

Federalism, the Commerce Clause, and the Constitutionality of the Unborn Victims of Violence Act of 2004

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The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed¹

INTRODUCTION

Over the last seventy years, the constitutional limits on the power of the federal government have eroded. Through its complicity—and in some cases, its authorization and encouragement—the Supreme Court has given Congress the power to expand its regulatory reach to nearly every area of American life: personal and commercial, local and national, civil and criminal. Initially, it appeared that the Court’s most recent proclamations regarding the commerce power may have the effect of reigning in the reach of Congress, particularly in the area of federal criminal law.² Subsequent actions, however, have proven otherwise. The Unborn Victims of Violence Act of 2004 (“UVVA”) is the latest example of a congressional act that violates the spirit, although

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.).

2. See Craig M. Bradley, *Federalism and the Federal Criminal Law*, 55 HASTINGS L.J. 573, 573 (2004) (citing other commentators and noting that the initial reaction to the Supreme Court’s most recent Commerce Clause decisions was that “these decisions would likely have a significant effect on the scope of federal criminal law”); see also John S. Baker, Jr., *United States v. Morrison and Other Arguments Against Federal “Hate Crimes” Legislation*, 80 B.U. L. REV. 1191, 1193 (2000) (recognizing “a more unified commitment within the Court to enforce constitutional limits on Congress’s legislative powers”); Erwin Chemerinsky, *Shrinking Federal Powers*, TRIAL, Jan. 2001, at 82, 83 (discussing recent cases indicating that at least “five justices are committed to enforcing their vision of federalism and limiting the scope of federal authority”); Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of United States v. Lopez and United States v. Morrison*, 68 TENN. L. REV. 605, 605 (2001) (discussing Court’s recent efforts to strike “down legislation as being outside the limits of Congress’s authority under the Commerce Clause”); Louis J. Virelli III & David S. Leibowitz, *“Federalism Whether They Want It or Not”: The New Commerce Clause Doctrine and the Future of Federal Civil Rights Legislation After United States v. Morrison*, 3 U. PA. J. CONST. L. 926, 926 (2001) (“[T]he Court intends to reduce federal commerce power to a fraction of what it had become in the previous sixty years.”).

not necessarily the letter, of the Court's Commerce Clause jurisprudence.³ As such, the Court should go further to protect federalism against the growing federalization of criminal law.

On April 1, 2004, President George W. Bush signed the UVVA into law.⁴ In general, the UVVA, also known as Laci and Conner's Law,⁵ makes it a federal crime to kill or harm an unborn fetus, without the consent of the woman pregnant with that fetus, during the commission of another federal crime.⁶

This Note will show that the UVVA, while technically within Congress's jurisdictional control under current doctrine, should be unconstitutional. Part I will briefly outline the Supreme Court's jurisprudence in the area of congressional power, focusing mainly on its most recent decisions. Part II will detail more closely the specific structure and history of the UVVA, including its basis of federal jurisdiction. Part III will apply the UVVA vis-à-vis the Court's modern Commerce Clause doctrine to show that the substance of the UVVA violates the spirit of the Court's most recent decisions. Finally, the Conclusion will briefly describe why a finding of unconstitutionality through expansion of the current doctrine is correct and desirable, both for this law specifically and other similar acts of Congress generally.

I. CONGRESSIONAL POWER

The limits on Congress's powers are as fundamental as the Constitution itself. This Part will detail exactly what those limits are and how the courts, until very recently, have fundamentally changed the checks and balances dynamic by giving little bite to the intentionally exhaustive and specific list of enumerated powers.

A. Constitutional Limits on the Power of Congress to Regulate

Article I, Section 8 of the Constitution of the United States provides an exhaustive list of Congress's powers. They include powers that are almost indisputably necessary for a central government to persevere, including powers over national defense and the military⁷ and national currency.⁸ The more controversial powers are found in the

3. To be sure, this Note does not address other, more "mainstream" arguments against the UVVA, including, most importantly, that the law infringes on a woman's right to privacy (i.e., right to abortion). See, e.g., Judy Holland, *Peterson Case Stirs Debate Over Abortion, Unborn Victims*, CHI. TRIB., Apr. 30, 2003, at 3B; Jessica Greenfield, *Bush Signs Law Granting Personhood to Fetuses*, NAT'L NOW TIMES, Spring 2004, at 15, available at <http://www.now.org/nnt/spring-2004/personhood.html> (last visited Oct. 18, 2004); see also *Roe v. Wade*, 410 U.S. 113 (1973) (invalidating criminal abortion statute as unconstitutional).

4. Unborn Victims of Violence Act of 2004, Pub. L. No. 108-212, 118 Stat. 568 (2004).

5. *Id.* § 1.

6. The Unborn Victims of Violence Act, 18 U.S.C.A. § 1841 (2004).

7. See, e.g., U.S. CONST. art. I, § 8, cl. 11-12, 15 (granting Congress the power "[t]o declare War . . . ; raise and support Armies . . . ; [and] provide for calling forth the Militia").

8. See, e.g., *id.* at cl. 5-6 (granting Congress the power "[t]o coin money, regulate the Value thereof . . . ; [and] provide for the Punishment of counterfeiting").

Commerce Clause⁹ and the Necessary and Proper Clause.¹⁰ These clauses will be the focus of the remainder of this Part.

1. The Commerce Clause

The Supreme Court's first attempt at defining Congress's commerce power came in 1824,¹¹ when the Court stated that commerce "describes the commercial intercourse between nations, and parts of nations."¹² Commerce Clause jurisprudence remained relatively stable until 1937, during which time "[t]he blackletter rule was simple to apply: If something moved across state borders, Congress was empowered to regulate it."¹³

In 1937, however, the Court's Commerce Clause doctrine changed dramatically with the landmark decision in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,¹⁴ in which the Supreme Court noted that completely local activity may affect interstate commerce to such a degree as to make it a matter of interstate concern.¹⁵ Since this decision, "[f]ederal regulation under the Commerce Clause . . . encountered little resistance by the Supreme Court,"¹⁶ essentially needing only to pass a rational basis test of constitutionality.¹⁷

The Court in *United States v. Lopez*,¹⁸ however, reverted to earlier, more stringent scrutiny of the commerce power. *Lopez* involved a challenge to the Gun-Free School Zones Act, which made it a federal crime to knowingly possess a firearm within five

9. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." *Id.* at cl. 3.

10. "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* at cl. 18.

11. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824); Michael Bono, Case Note: *Judicial Limitations on Congressional Power Under United States v. Morrison*, 2 LOY. J. PUB. INT. L. 229, 235 (2001).

12. *Gibbons*, 22 U.S. at 189–90. "The commerce power is a power to lay down the rule by which commerce is to be governed." Bono, *supra* note 11, at 235 n.40 (citing *Gibbons*, 22 U.S. at 189–90). See Jennifer L. Wethington, *Constitutional Law—Commerce Clause—Violence Against Women Act's Civil Rights Remedy Exceeds Congress's Powers to Regulate Interstate Commerce*, 23 U. ARK. LITTLE ROCK L. REV. 485, 491 (2001).

13. Wethington, *supra* note 12, at 492 (footnote omitted).

14. 301 U.S. 1 (1937).

15. *Id.* at 37.

16. George P. Ferro, Note, *Affecting Commerce: Post Lopez Review of the Hobbs Act*, 66 ALA. L. REV. 1197, 1198 (2003) (footnote omitted).

17. "Rational basis" requires only that legislation bear a rational relationship to the government's legitimate state interest to withstand constitutional scrutiny. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973); *United States v. Bishop*, 66 F.3d 569, 577 (3d Cir. 1995); see also *United States v. Morrison*, 529 U.S. 598, 608 (2000) ("[I]n the years since *Jones*, Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted." (citation omitted)).

18. 514 U.S. 549 (1995).

hundred feet of a school.¹⁹ The statute did not regulate, nor did possession have to be involved in, interstate commerce.²⁰

Chief Justice Rehnquist, writing for the majority,²¹ held that any activity must “substantially affect interstate commerce” before Congress may constitutionally regulate it.²² The majority identified three permissible categories of commerce power regulation: 1) “the use of the channels of interstate commerce;” 2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce;” and 3) “those activities having a substantial relation to interstate commerce.”²³ In striking down the Gun-Free School Zones Act under the third category,²⁴ the Court noted that the regulated activity at issue was neither commercial nor required to be in interstate commerce.²⁵ The Court also expressed its concern that the Gun-Free School Zones Act infringed on the states’ powers to regulate individuals’ activities.²⁶

[U]nder the Government’s “national productivity” reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens *Under the theories that the Government presents . . . , it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.*²⁷

The Court thus struck down the law as an unconstitutional use of the commerce power.²⁸

The Supreme Court’s curtailment of Congress’s commerce power continued five years later in *United States v. Morrison*,²⁹ a case involving a challenge to the Violence Against Women Act (“VAWA”).³⁰ That Act provided, inter alia, a federal civil remedy for victims of gender-motivated violence.³¹ The gender-motivated violence that was to

19. 18 U.S.C. § 922(q)(1)(A) (Supp. V 1988) (current version at 18 U.S.C. § 922(q)(2)(A) (2005)).

20. *Lopez*, 514 U.S. at 551.

21. *Id.*

22. *Id.* at 559.

23. *Id.* at 558–59 (citations omitted).

24. *Id.* at 568.

25. *Id.* at 567.

26. *Id.* at 564.

27. *Id.* (emphasis added); see also RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 317 (2004) (noting that, prior to *Lopez*, “Congress ha[d] claimed, and the Supreme Court ha[d] permitted, what amounts to a general plenary power to legislate in any manner it wishe[d]”).

28. *Lopez*, 514 U.S. at 564, 567–68. Congress reacted to *Lopez* by passing another version of the Gun-Free School Zones Act, this time further requiring knowing possession of a firearm that has moved in interstate commerce. 18 U.S.C. § 922(q)(2)(A) (2000). The amended version has not been struck down.

29. 529 U.S. 598 (2000).

30. *Id.* at 604–05.

31. 42 U.S.C. § 13981 (1994).

form the basis for the civil remedy was not required to have had any direct connection to interstate commerce.³²

As was the case in *Lopez*, only the third category of permissible Commerce Clause regulation (i.e., substantially affects interstate commerce) was seriously argued in *Morrison*.³³ The Court enumerated four “significant considerations” that shaped its decision in *Lopez*:³⁴ the economic nature of the regulated activity,³⁵ an express jurisdictional element that limits the reach of the regulation to activities affecting interstate commerce,³⁶ congressional findings regarding the regulated activity’s “substantial effect” on interstate commerce,³⁷ and a direct link between the regulated activity and the substantial effect on interstate commerce.³⁸

Analyzing these considerations, the majority ultimately struck down the federal civil remedy provided for in the VAWA. First, “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”³⁹ Second, the VAWA contained no jurisdictional element.⁴⁰ Third, while the regulation was supported by congressional findings, those findings were “not sufficient, by [themselves], to sustain the constitutionality of Commerce Clause legislation.”⁴¹ Finally, any link between gender-motivated violent crime and a substantial effect on interstate commerce was tenuous at best.⁴²

Moreover, the Court noted that “[t]he Constitution requires a distinction between what is truly national and what is truly local.”⁴³ Violence not directed at interstate commerce “has always been the province of the States.”⁴⁴ Chief Justice Rehnquist could “think of no better example of the police power, *which the Founders denied the*

32. See *id.* Congress did, however, include a statement that the purpose of the VAWA was “to promote . . . activities affecting interstate commerce.” §13981(a). However, the Supreme Court requires more than Congress’s statement that the activity being regulated affects interstate commerce. *Infra* note 41 and accompanying text.

33. *Morrison*, 529 U.S. at 609.

34. *Id.*

35. *Id.* at 610.

36. *Id.* at 611–12.

37. *Id.* at 612.

38. *Id.*

39. *Id.* at 613. The Court feigns to appear to be following precedent, claiming that “thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.” *Id.* (citation omitted). This statement is odd in light of, *inter alia*, *Wickard v. Filburn*, in which the Court upheld regulation of a farmer’s wheat harvested for self-consumption. 317 U.S. 111 (1942).

40. *Morrison*, 529 U.S. at 613.

41. *Id.* at 614 (“Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.” (quoting *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995))). The Court went on to say that the province of Congress to regulate any activity is ultimately for the Supreme Court to decide. *Id.*

42. *Id.* at 615–17.

43. *Id.* at 617–18 (citing *Lopez*, 514 U.S. at 568); *cf.* *Wethington*, *supra* note 12, at 509 (“After *Morrison*, Congress is powerless to set the national standard under the Commerce Clause.”).

44. *Morrison*, 529 U.S. at 618 (citation omitted).

National Government and reposed in the states, than the suppression of violent crime and vindication of its victims."⁴⁵

2. The Necessary and Proper Clause

The Necessary and Proper Clause gives Congress the power to pass laws that are "necessary and proper" for carrying out its Article I, Section 8 powers. And "[i]t is through this [means-to-an-end] reasoning that an intrastate activity 'affecting' interstate commerce can be reached through the commerce power."⁴⁶ For some, the Necessary and Proper Clause is an issue separate and distinct from, say, the Commerce Clause.⁴⁷ As it currently stands in the Supreme Court, however, the Necessary and Proper Clause, for purposes of this Note, is essentially intertwined and almost indistinguishable from the Commerce Clause,⁴⁸ and thus requires no further treatment.

B. The Judiciary's Failure to Strictly Enforce the Constitutional Mandate of Limited Congressional Power

Despite the Supreme Court's seemingly more exacting scrutiny in its enumerated powers doctrine, the federal courts remain reticent to strike down congressional acts for reasons other than infringement on constitutionally guaranteed civil liberties. Meanwhile, Congress has continued to legislate in areas even farther beyond its Article I authority. As Professor Randy Barnett notes, this is hardly a recent development:

Since the adoption of the Constitution, courts have eliminated clause after clause that interfered with the exercise of government power. This started early with the Necessary and Proper Clause, continued through Reconstruction with the destruction of the Privileges and Immunities Clause, and culminated in the post-New Deal Court that gutted the Commerce Clause As a result of judicial decisions, these provisions of the Constitution are largely gone and, in their absence, the enacted Constitution has been lost and even forgotten.⁴⁹

Nevertheless, the issue of congressional overreach remains salient today because of the areas to which the federal government's presence now extends.

45. *Id.* (emphasis added). The majority cites Justice Thomas's concurrence in *Lopez*, saying, "We *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *Id.* at 618-19 (quoting *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring)) (emphasis added).

46. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 584-85 (1985) (O'Connor, J., dissenting); see also David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL'Y 107, 108 (1998).

47. See, e.g., Engdahl, *supra* note 46, at 114-22 (arguing that Necessary and Proper doctrine, not Commerce Clause doctrine, is appropriate in the "instrumentalities" cases, some of the "channel" cases, and all of the "affecting" cases).

48. See *Lopez*, 514 U.S. at 558-59; Engdahl, *supra* note 46, at 115.

49. BARNETT, *supra* note 27, at 1.

1. The Federalization of Criminal Law

Perhaps most disturbing of all—and most important for purposes of this Note—is what some call the “federalization of criminal law.”⁵⁰ This “did not occur in isolation; on the contrary, it coincided with a broad national trend towards federalization and centralization which extended to virtually all sectors of the U.S. economy.”⁵¹ Of course, this was not originally part of the constitutional framework. Alexander Hamilton explained the Framers’ support for exclusively state criminal law:

There is one transcendent advantage belonging to the province of the State governments, which alone suffices to place the matter in a clear and satisfactory light—I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment.⁵²

Government attempts to deal with crime should hardly be discouraged. The problem, however, is that the Constitution’s carefully constructed governmental framework⁵³ has taken a backseat to political expedience,⁵⁴ while the branch entrusted

50. See Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997); Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825 (2000); Russell L. Weaver, Lopez and the Federalization of Criminal Law, 98 W. VA. L. REV. 815 (1996).

51. Weaver, *supra* note 50, at 817.

52. THE FEDERALIST NO. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Lauryn P. Gouldin, *Controlled Substance Law: Cannabis, Compassionate Use and the Commerce Clause: Why Developments in California May Limit the Constitutional Reach of the Federal Drug Laws*, 1999 ANN. SURV. AM. L. 471, 496–97.

53. See Ehrlich, *supra* note 50, at 827–28. Prof. Ehrlich notes that the Ratifiers had a clear vision of the Constitution’s governmental framework:

Whatever object of government is confined in its operation and effects within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends in its operation and effects beyond the bounds of a particular state, should be considered as belonging to the government of the United States.

Id. at 827 (citing Raoul Berger, *A Lawyer Lectures a Judge*, 18 HARV. J.L. & PUB. POL’Y 851, 858 n.54 (1995) (quoting 2 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 399 (2d ed. 1836))). Another, although often less-publicized, problem with the federalization of criminal law is the lack of double jeopardy protection when one is tried for the same crime based on the same acts under state and federal law. See *id.* at 838; cf. *Bartkus v. Illinois*, 359 U.S. 121, 134–37 (1959).

54. See Ferro, *supra* note 16, at 1210 (“Oftentimes, federal crimes are created for political reasons with no attention given to their consequences.”); cf. Ehrlich, *supra* note 50, at 826–27. But see Vicki C. Jackson, *Federalism and the Court: Congress as the Audience?*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 145, 150 (2001) (arguing that the protection of states’ rights should be left to the political process).

with the duty and responsibility of protecting our constitutional constructs⁵⁵ has, for the most part, idly watched it occur.

The increased scope of federal criminal law is vast. Activities previously under the exclusive province of the states⁵⁶ include malicious destruction of property,⁵⁷ drive-by shooting,⁵⁸ and non-payment of child support.⁵⁹ In all, there are approximately 3600 federal crimes,⁶⁰ with new ones being added every term.

More often than not, additions to Title 18 of the United States Code⁶¹ are congressional reactions to crimes that grab national headlines. For example, Congress passed a federal criminal carjacking law in 1992⁶² after a Maryland woman was killed in a carjacking incident.⁶³ (The fact that the perpetrator was convicted under state murder and robbery statutes was apparently immaterial as far as Congress was concerned.)⁶⁴ "Similar action was taken in 1994 in response to other publicized crimes, a drive-by shooting and a murder by an escaped prisoner."⁶⁵

Congressional grandstanding is to be expected, Constitution or not. Few traits are more popular with constituencies than platforms that include being "tough on crime." Opposition to federal criminal legislation is made all the more difficult when often the best argument against it is that the legislation is beyond the scope of Congress's Article I enumerated powers. This is especially true in an era when voters look more and more to their public servants to "fix" things.⁶⁶ Congress, therefore, while technically the

55. See U.S. CONST. art. III; BARNETT, *supra* note 27, at 132-42 (discussing the judiciary's power of nullification).

56. See, e.g., Weaver, *supra* note 50, at 816 (listing categories of federal crimes); Ehrlich, *supra* note 50, at 825-27 (describing more recent trends in the federalization of criminal law); *id.* at 837 (noting that it is the "deliberate design of federalism" that the states possess the general police power).

57. Weaver, *supra* note 50, at 817 (citing 18 U.S.C. § 844(i) (1994)).

58. *Id.* at 816 (citing 18 U.S.C. § 36 (1994)).

59. *Id.* (citing 18 U.S.C. § 228 (1994)).

60. Ehrlich, *supra* note 50, at 826 (citing James A. Strezella, *The Federalization of Criminal Law*, TASK FORCE ON FED. OF CRIM. LAW REP. A.B.A. CRIM. JUST. SEC. at 7-10, app. c (1998)).

61. "Crimes and Criminal Procedure."

62. 18 U.S.C. § 2119 (1992), amended by 18 U.S.C. § 2119 (2000). The courts of appeals have upheld the statute because the car has, at some point, moved in interstate commerce. See Bradley, *supra* note 2, at 607 (citing *United States v. Cobb*, 144 F.3d 319, 320-21 (4th Cir. 1998) (citing cases from seven circuits)).

63. Ehrlich, *supra* note 50, at 825 (footnotes omitted).

64. *Id.*

65. *Id.* (footnotes omitted).

66.

Of course, it is much easier to ride the current wave of federalizing every human misdeed in the name of saving the world from some evil than to uphold a constitutional oath which prescribes a procedural structure by which the Nation is protected from what is perhaps the worst evil, totalitarianism. Who, after all, wants to be amongst those Members of Congress who are portrayed as soft on violent crimes initiated against the unborn?

culprit, should not be made to bear the entire blame for the federal government's over-expansion into criminal law.⁶⁷ The federal judiciary also has a duty to provide a check on Congress's power—that is to say, to prevent Congress from creating a plenary police power.

2. The Presumption of Constitutionality

As noted above, the judiciary's deferential approach to the commerce power began nearly seventy years ago. To be fair, a presumption of constitutionality existed at ratification.⁶⁸ Even Justice Clarence Thomas, whom Professor Barnett describes as one "willing to consider first principles"⁶⁹ and who voted with the majority in both *Lopez*⁷⁰ and *Morrison*,⁷¹ has noted that legislation "comes to us bearing a strong presumption of validity."⁷² Nevertheless, the federal courts have a constitutional duty to strike down unconstitutional laws:

Th[e] Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power . . . will declare it to be void.⁷³

Thus, the judiciary's reluctance to invalidate congressional acts not authorized by Article I amounts to constitutional abdication.

The issue remains, however, when the judiciary may properly substitute its own judgment for that of Congress if the presumption of constitutional validity is to maintain significance. Where Congress makes no attempt to prove that a regulated activity substantially affects interstate commerce, like in *Lopez* and the UVVA, the

150 CONG. REC. H657 (daily ed. Feb. 26, 2004) (statement of Rep. Paul). "[T]he Supreme Court agrees with its fellow federal judges that Congress has a tendency to claim to solve social problems by creating new crimes A majority of the Court no doubt considered the Gun Free School Zones Act and the [VAWA] to be just such unnecessary legislation . . ." Bradley, *supra* note 2, at 591.

67. For the alternative view that Congress has not gone far enough in creating federal crimes, see generally, Troy A. Scotting, Comment: *Hate Crimes and the Need for Stronger Federal Legislation*, 34 AKRON L. REV. 853 (2001) (arguing that federal criminal law is being underutilized in the area of hate crimes).

68. BARNETT, *supra* note 27, at 151–52 (quoting, inter alia, *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 270 (1827)).

69. *Id.* at 151.

70. *United States v. Lopez*, 514 U.S. 549, 550 (1995).

71. *United States v. Morrison*, 529 U.S. 598, 600 (2000).

72. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993).

73. Speech of Oliver Ellsworth to the Connecticut ratification convention (Jan. 7, 1788) in 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 196 (Jonathan Elliot ed., 2d ed. 1836). *But see* Marci A. Hamilton, *The Elusive Safeguards of Federalism*, 574 ANNALS AM. ACAD. POL. & SOC. SCIENCE 93, 94 (2001) (arguing that *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) provided a strong statement "that judicial review over federalism is contrary to the constitutional design").

presumption is easier to overcome.⁷⁴ In that situation, Congress has failed to provide the courts with a basis for its regulation. Absent proper findings from Congress, the courts would seem to have little else to guide their decisions as to whether an activity “affects” interstate commerce.

Where Congress has undertaken significant efforts to substantiate its claims that an activity substantially affects interstate commerce, however, the presumption should be harder to overcome. In fact, some have argued that the judiciary has no business striking down an act for which Congress has produced voluminous findings and reports regarding its effects on interstate commerce,⁷⁵ as was the case in *Morrison*.⁷⁶ After all, the courts are unable to conduct their own investigations and would thus be invalidating laws based on their own conclusions and on their implicit distrust of Congress’s findings or motives.⁷⁷

The argument that the presumption cannot be overcome in cases where an act is complemented with congressional findings is misplaced. First, that argument presupposes that the congressional findings actually support a conclusion that the Supreme Court requires in order to pass constitutional muster. If the Court were to say, as it has, that an activity must substantially affect interstate commerce, then the activity must *actually* substantially affect interstate commerce; it would not be enough to merely say as much in self-interested and self-prophesizing congressional findings.⁷⁸ If it were otherwise, satisfying Article I would become a mere formality.

Second, the Court determines what in fact the test or standard is that Congress must meet or pass in order to withstand constitutional scrutiny. Moreover, the Court is the final authority as to whether Congress has met or passed the applicable test or standard. As such, the Court may still find unconstitutional an act accompanied by congressional findings as to a regulated activity’s effect on interstate commerce, for example. The

74. *But see* Weaver, *supra* note 50, at 822 (arguing that the Supreme Court may have upheld the Gun-Free School Zones Act had Congress made explicit findings as to the economic effects of gun possession in school zones).

75. *See, e.g.*, Bradley, *supra* note 2, at 611 (concluding that, where Congress has produced findings of an activity’s effect on interstate commerce and has a rational basis for them, a court’s subsequent invalidation of the law “is not merely holding Congress within its constitutional authority but is substituting its own judgment for that of the legislative branch. . . . [T]here is no limit to the Court’s authority if it can strike down legislation for which Congress had a rational basis for finding . . . a [meaningful] connection [to commerce]”); Jackson, *supra* note 54, at 150–53.

76. The majority in *Morrison* made a point of mentioning that it had made its decision “[w]ith this presumption of constitutionality in mind.” *Morrison*, 529 U.S. at 607; *Cf.* Bono, *supra* note 11, at 252 (concluding that “the Court’s history of deferring to congressional findings to show the connection between local and interstate activity is not likely to be continued following the *Morrison* decision”).

77. *See* Jackson, *supra* note 54, at 150 (arguing that the Supreme Court’s recent decisions “betray a genuine mistrust of Congress” and “the Court’s apparent view of Congress as a body that creates laws without real deliberation on the need for federal legislation and without knowledge of or respect for the role of the states”).

78. *See* Bradley, *supra* note 2, at 578 (“*Lopez*, and even more clearly *Morrison*, requires not just lip service in the statute, but rather an independent finding by the courts that the activity in question in fact substantially affects interstate commerce, regardless of the statutory language or congressional findings.”).

Court could determine that the findings do not prove a *substantial* effect on interstate commerce. It could also decide that the “new” standard is “directly and substantially affecting interstate commerce,” so that while the congressional findings show the activity’s substantial effect, they do not show any direct effect.

Concededly, some of these hypothesized results may be troubling in their own right, but they nevertheless show that the presumption of constitutionality is rebuttable, even where Congress has provided findings for its legislation. The presumption maintains its relevance and importance today. It does not, however, displace the role of the judiciary in protecting the constitutional framework.⁷⁹

3. Developments Since *Lopez*

Shortly after *Lopez*, the Supreme Court rejected an opportunity to expand its reasoning when it refused to grant certiorari in *Cargill, Inc. v. United States*.⁸⁰ The Army Corps of Engineers sought to apply the Clean Water Act to water pools where migratory birds land.⁸¹ Justice Thomas argued that the Corps’ “assumption . . . that the self-propelled flight of birds across state lines creates a sufficient interstate nexus to justify the Corps’ assertion of jurisdiction over any standing water that could serve as a habitat for migratory birds . . . test[s] the very ‘bounds of reason.’”⁸² Although the only possible interstate and commercial activities involved were the avian migratory habits, Justice Thomas was unable to convince enough of his brethren to have the case heard.

Five years later, the Court again refused an opportunity to further clarify and expand its Commerce Clause doctrine.⁸³ In *Jones v. United States*,⁸⁴ decided the same year as *Morrison*, Jones argued that his federal arson conviction⁸⁵ should be overturned because Congress exceeded its authority under the Commerce Clause in enacting the federal arson statute.⁸⁶ The Court did overturn the conviction, but did so on grounds of statutory interpretation rather than constitutional interpretation.⁸⁷ In so doing, the Court

79. For an alternative view on the presumption of constitutionality, see Barnett, *supra* note 27, at 151–52, 253–69 (arguing that “[t]he original meaning of [the Constitution] argues strongly against a presumption of constitutionality and in favor of [a] contrary construction” that Prof. Barnett describes as “the Presumption of Liberty”).

80. 516 U.S. 955 (1995).

81. *Id.* at 955–56.

82. *Id.* at 958 (quoting *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1396 (9th Cir. 1995)).

83. For an alternative view, see Bradley, *supra* note 2, at 583–87 (arguing that *Jones* is highly informative as to the Court’s direction in federalism cases). [

84. 529 U.S. 848 (2000).

85. Defendant Jones threw a Molotov cocktail into the Fort Wayne, Indiana home of his cousin, severely damaging the home. *Id.* at 851.

86. 18 U.S.C. § 844(i) (2000).

87. *Jones*, 529 U.S. at 857–59. Justice Thomas, joined by Justice Scalia, however, concurred separately to note that he “express[ed] no view on the question whether the federal arson statute . . . is constitutional in its application to all buildings used for commercial activities.” *Id.* at 860 (Thomas, J., concurring). Presumably, he and Justice Scalia did not wish their votes with the majority to imply their approval of the federal arson statute, even in the commercial context.

missed an opportunity to further expand its "new" enumerated powers doctrine.⁸⁸ This outcome is quite troubling indeed, as the Court had before it the quintessential federalized crime and not even in concurrence did it discuss a plenary police power.⁸⁹

Decisions of lower federal courts since *Lopez* have been even more deferential to Congress.⁹⁰ The Eleventh Circuit, for example, rejected a *Lopez*-type argument that the government must prove under the Hobbs Act that the defendant's actions had a substantial effect on interstate commerce.⁹¹ Even more troubling was the District of Columbia Circuit's requiring a mere "'explicit' and 'concrete' effect" on interstate commerce,⁹² as an effect may be "explicit" and "concrete" without being substantial or even slight. The problem with such formulations is that they not only violate the spirit of *Lopez*,⁹³ they also violate the express language of *Lopez*, which requires a *substantial* effect.

Shortly after *Lopez* was decided, the Third Circuit upheld the constitutionality of the federal carjacking statute, finding that "Congress had a rational basis for believing that carjacking substantially affects interstate commerce."⁹⁴ In *United States v. Bolton*,⁹⁵ the Tenth Circuit upheld a constitutional challenge to the Hobbs Act, holding "that the Hobbs Act regulates activities which in aggregate have a substantial effect on interstate commerce. In enacting the Hobbs Act, Congress determined that robbery and extortion are activities which through repetition may have substantial detrimental effects on interstate commerce."⁹⁶

As Professor Russell Weaver suggests, perhaps the reaction of the lower courts is predictable. "[T]he 'modern view' of the Commerce Clause . . . has been taught in law schools for decades, . . . [and t]he *Lopez* decision, surprising as it was, did not break lower-court judges out of this mindset."⁹⁷

88. Perhaps this decision can best be explained as adherence to precedent, for fifteen years earlier, the Supreme Court upheld the federal arson statute in the commercial building context. See *Russell v. United States*, 471 U.S. 858, 862 (1985).

89. While it is true that, as a general rule, the Supreme Court will not address constitutional arguments if it can resolve a controversy on other grounds, it is nonetheless disappointing that it failed to capitalize on an opportunity to further define the commerce power. For an alternative view, see Bradley, *supra* note 2, at 583-86 (arguing that *Jones* represents an application of *Lopez*, albeit under the guise of statutory interpretation).

90. *Cf.* Bradley, *supra* note 2, at 575 (noting that *Lopez* and *Morrison* have had little effect on the decisions of lower courts); Ferro, *supra* note 16, at 1205-09 (arguing that the approach of lower federal courts has been to construe *Lopez* so narrowly that it is applicable only in cases identical to *Lopez*).

91. See *United States v. Castleberry*, 116 F.3d 1384, 1387 (11th Cir. 1997) (stating that "[b]ecause the Hobbs Act contains [a] jurisdictional element, . . . the Government only needs to establish a minimal effect on interstate commerce to support a violation of the Hobbs Act").

92. *United States v. Harrington*, 108 F.3d 1460, 1465 (D.C. Cir. 1997).

93. See *infra* Parts III.A, C.

94. *United States v. Bishop*, 66 F.3d 569, 576 (3d Cir. 1995).

95. 68 F.3d 396 (10th Cir. 1995).

96. *Id.* at 399.

97. Weaver, *supra* note 50, at 840.

II. THE UNBORN VICTIMS OF VIOLENCE ACT OF 2004

A. Background

The UVVA makes it a federal crime to “cause[] the death of, or bodily injury . . . to, a child, who is in utero at the time”⁹⁸ during the commission of another enumerated federal crime.⁹⁹ It represents the latest example of political grandstanding that has become commonplace in Washington.

The UVVA, like many other federalized laws before it, was promulgated in response to a nationally publicized news story.¹⁰⁰ The alternative name for the UVVA, Laci and Conner’s Law,¹⁰¹ is derived from the first names of a twenty-seven year-old mother and her unborn son, who were murdered on Christmas Eve of 2002. Scott Peterson, Laci’s widower, was charged with the murder of both,¹⁰² and the Stanislaus County District Attorney sought the death penalty for the murders of both Laci and Conner.¹⁰³

Despite the fact that the state of California not only has a law making feticide a felony punishable by death,¹⁰⁴ and despite the fact that Scott Peterson was charged with the capital murder of his unborn son, Congress nonetheless again acted (or reacted) reflexively. The reason for acting is obvious: passing a law to make the killing of an unborn fetus a felony is politically popular,¹⁰⁵ especially when the circumstance is brought to the public’s attention in the daily news. But not only was there no need for the law in the specific circumstances of Conner Peterson, there is little reason for the

98. 18 U.S.C.A. § 1841(a)(1) (West 2004).

99. *See id.* at § 1841(a)(1), (b) (listing, for example, 18 U.S.C. § 36 (2004) (drive-by shooting); 18 U.S.C. § 351 (2000) (congressional, cabinet, and Supreme Court assassination, kidnapping, and assault); 18 U.S.C. § 1365(a) (2000) (consumer product tampering); 18 U.S.C. § 2231 (2000) (assault or resistance)).

100. *See supra* text accompanying notes 61–65; 150 CONG. REC. H642 (daily ed. Feb. 26, 2004) (statement of Rep. Hart); Susan Estrich, *Laci Peterson’s Unborn Child Becomes Pawn in Abortion Debate*, USA TODAY, Apr. 30, 2003, at 13A; Holland, *supra* note 3, at 3B.

101. Unborn Victims of Violence Act of 2004, Pub. L. No. 108-212, § 1, 118 Stat. 568 (2004).

102. Christine Hanley & Dan Morain, *The Nation*; *Scott Peterson Killed Wife in Their Home, Police Say*, L.A. TIMES, Apr. 22, 2003, at 1.

103. *See Nation in Brief*, WASH. POST, Apr. 27, 2003, at A06; *State Seeks Death for Peterson*, CHICAGO TRIBUNE REDEYE ED., Apr. 28, 2003, at 8; *see generally*, What’s Happening, The Laci Peterson Web Site, at <http://www.lacipeterson.com/whats happening/index.html> (last updated June 8, 2003).

104. CAL. PENAL CODE §§ 187, 190 (West 1999 & Supp. 2005).

105. Representative Sensenbrenner, during the UVVA debates in the House of Representatives, for example, cited a Fox News poll showing that 84% of those polled favor a separate criminal charge against Scott Peterson for the murder of Conner, a Newsweek poll showing that 79% support a separate charge for an unborn victim, and another Fox News poll showing 79% favor a separate charge for an unborn victim (including 69% support among self-identified pro-choice respondents). Each of those polls found that less than 10% do not support a separate charge. 150 CONG. REC. H661 (daily ed. Feb. 26, 2004) (statement of Rep. Sensenbrenner).

law outside of that context. Even if there were a pressing need for such a law, however, Congress may not pass it without a basis in the Constitution.

Scott Peterson was charged with the murder of Conner Peterson under the California state murder statute.¹⁰⁶ The District Attorney charged that murder as a capital offense. Thus, there is no more serious crime or punishment with which Scott could be tried or for which he could be punished. Section 1841, then, would work nothing more than a legal tautology in this case. In fact, while the killing of Conner Peterson is being tried as a capital offense, the death penalty is unavailable under § 1841.¹⁰⁷ Thus, the federal statute fails to fill any legal holes in the specific context of Conner Peterson (not to mention the fact that, since Scott Peterson did not kill Conner during the commission of a federal crime, Scott could not have been charged under § 1841 anyway).

Section 1841 would, however, add a separate and distinct offense vis-à-vis a defendant's state law charges in some contexts. Feticide is written into the criminal code of only twenty-nine states.¹⁰⁸ In the other twenty-one states, it is uncertain at best whether a person who kills an unborn fetus without the pregnant mother's consent may be charged with any degree of criminal homicide.¹⁰⁹ Congress, then, at least has some justification for passing the UVVA, albeit a veiled one.

B. Legislative History

The UVVA was first considered in 1999, when it passed the House of Representatives¹¹⁰ but failed to make it to the Senate floor for a vote. The House again passed the bill in 2001,¹¹¹ but the Senate again refused to consider it. The third time proved the charm, as the bill passed the House in February 2004 by a vote of 254 to 163¹¹² and passed the Senate one month later by a vote of 61 to 38.¹¹³ President George W. Bush signed the UVVA into law on April 1, 2004.¹¹⁴

106. A California jury found Scott Peterson guilty of first-degree murder of Laci and guilty of second-degree murder of Conner. Louis Sahagun & Mark Arax, *Peterson Found Guilty of Killing Pregnant Wife*, L.A. TIMES, Nov. 13, 2004, at 1. The logical pitfalls of the verdict notwithstanding, Peterson potentially faces a sentence of death, although not for the murder of Conner, since his was in the second degree. *See id.*

107. 18 U.S.C.A. § 1841(a)(2)(D) (West 2004).

108. 150 CONG. REC. H644 (daily ed. Feb. 26, 2004) (statement of Rep. Stearns); 150 CONG. REC. S3165 (daily ed. Mar. 25, 2004) (statement of Sen. Voinovich). For examples of state statutes expressly making feticide a crime, see ARIZ. REV. STAT. ANN. § 13-1103(a)(5) (2001); CAL. PENAL CODE § 187 (West 1999 & Supp. 2005); FLA. STAT. ANN. § 782.071 (West 2000); MICH. COMP. LAWS §§ 750.322-323 (2004); MO. REV. STAT. §§ 1.205 (2000), §188.035(1) (2004); N.Y. PENAL LAW § 125.00 (McKinney 2004); OHIO REV. CODE ANN. §§ 2901.01(B)(1)(a)(ii), (B)(1)(c) (West 2003); WIS. STAT. § 940.04 (2000 & Supp. 2004).

109. *See generally*, Alan S. Wasserstrom, Annotation, *Homicide Based on Killing of Unborn Child*, 64 A.L.R. 5th 671 (2004).

110. *See* 145 CONG. REC. H9040 (daily ed. Sept. 30, 1999).

111. *See* 147 CONG. REC. H1610, H1612, H1650 (daily ed. Apr. 26, 2001).

112. 150 CONG. REC. H667 (daily ed. Feb. 26, 2004).

113. 150 CONG. REC. H3167 (2004).

114. H.R. 1997, 108th Cong. (2004).

The congressional hearings and debates provide useful insight into what Congress considered and, perhaps more importantly, what Congress did not consider, in enacting the UVVA. During the House debate, the words “interstate,” “commerce,” and “enumerated” were never uttered.¹¹⁵ Nearly the entire debate focused on the implications of the legislation on fetal rights, the definition of when life begins, and the effect on *Roe v. Wade* and abortion rights.¹¹⁶

Texas Representative Ron Paul was the only member of the House to raise the federalism issue.¹¹⁷ As stated on his website, Representative Paul “never votes for legislation unless the proposed measure is expressly authorized by the Constitution.”¹¹⁸ In the House debate, he described the UVVA as “yet another step closer to a national police state,” and noted that “a legal, constitutional, and philosophical mess [will] result from attempts to federalize such . . . issue[s].”¹¹⁹ He summarized his opposition to the bill as follows: “[The UVVA] ignores the danger of further federalizing that which is properly reserved to State governments and, in so doing, throws legal philosophy, the Constitution, the Bill of Rights, and the insights of Chief Justice Rehnquist out with the baby and the bathwater.”¹²⁰ Unfortunately, no other opponent of the bill echoed Representative Paul’s concerns, and no advocate attempted a response.¹²¹

The Senate debate afforded similarly scant coverage to the issues of federalism and enumerated powers.¹²² Here, the words “Article I,” “federalism,” “substantial effect,” and “states’ rights” were never uttered.¹²³ “Interstate commerce” was mentioned once, but in the context of being for states’ rights so long as it does not interfere with interstate commerce.¹²⁴ Most of the debate centered on the various proposed amendments.¹²⁵ The only comments offered regarding economic effects of regulated activity were in the context of the Murray Amendment,¹²⁶ which was quickly rejected.¹²⁷ Moreover, those comments were not related to the economic effects of violence toward unborn victims but rather to victims of domestic abuse, the same kinds of economic effects rejected in *Morrison*.

115. See 150 CONG. REC. H637–68 (2004).

116. See generally, *id.*

117. *Id.* at 657–58 (statement of Rep. Paul). Representative Paul’s courage in opposition to the measure should be duly noted, as his Republican Party overwhelmingly supported the measure.

118. Web site of Congressman Ron Paul, *Who is Ron Paul?*, at <http://www.house.gov/paul/bio.shtml> (last visited Oct. 19, 2004).

119. 150 CONG. REC. H657, H658 (daily ed. Feb. 26, 2004) (statement of Rep. Paul).

120. *Id.* at H658.

121. For a possible explanation for the conspicuous silence regarding Representative Paul’s concerns, see *supra* text accompanying note 173.

122. See 150 CONG. REC. S3124–67 (daily ed. Mar. 25, 2004).

123. *Id.*

124. *Id.* at S3166 (statement of Sen. Allen).

125. See, e.g., *id.* at S3125 (statement of Sen. Feinstein) (discussing the Feinstein Amendment); *id.* at S3129–30 (statement of Sen. DeWine) (discussing same); *id.* at S3151–54 (statement of Sen. Murray) (discussing the Murray Amendment).

126. *Id.* at S3152–64.

127. *Id.* at S3164.

One interesting absence from the Senate debate was that of Delaware Senator Joseph Biden, who was attending the funeral of his wife's grandmother.¹²⁸ Shortly before the Supreme Court's decision in *Morrison*, Senator Biden wrote an article sharply criticizing what he called a "bright line" between commercial and noncommercial activity.¹²⁹ Senator Biden argued that "Congress may regulate individual acts of sexual violence or domestic abuse, not all of which affect interstate commerce, if such acts of gender-based violence, when considered cumulatively, exert a substantial effect on interstate commerce."¹³⁰ Senator Biden's article makes clear that the Constitution will not be a barrier to the federal government's power grab. Alas, while Senator Biden's interpretation of the constitutional propriety of the UVVA during the debate may have proved insightful, it was not to be (although he did manage to ultimately vote against the measure).¹³¹

III. THE EFFECT OF *LOPEZ* AND *MORRISON* ON THE UNBORN VICTIMS OF VIOLENCE ACT

The UVVA, by making murder of an unborn fetus a federal crime, has federalized a quintessential state-law crime. Such action violates the spirit of the Supreme Court's decisions in *Lopez* and *Morrison*. It might seem, then, that the UVVA is unconstitutional as written. Because the UVVA criminalizes only killings in connection with another federal crime, however, Congress is (likely) technically acting within the parameters of the Court's federalism doctrine.

Subpart A will analyze the UVVA in light of *Lopez* and *Morrison*, while leaving aside for the moment the requirement that a charged killing occur in connection with another federal crime. Subpart B will briefly explain why the law is nevertheless constitutional. Finally, Subpart C will argue for an extension of current federalism doctrine to include laws like the UVVA that violate the spirit, if not the letter, of *Lopez* and *Morrison*.

A. *The Unborn Victims of Violence Act and the "Spirit" of Lopez and Morrison*

To determine whether an act of Congress is constitutional, one must first determine whether Congress was acting pursuant to one of its enumerated powers.¹³² This

128. *Id.* at S3151 (statement of Sen. Reid).

129. Sen. Joseph R. Biden, Jr., *The Civil Rights Remedy of the Violence Against Women Act: A Defense*, 37 HARV. J. ON LEGIS. 1, 17 (2000); see also Wethington, *supra* note 12, at 298 (arguing that the power to regulate interstate commerce includes the power to regulate activities that obstruct commerce, even if they are not themselves "economic in nature"); Jackson, *supra* note 54, at 154 (concluding that *Morrison* created a "categorical line limiting the reach of national power").

130. Biden, *supra* note 128, at 12.

131. See 150 CONG. REC. S3167 (daily ed. Mar. 25, 2004) (statement of Sen. Coleman).

132. "Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000). Because the first sentence of the Constitution (other than the Preamble) is "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States . . .," U.S. CONST. art. 1, § 1,

determination is guided, of course, by the text of the Constitution itself and the case law interpreting the text.

Much like the possession of firearms in a school zone and gender-motivated violence, violence against the unborn has no obvious relation to any of the Article I, Section 8 enumerated power.¹³³ And much like the aforementioned activities, the government's best chance for success is found in the Commerce Clause,¹³⁴ whose analysis will shape the remainder of this Part.

In light of *Morrison* and especially *Lopez*, supporters of the UVVA may have reason for concern. Under *Lopez-Morrison* doctrine, there are three permissible categories of commerce power regulation.¹³⁵ Of those, like *Lopez* and *Morrison* themselves, only the third category—that the regulated activity substantially affects interstate commerce—is relevant to the UVVA, since the regulation contains no jurisdictional requirement that the unborn victims be involved in interstate commerce.¹³⁶ Thus, under the Supreme Court's modern Commerce Clause doctrine, the government must be able to prove that violence against unborn fetuses substantially affects interstate commerce.

The Court has developed four "significant considerations" to help determine whether a regulated activity substantially affects interstate commerce.¹³⁷ Each will be handled in turn.

The first is the economic nature of the regulated activity. On the face of it, the UVVA in no way regulates an economic activity. Violence against unborn fetuses is neither a commercial activity nor rationally related to commerce generally. As the majority stated in *Morrison*, "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."¹³⁸ It is difficult to see how the analysis would change in the context of violence against unborn fetuses. This consideration, then, clearly cuts against the constitutionality of the UVVA.

The second consideration is an express jurisdictional element that limits the reach of the regulation to activities affecting interstate commerce. One example of this is the language that confines a violation of the federal arson statute to intentionally setting ablaze "real or personal property used in interstate or foreign commerce or in any

"evaluating whether a federal law is constitutional must begin with whether Congress has acted within the powers it is granted in the Constitution." BARNETT, *supra* note 27, at 153.

133. See U.S. CONST. art. I, § 8.

134. This Part presupposes (naively, perhaps) that the Commerce Clause is the only constitutional basis for this federal legislation. Another possible argument, found most notably in support of the Violence Against Women Act, is Congress's Enforcement Power under § 5 of the Fourteenth Amendment. See U.S. CONST. amend. XIV, § 5; *Morrison*, 529 U.S. at 607; see, e.g., Biden *supra* note 128, at 7, 28–42. Of course, a § 5 rationale is unlikely to pass constitutional scrutiny. As the Supreme Court reiterated in *Morrison*, Congress's enforcement power was designed to ensure that the liberties guaranteed under the Fourteenth Amendment were protected by the states but that Congress was powerless under this section to enforce those liberties against private individuals. See *Morrison*, 529 U.S. at 619–27; the *Civil Rights Cases*, 109 U.S. 3, 11 (1883); *United States v. Harris*, 106 U.S. 629, 639–40 (1883). Similarly, the UVVA could hardly be said to be a congressional regulation designed to protect the civil rights of private individuals as against the several states.

135. See *supra* text accompanying note 23.

136. See 18 U.S.C.A. § 1841 (West Supp. 2004).

137. See *supra* notes 34–38 and accompanying text.

138. *Morrison*, 529 U.S. at 613.

activity affecting interstate or foreign commerce”¹³⁹ The benefits of an express jurisdictional element are twofold. First, the reach of the federal regulation cannot extend beyond that which is constitutionally permissible. If a person may be charged with a federal crime only if his actions were involved in or affected interstate commerce, the risk of federal overreaching is reduced because Congress may constitutionally regulate interstate commerce. Conversely, the absence of limiting language subjects individual citizens to a plenary police power, as the federal government need not prove a connection to interstate commerce to procure a conviction. Second, a federal regulation that contains no jurisdictional element makes the job of the federal courts that must hear potential constitutional challenges to the same much more difficult. That is to say, a jurisdictional element provides courts with guidance as to the purpose and coverage of, and rationale for, the regulation. Without it, courts are often left with little more than speculation and conjecture. Then, because of the presumption of constitutionality,¹⁴⁰ these courts are forced to engage in the difficult task of analyzing every possible constitutional basis for the regulation. Certainly, then, it is not particularly unreasonable for the Court to request that Congress include a jurisdictional element when it passes federal regulations.

Here, a jurisdictional element arguably exists,¹⁴¹ albeit indirectly so. To be convicted under § 1841, the death or serious bodily injury against the unborn fetus must have occurred during the course, or in furtherance, of one of the listed federally regulated activities.¹⁴² This attempt to limit jurisdiction, however, represents a fundamental misunderstanding of the reasoning in *Morrison*.

First, the UVVA’s jurisdictional element is indirect as far as it relies on the federal jurisdiction of the other federally regulated activities. The UVVA fails to require that the violence against an unborn fetus occur in interstate commerce or have a substantial effect on interstate commerce. In so doing, Congress cast the UVVA’s penalties “over a wider, and more purely intrastate, body of violent crime.”¹⁴³

Second, the indirect jurisdictional element in the UVVA amounts to constitutional piggybacking¹⁴⁴ and an end-around the enumerated powers that, if upheld, would relegate *Lopez* to a case of form over substance. Congress is apparently of the belief that, if an activity may properly be regulated pursuant to its commerce power, every potential offspring of that activity may also be properly regulated. Such a theory could lead to federalism absurdities. For example (and hopefully without giving Congress any ideas), Congress could enact federal conversion legislation for property stolen to

139. 18 U.S.C. § 844(i) (2000); *see also, e.g.*, 18 U.S.C. § 2261(a)(1) (2000) (interstate domestic violence) (“A person who travels in interstate commerce . . . with the intent to kill, injure, harass, or intimidate a spouse or intimate partner, and who, in the course of or as a result of such travel, commits or attempts to commit a crime of violence against that spouse or intimate partner, shall be punished as provided in subsection (b).”).

140. *See supra* Part I.B.2.

141. *See infra* Part III.B.

142. *See* 18 U.S.C.A. § 1841(a)(2), (b) (West Supp. 2004).

143. *Morrison*, 529 U.S. at 613 (footnote omitted).

144. I use the term “constitutional piggybacking” to describe Congress’s attempt to regulate and criminalize every potential activity or consequence of activity that may properly be described as “commercial” or “substantially affecting interstate commerce.”

purchase or acquire illicit drugs, as the sale¹⁴⁵ and possession of drugs¹⁴⁶ are proper objects of federal regulation.¹⁴⁷ This example's relation to interstate commerce is no less tenuous than a situation in which an individual is charged under § 1841 for the death of an unborn fetus that occurred in connection with the sale of narcotics. Nor is it any less tenuous than a conviction under a hypothetical federal child neglect statute for housing a child in a known drug den or crack house (that is, a place where narcotics are regularly bought and sold).

Lopez makes clear, and later *Morrison* reiterates, that the purpose for the jurisdictional element consideration is to limit the scope of the regulation to commercial activities or to activities that substantially affect the interstate commerce. What Congress has attempted here, though, is to limit the scope of the UVVA to violence against unborn fetuses that occurs in conjunction with other federally regulated activities. This obviously does not limit the scope of the UVVA to situations in which the violence occurs in interstate commerce or substantially affects interstate commerce, which is precisely what the Court found lacking in both *Lopez* and *Morrison*. By failing to provide a tenable jurisdictional element, Congress has either misunderstood or, worse, ignored the true import of those cases. Either way, the government cannot credibly rely on subsection b as an express jurisdictional element. This consideration, therefore, also cuts against the constitutionality of the UVVA.

Congressional findings regarding the regulated activity's substantial effect on interstate commerce represent the third consideration. While *Morrison* has made clear that even the existence of extensive congressional findings will not immunize the regulation from unconstitutionality,¹⁴⁸ Congress adopted no congressional findings pursuant to its passage of the UVVA. Thus, this consideration requires no further analysis, and it too cuts against the constitutionality of the UVVA.

The final consideration is the existence of a direct link between the regulated activity and the substantial effect on interstate commerce. This link is easily established in many federal criminal statutes. For example, the hijacking of truckload carriers crossing state lines would have a substantial effect on interstate commerce, as those vehicles exist commercially to facilitate trade among the states. In the context of violence against unborn fetuses, however, such a direct link does not exist. Moreover, as the *Morrison* court notes, *Lopez* rejected the government's "costs of crime" and "national productivity" arguments, arguing that such a scheme "would permit Congress to regulate not only all violent crime, but all activities that might lead to violent crime,

145. 21 U.S.C. § 841(a)(1) (2000).

146. 21 U.S.C. § 844(a).

147. See *United States v. Davis*, 288 F.3d 359, 362 (8th Cir. 2002); *United States v. Brown*, 276 F.3d 211, 214–15 (6th Cir. 2002) (citing other cases upholding the constitutionality of the Controlled Substances Act); *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996) (convicting defendant under 21 U.S.C. §§ 841 and § 844, among other crimes). *But see* *Raich v. Ashcroft*, 352 F.3d 1222, 1234–35 (9th Cir. 2003) (upholding the grant of a preliminary injunction against the federal government, because the Controlled Substances Act was likely unconstitutional as applied to intrastate harvesting and consumption of marijuana), *cert. granted* 124 S. Ct. 2909 (June 28, 2004) (No. 03-1454).

148. See *supra* note 41 and accompanying text; Ambre Howard, *United States v. Morrison*, 529 U.S. 598 (2000), 9 AM. U. J. GENDER SOC. POL'Y & L. 461, 468 (2001).

regardless of how tenuously they relate to interstate commerce."¹⁴⁹ Indeed, *Morrison's* warning of Congress's overreach vis-à-vis its commerce power is particularly prescient:

If accepted, [the government's] reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, *it would be able to regulate murder or any other type of violence* since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.¹⁵⁰

As were the cases with the VAWA and with the Gun-Free School Zone Act, the UVVA attempts to regulate activity that is in no way directly linked to interstate commerce. As much as the Court failed to find any such link in *Morrison*, it would unlikely find one in the UVVA. This is the fourth of four considerations, therefore, that cuts against the constitutionality of the UVVA.

While the Court has not given further guidance as to how these considerations should be weighed and balanced, it is clear that where all four considerations favor the same finding, the law will be found the same. Here, all four considerations favor a finding of unconstitutionality. The UVVA itself, then, is unconstitutional under the *Lopez-Morrison* considerations.

B. The Constitutionality of the UVVA

Despite the fact that the UVVA appears to fail each of the four *Lopez-Morrison* considerations, the law is (likely) nevertheless constitutional under current federalism doctrine. The reason is that the law does make every killing of an unborn fetus a federal crime, only those that are in connection with another federal activity that Congress presumably has jurisdiction to criminalize.

In this respect, the law can be analogized to the federal sentencing enhancements.¹⁵¹ For example, a federal criminal drug-trafficking defendant may receive an enhanced sentence for having committed a crime while carrying a firearm.¹⁵² These enhancements have consistently been upheld as constitutional.¹⁵³ In fact, in 1998 the

149. *Morrison*, 529 U.S. at 612–13 (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995)).

150. *Id.* at 615 (emphasis added).

151. *E.g.*, 18 U.S.C. § 3559(d), (e) (2000). For discussions of the federal sentencing enhancements, see, for example, Chereen J. Charlick & Steven F. Hubachek, *Categorically Confusing? Analyzing State Convictions Under Federal Enhancement Statutes*, 14 FED. SENTENCING REP. 289 (2002); Vivian Alberts, Comment, *Federal Sentencing Enhancement: Mandatory Penalties for Firearms Use Under the Comprehensive Crime Control Act of 1984*, 19 LOY. L.A. L. REV. 823 (1986); Rebecca L. Spiro, Note, *Federal Sentencing Guidelines and the Rehnquist Court: Theories of Statutory Interpretation*, 37 AM. CRIM. L. REV. 103 (2000).

152. 18 U.S.C. § 924(c)(1)(A) (2000).

153. See, *e.g.*, *United States v. Bradley*, 390 F.3d 145, 157 (1st Cir. 2004).

Supreme Court interpreted the firearm-carry enhancement without any mention of its constitutionality.¹⁵⁴

The analogy to the federal sentencing enhancements is obvious. If the government may enhance a sentence by proving an aggravating factor, it should be able to criminalize the aggravating conduct as well, because the effect on both parties will be the same. The government must still prove the conduct beyond a reasonable doubt,¹⁵⁵ and the defendant's sentence will be the same under either system, assuming analogous jury findings (that is, "aggravating conduct present" is the analog of "guilty," and "aggravating conduct not present" is the analog of "not guilty").

Moreover, the issue of federalism is less pronounced where, as here, Congress already has jurisdiction to regulate the conduct that forms the basis of the additional regulation (assuming arguing that Congress may constitutionally regulate the crimes enumerated in § 1841(b)). Put another way, Congress is already properly regulating the conduct at issue; it is now merely creating another crime where certain consequences result from the very same conduct (that is, the death of an unborn fetus). The UVVA, then, does not attempt to regulate anything new and, therefore, should be constitutional to the extent the crimes enumerated in § 1841(b) are also constitutional.

C. The Current Federalism Doctrine Should Be Extended to Make Unconstitutional the UVVA

The "spirit" of *Lopez* and *Morrison* was that congressional regulation of areas of traditional state-concern is proper only where it is directed at activities that are inherently commercial or that have a direct and significant effect on interstate commerce.¹⁵⁶ Violent crime is the quintessential local concern that has traditionally been left to the states to regulate.¹⁵⁷ The UVVA, however, ignores the clear import of these decisions by making the killing of an unborn fetus a federal crime. Extending current federalism doctrine to make the UVVA unconstitutional would serve the purpose of comporting with the true spirit of *Lopez* and *Morrison*.

The federal criminalization of violence against the unborn represents precisely the infringement of rights traditionally left to the states that concerned Chief Justice Rehnquist with the Gun-Free School Zones Act and the VAWA.¹⁵⁸ Granting Congress the authority to penalize violent crime may also allow Congress to regulate other areas traditionally left to state regulation, a prospect that has disturbed some members of the

154. *Muscarello v. United States*, 524 U.S. 125 (1998).

155. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that any factor that increases a defendant's sentence beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt).

156. *See generally supra* notes 18–45 and accompanying text.

157. *See Morrison*, 529 U.S. at 614 (noting that there is "no better example of the police power, which the Founders denied the National Government and reposed in the states, than the suppression of violent crime and vindication of its victims").

158. "Given [Congress's] findings and [the government's] arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded." *Id.* at 615 (citing *Lopez*, 514 U.S. at 564).

Court.¹⁵⁹ Justice Thomas has provided the most pointed criticism of the federalization of criminal law,¹⁶⁰ arguing that the Supreme Court has “always . . . rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power” and that the case law makes “clear that there are real limits to federal power.”¹⁶¹ While Justice Thomas may have overstated his case, especially in light of the sixty years of commerce power jurisprudence prior to *Lopez*, the crux of his argument is well-received: the Constitution does not empower Congress to criminalize activities as a general matter.

The UVVA represents Congress’s latest attempt to create a plenary police power. By comporting with only the holdings in *Lopez* and *Morrison*, Congress, like the lower courts,¹⁶² has read the Court’s recent federalism decisions too narrowly. Considering the number of current members of the Court who are obviously troubled by this, the UVVA’s constitutionality may yet be in doubt. Fewer activities have stronger traditions in purely state regulation than violent crimes.¹⁶³ As such, the states’ rights advocates who currently sit on the Supreme Court are unlikely to look favorably on federal legislation that criminalizes violence against unborn fetuses, regardless of whether it is “in or affecting interstate commerce” (which, in the case of the UVVA, it need not be). The UVVA makes a traditionally local concern a national concern, and thus, flies in the face of the Supreme Court’s expressions that Congress ply more care when exercising its commerce power.

While it is true that the UVVA does not regulate any additional conduct that Congress is not already regulating, it is also true that it creates a separate and distinct offense. This may properly be analogized to the federal sentencing enhancements,¹⁶⁴ but the analogy is not perfectly congruent. It seems patently obvious that, if presented with a choice between (1) a longer sentence because of a sentencing enhancement for having caused the death of an unborn fetus, and (2) a longer sentence because of a conviction under the UVVA, most would choose the former to avoid the additional stigma of a murder conviction. In addition, by piggybacking to create a separate and distinct offense, Congress has gone beyond the regulation of economic activity to

159. *See, e.g., id.* at 615–16 (arguing that if the Violence Against Women Act were upheld, Congress would be able to regulate 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”); *id.* at 618 n.8 (“With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate.”); *Lopez*, 514 U.S. at 566 (“The Constitution . . . withhold[s] from Congress a plenary police power.”).

160. *See, e.g., Morrison*, 529 U.S. at 627 (Thomas, J., concurring) (“By continuing to apply th[e] rootless and malleable [‘substantial effects’] standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.”).

161. *Lopez*, 514 U.S. at 584 (Thomas, J., concurring) (emphasis in original) (citations omitted).

162. *See supra* text accompanying notes 90–95.

163. *See supra* notes 43–45 and accompanying text.

164. *See supra* Part III.B.

include the regulation of non-economic activity that flows from conduct whose other object or consequence has an effect on interstate commerce. It is hard to imagine that the majorities in *Lopez* and *Morrison*—let alone the Framers—believed this to be a proper exercise of the commerce power.

Moreover, as shown above, when applied to the UVVA, the four considerations the Supreme Court uses to determine jurisdictional constitutionality under the Commerce Clause all favor a finding of unconstitutionality.¹⁶⁵ Combine this with the fact that there has been no showing that either the states are less capable or incapable, or that the federal government is more capable, of addressing the issue of violence against the unborn,¹⁶⁶ and the law begins to look like nothing more than another step toward a plenary police power.

CONCLUSION

The UVVA is constitutional insofar as it does not directly violate any of the Supreme Court's federalism or commerce power decisions. To be convicted under this Act, one must harm or kill an unborn fetus in connection with another activity that, presumably, Congress has already constitutionally criminalized. To that end, Congress has not regulated any additional conduct by passing the UVVA and, thus, has not acted beyond its jurisdictional authority as it now stands.

The Supreme Court should nevertheless strike down the UVVA as an unconstitutional federal regulation. In so doing, the Court would not only be consistent but also correct. The UVVA does not pass constitutional muster under the *Lopez* and *Morrison* considerations. It also violates the spirit of those decisions by criminalizing violence that has no inherent connection to interstate commerce, a concern traditionally left to the states to regulate.

The Supreme Court's decision in *Jones*, combined with the lower courts' continued deference to Congress even after *Lopez* and *Morrison*, however, places doubt as to whether the UVVA will eventually be struck down. This is not the only source for concern, though. In the specific context of the UVVA, the advocates for both sides face an inherent dilemma that will likely keep the enumerated powers issue from ever reaching the courts (unless, of course, done sua sponte).

165. See *supra* Part III.A.

166. Some commentators and even lower courts are of the opinion that, strict adherence to the Constitution notwithstanding, violations of federalism are less troublesome where the federal government is arguably better able to combat the evils sought to be addressed. See, e.g., *United States v. Franklyn*, 157 F.3d 90, 94 (2nd Cir. 1998); Bradley, *supra* note 2, at 600–02. One example of this is the entirely intrastate purchase and possession of firearms. See Bradley, *supra* note 2, at 601 (arguing that the federal weapons-possession statute is permissible, because “[t]he states are not in a good position to regulate the national and international trade” of those dangerous weapons). Although such reasoning is dubious on its face because it recognizes the possible federalism violations and nevertheless condones them, it is not an issue for this Note and will, therefore, not be addressed further, other than to note its existence and to preemptively respond to such an argument.

As of the time this Note was written, there had been one court challenge to the UVVA.¹⁶⁷ Not only did the plaintiff in that case not challenge Congress's power to enact § 1841,¹⁶⁸ he actually sought to have its scope extended and argued that the UVVA effectively superseded *Roe v. Wade*.¹⁶⁹ Although this case was unceremoniously dismissed,¹⁷⁰ there are sure to be other, more substantive challenges to the UVVA that will not be dismissed so easily.

Needless to say, the issue of criminalizing violence against the unborn is controversial. What is patently obvious from the debates on the floor of both houses of Congress and from the firestorm of commentary is that the status of the unborn is both polarizing and galvanizing.¹⁷¹ The problem that both sides face, however, is that both want to "win" the UVVA debate, but would like to do so without invoking Commerce Clause doctrine. Generally speaking, the ideological and philosophical breakdown is as follows: supporters of the UVVA's substance are more likely to favor a curtailment of the commerce power, while opponents of the UVVA's substance are more likely to favor an expansion of the commerce power. Assuming for the sake of argument that that is a fair statement, the inherent dilemma is obvious. Those who would like to see the UVVA struck down do not want to further the *Lopez-Morrison* trend because of the effect that it would have on Congress's ability to legislate in the future.¹⁷² Conversely, those who would like to see it upheld do not want to interfere with or marginalize those decisions for the same reason.

Unfortunately, the opponents of legislation that protects unborn victims of violence are less likely to challenge the UVVA on enumerated powers grounds than one might otherwise imagine (or hope). Speaking in partisan generalities, for Democrats, the UVVA represents an unwanted attempt by Congress to define when life begins, potentially paving the way for the overturning of *Roe v. Wade*. For Republicans, the UVVA represents an unwanted attempt by Congress to expand its powers and encroach on rights traditionally reserved for the states. While both sides have at least some interest in seeing the law struck down, neither side is likely to challenge it on enumerated powers grounds. Democrats do not want to limit what Congress may regulate under the Commerce Clause, and Republicans do not want to strike down a law that may signal a fundamental change in abortion rights.

As shown above, the UVVA raises constitutional concerns under the Supreme Court's current Commerce Clause doctrine.¹⁷³ Perhaps the more interesting issue, then, is whether either side will be willing to challenge the legislation on that basis. Doing so would effectively advance one side's agenda while simultaneously doing harm to its

167. See *Carlin v. United States*, No. 04-1666, 2004 U.S. Dist. LEXIS 14252 (E.D. Pa. July 26, 2004).

168. *Id.*

169. *Id.* at *2.

170. *Id.* at *1, *6.

171. See generally *supra* Part II.B.

172. The one notable exception to this is Representative Paul. See *supra* text accompanying notes 116–20. For Representative Paul, while the “[p]rotection of life—born or unborn—against initiations of violence is of vital importance . . . , it must be left to the States’ criminal justice systems.” 150 CONG. REC. H658 (daily ed. Feb. 26, 2004) (statement of Rep. Paul).

173. See *supra* Parts III.A, C.

greater constitutional philosophy. One hopes, of course, that both sides decide to do the right thing—that is, seek to have the law struck down as being beyond the scope of the federal government's constitutional powers. Since that argument is politically unpopular and went almost completely unexplored in the congressional debates, however, one must hope that the UVVA's opponents are more strongly tied to their abortion ideology than to their belief in an expansive commerce power.

One possible solution to this dilemma is for the courts to address the issue *sua sponte* when a lawsuit is inevitably brought questioning the UVVA's constitutionality on other grounds. As shown above, however, even after *Lopez*, the lower courts have demonstrated an unwillingness to strike down acts of Congress on Commerce Clause grounds. Any serious treatment of federalism concerns, then, will probably not occur if and until a case involving the UVVA reaches the Supreme Court.

If the Court were to grant a writ of certiorari in such a case, the Court might very well decide to strike down the law based on *Lopez* and *Morrison*. Doing so would not only aid the Court in avoiding a discussion of abortion and abortion rights, but would also provide the most logical disposition of the case. Before considering the constitutionality of the substance of the law, the Court should first question whether Congress was empowered to enact it at all. Whether Congress has attempted to regulate an activity not authorized under Article I is a threshold issue in any case questioning the validity of a congressional act., and by disposing of the case on commerce power grounds, the Court would also save itself from the accusations of illegitimacy and legislating from the bench it would otherwise receive by defining, furthering, limiting, or eliminating abortion rights vis-à-vis the Constitution.

The Constitution limits the power of Congress in order to safeguard the states and individuals. The Constitution also entrusts the Supreme Court with the duty of maintaining those safeguards through constitutional interpretation. With the UVVA, Congress has gone beyond the powers granted to it in Article I. The Court, therefore, should extend its current Commerce Clause doctrine and strike down the law.