 545 U.S. 1, 9 (2005). The authors seem to rely on the fact that three Justices of the Court, all of whom were in the majority in *Lopez* and *Morrison*, dissented in *Raich*. Mazzone & Woock, *supra* note 3, at 90 n.525. This may be true, but it must be noted that the authors' theory is that the *Court* in its entirety was motivated by docket control considerations in *Lopez* and *Morrison*, not specifically that three of the five Justices in the majorities were so motivated.

proportion of all federal criminal prosecutions.[99] Furthermore, the Court has provided a rather expansive interpretation of the necessary and proper clause to uphold a statute that specifically gave district court judges additional responsibilities with respect to federal prisoners.[100]

In sum, *Lopez* and *Morrison* have not had much effect on the dockets of the lower courts, and the Court has not taken other actions that might suggest that their real motivation in those cases was to have such an effect.

D. Diversity Jurisdiction and Docket Control

The authors contend that the Court in *Morrison* was concerned with "civil laws that . . . presented federalism and docket concerns."[101] This Section points out two problems with this contention. First, the evidence is even less convincing than it is for the more general "docket control" hypothesis. Second, given the existence of diversity jurisdiction, it is not very plausible.

To the extent that the authors rely on public comments of the Justices between the time that *Lopez* was decided and the time that *Morrison* was decided, these comments seem to be primarily about the growing *criminal* docket.[102] The authors also note concerns

99. According to the webpage of the Federal Bureau of Prisons, those in federal prison for drug crimes constitute over forty-six percent of all federal prisoners as of July 30, 2016. *BOP Offenses: Inmate Statistics,* FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp [http://perma.cc/596S-CBCW]; *see also* Kathleen Miles, *Just How Much the War on Drugs Impacts Our Overcrowded Prisons, In One Chart*, HUFFINGTON POST (Apr. 3, 2014), http://www.huffingtonpost.com/2014/03/10/war-on-drugs-prisons-infographic_n_4914884.html [http://perma.cc/2YCE-BPMZ] (explaining over fifty percent of inmates as of January 2014 were imprisoned because of drug offenses).

100. *See* United States v. Comstock, 560 U.S. 126, 129–30 (2010) (upholding Congress's authority to pass a statute permitting district court judges to confine, by means of civil commitment, sexually dangerous persons currently in prison past their sentence termination date).

101. Mazzone & Woock, *supra* note 3, at 75.

102. *Id.* at 76 (quoting WILLIAM H. REHNQUIST, THE 1997 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (1998), *reprinted in* STATE OF THE FEDERAL JUDICIARY: ANNUAL REPORTS OF THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES (Shelley L. Dowling ed., 2014)) (noting 1997 brought the "largest federal criminal caseload in 60 years"); *id.* at 77 (citing WILLIAM H. REHNQUIST, THE 1998 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4–5 (1999), *reprinted in* STATE OF THE FEDERAL JUDICIARY: ANNUAL REPORTS OF THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES (Shelley L. Dowling ed., 2014) (stating that the vast majority of local crimes should be prosecuted in state court)). The authors also quote Justice Kennedy to the effect that federalism should not be thought of as a workload division but as a means of preserving liberty. *Id.*

expressed by Chief Justice Rehnquist as to the scope of earlier versions of the statute—specifically that the statute would encompass many domestic relations disputes[103]—but they cite no evidence that the Justices believed that the statute they ultimately considered in *Morrison* retained those flaws.[104] Of course, the Court in both *Lopez* and *Morrison* expressed concerns about the scope of a *theory* of congressional power that would essentially be unlimited, and that Congress *could*, under that theory, regulate many domestic relationships traditionally regulated under state law.[105] However, that concern is an enumerated powers concern rather than a docket control concern because it involves the constitutional division of power between federal and state *legislatures*, not federal and state *courts*.[106]

But the more serious problem with the argument that the Court was concerned with the dockets of civil cases in federal courts can be summed up in two words: diversity jurisdiction.[107] Federal courts

103. *Id.* at 76.

104. Earlier versions of section 13981 did not have a requirement that the crime be motivated by a gender-based animus. *Compare* S. 2754, 101st Cong. (1990) (the first version of VAWA submitted to the Senate, which did not include animus requirement), *and* S. 15, 102d Cong. (1991) (the second version of VAWA submitted to the Senate, which also did not include animus requirement), *with* S. REP. NO. 103-138, at 50 (1993) (discussing new version of VAWA that included an animus requirement). According to a brief in *Morrison* submitted by then-Senator Joseph Biden (a leading sponsor of VAWA), Congress took steps to narrow the scope of section 13981, including the addition of the requirement of "animus," in response to criticisms of earlier versions that the civil rights remedy would encompass domestic relations disputes. *See* Brief of Senator Joseph R. Biden, Jr. as Amicus Curiae in Support of Petitioners, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29), 1999 WL 1072538, at *15–19.

105. United States v. Lopez, 514 U.S. 549, 564 (1995) (noting that the government's theory of congressional power would give Congress the authority to regulate all violent crime, all activities leading to violent crime, and activity related to national economic productivity, including marriage, divorce, and child custody); *see also* United States v. Morrison, 529 U.S. 598, 615–16 (2000) ("Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to 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.").

106. As the authors recognize, Congress may pass civil laws regulating conduct without giving federal courts jurisdiction to hear disputes arising under those laws. Mazzone & Woock, *supra* note 3, at 19 (noting that lower federal courts did not have general federal question jurisdiction in civil cases under the Judiciary Act of 1789). *Cf.* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983) (noting that the Federal Arbitration Act created a substantive federal law but did not give federal courts jurisdiction to hear cases arising under it).

107. *See* 28 U.S.C. § 1332 (2012) (stating that the district courts have original jurisdiction over, *inter alia*, civil actions between citizens of different states where the amount in controversy exceeds $75,000).

would have undisputedly had jurisdiction over any state law claim based on the conduct alleged in *Morrison* had the parties been residents of different states, and perhaps even if they were not.[108] More generally, federal courts must entertain civil cases under state law where the parties are diverse (and the jurisdictional amount is satisfied), including claims involving car accidents, slip and falls, breaches of contract, and child abuse.[109] In short, diversity jurisdiction requires federal courts to hear the very "garden-variety . . . civil disputes" that the authors claim concerned the Justices.[110] Thus, any effort to rid the lower courts of cases that closely resemble civil cases heard in state court would make a trivial impact if it did not address diversity jurisdiction. Surely, the Justices know that, and nothing in *Morrison*, of course, addresses diversity jurisdiction. Despite the aforementioned Long Range Plan and its proposals to limit diversity jurisdiction, the Justices have done little to address diversity jurisdiction in any other context.[111] Indeed, the Judicial Conference of the United States has supported the entire elimination of federal jurisdiction based on diversity of citizenship,[112] to little effect. Accordingly, attributing a civil docket control motive to the Court in *Morrison* is a bold claim that would require substantial support—something Mazzone and Woock simply do not have.

108. *See id.* There is at least a possibility that the federal court had supplemental jurisdiction over any state law claim asserting the alleged assault at issue in *Morrison*. Plaintiff in that case had asserted a claim under Title IX against the university that she and the alleged perpetrator attended. Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 827 n.2 (4th Cir. 1999) (remanding Title IX claim against university to district court), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000). The Seventh Circuit has held that a district court would have jurisdiction over an underlying state law claim for assault under similar circumstances. Ammerman v. Sween, 54 F.3d 423, 425 (7th Cir. 1995) (holding that federal court had jurisdiction over a state common-law assault claim where plaintiff sued her employer under Title VII for sexual harassment due to a failure to take remedial action).

109. *See, e.g.*, Ankenbrandt v. Richards, 504 U.S. 689, 706–07 (1992) (holding that federal courts had jurisdiction over claim seeking money damages for alleged sexual and physical abuse of children).

110. Mazzone & Woock, *supra* note 3, at 14.

111. LONG RANGE PLAN, *supra* note 62, at 90 (recommending the elimination of diversity jurisdiction where plaintiff is a citizen of the state in which the district court is located). The proposals made in the Long Range Plan incorporated the proposals made in a 1990 report of the Judicial Conference of the United States. *Id.* at 92.

112. *Id.* at 91 ("Since 1977, the Judicial Conference has supported abolition of federal jurisdiction based on diversity of citizenship.").

CONCLUSION

Mazzone and Woock have presented a brazen theory to explain significant decisions of the Supreme Court of the United States. They deserve credit for thinking past traditional explanations. However, a theory that can explain as much as the authors claim must be viewed with a skeptical eye. That is what this Response seeks to do. Mazzone and Woock have offered a hypothesis that, while plausible, is extraordinarily hard to support and has a good deal of evidence against it. In any event, they did not supply a sufficient amount of evidence in their article nor adequately explain away the contrary evidence. Until they do, their theory remains, at best, an interesting hypothesis.