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NOTES


I. Introduction

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.1

If . . . the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due . . . .2

Both of these statements were written in 1788 by James Madison in defense of the newly proposed Constitution of the United States and the principle of division of power between state and federal governments. Upon ratification of the Constitution, the balance of state and federal power, as expected by Madison, became an enduring source of conflict between those governments. Central to this conflict has been the democratic choice — and it cannot be considered anything but a choice — of the American people to allow the federal government greater power and responsibility than what was originally contemplated by the framers of the Constitution.

Although federal and state power have not continued to be divided as Madison may have predicted,3 the separation of power — and the conflict it creates — has still, in many ways, operated to preserve liberty and protect against tyranny. The role of the Supreme Court in defining and preserving the separation of power between state and federal governments, however, has proved most difficult and

* The Oklahoma Law Review has awarded the author the Harry Alley-Leroy Allen Memorial Prize for the Outstanding Case Note of 1996.
troublesome. Particularly troubling has been the development of a principled standard for the exercise of judicial review in Commerce Clause jurisprudence.

The vehicle for this expansion of federal power has been Article I, Section 8 of the Constitution — the Commerce Clause — which states: "The Congress shall have [p]ower . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Commerce Clause has come to affect people's lives in a multitude of ways. It allows federal regulation of what people eat and where they sleep. The Commerce Clause allows federal regulation of the hours that people work and the wages that they earn. It allows federal regulation of crime, violence, and racial discrimination. Indeed, for nearly sixty years — from 1937 until 1995 — not one federal regulation was ruled by the United States Supreme Court to be outside the boundaries of federal authority under the Commerce Clause.

In the 1995 Term, the United States Supreme Court held in United States v. Lopez that the Gun-Free School Zones Act of 1990 was beyond the power of the federal government under the Commerce Clause. In a five-to-four decision, the Court found the act, which made illegal the possession of firearms within 1000 feet of any school, to be an unconstitutional usurpation of power.

This note will examine the effects and ramifications of the Supreme Court's decision in United States v. Lopez. The first section will examine the history of

7. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 (1937) (upholding federal regulation of labor and management relations).
8. See United States v. Darby, 312 U.S. 100, 125 (1941) (upholding federal regulation of employment conditions in certain firms connected to interstate commerce).
10. See Perez v. United States, 402 U.S. 146, 156 (1971) (upholding 18 U.S.C. § 891, which criminalized "loansharking" or the use of violence or the threat of violence to collect debts).
11. See Katzenbach v. McClung, 379 U.S. 294, 305 (1964) (upholding federal penalties for discrimination by public restaurants on the basis of race, color, or national origin).
13. The Gun-Free School Zones Act of 1990 provided in pertinent part: "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." 18 U.S.C. § 922(g)(2)(A) (1994). In this context, "the term 'school zone' means — (A) in, or on the ground of, a public, parochial or private school; or (B) within a distance of 1,000 feet from the ground of a public, parochial or private school." Id. § 921(a)(25).
federalism and the debate over the Commerce Clause power. Second, the note will examine the opinions articulated in United States v. Lopez and will provide a critical analysis of those opinions. The third section will consider the early progeny of United States v. Lopez and look into possible areas of future action. Finally, the note will present an alternative approach and an argument for a new judicial analysis in defining the balance of state and federal power.

II. History

In the broad architecture of the United States Constitution, power is divided between the two structures of state and federal governments. State governments were given broad and general police powers over local affairs, including the regulation and preservation of the health, welfare, and morals of the people. The federal government was given much more limited power, restricted to only those powers enumerated in the Constitution. It is a system that was designed to prevent tyranny, preserve liberty, and to better promote civic virtue among the individual citizens of the nation.15

A. The Power of the Federal Government Under the Commerce Clause: Gibbons v. Ogden and Early Expansiveness

The early period of Supreme Court consideration of the Commerce Clause power is a time characterized by relatively great deference to Congress and an expansive view of federal power.16 The first Commerce Clause case considered by the Supreme Court was the landmark Gibbons v. Ogden.17 In Gibbons, Chief Justice John Marshall articulated an expansive view of federal regulatory power. The State of New York had granted a steamboat monopoly to a partnership, and, when Gibbons began operating a competing ferry service from New York to New Jersey, a suit was brought for encroachment on the monopoly.18 Popular sentiment ran strong against monopolies, and Marshall seized the opportunity to disguise within the political cause a much more important doctrine. Marshall ruled that the state-granted monopoly interfered with a federal statute, and, as that federal statute was a proper exercise of power under the Commerce Clause, the state action was preempted by the federal action under the dictates of the Supremacy Clause.19

18. Gibbons, 22 U.S. (9 Wheat.) at 1-2. New York had granted the steamboat monopoly to a partnership, which had in turn granted it to Ogden. Id.
19. Id. at 1. Marshall's opinion stopped short of giving the federal government an exclusive power to regulate commerce. Marshall held that the federal government's power to regulate commerce coexisted with the states, except where state regulations interfered with federal regulations. The only commercial activities which were exclusive to state or local regulation were those of the "internal commerce of a state," specifically those "which are completely within a state, which do not affect other states, and with
Marshall defined the language of the Commerce Clause broadly. He wrote that commerce included "every species of commercial intercourse," a much more inclusive definition than the prevailing understanding of commerce as merely the sale and transfer of goods. Marshall also broadly defined the federal government's power "to regulate," stating that that power, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." For most of the nineteenth century, the relatively minor role of the federal government provoked few questions concerning the extent of federal power. Rather, the great majority of decisions dealt with the "dormant" Commerce Clause and whether state commerce regulation was permissible in areas where the federal government had 'not acted.

B. The Reaction to Increasing Federal Regulation in the Industrial Age

The question of the extent of federal Commerce Clause power took on new significance with the advent of the Industrial Age and the resulting increase in federal regulation. In 1895, a sugar manufacturer was prevented from purchasing four competing sugar refineries by federal antitrust regulation. The Court, in United States v. E.C. Knight Co., held that the federal government's actions went beyond its Commerce Clause authority.

The Court held that federal power was limited by both intrinsic and extrinsic forces. First, the Court held that the Commerce Clause only authorizes the regulation of certain types of activities and determined the sovereignty over each type by measuring the directness of the activity's effect on interstate commerce. In E.C. Knight, the Court held that the manufacture of sugar was not subject to federal regulation because manufacturing does not have a sufficiently direct effect on interstate commerce. However, if the government had sought to regulate the trade of sugar, that is the sale or transfer of sugar, the regulation would have been upheld. Second, the Court drew strongly from the concept of dual federalism, giving rise to the view that the Tenth Amendment actively reserved the regulation

which it is not necessary to interfere for the purpose of executing some of the general powers of the government." Id. at 195.

20. Id. at 193.
21. U.S. CONST. art. 1, § 8, cl. 3.
23. This note will not include the related but separate issue of federal preemption of state action where the federal government is acting under Commerce Clause authority. See Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1857) (establishing the "selective exclusiveness" doctrine which forbid states from regulating commercial activities that necessitated uniform federal legislation). For an extensive inquiry into the modern usefulness of the "dormant" Commerce Clause analysis, see Julian N. Eule, Laying the Dormant Commerce Clause to Rest, 91 YALE L.J. 425 (1982).
24. 155 U.S. 1 (1895).
25. Id. at 17-18.
26. Id. at 15-16.
27. Id. The Court stated, "Commerce succeeds to manufacture and is not a part of it." Id. at 12.
of certain activities to the states and, thus, imposed an extrinsic limit on the reach of Commerce Clause power. 28

The limits recognized in E.C. Knight did not, however, engender an immediate turn in the Supreme Court's interpretation of Commerce Clause power. 29 Federal regulations were widely upheld throughout the early years of the twentieth century. During this period, the scope of federal regulatory power increased in a number of important ways. The power of the federal government was held to include regulation of certain purely intrastate activities that were connected to interstate commerce. 29 The power of the federal government "to regulate" was affirmed as plenary and without limitation, such that it allowed even outright prohibition. 31 And, the power of the federal government was held to include, in certain limited instances, regulation for purposes more moral than commercial in nature. 32

The shift in the Supreme Court's understanding of Commerce Clause authority was not swift; but, when it arrived, it was powerful indeed. The majority of the Court, dedicated to preserving the economic principles they believed to be inherent in the Constitution, turned from an expansive view of federal power under the Commerce Clause to a restrictive treatment of federal power in favor of states' rights. In Hammer v. Dagenhart, 33 the Court struck down a child labor act which prohibited the transportation in interstate commerce of goods produced in factories employing children and failing to comply with a set of age-based labor restrictions. 34 The majority held that the act regulated the conditions of production, as distinguished from commerce, and therefore lacked a sufficiently direct effect on interstate commerce to allow federal regulation under the Commerce Clause. 35

C. The Rise and Fall of Active Judicial Review of Commerce Clause Authority in the New Deal Era

The economic activism of the New Deal era focused a sharp eye on the direct-indirect effects test and the principles by which the Court had arrived at its

28. Id. at 13-14.
29. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 4.6, at 146-51 (5th ed. 1995).
30. See The Shreveport Rate Cases, 234 U.S. 342, 353-54 (1914) (upholding federally imposed rate structures for railroads because of the activity's economic effect on interstate commerce); see also Swift & Co. v. United States, 196 U.S. 375, 388-89 (1905) (upholding federal regulation of the sale of cattle in stockyards because the activity was in the stream or "current" of interstate commerce).
32. See, e.g., Holk v. United States, 227 U.S. 308, 326 (1913) (upholding the Mann Act, 18 U.S.C. § 2421, which prohibited the transportation of women across state lines for immoral purposes).
33. 247 U.S. 251 (1918), overruled by United States v. Darby, 312 U.S. 100 (1941).
34. Hammer, 247 U.S. at 276-77.
35. Id. at 269-77. The Court analyzed the act in terms of the directness of the regulated activity's effect on interstate commerce and whether the activity was reserved for state regulation by the Tenth Amendment. Id. Inherent in the majority's reasoning was the idea that there was no threat of the distribution of flawed goods — an economic effect that may have pushed the activity past the "directness" threshold; rather, there was only the issue of the health and welfare of the children, an issue of state-regulated police power. Id. at 271-72.
distinctions between those activities which are commerce and those which are not. Initially, very few of the New Deal statutes, each attempting a national cure of the troubled economy, survived the Supreme Court's interpretation of the Commerce Clause power.  

In 1935, the Court, considering A.L.A. Schechter Poultry Corp. v. United States, held that the employment practices of intrastate poultry dealers did not have a sufficiently direct connection to interstate commerce and, therefore, ruled the National Industrial Recovery Act unconstitutional. The Schechter decision signalled the first offensive in what would be an intense battle between the political and judicial branches of the federal government. In 1937, the Court, in Carter v. Carter Coal Co., struck down the Bituminous Coal Conservation Act of 1935. The Court held that the relationship between coal factory employers and employees was a matter of production and not commerce. As such, the federal regulation was of a "purely local activity," reserved for the exclusive jurisdiction of the states unless there could be shown a direct effect on interstate commerce. The Court stated that the production of coal may greatly affect interstate commerce without directly affecting it. Although the weaknesses of the direct-indirect effects test — easy pliability and misleading "formalism" — were becoming more and more clear, the majority of the Court still clung to the hope of a test which would separate state and federal power, fearing that the failure to do so would result in the practice of all-encompassing police powers by Congress and the subsequent elimination of state power and federalism.

D. The Emergence of the Rational Basis Test and a Return to Judicial Deference to the Legislature

Under increasing political and ideological pressure, the Court soon abandoned its position and returned to a policy of deference to the legislature. In 1937, the Court considered the constitutionality of the National Labor Relations Act (NLRA), which had established a comprehensive system of labor and management relations. In NLRB v. Jones & Laughlin Steel Corp., the Court made an unstated change in

38. Id. at 551. Through the National Industrial Recovery Act of 1933, ch. 90, 48 Stat. 195, Congress delegated to private businesses the power to draft a code for "fair competition," which would be submitted to the President for approval. A "Live Poultry Code" which regulated the conditions and price of labor was approved for poultry dealers in New York City. A.L.A. Schechter, 295 U.S. at 523.  
40. 298 U.S. 238 (1936).  
41. The Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991, in an attempt to stabilize the national coal industry, established coal boards which set minimum coal prices, wage rates, and labor terms. Any coal producer who did not comply with the regulations was subject to a tax.  
42. Carter, 298 U.S. at 303.  
43. Id. at 304.  
44. Id. at 308-09.  
46. 301 U.S. 1 (1937). Jones & Laughlin, a multistate steel producer, had been charged with
analysis: the Court did not look to the direct effect of labor relations on interstate commerce but merely held that intrastate activities could be regulated if they had a "close and substantial relation to interstate commerce." With this switch in analysis, the Court began to reject the notion that certain categories of activities — such as production and manufacturing — were not subject to Commerce Clause authority.

The implicit change in analysis became an explicit change in law when the Court, in United States v. Darby, specifically overruled Hammer v. Dagenhart and the direct-indirect effects test. The distinctions between activities made in previous decisions based on the directness of their effect on interstate commerce were rejected as hollow and unrealistic "formalism," with little meaning beyond what the various former justices had supplied. The Court held that Congress could regulate any intrastate activities that "affect interstate commerce or the exercise of the power of Congress over it." Moreover, Congress' power to regulate interstate commerce would be bound by no extrinsic limitations — including the Tenth Amendment — except those checks on its power in the Bill of Rights. The Court wrote, "The [Tenth] Amendment states but a truism that all is retained which has not been surrendered."75

Perhaps the most significant step in the fall of active judicial review of Commerce Clause legislation occurred with Wickard v. Filburn. In Wickard, the Court looked to the cumulative effects of intrastate wheat production on interstate commerce, holding that small-scale intrastate activities are subject to federal regulation if the activities are part of an aggregate interstate concern. Since 1937, the Commerce Clause has been used as authority for a wide scope of federal regulations. The standard that evolved to determine Congress' power over each of these activities was whether Congress had a rational basis for concluding that the activity sufficiently affected interstate commerce. Under the rational basis interfering with union activities. Id. at 22. The Court held that the regulation of intrastate labor relations was within the power of the federal government under the Commerce Clause. Id. at 43.

47. Id. at 37.
48. 312 U.S. 100 (1941). Darby was charged with a violation of the Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1050, which prohibited the shipment in interstate commerce of goods violating prescribed wage rates and labor conditions, and prohibited the employment of workers at less than the prescribed conditions in firms engaged in interstate commerce.
49. 247 U.S. 251 (1918), overruled by United States v. Darby, 312 U.S. 100 (1941).
50. Darby, 312 U.S. at 118.
51. Id. at 124. For further inquiry, see Edward S. Corwin, The Passing of Dual Federalism, 36 VA. L. REV. 1 (1950).
52. 317 U.S. 111 (1942). Wickard, a farmer who grew wheat largely for his own consumption and use, was charged with exceeding the bushel allotment assigned to him under the exercise of the Agriculture Adjustment Act of 1938, ch. 30, 52 Stat. 31. Wickard, 317 U.S. at 113. While the wheat produced by Wickard did not in and of itself amount to a substantial effect on interstate commerce, the aggregate national supply and demand of wheat clearly did. It should be noted that Wickard, contrary to common understanding, sold a portion of his wheat crop. Id. at 114.
54. "[W]hen Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational." Mcelvain v. Virginia Surface Mining & Reclamation Ass'n,
test, the Commerce Clause has become the fountainhead of the regulatory power of the federal government. For nearly sixty years — from NLRB v. Jones & Laughlin Steel Corp. in 1937 until United States v. Lopez in 1995 — no federal regulation was ruled by the Supreme Court to be beyond the power of the federal government under the Commerce Clause.

III. United States v. Lopez

A. Facts

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 pistol and five bullets. After being confronted by school officials, Lopez was charged under Texas law with possession of a firearm on school premises. The state charges were dismissed when federal charges for violation of the Gun-Free School Zones Act of 1990 were filed.

The district court, after denying Lopez's motion to dismiss on the grounds that the Gun-Free School Zones Act is unconstitutional as beyond the federal government's power under the Commerce Clause, convicted and sentenced Lopez to six months imprisonment and two years' supervised release. On appeal, the Court of Appeals for the Fifth Circuit, citing insufficient congressional findings of a connection between gun possession in schools and interstate commerce, held that the Act was beyond the power of Congress under the Commerce Clause. The conviction was reversed. The United States Supreme Court granted writ of certiorari in April 1994.

B. Holding

The issue presented to the Supreme Court was whether the Commerce Clause of the United States Constitution conferred upon Congress the power to regulate gun possession in school zones. By a five-to-four vote, the Supreme Court held that the Gun-Free School Zones Act of 1990, which required no connection to interstate travel, shipment, or manufacture, was invalid as beyond the power of the federal government under the Commerce Clause.

C. The Rehnquist Majority

Chief Justice Rehnquist, delivering the opinion for the majority of the Court,
began his analysis with a history of Commerce Clause jurisprudence. That history, Rehnquist argued, while demonstrating an expansive view of federal Commerce Clause power, should not be read to completely deny the Court the power to enforce limits on federal Commerce Clause power.\textsuperscript{64} Although not used in sixty years, "judicially enforceable outer limits"\textsuperscript{65} on Commerce Clause power undoubtedly exist, according to Rehnquist.\textsuperscript{66}

Rehnquist articulated three categories of activities that are within the Commerce Clause power. First, Congress has the power to regulate the use of the channels of interstate commerce.\textsuperscript{67} This category would include regulation of the availability and use of interstate shipment and travel. Second, Congress has the power to regulate and protect the instrumentalities of interstate commerce.\textsuperscript{68} This category would include, for example, regulation of planes, trains, and automobiles used for interstate transportation. Finally, Congress has the power to regulate those activities which substantially affect interstate commerce.\textsuperscript{69}

Rehnquist held that the Gun-Free School Zones Act regulated neither the channels nor the instrumentalities of interstate commerce.\textsuperscript{70} Thus, for the Act to be sustained, it must fall within the third category of permissible federal power. The Court held that firearm possession in school zones does not substantially affect interstate commerce and, thus, the Act is beyond the power of the federal government under the Commerce Clause.\textsuperscript{71}

The first rationale of the holding was the noncommercial nature of gun possession in schools. The Court found that \textit{Lopez} did not fit within a pattern of previous cases in which the Court had upheld regulation of intrastate \textit{economic} activity that substantially affected interstate commerce.\textsuperscript{72} Rehnquist wrote that even \textit{Wickard} v.
Filburn, which he characterized as "the most far reaching example of Commerce Clause authority over intrastate activity," contained a closer connection to economic activity than Lopez.

The Court also distinguished the Gun-Free School Zones Act from statutes which are limited in scope to merely those activities which are shown, on a case-by-case basis, to have an explicit connection to interstate commerce. The Gun-Free School Zones Act, noted the Court, seeks to regulate all gun possession in schools, without any attempt to limit its reach through the inclusion of a jurisdictional element to only that gun possession which affects interstate commerce.

Included in the majority's reasoning was the conclusion that there were no congressional findings or legislative history that demonstrated any legislative judgment that the possession of firearms in school zones substantially affects interstate commerce. The Court, however, noted that such findings are not required but only useful in the exercise of judicial review. Emphasizing the result of a lack of limits on federal power, Rehnquist rejected the Government's argument that violent crime resulting from gun possession within school zones substantially affects interstate commerce by imposing increased interstate costs. The Court also rejected the government's argument that the

Rehnquist wrote,

[The Act] is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms... It cannot... be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Id. at 1630-31.

73. 317 U.S. 111, 128-29 (1942) (upholding federal regulation of the purely intrastate production of wheat because, taken in the aggregate, wheat supply and demand affects interstate commerce).

74. Lopez, 115 S. Ct. at 1630.

75. See United States v. Bass, 404 U.S. 336, 351 (1971) (holding 18 U.S.C. § 1202(a), which criminalized receiving, possessing, or transporting any firearm in commerce or affecting commerce, to require a nexus to interstate commerce and, thus, placing the statute under Commerce Clause power).

76. Rehnquist wrote, "[The Gun-Free School Zones Act] has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." Lopez, 115 S. Ct. at 1631.

77. The Court refused to import congressional findings from other laws as evidence of legislative judgment in regard to the Gun-Free School Zones Act. Likewise, the Court refused to use congressional findings on the effects of firearm possession on interstate and foreign commerce which were added to the Gun-Free School Zones Act by amendment. See The Violent Crime Control and Law Enforcement Act of 1994 § 320904 Pub. L. No. 103-322, 108 Stat. 1796, 2125 (1994). The amendment came subsequent to the Court of Appeals for the Fifth Circuit's decision that the Gun-Free School Zones Act was beyond the power of the federal government under the Commerce Clause. The Fifth Circuit cited the lack of congressional findings concerning the Gun-Free School Zones Act as important to their decision. United States v. Lopez, 2 F.3d 1342, 1357-68 (5th Cir. 1993), aff'd, 115 S. Ct. 1624 (1995).

78. The Court, said Rehnquist, was left to consider Lopez absent any guidance by way of actual legislative judgment. Lopez, 115 S. Ct. at 1631-32.

79. The Government specifically cited increased national insurance rates and the discouragement of interstate travel to unsafe areas. Rehnquist responded "[u]nder its 'costs of crime' reasoning... Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." Id. at 1632.
national economy would suffer from the deterioration in quality of education as a result of the presence of violent weapons in schools. Rehnquist cautioned that if the Court were to analyze the case as the Government suggested, federal power would be made limitless and federalism obsolete.

Finally, while admitting that the analysis used by the Court in reaching its holding was necessarily one of degree and not kind, the Court concluded that firearm possession in schools fell beyond the regulatory power of the federal government under the Commerce Clause. Incorporating language from throughout the opinion, Rehnquist concluded that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."*84

D. The Kennedy Concurrence

Justice Kennedy, joined by Justice O'Conner, concurred in the opinion of the Court. After giving an overview of the history of Commerce Clause jurisprudence, Kennedy observed that past decisions made clear at least two reasons for great caution in overturning a federal regulation under the Commerce Clause. First, Kennedy warned about the "imprecision of content-based boundaries used . . . to define the limits of the Commerce Clause."*85 Second, Kennedy cautioned about ignoring stare decisis in an area where "the Court as an institution and the legal system as a whole have an immense stake in the stability of Commerce Clause jurisprudence."*86

Kennedy argued that among the structural elements of the Constitution, federalism has presented the most difficult challenge as a subject of judicial review. Kennedy noted the role of the political branches of government in preserving federalism but cautioned against complete judicial abdication in that regard.*87

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80. Rehnquist again looked to the elasticity of such an approach, stating "under the Government's 'national productivity' reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens." Id.

81. In what may be an important indication of future decisions, Rehnquist warned that this approach would result in federal power extending "even to areas such as criminal law enforcement or education where States historically have been sovereign." Id. Family law was also cited by Rehnquist as a recognized area of state sovereignty. Id.

82. Lopez, 115 S. Ct. at 1633.
83. Id. at 1634.
84. Id.
85. Id. at 1637 (Kennedy, J., concurring).
86. Id. (Kennedy, J., concurring).
87. Id. at 1637-38 (Kennedy, J., concurring).
88. Kennedy wrote, 'The absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role. Although it is the obligation of all officers of the Government to respect the constitutional design, 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.'
Kennedy admitted, however, that the "substantial element of political judgment" necessary to Commerce Clause decisions has made it extraordinarily difficult for the Court to establish principles in its Commerce Clause jurisprudence.99

Kennedy argued that a federal statute which contained no evident commercial nexus should trigger an inquiry as to whether the federal government was seeking to intrude upon an area of traditional state concern.90 Kennedy found that such an intrusion occurred with the Gun-Free School Zones Act.91 Arguing for the utility of state sovereignty in regulating gun possession in schools, Kennedy cited the ability of the states to act as laboratories for experimentation and the sufficiency of state powers to deal with instances of gun possession in schools.92

Kennedy concluded that the Gun-Free School Zones Act represented a significant intrusion on state sovereignty and an insufficient connection to the "commercial concerns" of the Commerce Clause.93 Kennedy concluded that the Gun-Free School Zones Act interfered with the balance of state and federal power to such a degree that the Court must hold the Act beyond the power of the federal government under the Commerce Clause.94

E. The Thomas Concurrence

In Justice Thomas' concurring opinion, Thomas articulated his desire to reconsider the substantial effects test in favor of a test more in line with the original understanding of the Commerce Clause.95 Thomas argued that the original understanding of Commerce Clause power did not include the extension of federal power to all activities that substantially affect interstate commerce.96 Under the original understanding, according to Thomas, "commerce" meant trade — that is, selling, buying, or bartering — and not production-related activities such as manufacturing or agriculture.97

 Rejecting Justice Breyer's analysis of prior case law, Thomas analyzed Commerce Clause jurisprudence as consistently maintaining the federalist principle of division of power between state and federal governments.98 Thomas concluded that the all-inclusive substantial effects test should be abandoned,99 but admitted that stare

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99. Of the substantial effects test, Thomas wrote, "Such a formulation of federal power is no test at all: it is a blank check." Id. at 1561 (Thomas, J., concurring).

98. Id. at 1646-49 (Thomas, J., concurring).
97. Id. at 1643 (Thomas, J., concurring).
96. Id. at 1644 (Thomas, J., concurring).
95. Id. at 1642 (Thomas, J., concurring).
94. Id. at 1640 (Kennedy, J., concurring).
93. Id. at 1641 (Kennedy, J., concurring).
92. Id. at 1640 (Kennedy, J., concurring).
91. Id. (Kennedy, J., concurring).
90. Id. (Kennedy, J., concurring).
89. Kennedy stated, "The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene . . . in doubt." Id. at 1639 (Kennedy, J., concurring).
88. Id. at 1639 (Kennedy, J., concurring).
87. Id. at 1638 (Kennedy, J., concurring).
86. Id. at 1637 (Kennedy, J., concurring).
85. Id. at 1636 (Kennedy, J., concurring).
84. Id. at 1635 (Kennedy, J., concurring).
83. Id. at 1633 (Kennedy, J., concurring).
82. Id. at 1632 (Kennedy, J., concurring).
81. Id. at 1631 (Kennedy, J., concurring).
80. Id. at 1630 (Kennedy, J., concurring).
79. Id. at 1630 (Kennedy, J., concurring).
78. Id. at 1629 (Kennedy, J., concurring).
77. Id. at 1628 (Kennedy, J., concurring).
76. Id. at 1627 (Kennedy, J., concurring).
75. Id. at 1626 (Kennedy, J., concurring).
74. Id. at 1624 (Kennedy, J., concurring).
73. Id. at 1623 (Kennedy, J., concurring).
72. Id. at 1622 (Kennedy, J., concurring).
71. Id. at 1621 (Kennedy, J., concurring).
70. Id. at 1620 (Kennedy, J., concurring).
69. Id. at 1619 (Kennedy, J., concurring).
68. Id. at 1618 (Kennedy, J., concurring).
67. Id. at 1617 (Kennedy, J., concurring).
66. Id. at 1615 (Kennedy, J., concurring).
65. Id. at 1614 (Kennedy, J., concurring).
64. Id. at 1613 (Kennedy, J., concurring).
63. Id. at 1612 (Kennedy, J., concurring).
62. Id. at 1611 (Kennedy, J., concurring).
61. Id. at 1610 (Kennedy, J., concurring).
60. Id. at 1609 (Kennedy, J., concurring).
59. Id. at 1608 (Kennedy, J., concurring).
58. Id. at 1607 (Kennedy, J., concurring).
57. Id. at 1606 (Kennedy, J., concurring).
56. Id. at 1605 (Kennedy, J., concurring).
55. Id. at 1604 (Kennedy, J., concurring).
54. Id. at 1603 (Kennedy, J., concurring).
53. Id. at 1602 (Kennedy, J., concurring).
52. Id. at 1601 (Kennedy, J., concurring).
51. Id. at 1600 (Kennedy, J., concurring).
50. Id. at 1599 (Kennedy, J., concurring).
49. Id. at 1598 (Kennedy, J., concurring).
48. Id. at 1597 (Kennedy, J., concurring).
47. Id. at 1596 (Kennedy, J., concurring).
46. Id. at 1595 (Kennedy, J., concurring).
45. Id. at 1594 (Kennedy, J., concurring).
44. Id. at 1593 (Kennedy, J., concurring).
43. Id. at 1592 (Kennedy, J., concurring).
42. Id. at 1591 (Kennedy, J., concurring).
41. Id. at 1590 (Kennedy, J., concurring).
40. Id. at 1589 (Kennedy, J., concurring).
39. Id. at 1588 (Kennedy, J., concurring).
38. Id. at 1587 (Kennedy, J., concurring).
37. Id. at 1586 (Kennedy, J., concurring).
36. Id. at 1585 (Kennedy, J., concurring).
35. Id. at 1584 (Kennedy, J., concurring).
34. Id. at 1583 (Kennedy, J., concurring).
33. Id. at 1582 (Kennedy, J., concurring).
32. Id. at 1581 (Kennedy, J., concurring).
31. Id. at 1580 (Kennedy, J., concurring).
30. Id. at 1579 (Kennedy, J., concurring).
29. Id. at 1578 (Kennedy, J., concurring).
28. Id. at 1577 (Kennedy, J., concurring).
27. Id. at 1576 (Kennedy, J., concurring).
26. Id. at 1575 (Kennedy, J., concurring).
25. Id. at 1574 (Kennedy, J., concurring).
24. Id. at 1573 (Kennedy, J., concurring).
23. Id. at 1572 (Kennedy, J., concurring).
22. Id. at 1571 (Kennedy, J., concurring).
21. Id. at 1570 (Kennedy, J., concurring).
20. Id. at 1569 (Kennedy, J., concurring).
19. Id. at 1568 (Kennedy, J., concurring).
18. Id. at 1567 (Kennedy, J., concurring).
17. Id. at 1566 (Kennedy, J., concurring).
16. Id. at 1565 (Kennedy, J., concurring).
15. Id. at 1564 (Kennedy, J., concurring).
14. Id. at 1563 (Kennedy, J., concurring).
13. Id. at 1562 (Kennedy, J., concurring).
12. Id. at 1561 (Kennedy, J., concurring).
11. Id. at 1560 (Kennedy, J., concurring).
10. Id. at 1559 (Kennedy, J., concurring).
9. Id. at 1558 (Kennedy, J., concurring).
8. Id. at 1557 (Kennedy, J., concurring).
7. Id. at 1556 (Kennedy, J., concurring).
6. Id. at 1555 (Kennedy, J., concurring).
5. Id. at 1554 (Kennedy, J., concurring).
4. Id. at 1553 (Kennedy, J., concurring).
3. Id. at 1552 (Kennedy, J., concurring).
2. Id. at 1551 (Kennedy, J., concurring).
1. Id. at 1550 (Kennedy, J., concurring).
decisis may prevent a complete return to the original understanding of Commerce Clause power. 100

F. The Stevens Dissent

Justice Stevens wrote a separate dissent in which he argued that the Commerce Clause power includes the power to regulate firearms at any location because of their "potentially harmful use" and the subsequent effect on interstate commerce. 101 Therefore, according to Stevens, Congress must also have the power to regulate firearm possession in particular markets, including school zones. 102

G. The Souter Dissent

Justice Souter, in a separate dissenting opinion, offered a clear defense of the rational basis test as the proper method for judicial review of Commerce Clause power. Souter analyzed Commerce Clause jurisprudence from the standpoint of the judicial function, associating the excesses and ineffectiveness of judicial review of Commerce Clause cases in the early twentieth century with the discredited Lochner, 103 line of decisions of that same period. 104 The primary lesson of this "chastening" 105 era, according to Souter, is the unsuitability of the judiciary, rather than the legislature, to decide which activities are interstate commerce and which are not. 106 It was this very unsuitability, said Souter, that led the Court to abandon the "formalistic" 107 distinctions that had been used to place limits on Commerce Clause power and adopt instead the rational basis test and its inherent deference to the legislature. 108

The majority's holding, according to Souter, adopted commerciality as a "qualification" 109 to the rational basis test. 110 Souter warned that the evaluation of what is commercial and what is not would send the Court into the same

100. Id. at 1650 (Thomas, J., concurring).
101. Id. at 1651 (Stevens, J., dissenting).
102. Id. (Stevens, J., dissenting).
103. The Court, in Lochner v. New York, 198 U.S. 45, 64 (1905) (holding that a state statute which set maximum hours for employees was unconstitutional because the law violated the due process guarantee of liberty of contract), and other similar decisions, struck down a variety of social and economic legislation on the grounds that the laws violated substantive due process.
105. Id. at 1652 (Souter, J., dissenting).
106. Id. at 1652-53 (Souter, J., dissenting).
107. Id. at 1653 (Souter, J., dissenting).
108. Souter wrote,
   The practice of deferring to rationally based legislative judgments . . . reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices.
   Id. at 1651-52 (Souter, J., dissenting).
109. Id. at 1654 (Souter, J., dissenting).
110. Id. at 1653-54 (Souter, J., dissenting).
analytical abyss of economic policy making that the Court experienced sixty years ago.111

Souter cautioned against any future use of traditional state sovereignty as an exception or qualification to rational basis review. Souter rejected the argument that the connection between interstate commerce and activities subject to traditional state sovereignty is in and of itself remote.112

Souter concluded that the Gun-Free School Zones Act passed the rational basis test113 and the majority holding in Lopez should be seen only as a "misstep."114 But, Souter warned, "not every epochal case has come in epochal trappings."115

H. The Breyer Dissent

Justice Breyer, joined by the three other dissenting justices,116 wrote that the Gun-Free School Zones Act falls well within the federal Commerce Clause power.117 Breyer argued for three principles of Commerce Clause interpretation in analyzing Lopez. First, the Commerce Clause power includes the power to regulate local activities insofar as they significantly affect interstate commerce.118 Second, the Court should consider the cumulative effect of all similar activities when determining whether the activity in question significantly affects interstate commerce.119 Third, the Court should judge the connection between an activity and interstate commerce "not directly, but at one remove."120 In other words, the Court should only judge whether the legislature could rationally decide that the activity, taken in totality, significantly affects interstate commerce.

As an additional point of analysis, Breyer argued that formal congressional findings should not be required in cases of rational basis review of Commerce

111. Id. at 1654 (Souter, J., dissenting).
112. Souter wrote,

As for remoteness, it may or may not be wise for the National Government to deal with education, but Justice Breyer has surely demonstrated that the commercial prospects of an illiterate State or Nation are not rosy, and no argument should be needed to show that hijacking interstate shipments of cigarettes can affect commerce substantially even though the States have traditionally prosecuted robbery.

Id. at 1654 (Souter, J., dissenting). Souter also made light of the notion that the Commerce Clause becomes "weaker," as Souter characterized the argument, where it touches activities subject to traditional state sovereignty. It is well settled, Souter responded, that the Commerce Clause power is plenary and therefore must either coexist with a particular police power of a state or preempt that power. Id. at 1654-55 (Souter, J., dissenting).
113. Souter stated "The only question is whether the legislative judgment is within the realm of reason." Id. at 1656 (Souter, J., dissenting).
114. Id. at 1657 (Souter, J., dissenting).
115. Id. (Souter, J., dissenting).
116. Justice Breyer was joined by Justices Stevens, Souter, and Ginsburg.
117. Lopez, 115 S. Ct. at 1665 (Breyer, J., dissenting).
118. "I use the word 'significant' because the word 'substantial' implies a somewhat narrower power than recent precedent suggests. But, to speak of 'substantial effect' rather than 'significant effect' would make no difference in this case." Lopez, 115 S. Ct. at 1657-58 (Breyer, J., dissenting) (citations omitted).
119. Id. at 1658 (Breyer, J., dissenting).
120. Id. (Breyer, J., dissenting).
Clause power. To do so, Breyer stated, "would appear to elevate form over substance."121

Analyzing whether regulation of gun possession in school zones could rationally be considered by the legislature to significantly — or, per the majority, substantially — affect interstate commerce, Breyer cited a long list of reports and studies in support of the position that such an effect could be found. The various documents listed by Breyer told of the influence of gun possession and violent crime on the quality of education and the influence of the quality of education on the national economy.122

Breyer rejected the majority's argument that holding gun possession in school zones to be a proper subject of federal regulation would destroy federalism and obliterate the line between what is federal and what is local.123 Breyer cautioned that the majority opinion created three important legal problems. First, activities with less connection to interstate commerce than evident in Lopez, according to Breyer, have been held to be within the federal government's Commerce Clause power.124 Second, the majority's distinction between commercial and noncommercial activities is a revival of the use of discredited "technical legal conceptions," rather than a "practical" understanding of economics to decide the level of effect an activity has on interstate commerce.125 Third, the majority's holding could cause legal uncertainty in what had been a settled point of law, inspiring needless litigation and bringing into question numerous federal statutes written to comply with the settled understanding of Commerce Clause power.126

I. Rehnquist's Response to the Breyer Dissent

Much of Rehnquist's opinion responded to the arguments made by Justice Breyer in his dissenting opinion. Rehnquist argued that under the analysis used by Breyer, the federal government's Commerce Clause power would be tantamount to a federal

121. Id. (Breyer, J., dissenting).
122. As evidence of the substantial effect of education on the national economy, Justice Breyer cited — among many others — articles detailing the financial rewards of investing in human capital, the increasing global competition, and the use of the level of education of the workforce as a criterion for corporate location decisions. Id. at 1655-71 (Breyer, J., dissenting).
123. Breyer wrote,
A holding that the particular statute before us falls within the commerce power would not expand the scope of that Clause. Rather, it simply would apply preexisting law to changing economic circumstances. It would recognize that, in today's economic world, gun-related violence near the classroom makes a significant difference to our economic, as well as our social, well-being.
Id. at 1661-62 (Breyer, J., dissenting).
125. Lopez, 115 S. Ct. at 1663 (Breyer, J., dissenting) (quoting Swift & Co. v. United States, 196 U.S. 375, 398 (1905) (Holmes, J.)).
126. Id. at 1664-65 (Breyer, J., dissenting).
police power, subject to no intrinsic or extrinsic limits other than the rights preserved to individuals.127

Rehnquist criticized the elasticity of Breyer's approach, arguing that it would result in judicial approval of any federal regulation.128 Rehnquist theorized that the reasoning which would allow federal regulation of firearms in schools because of the adverse effect on classroom learning would apply equally to direct federal regulation of the entire educational process, including specific school curricula.129

Rehnquist sharply rejected Breyer's assertion that "Congress . . . could rationally conclude that schools fall on the commercial side of the line."130 Rehnquist explained that the level of generality needed to support this conclusion would subvert any real limits on federal power under the Commerce Clause.

Perhaps the clearest articulation of the underlying rationale of the majority's holding in Lopez came in response to Breyer's charge that the decision would only create legal uncertainty. Rehnquist argued that such uncertainty is better than the alternative of the judicial branch complicitly allowing Congress to seize a plenary police power that reaches far beyond the limits imposed on that body in the Constitution.131 Rehnquist wrote, "So long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty.'"132 The need for the judiciary to impose limits on federal power is so important, according to Rehnquist, that it overrides many concerns regarding the elegance of method.

IV. The Ramifications of United States v. Lopez

Although it remains too early to gauge the true impact of Lopez, early Commerce Clause jurisprudence points to less significance than anticipated by most commentators. In the words of Justice Souter, Lopez does indeed seem to be more "misstep" than "epoch."133

A. The New Federalism

Certainly there is reason to believe that a judicial curtailment of federal Commerce Clause power would resonate throughout the decisions of the federal bench. Calls for greater state sovereignty have in recent times been loudly trumpeted in both the judicial and political arenas.134 Judges and politicians alike

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127. Id. at 1632.
128. Id.
129. Id. at 1633.
130. Id. (quoting id. at 1664 (Breyer, J., dissenting)).
131. Id.
132. Id.
133. Id. at 1657.
134. The diminishment of federal regulations has been an oft-repeated principle in the ideology of many political officials in recent times. As this issue has been mostly — but by no means exclusively — identified with the Republican party, perhaps the most important practical consideration
have spoken out for less federal "interference" in the affairs of the states, premising their arguments on the view that the ever-encroaching power of federal government is suffocating state's rights and making state responsibility useless.

The theme of federalism figured prominently in the 1995 and 1996 terms of the Supreme Court, not only in *Lopez* but also in *U.S. Term Limits, Inc. v. Thornton* and *Seminole Tribe v. Florida.* In *Term Limits*, the Court held that states cannot add to the qualifications to be a Member of Congress. The debate in *Term Limits* revolved around competing theories of sovereignty, with Justice Stevens — for the majority — interpreting the base of power of federal officials as national popular sovereignty and Justice Thomas — in his dissent — arguing for state sovereignty. In *Seminole*, the Court considered the constitutionality of the Indian Gaming Regulatory Act, which authorized a tribe to bring suit in federal court to compel a state to mediate with the tribe in order to arrive at a compact between the tribe and the state regarding the regulation of certain gaming activities. The Court held that the Indian Commerce Clause does not grant Congress the power to infringe upon state sovereignty by abrogating a state's Eleventh Amendment immunity from suit in federal court. Thus, under *Seminole*, a tribe cannot sue a state in federal court to force negotiations pursuant to the Indian Gaming Regulatory Act. What is most clear from these cases is that the nuances of the

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for the future of Commerce Clause jurisprudence is the number of federal judges appointed during the years of that party's control of the White House. As of January 1, 1995, fully 393 of the 645 active federal district judges and 103 of the 167 active Court of Appeals judges were appointed under Republican administrations. See Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination, JUDICATURE, May-June 1995,* at 291. History, however, cautions against reading too much into the source of political appointments of judges as a means of forecasting their decisions.

138. Justice Stevens wrote, "Thus the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by States, but by the people." Id. at 1868.
139. Justice Thomas countered,

"In short, the notion of popular sovereignty that undergirds the Constitution does not erase state boundaries, but rather tracks them. The people of each State obviously did trust their fate to the people of the several States when they consented to the Constitution; not only did they empower the governmental institutions of the United States, but they also agreed to be bound by constitutional amendments that they themselves refused to ratify. . . . At the same time, however, the people of each State retained their separate political identities. As Chief Justice Marshall put it, "[n]o political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass." *Id.* at 1877 (Thomas, J., dissenting) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819)).
141. U.S. CONST. art. 1, § 8, cl. 3.
143. As with the progeny of *Lopez*, lower courts have not read *Seminole* to significantly undermine the extent of federal power authorized by the Indian Commerce Clause. *See United States v.*
division of state and federal power will likely occupy the Court's attention for some time.

B. Early Developments

The early progeny of *Lopez* have not borne out the forecasts of radical change made by early prognosticators. It would be inaccurate, however, to say that the effects of *Lopez* have not been, nor will not be, important. At minimum, federal Commerce Clause authority has become a legitimate subject of judicial review, rather than a mere formality. Because the Commerce Clause covers an extraordinarily wide field of action, it will be a number of years before an accurate assessment of the impact of this change can be made.

1. Federal Criminal Statutes

At least one hope for *Lopez* was that the Supreme Court's decision would reverse the increasing federalization of criminal law. That has not proved to be the result. To date, no federal criminal statute has been ruled unconstitutional in light of *Lopez*.

Federal statutes regulating firearms have been repeatedly challenged since the announcement of *Lopez*, all to no avail. Post-*Lopez* decisions have upheld federal statutes prohibiting the possession of firearms by a felon; the importing,
manufacturing, or dealing in firearms by unlicensed persons; the possession of a firearm with an obliterated serial number; the unlawful manufacture of a firearm; the possession of a handgun by a juvenile; the possession of a firearm in connection with a drug trafficking crime; and the transfer or possession of machine guns. In each case, courts distinguished the firearms statutes from the Gun-Free School Zones Act by noting the express jurisdictional requirement in each firearms statute that the firearm have some nexus to interstate commerce. Such a requirement, as noted by the majority in *Lopez*, was absent

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*NOTES*


149. See United States v. Hernandez, 85 F.3d 1023 (2d Cir. 1996) (holding 18 U.S.C. § 922(k) (1994), which prohibits the possession of a firearm with an obliterated serial number, to be a proper exercise of federal Commerce Clause power because of the express requirement that the firearm have moved in interstate commerce); United States v. Diaz-Martinez, 71 F.3d 946 (1st Cir. 1995) (same).

150. See United States v. Copus, 93 F.3d 269 (7th Cir. 1996) (holding 26 U.S.C. § 5861(f) (1994), which prohibits the unlawful manufacture of a firearm, to be within federal Commerce Clause power).


153. Courts of appeals in five circuits have held that the prohibition of possession of a machine gun, 18 U.S.C. § 922(o) (1994), is within federal Commerce Clause power. See United States v. Kirk, 70 F.3d 791 (5th Cir. 1995), rehg en banc granted, 78 F.3d 160 (5th Cir. 1996); United States v. Beuckelaere, 91 F.3d 781 (6th Cir. 1996); United States v. Copus, 93 F.3d 269 (7th Cir. 1996); United States v. Kenney, 91 F.3d 884 (7th Cir. 1996); United States v. Rambo, 74 F.3d 948 (9th Cir. 1996), cert. denied, 65 U.S.L.W. 3233 (U.S. Oct. 7, 1996) (No. 95-1976); United States v. Wilks, 58 F.3d 1518 (10th Cir. 1995).

154. But see United States v. Monteleone, 77 F.3d 1086 (8th Cir. 1996), which upheld the prohibition of the disposal of a firearm to a convicted felon as within federal Commerce Clause power despite the statute’s lack of a jurisdictional element which limits its scope to those offenses affecting interstate commerce. 18 U.S.C. § 922(d) (1994). The Monteleone court found that the statute was within federal Commerce Clause authority because of the commercial nature of the activity regulated. Monteleone, 77 F.3d at 1092.
in the Gun-Free School Zones Act.\textsuperscript{155}

Other federal crimes have also been upheld as proper exercises of federal Commerce Clause power, even in light of \textit{Lopez}. Federal regulation of drug trafficking has been held to be authorized by the Commerce Clause, based on the distinction from \textit{Lopez} that drug trafficking is a commercial or economic activity which substantially affects interstate commerce.\textsuperscript{156} Similar "economic activity" reasoning has been used to uphold federal prohibition of the distribution of controlled substances in school zones,\textsuperscript{157} carjacking,\textsuperscript{158} money laundering,\textsuperscript{159} and RICO statutes (use of income gained through racketeering on enterprises or activities affecting interstate commerce).\textsuperscript{160}

Courts of appeals have unanimously upheld the facial constitutionality of the federal prohibition against arson of property used in interstate commerce.\textsuperscript{161} A split

\textsuperscript{155} Lopez, 115 S. Ct. at 1631.

\textsuperscript{156} Courts of appeals in five circuits have held that the prohibition of drug trafficking, 21 U.S.C. § 841(a)(1) (1994), is within federal Commerce Clause power. See United States v. Lerebours, 87 F.3d 582 (1st Cir. 1996); United States v. Leshuk, 65 F.3d 1105 (4th Cir. 1995); United States v. Bell, 90 F.3d 318 (8th Cir. 1996); United States v. Brown, 72 F.3d 96 (8th Cir. 1995) (per curiam), \textit{cert. denied}, 116 S. Ct. 2581 (1996); United States v. Kim, 94 F.3d 1247 (9th Cir. 1996); United States v. Wacker, 72 F.3d 1453 (10th Cir. 1995); \textit{see also} United States v. Tisor, 96 F.3d 370 (9th Cir. 1996) (holding 18 U.S.C. § 846 (1994), which prohibits the conspiracy to distribute controlled substances, to be within federal Commerce Clause power); United States v. Morris, 94 F.3d 1333 (2d Cir. 1996) (same); United States v. Genao, 79 F.3d 1333 (2d Cir. 1996) (same).


\textsuperscript{161} See United States v. McMasters, 90 F.3d 1394 (8th Cir. 1996) (holding 18 U.S.C. § 844(i)
has developed, however, in regard to the jurisdictional question of whether *Lopez* alters the degree of effect on interstate commerce that must be present in order to allow prosecution under the federal arson act.\(^{162}\) Both the Ninth and Eleventh Circuits have required a greater nexus to interstate commerce in light of *Lopez*.\(^{163}\) The Eighth Circuit has rejected the argument that *Lopez* redefines the jurisdictional element of the arson act's required effect on interstate commerce.\(^{164}\)

A similar question has been raised as to the effect on interstate commerce necessary to support a violation of the Hobbs Act,\(^{165}\) which prohibits interference with commerce by robbery or extortion. The great majority of courts to consider the issue have ruled that *Lopez* does not alter the degree of effect on interstate commerce required to state a claim for violation of the act.\(^{166}\) At least one district court, however, has held that the government, in order to satisfy the jurisdictional element of the Hobbs Act, must show that the conduct of the accused had a substantial rather than merely a de minimis effect on interstate commerce.\(^{167}\)

### 2. Federal Civil Statutes

Another predicted area of diminished federal power as a result of *Lopez* is the federal government's regulation of noncriminal intrastate activities. Here, more than in federal regulation of crimes or firearms, the principles articulated in *Lopez* show a few, limited signs of influencing the decisions of lower courts regarding the limits of federal power. Nonetheless, most post-*Lopez* decisions in this area have endorsed

(1994), which prohibits arson of a building used in interstate commerce, to be within federal Commerce Clause authority because of the economic nature of the activity and the required nexus between the activity and interstate commerce); United States v. Gomez, 87 F.3d 1093 (9th Cir. 1996) (same); United States v. DiSanto, 86 F.3d 1238 (1st Cir. 1996); United States v. Flaherty, 76 F.3d 967 (8th Cir. 1996) (same); United States v. Sherlin, 67 F.3d 1208 (6th Cir. 1995) (same), *cert. denied*, 116 S. Ct. 795 (1996).


163. *See United States v. Denalli*, 73 F.3d 328, 330-31 (11th Cir.) (holding, in light of *Lopez*, that the occasional use of a home computer for a business purpose does not represent a sufficient nexus to interstate commerce to allow prosecution under 18 U.S.C. § 844(i) (1994)), *amended in part on reh'g*, 90 F.3d 444 (11th Cir. 1996); United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995) (en banc) (holding, in light of *Lopez*, that the receipt of natural gas from an out-of-state source does not represent a sufficient nexus to interstate commerce to allow prosecution under 18 U.S.C. § 844(i) (1994)).

164. *See United States v. McMasters*, 90 F.3d 1394, 1398 (8th Cir. 1996) (holding that the arson of a rent house which received out-of-state utilities represents a sufficient nexus to interstate commerce to allow prosecution under 18 U.S.C. § 844(i) (1994)).


federal regulation as within Commerce Clause authority. Courts have upheld the constitutional authority of, among other civil statutes, the Employee Retirement Income Security Act (ERISA),\textsuperscript{168} the National Labor Relations Act,\textsuperscript{169} the Beef Promotion and Research Act,\textsuperscript{170} and the Religious Freedom Restoration Act.\textsuperscript{171} To date, the Americans with Disabilities Act as applied to prison work assignments, the Freedom of Access to Clinic Entrances Act, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Violence Against Women Act, and the Child Support Recovery Act have been ruled unconstitutional by a lower court as a result of the Supreme Court's decision in Lopez.

\textit{a) The Americans with Disabilities Act}

In \textit{Pierce v. King},\textsuperscript{172} a North Carolina district court held that Congress lacks the authority under the Commerce Clause to apply the Americans with Disabilities Act (ADA) to prison work assignments. The district court ruled that a state inmate displeased with his prison work assignment does not have a valid cause of action for accommodation under the ADA because that Act's reach is limited by the Commerce Clause.\textsuperscript{173} The \textit{Pierce} court looked to the insufficiency of the effect of the administration of state prisons on interstate commerce and the traditional sovereignty of states over their own prisons.\textsuperscript{174}

In \textit{Abbott v. Bragdon},\textsuperscript{175} however, a federal district court in Maine rejected a \textit{Lopez} challenge to Title III of the ADA.\textsuperscript{176} The ADA prohibits discrimination in the full and equal enjoyment of services by places of public accommodation on the basis of disability.\textsuperscript{177} The \textit{Abbott} court held that Congress, under the Commerce Clause, may forbid the denial of dental service by a private clinic to a patient who is HIV positive.\textsuperscript{178} The \textit{Abbott} court, citing \textit{Wickard},\textsuperscript{179} held that dental service, in the aggregate, substantially affects interstate commerce and is therefore subject to federal regulation under the Commerce Clause.\textsuperscript{180}

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\textsuperscript{171} 42 U.S.C. § 2000bb (1994); \textit{see} Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996) (holding that the constitutionality of the RFRA is not affected by \textit{Lopez} because the RFRA was enacted pursuant to section 5 of the Fourteenth Amendment).

\textsuperscript{172} 918 F. Supp. 932, 938 (E.D.N.C. 1996).

\textsuperscript{173} \textit{Id.}

\textsuperscript{174} \textit{Id.} at 939.

\textsuperscript{175} 912 F. Supp. 580 (D. Me. 1995).

\textsuperscript{176} 42 U.S.C. § 12,182 (1994).

\textsuperscript{177} \textit{Id.}

\textsuperscript{178} \textit{Abbott}, 912 F. Supp. at 591.

\textsuperscript{179} \textit{Wickard} v. Filburn, 317 U.S. 111 (1942) (upholding federal regulation of the purely intrastate production of wheat because of the aggregate effect of wheat supply and demand on interstate commerce).

\textsuperscript{180} \textit{Abbott}, 912 F. Supp. at 593.
b) The Freedom of Access to Clinic Entrances Act

Courts of appeals in four circuits have held the Freedom of Access to Clinic Entrances Act (FACE), which regulates interference with access to abortion clinics, to be within the power of the federal government under the Commerce Clause. In Cheffer v. Reno, the 11th Circuit distinguished the FACE from the Gun-Free School Zones Act on the basis of the commercial nature of the provision of reproductive health services. Further, the Cheffer court held that the congressional findings, the interstate movement of doctors, patients, and supplies, and the threat to interstate commerce by the violent and physical obstruction of abortion clinic entrances all support a holding that provision of reproductive health services substantially affects interstate commerce. On these grounds, the Cheffer court found the FACE to be a proper subject of federal Commerce Clause authority.

A lone federal district court has taken exception to the above decisions, instead ruling that the FACE is unconstitutional as beyond the federal government’s power under the Commerce Clause. In Hoffman v. Hunt, the district court rejected congressional findings of a substantial effect on interstate commerce. The Hoffman court compared those findings to the government’s arguments rejected in Lopez, stating that any connection between access to abortion clinic entrances and interstate commerce is too tenuous to justify Congress’ conversion of a state crime into a federal offense.

Again citing Lopez, the Hoffman court held that the FACE lacked a jurisdictional element which would limit the Act’s reach to a discrete set of activities which affect interstate commerce. Further, the Hoffman court determined that the activity which the FACE sought to regulate was not the provision or sale of reproductive health services but the civil protest of such services. Based on this distinction,

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183. 55 F.3d 1517 (11th Cir. 1995).
184. Cheffer, 55 F.3d at 1520.
185. Id. at 1520-21.
186. Id.
187. 923 F. Supp. 791 (W.D.N.C. 1996). A federal district court in Wisconsin agreed with Hoffman, but was reversed by the Court of Appeals for the Seventh Circuit. See United States v. Wilson, 880 F. Supp. 621 (E.D. Wis.), rev’d, 73 F.3d 675 (7th Cir. 1995).
189. Id. at 817.
190. Id. at 809.
the Hoffman court held that the FACE does not regulate an activity that is commercial or economic in nature, because civil protest is not commerce,\(^{191}\) and rejected arguments regarding the interstate movement of doctors, patients, and supplies, because only the movement of the protesters would be relevant.\(^{192}\)

c) CERCLA

A federal district court in Alabama has held that Lopez prevents the application of liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)\(^{193}\) to the clean-up of hazardous waste after the facility in question is no longer operating.\(^{194}\) In United States v. Olin Corp., the district court found that the activity sought to be regulated was the after the fact clean-up of real property, an issue of local real property law and, thus, properly subject to state sovereignty.\(^{195}\) Echoing Lopez, the Olin court held that such clean-up was not economic or commercial in nature and bore no substantial effect on interstate commerce.\(^{196}\) Moreover, the Olin court found that CERCLA contains no jurisdictional element which limits its reach to a discrete set of activities which affect interstate commerce.\(^{197}\) The Olin court ruled that in such circumstances the application of CERCLA is beyond the power of the federal government under the Commerce Clause.\(^{198}\)

The two other district courts to consider the issue disagreed with Olin.\(^{199}\) In Cooper Industries v. Agway, a district court in New York held that the imposition of CERCLA liability for clean-up of an inactive site is a proper exercise of federal Commerce Clause power.\(^{200}\) As a matter of dicta, the Cooper court found that the clean-up of hazardous waste does have a substantial effect on interstate commerce, specifically disagreeing with the arguments in Olin to the contrary.\(^{201}\) The principal holding of the court, however, was that CERCLA is subject to federal Commerce Clause authority because CERCLA falls under the second category of permissible federal regulation articulated in Lopez, specifically the regulation and protection of instrumentalities of interstate commerce.\(^{202}\) The Cooper court observed that a priority of CERCLA regarding the clean-up of hazardous waste is the protection of ground water resources from contamination and held that such

191. Id. at 814.
192. Id. at 807-08.
195. Id. at 1532-33.
196. Id.
197. Id. at 1533.
198. Id.
201. Id.
202. Id. at *10 (citing Lopez, 115 S. Ct. at 1629).
resources are, in fact, an instrumentality of interstate commerce. On this basis, the *Cooper* court held that it is a proper use of federal Commerce Clause power to protect ground water from pollution, even if the threat of pollution is from a purely intrastate source.

d) The Violence Against Women Act

The two district courts that have considered the constitutionality of the Violence Against Women Act (VAWA), which establishes a federal civil right to be free from crimes of violence motivated by gender and provides civil remedies for violations of that right, have split on the issue of whether the VAWA is authorized by federal Commerce Clause authority. In *Brzonkala v. Virginia Polytechnic and State University*, the VAWA was held to exceed the power of the federal government under the Commerce Clause. Comparing the VAWA to the Gun-Free School Zones Act struck down in *Lopez*, the *Brzonkala* court cited four reasons for holding the VAWA unconstitutional: (1) the VAWA seeks to regulate local criminal activity which is not economic or commercial in nature; (2) the VAWA does not contain a jurisdictional element which limits its scope to activities which affect interstate commerce; (3) permitting federal regulation under the VAWA would have the practical result of "excessively extending" the power of the federal government at the expense of that of the states; and (4) congressional findings predating the VAWA only demonstrate that violence against women affects the national economy, but do not establish that such violence substantially affects interstate commerce.

A district court in Connecticut, however, held that the VAWA's establishment of a federal civil right to be free from crimes of gender motivated violence is a proper exercise of federal power under the Commerce Clause. In *Doe v. Doe*, the district court rejected the argument that the VAWA federalizes state criminal, family, and tort law. The VAWA, stated the *Doe* court, merely complements those laws and does not preclude their use. The *Doe* court held that congressional findings regarding the VAWA show that gender based violence "qualitatively and quantitatively" has a substantial effect on interstate commerce. Finally, the *Doe* court, citing *Wickard*, held that the aggregate nationwide impact of

203. *Id.*
204. *Id.*
206. *Id.* at *15.
207. *Id.* at *13.
208. *Id.*
209. *Id.* at *14.
210. *Id.*
212. *Id.* at 610.
213. *Id.* at 616.
214. *Id.* at 613-14.
diminished participation by women in the workforce or marketplace caused by the threat or actuality of gender based violence substantially affects interstate commerce.  

e) The Child Support Recovery Act  

Perhaps the most prominent post-\textit{Lopez} debate concerning the constitutionality of a federal civil statute is that over the Child Support Recovery Act (CSRA).\textsuperscript{217} To date, the CSRA, which prohibits willful nonpayment of child support where the obligor and child are in different states, has been challenged on \textit{Lopez} principles in three courts of appeals and fourteen federal district courts. All three courts of appeals and all but three federal district courts held that the CSRA is a proper exercise of federal Commerce Clause power.\textsuperscript{218}  

The debate over the CSRA can perhaps be best illustrated by considering \textit{United States v. Mussari},\textsuperscript{219} in which a federal district court in Arizona dismissed an indictment for failure to pay over $40,000 in child support after holding that the CSRA is not authorized by the Commerce Clause.\textsuperscript{220} That decision was reversed by the Court of Appeals for the Ninth Circuit, which held the CSRA to be within federal power under the Commerce Clause.\textsuperscript{221}  

The Ninth Circuit held that the obligation created by nonpayment of child support where the obligor and child are in different states is an instrumentality of interstate commerce.\textsuperscript{222} As such, observed that court, the obligation to pay child support falls under the second category of permissible federal regulation articulated by Justice Rehnquist in \textit{Lopez} — the protection of instrumentalties of interstate commerce — and is not subject to the same substantial effects analysis that was used in considering the Gun-Free School Zones Act. As an instrumentality of interstate commerce, 

\footnotesize{216.} \textit{Doe,} 929 F. Supp. at 614.  
\footnotesize{219.} \textit{Doe}, 929 F. Supp. at 614.  
\footnotesize{220.} \textit{Id.} at 791.  
\footnotesize{221.} \textit{United States} v. Mussari, 95 F.3d 787 (9th Cir. 1996), \textit{reversing} 894 F. Supp. 1360 (D. Ariz. 1995).  
\footnotesize{222.} \textit{Id.} at 791.
commerce, the obligation to pay child support is regulatable by Congress even where the impediment to payment is purely intrastate.\textsuperscript{223}

The district court in \textit{Mussari} had held that, under \textit{Lopez}, a proper analysis of the CSRA required the determination of whether the activity sought to be regulated has a substantial effect on interstate commerce. The district court cited four reasons for finding the CSRA to be an unconstitutional usurpation of power: (1) the noneconomic nature of the nonpayment of child support; (2) the lack of a jurisdictional requirement in the CSRA of a nexus between nonpayment of child support and interstate commerce; (3) the lack of legislative findings that the nonpayment of child support is a matter of interstate commerce; and (4) general notions of federalism and comity.

Characterizing the CSRA as a criminal — rather than a commercial or economic — statute, the district court in \textit{Mussari} held that nonpayment of child support does not have a substantial effect on interstate commerce.\textsuperscript{224} The district court in \textit{United States v. Sage},\textsuperscript{225} however, which held the CSRA to be constitutional, argued that nonpayment of child support is economic in a way that gun possession in a school zone is not. To wit, there is an economic gain by the obligor and an economic loss by the obligee.\textsuperscript{226}

Echoing \textit{Lopez}, the district court in \textit{Mussari} held that the CSRA lacked the jurisdictional requirement of a nexus between nonpayment of child support and interstate commerce.\textsuperscript{227} The district court in \textit{Mussari} held that the CSRA's requirement that parent and child live in different states is not sufficient to establish an interstate nexus because, first, the CSRA applies equally where parents or children have moved out of state and, second, such a connection is so tenuous that, if allowed, it would result in unlimited congressional power.\textsuperscript{228} The Ninth Circuit, however, countered that it made no difference whether the interstate character of the offense was created by the parent or child, so long as it exists.\textsuperscript{229}

The legislative history of the CSRA, argued the district court in \textit{Mussari}, contains no findings demonstrating a substantial effect on interstate commerce by nonpayment of child support. According to that court, the congressional findings merely show that nonpayment of child support is a national problem, not a matter of national commerce.\textsuperscript{230} The district court in \textit{Mussari} rejected the argument that federal regulation is authorized simply because state action is ineffective or interstate extradition difficult.\textsuperscript{231} Other courts considering the issue have disagreed, holding that congressional findings, speaking to the poverty level of obligees and the inability of individual states to effectively collect interstate child support, amply

\begin{itemize}
  \item \textsuperscript{223} Id. at 789-90.
  \item \textsuperscript{224} \textit{Mussari}, 894 F. Supp. at 1363.
  \item \textsuperscript{225} 906 F. Supp. 84 (D. Conn. 1995), aff'd, 92 F.3d 101 (2d Cir. 1996).
  \item \textsuperscript{226} Id. at 86-87.
  \item \textsuperscript{227} \textit{Mussari}, 894 F. Supp. at 1364-65.
  \item \textsuperscript{228} Id.
  \item \textsuperscript{229} \textit{Mussari}, 95 F.3d at 790.
  \item \textsuperscript{230} \textit{Mussari}, 894 F. Supp. at 1366.
  \item \textsuperscript{231} Id.
\end{itemize}
demonstrate a substantial effect of nonpayment of child support on interstate commerce.232

Finally, the district court in Mussari held that federalism and comity support a
decision disallowing a federal criminal and family law statute, which traditionally
would have been subject to state sovereignty.233 The district court argued that
actual application of the CSRA would force federal courts to review and apply state
child support orders, a clear intrusion into domestic relations issues.234 The Ninth
Circuit specifically rejected this analysis, holding that federalism and comity would
at most only require a federal court to delay action until a state court has ruled on
a support order.235

V. A Few Brief Suggestions on the Methods of
Judicial Review of the Balance of State and Federal Power

The broad range of activities at issue, and the interconnectedness of those
activities in the modern world, have ensured that Commerce Clause jurisprudence
be filled with subtlety and complexity. It is an area where the language of decisions
has often become strained and obscure in the attempt to find principle for future
guidance. But at its heart is a question of judicial review: What is the Supreme
Court's role — and what role is the Supreme Court capable of — in determining the
balance of state and federal power by defining the limits of Commerce Clause
authority?

A. Criticism of the Lopez Opinions

Consistent throughout the history of Commerce Clause jurisprudence is
controversy regarding judicial review of the balance of state and federal power. The
difficulty stems from this conflict: Judicial review of Commerce Clause power
requires the judiciary to inquire into and make decisions about economic policy, but
complete deference to the legislature removes all checks — save democracy — on
the federal government's augmentation of its own power. On the one hand, the
judiciary cannot review the effect of an activity on interstate commerce without
making itself into an unrestrained superlegislature. On the other, the legislature
should not be relied on for principled self-restraint exclusive of any check on the
constant temptation to increase its own power.

Rehnquist, in Lopez, fails to define a principled standard for judicial review of
Commerce Clause authority. Rehnquist's claim that Lopez represents no change in

Cir. 1996).

233. Mussari, 894 F. Supp. at 1367. Because of its ruling that the CSRA is not rooted in any
enumerated power, the Mussari court held that the CSRA violated the Tenth Amendment's reservation
of power to the states. Id. at 1367-68. The Mussari court's use of the Tenth Amendment did not,
however, rise to the level of interpreting the Tenth Amendment to be, in and of itself, a substantive,
extrinsic limit on Commerce Clause authority.

234. Id.

235. Mussari, 95 F.3d at 791.
Commerce Clause doctrine is untrue.\textsuperscript{236} As Breyer argued in his dissent, it is perfectly possible to find that Congress had a rational basis for deciding that gun possession in schools substantially affects interstate commerce.\textsuperscript{237} By not admitting that \emph{Lopez} changes the principles of Commerce Clause review, Rehnquist leaves those principles unnecessarily vague and ambiguous.

Rehnquist's distinction between commercial and noncommercial activities is the most substantive guidance \emph{Lopez} offers. But even that distinction is vague in its application, as cases both before and after \emph{Lopez} show.\textsuperscript{238} Commerce Clause history has repeatedly demonstrated the importance of clear principle in determining what is commerce and what is not. The categorization of commercial and noncommercial activities, left to definition by the various members of the federal bench, invites ambiguity and pliability. \emph{Lopez} demands a judicial decision as to the degree of economic connectedness of a given activity; and in modern economics, everything is interconnected. Rehnquist opens the door to the same goblins that chased the Court away from formalistic Commerce Clause analysis sixty years before.\textsuperscript{239}

Rehnquist is correct in arguing that the judiciary must have a role in the determination of the extent of Commerce Clause power.\textsuperscript{240} Neither Breyer nor any of the other dissenters offer any real limit to Commerce Clause authority under their versions of the rational basis test. Clearly a fundamental principle in the constitutional scheme is that too much danger of tyranny exists to risk relying solely upon Congress to restrain itself from intruding upon the liberties of the people and the powers of the states. The process of the legislature requires consideration of issues policy by policy, not principle by principle. Complete deference to the legislature would ask Congress to determine constitutional principles in the pressure cooker of policy debate — the exact moment where the government's natural temptation to increase its own power is at its greatest. Moreover, it is unwise to argue that democracy alone is an adequate safeguard to federal tyranny; the danger of tyranny is inherent to democracy.\textsuperscript{241} The preservation of rights and liberties

\textsuperscript{236} \emph{Lopez}, 115 S. Ct. at 1630.
\textsuperscript{237} \textit{Id.} at 1659 (Breyer, J., dissenting).
\textsuperscript{238} The distinction between commercial and noncommercial — or, worse yet, economic and non-economic — activities has by no means developed into a clear or useful line for judicial review. \textit{Cf.}, \textit{e.g.}, Carter v. Carter Coal Co., 298 U.S. 332, 304 (1936) (holding that Congress could not regulate the relationship between coal factory employers and employees because production did not directly affect interstate commerce); United States v. Darby, 312 U.S. 100, 118 (1941) (upholding the Fair Labor Standards Act of 1938, 52 Stat. 1060 because of the effect of labor standards on interstate commerce); \textit{cf. also,} \textit{e.g.}, United States v. Mussari, 894 F. Supp. 1360, 1363 (D. Ariz. 1995) (holding the Child Support Recovery Act, 18 U.S.C. § 228, to be beyond federal Commerce Clause power because the CSRA is a criminal rather than a commercial or economic statute), rev'd, 95 F.3d 787 (9th Cir. 1996); United States v. Sage, 905 F. Supp. 84 (D. Conn. 1995) (holding the CSRA to be within Commerce Clause authority because the nonpayment of child support is an economic activity).
\textsuperscript{239} See, \textit{e.g.}, Hammer v. Dagenhart, 247 U.S. 251 (1918), \textit{overruled by} United States v. Darby, 312 U.S. 100 (1941).
\textsuperscript{240} \emph{Lopez}, 115 S. Ct. at 1634.
\textsuperscript{241} Still the clearest analysis of the dangers of tyranny of the majority is from ALEXIS DE
from the tyranny of the majority is a role assigned to — and most suited to — the judiciary, that branch least affected by the potential excesses of a democratic majority.


In Lopez, Rehnquist seeks to define the point of division of state and federal power according to the dictates of the Commerce Clause. Let me suggest that the Court asks the wrong question. The central question for judicial review of federalism is not where the divide is between state and federal power but where the divide is between that power which could — if the people so choose — be federal and that which — regardless of democratic choice — must remain to the states. The balance of state and federal power is largely, but not completely,\textsuperscript{242} subject to the democratic process. The people, within the structure of the Constitution, have the ability to assign, to a certain extent, where the power of government will reside. The role of the Court is to determine which activities are, according to the dictates of the Commerce Clause, beyond the discretion of Congress to classify as subject to state or federal authority. The pendulum marking the balance of state and federal power swings wide, but it does not swing forever.

Upon consideration of federal attempts to regulate activities traditionally subject to state sovereignty, a heightened standard should be imposed to scrutinize whether Congress is attempting to seize power beyond that which is subject to division by the democratic process. The need for a standard higher than the mere rationality of the legislature is justified in such instances by the lessened necessity of deference to the legislature.

The guiding principle of Commerce Clause jurisprudence, beginning with Gibbons v. Ogden,\textsuperscript{243} has been judicial deference to the legislature, and for good reason. First, the Supreme Court has found it extraordinarily difficult to determine the extent of Commerce Clause authority without devolving into economic policy making, as clearly occurred in the decisions of the early twentieth century.\textsuperscript{244} During that period, inquiries into economic policy required by formalistic tests and definitions broke down the walls of judicial restraint and sent the Court spinning out into the unfamiliar and unintended territory of policy determination. Justices were not exercising judgment, with its inherent limitations of text and precedent, but choosing economic policy, with only a five-person majority of unelected, lifetime-tenured votes needed to sustain any measure. Shaken by this conflict, the New Deal Era Court returned to the protections of deference to the legislature and, thus, ensured its own restraint from abuse of power.\textsuperscript{245}

\textsuperscript{242} Save by Constitutional amendment.
\textsuperscript{243} 22 U.S. (9 Whart.) 1 (1824).
\textsuperscript{244} See Carter v. Carter Coal Co., 298 U.S. 238 (1936).
\textsuperscript{245} See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
Second, the Court has recognized that Congress is better able to make policy decisions about which activities substantially affect interstate commerce. The legislature reflects popular will and is, thus, more adaptable to the changing circumstances of the marketplace. Also, Congress is capable of independent, large-scale fact-finding, an ability not shared by the Court.

Third, and perhaps most important, is the role of the people themselves in determining the balance of state and federal power. In the *Federalist* No. 46, Madison argues that the balance of state and federal power will be determined by the success of each government in earning the people's trust. Madison writes:

> If . . . the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due . . .

As circumstances change, and the needs and trust of the people change, the political branches of government respond and power is divided accordingly. The power of government is divided as the people desire, making the possibility of diminishment a caution against tyranny. Further, leaving the balance of power to the desire of the people was itself thought to be an encouragement to civic virtue, trusting the people to find within themselves the ability to govern themselves.

Deference to the legislature, however, should not be raised up as an all-encompassing ideal. The democratic process is not the sole safeguard of liberty. The express delegations of power in the Constitution — and the preservation of all other power to the states and to the people — also serve that end. Madison also argued for limits to the reach of federal power, writing "[T]he State governments . . . have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered." Federal attempts to regulate activities traditionally subject to state sovereignty mark the point where the judiciary must set aside a degree of deference to the legislature and independently inquire as to whether the attempted regulation is authorized by the Commerce Clause. There is a limit to the swing of the balance of power, and that limit should be subject to, and defined by, judicial review at the hands of the Supreme Court.

The imposition of a heightened standard of scrutiny upon federal regulation of activities traditionally subject to state sovereignty asks a question capable of answer by the Court on the basis of constitutional principle. Such an inquiry would not force the judiciary into the arena of economic policy making — a task which it has amply demonstrated it is unequipped to handle.

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249. See Justice Souter's remarks characterizing the *Lochner* line of decisions and Commerce Clause
Moreover, heightened scrutiny would allow real and practical — albeit moderate — limits on federal encroachment on state power without infringing upon the function of federalism as a check on tyranny and an encouragement to civic virtue. The elective power to determine — to a large but not complete extent — the balance of state and federal power would be preserved.

Note that the "rule" or test of whether an activity is subject to federal regulation under the Commerce Clause power would not change in formulation. The inquiry remains whether the activity sought to be regulated substantially affects interstate commerce. The heightened standard results not from a change in the definitional test of Commerce Clause authority but from a change in the body which primarily determines whether an activity has a sufficient effect on interstate commerce to allow federal action.

The measure of the effect of an activity on interstate commerce should include a consideration of the commercial or economic nature of the activity sought to be regulated, the sufficiency of state regulation, and the need for national — rather than local — government control. The requirement in *Lopez* that the activity which the federal government is attempting to regulate be commercial or economic in nature is overdue. However, the requirement is also, as the decisions of the lower courts show, not likely to lead to a discernible limit on federal power. It is useful only as a landmark of the outer boundaries of Commerce Clause authority.

Largely lacking in the various attempts at construction of a theory of Commerce Clause jurisprudence is the incorporation of a most practical and fundamental principle of our representative democracy: The federal government should be sovereign where uniform, national measures are necessary, and the states should be sovereign where state action is sufficient. Still the clearest articulation of the nature of the Constitution's division of state and federal power is from Chief Justice Marshall in *Gibbons v. Ogden*:

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to 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.\(^{200}\)

At its essence, a theory of the extent of Commerce Clause authority must ask the practical question of whether the activity sought to be regulated is, as regarding interstate commerce, an external concern of the nation or an internal concern which affects the states generally. If neither, the activity is properly the subject of state sovereignty.

\(^{200}\) Jurisprudence in the early 20th Century as a "chastening era" in Supreme Court history. *Lopez*, 115 S. Ct. at 1652. *See supra text* accompanying notes 103-08.

The central question is judicial review: When must the Court act and what role may it responsibly play? The consideration of the necessity of national regulation in determining the effect of an activity on interstate commerce incorporates a practical understanding of the intent and values of our dual system of government into Commerce Clause jurisprudence. Federal intrusion into areas of traditional state sovereignty present a situation where the judiciary must forsake a degree of caution regarding its inability to refrain from the abuse of judicial power and take action against a greater threat.

The attempt here at a better method of judicial review of Commerce Clause authority is a moderate approach. This method contemplates a slight but significant change in the understanding of the Supreme Court's role in Commerce Clause jurisprudence and a slight but significant change in the decisions that would result. It is an approach that values the contributions of the division of power between state and federal governments. It is an approach that values the role of the people in determining how that power is divided. Most importantly, it is an approach that allows the Supreme Court to exercise judicial review of Commerce Clause authority in a restrained and principled manner. The use of a heightened standard of scrutiny where the federal government has sought to regulate an activity traditionally subject to state sovereignty would allow the pendulum of state and federal power to be controlled by the people, but would ensure that the reach of that pendulum is bound by the enumerated powers of the Constitution.

VI. Conclusion

Following the decision in Lopez, commentators predicted results ranging from radical changes in Commerce Clause jurisprudence to no change at all. The Supreme Court's holding in Lopez permits both these interpretations. The early progeny for the most part follow the more restrictive view; but, certainly there is support in the opinion for a judicially enforced resurgence of state sovereignty.

The failure of the judiciary to impose limits on the reach of federal Commerce Clause power stands as a distant but significant threat to state autonomy and individual liberty. However, a judicially enforced curtailment of the power of the people to divide power between the state and federal governments according to their own trust and wisdom would represent at least as great an usurpation of power as ever accomplished by the federal government through the use of the Commerce Clause. This note suggests that the use of a heightened standard of scrutiny of federal attempts to regulate activities traditionally subject to state sovereignty would allow the pendulum of state and federal power to be controlled by the democratic process, while ensuring that the reach of that pendulum is bound by the enumerated powers of the Constitution.

The balance of state and federal power is too critical to the American scheme of government to be left to definition by lower courts on the basis of the hazy principles articulated in United States v. Lopez. A careful consideration of judicial review of federalism is in order.

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