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# *Lopez* Has Some Merit

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“Controversial Decisions of the 1994-95  
Supreme Court Term:  
*United States v. Lopez*”

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## Introduction

In *United States v. Lopez*,<sup>1</sup> the Supreme Court of the United States held for the first time in sixty years that an act of Congress<sup>2</sup> was unconstitutional because it exceeded the scope of Congress's authority under the Commerce Clause.<sup>3</sup> *Lopez* immediately generated a firestorm of commentary, both favorable and unfavorable, regarding the significance of the decision and its implications for future cases. Regardless of whether *Lopez* is a watershed decision, a careful reading of the Court's opinions suggests that *Lopez* may not really be about the Commerce Clause at all.

The outcome in *Lopez* has some merit. In evaluating the decision, it is important to remember that the Supreme Court did not purport to impose any limits on Congress's authority to regulate either (1) the channels of interstate commerce or (2) the instrumentalities or persons that move in interstate commerce. Rather, *Lopez* is limited to the fairly narrow category of cases that involve non-commercial activity which may have a cumulative and significant effect on interstate commerce. In cases falling into this third *Lopez* category, this essay suggests that rather than relying upon implausible and difficult definitions regarding what constitutes “commerce,” or an “indirect,” “direct,” “substantial,” or “significant” effect on commerce, the Justices should look to (1) the presence or lack of a particularized federal interest (something other than general effects on commerce) and (2) tradition. These two factors should be the constitutional bases for deciding the scope of congressional power with respect to the third *Lopez* category, not a strained interpretation (or in the case of the dissenting Justices, *no* interpretation) of the Commerce Clause. In exploring the implications of this approach, this essay will consider four recent congressional enactments or proposals that arguably fall within the third *Lopez* category: (1) the Freedom of Access to Clinic Entrances Act of 1994;<sup>4</sup> (2) the Violence Against Women Act of 1994;<sup>5</sup> (3) the Child Support and Recovery Act of 1992;<sup>6</sup> and (4) federal tort reform.<sup>7</sup>

## I. Why Federalism?

The most fundamental questions *Lopez* raises are whether and to what extent the concept of federalism is valuable. For if federalism serves no valid purposes, then the *Lopez* dissenters are almost certainly correct that there is no need for judicial intervention in this context. Instead, as the dissenters argued, the relationship between the States and the federal government should be determined solely by the political process (with extremely deferential rationality review by the courts) rather than by judicial interpretation of the commerce power found in Article I of the Constitution or other substantive limits on national power.

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What are the values of federalism? Several possibilities have been put forward.<sup>8</sup> First, division of authority between the federal and state governments may result in the efficient allocation and use of resources, for example, by avoiding a double layer of regulation where one set of rules will suffice. Second, and related to the first, federalism may recognize and implement any comparative advantage in expertise Congress or the States may have regarding certain policy matters. States probably are less likely than Congress to have significant exposure to certain kinds of problems, and vice versa. Third, federalism may actually increase political accountability and responsibility by clearly defining which level of government is responsible for addressing certain problems. Fourth, the diffusion of sovereign power may enhance and increase the protection of personal liberty by ensuring that no sovereign is omnipotent. When one sovereign is narrowing the protection of personal liberty, the other may have the option of expanding protections under its own laws. Fifth, federalism may protect democratic values by making governments more responsive to local preferences, local conditions, and the social costs of regulation. Sixth, federalism may permit competition and experimentation between jurisdictions. States may develop and experiment with new methods of providing public services or addressing social problems. In other words, federalism encourages and promotes diversity, which in turn may protect against the curtailment of individual moral freedom that results from uniform national regulation.

Federalism also has potential disadvantages. First, federalism may result in the loss of the substantial benefits associated with economies of scale. For example, it may be far cheaper and more efficient to have one national regulatory structure rather than to maintain fifty different state systems. Second, federalism does not necessarily address the problem of external costs. In a federal system, a state may be free to ignore the costs that its regulatory systems impose on persons located outside the state. Third, local control may result in discrimination and infringement on individual rights or the rights of minorities, a proposition readily confirmed by American history. Fourth, some problems may simply exceed the scope of local governments' financial or administrative capabilities — for example, environmental cleanup.

It may be impossible to obtain empirical answers to the questions whether and to what extent federalism serves important values. Indeed, the likely impossibility of attaining such answers in large part explains the attention given to *Lopez* and the divergence of opinions regarding the propriety of the Court's decision. Neither the Justices of the Supreme Court, nor lawyers, nor members of Congress, nor local government officials, nor commentators on public policy have any solid empirical basis for determining whether federalism serves the foregoing values and results in the foregoing disadvantages and, if so, to what extent.

Ultimately, we do not know whether the costs of federalism outweigh its benefits. Thus, we are left to argue about the constitutional first principle of federalism without a full understanding of the utility and effectiveness of that concept.

What is indisputable is that one's view of the importance of the concept of federalism and the values it serves will have a significant effect on one's opinion of *Lopez*. At bottom, *Lopez* raises fundamental (and perhaps unanswerable) questions regarding the Constitution's first principles. For that reason alone, *Lopez* merits serious attention by judges, lawyers, scholars, legislators, and the citizenry.

## II. The Importance of a Particularized Federal Interest and the Role of Tradition in Commerce Clause Jurisprudence

One problem with utilizing the Commerce Clause as an engine for social change is that the clause itself does not purport to address individual rights. Rather, the Commerce Clause, unlike provisions in the Bill of Rights, is more in the nature of a structural component of the Constitution; it defines federal power vis-a-vis the States in the context of economic matters. Only in this century has the commerce power come to be viewed as the primary authority for congressional regulation of all sorts of conduct that may not initially appear to constitute "commerce" at all.<sup>9</sup>

This change is not simply the result of a philosophical shift in attitudes toward the commerce power. Indeed, the modern reality is that in the complex international economy that now exists — an economy that did not exist two hundred years ago and which probably was not foreseeable at that time — virtually every activity has some actual or potential effect on interstate commerce. That being the case, it is no mystery why Congress has chosen to rely on its commerce powers to address many different social problems and why a sympathetic Supreme Court initially endorsed those efforts. In this day and age, it simply is not practicable to suggest that the scope of Congress's commerce power should depend on vague notions of "direct" versus "indirect," or "significant" versus "substantial" effects on interstate commerce, or a distinction between "commercial" and "non-commercial" activities.

The problem with an expansive commerce power is that it runs counter to the principle that ours is a national government of limited powers, a notion that the Constitution plainly endorses.<sup>10</sup> Ironically, perhaps, in the process of identifying with some precision and thereby limiting the powers that the States ceded to Congress, Article I of the Constitution granted to Congress plenary power over commerce between the States. Whether or not there was in the eighteenth century a tension between the idea of a limited national government and a national government with plenary power over interstate commerce, there certainly is today. Chief Justice John Marshall presciently observed more than 175 years ago that "[t]he [federal] government is acknowledged by all

to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist."<sup>11</sup>

*Lopez* presented the Supreme Court with an opportunity to reconcile the tension between constitutional first principles in a modern economy. One way to address the dilemma would be to look at the nature of the federal interest Congress seeks to protect or further through a particular statute. The point of such an inquiry would be to determine the nature and strength of the federal interest at stake. Because *Lopez* does not purport to affect congressional power to regulate the channels of interstate commerce or the persons or instrumentalities that move in interstate commerce, the first question must be, does Congress seek to regulate commerce per se? If so, then there is no constitutional problem (assuming the statute passes rationality review) under *Lopez* because the statute at issue falls within the first or second *Lopez* categories. If Congress is not regulating commerce per se, then it is appropriate to require closer judicial scrutiny.

At this point, a federal court should question how and why Congress is exercising its commerce powers. Is Congress using the commerce power to address social problems, such as crime, educational deficiencies, domestic violence, or discrimination, that may have an effect on interstate commerce? If so, is there a particularized federal interest in the problem? Important and particularized federal interests might include the protection of federal constitutional rights (equal protection, due process, the right to an abortion) or any special impact the regulated conduct has on the federal government and its interests.

If Congress is not utilizing its commerce powers to address a particularized federal interest, a federal court should inquire whether federal intervention or regulation will trample upon or intrude into matters that traditionally have been the States' domain. Tradition long has assumed legal significance in other areas of constitutional law.<sup>12</sup> Examples of Supreme Court reliance on tradition in interpreting the Constitution include separation of powers decisions,<sup>13</sup> First Amendment free speech and religion cases,<sup>14</sup> decisions involving education,<sup>15</sup> family rights cases,<sup>16</sup> and the Court's due process jurisprudence.<sup>17</sup>

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Assuming tradition has validity as a tool in interpreting the Constitution, why should it not be a useful guide in the federalism context? Much of the complex relationship between the States and the federal government has been shaped by tradition; there was no real federalism prior to the ratification of the Constitution. Though it might be unwise to engage in slavish adherence to the concept of tradition as a constitutional guide, surely, at least in some circumstances, tradition can be an important indicator of the limits that might or should be imposed on congressional power under Article I. And, again, it is important to remember that the foregoing analysis, including its resort to tradition as an interpretive tool, would only be invoked when examining one of the relatively small number of federal statutes that fall within the third *Lopez* category.

In summary, the first step is to inquire whether a challenged statute is in the third *Lopez* category at all. For if a statute regulates either the channels of interstate commerce or the persons and instrumentalities that move in interstate commerce, then it is subject only to rationality review. If, however, the statute falls within the third *Lopez* category, then the second step is to inquire whether it addresses a particularized federal interest, such as the protection of federal constitutional rights. If so, then again the statute should only be subject to rationality review. If not, the third and final step is to inquire whether tradition allocates responsibility for regulating the subject matter of the statute exclusively or primarily to the States. If not, then the statute should be reviewed only for rationality; but if so, then the statute should be deemed unconstitutional as an enactment that exceeds Congress's Article I authority.

### III. The Proper Scope for *Lopez*

Applying the proposed approach to several recently enacted or pending pieces of federal legislation may illustrate its propriety and usefulness in resolving commerce power issues.

#### *The Freedom of Access to Clinic Entrances Act of 1994* ("FACE")<sup>18</sup>

The Freedom of Access to Clinic Entrances Act of 1994 has been challenged as exceeding the scope of Congress's commerce powers, both before and after the Supreme Court decided *Lopez*.

To date, no federal court of appeals has declared the statute unconstitutional on commerce power grounds. Applying the suggested approach, it is fairly clear that *Lopez* does not and should not require the conclusion that FACE is unconstitutional. It is true that FACE may not regulate either the channels of interstate commerce, or the persons or instrumentalities who move in interstate commerce, and thus may fall within the third *Lopez* category. Even assuming that this is the case, however, FACE, unlike the Gun Free School Zones Act of 1990, addresses a particularized federal interest — the constitutionally protected right to choose whether to have an abortion — a federal interest that is completely independent of interstate commerce concerns. For that reason alone, judicial deference to Congress's decision to regulate access to abortion clinics is entirely appropriate.

Moreover, FACE may be constitutional for other reasons. Certainly, to the extent FACE protects against state interference with the right to choose, Congress can seek constitutional refuge in its enforcement powers under Section Five of the Fourteenth Amendment. The Supreme Court itself has characterized the right to choose as a liberty interest within the ambit of the Fourteenth Amendment.<sup>19</sup> In addition, Congress arguably has the inherent power to enact legislation which is designed to protect and implement federal constitutional rights. Although the Supreme Court has never addressed this possibility, the United States raised it in at least one recent challenge to FACE, although the District Court rejected the federal government's "novel proposition."<sup>20</sup>

In any event, the proposed analysis suggests that, with respect to FACE, a federal court would not even reach the question of tradition. Unless and until a federal constitutional right to choose no longer exists, FACE should be constitutional under *Lopez*.

*The Violence Against Women Act of 1994 ("VAWA")<sup>21</sup> and The Child Support Recovery Act of 1992 ("CSRA")<sup>22</sup>*

Federal statutes dealing with domestic violence and the recovery of child support, like FACE, probably are not regulations of interstate commerce per se. Neither statute deals with either the channels of interstate commerce or, at least not directly, the instrumentalities or persons that move in interstate commerce. Thus, like FACE, the VAWA and CSRA statutes may fall within the third *Lopez* category. But unlike FACE, neither statute addresses a particularized federal interest. Rather, like the Gun Free School Zones Act, these federal statutes appear aimed at general social problems. And, if anything, the tradition of leaving matters of domestic violence and child support to the States is even stronger than the tradition of leaving the definition and enforcement of firearms offenses to the States. For these reasons, the proposed analysis suggests that VAWA and CSRA require closer scrutiny under *Lopez*.

VAWA probably is saved, however, at least in its application in particular cases, by the fact that Congress included an interstate

jurisdictional requirement. In order to establish the commission of an offense under VAWA, the federal government must prove that the defendant either crossed state lines to commit the crime or caused someone else to do so. This should avoid any serious problem under *Lopez*. In effect, the interstate jurisdictional requirement shifts VAWA, as applied in particular cases, from the third to the second *Lopez* category, with the result that VAWA is subject only to rational basis review. This essentially was the Court's holding in *United States v. Robertson*,<sup>23</sup> a case decided shortly after *Lopez*. In *Robertson*, the Court rejected a *Lopez*-type challenge to a RICO conviction, concluding that the government proved that the enterprise at issue had moved goods and money in interstate commerce, and therefore did not have to demonstrate that the enterprise had a substantial or significant effect on commerce.

CSRA may stand on different footing. CSRA makes it an offense to fail to pay child support any time the child resides in a different state than the defendant. There is no requirement that the defendant's conduct involve travel in interstate commerce or across state lines. Rather, the gist of the offense is the defendant's *failure* to cause money to move across state lines. Failure to pay child support likely does have an effect on interstate commerce because it reduces the custodial parent's and the child's ability to engage in commercial transactions. Nonetheless, it is not clear that CSRA involves regulation of the channels of interstate commerce or the movement of persons or instrumentalities in interstate commerce in any conventional sense.

Assuming that CSRA falls within the third *Lopez* category, the statute presents difficulties under the proposed approach because it does not serve any particularized federal interest nor does it require proof of the movement of persons in interstate commerce. Moreover, it intrudes into an area of the law that traditionally has been the exclusive domain of the States, an area in which the federal courts long have declined to take jurisdiction even in the absence of any constitutional prohibition against their doing so.<sup>24</sup> Thus, CSRA should be subject to serious scrutiny under *Lopez*, and, unfortunate though it may be as a practical matter, CSRA may not pass constitutional muster.

*Federal Tort Reform Proposals<sup>25</sup>*

Recent congressional proposals to reform state tort law by virtue of federal preemptive legislation which would impose damages caps, establish higher burdens of proof, eliminate joint and several liability, and exempt non-manufacturers from liability in certain categories of torts cases present a particularly interesting situation for application of the proposed approach. Federal regulation of tort litigation may constitute the regulation of interstate commerce per se; certainly, there appears to be a closer connection to the channels or instrumentalities of interstate commerce than is true of either CSRA or VAWA. Tort liability

for harm caused by a product that a manufacturer introduces into the stream of interstate commerce is closely connected to interstate commerce itself. Although, strictly speaking, the regulation of tort liability is not direct regulation of the channels of commerce, nor of the instrumentality itself (as would be true with minimum safety or labeling requirements), tort liability has a direct and real impact on the cost and distribution of products that move in interstate commerce. Nor is tort reform legislation really aimed at social problems of the same type as FACE, CSRA, and VAWA, although tort liability is still a social problem in a very real sense. At the least, it is arguable that tort reform legislation should fall within the scope of the first two *Lopez* categories and be subject only to rationality review.

Assuming for the sake of argument that federal tort reform falls within the third *Lopez* category, however, there is no particularized federal interest in tort liability. Generally, tort liability does not involve any federal constitutional rights<sup>26</sup> nor any uniquely federal interest.<sup>27</sup> Moreover, by tradition, the subject of tort liability generally has been the province of the States, although there may be infrequent historical examples of direct federal intrusion into state tort law and certainly many federal regulatory schemes preempt some aspects of state tort law.<sup>28</sup>

Federal tort reform efforts might be upheld on the basis of the close and substantial effects tort liability has on interstate commerce and the instrumentalities which move in commerce. In other words, federal tort reform legislation may fall within the first two *Lopez* categories. But if tort liability does not involve the regulation of interstate commerce per se, then under the proposed approach the lack of a particularized federal interest coupled with the strength of the tradition of state control may favor the conclusion that such legislation, if enacted, is unconstitutional.

### Conclusion

The result in *United States v. Lopez* has some merit. A contrary conclusion reads out of the Constitution the important constitutional principle that the national government is a government of limited powers. The Justices' opinions in *Lopez*, however, generally do not address the concerns which should guide the federal courts in this difficult constitutional area. The Supreme Court should determine the scope of congressional commerce power with respect to the third *Lopez* category — activities that do not involve interstate commerce per se, but which have a potential cumulatively significant effect on interstate commerce — by reference to two factors: (1) the presence or lack of a particularized federal interest in the matter (something independent of general effects on interstate commerce) and (2) tradition. The Court could have justified the result in *Lopez* by pointing out that (1) the Gun Free School Zones Act did not address any federal constitutional right nor

serve any particularized federal interest and (2) there is a strong American tradition of allocating primary responsibility for investigating and prosecuting local crimes to the States.

Grounding the outcome in *Lopez* on those two considerations would suggest that a relatively small number of other federal statutes may be at constitutional risk after *Lopez*, and properly so, given the complexity of the modern economy and Congress's expansive (and unaltered by *Lopez*) authority to regulate the channels of interstate commerce, and the instrumentalities and persons that move in interstate commerce. Under the proposed approach, it is apparent that the vast majority of congressional enactments will withstand constitutional challenge after *Lopez*, including the Freedom of Access to Clinic Entrances Act of 1994 and the Violence Against Women Act of 1994. Recent congressional tort reform proposals present a more complicated situation, with constitutionality perhaps depending on whether such proposals can be characterized as efforts to regulate the channels or instrumentalities of interstate commerce.

*Lopez* accepts the proposition that federalism serves important values. As a result, the Supreme Court understandably indicated that the federal courts must subject to heightened scrutiny federal statutes which do not regulate either the channels of interstate commerce or the instrumentalities or persons that move in interstate commerce. Greater judicial sensitivity — and perhaps ultimately legislative sensitivity — to federalism concerns may be the legacy of *Lopez*.

### Notes

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1. 115 S. Ct. 1624 (1995).
2. Gun Free School Zones Act of 1990, 18 U.S.C. §§ 921-24 (1994).
3. See U.S. Const., art. I., § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .").
4. 18 U.S.C. § 248 (1994).
5. Title IV of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in part in 18 U.S.C. § 2261 (1994)).
6. 18 U.S.C. § 228 (1994).
7. See, e.g., Common Sense Legal Reform Act of 1995, H.R. 10, 104th Cong., 1st Sess. (1995); Product Liability Fairness Act of 1995, S. 565, 104th Cong., 1st Sess. (1995).
8. The following list of articles addressing potential values and disadvantages is neither exhaustive nor intended to rank values or disadvantages by relative significance. See Jacques LeBoeuf, *The*

- Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555 (1994); Anne C. Dailey, *Federalism and Families*, 43 U. PA. L. REV. 1787 (1995). See generally Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979 (1993); Ann Althouse, *Federalism, Untamed*, 47 VAND. L. REV. 1207 (1994); Stephen R. McAllister, *Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause?*, 44 U. KAN. L. REV. 217 (1996).
9. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding on commerce power grounds provisions of the Civil Rights Act of 1964 that prohibit racial discrimination in the provision of public accommodations); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (same).
10. See, e.g., Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1494 n.18 (1994) (“Certainly the argument that Congress was given limited power is uncontroversial. This was, after all, one of the critical compromises that made the Constitution possible.”).
11. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).
12. See *Burson v. Freeman*, 504 U.S. 191, 227 (1992) (Stevens, J., dissenting) (“Ours is a Nation rich with traditions. Those traditions sometimes support, and sometimes are superseded by, constitutional rules.”).
13. See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731, 748 (1982) (tradition supports giving the President absolute immunity from damages liability predicated on the performance of official acts); *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (Scalia, J., concurring) (tradition supports the conclusion that the judiciary lacks the constitutional power to order the President to perform particular executive acts); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 632 (1952) (Douglas, J., concurring) (“[O]ur history and tradition rebel at the thought that the grant of military power [to the President] carries with it authority over civilian affairs.”).
14. See, e.g., *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983) (for government property to be considered a public forum for free speech purposes it must by long tradition be open to the public at large for assembly and speech); *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding the use of prayer to open legislative sessions on the basis of tradition).
15. See, e.g., *Missouri v. Jenkins*, 115 S. Ct. 2038, 2070 (1995) (“We have long recognized that education is primarily a concern of local authorities. ‘[L]ocal autonomy of public school districts is a vital national tradition.’”) (quoting *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977)).
16. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 123-24 (1989) (“Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).
17. See, e.g., *Reno v. Flores*, 507 U.S. 292, 303 (1993) (the substantive component of the Due Process Clause affords only those protections “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (Cardozo, J.)).
18. 18 U.S.C. § 248 (1994). Among other things, the statute prohibits the use of force or the threat of force to intimidate or interfere with any person because that person has been obtaining or providing reproductive health services. § 248(a)(1). FACE provides for civil and criminal penalties for violations of its prohibitions. See §§ (b), (c).
19. See, e.g., *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 278 (1993) (“[T]he right to abortion has been described in our opinions as one element of a more general right of privacy . . . or of 14th amendment liberty . . .”) (citations omitted).
20. *United States v. Wilson*, 880 F. Supp. 621, 636 (E.D. Wis. 1995).
21. Title IV of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in part at 18 U.S.C. § 2261 (1994)). In pertinent part, the statute makes it a federal offense to travel across state lines to commit a crime of domestic violence or to cause someone else to cross state lines for that purpose. §§ 2261(a)(1), (2). The statute also makes it an offense to cross or cause the crossing of state lines in violation of a protective order. §§ 2262(a)(1), (2).
22. 18 U.S.C. § 228 (1994). The statute makes it a federal crime to “willfully fail[] to pay a past due support obligation with respect to a child who resides in another State.” § (a).
23. 115 S. Ct. 1732 (1995).
24. See, e.g., *In re Burrus*, 136 U.S. 586, 593-94 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”).
25. See, e.g., Common Sense Legal Reform Act of 1995, H.R. 10, 104th Cong., 1st Sess. (1995); Product Liability Fairness Act of 1995, S. 565, 104th Cong., 1st Sess. (1995).
26. But see 42 U.S.C. § 1983 (1988) (creating a tort cause of action for violations of federal rights occurring “under color of” state law).
27. But see Federal Tort Claims Act, 28 U.S.C. § 1346 (1994) (addressing the federal government’s tort liability).
28. See, e.g., *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (acknowledging “the States’ traditional authority to provide tort remedies to their citizens”).