

in just the last three years. One company that has been particularly generous is MBNA Corporation, one of the largest issuers of credit cards in the country. In 1998, MBNA gave a \$200,000 soft money contribution to the Republican Senatorial Committee on the very day that the House passed the conference report and sent it to the Senate.

This year, MBNA gave its first large soft money contribution ever to the Democratic party—it gave \$150,000 to the Democratic Senatorial Campaign Committee on December 22, 1999, right in the middle of Senate floor consideration of the bill.

So it is no mystery to me why this bill is so anti-consumer, and I don't think it's a mystery to the public either. The bill contains precious little to address abuses by creditors in debt collection and reaffirmation practices, and it contains very weak credit card disclosure provisions. The credit card industry has ridden the rise in personal bankruptcies to get the changes in the law that it wants, but has resisted efforts to inform consumers of the risks of overuse of credit cards. Better disclosure might reduce the number of bankruptcy filings in this country, but the credit industry has successfully prevented the Congress from requiring such disclosure.

There is still time to step back from the brink. Nonpartisan experts have many recommendations to reform the bankruptcy laws in a balanced and fair way to get at the abuses, without causing undeserved misery to thousands of powerless and defenseless Americans. Let's listen to them rather than the credit card issuers who are lining our campaign treasuries.

I again thank the Senators from Massachusetts, Minnesota and Iowa and my other colleagues who are here this morning to call attention to this crucial issue, and I yield the floor.

The PRESIDING OFFICER. The Chair recognizes the Senator from Delaware for up to 10 minutes.

#### SUPREME COURT DECISION IN U.S. v. MORRISON

Mr. BIDEN. Mr. President, I attended the Million Mom March with my wife. I do not think anyone should misunderstand the significance and consequence of so many mothers and a number of fathers giving up Mother's Day to make an important point. These were not a bunch of wild radicals. These were a bunch of moms from rural areas, inner cities, and suburban areas. They were black, they were white, Hispanic, Asian American. They were basically making a plea. As I stood there and listened, I was reminded of a quote attributed to John Locke speaking about someone he heard. He said:

He spoke words that wept and shed tears that spoke.

I do not know how anyone could have attended any significant portion of that march and not felt, as John Locke

felt, listening to the words these women spoke that wept and the tears they shed that spoke volumes about the insanity of our policy.

Irony of all ironies; the next day, on Monday, the Supreme Court hands down a decision, not about guns but about the protection and empowerment of women in society. Yesterday, in *United States v. Morrison*, the Supreme Court struck down a provision of an act that I spent 8 years writing and attempting to pass—six of which were in earnest—the so-called Violence Against Women Act. There is one provision of that act they struck down and only one provision. That is the provision that empowered women to take up their cause in Federal court to make the case they were a victim of sexual abuse because, and only because, of their gender and to sue their attacker for civil damages in Federal court; empowering women to not have to rely on the prosecutorial system or anyone else to vindicate the wrong that had been done to them if they can supply the proof.

As the author of that act, I must tell my colleagues that I was disappointed by the Court's decision but, quite frankly, not surprised by it.

I emphasize, though, the *Morrison* case struck down the civil rights cause of action women have in Federal court, no other part of the act. Nothing in the Court's decision yesterday affects the validity of any other provision, any other program, or the need to reauthorize these programs through my bill, the Violence Against Women Act II, which now has 47 cosponsors.

Unfortunately, I believe the Court's ruling yesterday will have a significant impact on Congress' ability to respond to public needs in a way that has not been constrained since the 1930s. The Court has been inching toward this decision and this line of reasoning in case after case over the last several years. The Court has grown bolder and bolder in stripping the Federal Government of the ability to make decisions on behalf of the American people, part of the objectives of the Honorable Chief Justice, who believes in the notion of devolution of power and thinks that the Federal Government should have significantly less power.

The Court's decision—and these have all been basically 5-4 decisions—in *United States v. Lopez* in 1995 struck down the Gun-Free School Zones Act, a decision upon which the Court heavily relied in the *Morrison* case in striking down the civil rights remedy.

In the case of *Boerne v. Flores*, a 1997 case, the Court struck down the Religious Freedom Restoration Act. Again, this is not mostly about what act they like and do not like; it is about Congress' power. Those who thought we should not be dealing with guns were happy with the *Lopez* case substantively. Those who thought we should have more religious freedom in public places, our conservative friends—and I happen to agree with

them on that point—were disappointed when the Supreme Court reached in and said as to section 5 of the 14th amendment, which is the provision which says the Congress shall determine how to enforce the 14th amendment, no, no, no, Congress is not the one; we—the Court—are going to decide.

There, then, was another decision, the Supreme Court's watershed decision in the *Seminole Tribe of Florida v. Florida*, a 1996 decision, and the cases that followed, in which the Court limited Congress' ability to authorize private citizens to vindicate Federal rights in lawsuits against their States, and that included the Fair Labor Standards Act and the Age Discrimination Act.

Putting it in simple terms, if the State of Florida discriminated against somebody in State employment because of age in violation of the Federal act, the Court said: Sorry, Florida has immunity. A Federal Government cannot protect all Americans against age discrimination because of a new and novel reading of the 11th amendment.

The Court's decision today is at peace with those rulings. Fundamentally, this decision is about power. Who has the power, the Court or the Congress, to determine whether or not a local activity, such as gender-motivated violence, has a substantial impact on interstate commerce? Yesterday the Court said it: The Court has this power—echoes of 1920 and 1925 and 1928 and 1930, the so-called *Lockner* era.

I find it particularly striking the Court acknowledged in *Morrison* that in contrast to the lack of congressional findings supporting the law struck down in *Lopez*, the civil rights remedy is supported by numerous findings regarding the serious impact of gender-motivated violence on interstate commerce. I conducted 4 years of hearings to make that record.

We showed overwhelmingly that the loss of dollars to the economy of women being battered and abused and losing work is billions of dollars. We showed overwhelmingly that women make decisions about whether to engage in a business that requires them to cross State lines based in significant part upon the degree to which they think they can be safe, based upon a survey of 50 State laws, and whether or not they adequately protect women as they do men against violence.

The record is overwhelming. Nonetheless, instead of applying the rule they had traditionally applied in determining whether Congress has the right to be involved in what is a local matter, they came up with a new standard.

Instead of applying the old standard of: Is there a rational basis for Congress to find, as they did, the traditional "rational basis review" to decide whether Congress' findings in this case were rational—and I cannot conceive of how they concluded they could not be—the Court simply disagreed with the

findings, marking the first occasion in more than 60 years that the Court has rejected explicit factual findings by the Congress, supported by a voluminous record. They, in fact, explicitly rejected the findings that a given activity substantially affects interstate commerce.

The Court justified the abandonment of the deference to Congress by declaring that whether particular activities sufficiently affect interstate commerce "is ultimately a judicial rather than a legislative question."

I could not disagree more fundamentally with the Court's ruling. Quite frankly, this will affect the Violence Against Women Act less than it is going to affect a whole lot of other things. The Supreme Court precedents have long recognized that Congress has the power to legislate with regard to local activities that, in the aggregate, have a substantial impact on interstate commerce.

I personally believe Justice Souter, who wrote the principal dissent in this case, had it right when he explained that:

[t]he fact of such a substantial effect is not an issue for the courts in the first instance, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours.

I am left wondering, where does the Court's decision leave Congress' formerly plenary power to remove serious obstructions to interstate commerce, whatever their source?

It is reminiscent of the *Lockner* era when they said, by the way, you have those labor standards having to do with mining—mining is not interstate commerce. Then they came along and said production is not interstate commerce. Then they said manufacturing is not interstate commerce. Until midway in the New Deal, with the end of the *Lockner* era, they said: Woe, woe, woe; wait a minute, wait a minute.

Unfortunately, this decision yesterday reads more as a decision written in 1930 than in the year 2000.

As Justice Souter documented so well in his dissent, the Court appears to be returning to a type of categorical analysis of Congress' power under the Commerce Clause that characterized the pre-New Deal era, where, as I said, manufacturing, mining, and production were all held to be off limits despite their obvious impact on interstate commerce. Now it is a new standard: "Economic activity" versus "non-economic activity."

If Congress can regulate activity with substantial effects on interstate commerce, then I, as Justices Souter and Breyer, do not understand what difference it makes whether the causes of those substantial effects on interstate commerce are in and of themselves commercial.

In any event, suffice it to say that this type of formalistic, enclave analysis—where certain spheres of activity are held off limits to Congress—did not work in the 1930s and will work no better in the 21st century.

Because it is impossible to develop judicially defined subject matter categories spelling out in advance what is in Congress' Commerce Clause power and what is out, I believe the dissenting Justices are correct that Congress, not the courts, must remain primarily responsible for striking the right Federal-State balance, and that the Members of Congress are institutionally motivated to strike that balance by virtue of the fact that we represent our States and local interests as well as the Federal interest.

So why has the Court revived the form of analysis that so ill-served the Nation in the years leading up to the judicial crisis of 1937? Again, I find Justice Souter's explanation convincing: In both eras, the Court adopted these formalistic distinctions in interpreting the Commerce Clause in service of broader political theories shared by a majority of the Court's members.

In the pre-New Deal era, that broader political theory was *laissez faire* economics; now it is the new federalism. In both instances, the Court has been eager to substitute its own judgment for that of the political branches democratically elected by the people to do their business.

Those of you who are conservatives in this Congress, who say that you, in fact, want the democratically elected bodies making these decisions, I suggest to you that this is one of the most activist Courts we have had in 50 years. It is supplanting its judgment for the democratically elected branches of the Government.

So have at it, conservatives. This judicially active Court is supplanting their judgment for the democratically elected bodies.

Justice Stevens put it bluntly in his recent dissent in the recent age discrimination case. He said: The Court's federalism decisions constitute a "judicial activism"—that is his quote, not mine—that is "such a radical departure from the proper role of this Court that it should be opposed whenever an opportunity arises."

This is one Senator who plans to keep up that opposition.

Stay tuned, folks, because what this upcoming election is about is the future—the future—of the power of the elected branches of the Government versus the Court which is appointed for life. This is a conservative agenda that is being forced upon the democratically elected bodies, as it was in the 1920s. The next President is going to get to pick somewhere between one and three new Justices.

Mr. President, I ask unanimous consent that a speech I made on the Supreme Court and its changing direction be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

REMARKS BY JOSEPH R. BIDEN, JR., TO THE NEW HAMPSHIRE SUPREME COURT, SEPTEMBER 17, 1999

Today marks the anniversary of an extraordinary event, the 212th anniversary of

the birth of the Constitution of the United States. On September 17, 1787, the Constitutional Convention, its work complete, rose and submitted the Constitution to the thirteen states for ratification. Bringing together thirteen different states with diverse cultures and established governments—some of these harking back a hundred years—did not come easy. In 1775, at the time of the Continental Congress, John Adams, writing to his wife, Abigail, described: "[f]ifty gentlemen meeting together all strangers \* \* \* not acquainted with each other's language, ideas, views, designs. They are therefore jealous of each other—fearful, timid, skittish."

The men who attended that Constitutional Convention knew, even then, that they had begun the greatest political experiment in human history, producing a document that would become an engine of change throughout the world. According to James Madison's account, Governor Morris of Pennsylvania stated that:

He came here as a Representative of America; he flattered himself he came here in some degree as a Representative of the whole human race; for the whole human race will be affected by the proceedings of this Convention.

"This Country," Governor Morris continued, must be united. If persuasion does not unite it, the sword will. \* \* \* The scenes of horror attending civil commotion can not be described. \* \* \* The stronger party will then make [traitors] of the weaker; and the Gallows & Halter will finish the work of the sword.

The Framers, in their vision and wisdom, did unite the country, fashioning a government that was both federal—that is, comprised of sovereign states—and, at the same time, truly national in power. The Framers respected and sustained the essential role of the states. But, at the same time, the Framers made national law supreme, a principle enshrined in the Supremacy Clause of the Constitution, and created a government empowered to bind both the states and individuals, powers denied the government under the Articles of Confederation.

The Constitution also established a vigorous and independent presidency—what Alexander Hamilton in the *Federalist Papers* called "energy in the executive"—by freeing the Chief Executive from selection by the legislature and granting the President real and meaningful powers. As early as *McCulloch v. Maryland*, Chief Justice John Marshall in 1819 recognized the "great powers" the national government possessed:

to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government.

And, on this 212th anniversary of the crafting of the Constitution—a day and age now marked by national malaise about and distrust of our government and its institutions—it is only fitting to reflect on how right Governor Morris was about how the Framers' creation has transformed—and transfixed—the human race. Under this Constitution, we settled a vast continent—from the Atlantic to the Pacific coasts; we mobilized millions of men to unite the nation and end slavery, fulfilling the promise of the Constitution; we ascended, like the mythical phoenix, from the ashes of the Great Depression; we turned back despotism and preserved a free Europe in two World Wars; we won the Cold War; and we now enjoy economic and military power unrivaled across the globe and unmatched in the history of the world. No small achievements, these.

These achievements make us the envy of the world. Just last week, I returned from a trip to six European countries, including Kosovo, and I met with six Presidents. The President of Bulgaria said to me:

I know of no other country that has risked the lives of its young men and women and would spend \$15 billion dollars on behalf of a place in which it has no economic interest, no strategic interest, and no territorial interest—only an interest in defending human rights.

Could we have achieved these successes without vigorous presidential leadership? We owe our position in the world to the choices made by the Framers at the Constitutional Convention. Imagine accomplishing what we have in the two centuries of our brief history without a strong federal government and a strong president.

More than our achievements, though, it is our public institutions that other nations seek to imitate. In every place I traveled around the world last month, every one of those six foreign Presidents talked about how they wanted to mimic American governmental institutions—our Congress, our President, our courts. They do not talk about our resources; they do not talk about the American people themselves; they talk about our institutions. It is these public institutions—not a common ethnicity or religion, which, of course, we do not share—that acts as the glue that binds this country together.

But although other nations clamor to model their institutions after ours, our own public discourse reflects a deep and abiding angst about and suspicion of our government. Last November, only 38 percent of Americans voted, a 50-year low that ranks the United States at or near the bottom of the world's democracies in voter participation. As of 1995, voter turnout in 14 European countries, by contrast, was above 70 percent.

And take Washington Post reporter Bob Woodward's recent book, *Shadow: Five Presidents and the Legacy of Watergate*, which New York Times columnist Frank Rich recently nicknamed "All the Presidents Stink." Woodward's book puts between two covers a cynicism about government that you can purchase for fifty cents by picking up a daily newspaper, and for less than that by turning on your television. A style of attack and scandal journalism toward public officials dominates the news media—and studies by Kathleen Hall Jamieson, Dean of the Annenberg School of Communication and her colleague Joseph Cappella, have shown that cynical coverage breeds cynical voter reactions.

It produces the kinds of expectations what were well captured by Marvin Lucas, a 59-year-old custodial supervisor at a college in Milledgeville, Georgia. Responding to a Washington Post-Kaiser Foundation interviewer, Mr. Lucas said "I compare politicians with used car salesmen: say one thing, do another."

And the "other thing" that politicians do, of course, is to feather their own nests and the nests of special interest groups that support their reelection campaigns. That is the dominant opinion people have of American elected officials. If that is your starting point, it is no wonder that in 1994, 56 percent of Americans thought that government did more to hinder their family's achieving the American dream than to help them achieve it, while only 31 percent thought that government helped them. (The numbers had improved by 1997, but were still negative—47 percent to 38 percent).

Heaven knows that politicians are far from perfect, and our own missteps and, yes, deceptions, contribute to the country's cynical attitude. Some historians trace the contem-

porary decline in faith in government to Lyndon Johnson's 1964 Presidential campaign, where he pledged that "no American boy will fight a foreign war on a foreign soil if I'm elected President." Within a year of that statement, Johnson had ordered massive increases in draft calls and the military build-up for the Vietnam War. Then Watergate cut right to the heart of our faith in elected officials.

And today, highly negative campaigning has become an art form, as each candidate tries to tag his opponent with being an insider, or else being a corrupt person who just hasn't had the chance to be corrupt on the inside yet. When Majority Leader George Mitchell was retiring from the Senate, he remarked to Jim Lehrer on the News Hour that so long as campaigns consist of one candidate calling his opponent a crook and the other calling his opponent a scoundrel, is it any wonder that Americans believe that Congress is filled with crooks and scoundrels?

So I don't want to understate the complexity of the sources of contemporary cynicism and distrust toward elected officials. What worries me, though, is that this cynicism and distrust is way out of proportion to the actual accomplishments of the federal government, and way out of proportion to the sincerity and honesty with which my colleagues conduct themselves every day in doing the country's business.

This public cynicism is not the only current raging in American politics today, however. There is a movement among intellectuals, historians, and political scientists to shift the locus of political power, or to "devolve power," from the national government to the states. George Will, one of the champions of this "devolution of power" movement, explained its premise as follows:

[I]t is unwholesome that Washington, like Caesar, has grown so great. Power should flow back to where it came from and belongs, back to the people and their state governments, back to state capitals \* \* \*

This is nothing less than a fight for the heart and soul of America. This is a fight about power. And it is a fight about who will be left in charge.

In my view, the value of devolution of power from the national government to the states can be overstated. Certainly the abuse of power, whenever it occurs, must be checked. The federal government admittedly does tend to grab power for itself without due regard for whether its goals can better be achieved at the local level. But the state and local governments, in contrast, tend toward parochialism without due regard for the national interest. Thus, devolution of power is not per se a good thing. At whatever level of government, it all depends how that power is used.

It cannot be that the Framers intended to hamstring the federal government in favor of the states. If that was their intent, why abandon the Articles of Confederation? And just try to imagine the United States attaining its successes to date without a strong national government and a vigorous President. To go one step further—imagine how difficult it will be to fortify our position in the world in the 21st century without a powerful central government.

The current cynicism about our public institutions, it seems to me, is also beginning to gain a foothold in the constitutional decisions of the Supreme Court, and that is also of concern to me, and is something I would like to spend the next few minutes discussing with you. Now first I want to say that today's Supreme Court is the best-informed, hardest working Court we have ever had. In particular, I want to commend Justice Souter, a native son of this great state

of New Hampshire, for writing several of the most scholarly and persuasive dissents this Court has seen in recent years—dissents that I am confident will prove prophetic.

Yet the Supreme Court of today embodies both strands of the phenomenon now plaguing our American culture—both the public cynicism about, and the intellectual disdain for, our national government. The Court is sharply critical of the political branches of our federal government, accusing them in case after case this decade of arrogating power to themselves at the expense of state governments. But in assuming the role of "Chief Protector" of the allocation of power between the federal government and the states, the Supreme Court of late has regrettably adopted a court-centered view of the scope of federal power. In doing so, it has arrogated to itself a responsibility that more properly befits the political branches.

In my opinion, we have in the past eight years or so begun to see a series of opinions in which the Supreme Court has become bolder and bolder in stripping the federal government of the ability to make decisions on behalf of the American people. So far, the immediate effects of these decisions are real, but relatively modest. They may represent marginal readjustments in the allocation of power under the Constitution. On the other hand, if I am right and the jurisprudence is being driven by an oversized sense of distrust and cynicism toward democratically elected government—and especially toward the federal government—the decisions could constitute the beginnings of a sea change that could take us quite literally back to a style of judicial imperialism unseen in this country since the early 1930s.

The trio of cases decided by the Supreme Court at the very end of the last Term are a prime example of this court-centered view of federal power. For example, in its 5-4 decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court held that Congress had no power to subject the states to private patent infringement suits in federal court because in the Court's view, the statute was not "appropriate" legislation to enforce the Fourteenth Amendment. The Court said no to patent infringement cases against state entities because the Court—not Congress—decided that legislation remedying patent infringement by state entities was not really necessary. In so deciding, the Court made a quintessentially legislative judgment.

To the same effect was the companion case, *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, in which the Court dismissed out of hand Congress' effort to hold state entities accountable to private parties for misrepresenting the states' commercial products in violation of federal trademark law, because the Court decided that the statute did not protect "property rights" within the meaning of the Fourteenth Amendment.

The two Florida Prepaid decisions unfortunately flow directly from *City of Boerne v. Flores*, in which the Court in 1997 struck down the Religious Freedom Restoration Act as also exceeding Congress' authority under section 5 of the Fourteenth Amendment. In ruling that Congress had gone too far in protecting religious liberty, the Court in essence held that Congress had not done its homework to the Court's satisfaction. The Court attacked the legislative record as lacking what it considered to be sufficient modern instances of religious bigotry and found that the statute was "out of proportion" to its supposed remedial or preventive objects. Again, the Court in effect decided that a law simply was not really necessary.

Implicit in the Court's obvious willingness in *Boerne* to second-guess Congress' legislative judgment in the name of protecting

state governments is the notion that it is for the Supreme Court, and not Congress, to specify the meaning of the provisions of the Constitution, even when Congress claims to enforce the individual liberties protected by the Fourteenth Amendment.

It is as if the Court has forgotten that the only institution mentioned in section 5 of the Fourteenth Amendment is Congress. The text of section 5 is clear and simple: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." It was for Congress, not the courts, to be the primary guarantor of individual rights as against oppression by state authorities, and for Congress, not the courts, to assess whether and what legislation is needed for that purpose. Remember that the Fourteenth Amendment was adopted in the long shadow of the Dred Scott decision. The court-centered view the Court has since taken of that amendment is directly at odds with the universal sentiment at the time of its adoption that it was our federal legislature, not the courts, that could best be trusted to police the states.

What seems to lie at the heart of the headline-grabbing cases of the past few terms is the Court's willingness to disregard the views of Congress in favor of its own. It is as if the Court believes that it has a better sense of the economic and other real-world implications of the laws Congress passes than do those elected by the people to serve in that branch.

The Court's recent decisions contain troubling echoes from the New Deal era, when the Supreme Court was swift to substitute its own judgment of what was desirable economic legislation for that of Congress and the President. Here is just one illustration from that bygone era: In *Railroad Retirement Board v. Alton Railroad Co.*, the Court in 1935 struck down the Railroad Retirement Act as unconstitutional, in part because the Court concluded that it was not a valid regulation of interstate commerce. Congress enacted the statute, which established a compulsory retirement and pension system for all railroad carriers, to promote "efficiency and safety in interstate transportation" both by reducing the aging population of employees and by improving the employees' sense of security and morale. In its opinion, the Court stated, however: "We cannot agree that these ends \* \* \* encourage loyalty and continuity of service." We cannot agree. That is a breathtaking statement by a court which had abandoned its proper role. We cannot agree?

And in denying Congress what Justice Breyer in dissent has called "necessary legislative flexibility," such as to create, for example, "a decentralized system of individual private remedies," the Court has returned to the kind of court-centered conception of federal power that typified not only the New Deal era, but the Lochner era as well. As Justice Souter predicted in his *Alden v. Maine* dissent lamenting the Court's sovereign immunity decisions:

The resemblance of today's state sovereign immunity to the Lochner era's industrial due process is striking. The Court began this century by imputing immutable constitutional status to a conception of economic self-reliance that was never true to industrial life and grew insistently fictional with the years, and the Court has chosen to close the century by conferring like status on a conception of state sovereign immunity that is true neither to history nor to the structure of the Constitution. I expect the Court's latest essay into immunity doctrine will prove the equal of its earlier experiment in *laissez-faire*, the one being as unrealistic as the other, as indefensible, and probably as fleeting.

(Justice Souter, I sincerely hope that you are correct when you said "probably as fleeting" because if you are wrong, and the Court's pronouncements endure, then I am afraid that the country is in bigger trouble than I thought.)

Don't misunderstand me. I do not mean for a second to disparage the role of the states. The states play a critical part in warding off tyranny by the national government and in performing all the fundamental functions with which the governments closest to the people are charged. Certainly those of you who live in this great state of New Hampshire—whose motto is "Live Free or Die"—understand that better than anyone else. As James Madison wrote in the *Federalist Papers*:

The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

But we should think long and hard before allowing one branch of our government—the federal judiciary—to cripple its co-equal branches, the political branches, of government. To do so is to put in jeopardy all that we have accomplished in our brief history and all that we may do in the future.

I must tell you that I am gravely concerned about the direction the Court is headed. I have a particular stake in this which I will confess now and that is the fate of the civil rights remedy created by the Violence Against Women Act of 1994, which I wrote. Earlier this year, the U.S. Court of Appeals for the Fourth Circuit invalidated the civil rights remedy in *Brzonkala v. Virginia Polytechnic Institute & State University*, and the case may come before the Supreme Court in the coming Term if the Court grants review.

The civil rights remedy creates a new federal cause of action allowing a victim of gender-motivated violence to sue her attacker in court. I believe—indeed, I know—that violence against women restricts the participation of women in the national economy, inhibits their production and consumption of goods and services in interstate commerce, and obstructs their ability to work and travel freely. In short, violence against women was, and is, a national problem of epic proportions that substantially and adversely affects interstate commerce. A massive legislative record compiled after four years of fact-finding hearings in Congress irrefutably confirms the impact of violence against women on the national economy and interstate commerce.

When we enacted the Violence Against Women Act civil rights remedy in 1994, the Senate Judiciary Committee explicitly found that the provision satisfied the "modest threshold" required by the Commerce Clause, and we in Congress were confident of the statute's constitutionality. The civil rights remedy quite appropriately attempted to remove an obstruction to interstate commerce, much as the Civil Rights Act of 1964 barred race discrimination in hotels and restaurants because such discrimination, as the Court put it in upholding the statute, "imposed 'an artificial restriction on the market.'"

But less than a year after we enacted the Violence Against Women Act and its civil rights remedy, the Supreme Court decided *United States v. Lopez* and invalidated, as beyond Congress' Commerce Clause authority, the Gun-Free School Zones Act, which prohibited the possession of a firearm within 1000 feet of a school. In the wake of *Lopez*, I find myself asking: Will this Court accept the congressional judgment that violence against women adversely affects the national economy? Or will this Court second-guess the remedy we chose to address that effect?

Ironically, the Court may find itself the champion of states' rights that the states do not even want. Just as with the Patent Remedy Act, where no state testified in favor of immunity from private patent infringement actions, the vast majority of states strongly favor the Violence Against Women Act civil rights remedy. Forty-one state attorneys general wrote to Congress in favor of the statute, including the civil rights remedy, before its enactment. Only a few weeks ago, 33 Attorneys General submitted an amicus brief to the Supreme Court asking the Court to grant the petition for certiorari and uphold the statute because the states "agree with Congress that gender-based violence substantially affects interstate commerce and the States cannot address this problem adequately by themselves."

I also fear that the Supreme Court's readiness to disregard the people's judgment has served as a clarion call to the federal courts to usher in what Judge Douglas Ginsburg of the U.S. Court of Appeals for the D.C. Circuit has called the "Constitution in Exile." According to Judge Ginsburg, the doctrine of enumerated powers, the nondelegation doctrine, the Necessary and Proper, Contracts, Takings, and Commerce clauses, had become "ancient exiles, banished for standing in opposition to unlimited government."

In service of this "Constitution-in-Exile," the lower courts have begun to read the Constitution in a revolutionary way. Thus, a district court in Alabama decided, remarkably, that the Superfund amendments were unconstitutional because they did not regulate interstate commerce, a decision later reversed on appeal. Similarly, the Fourth Circuit's ruling striking down the civil rights remedy of the Violence Against Women Act transforms *Lopez v. United States* from an important reminder that Congress' commerce power is not without limits, into what is arguably the most momentous decision of the last fifty years regarding the scope of federal power.

That same court of appeals has tightened the noose in yet another way. The Fourth Circuit ruled last year in *Condon v. Reno*, a case now under review by the Supreme Court, that Congress may not pass a law when that law applies only to the states, and not also to private individuals. In other words, Congress may not require the states to comply with federal law if the law does not also affect private individuals.

The jury is still out on whether the Supreme Court will let the other shoe drop and sustain these additional restrictions on federal power, but the Court seems primed and poised to do so. Much hangs in the balance. If your eyes glaze over when I speak about Congress authorizing private actions for patent infringement or trademark violations by state entities, then think about the Fair Labor Standards Act, which the Court held last June in *Alden v. Maine* could not be enforced against noncompliant states by state employees seeking backpay. How far we have come from the Framers' vision of a federal government strong enough and flexible enough to do the people's business. As Justice Souter observed in his dissent in *Alden v. Maine*:

Had the question been posed, state sovereign immunity could not have been thought to shield a State from suit under federal law on a subject committed to national jurisdiction by Article I of the Constitution.

Other cases could potentially serve as a resounding wake-up call as to the extent to which the federal government's hands have been tied in addressing problems of national import. In the coming Term, the Court will take up the question whether the Congress had the power in the Age Discrimination in

Employment Act to authorize private law suits against state violators. A case raising a similar issue with respect to the Americans with Disabilities Act is sure to follow. And if the Court says no, private individuals who suffer age, disability, and other forms of discrimination at the hands of state actors will have few means at their disposal to enforce their rights under federal law, and the federal government will rarely be able to help them.

The Court left open the possibility that the federal government could sue noncompliant states, but if you think that it is realistic for the federal government to come to the rescue by going into court on a regular basis to vindicate the federal rights of private individuals, think again. I do not see a massive expansion of the federal litigating corps happening any time soon. Nor do I see how that could be anything but self-defeating if the goal is to minimize the federal intrusion into state government affairs. By elevating the states' sovereign immunity to an immutable principle of constitutional law, the Court, as Justice Breyer recognized in his *College Savings Bank* dissent: "makes it more difficult for Congress to decentralize governmental decisionmaking and to provide individual citizens, or local communities, with a variety of enforcement powers. By diminishing congressional flexibility to do so, the Court makes it somewhat more difficult to satisfy modern federalism's more important liberty-protecting needs. In this sense, it is counter-productive."

Now don't get me wrong. Sometimes the federal and state governments do not get their relationship quite right. We do not have infallible institutions. But when the Supreme Court restricts the flexibility of Congress to decide how best to address national problems within the scope of its enumerated powers, the Court truncates the learning process otherwise underway in our political institutions—a result a conservative court—conservative with a small "c"—should hesitate to effect.

The Court has imposed by fiat limitations on the exercise of federal power that might very well have come about without the Court's interference. In other words, the Court in *Garcia v. San Antonio Metropolitan Transit Authority* got it right when, in 1985, it overruled *National League of Cities v. Usery*, a case decided a decade earlier, that had restricted the federal government's power to regulate the states "in areas of traditional governmental functions." Instead, the Court announced in *Garcia* that the political process, not the Court, should serve as the principal check on federal overreaching. I must disagree with the notion that leaving it to Congress and the President is like leaving the fox to guard the chicken coop, or as Justice O'Connor put it in her dissent in *Garcia*, like leaving the "essentials of state sovereignty" to Congress' "underdeveloped capacity for self-restraint."

The Violence Against Women Act civil rights remedy is a good example of Congress' developing capacity for self-restraint. At the outset, those most concerned about domestic violence and rape wanted a statute with a broad sweep, and so we started out by introducing a provision in 1990 that arguably would have federalized a significant portion of state laws against domestic violence and rape. But the Conference of Chief Justices of State Supreme Courts, the Judicial Conference of the United States—and Chief Justice Rehnquist, in particular—pointed out to Congress, while the bill was under consideration, that the civil rights provision might significantly interfere with the states' handling of domestic relations and rape cases, while at the same time, overburdening the federal courts. The federal and state judi-

ciaries raised the concern, we examined it, and we decided that they were right. Congress then carefully redrafted the civil rights remedy so that it would not have that effect.

There are other recent examples—such as the Unfunded Mandates Act—that came about because the states complained to Congress that we were forcing them to use their tax dollars to do whatever we mandated in Washington. The states staged a mini-rebellion. So Congress wrote a new law requiring federal restraint. And for that, I must give my Republican colleagues their due.

But when the Supreme Court plays traffic cop on the streets of federalism, the Court does our country a disservice by cutting this national political dialogue short. We are already reaching many of the conclusions the Court has now cemented into the Constitution. James Madison wrote in the *Federalist Papers* that the new federal government would be sufficiently national and local in spirit as "to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." Our political institutions can be trusted. The Framers understood this.

In short, the disconnect between our public and cultural perceptions of our institutions and reality is stunning. Keep in mind that the rest of the world is struggling to emulate our institutions because they believe it is our institutions that separate us from other nations—indeed, from other democracies—and are the bedrock upon which our successes are founded.

Yet our public discourse, our legal opinions, our very culture, are compelling us to overlook or scorn our own accomplishments. We are losing, as a nation, the communal notion that our strength lies in our institutions. Relentlessly accentuating the negative when it comes to our political institutions, however, eclipses our considerable successes. And this predilection to distrust the political branches now seems to be shared equally by the judicial branch, not only when it comes time to decide how to distribute power between the federal government and the states, but also when it comes to making a judgment of what is in the best interests of Americans.

I talked to you tonight about cynicism, devolution of power, and how we got here. In my view, all of that can be overcome by the right leadership, the right people in power, who will recharge the public's imagination and confidence. The public mood can be transformed in an election, a single cycle. Maybe it will take a generation. But it can be changed. Elected officials who cater too much or too little to state interests can be voted out of office. But if the Supreme Court chisels into stone new constitutional restrictions on federal power, new hoops through which Congress must leap, where will we be then? You cannot go to the polls to undo a constitutional ruling of the Supreme Court. There is no further appeal—no appeal to a higher court, no appeal to the voters. Nothing short of a new constitutional convention or an amendment to the Constitution—and you know how easy that is—or will do. James Madison was right: trust the political process. "WE CANNOT AGREE"? Please.

Let me conclude by making the following simple point: if, at the federal level, we are such a failure institutionally, why does the rest of the world look to us to copy our supposed frailties? If we are such a failure—with our last six Presidents supposedly flops—how is that our incomes are actually growing, crime is going down, drug use is down, and our economy is in better shape than that of any nation in the history of the world? How did we produce a nation willing and able, as the President of Bulgaria pointed out, to spend billions of dollars and risk the lives of

its men and women to advance the cause of human rights? Did it happen by chance? Did it happen by accident? It happened as a direct result of our unique political institutions.

The Framers set out to create a centralized government robust enough to deal with national problems, but with built-in guarantees that it be respectful of, and sensitive to, local concerns. There is an inherent tension in the document. But look at the sweep of history: as the balance of power has shifted back and forth between the national government and the states, our resilient political branches have adjusted and responded. The rest of the world gets it.

We must remember that politics—and politicians—are not the enemy. The Constitutional Convention was composed of men who were regarded as gifted even in their own day. As the French charge d'affaires wrote to his government as the Convention convened:

If all the delegates named for this Convention at Philadelphia are present, we will never have seen, even in Europe, an assembly more respectable for the talents, knowledge, disinterestedness, and patriotism of those who compose it.

Above all else, these men were politicians. And I am not suggesting by this that our government today boasts the likes of a Jefferson or a Madison, but I am suggesting that we have fine and decent men and women with significant capabilities who choose public service. And some of you are among them.

The hostility we see from the Supreme Court toward the elected branches of government is the same suspicion we see in the eyes of the ordinary person on the street. "Politics" has become a dirty word. But as those of you here who live in this state of strong local community governments and town hall meetings, know better than anyone, "politics" is fundamental to how we govern ourselves in a democracy. At the end of the day, politics is the only way a community can govern itself and realize its goals without the sword.

So I stand before you today, on this 212th anniversary of the completion of the work of the Constitutional Convention, ready and willing to defend politics—even national politics. It was what those 50 gentlemen, all strangers, who met 212 years ago defended and vindicated. And it is what, in the end, has made and will continue to make us secure and strong.

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#### CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

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#### MILITARY CONSTRUCTION APPROPRIATIONS ACT, 2001

The PRESIDING OFFICER. The Senate will now resume consideration of S. 2521, which the clerk will report.

The legislative clerk read as follows:

A bill (S. 2521) making appropriations for military construction, family housing, and base realignment and closure for the Department of Defense for the fiscal year ending September 30, 2001, and for other purposes.

The PRESIDING OFFICER. The Chair recognizes the Senator from Montana.

Mr. BURNS. The ranking member of this committee has some chores to do. I am finding no one on the floor who wants to talk on this piece of legislation, unless the Senator from Delaware wants to make his Kosovo statement.