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United States v. Lopez: Reaffirming the Federal Commerce Power and Remembering Federalism

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The United States Constitution specifically enumerates the federal government’s power to regulate commerce “among the several states.” While this grant of federal authority over commerce might appear relatively unambiguous, considerable debate persists over the precise definition of the term “commerce.” The phrase “among the several states”

1. U.S. Const. art. I, § 8, cl. 3. Article I, section 8 of the Constitution provides that Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Id. This clause was adopted primarily in response to the economic problems the new nation experienced under the Articles of Confederation. Thomas H. Calvert, Regulation of Commerce Under the Federal Constitution 3 (1907). The Articles of Confederation did not provide for centralized control over commerce but instead provided: “The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States.” United States Articles of Confederation, art. IX (emphasis added).

As a result of this decentralized structure, individual states began imposing taxes on goods from other states. See The Records of the Federal Convention of 1787 307-08 (Max Farrand ed., 1966); Calvert, supra, at 4. This lack of national control over commerce threatened the new nation’s economic well-being. John E. Nowak & Ronald D. Rotunda, Constitutional Law § 4.3, at 138 (5th ed. 1995); see Noah Webster, An Examination into the Leading Principles of the Federal Constitution (1787), reprinted in Pamphlets on the Constitution of the United States, Published During Its Discussion By the People, 1787-1788, at 61-62 (Paul L. Ford ed., 1968) (recognizing the need for a unified central government). Noah Webster warned that “[w]ithout powers lodged somewhere in a single body, fully competent . . . to regulate commerce . . . our confederation is a cobweb—liable to be blown asunder by every blast of faction that is raised in the remotest corner of the United States.” Id.; see The Federalist No. 42, at 267 (James Madison) (Clinton Rossiter ed., 1961) (recognizing that the Confederacy’s “defect of power” was the absence of power to regulate commerce between the states); The Federalist No. 4, at 49 (John Jay) (Clinton Rossiter ed., 1961) (recommending national control over commerce to strengthen the nation against foreign forces). In response to this decentralization, the Founders granted the federal government power over commerce “among the several states” to strengthen the nation’s ability to confront economic problems. Nowak & Rotunda, supra, at 139.


3. See Adair v. United States, 208 U.S. 161, 177 (1908) (defining commerce among the several states as "traffic, intercourse, trade, navigation, communication, the transit of persons, and the transmission of messages by telegraph"); Swift & Co. v. United States, 196 U.S. 375, 398 (1905) ("Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824) (restricting the definition of the word "among" to "commerce which concerns more States than one"); Crosskey, supra note 2, at 17 (defining interstate and intrastate commerce). William Crosskey describes intrastate commerce as "commercial transactions that take place wholly within the territory of a single state" whereas interstate commerce includes "commercial transactions that are carried on from a point in the territory of one state to a point in the territory of another." Id.

One commentator suggests that the choice of the words "among the several states" was a matter of style. Raoul Berger, State and Federal Powers: The Founders' Design, in Is Constitutional Reform Necessary To Reinvigorate Federalism? A Roundtable Discussion 7, 10-11 (Advisory Comm'n on Intergovernmental Relations No. M-152, 1987). Professor Berger notes that the Founders originally employed the phrase "with the several states" instead of "among the several states." Id. at 10. Berger further maintains that the word "among" was commonly substituted with the word "between." Id. at 11. The frequent substitution of the word "between" indicates that the Founders' primary goal was to protect the states from each other and not to grant the federal government power over the internal police matters of the state. Id.; see Richard H. Lee, Letters of A
among the several states, or interstate commerce, results in regulation of intrastate activities, the Supreme Court must adhere to principles inherent in the concept of Federalism and the Tenth Amendment.


The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. 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.

The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments in times of peace and security.

Id. (emphasis added). As described by Madison, this federal structure is established in the Constitution. See U.S. Const. art. I, § 8 (enumerating eighteen specific powers reserved for the national government including the power to make all laws “necessary and proper” for carrying out those enumerated powers); Id. § 10 (denying states the power to issue money, enter into treaties, levy export and import duties, and keep troops during wartime); U.S. Const. amend. X (reserving for the states all powers not delegated to the national government); see also Jenna Bednar & William N. Eskridge, Jr., Steady the Court’s “Unsteady Path”: A Theory of Judicial Enforcement of Federalism, 68 S. Cal. L. Rev. 1447 (1995) (proposing the Court adopt a more consistent approach to applying the principles of federalism); Martin H. Redish & Karen L. Drizin, Constitutional Federalism and Judicial Review: The Role of Textual Analysis, 62 N.Y.U. L. Rev. 1 (1987) (tracing the Supreme Court’s various approaches to constitutional federalism). But cf. Jesse H. Choper, Judicial Review and the National Political Process 258 (1980) (advocating that the Supreme Court refuse to review federalism questions and, instead, reserve its capital for other matters); Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 558-60 (1954) (asserting that the Court is on its weakest ground when confronting issues of federalism and arguing that the national political process is the more appropriate mechanism for safeguarding the federal system).

5. U.S. Const. amend. X. The Tenth Amendment provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Id.; see Garcia v. San Antonio Metro. Transit Auth. 469 U.S. 528, 568-72 (1985) (Powell, J., dissenting) (recounting the reasons for the inclusion of the Tenth Amendment and noting that the promise of federalism ensured ratification of the Constitution); see infra notes 43, 88, 116, & 120 and accompanying text (discussing the Court’s treatment of the Tenth Amendment).
In an attempt to balance the federal government's power to regulate interstate commerce with the states' authority to regulate intrastate activity, the Supreme Court has adopted various analytical models for interpreting the federal commerce power. Before 1937, the Court vacillated between a formalistic direct/indirect test and a more lenient instrumentalities rationale. The Court used the direct/indirect test to distinguish between activities such as manufacturing and commerce. The Court later applied the instrumentalities rationale to regulate the means by which goods and other products of commerce were moved interstate. In 1937, however, the Court abandoned the formalistic restrictions on the national commerce authority and began a trend of consistent validation of congressional use of the commerce power.

6. See, e.g., Houston, E. & W. Tex. Ry. v. United States (The Shreveport Rate Case), 234 U.S. 342, 351 (1914) (using the instrumentalities rationale); Swift & Co., 196 U.S. at 398 (applying the current of commerce rationale); United States v. E.C. Knight Co., 156 U.S. 1, 17 (1895) (using the direct/indirect test).

7. Compare E.C. Knight, 156 U.S. at 12 (holding that Congress lacked authority to regulate manufacturing because it only indirectly affected interstate commerce) with The Shreveport Rate Case, 234 U.S. at 351 (holding that Congress had authority to regulate railroads because they were instruments of interstate commerce).

8. See Chassaniol v. City of Greenwood, 291 U.S. 584, 587 (1934) (commenting that production is not commerce but only a step in the preparation for commerce); E.C. Knight, 156 U.S. at 12 (stating that "commerce succeeds to manufacture, and is not a part of it."); Kidd v. Pearson, 128 U.S. 1, 20 (1888) (stating "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce."); see cases cited infra notes 33, 46 & 64 and accompanying text (distinguishing manufacturing from commerce).

9. See The Shreveport Rate Case, 234 U.S. at 351 (applying the instrumentalities rationale to regulate railroads). Under the instrumentalities rationale, federal regulation of interstate railroads included:

- all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.

Id.; see infra part I.A (exploring the holding of The Shreveport Rate Case).

10. See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 555-56 (1985) (holding that the federal government could regulate a municipally owned and operated mass transit system); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 277 (1981) (noting the Court uses a rational basis test to determine whether an activity substantially affects interstate commerce); Perez v. United States, 402 U.S. 146, 156-57 (1971) (determining that Congress could regulate organized crime and loan-sharking activities even when they occurred entirely within a single state); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (holding that Congress could prohibit racial discrimination in hotels under the commerce clause); Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (holding that Congress could prohibit racial discrimination in restaurants under the commerce clause); Wickard v. Filburn, 317 U.S. 111, 128 (1942) (concluding that the federal government could regulate intrastate activities if the aggregate effect of those activities has a substantial economic effect on interstate commerce); United States v.
Under the commerce clause, the Court has upheld federal civil rights laws, federal regulation of state entities, and federal criminal laws. Although the Court has been willing to validate virtually all commerce-based legislation, the Court has articulated limits on the commerce power. In *United States v. Lopez*, the Court finally determined that Congress exceeded its commerce authority by attempting to regulate guns within 1,000 feet of a school zone.

*Lopez* involved the indictment of a high school student who brought a .38 caliber handgun to school in violation of the Gun-Free School Zones Act (The Act). The student pleaded not guilty and moved to dismiss

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Darby, 312 U.S. 100, 113 (1941) (validating Congress's authority to prohibit the shipment of items in interstate commerce); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (holding that the federal government may regulate intrastate activities so long as those activities have a substantial economic effect on interstate commerce). But see *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that the federal government may not coerce a state to enforce a federal regulatory program).

11. See cases discussed infra parts I.D.1, I.D.2, and I.D.3 (upholding civil rights legislation, federal regulation of state entities, and federal criminal laws that are based on the commerce power).


14. Id. at 1634.

15. *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), aff'd, 115 S. Ct. 1624 (1995). On March 10, 1992, Alfonso Lopez, Jr., a senior at Edison High School in San Antonio, Texas, went to school carrying a concealed .38 caliber handgun. *Id.* Lopez admitted that he was carrying the gun when school officials, relying on an anonymous tip, confronted him. *Id.* Lopez was carrying the unloaded gun and five bullets for another individual who planned to use it in a gang war. *Id.* The State of Texas initially charged Lopez under a Texas law that classified carrying a firearm on school property as a third degree felony. *Id.* at 1345 n.1. However, these charges were dropped so that the federal government could prosecute Lopez under the federal Gun-Free School Zones statute. *Id.*

The original Gun-Free School Zones Act of 1990 provided:

(A) It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.

(B) Subparagraph (A) shall not apply to the possession of a firearm—

(i) on private property not part of school grounds;

(ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual
the indictment on the ground that section 922(q) of the Act, which banned possession of a firearm within 1,000 feet of a school zone, did not further any enumerated power granted to Congress by the Constitution. The United States District Court for the Western District of Texas denied the motion, finding that the federal statute derived its authority from the commerce clause. The United States Court of Appeals for the Fifth Circuit reversed, however, finding the Act beyond the scope of the commerce clause. The Court of Appeals reasoned that because the statute mentioned neither the commerce clause nor the impact of guns in school zones, the court could not determine if the regulated activity was rationally related to interstate commerce.

obtain such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license;

(iii) which is—

(I) not loaded; and

(II) in a locked container, or a locked firearms rack which is on a motor vehicle;

(iv) by an individual for use in a program approved by a school in the school zone;

(v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;

(vi) by a law enforcement officer acting in his or her official capacity; or;

(vii) that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.


16. Lopez, 2 F.3d at 1345.

17. Id. The district court found that the business of elementary, middle, and high schools affected interstate commerce. Id.

18. Id.

19. Id. at 1363-64; see supra note 15 (providing the original text of the Gun-Free School Zones Act of 1990); infra note 225 and accompanying text (explaining that the statute did not contain the word commerce).
The Supreme Court granted certiorari, and affirmed the decision of the Fifth Circuit. The Court held that the federal commerce power extends to noncommercial intrastate activities only when those activities "substantially affect interstate commerce." The Court found that the noncommercial activity of possessing a gun in a school zone did not substantially affect commerce and invalidated the Act. Additionally, the majority noted that the statute did not contain a jurisdictional element limiting the Act to only those intrastate firearm possessions that actually affected interstate commerce.

Justice Kennedy, joined by Justice O'Connor, concurred, emphasizing the importance of federalism. According to Justice Kennedy, maintain-
ing this federal-state balance ensures political accountability, especially with regard to traditional state concerns. Justice Thomas concurred separately to explain how far modern commerce clause jurisprudence has deviated from the original meaning of the clause. Justice Thomas rejected the substantial effects test adopted by the majority, and strongly urged the Court to fashion a more coherent and limited application of the commerce clause. Justice Breyer dissented, arguing that the rational basis test was applicable despite the absence of specific congressional findings linking guns in school zones to interstate commerce. In applying this rational basis test, Justice Breyer steadfastly maintained that the Gun-Free School Zones Act was valid. Justice Breyer speculated that the majority's decision would create uncertainty regarding Congress's commerce power. He maintained that as a consequence of this uncertainty, congressional ability to use the commerce power to regulate on a national scale would be significantly undermined, threatening the economic and social well-being of the nation.

This Note traces the development of commerce clause jurisprudence over the past two centuries. This Note first discusses the Supreme Court's initially restrictive nineteenth century interpretation of the commerce clause. Then, this Note surveys the more expansive application of the commerce power after 1937, during which the Court adopted the substantial effects test, the commerce-prohibiting technique, and the aggregate effects theory. Next this Note presents the Court's modern definition of the commerce clause, which permits federal regulation of all activities rationally related to interstate commerce. This Note then ana-


27. *Lopez*, 115 S. Ct. at 1642 (Thomas, J., concurring); see infra part II.B.2 (reviewing Justice Thomas's concurrence).

28. *Lopez*, 115 S. Ct. at 1642-43; see infra notes 198-200 and accompanying text (surveying Justice Thomas's rejection of the substantially affects test and advocacy of a limited commerce clause jurisprudence).

29. *Lopez*, 115 S. Ct. at 1658 (Breyer, J., dissenting); see infra part II.C (discussing Justice Breyer's dissenting opinion). Notably, Justice Breyer read portions of his dissent from the bench, which was quite unusual. Biskupic, *supra* note 21, at A6.

30. *Lopez*, 115 S. Ct. at 1659; see infra notes 207-09 and accompanying text (recounting Justice Breyer's application of the rational basis test).


32. *Lopez*, 115 S. Ct. at 1664. Justice Breyer asserted "the legal uncertainty now created will restrict Congress's ability to enact criminal laws aimed at criminal behavior that, considered problem by problem rather than instance by instance, seriously threatens the economic, as well as social well-being of Americans." *Id.* at 1665; see infra note 218 and accompanying text (noting Justice Breyer's apprehensions regarding threats to social and economic well-being).
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lyzes the majority, concurring, and dissenting opinions in *United States v. Lopez*, and illustrates that the majority remained faithful to precedent, maintained the federal balance, and respected the original meaning of the commerce power. Finally, this Note argues that the primary dissent's rationale disregards federalism and ignores the true purpose of the commerce clause.

I. Origins of the Commerce Power

Initially, the Supreme Court's review of the commerce power centered on the invocation of the dormant commerce clause. In dormant commerce clause disputes, the Court recognized the commerce power as a means of determining the limits of state power to regulate, rather than as a restrictive device to limit the states' powers rather than as an affirmative device to promote national commerce; see also Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 Harv. L. Rev. 645 (1946) (noting that Congress made no substantial, affirmative use of the commerce power for the first one hundred years following the signing of the Constitution).

Dormant commerce clause issues arise when Congress has not enacted legislation preempting state commerce regulation and, as a result of this silence, states legislate. See *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945) ("[n the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it."). When this state regulation discriminates against out-of-state residents or businesses, or unduly burdens interstate commerce, the Court will invalidate the regulation as violative of the commerce clause. See, e.g., *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671 (1981) (striking down an Iowa statute regulating truck length prohibitions because the regulation burdened interstate commerce); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350-53 (1977) (invalidating a North Carolina apple packaging regulation because of the discriminatory effect the regulation had on Washington apple growers); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 528 (1959) (holding an Illinois law requiring contoured mudguards on trucks invalid because there was a "rather massive showing of burden on interstate commerce"); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) (declaring a Wisconsin ordinance invalid because the milk pasteurizing and sale requirements plainly discriminated against interstate commerce); *Southern Pacific*, 325 U.S. at 773-74 (invalidating an Arizona Train Limit Law prohibiting certain railroad trains because the prohibition imposed a burden on interstate commerce); *Baldwin v. G.A.F Seelig, Inc.*, 294 U.S. 511, 521 (1935) (finding a New York law regulating milk prices invalid because the regulation discriminated against out-of-state milk producers); *Di Santo v. Pennsylvania*, 273 U.S. 34, 37 (1927) (invalidating a state licensing requirement for vendors of steamships); *Buck v. Kuykendall*, 267 U.S. 307, 315-16 (1925) (concluding that a licensing requirement to operate a passenger and freight line was invalid because the regulation imposed an unreasonable burden on interstate commerce).
an affirmative device for promoting national regulatory power.\textsuperscript{34} The reasoning and legal principles that the Court established in these dormant commerce clause cases, however, also laid the foundation for an eventual affirmative exercise of the national commerce power.\textsuperscript{35}

Chief Justice Marshall’s landmark opinion in \textit{Gibbons v. Ogden}\textsuperscript{36} defined the scope of the national commerce power.\textsuperscript{37} In \textit{Gibbons}, Chief Justice Marshall defined commerce as “intercourse” that extended into each state.\textsuperscript{38} Thus, Congress could regulate all commercial activity with the exception of purely intrastate activity.\textsuperscript{39}

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\item[34.] See \textit{Leisy v. Hardin}, 135 U.S. 100, 107 (1890) (invalidating an Iowa ban on the importation of alcohol without county certification because the ban violated the commerce clause); \textit{Kidd v. Pearson}, 128 U.S. 1, 20-24 (1888) (determining that the manufacture of intoxicating liquors was subject to state regulation because manufacture itself was not commerce); \textit{Veazie v. Moor}, 55 U.S. (14 How.) 568, 573-74 (1853) (upholding a state law granting a navigation monopoly over a purely intrastate river); \textit{Pennsylvania v. Wheeling & Belmont Bridge Co.}, 54 U.S. (13 How.) 518, 578 (1852) (invalidating a state statute authorizing a bridge because the bridge might interfere with commerce); \textit{Brown v. Maryland}, 25 U.S. (12 Wheat.) 419, 425 (1827) (invalidating a state tax because the tax encroached on the federal government’s power to regulate the sale of imports); see also Mendelson, supra note 33, at 7 (proposing that the Court initially used the commerce power as a restrictive instrument).
\item[36.] 22 U.S. (9 Wheat.) 1 (1824). In \textit{Gibbons}, the Court confronted the issue of whether the State of New York could grant a monopoly to a private company. \textit{Id.} at 1-2. Ogden possessed a permit that his predecessors, Robert Livingston and Robert Fulton, obtained granting the exclusive navigation rights in the waters of New York. \textit{Id.} at 2. Gibbons possessed a federal license to carry on coastal trade and wanted to navigate the waters between New York and New Jersey. \textit{Id.} Relying on his federal navigation license, Gibbons challenged the state law granting Ogden an exclusive right to navigate the waters within New York. \textit{Id.} Chief Justice Marshall found the New York statute invalid because it was preempted by a federal licensing statute. \textit{Id.} at 210-11. Essentially, the invalidation of the New York Law was based on the Supremacy Clause. \textit{Id.} at 211.
\item[37.] \textit{Id.} at 189. Chief Justice Marshall realized, “The subject to be regulated is commerce; and our constitution being . . . one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word.” \textit{Id.}
\item[38.] \textit{Id.} Chief Justice Marshall explained that, “Commerce, undoubtedly, is traffic, but it is something more: it is intercourse.” \textit{Id.} The federal government’s power over commerce among the several states “cannot stop at the external boundary line of each State, but may be introduced into the interior.” \textit{Id.} at 194.
\item[39.] \textit{Id.} at 194. Chief Justice Marshall defined a state’s internal activities as those “which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.” \textit{Id.} at 195 (emphasis added). The Court later referred to this language as the affecting commerce rationale. See \textit{NLRB v. Jones & Laughlin Steel Corp.}, 301 U.S. 1 (1937); \textit{Wickard v. Filburn}, 317 U.S. 111, 120 (1942) (“Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded.”). But cf. Ep-
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A. E.C. Knight and The Shreveport Rate Case: Divergent Approaches to the National Commerce Power

Active promotion of national power was suitable for the century following the *Gibbons* decision because the nation’s economy was expanding. Congress sought to exert national power over commerce with legislation such as the Interstate Commerce Act of 1887 and the Sherman Anti-Trust Act. Because active promotion of national commerce authority often reached intrastate activities, the Court had to determine whether these regulations over intrastate activities were valid; as a result, the Court developed two analytical models. The Court adopted a restrictive direct/indirect effects test and a more lenient instrumentalities of commerce rationale.

The Court developed the direct/indirect test when it reviewed the Sherman Antitrust Act. In *United States v. E.C. Knight Co.*, the Court held...
that Congress could use the commerce power to regulate monopolies in commerce, but not to regulate monopolies in manufacturing because "[c]ommerce succeeds to manufacture, and is not a part of it."47 The Court noted that the national commerce power did not extend to all activities that might indirectly affect commerce.48 If national power extended to all activities that ultimately affected commerce, no affairs would be left for the states to regulate.49 The Court, instead, maintained that the national commerce power extended only to those activities that directly affected commerce, as distinguished from those that indirectly affected commerce such as manufacturing.50

47. Id. at 12. Chief Justice Fuller borrowed this manufacture/commerce distinction from Kidd v. Pearson, 128 U.S. 1 (1888), where the Court reviewed a state statute prohibiting the manufacture of intoxicating liquors within a state. In Kidd, the Court explained the difference between manufacture and commerce: manufacture was the transforming of raw materials into useable goods, while commerce consisted of the buying, selling, and transportation of those goods. Id. at 20. The Court held that even though the manufacturer intended to export the liquor after it was made, the intent of the manufacturer did not determine when the article passed into commerce. Id. at 24. Thus, the state statute was valid because it aimed at only the manufacture of the liquor and did not interfere with the federal government's power to regulate commerce. Id.

48. E.C. Knight, 156 U.S. at 16. Chief Justice Fuller stated that "if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control." Id.

49. Id. This idea of the independent powers of the state serving as a limitation on federal lawmakers is known as "dual federalism." See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 410 (1819) ("In America, the powers of sovereignty are divided between the government of the Union, and those of the States."). Chief Justice Marshall went on to note that, "[The Union and the states] are each sovereign, with respect to the objects committed to it, and neither are sovereign with respect to the objects committed to the other." Id. This notion of dual federalism saw its demise with the Court's shift in 1937. See infra part I.C (describing the Court's shift in 1937 toward approving extensive national lawmakers). Thus, the idea of dual federalism is no longer a constraint on federal lawmakers. See generally Edward S. Corwin, The Passing of Dual Federalism, 36 VA. L. REV. 1 (1950) (recounting the demise of dual federalism); Anne C. Dailey, Federalism and Families, 143 U. PA. L. REV. 1787, 1796-1816 (1995) (remarking on dual federalism's emphasis on localism).

50. E.C. Knight, 156 U.S. at 16-17. According to Chief Justice Fuller, Congress intended the Sherman Antitrust Act to reach contracts and conspiracies to monopolize trade and commerce. Id. at 17. The goal of American, however, was to gain control over the manufacturing of sugar. Id. As long as the company did not try to control interstate commerce to obtain this goal, activities related to monopolizing manufacture were beyond the federal government's reach because they only had an indirect effect on commerce. Id.
The formalistic direct/indirect approach of E.C. Knight, however, was not as suitably applied to the railroads as it had been to the sugar refining industry. Consequently, the Court adopted a more lenient approach which permitted federal regulation of the instrumentalities of interstate commerce. In *The Shreveport Rate Case*, the Court held that the railroads were instruments of interstate commerce and, therefore, Congress maintained the authority to regulate them.

**B. Initial Hostility Toward New Deal Legislation**

During the 1930s, the economic crisis of the Great Depression plagued the nation. To relieve the nation's economic problems, the federal government wielded its commerce power to enact aggressive legislation aimed at reviving the country's depressed economy. Initially, the Court

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51. *See* *The Shreveport Rate Case*, 234 U.S. 342, 351-52 (1914) (adopting a more lenient instrumentalities approach to evaluate the application of the commerce power to the railroad industry).

52. *See id.* (discussing the instrumentalities rationale); United States v. Lopez, 115 S. Ct. 1624, 1636 (1995) (recalling the reasoning behind the instrumentalities approach). Chief Justice Rehnquist noted that congressional regulations on intrastate rates were acceptable "by reason of the interblending of the interstate and intrastate operations of interstate carriers [that] the regulation of interstate rates could not be maintained without restrictions on 'intrastate rates which substantially affect the former.'" *Id.* (quoting *Minnesota Rate Cases*, 230 U.S. 352, 432-33 (1913)).

53. 234 U.S. 342 (1914), *The Shreveport Rate Case* involved a railroad company that established intrastate hauling rates significantly lower than interstate rates. *Id.* at 345. The interstate commerce commission found that the rates discriminated against interstate traffic, and directed the railroad companies to eliminate the disparate rate structures. *Id.* at 347. The railroad companies challenged the order on the ground that Congress did not have the power to control the intrastate rates of an interstate carrier. *Id.* at 350.

54. *Id.* at 351; *see also* The Daniel Ball, 77 U.S. (10 Wall.) 557, 564 (1870) (determining a ship was an instrumentation of commerce and, therefore, federal safety regulations were applicable).

55. FREDERICK E. HOSEN, THE GREAT DEPRESSION AND THE NEW DEAL vii (1992). Nationwide increases in unemployment, a loss in the value of goods and services, and human suffering marked the era of the Great Depression. *Id.* Under President Roosevelt, the federal government attempted to alleviate the national economic crisis through federal legislation. *Id.* at vii-viii. Roosevelt's "New Deal" was a series of federal regulations aimed at improving the national economy in areas such as banking, employment, unemployment, housing, agriculture, transportation, salaries and wages, credit, and insurance. *Id.* at viii. Congress adopted the "affecting commerce" rationale in order to justify federal regulation. NOWAK & ROTUNDA, supra note 1, § 4.9, at 158.

56. *See generally* HOSEN, supra note 55 (detailing the Roosevelt administration's legislative acts aimed at improving the country's economy). President Roosevelt described the New Deal as an era in which the federal government "was going to use affirmative action to bring about its avowed objectives." 2 THE PUBLIC PAPERS OF FRANKLIN D. ROOSEVELT 5 (1938).
applied the formalistic standards of *E.C. Knight* which proved unfavorable to the federal government’s attempts to regulate.  

*A.L.A. Schechter Poultry Corp. v. United States* 58 exemplified the Court’s initial unwillingness to approve extensive federal regulation under the commerce clause. 59 In *Schechter*, the Court invalidated the wage and hour provisions of the National Industrial Recovery Act, and held that Congress only had the authority to regulate activity that directly affected interstate commerce. 60 Because the wages and hours of employees only had an indirect effect on commerce, Congress could not invoke the federal commerce power to regulate wages and hours. 61 Thus, the Court chose *E.C. Knight*’s formalistic standards, and affirmed that it only would uphold federal regulations under the commerce power if the regulated activity had a direct effect on interstate commerce. 62

Maximum hour and minimum wage provisions in coal mines under the National Labor Relations Act also were challenged as an unconstitutional exercise of the commerce power. 63 In *Carter v. Carter Coal Co.*, 64 the Court invalidated the wage and hour provisions of the Act because they regulated the production of coal and not commerce. 65 Thus, *Schechter* and *Carter Coal* rejected the expansive interpretation of the commerce clause adopted in *The Shreveport Rate Case*, and followed the restrictive

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57. See *United States v. E.C. Knight Co.*, 156 U.S. 1, 16-17 (1895) (holding that Congress may only use the commerce clause to regulate activities that have a direct effect on interstate commerce).
59. See id. at 550. *Schechter* involved wage and hour regulations established by the National Industrial Recovery Act (NIRA). *Id.* at 521-22. The NIRA authorized the president to approve codes of fair competition. *Id.* at 521 n.4. The defendant, *Schechter*, challenged the NIRA, asserting that it was not a valid exercise of the commerce power, and the Court agreed. *Id.* at 520. Because *Schechter* only slaughtered and sold poultry to local dealers and butchers, none of *Schechter*’s business involved interstate transactions. *Id.* at 543; see also *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330, 372-74 (1935) (invalidating the Railroad Retirement Act of 1934 as not within the bounds of interstate commerce).
60. *Schechter*, 295 U.S. at 546.
61. *Id.* at 550; see THOMAS I. EMERSON, YOUNG LAWYER FOR THE NEW DEAL: AN INSIDER'S MEMOIR OF THE ROOSEVELT YEARS 26 (1991) (recognizing that the decision in *Schechter* rendered the entire NIRA invalid in part on the basis of commerce).
62. *Schechter*, 295 U.S. at 550. In his concurrence, Justice Cardozo noted, “Activities local in their immediacy do not become interstate and national because of distant repercussions.” *Id.* at 554.
64. 298 U.S. 238 (1936).
65. *Id.* at 304. Production, like manufacture, was a local activity that had only an indirect effect on commerce. *Id.*; see *supra* notes 46-47 (discussing the origin and application of this manufacture/commerce distinction). The direct/indirect distinction was based on “the manner in which the effect has been brought about,” causing one to question “the relation between the activity or condition and the effect?” *Carter Coal*, 298 U.S. at 308.
path paved by *E.C. Knight*. As a result, these holdings thwarted President Roosevelt's attempts to solve the economic crisis through national legislation.

C. The New Commerce Clause Jurisprudence

The Court's stance regarding the federal commerce power dramatically shifted in 1937. During this period, the Court upheld federal regulation

66. See Emerson, *supra* note 61, at 77. Professor Emerson, a young New Deal lawyer for the government, notes that the decision in *Carter Coal*, even more so than the decision in *Schechter*, indicated that the Court would find the National Labor Relations Act unconstitutional. *Id.*

67. To preserve remaining New Deal legislation, President Roosevelt proposed a bill to reorganize the federal judiciary and "pack the Court" with more judges who would allow more federal regulation. Emerson, *supra* note 61, at 83. This bill, more commonly referred to as the Court-packing plan, proposed that:

when any judge of a court of the United States . . . has . . . attained the age of seventy years . . . and within six months thereafter has neither resigned nor retired, the President, for each such judge who has not so resigned or retired, shall nominate and, by the advice and consent of Senate, shall appoint one additional judge to the court to which the former is commissioned . . . [No judge shall] be so appointed if such appointment would result in . . . more than fifteen members of the Supreme Court of the United States . . .

S. 1392, 75th Cong., 1st Sess. § 1 (1937).

When Roosevelt proposed this measure, six justices were over seventy years old; therefore, Roosevelt would have been able to appoint six additional justices, resulting in a fifteen justice Supreme Court bench. Gunther, *supra* note 40, at 122. Reaction to Roosevelt's Court-packing plan was negative, and the Senate emphatically rejected the bill. See S. REP. NO. 711, 75th Cong., 1st Sess. 3 (1937) (Reorganization of the Federal Judiciary, Adverse Report of the Committee on the Judiciary). In a letter to Senator Burton K. Wheeling, Chief Justice Charles Evans Hughes assured the Senator that the Court was "fully abreast of its work" and he maintained that any change in the number of justices to the Court would not promote efficiency. Gunther, *supra* note 40, at 123. Yet, the mere proposal of the bill seemed to impact the Court. Emerson, *supra* note 61, at 87. Many Washington attorneys at the time determined that the decision in *Jones & Laughlin* was the Court's way of protecting itself from Roosevelt's packing plan and aligning the Court's decisions with the spirit of the New Deal era. *Id.* One New Deal attorney recalls a conversation with Justice Benjamin Cardozo regarding Roosevelt's plan, during which Cardozo cautiously agreed that the Supreme Court had "damaged its prestige" and that the Court "did not have the power, political backing, or prestige to survive as an obstacle to . . . irresistible social forces." *Id.* at 84; see infra part I.C.1 (discussing the *Jones & Laughlin* decision).

68. See Cass R. Sunstein, *The Partial Constitution* 40-67 (1993) (surveying the legal revolution of 1937). This shift in the Court's commerce jurisprudence was paralleled by a shift in the Court's stance regarding contract and property rights. *Id.* Professor Sunstein maintains that during the New Deal, the Court abandoned the "status-quo" neutrality that dominated the Court's decisions in the late nineteenth and early twentieth centuries. *Id.* at 40. But see Barry Cushman, *Rethinking the New Deal Court*, 80 Va. L. Rev. 201, 249 (1994) (proposing that the Court's shift in its stance on New Deal legislation was attributable to poorly drafted statutes); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. Pa. L. Rev.
of intrastate activities if the commerce-based regulation: (1) had a substantial economic effect on interstate commerce; 69 (2) could be regulated through the commerce-prohibiting technique; 70 or (3) affected, in the aggregate, interstate commerce. 71 In addition to these rationales, the Court conducted a rational basis review of commerce legislation so that the regulations were valid if the means were rationally related to a legitimate government end. 72

1. The Substantial Economic Effect Rationale

_NLRB v. Jones & Laughlin Steel Corp._ 73 ushered in this new era of national commerce power. For the first time, the Court held that Congress may regulate intrastate activities if those activities had a close and substantial relation to interstate commerce. 74 _Jones & Laughlin_ involved a steel company that violated the National Labor Relations Act (NLRA) by engaging in unfair labor practices. 75 The Court held that Congress could regulate labor relations because the steel industry was organized on a national scale 76 and because the ability of workers to organize and con-

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69. See _NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37-38 (1937) _ (finding that unfair labor practices had a substantial effect on interstate commerce).

70. See _United States v. Darby, 312 U.S. 100, 122 (1941) _ (finding that goods produced under substandard working conditions had a substantial impact on interstate commerce).

71. See _Wickard v. Filburn, 317 U.S. 111, 127-28 (1942) _ (finding consumption of home-grown wheat, in the aggregate, had a substantial impact on commerce).

72. See _Darby, 312 U.S. at 121 _ (employing a rational basis level of review).

73. 301 U.S. 1 (1937).

74. Id. at 37.

75. Id. at 22. The NLRB argued that the steel company used discriminatory hiring practices against union members that interfered with labor organization. Id. The National Labor Relations Act authorized the NLRB to make findings demonstrating the impact of employers' unfair labor practices on commerce and to take steps to prevent those practices. Id. at 23 n.2. The steel company contended that the NLRA was invalid because it used the federal commerce power to regulate local activity. Id. at 29. The steel company argued that the industrial relations and activities of the company involved manufacturing, rather than commerce. Id. at 34; see _supra_ notes 8, 47, & 65 (distinguishing between production and manufacture). Although the steel company employees were engaged in manufacturing, the Court did not find this factor determinative. _Jones & Laughlin, 301 U.S. at 40._

76. _Jones & Laughlin, 301 U.S. at 41._ In this case, Jones & Laughlin was the fourth largest producer of steel in the United States, and had nineteen subsidiaries throughout the country, as well as sales offices in twenty cities. Id. at 26-27. Moreover, Jones & Laughlin Steel was a completely integrated enterprise. Id. Thus, the Court questioned:

When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?
duct collective bargaining, albeit an intrastate activity, had a substantial effect on interstate commerce. By adopting this "close and substantial relation" test, the Court abandoned the direct/indirect test of E.C. Knight and reinvigorated the broader "affecting commerce" rationale developed in Gibbons.

2. The Commerce-Prohibiting Technique

In addition to reinvigorating the broad affecting commerce rationale, the Court also developed a new "commerce-prohibiting" analysis. This commerce-prohibiting technique enhanced Congress's power in two ways. By utilizing the commerce prohibiting technique, Congress could (1) prohibit goods not produced in compliance with federal regulation from entering interstate commerce, and (2) regulate intrastate activity if the activity had a substantial effect on interstate commerce. The Court consistently approved Congress's use of this technique by applying a deferential rational basis standard of review.

In United States v. Darby, the Court upheld wage and hour provisions of the Fair Labor Standards Act (FLSA) as a valid exercise of the federal commerce power. Darby involved the interstate shipment of lumber products that were produced in violation of the minimum wage and maximum hour provisions of the FLSA. The Court held that Congress may...
prohibit goods from entering interstate commerce. Because Congress had plenary power over commerce, the Court held that the federal government could prohibit any article from entering interstate commerce, regardless of the motive and purpose of the regulation.

The Court also asserted that Congress could regulate a purely local activity as a means of regulating interstate commerce. According to the Court, federal wage and hour regulations eliminated substandard working conditions, thereby facilitating fair competition among producers of goods in interstate commerce. The Court conducted a rational basis review and found the regulations an appropriate means to attaining the legitimate end of regulating interstate commerce. Dispensing with the direct relationship test, the Court held that the government merely had to show that goods produced under substandard working conditions would affect commerce.

3. The Aggregate Theory

The development of the affecting commerce rationale culminated in the 1942 case Wickard v. Filburn. In Wickard, the Court extended the affecting commerce rationale to include intrastate activities that, in the

86. Id. at 115-16.
87. Id. The Court noted “regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.” Id.

The Court also expressly overruled Hammer v. Dagenhart, 247 U.S. 251 (1918). Darby, 312 U.S. at 116. Hammer involved a federal law prohibiting the interstate transportation of goods that were produced by child labor. Hammer, 247 U.S. at 252-53. The Hammer Court held that Congress could only prohibit interstate transportation of articles that were inherently harmful. Id. at 271-72. In Darby, however, the Court maintained that Congress could prohibit any goods from entering interstate commerce regardless of whether the goods were inherently harmful. Darby, 312 U.S. at 116.

88. Darby, 312 U.S. at 121. After reaching this conclusion, the Court went on to say that the Tenth Amendment “states but a truism that all is retained [by the states] which has not been surrendered.” Id. at 124. The decision in Darby, therefore, effectively overruled Carter Coal, which signified the last stand of dual federalism. See supra note 49 and accompanying text (discussing dual federalism); New York v. United States, 505 U.S. 144, 156-57 (1992) (“[T]he Tenth Amendment itself . . . is essentially a tautology.”).

89. Darby, 312 U.S. at 122.
90. Id. at 121.

91. Id. at 121-22. Darby also articulated the possibility of the “superbootstrap.” Gunther, supra note 40, at 135-36. Although Congress has no general police power, it does have the power to prohibit noxious items from entering commerce. Darby, 312 U.S. at 121. Because Congress has the ultimate power to prohibit the movement of noxious items (e.g., diseased cattle) it might also have the power to regulate the production of noxious goods without any showing that they affect commerce. See Gunther, supra note 40, at 135-36.

aggregate, affected interstate commerce. The Court held that Congress could reach local activity, such as the production and consumption of wheat, if that activity had a substantial economic effect on interstate commerce. Even though one farmer, considered alone, might have only a trivial impact on the market, his actions, when aggregated with those of other farmers, would have a substantial effect. *Wickard* greatly expanded the reach of the commerce clause, permitting the federal government to regulate those local activities which, in the aggregate, affected interstate commerce. The aggregate theory signalled a return to Chief Justice Marshall's original concept of commerce, and allowed the federal government to reach virtually all intrastate activity. Deriving its authority from this new commerce jurisprudence, Congress could regulate even purely intrastate activities.

D. Modern Applications of the Commerce Power

From 1937 to 1942, the Court continued to apply and expand the affecting commerce rationale, enabling the federal government to regulate almost any intrastate activity. After 1942, the Court continued to extend the commerce power into three general categories: civil rights legisla-
tion,\textsuperscript{99} regulation of activities of state governmental entities,\textsuperscript{100} and federal criminal laws.\textsuperscript{101} The Court consistently deferred to the findings of Congress, and upheld legislation in all three categories.\textsuperscript{102}

\textbf{I. Civil Rights Legislation}

One modern use of the commerce power is exemplified in Title II of the Civil Rights Act of 1964 (the 1964 Act).\textsuperscript{103} The Court validated the constitutionality of the 1964 Act by relying on the affecting commerce rationale, and applying the rational basis test.\textsuperscript{104} The Court also indicated its willingness to uphold federal regulation of purely local activities, \textsuperscript{104}

\begin{itemize}
  \item \textsuperscript{102} See, e.g., Preseault v. ICC, 494 U.S. 1, 17 (1990) (noting the Court's deference to congressional findings in the area of interstate commerce issues); Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 276 (1981) (same); Perez v. United States, 402 U.S. 146, 155-56 (1971) (same); Heart of Atlanta, 379 U.S. at 261-62 (same); Katzenbach, 379 U.S. at 304 (noting that even the absence of formal findings by Congress is not fatal to the validity of the statute).
    \begin{itemize}
      \item All persons shall be entitled to the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
      \item Each of the following establishments which serves the public is a place of public accommodations . . . if its operations affect commerce . . . .
    \end{itemize}
  \end{itemize}

\textit{Id.}

Congress debated whether this piece of social legislation should derive its authority from the Equal Protection Clause of the Fourteenth Amendment or the commerce clause. Joseph G. Cook & John L. Sobieski, Jr., 3 Civil Rights Actions § 15.02, at 15-5 (1996). Congress eventually chose the commerce clause as the source of authority because the Fourteenth Amendment is only applicable to discrimination by state actors, whereas the commerce clause would reach discrimination by private actors. \textit{Id.; see also} Gunther, supra note 40, at 147-51 (discussing the debate between the Kennedy Administration and its critics as to whether the Fourteenth Amendment or the commerce clause should be used as a source of authority). The Court upheld this commerce-based legislation as applied to hotels as well as applied to restaurants. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252-53 (1964) (involving accommodations for transient guests); Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) (involving a local restaurant).

\textsuperscript{104} See Heart of Atlanta, 379 U.S. at 252-53; Katzenbach, 379 U.S. at 303-04.
as long as Congress included findings of how the intrastate activity affected interstate commerce.\footnote{Heart of Atlanta, 379 U.S. at 252. But see Katzenbach, 379 U.S. at 304 (noting that Congress need not always include formal findings). Although Title II of the Act did not contain explicit findings linking discriminatory practices in hotels to interstate commerce, the Court noted that “the record of [the Act’s] ... passage is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce.” Heart of Atlanta, 379 U.S. at 252.}

In *Heart of Atlanta Motel, Inc. v. United States*,\footnote{Id. at 243-44.} the owner of a motel located near an interstate highway challenged the constitutionality of the 1964 Act.\footnote{Id. at 261-62; see supra note 105 (highlighting the Court’s articulation of why no congressional findings were specifically required in the Act). Congressional hearings revealed that racial discrimination in hotels discouraged travel by minorities, and the Court specifically noted that this decrease in travel affected air commerce. Heart of Atlanta, 379 U.S. at 252-53.} The Court deferred to the findings of Congress and upheld the 1964 Act.\footnote{Id. at 252.} The Court agreed with Congress’s finding that racial discrimination in hotels affected interstate commerce, and after applying the rational basis test, determined that the means chosen to eliminate the discrimination were reasonable.\footnote{Heart of Atlanta, 379 U.S. at 241. The practice of racial discrimination by businesses providing transient accommodations discouraged blacks from travelling, and Congress was authorized to remove this obstruction under the commerce power. Id.}

*Katzenbach v. McClung*\footnote{Id. at 294 (1964).} involved application of the 1964 Act to family-owned restaurants.\footnote{Id. at 296.} Once again, the Court found the 1964 Act valid under the rational basis test.\footnote{Id. at 304; see supra notes 106-09 and accompanying text (discussing the Court’s validation of Title II in Heart of Atlanta).} Relying on testimony given at congressional hearings, the Court determined that the practice of racial discrimination at restaurants affected the interstate flow of food.\footnote{Katzenbach, 379 U.S. at 299.} Furthermore, the Court found that Congress’s regulatory scheme was rationally related to the goal of eliminating racial discrimination.\footnote{Id. at 304.}

2. Regulation of Activities of State Entities

When federal commerce regulations interfered with state autonomy, state entities often challenged the regulations on the basis of the Tenth
Amendment or federalism. The Court typically has upheld congressional regulations despite challenges asserting encroachment on state autonomy. Generally, the Court has upheld congressional regulations applicable to the states as long as the regulations do not coerce a state into accepting or administering a federal regulatory scheme.

Garcia v. San Antonio Metropolitan Transit Authority involved employees of a metropolitan transit system who challenged federal wage and overtime regulations as applied to the state transit. First, the Court determined that Congress may impose commercial regulations on a state

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116. See cases cited supra note 115 (validating federal regulations affecting state entities). In United States v. Darby, the Court announced that the Tenth Amendment was "but a truism" thus making it difficult for a state entity to prevail with this rationale. 312 U.S. at 100, 124 (1941); see supra note 49 (discussing the concept of dual federalism and its demise with the pronouncement in Darby).

The Court did, however, temporarily alter its position with the 1976 decision in National League of Cities v. Usery, 426 U.S. 833 (1976), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). In National League of Cities, the Court held that the federal government could not regulate the "States as States," id. at 845, and prohibited federal legislation that would interfere with "traditional governmental functions." Id. at 852. However, the Court soon overruled National League of Cities and developed a new model for protecting state autonomy. Garcia, 469 U.S. at 556-57 (rejecting the traditional government function analysis and determining that the political process and the structure of government sufficiently protect state sovereignty); see infra notes 118-22 and accompanying text (discussing Garcia).

117. See New York v. United States, 505 U.S. 144, 188 (1992) (holding that a state cannot be compelled to carry out a federal regulatory program). The Court noted that the compulsory nature of the "take title" provision was unique to the Low Level Radioactive Waste Act, in that no other federal statute contained such a provision. Id. at 177; see also Nowak & Rotunda, supra note 1, § 4.10, at 171 (asserting that this immunity from federal authority is limited to only those circumstances where a state is compelled to apply a federal regulatory scheme).


119. Id. at 534. The employees asserted that mass transportation was traditionally a function of state government, and therefore, the federal government was without authority to regulate in that area. See id. at 530. In National League of Cities, the Court held that a state is immune from federal regulation which would displace a state's right to administrate in an area of traditional governmental functions. 426 U.S. at 852. The Court in Garcia, however, found this test unworkable and inconsistent with federalism. Garcia, 469 U.S. at 531.
entity without violating the sovereignty of the state, because protecting
the "States as States" against federal regulation was a matter of process
rather than result.120 Second, the Court maintained that the structure
of the federal government itself would further safeguard the role of the
states in the federal system.121 Therefore, no affirmative limits on federal
power, such as the traditional state functions proposition, were
necessary.122

The Court, however, has found it necessary in some instances to pro-
hibit coercive federal regulation of the states.123 In New York v. United
States,124 the Court invalidated a federal regulation because the regula-
tion coerced a state into carrying out a federal regulatory scheme.125

120. Garcia, 469 U.S. at 554. The Court pointed to the states' success in obtaining fed-
eral funding for police and fire services as an example of the states' interests being served
by the political process. Id. at 552-53. The Court also noted the states' ability to secure
exemptions from federal programs as another example of the states exercising their influ-
ence in the political process. Id. at 553. But see John H. Sununu, Evolution and Erosion of
Federal Principles, in Is CONSTITUTIONAL REFORM NECESSARY TO REINVIGORATE FED-
ERALISM?: A ROUNDTABLE DISCUSSION 3, 5 (Advisory Comm'n on Intergovernmental
Relations No. M-154, 1987) (suggesting that the states' ability to obtain federal funding
indicates the abrogation of states' rights).

By leaving the protection of state sovereignty up to the political process, Garcia indi-
crectly reinforces Darby's proposition that the Tenth Amendment is but a truism. See Gar-
cia, 469 U.S. at 574-75 (Powell, J., dissenting).

121. Garcia, 469 U.S. at 550-51. According to the Court, the structure of the federal
government protected the states from Congressional overreaching because the states
played a role in electing the executive and legislative branches of government. Id. at 551.
In addition, the states have influence in the Senate by virtue of the equal representation
guarantee in Article I, § 3 of the Constitution. Id.

122. Id. at 556. The majority noted that no cases required the Court "to identify or
define what affirmative limits the constitutional structure might impose on federal action
affecting the States under the Commerce Clause." Id.

Justice Blackmun, writing for the majority in Garcia, essentially proposed that only ex-
plicitly stated prohibitions serve as limits on substantive grants of power to the federal
government. Vincent Ostrom, Garcia, Constitutional Rule, And The Central-Government
Trap, in FEDERALISM AND THE CONSTITUTION: A SYMPOSIUM ON Garcia 35, 42 (Advisory
Comm'n on Intergovernmental Relations No. M-152, 1987). Under the Constitution, such
prohibitions are relatively few and include those against bills of attainder and ex post facto
laws. Id.; see U.S. CONST. art. I, § 9, cl. 3. Justice Blackmun recognized that the substan-
tive grant of power to regulate commerce is without limit when it includes "anything that
affects or is affected by" interstate commerce. See Ostrom, supra, at 42. According to
Justice Blackmun, no affirmative limits are necessary because the structure of the federal
system is sufficient to protect states' rights. See Garcia, 469 U.S. at 550-51. Critics of the
"Blackmun doctrine" assert that the structure of federal government is an inadequate pro-
tection because the governmental decision-making process is unrepresentative of the elec-
torate and is subject to change by Congress. Ostrom, supra, at 49.

123. See supra note 117 (noting that the holding in New York v. United States is applicable
only to the limited situation in which Congress coerces a state to take action).


125. Id. at 188.
New York concerned a federal law regulating disposal of low-level radioactive waste.\textsuperscript{126} The Court invalidated the "take title" provision of the law which offered states a choice of accepting the waste, or regulating its disposal according to federal standards.\textsuperscript{127} The Court found the take title provision unconstitutional because it coerced the states into complying with the federal regulation.\textsuperscript{128} Thus, even though the Court traditionally has upheld federal laws that are applicable to the states, the Court drew the line where Congress compelled a state to enforce a federal regulatory scheme.\textsuperscript{129}

3. Federal Criminal Legislation

As with civil rights legislation and the regulation of state entities, the Court has upheld federal criminal legislation based on the commerce power.\textsuperscript{130} Federal criminal legislation, however, tends to encroach upon

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  \item \textsuperscript{126} \textit{Id.} at 149.
  \item \textsuperscript{127} \textit{Id.} at 173-76. The Act provided monetary incentives, access incentives, and a take title provision to encourage states to comply with federal regulations and dispose of waste within their borders. \textit{Id.} The "monetary incentives" in the Act permitted states to place a surcharge on waste received from states without disposal sites. \textit{Id.} at 152-53. The "access incentives" in the Act permitted states with waste sites to gradually increase the surcharges on waste received from states without sites and eventually deny those states access. \textit{Id.} at 153. Finally, the "take title" provision of the Act required that if a state did not provide for disposal of its own waste by a specified date, the state would have to take title to the waste and become liable for all damages suffered by the generator of the waste. \textit{Id.} at 153-54. According to the Court, the monetary and access incentives were constitutionally permissible means for the federal government to induce states to regulate. \textit{Id.} at 173-74. The Court found the monetary incentives were constitutionally justified under the commerce clause and the Spending Clause. \textit{Id.} at 173. The access incentives were also a constitutionally permissible exercise of the commerce power. \textit{Id.} at 173-74.
  \item \textsuperscript{128} \textit{Id.} at 174-76. Although the Court held that Congress was prohibited from using this type of coercive regulatory technique, the Court did not specifically state why the provision was invalid. \textit{See id.} at 177. Instead the Court offered two alternatives as to why the provision was invalid: "Whether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution." \textit{Id.; cf.} Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981) (observing with regard to a federal mining statute that "there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.").
  \item \textsuperscript{129} \textit{But see} Evan H. Caminker, \textit{State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?}, 95 \textsc{Colum. L. Rev.} 1001 (1995) (criticizing the majority opinion of \textit{New York v. United States} and offering justifications for coercing a state).
  \item \textsuperscript{130} \textit{See} Perez v. United States, 402 U.S. 146, 157 (1971) (upholding the Consumer Credit Protection Act as within the federal commerce power).
\end{itemize}
the state's traditional autonomy in regulating local crime.\textsuperscript{131} Thus, the Court has always demanded a clear statement of Congress's intent to alter the federal-state balance before it would uphold a statute expanding federal criminal jurisdiction.\textsuperscript{132}

Nevertheless, in \textit{Perez v. United States},\textsuperscript{133} the Court expanded federal criminal jurisdiction to reach intrastate loansharking.\textsuperscript{134} \textit{Perez} involved a man convicted under the Consumer Credit Protection Act who challenged the Act's constitutionality.\textsuperscript{135} The Court upheld the Act as a valid exercise of the commerce power, reasoning that Congress can regulate a class of activities as long as that class has a substantial effect on interstate commerce.\textsuperscript{136} Thus, Congress may regulate a class of intrastate activities without a particular demonstration of the intrastate activity's effect on commerce.\textsuperscript{137} Relying on the legislative history of the Act, the Court found that intrastate loansharking was a class of activities that Congress

\begin{footnotesize}
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\item \textsuperscript{131} See Brecht v. Abrahamson, 507 U.S. 619, 635 (1993) (holding that states possess authority for defining and enforcing criminal law); Screws v. United States, 325 U.S. 91, 109 (1945) (supporting the proposition that states should administer criminal justice).
\item \textsuperscript{132} United States v. Five Gambling Devices, 346 U.S. 441, 450 (1953) (plurality opinion) ("[W]e must assume that the implications and limitations of our federal system constitute a major premise of all congressional legislation . . ."); FTC v. Bunte Bros., Inc., 312 U.S. 349, 355 (1941) (requiring a clear manifestation of Congress's intention before the Court will construe a statute broadly); Apex Hosiery Co. v. Leader, 310 U.S. 469, 513 (1940) ("An intention to disturb the balance is not lightly to be imputed to Congress."). Through narrow statutory interpretation, the Court has rejected the government's efforts to use ambiguous federal statutes to regulate areas such as local crime. See, e.g., United States v. Enmons, 410 U.S. 396, 411 (1973) (interpreting the language in the Hobbs Act narrowly); Rewis v. United States, 401 U.S. 808, 812 (1971) (interpreting language in the Travel Act narrowly); United States v. Bass, 404 U.S. 336, 351 (1971) (interpreting the language of § 1202(a)(1) of the Omnibus Crime Control Act narrowly); \textit{Five Gambling Devices}, 346 U.S. at 450 (plurality opinion) (interpreting the language of the Gambling Devices Act narrowly).
\item \textsuperscript{133} 402 U.S. 146 (1971).
\item \textsuperscript{134} \textit{Id.} at 156-57.
\item \textsuperscript{135} \textit{Id.} at 149.
\item \textsuperscript{136} \textit{Id.} at 154; see also United States v. Darby, 312 U.S. 100 (1941) (regulating, as a class of activities, the employment of workers producing goods for interstate commerce). In \textit{Darby}, the Court declared that, "In passing on the validity of legislation of the class . . . the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power." \textit{Id.} at 120-21; see also Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252-53 (1964) (validating Congress's use of the federal commerce power to regulate, as another class of activities, the provision of public accommodations for transient guests); Katzenbach v. McClung, 379 U.S. 294, 304-05 (1964) (upholding Title II of Civil Rights Act of 1964 because it regulated a class of activities affecting interstate commerce—serving interstate travellers or serving food that has moved in interstate commerce).
\item \textsuperscript{137} \textit{Perez}, 402 U.S. at 156.
\end{itemize}
\end{footnotesize}
could regulate because it affected interstate commerce by financing organized crime, and by causing the takeover of legitimate businesses.\textsuperscript{138}

In other instances, the Court has been less willing to expand the commerce power to validate federal criminal legislation.\textsuperscript{139} In \textit{United States v. Bass},\textsuperscript{140} the Court interpreted a statute narrowly to avoid addressing potential constitutional issues.\textsuperscript{141} \textit{Bass} concerned a defendant convicted under a federal statute imposing criminal sanctions on any felon who received, possessed, or transported a firearm in commerce.\textsuperscript{142} The Court explained that the statute was not clear as to whether the words "in commerce or affecting commerce" applied exclusively to the transportation of the firearm, or whether the words also applied to the receiving and possessing of the firearm.\textsuperscript{143} By interpreting the statute narrowly, the Court avoided the constitutional question of whether Congress could regulate the possession of firearms without showing how possession related to interstate commerce.\textsuperscript{144} The Court noted that the statute was ambiguous

\begin{itemize}
\item \textsuperscript{138} \textit{Id.} at 156-57.
\item \textsuperscript{139} \textit{See} \textit{United States v. Five Gambling Devices}, 346 U.S. 441 (1953) (plurality opinion). In \textit{Five Gambling Devices}, the Court narrowly interpreted a federal statute that prohibited the shipment of gambling machines in interstate commerce. \textit{Id.} at 452. The statute contained reporting requirements that applied to every manufacturer and dealer of gambling devices. \textit{Id.} at 443. However, the reporting requirements in the statute applied to all manufacturers and dealers, not just to those who were connected with interstate commerce. \textit{Id.} at 444. According to the Court, this lack of a nexus between interstate commerce and the person required to report raised doubts about the constitutionality of the legislation. \textit{See id.} at 446. Conceivably, under this statute, a manufacturer or dealer could be required to report information even though the person had no connection with interstate commerce. \textit{See id.} at 444.
\item The Court affirmed the lower court's dismissal on statutory grounds, thereby avoiding the constitutional problems of the statute. \textit{Id.} at 452. The Court referred to previous holdings to defend its position: "The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative." \textit{Id.} at 448. The dissent asserted that the statutory language was clear and left no reasonable alternative but to address the constitutional issues. \textit{Id.} at 454 (Clark, J., dissenting).
\item \textit{Id.} at 351; \textit{see also} \textit{United States v. Enmons}, 410 U.S. 396, 411 (1973) (narrowly interpreting a federal statute to avoid constitutional issues); \textit{Rewis v. United States}, 401 U.S. 808, 812 (1971) (same). \textit{But see Scarbrough v. United States}, 431 U.S. 563, 577 (1977) (interpreting the federal firearms statute involved in \textit{Bass} broadly once the government had demonstrated a minimal connection between possession and interstate commerce).
\item \textit{Bass}, 404 U.S. at 337. The statute provided criminal sanctions for felons "who receiv[ed], possess[ed], or transport[ed] in commerce or affecting a commerce . . . any firearm." 18 U.S.C. § 1202(a) (1994).
\item \textit{Bass}, 404 U.S. at 347.
\item \textit{Id.} at 347-48. The Court recognized the ambiguous construction of the statute and decided to "adopt the narrower reading: the phrase 'in commerce or affecting commerce' is
and demanded that Congress convey its purpose clearly where the statute involves shifting the federal-state balance.145

II. FINDING THE GUN-FREE SCHOOL ZONES ACT BEYOND THE LIMITS: UNITED STATES V. LOPEZ

In United States v. Lopez,146 the Respondent, Lopez, was charged with violating the Gun-Free School Zones Act, a federal statute making it unlawful to knowingly possess a firearm within 1,000 feet of a school zone.147 The United States District Court for the Western District of Texas upheld the Act and found that guns near schools affected the business part of all three offenses, and the present conviction must be set aside because the Government has failed to show the requisite nexus with interstate commerce.” Id. at 347.

145. Id. at 347-49. The Court maintained “unless Congress conveys its purpose clearly, [the statute] will not be deemed to have significantly changed the federal-state balance.” Id. at 349.

146. 115 S. Ct. 1624 (1995); see supra note 15 and accompanying text (recounting the facts of Lopez).


(q)(1) The Congress finds and declares that—
(A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;
(B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;
(C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings . . .
(D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;
(E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;
(F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;
(G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;
(H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves; even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and
(I) Congress has power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation’s schools by enactment of this subsection.
ness of education, which in turn affected commerce.\textsuperscript{148} The United States Court of Appeals for the Fifth Circuit invalidated the Act, finding no rational basis for a connection between guns in school zones and interstate commerce.\textsuperscript{149} The government appealed to the Supreme Court which affirmed the Fifth Circuit's holding in a five to four decision.\textsuperscript{150}

A. The Majority Opinion: Distinguishing Commercial and Noncommercial Activities

After reviewing the Gun-Free School Zones Act, the Court determined that it was not a valid exercise of the federal commerce power.\textsuperscript{151} The Court identified the three general categories in which Congress historically has been permitted to exercise its commerce power: (1) regulation of the use of the channels of interstate commerce,\textsuperscript{152} (2) regulation of the instrumentalities of interstate commerce,\textsuperscript{153} and (3) regulation of activities having a substantial effect on interstate commerce.\textsuperscript{154} According to

\textsuperscript{2}(A) It shall be unlawful for any individual to knowingly possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.


Although Congress amended the statute to include findings linking guns in school zones to interstate commerce, the government did not rely on these findings "as a substitute for findings in the first instance." Lopez, 115 S. Ct. at 1632 n.4. Yet, the government did argue that these findings "indicate that reasons can be identified for why Congress wanted to regulate this particular activity." \textit{Id.} (quoting the transcript of oral argument).

The appellate court judge noted the statute as written originally:

makes it a federal offense to carry an unloaded firearm in an unlocked suitcase on a public sidewalk in front of one's residence, so long as that part of the sidewalk is within one thousand feet—two or three city blocks—of the boundary of the grounds of any public or private school anywhere in the United States, regardless of whether it is during the school year or the school is in session.


\textsuperscript{148} Lopez, 115 S. Ct. at 1626.

\textsuperscript{149} Lopez, 2 F.3d at 1366-68.

\textsuperscript{150} Lopez, 115 S. Ct. at 1634.

\textsuperscript{151} Id. at 1630-34.

\textsuperscript{152} Id. (citing United States v. Darby, 312 U.S. 100, 114 (1941); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964)).

\textsuperscript{153} Id. at 1629; \textit{see also} The Shreveport Rate Case, 234 U.S. 342, 351 (1914) (discussing the instrumentalities rationale).

\textsuperscript{154} Lopez, 115 S. Ct. at 1629-30; \textit{see also} NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (discussing the substantial effects test); Charles Fried, \textit{Forward: Revolutions?}, 109 \textsc{Harv. L. Rev.} 13, 40 (1995) (proposing that this third category of regulation involves economic conceptualization more so than the other two categories).
the Court, in order to be sustained, this statute had to fall under the third category, as it did not qualify under the first or second.  

The Court admitted that the case law has been unclear regarding whether an activity must merely "affect" or "substantially affect" commerce. After reviewing the history of the commerce clause, the Court concluded that prior case law dictated that an activity must substantially affect commerce. In addition, the majority recognized that the Court always has placed limits on the commerce power. Because this Act extended beyond those limits, the majority refused to sustain it. First, the Court noted that section 922(q), which prohibited possession of a firearm within 1,000 feet of a school zone, was not a regulation of commercial activity. Thus, the Act could not be upheld under prior case law

155. Lopez, 115 S. Ct. at 1630. The Court determined that § 922(q) did not fall into either of the first two categories because it did not attempt to regulate the channels of interstate commerce nor did it attempt to protect an instrumentality of interstate commerce. Id.

156. Id. Compare Preseault v. ICC, 494 U.S. 1, 17 (1990) (stating that the Court must defer to a congressional finding that a regulated activity affects interstate commerce as long as there is any rational basis for the finding) with Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968) (stating that Congress may not use a trivial impact on commerce to justify a general regulation unless the activity bears a "substantial relation" to commerce).

157. Lopez, 115 S. Ct. at 1630; see, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 280 (1981) (finding that intrastate coal mining has a substantial effect on interstate commerce); Perez v. United States, 402 U.S. 146, 156-57 (1971) (finding that intrastate loansharking has a substantial effect on interstate commerce); Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (finding that restaurants serving large amounts of food that have moved in interstate commerce have a substantial effect on interstate commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (finding that the operation of a motel serving interstate travellers has a substantial effect on interstate commerce); Wickard v. Filburn, 317 U.S. 111, 127-29 (1942) (finding that production and consumption of home-grown wheat, in the aggregate, has a substantial effect on interstate commerce).

Concurring in Hodel, Chief Justice Burger indicated his support for the "substantially affects" test: "we often seem to forget the doctrine that laws enacted by Congress under the Commerce Clause must be based on a substantial effect on interstate commerce." Hodel, 452 U.S. at 305 (Burger, C.J., concurring).

158. Lopez, 115 S. Ct. at 1628-29. The Court referred to its warning in Jones & Laughlin that extending the commerce clause to activities having an indirect and remote effect on interstate commerce would create a completely centralized government. Id. The Court also cited its decision in Maryland v. Wirtz which similarly recognized that Congress cannot use a trivial impact on commerce as a justification for regulating state activities. Id. at 1629 (citing Wirtz, 392 U.S. at 196 n.27).

159. Id. at 1630-34; see also discussion infra note 222 and accompanying text (observing the majority's determination in Lopez that the Gun-Free School Zones Act went beyond the scope of the commerce power).

160. Lopez, 115 S. Ct. at 1626. The Court distinguished between commercial and non-commercial activity. Id. at 1630-31. The channels of interstate commerce, the instrumentalties of interstate commerce, and commercial activities that have a substantial effect on commerce are within the reach of the federal commerce power. Id. at 1629-30. For the
that permitted federal regulation of intrastate commercial activities substantially affecting interstate commerce.\footnote{161}

Second, the Court recognized that the Act lacked a jurisdictional element.\footnote{162} The Act simply banned gun possession within 1,000 feet of a school zone generally, omitting a requirement that a nexus exist between the possession and interstate commerce.\footnote{163} According to the majority, a jurisdictional element would have allowed a case-by-case inquiry to determine whether each particular firearm possession in a school zone actually affected interstate commerce.\footnote{164} Because possession of a firearm did not have an obvious connection with commercial activity, a jurisdictional element would have validated the Act by limiting its reach to only those firearm possessions with the requisite interstate nexus.\footnote{165} The majority noted that, in this case, making a determination about the requisite inter-

\footnote{161}{Id. at 1631. The majority commented, "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect interstate commerce." Id. at 1634; cf. Wickard v. Filburn, 317 U.S. 111, 127-29 (1942) (holding that home-grown and home-consumed wheat, in the aggregate, substantially affects the interstate wheat market). The Court noted that \textit{Wickard} involved the wheat market, an economic enterprise, whereas \textit{Lopez} involved gun possession, which is in no sense an economic activity or enterprise. \textit{Lopez}, 115 S. Ct. at 1630-31.}

\footnote{162}{\textit{Lopez}, 115 S. Ct. at 1631. An appropriate jurisdictional element would have required a showing that each case of gun possession was in some way connected with or affected interstate commerce. See United States v. Bass, 404 U.S. 336, 337 (1971) (involving a statute that contained a jurisdictional element). The statute in \textit{Bass}, for instance, contained a jurisdictional element requiring a showing that the possession, receipt, or transportation of a firearm was in or affecting commerce. Id. The Court in \textit{Bass} refused to address the constitutional issue of whether this jurisdictional element was sufficient to justify using the commerce power because the statute was constructed ambiguously. Id. at 346-47; see supra notes 143-45 and accompanying text (discussing the Court's treatment of the statute in \textit{Bass}).}

\footnote{163}{\textit{Lopez}, 115 S. Ct. 1631-32; see Kelly G. Black, Note, \textit{Removing Intrastate Lawsuits: The Affecting-Commerce Argument After United States v. Lopez}, 1995 B.Y.U. L. Rev. 1103, 1130 (describing jurisdictional elements and noting that such jurisdictional elements require the government to prove specified facts illustrating authority over the persons or subject matter involved in the proceeding). A jurisdictional element would ensure that a statute regulating a class of activities only regulated those instances in which the activity possessed the requisite nexus with interstate commerce. Black, \textit{supra}, at 1130.}

\footnote{164}{\textit{Lopez}, 115 S. Ct. at 1631. Nothing in the record indicated that Alfonso Lopez, a local student attending a local school, had recently moved in interstate commerce nor had any ties with interstate commerce. Id. at 1634. Nothing in the statute, moreover, required such a showing. Id.}

\footnote{165}{Id. at 1631. The Court refused to rely on previous congressional findings to justify the statute because earlier findings would not address the specific subject matter of § 922(q). Id. at 1632.}
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state nexus was not possible because the Act lacked any legislative findings.\(^\text{166}\)

Thus, the Court rejected the government’s general argument that possession of guns in school zones substantially affects interstate commerce.\(^\text{167}\) The government made two assertions regarding the effect that guns in school zones had on commerce: the “costs of crime” rationale\(^\text{168}\) and the “national productivity” rationale.\(^\text{169}\) Under a “costs of crime” rationale, the federal government could regulate virtually all activities no matter how remote their effect on interstate commerce.\(^\text{170}\) Under the “national productivity” rationale, Congress’s reach would extend to the economic productivity of individual citizens.\(^\text{171}\) The majority, however, refused to accept either justification, noting that the connection between gun possession in a school zone and interstate commerce was too tenuous.\(^\text{172}\) The majority reasoned that accepting either rationale would transform the commerce clause into a general federal police power.\(^\text{173}\)

\(^{166}\) Id. at 1631-32. Legislative findings on how possession of a firearm in a school zone affects interstate commerce could have been used in assessing the constitutionality of the statute. Id. Indeed, Congress is not required to make formal findings as to the substantial burdens an activity has on interstate commerce, however, in the absence of any such findings, the majority could not conduct a rational basis review. Id.

\(^{167}\) Id. at 1630-32.

\(^{168}\) Id. at 1632. Under this line of reasoning, the government maintained that the substantial costs of violent crime are spread throughout the country by the mechanism of insurance. Id. The government also posited that the substantial costs of violent crime reduce interstate travel in those areas perceived to be dangerous. Id.

\(^{169}\) Id. Under this line of reasoning, the government claimed that the presence of guns threatens education which produces a “less productive citizenry,” ultimately damaging the nation’s economy. Id.

\(^{170}\) Id. at 1632.

\(^{171}\) Id.

\(^{172}\) Id. at 1632-34. The majority remarked, “To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” Id. at 1634.

\(^{173}\) Id. at 1634. See generally NOWAK & ROTUNDA, supra note 1 (commenting on the federal government’s lack of a general police power).

The majority also addressed several points that Justice Breyer made in his dissent. Lopez, 115 S. Ct. at 1632-33. First, the majority highlighted Justice Breyer’s failure to present any examples of an activity that would be beyond the federal government’s reach if these theories were accepted. Id. The majority asserted that Justice Breyer’s rationale would permit the federal government to regulate family law (i.e., marriage, divorce, and child custody) and education. Id. at 1632. Furthermore, the majority speculated that if the federal government could regulate activities that affect the learning environment then, in a logical progression, the government also could regulate the educational process directly. Id. at 1633. In addition, the majority acknowledged Justice Breyer’s criticism that drawing a line between commercial and noncommercial activities creates legal uncertainty. Id. at 1633. The majority conceded that this distinction would create legal uncertainty; however, the majority also insisted that this legal uncertainty always will exist under the Constitu-
B. The Concurrences: Concerns With Maintaining the Federal Balance and the Original Meaning of the Commerce Clause

1. Justice Kennedy's Concurrence

Justice Kennedy, joined by Justice O'Connor, wrote separately to emphasize why the Court, in light of sixty years of expansive commerce clause jurisprudence, refused to uphold this exercise of the government's commerce power. Justice Kennedy remarked that this limited holding was necessary because the Act upset the federal balance to such a degree that it was an invalid exercise of the federal commerce power. After tracing the evolution of the commerce clause, Justice Kennedy accepted the majority's distinction between commercial and noncommercial activities. He also recognized that the Court and the legal system have a substantial interest in the stability of commerce clause jurisprudence, but he maintained that this interest in stability does not foreclose the Court from reviewing congressional action in those cases where the action alters the federal-state balance.

Although the Court's role in preserving the federal balance is attenuated, Justice Kennedy insisted that the Court is compelled to intervene
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in those cases where the federal government's regulation diminishes political accountability\(^{180}\) and where the regulation interferes with traditional state concerns.\(^{181}\) Justice Kennedy remarked that federal regulation of noncommercial intrastate activities, traditionally a state concern, creates uncertainty regarding political accountability.\(^{182}\) When the federal government begins to encroach upon areas of traditional state concern, the electorate is unsure of which level of government to hold accountable.\(^{183}\)

Justice Kennedy also noted that in addition to reducing political accountability, federal intrusion into areas of traditional state concern prevents states from experimenting with various solutions to their internal problems.\(^{184}\) Such experimentation permits a state to fashion its own regulations and sanctions.\(^{185}\) According to Justice Kennedy, gun possession in a school zone lacked the essential nexus to commercial activity necessary to invoke the federal commerce power;\(^{186}\) thus, the Act disrupted the federal balance and the Court was compelled to intervene.\(^{187}\)

2. **Justice Thomas's Concurrence**

In a separate concurrence, Justice Thomas chronicled the Court's dramatic deviation from the original meaning of the commerce clause to emphasize the necessity of fashioning a more coherent and limited inter-

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181. *Id.* at 1640.
182. *Id.* at 1638. Justice Kennedy maintained that noncommercial intrastate activities traditionally are left to the states, and federal intrusion into this realm of state authority would cause political responsibility to become illusory. *Id.*
183. *Id.*
184. *Id.* at 1641.
185. *Id.* Justice Kennedy asserted that education is clearly a traditional concern of the state. *Id.* at 1640. Therefore, because of the state's "claim [to control education] by right of history and expertise," the state is the appropriate level of government to regulate the safety of schools. *Id.* at 1641.
186. *Id.* at 1642.
187. *Id.*
pretation of the clause. Focusing on the Founding Fathers' view that activities such as agriculture and manufacture were separate from commerce and that commerce included sale and transport but not business in general, Justice Thomas submitted that "commerce" demands a more narrow definition. Accordingly, he maintained that the Founders did not intend that the commerce power reach every activity substantially affecting commerce because that interpretation would render the rest of the enumerated powers superfluous.

To support his originalist interpretation of the Constitution, Justice Thomas criticized Justice Breyer's reading of *Gibbons v. Ogden*. First, Justice Thomas asserted that the dissent's notion of the federal government regulating any activity affecting commerce was incorrect. Rather, he noted that the inclusion of the "affects" language in *Gibbons* was intended only to clarify the intrastate/interstate distinction. He asserted that this language merely explained that an activity must affect commerce to be included under the commerce power—not that every activity that affects commerce could be regulated. Second, Justice Thomas argued that *Gibbons* did not purport to give the federal government control over matters Congress deemed national. Justice Thomas, instead, read *Gibbons* as a refusal to allow Congress to regulate the states generally.

Justice Thomas also highlighted the deficiencies in the substantially affects test espoused in Chief Justice Rehnquist's opinion. Insisting that

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188. *Id.* at 1642-43 (Thomas, J., concurring). Justice Thomas proposed that the substantially affects test should be reconsidered in future cases. *Id.*

189. *Id.* at 1643. Justice Thomas noted that during the time of ratification, commerce consisted of selling, buying, bartering, and transporting, rather than production or manufacturing. *Id.*; see *supra* note 2 (detailing the various contexts in which the word commerce was used synonymously with the term trade).


191. *Id.* at 1644. Justice Thomas noted that under the substantially affects test, other enumerated powers over activities such as enacting bankruptcy laws, standardizing weights and measures, establishing post offices, and granting patents and copyrights would be "surplusage." *Id.* He also claimed that if a substantially affects rationale can be attached to the commerce power then it also could be attached to every other enumerated power. *Id.*

192. *Id.* at 1646 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

193. *Id.* at 1647.

194. *Id.*

195. *Id.*

196. *Id.* at 1648; see *Perez v. United States*, 402 U.S. 146, 157 (1971) (Stewart, J., dissenting) (commenting on "national" crime). Like Justice Thomas, Justice Stewart maintained that labeling an intrastate activity, specifically crime, as a "national" problem was not enough to justify invocation of the federal commerce power. *Id.* at 157. According to Justice Stewart, "all crime is a national problem." *Id.*


198. *Id.* at 1649.
the substantially affects test grants the federal government a police power, Justice Thomas explained that such a grant would give Congress unlimited authority to regulate any activity.\textsuperscript{199} Once again, he asserted that this flaw in the substantial effects test demonstrated how far current commerce clause jurisprudence has deviated from the Founders' original intentions, and he maintained that, in light of this deviation, the majority's decision is not as "radical" as the dissent suggested.\textsuperscript{200}

C. The Dissenters: Insisting that the Gun-Free School Zones Act Passes the Rational Basis Test

Justices Breyer, Stevens,\textsuperscript{201} Souter,\textsuperscript{202} and Ginsburg dissented and

\textsuperscript{199} Id. at 1649-50. Justice Thomas specifically cited the aggregate theory espoused in \textit{Wickard} to demonstrate that the substantial effects test "has no stopping point." \textit{Id.}

\textsuperscript{200} Id.

\textsuperscript{201} Justice Stevens joined Justice Breyer's dissent but also submitted his own brief dissent. \textit{Id.} at 1651, 1657. In his own dissent, Justice Stevens commented on Congress's power to regulate firearms. \textit{Id.} at 1651. According to Justice Stevens, firearm possession is a consequence of commercial activity. \textit{Id.} He maintained further that guns are articles of commerce and may restrain commerce; therefore, Congress, through the commerce clause, has the authority to regulate firearms possession at any location. \textit{Id.}

\textsuperscript{202} In addition to joining Justice Breyer's dissent, Justice Souter submitted his own dissent emphasizing judicial restraint. \textit{Id.} at 1651, 1657 (Souter, J., dissenting). Justice Souter attacked assertions in both the majority's opinion and in Justice Kennedy's concurrence. \textit{Id.} at 1653-57. Regarding the majority's commercial/noncommercial distinction, Justice Souter warned that this classification resembles the defunct direct/indirect test. \textit{Id.} at 1653-54 (Souter, J., dissenting). According to Justice Souter, qualifying the rational basis test with classifications such as direct/indirect and commercial/noncommercial is unworkable. \textit{Id.} at 1654. In order to refute the majority's claim that the connection between gun possession and commerce is remote, Justice Souter pointed out the implications of an illiterate nation on commerce. \textit{Id.} He recognized that perhaps the federal government should not be involved in education, but an uneducated populous certainly has an effect on commerce. \textit{Id.} In response to Justice Kennedy's focus on traditional state concerns, Justice Souter reminded his fellow Justices that "the notion that the commerce power diminishes the closer it gets to customary state concerns" was renounced recently. \textit{Id.; see} Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (discarding the traditional governmental functions rationale); \textit{supra} notes 118-22 and accompanying text (discussing the \textit{Garcia} decision).

Justice Souter also addressed the majority's concern about the lack of congressional findings. \textit{Lopez}, 115 S. Ct. at 1655-57. According to Justice Souter, requiring the legislature to make specific findings implies judicial authority to review the wisdom of congressional decisions. \textit{Id.} Instead, Justice Souter maintained that the well-settled commerce clause jurisprudence of the past sixty years only requires the Court to determine whether Congress acted "within the realm of reason." \textit{Id.} at 1656. Finally, Justice Souter insisted that this holding should be viewed as a "misstep" from traditional interpretation. \textit{Id.} at 1657. However, Justice Souter also offered a caveat: "Not every epochal case has come in epochal trappings." \textit{Id.} In other words, although the decision in this case was only a misstep, it has the potential to alter a well-settled area of the law. \textit{But see} Joan Biskupic, \textit{Justices Shift Federal-State Power Balance: Rehnquist-Led Majority Determined to Restrict Washington's Authority}, WASH. POST, Mar. 29, 1996, at A1, A6 (quoting University of California,
found that the Act passed the rational basis test. Justice Breyer recounted the three basic principles of commerce clause interpretation. First, an activity must have a significant effect on commerce. Second, when a local activity standing alone does not have a significant effect on commerce, Congress still may regulate the activity if it has an effect on commerce in the aggregate. Third, the Court is required to afford Congress a high degree of deference by using a rational basis level of review.

Applying the rational basis test, Justice Breyer concluded that the Act clearly satisfied rational basis review. He reasoned that guns in schools undermine the quality of education and ultimately produce uneducated workers. As a result, this uneducated workforce deprives communities and businesses of the ability to compete successfully in interstate commerce. Justice Breyer proposed that upholding the Act would not imply an expansion of the commerce power; instead, "it simply would apply preexisting law to changing economic circumstances.

Berkeley's Professor Jesse H. Choper. Professor Choper commented, "Is the Court going back to the [early] New Deal era and beginning to strike down gobs of federal legislation . . . ? No. But is this a major qualification in the attitude since the New Deal? Yes." Id. (emphasis added).

203. Lopez, 115 S. Ct. at 1657 (Breyer, J., dissenting).
204. Id. Justice Breyer noted that he chose the word "significantly" over "substantially" because the latter implies a narrower definition than recent precedent. Id.
205. Id. at 1658; see supra notes 92-96 and accompanying text (explaining the aggregate effects rationale adopted in Wickard); cf. supra note 161 (noting Chief Justice Rehnquist's opinion distinguishing the noncommercial activity in Lopez from the commercial activity in Wickard).
206. Lopez, 115 S. Ct. at 1658 (Breyer, J., dissenting). Justice Breyer asserted the empirical judgment of whether a regulated activity affects interstate commerce is better left to the legislature than the courts. Id. He noted, "[T]he Constitution requires us to judge the connection between regulated activity and interstate commerce, not directly, but at one remove." Id. But cf. Lopez, 115 S. Ct. at 1631 (recognizing the Court's duty to consider legislative findings).
207. Id. at 1659 (Breyer, J., dissenting).
208. Id. at 1659-61.
209. Id. Justice Breyer cited increasing competition in the global economy to illustrate the importance of education as related to business. Id. at 1660. Attributing the decline in worker productivity to inadequate education, Justice Breyer maintained that Congress could have concluded that uneducated workers may jeopardize the country's "standing in the international marketplace." Id. Further illustrating the interconnectedness of education and business, Justice Breyer noted that businesses today are involved in structuring the agenda of our nation's classrooms. Id. at 1661.
210. Id. at 1662. Gun-related violence, especially near schools, has a definite impact on the nation's economy, and the Court always has permitted Congress to regulate according to these "economic . . . realities" and "national needs." Id. at 1662-63 (quoting North Am. Co. v. SEC, 327 U.S. 686, 705 (1946)).
Justice Breyer also criticized the legal problems implicated in the majority's determination that the statute was not supported by the commerce clause. First, Justice Breyer argued that the decision was inconsistent with several cases that approved Congress's exercise of the commerce power where the interstate nexus was less significant than the impact of guns and school violence on commerce. Second, Justice Breyer argued that the decision incorrectly distinguished between commercial and noncommercial activity, thereby ignoring previous warnings of the Court. In Perez, McClung, and Wickard, the Court did not base its holding on the economic nature of the activity involved, but on the effect the activity had on interstate commerce. According to Justice Breyer, history has proven that focusing on the economic nature of an activity is unworkable. Finally, Justice Breyer contended that the decision created legal uncertainty, in that, before this decision, Congress could confidently enact federal criminal laws under the commerce power. This uncertainty, Justice Breyer argued, would effectively thwart federal criminal legislation, thereby undermining the nation's economic and social well-being.

III. United States v. Lopez: An Epochal Decision?

A. Respecting the Present State of Commerce Clause Jurisprudence

For the Court to invalidate the Gun-Free School Zones Act, the majority did not drastically alter commerce clause jurisprudence; in fact, the majority accepted the general categories of commerce regulation and affirmed the rational basis level of review. The majority accurately

211. Id. at 1662-65.
212. Id. at 1662-63 (citing Perez v. United States, 402 U.S. 146 (1971); Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942)).
213. Lopez, 115 S. Ct. at 1663-64 (Breyer, J., dissenting).
214. Id. According to Justice Breyer, in Perez the activity was use of force (in credit transactions) and in McClung, the activity was race based exclusion—neither activity being commercial in nature. Id.
215. Id. at 1664. Justice Breyer commented that such a distinction would be nearly impossible to make. Id. Teaching reading, writing, and arithmetic skills, for instance, serves social as well as commercial purposes. Id.
216. Id. at 1664-65.
217. Id. at 1664.
218. Id. at 1665.
219. Lopez, 115 S. Ct. at 1630-31; see Epstein, supra note 177, at 174 (maintaining that Chief Justice Rehnquist carefully surveyed the history of commerce jurisprudence to coincide with his opinion in Lopez).
220. Lopez, 115 S. Ct. at 1629; cf. Epstein, supra note 177, at 177 (proposing that Lopez marks a shift to intermediate scrutiny). According to Professor Epstein, Chief Justice Rehnquist's choice of the phrase "we . . . consider" legislative findings indicates that the Court is not "bound" by the findings. Id. (citing Lopez, 115 S. Ct. at 1631).
pointed out that each decision expanding the scope of the commerce clause recognized that the commerce power is limited. As such, the Lopez decision is not a deviation from the Court's prior holdings but rather an invalidation of a statute that simply exceeded those limits.

Although the Court has never required Congress to make formal findings, the Court has always demanded a clear statement of Congress's intentions, especially in those cases where the application of the commerce power was tenuous. In the Gun-Free School Zones Act, however, Congress neglected to articulate any statement linking the possession of guns in school zones with interstate commerce; in fact, the Act did not even contain the word commerce, making it impossible for the Court to determine whether Congress had a rational basis for enacting the law.

221. Lopez, 115 S. Ct. at 1628-29; see, e.g., Katzenbach v. McClung, 379 U.S. 294, 303 (1964) (stating that "[o]f course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court."); Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968) (recognizing that "[n]either here nor in Wickard has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."); see also Laurence H. Tribe, American Constitutional Law 313 (2d ed. 1988) (maintaining that the commerce power is also subject to limits such as the Bill of Rights).

222. See Jay M. Cohen & David J. Fried, United States v. Lopez and the Federalization of Criminal Law, 29 PROSECUTOR 23 (1995) (concluding that the Court's decision in Lopez represents merely an example of a federal law that went beyond the limits of the commerce power); Fried, supra note 154, at 37 (maintaining that "the Court both adhered to and refreshed tradition" in the Lopez decision); cf. Stephen M. McJohn, The Impact of United States v. Lopez: The New Hybrid Commerce Clause, 34 DUQ. L. REV. 1, 34 (1995) (characterizing the Court's decision in Lopez as a refusal to proceed any further with the expansion of the commerce clause, rather than a limit on the commerce clause).

223. See Katzenbach v. McClung, 379 U.S. 294, 299 (1964) (noting that "no formal findings were made, which of course are not necessary"); United States v. Caralone Products Co., 304 U.S. 144, 152 (1938) (stating that explicit findings are not required). See generally Archibald Cox, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 HARV. L. REV. 91, 105 (1966) (asserting that, although courts may rely on the congressional record, legislative findings are not essential to the constitutionality of a federal statute); Wendy M. Rogovin, The Politics of Facts: The Illusion of Certainty, 46 HASTINGS L.J. 1723, 1729-40 (1995) (examining the justifications and legitimacy of the judiciary imposing empirical data requirements on Congress); David S. Gehrig, Note The Gun-Free School Zones Act: The Shootout Over Legislative Findings, the Commerce Clause, and Federalism 22 HASTINGS CONST. L.Q. 179, 187 (1994) (claiming that preliminary findings are not a necessary prerequisite to federal legislation).

224. Tribe, supra note 221, at 316; Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) (requiring Congress to state clearly its intentions especially in statutes that propose to alter the federal-state balance); United States v. Bass, 404 U.S. 336, 349 (1971) (asserting that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance").

By requiring Congress to state its intentions clearly, whether those intentions are revealed during congressional debate or stated specifically within the statute, the Court honors its duty as a check on Congress.\textsuperscript{226} This requirement ensures a greater degree of political accountability.\textsuperscript{227} Under this clear statement requirement, the federal government, which must balance competing interests, cannot escape political accountability by constructing an ambiguous statute.\textsuperscript{228}

The Court's refusal to grant the federal government a general police power also is well-established.\textsuperscript{229} The majority in \textit{Lopez} once again asserted that the federal government cannot encroach upon areas where the states historically have been sovereign.\textsuperscript{230} The majority noted that if the Court adopted the government's argument, Congress could regulate virtually all activities.\textsuperscript{231}

As the majority recognized, upholding the Act would imply that Congress could regulate almost all noncommercial individual activity, regardless of the tenuous connection with interstate commerce.\textsuperscript{232} A boundless

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\textsuperscript{226} \textit{See} \textsuperscript{TRIBE, supra note 221, at 317; see also} David S. Bogen, \textit{The Hunting of the Shark: An Inquiry Into the Limits of Congressional Power Under the Commerce Clause}, 8 \textit{WAKE FOREST L. REV.} 187, 198 (1972) ("[T]he Court should require Congress to relate the law to its impact on interstate transactions. This could assist in focusing Congressional concern on the proper issues.").

\textsuperscript{227} \textit{See} \textsuperscript{TRIBE, supra note 221, at 317.}

\textsuperscript{228} \textit{See id.}

\textsuperscript{229} \textit{See} United States v. E.C. Knight Co., 156 U.S. 1, 11 (1895) (recognizing that the police power is within the province of the state). The majority in \textit{E.C. Knight} stated:

\begin{quote}
It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, \ldots\ is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive.
\end{quote}

\textit{Id.; see also} Hoke and Economides v. United States, 227 U.S. 308, 312 (1913) (sustaining the Mann Act, a morality law prohibiting the transportation of women for the purpose of prostitution); Hipolite Egg Co. v. United States, 220 U.S. 45, 60 (1911) (upholding the federal Pure Food and Drug Act); Champion v. Ames, 188 U.S. 321, 363 (1903) (sustaining a federal statute which prohibited the sale and circulation of lottery tickets).


\textsuperscript{231} \textit{Id.} The majority pointed out that the dissent failed to offer a concrete example of what activities would be beyond the federal government's reach. \textit{Id.} The majority also predicted that the dissent's formulation would permit even regulation of individual activity. \textit{Id.}

\textsuperscript{232} \textit{Id.; see also} United States v. Pappadopoulos, 64 F.3d 522, 528 (9th Cir. 1995) (reversing an arson conviction based on a federal statute). In \textit{Pappadopoulos}, a couple was convicted of arson under a federal statute criminalizing destruction of any building using or affecting
federal commerce power would grant Congress control over family law, including marriage, divorce, and child custody. The government could assert that these aspects of family life have an impact on national productivity which, in turn, affects commerce. Thus, the majority limited the commerce power to commercial activities having a substantial effect on commerce.

B. Lopez: Confirming Federal Limits and Respecting the Original Meaning of Commerce

The Court’s decision in Lopez also was appropriate because it adhered to the principle of federalism. The Framers established a federal system of government to ensure uniformity in national laws, to prevent overreaching by the federal government, and to protect fundamental interstate commerce. Id. at 524. Offering evidence that the couple’s house received natural gas from out of state sources, the government charged the couple under the federal statute. Id. at 525. The couple was convicted, and the wife appealed, asserting the government did not have jurisdiction over the private house. Id. The Ninth Circuit overturned the conviction because the gas pipeline theory was too tenuous a connection with interstate commerce. Id. at 528; see also Jan C. Greenburg, Lopez Case Ignites Debate on Congress’ Law-Passing Limits, CHI. TRIB., Jan. 4, 1996, at 3 (discussing the Pappadopoulos holding).

233. Lopez, 115 S. Ct. at 1632. In a post-Lopez decision, the United States District Court for the Eastern District of Pennsylvania refused to uphold a federal law that criminalized willful failure to pay child support. United States v. Parker, 911 F. Supp. 830, 843 (E.D. Pa. 1995). The court held that Congress had no rational basis for finding that failure to pay child support substantially affected interstate commerce. Id. Furthermore, the court noted that family matters such as child support are within the realm of state sovereignty. Id.; see also United States v. Schroeder, 894 F. Supp. 360, 362 (D. Ariz. 1995) (refusing to uphold the same federal child support law).


235. See Epstein, supra note 2, at 1403 (proposing it is the nature of the transaction, rather than the location of the transaction, that determines whether the transaction constitutes interstate commerce); cf. McJohn, supra note 222, at 34 (commenting that the Lopez decision will not create areas of activity that are absolutely immune to congressional regulation).

236. See Biskupic, supra note 202, at A1, A16 (discussing the Supreme Court’s shift to protecting states’ rights). Chief Justice Rehnquist, accompanied by Justices O’Connor, Scalia, Kennedy, and Thomas, are no longer permitting Congress to exceed its Constitutional powers. Id. Professor Paul D. Gewirtz commented, “What we’re seeing from the judicial branch is an across-the-board restriction on national government power on every front and a bolstering of state sovereignty.” Id. at A16.

237. See supra note 1 (discussing the reasons why the commerce clause was included in the Constitution).

238. See The Federalist No. 46, at 298 (James Madison) (Clinton Rossiter ed., 1961). Madison stated, “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State Governments are numerous and indefinite.” The Federalist No. 45, supra note 4, at 292 (James Madison). The Founders were wary of a national government that was too powerful because it might undermine the States as legitimate political entities. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 568 (1985) (Powell, J., dissenting).
liberties. Maintenance of this federal balance is imperative in keeping with the original intentions of the Framers, and, as Justice Kennedy indicated, the Court must assist in preserving that balance. The expectation of judicial review encourages Congress to deliberate carefully before enacting legislation that would alter the federal balance. The Gun-Free School Zones Act was Congress's attempt to regulate two areas traditionally reserved to the states: crime and education. Thus, the


240. United States v. Lopez, 115 S. Ct. 1624, 1639 (1995) (Kennedy, J., concurring). Justice Kennedy explained that the Court's role in maintaining the federal balance is somewhat tenuous in comparison to the Court's significant role in maintaining other structural elements of the Constitution such as separation of powers, checks and balances, and judicial review. Id. at 1638. Justice Kennedy, however, also remarked that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." Id. at 1639. See generally Henry J. Friendly, Federalism: A Foreword, 86 Yale L.J. 1019 (1977) (recognizing federalism as the unique contribution that the Framers made to political science).

241. Redish & Drizin, supra note 4, at 49. Professor Redish and Ms. Drizin suggest that, "The very expectation of review strongly encourages Congress to engage in [a] searching inquiry . . . . Such inquiry serves to ensure that Congress stays within the limitations on its power established by the Constitution in the name of federalism." Id.; see also The Supreme Court, 1995 Term—Leading Cases, 109 Harv. L. Rev. 111, 120-21 (1995) (asserting that rational basis review after Lopez will compel legislators to consider the implications on federalism before exercising the commerce power).

242. See cases cited supra note 131 (maintaining the states possess primary authority over crime).

Not only does the federalization of criminal laws cause problems with the structure of government, but it also causes severe problems regarding the workload in federal courts. Thomas M. Mengler, The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary From the Federalization of State Crime, 43 U. Kan. L. Rev. 503, 505 (1995) (recognizing the impact of federal criminal laws on the federal judiciary and noting that the criminal caseload in federal courts rose from 27,968 cases in 1980 to 44,919 cases in 1994); Sanford H. Kadish, Comment: The Folly of Overfederalization, 46 Hastings L.J. 1247, 1249-50 (1995) (criticizing the increase of federal criminal "knee-jerk" legislation and comparing the seventy percent increase in criminal filings in federal courts from 1980 to 1992 with the thirty-four percent increase in federal civil filings within the same time period).

243. Lopez, 115 S. Ct. at 1633. The majority reasoned:

[I]f Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, a fortiori, it also can regulate the educational process directly. Congress could determine that a school's curriculum has a 'significant' effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum . . . .

Act upset the federal-state balance. By invalidating the Act, the majority affirmed the Court’s role in maintaining this federal balance.

The majority’s decision is appropriate not only because it conforms with modern commerce jurisprudence and the ideal of federalism, but also because it is consistent with Chief Justice Marshall’s original interpretation of commerce. Chief Justice Marshall defined commerce as “intercourse.” During his time, intercourse included shipping, navigation, and contracts regulating buying and selling. Possessing a firearm in a school zone is not intercourse and would not fit within Chief Justice Marshall’s definition. The economic realities have changed since Gibbons, and the scope of the commerce power has grown considerably so that the Court cannot possibly return to an original understanding of the clause. Even Justice Thomas, who rejected the substantial effects test, recognized that in light of the development of the commerce clause, the Court cannot return commerce jurisprudence to its origins. The majority, however, refused to ignore the intended meaning of the clause and, instead, found a middle ground on which to base its decision.

244. See Statement by President George Bush Upon Signing S. 3266, 26 WEEKLY COMP. PRES. DOC. 1944 (Dec. 3, 1990). Upon the signing of the Act, President Bush remarked, “Most egregiously, section 1702 [922(q)] inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed on the States by the Congress.” Id.

245. The Supreme Court, 1995 Term—Leading Cases, supra note 241, at 120-21 (remarking that the Lopez decision secures the role of federalism in the future of American government).


248. Epstein, supra note 2, at 1394.

249. But see id. at 1396 (claiming that no distinction exists between business and its effects on commerce in our time and at the time of Gibbons).

250. See supra parts I.C and I.D (surveying the expansion of commerce jurisprudence).


252. Id. at 1650 n.8. Justice Thomas opined:

Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of stare decisis and reliance interests may convince us that we cannot wipe the slate clean.

Id.

253. Id. at 1634. Chief Justice Rehnquist declared:

The broad language in [previous] opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated. . . . This we are unwilling to do.
C. Finding That Middle Ground

Although the majority's distinction between commercial and noncommercial activities may create confusion, this confusion is a necessary result of the federal system.\textsuperscript{254} Congress's power is limited to those grants of authority enumerated in the Constitution,\textsuperscript{255} and the extent of those enumerated powers is subject to considerable debate.\textsuperscript{256} The Court, however, cannot undermine the federal system for the sake of legal certainty.\textsuperscript{257}

Because Congress exceeded its commerce power authority in enacting the Gun-Free School Zones Act, the \textit{Lopez} majority's invalidation of the statute was not radical.\textsuperscript{258} Rather, the Court was being faithful to prior

\textit{Id.} (citations omitted).

\textsuperscript{254} \textit{Lopez}, 115 S. Ct. at 1633. The majority recollected:

The [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

\textit{Id.} (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819)); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("[T]he question respecting the extent of [enumerated powers] is perpetually arising, and will probably continue to arise as long as our system shall exist."); see also Fry v. United States, 421 U.S. 542, 557 (1975) (Rehnquist, J., dissenting) (acknowledging that determining when an activity is appropriately characterized as a traditional state function and beyond Congress's authority under the commerce clause can be difficult); Ostrom, \textit{supra} note 122, at 52 (acknowledging the overlapping jurisdictions inherent in a federal system).

\textsuperscript{255} \textit{Id.} (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819)); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("[T]he question respecting the extent of [enumerated powers] is perpetually arising, and will probably continue to arise as long as our system shall exist."); see also Fry v. United States, 421 U.S. 542, 557 (1975) (Rehnquist, J., dissenting) (acknowledging that determining when an activity is appropriately characterized as a traditional state function and beyond Congress's authority under the commerce clause can be difficult); Ostrom, \textit{supra} note 122, at 52 (acknowledging the overlapping jurisdictions inherent in a federal system).

\textsuperscript{256} See \textit{U.S. CONST.} art. 1, § 8 (enumerating Congress's power); see also Epstein, \textit{supra} note 2, at 1395-97 (commenting on the limited nature of the federal government's enumerated powers). Professor Epstein acknowledged that "[a] system which says that the commerce clause essentially allows the government to regulate anything that even indirectly burdens or affects commerce does away with the key understanding that the federal government has received only enumerated powers." \textit{Id.} at 1396; Gregory W. O'Reilly & Robert Drizin, United States v. Lopez: Reinvigorating the Federal Balance By Maintaining the States' Role as the "Immediate and Visible Guardians" of Security, 22 \textit{Notre Dame J. LEGIs.} 1, 3 (1996) (maintaining that structural mechanisms such as separation of powers, checks and balances, and judicial review also serve as limits on the federal government's enumerated powers).

\textsuperscript{257} See \textit{U.S. CONST.} amend. X; \textit{supra} note 4 (delineating the limits on the enumerated federal powers); see also Ostrom, \textit{supra} note 122, at 40-42 (criticizing Justice Blackmun's assertion in \textit{Garcia} that the structure of the federal system adequately protects states' rights from federal encroachment).

\textsuperscript{258} \textit{Lopez}, 115 S. Ct. at 1651 (Stevens, J., dissenting). Justice Stevens characterizes the majority's holding as "radical." \textit{Id.}
case law and the structure of the federal system.\textsuperscript{259} Despite inevitable uncertainty, the majority's formulation of commercial and noncommercial activities is both necessary and workable.\textsuperscript{260} The distinction permits federal regulation of the instrumentalities and channels of interstate commerce.\textsuperscript{261}

The Court in \textit{Lopez} indicates a willingness to sustain even federal regulation of noncommercial intrastate activities if the statute contains a jurisdictional provision allowing a case-by-case inquiry into the activity's

\begin{itemize}
\item \textsuperscript{259} \textit{Cf. The Supreme Court, 1995 Term—Leading Cases, supra} note 241, at 119-20 (suggesting that \textit{Lopez} creates a more independent role for the Court when determining whether congressional legislation constitutes a valid exercise of the commerce power).
\item \textsuperscript{260} \textit{See United States v. Robertson, 115 S. Ct. 1732, 1732-33 (1995) (per curiam) (finding a gold mine owner engaged in interstate commerce).} \textit{Robertson}, decided five days after \textit{Lopez}, demonstrates that the \textit{Lopez} distinction still permits necessary regulation of certain crimes. \textit{Id}. In \textit{Robertson}, a drug dealer used proceeds from narcotics sales to open a gold mine in Alaska and was convicted under the federal Racketeer Influenced and Corrupt Organizations Act (RICO). \textit{Id}. at 1732. The Supreme Court found that the mine operator engaged in interstate commerce because he hired miners from outside Alaska, purchased equipment in California and shipped it to Alaska, and took gold from the mine out of Alaska. \textit{Id}. at 1732-33; see Harvey Berkman, \textit{Second Commerce Clause Ruling Calms the Waters: The School Gun Zone Case, Observers Say, May Indeed Have An Aberration}, NAT'L L.J., May 15, 1995, at A7 (stating that the \textit{Robertson} decision should allay fears that \textit{Lopez} will make it impossible for the federal government to enact many criminal laws).
\item Several other post-\textit{Lopez} cases have upheld federal criminal laws based on the commerce clause. \textit{See, e.g.}, Cheffer v. Reno, 55 F.3d 1517, 1520-21 (11th Cir. 1995) (upholding the Freedom of Access to Clinic Entrances Act because reproductive health services is an economic activity substantially affecting interstate commerce); United States v. Garci-Salazar, 891 F. Supp. 568, 572 (D. Kan. 1995) (upholding the Drug-Free School Zones Act of 1990 because intrastate and interstate drug trafficking substantially affects interstate commerce); United States v. Wilks, 58 F.3d 1518, 1520-22 (10th Cir. 1995) (upholding a conviction under a federal law prohibiting the possession and transfer of automatic weapons because automatic weapons are objects of interstate commerce).
\item \textsuperscript{261} \textit{See Lopez, 115 S. Ct. at 1629} (stating that Congress may regulate the use of channels and instrumentalities of interstate commerce). The \textit{Lopez} majority only briefly acknowledged the instrumentalities and channels of commerce rationale, rather the majority focused on the substantially affecting commerce rationale. \textit{Id}. at 1629-30. Cases since \textit{Lopez}, however, confirm that the instrumentalities and channels of commerce rationales remain viable. \textit{See United States v. Bishop, 66 F.3d 569, 588-90 (3d Cir.), cert. denied, 116 S. Ct. 681 (1995)} (applying the instrumentalities rationale to affirm the constitutionality of a federal carjacking law).
\item Allowing for use of the instrumentalities and channels of commerce rationales permits federal regulation of all other activities having a substantial effect on interstate commerce. \textit{Lopez}, 115 S. Ct. at 1630. The majority's formulation does not foreclose completely the federal government's ability to enact federal criminal laws; instead, courts will uphold federal criminal laws if the intrastate criminal activity has a substantial effect on interstate commerce. \textit{See Cohen & Fried, supra} note 222, at 23 (listing several post-\textit{Lopez} cases in which courts have upheld federal criminal laws). \textit{But cf. Bishop, 66 F.3d at 603} (Becker, J., dissenting) ("I believe that non-commercial intrastate crimes, even ones receiving publicity in the national media, are a matter of state and not federal concern.").
\end{itemize}
substantial effect on interstate commerce.\textsuperscript{262} Thus, the majority's holding still permits considerable federal regulation under the commerce clause and is not, as Justice Souter alleged, "a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago."\textsuperscript{263} Instead, the majority's distinction between commercial and noncommercial activities tempers original intentions with modern realities.

\subsection*{D. Unacceptable Flaws Inherent in a Limitless Commerce Power}

Justice Souter's dissent disagreed with the majority's commercial/non-commercial distinction and advocated a more permissive interpretation of the federal commerce power.\textsuperscript{264} This liberal interpretation, however, has several flaws. First, Justice Souter's interpretation of the commerce power would permit Congress to regulate virtually any activity even if only a remote possibility existed that the activity would affect interstate commerce.\textsuperscript{265} Indeed, Justice Souter argued that Congress should accept any justification "within the realm of reason."\textsuperscript{266} This approach ignores the Court's role in maintaining the federal-state balance.\textsuperscript{267} Under Justice Souter's approach, the Court would be required to uphold a law with a connection to interstate commerce that was "within the realm of reason," regardless of whether it upset the federal balance.

Second, Justice Breyer's limitless interpretation of the commerce power would render other enumerated federal powers in Article I, section 8 meaningless.\textsuperscript{268} If the commerce clause were intended to encompass every activity that "significantly affected"\textsuperscript{269} commerce, most activities would be subject to regulation because they somehow affect commerce.

\textsuperscript{262} Lopez, 115 S. Ct. at 1631; see, e.g., United States v. Trupin, No. 95 Cr. 450, 1996 WL 50237 at 2-4 (S.D.N.Y. Feb. 8, 1996) (distinguishing Lopez and upholding a federal law prohibiting possession of stolen goods because the statute contained a jurisdictional element limiting the scope to possessing stolen goods that had moved in interstate commerce); United States v. Sorrentino, 72 F.3d 294 (2d Cir. 1995) (upholding a federal law prohibiting a convicted felon to possess a firearm as a valid exercise of the commerce power because the statute provided for a nexus between possession and interstate commerce); United States v. Stillo, 57 F.3d 553, 558 (7th Cir.), cert. denied, 116 S. Ct. 383 (1995) (affirming the conviction of a judge prosecuted under the Hobbs Act because the Act required that the violation have a nexus with interstate commerce).

\textsuperscript{263} Lopez, 115 S. Ct. at 1652-54 (Souter, J., dissenting).

\textsuperscript{264} See id.

\textsuperscript{265} See id. at 1654.

\textsuperscript{266} Id. at 1656.

\textsuperscript{267} See supra note 4 and accompanying text (discussing the Court's role in maintaining the federal balance).

\textsuperscript{268} See Epstein, supra note 2, at 1395 (discussing possible limits on Congress given the enumerated powers and limitations contained in Article I).

\textsuperscript{269} Lopez, 115 S. Ct. at 1657 (Breyer, J., dissenting).
commerce.\textsuperscript{270} Extending Justice Breyer's argument to its logical conclusion would render other enumerated powers in Article I, section 8 unnecessary because activities such as bankruptcy,\textsuperscript{271} patents and copyrights,\textsuperscript{272} and immigration\textsuperscript{273} certainly could be classified under the commerce heading.

Finally, both Justice Breyer's and Justice Souter's dissents ignored the states' important function of serving as laboratories for experimentation.\textsuperscript{274} States traditionally have structured criminal laws within their respective jurisdictions, experimenting with various solutions and gaining expertise.\textsuperscript{275} Addressing the problem of prohibiting guns in schools implicates unique circumstances within each state, and several states, including Texas, have enacted laws prohibiting guns in school zones.\textsuperscript{276} The

\textsuperscript{270} United States v. Lopez, 2 F.3d 1342, 1362 (5th Cir. 1993), aff'd, 115 S. Ct. 1624 (1995).

\textsuperscript{271} U.S. CONST. art. I, § 8. The section provides in part: "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." \textit{Id. See generally JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 47-56 (1994)} (assessing the constitutional history the bankruptcy clause).

\textsuperscript{272} U.S. CONST. art. I, § 8. The relevant part provides: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." \textit{Id. See generally STORY, supra note 271, at 83-85 (discussing the origin of the writing and discoveries clause).}

\textsuperscript{273} U.S. CONST. art. I, § 8. The section provides in part: "To establish an uniform Rule of Naturalization . . . ." \textit{Id. See generally STORY, supra note 271, at 45-46 (reviewing the exclusive power of the federal government to establish uniform rules of naturalization).}

\textsuperscript{274} United States v. Lopez, 115 S. Ct. 1624, 1641 (1995) (Kennedy, J., concurring); \textit{see} New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); \textit{see also} Rachel J. Litman, Comment, \textit{Gun-Free Schools: Constitutional Powers, Limitations, and Social Policy: Concerns Surrounding Federal Regulation of Firearms in School 5 SETON HALL CONST. L.J. 723 (1995)}. Some observers propose that local laws, specifically local gun control laws, are more effective because they address local concerns. \textit{Id.} The Morton Grove ordinance, a community based gun control law, and Goals 2000, a federal funding act with voluntary compliance, are better approaches to the problem of guns in schools. \textit{See id.} at 159-72 (discussing the effectiveness of the Morton Grove ordinance and the Goals 2000 program).

\textsuperscript{275} \textit{Lopez}, 115 S. Ct. at 1641. Similarly, the states have gained expertise in areas such as tort law. Eleanor N. Bradley, \textit{State Reform of Tort Laws Proceeds During Calls for Federal Intervention}, Corp. Couns. Daily (BNA), at D-17 (May 23, 1995). Despite years of the state legislatures, state courts, and voters "fashioning and refashioning" state tort law the federal government may enact legislation that would pre-empt those state laws. \textit{Id.} Some commentators note that this type of federal intervention is an "effrontery to the states" that undermines state expertise that has developed in this area over the past 20 years. \textit{Id.}

state, not the federal government, can combat this problem most appropriately. Federal intervention such as the Gun-Free School Zones Act may preempt effective local solutions that states have developed based on their expertise.

Both of these statutes are examples of other federal statutes that encroach upon the state's Rights Remedies for Gender-Motivated Violence Act, 42 U.S.C.A. § 13981 (West 1995). The Highway Safety Act, 23 U.S.C. § 159 (1994) (reducing each state's federal highway funds by 10% unless it enacts laws revoking driving privileges of convicted drug offenders for six months).

If the federal government decided that federal regulation was necessary, the government could invoke the spending power to regulate on a national scale; the spending power enables Congress to condition the receipt of federal funds on the adoption of certain federally mandated measures. New York v. United States, 505 U.S. 144, 166-69 (1992); see also South Dakota v. Dole, 483 U.S. 203, 206-12 (1987) (noting that the spending clause is independent of and potentially broader than the commerce clause). See generally Thomas R. McCoy & Barry Friedman, Conditional Spending: Federalism's Trojan Horse, 1988 Sup. Ct. Rev. 85, 117-25 (examining the expansive holding in Dole); Albert J. Rosenthal, Conditional Federal Spending and the Constitution, 39 Stan. L. Rev. 1103 (1987) (examining the limits on the federal spending power).


The Brady Handgun Violence Protection Act, 18 U.S.C. § 922(s) (1994); Civil Rights Remedies for Gender-Motivated Violence Act, 42 U.S.C.A. § 13981 (West 1995). Both of these statutes are examples of other federal statutes that encroach upon the state's


277. See U.S. Const. art 1, § 8, cl. 1 (authorizing Congress to "provide for the common Defence and general Welfare of the United States."). If the federal government decided that federal regulation was necessary, the government could invoke the spending power to regulate on a national scale; the spending power enables Congress to condition the receipt of federal funds on the adoption of certain federally mandated measures. New York v. United States, 505 U.S. 144, 166-69 (1992); see also South Dakota v. Dole, 483 U.S. 203, 206-12 (1987) (noting that the spending clause is independent of and potentially broader than the commerce clause). See generally Thomas R. McCoy & Barry Friedman, Conditional Spending: Federalism's Trojan Horse, 1988 Sup. Ct. Rev. 85, 117-25 (examining the expansive holding in Dole); Albert J. Rosenthal, Conditional Federal Spending and the Constitution, 39 Stan. L. Rev. 1103 (1987) (examining the limits on the federal spending power).


278. See The Brady Handgun Violence Protection Act, 18 U.S.C. § 922(s) (1994); Civil Rights Remedies for Gender-Motivated Violence Act, 42 U.S.C.A. § 13981 (West 1995). Both of these statutes are examples of other federal statutes that encroach upon the state's
IV. CONCLUSION

For the past sixty years, the Supreme Court has approved Congress's expansive use of the commerce clause, while always articulating limits on this power. At first blush, *Lopez* seems to deviate from established commerce clause jurisprudence. The Gun-Free School Zones Act, however, is merely an example of a federal statute that went beyond those limits. The majority's decision is consistent with the Court's established position that it will not sustain statutes significantly altering the federal-state balance unless Congress clearly articulates its invocation of the commerce power. *Lopez* also reaffirms the Court's continued reluctance to grant the federal government a general police power. By distinguishing between commercial and noncommercial activities, the majority permits the federal government to regulate on a national scale while simultaneously safeguarding the states' ability to exercise their inherent police powers that the Constitution reserves. Essentially, *Lopez* clarifies the limits of the commerce power and ensures the continuation of the federal system of government.

Rachel Elizabeth Smith

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Some members of Congress have even considered proposing a bill entitled "The Federalism Act of 1995" which would impose notice requirements on Congress before enacting a law that preempted state law. Brown Will Introduce Bill to Limit Congress' Ability to Preempt State Laws DAILY REP. FOR EXECS. (BNA) No., 133, at A-6 (July 12, 1995). When Congress enacts an ambiguous statute, this bill would encourage the courts to find in favor of the states. *Id.*