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Irresponsibility Breeds Contempt

Suzanna Sherry

EVERYONE IS PICKING on the Supreme Court these days. To be sure, some of the criticism is warranted: the Court has butchered history – to say nothing of constitutional text – in its attempt to interpret the Eleventh Amendment, and betrayed its own federalism principles by second-guessing a state court's interpretation of state law (and applying a constitutional test explicitly limited to the case before it). But the current attacks on the Court go well beyond individual cases or doctrines, and are reminiscent of Jeffersonian jabs at John Marshall or the John Birch Society's "Impeach Earl Warren" campaign. Pointing to the Court's invalidation of parts of more than 30 federal statutes over the past decade, critics blame the Justices. The Court is portrayed as arrogant, self-aggrandizing, and unduly activist, and accused of giving insufficient deference – or even a modicum of respect – to Congress.

Of course, these critics presume that Congress is *worthy* of deference and respect – and that is where they make their mistake. Congress has completely abdicated its responsibility to ensure that the legislation it enacts is constitutional, reasonable, and in the public interest. Many of the recently-invalidated federal statutes were the product of popular or political pressure, not reasoned deliberation. The statutes were unnecessary, badly drafted, and often patently unconstitutional – but they were popular, which is what mattered to the enacting Congress. And the statutes the Court has thus far invalidated are only the tip of the iceberg when it comes to congressional carelessness.

In this essay, I do not try to explain why Congress has become so irresponsible; I leave that to public choice theorists and others. Nor do I mean to signal agreement with the Supreme Court's recent controversial cases. I do not claim that the Court is always – or even often – correct in its reasoning or its results, but merely offer a (limited) defense of extreme provocation: when Congress acts

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so irresponsibly, we can hardly blame the Court for responding with contempt.

The Constitution gives Congress extremely broad but not unlimited power. In enacting some recent statutes, however, Congress has ostentatiously thumbed its nose at those limits in order to satisfy popular demand or interest group clamoring. These statutes exceed even an expansive view of Congress's constitutional power.

The Court invalidated both the Violence Against Women Act (VAWA) and the Gun-Free School Zones Act as beyond Congress's power under the Commerce Clause.[1] These are the only statutes that have been struck down for exceeding the Commerce Clause power since 1937. Some critics conclude that these invalidations portend a modern return to the pre-1937 Court's miserly view of congressional power. I would suggest instead that the long hiatus – extending into the period of dominance by the current conservative majority – and the Court's rejection of Commerce Clause challenges to other statutes, are evidence that Congress, not the Court, is ignoring precedent.

The essential problem with VAWA and the Gun-Free School Zones Act is that Congress tried to regulate intrastate crime, not interstate commerce. Congress justified its authority by arguing that both violence against women and the threat of gun violence near schoolyards have an ultimate effect on interstate commerce: battered women spend less money and travel less because of their battering; children whose education has been disrupted by gun violence turn into less productive adults. Congress's argument cannot be a plausible interpretation of the Commerce Clause, because it gives Congress unlimited power. Had VAWA and the Gun-Free School Zones Act been upheld as valid, Congress could have used the same reasoning to regulate every criminal and tortious act, as well as all aspects of education and family law.[2] Taken in combination, virtually every action by every individual has some effect on interstate commerce, and thus could be regulated.

To see how these two statutes expand congressional power beyond all limits, compare VAWA and the Gun-Free School Zones Act to other federal statutes, all upheld by the Court. In the 1964 Civil Rights Act, Congress prohibited discrimination by commercial enterprises, and did so in circumstances that suggested that the states were unable or unwilling to protect the victims of discrimination. In a series of environmental statutes, Congress acted to safeguard the national interest in clean air and water, recognizing that individual state legislation would be both ineffective (because states cannot stop incoming dirty air and water the way they can bar illegal alcohol or diseased cattle) and unlikely (because the first state to act would be put at a commercial disadvantage). Many federal criminal statutes require as a predicate for prosecution that the person, object, or criminal activity cross state lines – indeed, Congress's response to *Lopez* was to re-enact the federal Gun-Free School Zones Act but with an additional provision requiring that the offending gun have moved in interstate commerce. More recently, Congress enacted the Drivers' Privacy Protection Act (DPPA), upheld by the Court subsequent to

1 See United States v. Morrison, 529 U.S. 598 (2000) and United States v. Lopez, 514 U.S. 549 (1995).

2 Marriage and divorce cause various economic effects, not the least of which is the fluctuation in children's well-being, which eventually might affect their adult productivity. In addition, marriage and divorce also often result in the parties moving from one state to another, in expansion or contraction of spending, and in the interstate movement of money as non-custodial parents send child-support checks across state lines.

Lopez.[3] The DPPA regulated information, which can and does move across state lines and which states cannot control as effectively as Congress can.

All these other statutes reflect, at a minimum, one of three basic principles underlying Congress's Commerce Clause authority. First, because the United States economy is indivisibly national, the Commerce Clause gives Congress the power to regulate virtually every economic activity, however tenuous its connection to interstate commerce. Second, anything that actually crosses state lines is fair game. Finally, if federalism is not to be reduced to John Calhoun's vision of states' rights, Congress must be permitted to act in circumstances that peculiarly affect the national interest or are beyond the competence of states to regulate, whether or not they directly involve commercial activity. These three principles, taken together, give Congress extremely broad authority – perhaps broader than some readers (or some Justices) might like. But even these three principles are not enough to authorize the regulation of intrastate crime merely because it has spill-over effects on interstate commerce.

Thus, if we recognize any limits at all on Congress's authority under the Commerce Clause, the statutes invalidated in *Lopez* and *Morrison* exceeded those limits. It would be possible to argue, of course, that the Commerce Clause power *ought* to be unlimited. But doing so would necessarily abandon two principles that have been recognized, to a greater or lesser degree, by every branch of the federal government since the founding: that the federal government is a government of enumerated powers, and, relatedly, that the authority of the federal government does not completely overlap that of the state governments. It is thus the enactment of the statutes by Congress, and not their invalidation by the Court, that transgresses previously established norms.

But both statutes were exceedingly popular, and in election years – 1990 and 1994 – gave members of Congress the ability to point to their handiwork on the campaign trail. After all, who could be *for* violence against women or guns in schoolyards? The damage to the constitutional allocation of power – and, as I note later, the unnecessary duplication of already-existing state statutes – could not possibly outweigh the political benefits that accrued to Congress in enacting the legislation. The Gun-Free School Zones Act, for example, passed the House by a vote of 313 to 1, and the Senate by a voice vote, only days before election day.

The Court has also recently invalidated two statutes for exceeding the power granted to Congress by section 5 of the Fourteenth Amendment. One is VAWA, which Congress sought to justify as an exercise of its section 5 power even if it could not be enacted under the Commerce Clause. The Court also struck down the Religious Freedom Restoration Act (RFRA), which Congress purported to enact under section 5.[4] Again, however, even if we take an expansive view of section 5, these two statutes cannot fit within it.

Section 5 gives Congress the power to *enforce* the substantive provisions of the Fourteenth Amendment. It does not give Congress any additional power to *enlarge* or *interpret* those provisions. Thus, it leaves Congress and the Supreme Court with the same relative authority to declare the meaning of the Constitution as under any other constitutional provision, merely adding another source of power for congressional enactments. If the Supreme Court declares that a particular state's behavior does or does not violate the Equal Protection Clause, for example, Congress may no more

3 Reno v. Condon, 528 U.S. 141 (2000).

4 See City of Boerne v. Flores, 521 U.S. 507 (1997).

override that determination than it may override a judicial decision that a state's behavior does or does not violate the Ex Post Facto Clause. Should the Court decide that a particular state activity does not violate the Constitution, Congress cannot rule that the state's activity is nevertheless unconstitutional. What Congress may do instead is to make the state's behavior *illegal*; but to do so it must find an independent constitutional source of power to enact a statute prohibiting the behavior.

This much of the argument, while certainly contingent and sometimes contested, follows from two centuries of the practice of judicial review, in which the Court is the final – although not the only – interpreter of the Constitution. We might envision a regime in which the federal legislature and judiciary had equal authority to declare a state's activity unconstitutional, but such a system would allow Congress to be the final arbiter of its own constitutional authority, draining judicial review of all effect. Moreover, if Congress had the authority to hold a state's action *unconstitutional* despite a Supreme Court ruling to the contrary, why couldn't it similarly declare *constitutional* what the Supreme Court has already declared unconstitutional? Note that this is different from Congress's judgments about its own statutes: if the Supreme Court declares a federal statute constitutional, Congress may nevertheless decline to re-enact it (or the president may veto it), believing it unconstitutional. But where Congress is attempting to govern state conduct, it must have a constitutional source of power beyond its mere belief that the state has violated the Constitution. As with the Commerce Clause, then, I am essentially arguing that if there are any limits at all on Congressional power under section 5, Congress cannot "enforce" the Fourteenth Amendment by adopting an interpretation of it directly contrary to the Supreme Court's interpretation.

It is but a small step from that recognition to the unconstitutionality of RFRA. In *Employment Division v. Smith*, the Supreme Court held that neutral, generally-applicable state laws with an incidental effect on religious practices do not violate the Constitution. Congress disagreed, and enacted RFRA to require states to exempt religious objectors from such neutral laws. Congress needed a source of power for the statute. Because RFRA's broad coverage and categorical prohibitions far outstripped any effect on commerce, the Commerce Clause could not provide that source of power.[5] But neither can it be a valid exercise of Congress's section 5 powers, because RFRA makes illegal a state action that the Supreme Court has specifically held constitutional. RFRA does not "enforce" the substantive provisions of the Fourteenth Amendment unless Congress has the power to overrule the Supreme Court's interpretation of those provisions.

Note that this is still a narrow limit on an expansive power. Congress can still enact prophylactic or remedial legislation that goes beyond the constitutional prohibitions. If, for example, Congress had gathered evidence that states were enacting neutral laws as a pretext for discrimination against certain religions – which, under the Supreme Court's interpretation, *would* violate the Constitution – Congress might have decided that requiring accommodation of religious objectors was necessary to prevent states from undermining

5 It is illuminating to note that, after the Court invalidated RFRA, Congress passed the Religious Land Use and Institutionalized Persons Act, which essentially re-enacted RFRA's requirements but only in circumstances that implicate federal funding, interstate commerce, or substantive violations of the religion clauses as interpreted by the Supreme Court. Two federal courts have already upheld the new statute. Freedom Baptist Church of Delaware County v. Middletown Township, 204 F.Supp.2d 857 (E.D. Pa. 2002); Mayweathers v. Terhune, 2001 WL 804140 (C.D. Cal. 2001).

the constitutional prohibitions. But Congress had no such evidence, and probably could not have found any: RFRA's supporters testified that the problem the bill sought to remedy was that states were insensitive rather than deliberately discriminatory toward religious practices.[6]

The combination of an expansive (but not unlimited) reading of the Commerce Clause and an expansive (but not unlimited) reading of section 5 will invalidate very few statutes. But if the limits are to mean anything at all, they must mean that Congress cannot interfere with purely intrastate activities that do not otherwise violate the Constitution. RFRA was just such an interference. The enactment of RFRA, however, was driven by forces powerful enough to drown any concern for its constitutionality. Liberals and conservatives came together to support RFRA, because liberals viewed it as rights-protective and conservatives viewed it as religion-protective. Between that fact and the enormous lobbying power of the Catholic Church, among other religious organizations, the few opponents of RFRA didn't stand a chance. It passed unanimously in the House – where it had 170 co-sponsors – and by a 97 to 3 vote in the Senate.

VAWA failed for a much simpler reason. Again, we begin by noting that under section 5, Congress can only "enforce" the substantive provisions of the Fourteenth Amendment. Those substantive provisions regulate only state action. Because the part of VAWA that was struck down tried to regulate private actors rather than government officials, it was not an appropriate enforcement of the substantive provisions of the Fourteenth Amendment.[7] Once again, if there are any limits at all on Congress's power under section 5, VAWA exceeded them.

Two other recent federal statutes also exceeded Congress's powers. The Court has already invalidated the Communications Decency Act (CDA). As Justice Stevens's majority opinion in *Reno v. ACLU*[8] pointed out, the statute flagrantly ignored all of the careful First Amendment limits that the Court had previously placed on pornography regulations designed to protect children. The CDA was content-based, prohibited indecent and offensive speech rather than just obscene speech, provided insufficient definitions of what speech was prohibited, imposed criminal rather than civil penalties, and had the inevitable effect of broadly restricting protected speech even among adults. But it was great public relations: with the public clamoring to restrict children's access to on-line pornography, Congress did itself a favor even while it ignored the First Amendment. Not surprisingly, the CDA was enacted in an election year (1996), by a vote of 414 to 16 in the House and 91 to 5 in the Senate.

As with RFRA and the Gun-Free School Zones Act, Congress's response to the invalidation of the CDA was to enact narrower and more thoughtful legislation. The Child Online Protection Act (COPA), recently upheld by the Supreme Court,[9] remedies the most glaring errors in the CDA. It prohibits a narrower and more precisely defined category of speech, and applies to a more limited set of communications. Moreover, unlike the CDA, it exempts speech with serious literary artistic, political, or scientific value, and allows speakers to raise the affirmative defense of a good faith attempt to shield minors from the material. All

6 City of Boerne, 521 U.S. at 530.

7 In the Court's view, there was insufficient evidence to support the legislation on the alternative ground that state officials had abdicated their responsibility to protect women from domestic violence; this distinguishes VAWA from earlier civil rights statutes protecting African-Americans.

8 521 U.S. 844 (1997).

9 Ashcroft v. ACLU, 122 S.Ct. 1700 (2002).

of these aspects of COPA serve to reduce its impact on protected speech among adults and to lessen its chilling effect on speech in general. COPA thus shows more congressional attention to constitutional considerations than the CDA did. Again, however, it took a Supreme Court brickbat to get Congress's attention.

The Court is considering another federal statute, the Sonny Bono Copyright Term Extension Act (CTEA), as this essay goes to press.[10] The primary problem with the CTEA is that by extending the term of *existing* copyrights, Congress is not "promot[ing] the progress of science and useful arts."[11] Rather than purchasing for the public an increase in creative exertions – the purpose of the power under the Intellectual Property Clause – Congress is simply giving a windfall to copyright owners whose copyrights are about to expire.[12] And Congress provided this windfall at the explicit behest of powerful copyright owners like Disney, whose famed mouse, first copyrighted in 1928, was about to fall into the public domain. Passed by overwhelming majorities in the House and Senate a month before election day 1998, the CTEA was defended by Congressman Sonny Bono's widow and successor in office:

> Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, there is also Jack Valenti's proposal for a term to last forever less one day. Perhaps the Committee may look at that next Congress.[13]

By and large, Congress seems to view the Court and the Constitution as minor impediments to be ignored whenever possible.[14]

Congress's abdication of its responsibilities is also reflected in some recent statutes that are completely unnecessary. VAWA, for example, simply duplicates remedies available under state law. All states have both criminal and civil laws prohibiting rape and other violence against women. To the extent that these laws are inadequate to the task, it is because of the difficulties of proof inherent in an act that almost always takes place away from witnesses, victim reluctance, and the obduracy – or even gender bias – of juries. None of those difficulties is remedied by moving the lawsuit down the street from the state to the federal courthouse, and thus VAWA cannot be justified as necessary to remedy state underenforcement of laws prohibiting violence against women. The Gun-Free School Zones Act similarly criminalizes behavior that is already illegal in most states;[15] again, it results only in a

10 See Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001), cert. granted sub nom. Eldred v. Ashcroft, No. 01-618, 122 S.Ct. 1062 (Feb. 19, 2002).

11 U.S. Const. Art. I, § 8, cl. 8.

12 For a more extended discussion of the history and meaning of the Intellectual Property Clause, and of why the CTEA is unconstitutional, see Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. Ill. L. Rev. 1119.

13 144 Cong. Rec. H9951-52 (daily ed. Oct. 7, 1998) (statement of Hon. Mary Bono).

14 For another argument about Congress's failure to consider the constitutionality of its enactments, see Neal Devins, *Congress As Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 Duke L.J. 435 (2001).

15 Justice Kennedy, concurring in *Lopez*, stated that over 40 states had such statutes, at least by the time *Lopez* was decided in 1995. Excellent historical research by Misty Fairbanks has uncovered 29 such state statutes pre-dating the 1990 federal act, and eight other states in which judicial interpretation did or could have applied more general statutes to schoolyards. A list of those statutes is available from the author.

change of venue. The Electronic Signatures in Global and National Commerce Act (E-SIGN) duplicated legislation in almost half the states; at the time of its passage, numerous other states were considering such legislation.[16] But E-SIGN, like the other statutes I discuss, was extremely popular: enacted in another election year (2000), it passed the House by a vote of 426 to 4 and the Senate by a vote of 87 to 0.

Another recent federal statute duplicates pre-existing *federal* remedies. The Anticybersquatting Consumer Protection Act (ACPA) was enacted in 1999 to combat the practice of "cybersquatting": individuals registering others' trademarks as internet domain names. The cyber-pirate sometimes tries to sell the domain name back to the trademark owner, sometimes tries to divert customers to his own products, and sometimes traps the user's browser so that she must click through hundreds of advertisements before exiting the site (with the cyber-pirate making money on each click).[17]

Whatever the merits of banning cybersquatting, the ACPA itself was unnecessary. Only a few years earlier, Congress had enacted the Federal Trademark Dilution Act (FTDA). That statute could be – and frequently was – used to force cybersquatters to turn over trademarked domain names to their rightful owners. *Sporty's Farm v. Sportsman's Market*[18] offers the most telling evidence of the ACPA's duplication of the FTDA. In that case, a federal district court had used the FTDA to order the domain name registrant to turn over the name to the trademark owner, but refused to award damages because the violation was not sufficiently "willful." While the Court of Appeals was considering the case, Congress enacted the ACPA. The Second Circuit ultimately affirmed the district court's ruling in its entirety – but did so under the ACPA rather than the FTDA. Thus, in that case, everything the ACPA accomplished could be done – indeed, *had* been done – under the FTDA. Many other subsequent cases confirm that the ACPA offers neither greater protection nor broader remedies to trademark owners. A congressional committee considering the ACPA had testimony before it from law professors, who canvassed the cases and explained the adequacy of the FTDA in combatting cybersquatters. But trademark owners and their representatives clamored for a new statute, and cybersquatters themselves are disreputable, so the ACPA was appended to a massive appropriation bill with no floor discussion in either chamber.

The Age Discrimination in Employment Act (ADEA) is another example of an unnecessary statute, in this case because its beneficiaries simply did not need congressional solicitude. The ADEA, first passed in 1967 and broadened through subsequent amendments, prohibits employers from discriminating against anyone over the age of 40. It was meant to serve the laudatory purpose of preventing employers from maintaining "No Elders Need Apply" policies. But because Congress – without sufficient thought – wrote it broadly, the ADEA has become instead a powerful protection for incumbent workers at the expense of a younger workforce. It has, in fact, resulted in a tremendous transfer of wealth to the current generation of older workers.[19]

Through careless drafting, Congress

16 See Suzanna Sherry, *Haste Makes Waste: Congress and the Common Law in Cyberspace*, 55 Vand. L. Rev. 309, 361 (2002).

17 For a more extended discussion both of cybersquatting and of why the ACPA was unnecessary (and harmful), see id. at 317-58.

18 202 F.3d 489 (2d Cir. 2000).

19 See Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination? The ADEA's Unnatural Solution*, 72 N.Y.U. L. Rev. 780 (1997). This article also contains a more extensive

invited the ADEA's extension and overzealous application to disgruntled – but not disadvantaged – workers. The problem is that in patterning the ADEA after statutes prohibiting discrimination against such groups as women and racial minorities, Congress treated individuals over 40 as if they were members of a similarly disadvantaged and defenseless class. While it is possible that at some age – 70? 80? 90? – people tend to become peculiarly vulnerable, it is absurd to maintain that one is over the hill at 40.

Perhaps my approach of the half-century mark colors my judgment, but it does not seem that those over 40 have any of the indicia of discrete and insular minorities. They are, if anything, disproportionately represented in the halls of both corporate and political power, disproportionately wealthy, and more likely to discriminate than to be discriminated against. There is no history of generalized discrimination or exclusion from positions of power. Unlike discrimination based on race or gender, "discrimination" on the basis of age is usually the result of economic considerations rather than of demeaning stereotypes. Moreover, whatever limitations are placed on employees over 40 are usually imposed by employers who are themselves in the same age group: except perhaps in the late and unlamented Silicon Valley culture, 30-year-olds don't generally have power to hire, fire, or set salaries for those 40 and up.

This necessarily brief examination of the characteristics of the over-40 crowd suggests that the ADEA protects a segment of the American population least in need of protection. Thus, while the Supreme Court may have been wrong to invalidate part of the statute as unconstitutional,[20] the ADEA was certainly an unwise exercise of Congress's authority. The amendments expanding the age range of covered individuals were particularly flawed, but also easily explainable: by the early 1980s – before the most significant amendments – the American Association of Retired Persons had become the largest private, non-profit, non-partisan organization in the world, and was labeled "the nation's most powerful special interest lobby."[21] Moreover, the AARP's members *vote* – and the 1986 amendments, eliminating mandatory retirement entirely, were passed by both chambers a month before election day.

Even some statutes that might be useful are compromised by Congress's neglect of its responsibilities. The Supplemental Jurisdiction Act (§ 1367) is one example. After the Supreme Court limited the reach of pendent and ancillary federal jurisdiction in *Finley v. United States*,[22] Congress quickly attempted to return the law to its pre-*Finley* state. Unfortunately, Congress – abetted by law professors – was careless in its drafting. As a result, lower courts have been struggling with new confusion created by the statute. Some courts have held that the statute *expands* the reach of supplemental jurisdiction;[23] others have concluded that § 1367 *contracts* pre-*Finley*

discussion of why the ADEA was not necessary.

20 See Kimel v. Florida Board of Regents, 528 U.S. 62 (2000).

21 See Issacharoff & Harris, supra note 19, 72 N.Y.U. L. Rev. at 811-12 & n.157.

22 490 U.S. 545 (1989).

23 See Rosmer v. Pfizer, Inc., 263 F.3d 110 (4th Cir. 2001); Gibson v. Chrysler Corp., 261 F.3d 927 (9th Cir. 2001); Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 73 F.3d 928 (7th Cir. 1996); In re Abbott Laboratories, 51 F.3d 524 (5th Cir. 1995); but see Trimble v. Asarco, Inc. 232 F.3d 946 (8th Cir. 2000); Meritcare, Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214 (3rd Cir. 1999); Leonhardt v. Western Sugar Co., 160 F.3d 631 (10th Cir. 1998).

jurisdictional doctrines.[24]

The ACPA (as already noted, duplicative of the FTDA) is also an example of a hasty and poorly drafted statute causing interpretive difficulties for courts. Although the ACPA overlaps in coverage with the FTDA, the statutes use different language, and courts are thus struggling to define the new phrases. Moreover, the ACPA allows *in rem* suits against offending domain names themselves, but the statutory provision creates many ambiguities that courts are currently resolving in different ways.[25]

Finally, there is the Americans With Disabilities Act (ADA), recently invalidated in part by the Supreme Court.[26] Once again, lobbying pressures and sloppy drafting resulted in a statute that is as flawed as the others I have canvassed. Like the other statutes, the ADA was passed in an election year (1990) by overwhelming majorities: 377 to 28 in the House and 91 to 6 in the Senate. Part of the ADA is devoted to prohibiting intentional discrimination against the disabled, and that section, while causing some interpretive difficulties as to what constitutes a disability, is otherwise largely unproblematic; unlike those over 40, disabled Americans were often the victims of the kind of irrational and demeaning discrimination that warrants a legal remedy.

But the ADA also requires employers, public entities, and private providers of public accommodations to make "reasonable accommodations" for individuals with disabilities. The outrageous demands that plaintiffs have made under this provision (some of which courts have granted) illustrate the consequences of congressional irresponsibility. It is inconceivable that Congress meant to authorize such inanities when it attempted to remedy discrimination against the disabled. But its inattention to language and detail, and its haste to enact a popular statute, have led to an explosion of ADA litigation.

The most notorious – although not the most egregious – is the Supreme Court's holding that golfer Casey Martin must be allowed to use a cart in competition, although his competitors are required to walk.[27] The Court's justification was that golf is essentially about putting a ball in a hole, not about walking. As commentators pointed out, that reasoning could have ripple effects throughout professional sports: older baseball players who can no longer run the bases might demand extension of the designated hitter rule (the existence of the DH rule in the American League *proves* that baseball is not about running the bases);[28] shorter basketball players could demand stepladders, since "basketball, like golf, is fundamentally a sport about putting a ball in a hole, which is a lot easier to do with the aid of a stepladder."[29]

If those hypotheticals seem farfetched, a quick perusal of the lower court cases yields equally bizarre results. At 5 feet 2 inches, I'm at a disadvantage in movie theaters, sports arenas, and the like. If, at a particularly exciting play, the people seated in front of me stand up, I have no hope of seeing the action. But disabled individuals have successfully sued to

24 See Chase Manhattan Bank v. Aldridge, 906 F.Supp. 866 (S.D.N.Y. 1993); Guaranteed Systems, Inc. v. American National Can Co., 842 F.Supp. 855 (M.D.N.C. 1994); see also Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After* Finley *and the Supplemental Jurisdiction Statute*, 40 Emory L.J. 445 (1991).

25 For a discussion of these interpretive difficulties, see Sherry, supra note 16, 55 Vand. L. Rev. at 342-45.

26 See Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001).

27 PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).

28 See David Broder, *Golf, Baseball, and ...*, Washington Post, June 3, 2001 at B7.

29 Joe Queenan, *Differently-Abled Athletes*, Wall Street Journal, March 2, 1998 at A18 (commenting on lower court decision).

require stadiums to provide wheelchair seating that allows them to see over the heads of *standing* patrons.[30] Other plaintiffs have forced ABC to trial by claiming that the telephone screening process by which contestants are selected for the show "Who Wants to Be a Millionaire" fails to accommodate individuals with hearing problems or reduced mobility in their not-so-fast fingers.[31] One lucky litigant who claimed a learning disability – partly on the basis of SAT scores in the 300s and 400s – was awarded twice the normal time to take the bar exam (spread out over four days) plus the use of a computer on the essay portions. Although she failed despite these accommodations, the court ordered the bar examiners to allow her to repeat the exam with the same accommodations, in addition to $7500 in compensation for earlier failures to offer accommodations.[32]

And even sillier ADA suits, although ultimately resolved in favor of defendants, are clogging the federal courts. One employee, fired after threatening a supervisor, argued that the firing violated the ADA because she should have been allowed to walk away from her supervisors if they caused her stress.[33] Another litigant claimed that his sleep apnea and narcolepsy entitled him to two naps a day on the job.[34] Football lovers with hearing problems challenged the NFL's blackout rule, arguing that the games had to be televised because they could not hear them on the radio.[35] Several college athletes with poor academic records have challenged the NCAA's eligibility requirements as discrimination against students with learning disabilities.[36] Poor drafting and an overbroad statute designed primarily to pacify interest groups combine to make the ADA a potent source of these types of lawsuits.

Not all of these statutes – or the others invalidated by the Supreme Court – were unconstitutional. But all of them were the product of congressional irresponsibility. It is no wonder that the Court does not give much deference to an institution that seems to care so little about its own deliberative role in our constitutional regime. Perhaps if Congress started taking its own responsibilities seriously, the Court might start taking Congress more seriously.

30 See Paralyzed Veterans of America v. D.C. Arena, 117 F.3d 579 (D.C. Cir. 1997); see also Lara v. Cinemark, 207 F.3d 783 (5th Cir. 2000) (requiring comparable sight-lines in movie theaters).

31 See Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279 (11th Cir. 2002) (reversing district court grant of summary judgment to defendants).

32 Bartlett v. New York State Board of Law Examiners, 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001).

33 See Reed v. LePage Bakeries, 102 F.Supp.2d 33 (D. Me. 2000), aff'd 244 F.3d 254 (1st Cir. 2001).

34 Jackson v. Boise Cascade Corp., 941 F.Supp. 1122 (S.D. Ala. 1996).

35 Stoutenborough v. National Football League, 59 F.3d 580 (6th Cir. 1995).

36 See, e.g., Bowers v. National Collegiate Athletic Ass'n, 118 F.Supp.2d 494 (D.N.J. 2000), amended after reargument, 130 F.Supp.2d 610 (2001); Matthews v. National Collegiate Athletic Ass'n, 179 F.Supp.2d 1209 (E.D. Wash. 2001).