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LEGISLATIVE FINDINGS AND JUDICIAL SIGNALS: A POSITIVE POLITICAL READING OF *UNITED STATES V. LOPEZ*

Barry Friedman[*]

Positive political theory (PPT) has contributed mightily to our understanding of the utility of legislative history in cases in which courts must interpret statutes. Oddly, however, far less attention has been given to the application of PPT in a somewhat reverse but equally important area. Following a constitutional decision by the Supreme Court, Congress frequently must determine its available courses of action. Just as courts might apply PPT in reading the legislative record, PPT can help the legislative branch understand the meaning of judicial decisions. The recent Supreme Court decision in *United States v. Lopez*[1] provides occasion to examine both applications of PPT.

In *Lopez* the Supreme Court held, for the first time in sixty years, that congressional legislation exceeded the scope of the commerce power. The *Lopez* Court affirmed a decision of the Fifth Circuit that struck down the Gun-Free School Zones Act of 1990[2] on the grounds that Congress had failed to support the exercise of its power with legislative findings or a record.[3] In the interim

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* Professor of Law, Vanderbilt University School of Law. I would like to thank Ann Althouse, Bill Eskridge, Dan Farber, John Ferejohn, Phil Frickey, Larry Kramer, Bob Rasmussen, Dan Rodriguez, Barry Weingast, and Nick Zeppos for their assistance at varying stages of this project. Ann Vandevelde provided excellent research assistance under tight time constraints, for which I am indebted.

1. 115 S. Ct. 1624 (1995).

2. The Gun-Free School Zones Act of 1990 was enacted on November 29, 1990, as § 1702 of the Crime Control Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844-45 (codified as 18 U.S.C. § 922(q) (1988 & Supp. V 1993) (prohibiting the possession of firearms within 1,000 feet of a school).

3. United States v. Lopez, 2 F.3d 1342, 1367-68 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995).

between federal appellate and Supreme Court review, Congress adopted findings that purported to address the lower court's concern.[4] The *Lopez* Court nonetheless struck down the statute, while disregarding the *post hoc* findings and simultaneously suggesting that findings or a record might be of assistance in future cases.[5]

Lopez thus provides a ripe opportunity to examine the role congressional findings should play when courts are asked to determine whether statutes are within the bounds of congressional authority. That, in essence, is the question Professor Frickey addresses in his insightful article.[6] Professor Frickey concludes that while such findings may not be strictly required, after *Lopez* a "prudent Congress" should "articulate the judicial standard (the subject of the statute must have a substantial effect upon interstate commerce) and then document the satisfaction of that standard through facts developed in hearings and other legislative methods."[7] Essentially Professor Frickey advocates a constitutional interpretive canon that would invalidate dubious exercises of the commerce power unless Congress has made a record regarding the nexus between the challenged regulation and commerce.

Although some may disagree with Professor Frickey's position, I am not one of them. Congress's powers are limited to those enumerated in Article I of the Constitution.[8] When a reviewing court cannot fathom how the statute at issue is the offspring of one of those enumerated powers, it seems unavoidably sensible to ask Congress to draw the connection. The choice belongs to Congress. It can either make the suggested record or risk having the statute invalidated. Given this choice, it is difficult to quibble with a judi-

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4. Section 320904 of the Violent Crime Control and Law Enforcement Act of 1994 amended § 922(q)—the Gun-Free School Zones Act of 1990—to include congressional findings purporting to establish a nexus between firearm possession in and around schools and interstate commerce. Pub. L. No. 103-322, sec. 320904, 108 Stat. 1796, 2125-26 (1994).

5. 115 S. Ct. at 1632 & n.4.

6. Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695 (1996).

7. *Id.* at 720. Indeed, Professor Frickey seems to go further, arguing that for consistency's sake the Supreme Court should require findings not only when performing rational basis review of commerce legislation, but also when performing the same kind of review in equal protection cases, at least when the regulation is not economic. *Id.* at 726-28.

8. There undoubtedly are those who believe this limitation is meaningless, and those who think it should be. As to the former, *Lopez* suggests the Supreme Court thinks otherwise. *See Lopez*, 115 S. Ct. at 1628.

cial doctrine that simply asks Congress to aid courts by explaining the less-than-obvious nexus. The first part of this paper bolsters Professor Frickey's own argument, providing reasons why the canon he recommends is a useful one.[9]

The *Lopez* decision poses difficulties for Professor Frickey, however. These difficulties are grounded both in traditional rules of statutory construction and in the insights of PPT. The difficulties arise because the *Lopez* Court neither adopted Professor Frickey's canon nor rejected it. Although legislative findings and a legislative record were arguably available to the *Lopez* Court, traditional rules of statutory interpretation might have found both of these deficient, providing an opportunity for the Supreme Court to reject what was available and then adopt Professor Frickey's canon for future cases. This was, in essence, the position taken by the lower court. Alternatively, PPT would have suggested the value in crediting the available findings and legislative record despite their supposed deficiencies, in which case the Supreme Court might have applied Professor Frickey's canon and upheld the statute. The second section of this paper discusses how the *Lopez* Court rejected both these possibilities.[10]

The fact that the *Lopez* Court rejected both these theories raises puzzling questions for Congress about the scope of the *Lopez* decision. Relying on traditional readings of the *Lopez* decision, commentators have suggested interpretations at opposite ends of the spectrum. Some argue that the decision is relatively meaningless,[11] while others suggest it marks a sea of change in Commerce Clause jurisprudence.[12] Where along the continuum the Su-

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9. *See infra* text accompanying notes 15-70.

10. *See infra* text accompanying notes 71-86.

11. *See* Charles Fried, *Foreword: Revolutions*, 109 HARV. L. REV. 13, 15 (1995) (arguing that the *Lopez* decision does not signal a transformation of the federal system); Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643 (1996) (arguing that *Lopez* indicates a predictable shifting of doctrine but not a major political change).

12. *See* Nagel *supra* note 11, at 643 (quoting journalists who feel we are in the midst of a "significant transformation of the legal relationship between the national government and the states"); *see also* Kathleen M. Sullivan, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 105 (1995) (suggesting that the impact of *Lopez* may depend on Justice Kennedy's vote); Linda Greenhouse, *Supreme Court Could Decide How Far Federal Power Reaches*, N.Y. TIMES, Apr. 30, 1995, at 6A. ("The Supreme Court's stunning decision that Congress lacked the authority to bar gun possession in or near schools was a forceful reminder not only of the court's raw power . . . but also of its inevitable role in shaping the country's ongoing political dialogue.").

preme Court actually sits is, of course, a question of great moment to Congress and to the nation.

The third section of this paper discusses the application of PPT to the reading of constitutional cases and then reads *Lopez* through the lens of PPT.[13] In the context of judicial interpretation of congressional statutes, PPT focuses attention upon the legislative record to determine the "signals" being sent by "pivotal" voters as to the meaning of the statute. With some modification appropriate to the very different judicial environment, these same techniques can be employed to interpret the meaning of judicial decisions such as *Lopez.*

In order to demonstrate the potentially different readings of judicial decisions rendered by traditional means and by PPT, this paper focuses upon an intriguing case study. *'Lopez* struck down the Gun-Free School Zones Act of 1990 (the "1990 Act"). Congress now is considering a piece of legislation creatively entitled the Gun-Free School Zones Act of 1995 (the "1995 Act").[14] The 1995 Act does what its predecessor did, except that Congress has attempted by a number of devices to cure the unconstitutionality of the 1990 Act. Although there may be little reason to think that Congress ultimately will move to enact the 1995 Act, the similarity between the two statutes provides a control that is useful in trying to understand what *Lopez* spells for the future of the commerce power. The implication of a positive political reading of *Lopez* is that existing Commerce Clause jurisprudence may indeed be unstable.

There are essentially three points to this paper. First, the legislative record canon proposed by Professor Frickey is a useful suggestion calculated to facilitate the exercise of judicial review and improve interbranch communication. Second, PPT has a great deal to add to congressional interpretation of judicial constitutional decisions. Third, a positive political reading of *Lopez* suggests some possible judicial interest in doctrinally curtailing one critical branch of Congress's commerce power.

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13. *See infra* text accompanying notes 87-193.

14. *See* S. 890, 104th Cong., 1st Sess. (1995); H.R. 1608, 104th Cong., 1st Sess. (1995).

I. THE SENSE OF THE LEGISLATIVE RECORD CANON

The facts of *Lopez* are straightforward.[15] Lopez, a high school senior in Texas, was caught in possession of a gun on school grounds. He was arrested and charged under a Texas law that forbade the possession of a firearm on school grounds. The very next day federal agents charged Lopez with violating the 1990 Act, and the state charges were dropped.[16] The 1990 Act prohibited possession of a firearm within 1,000 feet of the grounds of a school.[17] However, the 1990 Act contained no findings drawing a connection between guns near schools and interstate commerce, and there was no requirement that the gun have moved in commerce or that the crime itself affected commerce in any way. Lopez challenged the indictment on the ground that the 1990 Act exceeded Congress's powers under Article I of the Constitution. The district court upheld the law,[18] but the Fifth Circuit reversed.[19] The Supreme Court granted certiorari[20] and held that Congress may not regulate in a given area unless the regulated conduct "substantially affects" interstate commerce.[21] Deciding that possession of guns near schools did not have a substantial effect on commerce, the Supreme Court affirmed the Fifth Circuit decision.[22]

The question of congressional findings was a backdrop to the entire litigation. The Fifth Circuit stressed the absence of findings or a legislative record in striking the statute and noted the absence of evidence that Congress had considered the 1990 Act as an exercise of the commerce power.[23] The court could not see how prohibiting guns within 1,000 feet of a school related to interstate commerce.[24] The Fifth Circuit held that in light of these two facts, it could not uphold the 1990 Act absent findings and a legis-

15. *See* 2 F.3d at 1345.
16. *Id.* at 1345 n.1.
17. 18 U.S.C. §§ 921(a)(25)-(26), 922(q)(1)(A) (1988 & Supp. V 1993).
18. *See* 115 S. Ct. 1624, 1626 (1995) ("The District Court denied the motion [to dismiss], concluding that § 922(q) 'is a constitutional exercise of Congress's well-defined power to regulate activities in and affecting commerce, and the 'business' of elementary, middle and high schools . . . affects interstate commerce.'").
19. 2 F.3d at 1345.
20. 114 S. Ct. 1536 (1994).
21. 115 S. Ct. at 1630.
22. *Id.* at 1634.
23. 2 F.3d at 1359-66.
24. *Id.* at 1366-67.

lative record to establish the commerce nexus.[25] Thus, the Fifth Circuit essentially imposed on Congress an obligation to make findings or establish a legislative record regarding the commerce nexus in close cases—the very canon Professor Frickey suggests.

The Supreme Court rested its decision far less on the absence of findings. Chief Justice Rehnquist's majority opinion observed that

> Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. . . . [T]o the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no substantial effect was visible to the naked eye, they are lacking here.[26]

What the majority seems to be saying is, in a close case, findings could help. In his dissent, Justice Souter noted that findings could assist the Court in answering the question whether Congress had a rational basis for concluding that the statute was within the commerce power; but while such help would be "welcome,"[27] it was not necessary because "[t]he legislation implies such a finding."[28] Justice Breyer, also dissenting, felt that under the rational basis test Congress has "considerable leeway" and that "the absence of findings, at most, deprives a statute of the benefit of some *extra* leeway."[29] The other separate opinions did not address the issue of findings.[30]

Framed thus, Professor Frickey assuredly is correct that *Lopez* "provides the occasion" to address the question of the "utility of congressional findings."[31] Professor Frickey's article is an exami-

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25. *Id.* at 1367-68.

26. 115 S. Ct. at 1631-32.

27. *Id.* at 1657 (Souter, J., dissenting).

28. *Id.* at 1656.

29. *Id.* at 1658 (Breyer, J., dissenting) (emphasis in original).

30. However, Justice Kennedy's concurring opinion might be read as suggesting that findings could matter. *See id.* at 1634-42 (Kennedy, J., concurring). Justice Kennedy noted, "[a]s the Chief Justice explains, unlike the earlier cases to come before the Court here neither the actors nor their conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus." *Id.* at 1640 (Kennedy, J., concurring). Had Congress included findings establishing a nexus between gun control in school zones and interstate commerce, the Court may have found the "evident commercial nexus" to which Justice Kennedy referred.

31. Frickey, *supra* note 6, at 707.

nation of that question framed against the precedents of the past. As Professor Frickey concludes, past cases suggest that while the Supreme Court will not wholly defer to Congress, when findings in a statute are detailed, not boilerplate, and responsive to judicial concerns, courts properly ought to take them into account.[32] According to Professor Frickey, this approach makes great sense, for determining what constitutes "commerce" is neither a factual question on which the opinion of Congress should hold full sway, nor a legal conclusion that the courts may draw on their own.[33] Rather, determining what is commerce is a shared endeavor in which each branch must participate.[34] From this analysis, Professor Frickey recommends that a prudent Congress acknowledge the applicable legal standard and then provide a record and findings to support its conclusion that the standard is met by a given enactment.[35]

What Professor Frickey suggests, at bottom, is a canon of constitutional interpretation: absent findings and a record to support them, a court will not uphold a dubious exercise of the commerce power. By dubious I mean, and I think Professor Frickey would agree, a statute that leaves the reviewing court befuddled as to the connection with the commerce power. Some cases, particularly cases of economic regulation, will be easy ones that require no detailed record. Further, Professor Frickey stresses, and I agree, that findings alone are insufficient because they may be boilerplate

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32. *Id.* at 710-11. Professor Frickey bases this conclusion on cases decided prior to the seminal Commerce Clause case NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46-49 (1937) (upholding Congress's power to regulate labor at any manufacturing plant selling its goods on the interstate market). These cases include the following: Carter v. Carter Coal Co., 298 U.S. 238, 304 (1936) (striking down the Bituminous Coal Conservation Act of 1935 as outside Congress's interstate commerce authority in the absence of detailed findings asserting more than a general connection between the coal industry and the national public interest); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935) (holding that the National Industrial Recovery Act, which contained only a general finding of an economic emergency affecting interstate commerce, was beyond Congress's commerce power); Chicago Bd. of Trade v. Olsen, 262 U.S. 1, 37-38 (1923) (upholding the Grain Futures Act, which contained specific findings supporting the nexus between grain futures trading and interstate commerce). *See* Frickey, *supra* note 6, at 708-11. However, Professor Frickey recognizes that the Supreme Court has subsequently upheld legislation under Congress's commerce power absent any formal congressional findings. *Id.* at 711-12.

33. Frickey, *supra* note 6, at 715-16.

34. *Id.* at 716.

35. *Id.* at 720. Professor Frickey notes that the Court adopted this approach in upholding the Voting Rights Act in Rome v. United States, 446 U.S. 156, 157-58 (1980). Frickey, *supra* note 6, at 716-18.

and fairly meaningless.[36] If deference is to accompany the inclusion of findings, those findings must be supported by evidence from the legislative record as to why interstate commerce is being regulated by the law in question.[37]

Professor Frickey grounds his constitutional interpretive canon in the theory of "due process of lawmaking."[38] Due process of lawmaking finds its genesis in an important article by Hans Linde, arguing that although substantive policing by the judiciary of certain legislative enactments is inappropriate, reviewing courts could at least ensure that the legislatures have done their work.[39] Thus, in the case of Professor Frickey's proposed canon, although courts might think that in close cases they ought to defer to congressional judgment that a particular statute was a necessary regulation of commerce, that deference only would be warranted once courts were assured that Congress actually had considered the matter and had built a record regarding the commerce nexus.

In addition, Professor Frickey supports his proposed canon with reference to *Gregory v. Ashcroft*,[40] which itself established another federalism canon.[41] In an excellent article on the role of statutory canons, Professors Frickey and Eskridge argue that these "super-strong clear statement requirements" permit the Supreme Court to patrol constitutional boundaries through the guise of statutory interpretation.[42] In his latest piece, Professor Frickey envisions *Lopez* as the next step in the development of procedural canons designed

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36. *See* Frickey, *supra* note 6, at 720.

37. An analogy from administrative law can be found in Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983) (requiring the agency to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'" (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962))).

38. Frickey, *supra* note 6, at 720 & n.130.

39. Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 220-21 (1976).

40. 501 U.S. 452 (1991).

41. In *Gregory*, the Supreme Court held that absent a clear statement by Congress, the Court would not interpret a statute in a way that invaded core state functions. *Id.* at 464.

42. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) ("What the Court is doing is creating a domain of 'quasi-constitutional law' in certain areas: Judicial review does not prevent Congress from legislating, but judicial interpretation of the resulting legislation requires an extraordinarily specific statement on the face of the statute for Congress to limit the states or the executive department."). As Professor Lupu has observed, Congress often uses the opposite tactic of enacting statutes that attempt to legislate constitutional norms. Ira C. Lupu, *Statutes Revolving in Constitutional Orbits*, 79 VA. L. REV. 1, 3 (1993).

to protect the interests of federalism in a procedural, rather than substantive, manner.[43] He explains that *Gregory* represented the procedural implementation of the substantive review the Supreme Court abandoned in *Garcia v. San Antonio Metropolitan Transit Authority*.[44] What Professor Frickey does not say, although he could have, is that the new canon may implement procedural safeguards for the substantive protection seemingly abandoned in the line of cases commencing with *NLRB v. Jones & Laughlin Steel Corp.*[45] and ending with *Katzenbach v. McClung*.[46]

It is difficult to contest the logic of Professor Frickey's argument, and I am not about to do so. To the contrary, an even stronger case than Professor Frickey provides for his constitutional interpretive canon exists, especially for the conclusion that what occurred in *Lopez* ought to give rise to such a canon. Therefore, I intend to stress the salient points of the legislative record and then draw from that review some arguments about why the proposed legislative record canon makes such good sense.

The 1990 Act[47] was enacted into law as part of the Omnibus Crime Control Act of 1990.[48] The Gun-Free Schools portion of the broader act was introduced in the Senate by Senator Herbert Kohl, and in the House of Representatives by Representative Edward Feighan. Both made statements on the floor regarding the legislation, but neither statement reflected any sense that commerce was being regulated, nor that the members of Congress even were cognizant that a nexus to commerce was required.[49] Rather, the entire focus was on the tragedy of guns in schools.[50]

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43. *See* Frickey, *supra* note 6, at 721-23. Professor Frickey argues that since "*Gregory* is an approach for implementing *Garcia*'s procedural focus, rather than some interpretive end in itself, other judicially constructed means may be forthcoming as well." *Id.* at 722.

44. *Id.* at 722. *Garcia* held that claims that Congress had violated the Tenth Amendment by invading core state functions would not be justiciable. 469 U.S. 528, 555-57 (1985). *Gregory* obviously completes the circle by requiring that Congress actually have considered the intrusion on state autonomy itself, and by making Congress state the intrusion in the clearest possible terms. *See* 501 U.S. at 460-61 (requiring that Congress make its intentions "'unmistakably clear in the language of the statute'" (quoting Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989))).

45. 301 U.S. 1 (1937).

46. 379 U.S. 294 (1964) (upholding the Civil Rights Act as applied to a local restaurant because it received food that had travelled in interstate commerce).

47. 18 U.S.C. § 922(q).

48. Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844-45 (1990).

49. *See* 136 CONG. REC., S17,595-96 (1990) (statements of Sen. Kohl); 135 CONG. REC. H3988 (1989) (statements of Rep. Feighan).

50. *See* 136 CONG. REC., S17,595-96 (1990) (statements of Sen. Kohl); 135 CONG.

The only additional legislative history that dealt with the 1990 Act was the record of a House of Representatives subcommittee hearing.[51] The hearings in the House revealed that the entire focus was upon youth violence and the problem of guns in schools. No witness drew any connection between guns in schools and commerce. To the contrary, Richard Cook, the witness for the Bureau of Alcohol, Tobacco and Firearms, expressed concern that "constitutional authority to enact the legislation is not manifest on the face of the bill."[52] Representative Hughes pursued this point in questioning Cook, having Cook concede that the 1990 Act would be "a major departure from a traditional federalism concept which basically defers to State and local units of government to enforce their laws."[53]

One cannot read the *Lopez* record without concluding that at best Congress simply forgot to consider the constitutional limitations upon its powers, and at worst it chose to ignore them. The former is careless, the latter would be arrogant. Both are symptoms of a disregard for limitations on Congress's powers, which was inevitable in light of sixty years of complete judicial deference to the jurisdictional basis for congressional enactments. Moreover, the 1990 Act plainly was a stretch beyond the already stretched Commerce Clause.[54] Even in such cases as *Perez v. United States*[55]

REC. H3988 (1989) (statements of Rep. Feighan).

51. *See Gun-Free School Zones Act of 1990: Hearings on H.R. 3757 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 8 (1990) [hereinafter *1990 Act Hearing*]. None of the committee reports on the Omnibus Crime Bill discussed the Gun-Free School Zones Act provision.

52. *Id.* at 10. In addition, when signing the Crime Control Act of 1990, President Bush commented on the overreaching of § 922(q) in violation of established divisions between the federal and state governments with regard to firearms laws. Statement by President George Bush On Signing the Crime Control Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1944 (Dec. 3, 1990).

53. *1990 Act Hearing*, *supra* note 51, at 14.

54. In *Lopez*, Chief Justice Rehnquist said no effect on commerce was "visible to the naked eye." 115 S. Ct. at 1632. The Fifth Circuit's blunt assessment of *Lopez* puts the point more sharply: "we see no basis for assuming . . . that, for example, ordinary citizen possession of a shotgun during July 900 feet from the grounds of an out-of-session private first grade in rural Llano County, Texas, has any effect on education even in relatively nearby Austin, much less in Houston or New Orleans." 2 F.3d at 1367.

55. 402 U.S. 146, 149-57 (1971) (finding that loan sharks using extortion to collect payments on loans are primarily controlled by organized crime with a substantially adverse effect on interstate commerce).

and *Wickard v. Filburn*,[56] the connection between commerce and the regulated activity was somewhat obvious and articulable.

This discussion of the 1990 Act and its legislative history suggests a good reason for Professor Frickey's legislative record canon. The canon rests on the difficult-to-refute logic that if judges are asked to enforce a statute upon which the nexus to commerce is not obvious, it is not asking too much for Congress to establish that nexus in the legislative record. Despite this good sense, Professor Frickey's article fails to develop adequately the rationale for the legislative record canon.

Indeed, the least promising rationale for the canon is one that perhaps flows most directly from part of Professor Frickey's reasoning. As explained above, Professor Frickey relies on the theory of due process of lawmaking,[57] raising the question of why it makes any sense to require process out of Congress before it enacts legislation. One obvious reason is to promote congressional deliberation, in the hope that such deliberation will forestall the enactment of unconstitutional laws. This rationale rests on some overly optimistic assumptions about the conduct of members of Congress, a point that seems all too clear in this case. The 1990 Act represented little more than get-tough-on-crime rhetoric that is certainly valuable in election campaigns, but good for little else. It is highly dubious that the 1990 Act was designed to, or was likely to, do anything to address the very real problem of guns in schools.[58] Public choice theory suggests that members of Congress will rush to enact this type of legislation,[59] making the value of congressional consideration, as well as the broad principle of deference, doubtful.

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56. 317 U.S. 111, 127 (1942) (finding that one farmer's contribution to the demand for wheat substantially affects interstate commerce when considered in context of the aggregate of wheat farmers making similar contributions).

57. *See supra* notes 38-39 and accompanying text.

58. The arguments for the exercise of national or state power are catalogued and debated in David Shapiro's concise and masterly volume FEDERALISM: A DIALOGUE (1995). The reasons for retaining authority in the states are set out in Michael W. McConnell, *Federalism: Evaluating the Founder's Design*, 54 U. CHI. L. REV. 1484 (1987). It is difficult, with these catalogues in hand, for anyone to conclude that it makes sense to regulate the problems of guns in schools from Washington, D.C., especially when that regulation is a criminal law.

59. *See* Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 14-23 (1991) (discussing, although ultimately discounting, the "re-election maximizer model" prevalent in public choice theory).

Despite this, the legislative record canon serves useful purposes. Perhaps foremost among them is the fact that absent such a legislative record, asking the courts to uphold this statute is a total abdication of judicial review. The point can be made simply by examining Justice Souter's dissenting opinion. According to Justice Souter, no findings were necessary because such findings were implicit in the enactment of the statute.[60] While it may be unnecessary to assume Congress intentionally disregarded limitations on its power, upholding a dubious statute without a record accords too much credit to Congress and too little to the role of judicial review. As Justice Souter recognizes, the reason for the rational basis test is deference to Congress's judgment about what legislation is necessary in the interest of interstate commerce.[61] But to defer to implicit findings is to defer to nothing. In other words, absent findings, there is nothing to defer to other than the fact that Congress obviously wanted to pass a particular act. If this deference is what Justice Souter has in mind, why engage in judicial review at all?

An ironic response to this argument is that even absent findings, courts still could determine for themselves whether commerce is substantially affected by the regulation. This answer is ironic because Justice Breyer's dissent, joined by Justice Souter, raises the "institutional competence" argument: courts should defer to Congress's judgment that something substantially affects commerce "because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy."[62] I think this is an old saw, and one that needs inspection for rust,[63] but assume for the moment that Justice Breyer is correct. Is not asking the Supreme Court to look for a rational

60. *Lopez*, 115 S. Ct. at 1656 (Souter, J., dissenting) ("The legislation implies such a finding, and there is no reason to entertain claims that Congress acted ultra vires intentionally.").

61. *Id.* at 1653 (Souter, J., dissenting) (recognizing that "deference [to legislative policy judgments on commercial regulation] . . . became articulate in the standard of rationality review").

62. *Id.* at 1658 (Breyer, J., dissenting).

63. *See* John Ferejohn & Barry Weingast, *Limitations of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 569-70 (1992) (explaining how the institutional competence argument rests on a notion of common good that may be unrealistic in a pluralist society). *See generally* Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984) (arguing that courts can and should take into account the most competent institutional decisionmaker when rendering judgment).

basis in the absence of a legislative record asking the Court to do precisely what Justice Breyer suggests courts lack the competence to do? Lest the point require demonstration, Justice Breyer's opinion provided it. After taking the majority to task for claiming expertise as to what constitutes commerce, Justice Breyer demonstrated the very expertise he claims the courts lack by arguing that guns near schools affect commerce.[64]

Although courts may be competent to develop the commerce nexus, the question is whether courts should defer to Congress on the constitutional question when Congress has failed to consider the question at all. *Lopez* presents the question sharply. Congress went to the trouble of making a record regarding the problem of youth violence, either because it thought such a record necessary or because making the record provided good publicity. Yet, the *Lopez* record is devoid of witnesses establishing the nexus between guns in schools and commerce.[65] In similar hearings in other contexts, however, Congress has been attentive to the problem of establishing a nexus with an enumerated power.[66]

The possible reasons for neglect in this case seem limited: the nexus was so obvious no one felt the need to address it, the nexus was so problematic Congress did not attempt to make the case, or Congress simply failed to consider limitations on its power. Given the history of the case, the first option is unlikely. In either of the other situations, deferring to Congress's judgment simply would be a meaningless act. In close cases deference ought to require a record as to what exactly the court is deferring. Absent such a record, it is difficult to see the basis for deference, other than simply to assume that Congress has a constitutional basis for whatever it does. If this is the case, again, what purpose is served by judicial review?

Yet another reason for the legislative record canon finds its basis in recognizing, as does Professor Frickey, that giving content

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64. *See Lopez*, 115 S. Ct. at 1659-62 (Breyer, J., dissenting).

65. *See supra* notes 52-53 and accompanying text.

66. *See, e.g., The Freedom of Access to Clinic Entrances Act of 1993: Hearings on S. 636 Senate Labor and Human Resources Comm.*, 103rd Cong., 1st Sess. 16-17 (1993) (Attorney General Janet Reno and Professor Laurence Tribe testified that Congress has authority to enact the Freedom of Access to Clinic Entrances Act of 1993 under the Commerce Clause); *Violence Against Women: Victims of the System: Hearings on S. 15 Before the Senate Judiciary Comm.*, 102nd Cong., 1st Sess. 90, 95-97, 103, 113-17 (1991) (Professors Burt Neuborne and Cass Sunstein testified that Congress has the authority to enact the Violence Against Women Act under the Commerce Clause).

to the meaning of the commerce power is a shared endeavor between Congress and the courts. What constitutes commerce that Congress may regulate is not obvious on the face of the Constitution, and history suggests original understandings are not going to resolve the question. Only Justice Thomas suggests that we should return to old definitions,[67] a view that is unlikely to garner even one more vote. Moreover, Professor Frickey notes that the meaning of commerce is not a question peculiarly within the domain of the Congress or the Supreme Court.[68] Our traditional view of the process would give the Supreme Court the last word on the applicable legal test and perhaps whether any statute is within the test, but initially the Supreme Court must rely on Congress to determine what modern necessities suggest as to the definition of commerce.

In light of the shared task of defining commerce, the legislative record canon demands only that Congress not abdicate its own constitutional responsibilities. Professor Frickey argues that the post-1937 switch in the interpretation of commerce resulted from an educational process launched by Congress.[69] I am not sure the educational process was precisely the one Professor Frickey describes, but Professor Frickey assuredly is correct that Congress will bring insight to the question of what constitutes interstate commerce given a rapidly changing world. Just as the Court ought not to defer to nothing, the Court should defer to considered judgment.

The necessity of congressional participation is all the more apparent when one considers that as the meaning of commerce changes over time, the Supreme Court is thrust into the awkward position of having to define and delimit that change. The judicial definition of commerce ought not to be simply an *ad hoc* list of whatever project Congress chooses to pursue at the moment. The judicial process at least ought to attempt to develop generalized principles of when a constitutionally granted power might be exer-

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67. *See Lopez*, 115 S. Ct. at 1642-51 (Thomas, J., concurring) (criticizing the "substantial effects" test employed by the Supreme Court to determine what constitutes interstate commerce).

68. *See* Frickey, *supra* note 6, at 716 ("[P]rudence suggests that there should be an intermediate ground between judicial and congressional monopoly on constitutional interpretation, especially on questions of congressional power.").

69. *See id.* at 711 ("The larger lesson of the New Deal Supreme Court, though, is that a thorough, sustained effort of factual reeducation . . . may, in time, reorient the thinking of the judiciary sufficient to work an evolution in constitutional law. That, . . . is what the 'switch in time' was all about.").

cised. Suppose the Supreme Court truly wished to act deferentially but could not understand how regulating guns in schools fell within pre-existing general definitions of commerce. Refashioning the generalization, the legal test, requires some understanding beyond simply adding "guns near schools" to the list. A legislative record and findings would significantly assist the Supreme Court in the job that properly is its own, refashioning the applicable test.

Finally, the legislative record canon serves to notify Congress that the Supreme Court will take seriously its job of interpreting the Constitution, while at the same time according Congress the deference it deserves.[70] Call this the gentle *in terrorem* effect. *Lopez* itself stands as testament that absent some exercise of power on the Court's part, Congress will get sloppy or overly bold in the exercise of its powers. One answer, which almost no one suggests is the correct one, is for the Supreme Court to become more aggressive in striking down congressional enactments. A gentler way to achieve a similar impact is for the Supreme Court to strike enactments only when Congress fails to do its own job.

II. *LOPEZ'S* SIDESTEPPING OF THE LEGISLATIVE RECORD CANON

Despite the good sense of Professor Frickey's proposed canon and the excellent support that he offers for it, *Lopez* proves to be an awkward springboard for discussing the legislative record canon. Why? Because *Lopez* did not apply the canon Professor Frickey proposes. Rather, *Lopez* was quite plainly a decision resting squarely on the merits. The *Lopez* Court did not say that absent a legislative record, it would not sustain the statute as a valid exercise of the commerce power. Instead, it stated that "[t]he Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress."[71]

My point is more than simply saying *Lopez* was a decision on the merits, and that in reaching the merits the *Lopez* Court was silent as to the canon. This is something Professor Frickey knows full well.[72] As I read *Lopez*, the Supreme Court not only failed to

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70. I thank Bill Eskridge for making this point to me.

71. 115 S. Ct. at 1626.

72. *See* Frickey, *supra* note 6, at 697-98. Professor Frickey's assignment was to write about legislative findings, and the canon he proposes is a result of that assignment. But Professor Frickey is well aware that the *Lopez* Court sidestepped the findings question. Thus, he suggests that his proposed canon "may be forthcoming," not that it actually was

remand for congressional findings and a record, it more pointedly said that it did not even care what such a record might contain.[73] In another case, the Supreme Court may adopt Professor Frickey's canon, but what is important to the point I want to make is that *Lopez* was a decision squarely on the merits. In other words, regardless of what findings Congress had adopted, the *Lopez* Court would not have upheld the regulation of guns near schools as an exercise of the commerce power.

Had the Supreme Court been interested in pursuing the canonical approach, it did not have far to look for a model. This was precisely the course taken by the Fifth Circuit: "Where Congress *has* made findings, formal or informal, that regulated activity substantially affects interstate commerce, the courts must defer 'if there is any rational basis for' the finding. . . . Practically speaking, such findings almost always end the matter."[74] On the other hand, the Fifth Circuit continued,

> [c]ourts cannot properly perform their duty to determine if there is any rational basis for a Congressional finding if neither the legislative history nor the statute itself reveals any such relevant finding. And, in such a situation there is nothing to indicate that Congress itself consciously fixed, as opposed to simply disregarded, the boundary line between the commerce power and the reserved power of the states.[75]

This is precisely the argument made above.

Not only did the Supreme Court fail to follow the Fifth Circuit's approach, it went out of its way to disregard the available record and findings. As for a record, Justice Breyer accumulated a pile of materials in the appendix to his dissent.[76] As for findings, shortly before the Supreme Court heard oral argument in *Lopez*, Congress adopted findings tying the 1990 Act to interstate com-

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adopted. *Id.* at 722.

73. The Court stated that "to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, . . . they are lacking here." 115 S. Ct. at 1632. In a footnote the Court acknowledged Congress's enactment of post hoc findings, but simply dismissed those findings, stating, "[t]he Government does not rely upon these subsequent findings as a substitute for the absence of findings in the first instance." *Id.* at 1632 n.4.

74. 2 F.3d 1342, 1363 (5th Cir. 1993) (emphasis added) (citations omitted).

75. *Id.* at 1363-64 (footnote omitted).

76. *See* 115 S. Ct. at 1665-71.

merce.[77] Yet, in rendering its decision, the Court considered neither of these.[78]

There arguably was some reason for the Supreme Court to have viewed both the findings and the prior record skeptically. A traditional view of legislative materials provides ample support for such skepticism. For example, courts generally, and the Rehnquist Court particularly, have been reluctant to rely upon post hoc legislative history.[79] The problem is compounded where, as here, the Congress providing the after-the-fact evidence is not even the same Congress that passed the statute. Well-recognized difficulties with the intentionalist inquiry multiply in the case of a subsequent Congress. Professor Frickey seems to view the findings in this way, explaining that "[t]he Solicitor General did not contend that these later findings could operate *nunc pro tunc*, instead making the more defensible argument that the *post hoc* findings simply added evidence to support the rational basis for the nexus with commerce."[80] The Court apparently agreed with this "more defensible" position, sweeping the Solicitor General's position into a footnote, along with the findings, and leaving them both there to suffer in neglect.[81] Similarly, both the Fifth Circuit and the Supreme Court decisions demonstrated a reluctance to rely upon a legislative record pieced together from prior congressional enactments. Relying upon a traditional approach to the use of legislative history, the Supreme Court might have discounted both the post hoc findings and the stitched-together record and then adopted Professor Frickey's canon for future cases, suggesting some appropriately expressed concern for the views of Congress.

Alternatively, there was reason to credit both the post hoc findings and the legislative record, an approach PPT might have counseled. Although reliance upon post hoc findings may be controversial in some situations, this was not one of them. Typically, inter-

77. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320904, 108 Stat. 1796, 2125-26 (1994).

78. As to the findings, see 115 S. Ct. at 1631-32, where the Court held that there was an inadequate demonstration of a connection between the Act and interstate commerce. The record assembled by Justice Breyer was dismissed as proving too much. 115 S. Ct. at 1632-33 ("Justice Breyer's rationale lacks any real limits.").

79. *See* William N. Eskridge, Jr., *Post-Enactment Legislative Signals*, 57 LAW & CONTEMP. PROBS. 75, 79, 83-85 (1994) (discussing how doctrines of statutory interpretation traditionally have been suspicious of subsequent legislative history).

80. Frickey, *supra* note 6, at 705.

81. *See* 115 S. Ct. at 1632 n.4.

preters of statutes are disdainful of after-the-fact legislative history because it is used to show Congress's intent in passing a statute, but actually provides limited utility in discovering such intent of the enacting Congress.[82] However, in *Lopez* these findings were not offered to show intent, but rather for the entirely legitimate purpose of establishing a connection between the legislation and the commerce power. Intent has little, if any, place in this inquiry. The relevant question is whether what Congress has regulated was properly within the commerce power. If the enacting Congress can make this showing after the fact, or if a subsequent Congress can make it, why should the timing of the showing matter?

Similar analysis is applicable to the overpowering record assembled by Justice Breyer. Not only did Justice Breyer do Congress's work, he did it well. Justice Breyer demonstrated that ample support existed in prior legislative history for the nexus he believed existed between the regulation of guns near schools and interstate commerce. Even if all the information was not in prior congressional hearings, it was in the public domain. Again, if the inquiry were of Congress's intent in passing this particular statute, we might properly be skeptical of deducing that intent from bits and pieces of prior hearings, many disconnected from the work of the present Congress. But that is not the inquiry. The question is whether an articulable relationship between commerce and the regulation Congress enacted exists. The evidence Justice Breyer compiled surely addresses that question.

Insights from PPT underscore the utility of the post hoc findings and legislative record. PPT suggests that if the Supreme Court does not want its interpretation overridden, post hoc legislative history can serve as a useful signal of the sentiments of the present Congress.[83] Admittedly, *Lopez* is a constitutional decision, and so an immediate congressional override is unlikely. But *Lopez* also is a decision rendered very much against the backdrop of the trouble the Court bought itself in 1937 by striking legislative enactments

82. *See* Eskridge, *supra* note 79, at 79 ("Subsequent legislative history has little or no formal relevance to original legislative intent or statutory plain meaning and is accordingly viewed with suspicion under traditional doctrines of statutory interpretation.").

83. *See id.* at 79-80, 83-85 (describing how the Burger Court was attentive to legislative signals and avoided being overruled, while the Rehnquist Court was inattentive and had its decisions overturned by Congress); Edward P. Schwartz et al., *A Positive Theory of Legislative Intent*, 57 LAW & CONTEMP. PROBS. 51, 74 (1994) ("The main thrust of this argument is that related legislative history, subsequent to enactment, should not be ignored by the Court. In fact, it should take precedence.").

on Commerce Clause grounds.[84] At the least, the Supreme Court might have understood the post hoc findings to suggest the importance Congress attached to the legislation. Similarly, although the material assembled by Justice Breyer did not speak directly to the legislation at hand, it served two vital purposes. First, it demonstrated Congress's awareness of the connection between education and economic competitiveness. Second, it showed Congress's deep concern about guns in schools hindering the educational process.

Disregarding the post hoc findings after Congress adopted them suggests that the Court did not care how attached Congress was to this legislation. The same is true with regard to the record assembled by Justice Breyer. In the case of both the findings and Justice Breyer's record, the evidence proved too much.[85] As the Court stated, "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[86] What troubled the *Lopez* majority was the slippery slope, a concern heightened but not addressed by the record Justice Breyer assembled.

The Supreme Court's disregard of available findings and a record suggests that it had no intention of upholding a law like this, whatever the state of the record. That is quite a strong statement, indeed quite a stronger one than the legislative record canon would suggest. The implications of the statement are, however, unclear. If *Lopez* was a statement that the 1990 Act would have been unconstitutional regardless of the legislative record, after *Lopez* the important question is what role the Supreme Court's decision should play in any further legislative activity in this area. Professor Frickey envisions a dialogue between the Supreme Court and Congress regarding the limits of the commerce power. The decision actually reached in *Lopez* raises difficult and important

84. *See Lopez*, 115 S. Ct. at 1652-57 (Souter, J., dissenting) (discussing how the majority is repeating mistakes of past). The dissenting opinion is full of ominous statements such as "[t]here is no reason to expect the lesson would be different another time." *Id.* at 1655 (Souter, J., dissenting).

85. With regard to the findings, even Justice Souter makes this point. While he disagrees perhaps with the Court's failure to consider the findings, he does not find them very helpful either, for the findings "go no further than expressing what is obviously implicit in the substantive legislation, at such a conclusory level of generality as to add virtually nothing to the record." *Id.* at 1656 n.2 (Souter, J., dissenting).

86. *Id.* at 1634.

questions about the appropriate next move in that dialogue by the political branches.

III. POSITIVE POLITICAL THEORY AND JUDICIAL SIGNALING: THE IMPORT OF *LOPEZ*

PPT offers valuable insights concerning the interaction among institutions of government. PPT presumes that institutions, or at least institutional actors, have policy preferences and that political institutions act rationally in a manner calculated to advance those preferences.[87] PPT also recognizes that institutional interaction is a sequential process through which institutions reach an equilibrium among competing preferences.[88] Much of the contribution of PPT to legal scholarship has been in the realm of judicial/congressional/executive interaction regarding the interpretation of statutes. PPT scholars have devoted substantial energy to describing the interactions of players in the statutory interpretation game as the branches of government act to achieve the preferred result without being overridden by another branch.[89] In addition, PPT has contributed great insight into the value of legislative history as a signaling device to the judiciary about the preferences of the legislative branch.[90] One such insight already discussed here is

87. Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 462 (1992) (defining PPT as a collection "of non-normative, rational choice theories of political institutions" (emphasis omitted)); Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 93 (1994) ("Positive theory's core maxim of judicial discretion is that a court will decide with reference to the likelihood that its decision will be reversed by another political institution." (footnote omitted)).

88. William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 30-33 (1994).

89. *See, e.g.*, William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 372-89 (1991) (describing interaction of branches of federal government in statutory interpretation); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 527 (1992) (analyzing Article I, Section 7 as a "sequential game" consisting of interactions among the branches based on their individual preferences); Eskridge and Frickey, *supra* note 88, at 39-41 (describing "signalling" as a means of communication among institutions that resolve disputes without open, destructive conflict); Schwartz et al., *supra* note 83, at 55-59, 71-74 (1994) (discussing the "signalling model" in relation to statutory interpretation and the interaction among federal branches).

90. *See* Eskridge, *supra* note 79, at 76 (analyzing post-enactment signals); McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 3 (1994) [hereinafter McNollgast, *Legislative Intent*] (proposing the use of PPT as a descriptive model of the legislative process in order to clarify statutory intent); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statu-*

PPT's unique contribution to the understanding of the utility of post-enactment legislation.

Although relatively extensive commentary on the utility of PPT to judicial/congressional interaction in *statutory* cases exists, there is far less commentary on congressional reaction to judicial decisions in *constitutional* cases.[91] At least one reason for this is readily apparent. PPT sees institutional interaction as a sequential movement toward equilibrium. Although "[a] consequence of sequence is that each institution has trumping power,"[92] in constitutional cases, the role of the Supreme Court as "ultimate arbiter"[93] theoretically imposes limits on the responses of other institutional players. The widely accepted doctrine of judicial review dictates that once the judiciary has spoken as to the constitutional invalidity of a statutory scheme, constitutional amendment is required to overcome the judicial interpretation.[94] Given the enormous barrier to constitutional amendment, the Supreme Court can discount this possibility heavily and ignore entirely the potential congressional response. Of course, this overstates matters because Congress has a range of possible options to punish the Supreme Court, including impeachment, jurisdiction stripping and budget curtailment.[95]

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tory Interpretation, 80 GEO. L.J. 705, 706 (1992) [hereinafter McNollgast, *Positive Canons*] (advocating the use of PPT to attain a clearer understanding of statutory intent); Schwartz et al., *supra* note 83, at 52-55, 73-74 (arguing that subsequent legislative history should not be ignored by the Court).

91. A notable exception is Rafael Gely & Pablo T. Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court-Packing Plan*, 12 INT'L REV. L. & ECON. 45 (1992). Gely and Spiller examine the conditions under which the Supreme Court may impose its policy preferences on the Constitution without risking overruling by constitutional amendment.

92. Eskridge & Frickey, *supra* note 88, at 30.

93. *See* Daniel A. Farber, *The Supreme Court and the Rule of Law*: Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387, 387-88 (describing how the Supreme Court adopted the position in *Cooper* that its pronouncements represented the "supreme law of the land").

94. *See* Gely & Spiller, *supra* note 91, at 45 ("[T]he reversal of a Supreme Court constitutional decision requires an explicit constitutional amendment . . . ."); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 72 (2d ed. 1991) ("The most straightforward way for the people to respond to a Supreme Court decision with which they disagree is to amend the Constitution."); Kathleen M. Sullivan, *The Nonsupreme Court*, 91 MICH. L. REV. 1121, 1124 (1993) ("The judicial supremacist vision of the Court . . . has prevailed ever since Hamilton in *Federalist 78* first located the Supreme Court atop a 'hierarchical pyramid' within the national government." (footnote omitted)).

95. *See generally* STONE ET AL., *supra* note 94, at 72-77 (discussing means by which Congress can respond to Supreme Court rulings as alternatives to constitutional amendments). McNollgast adds to the list the packing of the lower courts. McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and The Rule of Law*, 68 S. CAL.

These moves tend to be reserved for an entire course of conduct by the judiciary, however, and are not generally deemed an appropriate response to any given case. Thus, in the constitutional context, the space in which the Supreme Court can simply impose its will seems substantial.

PPT is valuable, however, because the traditional view of constitutional adjudication understates the amount of interbranch communication in constitutional cases. Commentators have written extensively about the dialogue between the branches in the constitutional realm.[96] My own view is that there are many ways in which even in constitutional cases the Supreme Court leaves the door open to the expression of views by other branches. Professor Frickey makes just this point regarding the interpretation of the commerce power, arguing that through a gradual process of education Congress can direct the Court toward broader and different interpretations of the commerce power.[97] Using *Lopez* as a model, the question I would like to examine is how PPT can contribute to our understanding of the ways in which Congress might respond to the Supreme Court in the constitutional realm.

Another reason PPT may have been applied more frequently to judicial understanding of the legislative process is that its application in this way seems so novel. Among other things, PPT suggests that courts intentionally adopt interpretations of statutes that are unlikely to be overridden by the legislature. Accordingly, much of the literature explains judicial decisions as reaching an equilibrium between judicial and congressional preferences. Such a strategic view of judicial decisionmaking is quite untraditional, however. Professors Eskridge and Frickey observe that "[t]o some lawyers, . . . the notion that the Supreme Court engages in strategic behavior may be shocking."[98] In contrast, no one would be shocked to learn that Congress acts strategically vis-à-vis the courts, at least in one sense.[99] When Congress enacts statutes, the

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L. REV. 1631, 1634 (1995).

96. *See, e.g.*, Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); *see also* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 5 (1992) (arguing for an egalitarian conception of authority among the branches); LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 3, 8 (1988) (emphasizing the interaction of all three branches in constitutional interpretation as opposed to a monopoly of the judiciary).

97. Frickey, *supra* note 6, at 708-09.

98. Eskridge & Frickey, *supra* note 88, at 29.

99. *See* Gely & Spiller, *supra* note 91, at 47 ("That politicians have preferences over

members know that the legislation is subject to judicial review. If members of Congress do not want their handiwork rejected, they must take some care to ensure, as best as possible, that the legislation stays within bounds set by the courts. Rare would be the purist lawyer or legislator who thinks that Congress either does, or should, assess the constitutional question independent of judicial pronouncements and let the chips fall where they may.[100] Thus, our common understanding of congressional activity already is strategic in somewhat the fashion that PPT would suggest.

Nonetheless, the perspective of PPT can teach us to read cases better or at least differently. It is true that the typical lawyer's reading of a case is already strategic in the sense that cases are read in order to predict the outcome of later cases. In making this prediction, the well-schooled reader will pay attention to the language of the majority opinion, take a head count of the Justices, and predict their likely position in a later case. However, this only demonstrates that the rough intuitions of skilled lawyers are consistent with many of the lessons of PPT. Indeed, the fact that lawyers read cases strategically suggests the value of PPT because such strategic reading often is inconsistent with a more formal view of law, for example a view that distinguishes between holding and dicta. Thus, lawyers intuitively understand and apply the lessons of PPT. But, closer attention to PPT will lead to a reading of cases that emphasizes separate opinions of the Justices in different ways and that causes opinions to be read with a different eye.

A. PPT and the Reading of Cases

The central contribution of PPT transferable to the reading of cases comes from the literature on judicial interpretation of legislative history. In essence, that literature says that in order for the Supreme Court to ensure its statutory decisions are not overridden by Congress, the Court must identify the preferences of Congress.[101] PPT offers ways to read the legislative record in order to identify meaningful indicators of congressional preference.[102] In

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particular aspects of policies is not surprising."). Gely and Spiller also argue that the Supreme Court has policy preferences. *Id.* at 46.

100. Indeed, Franklin Roosevelt created quite a stir when he suggested that Congress do just that. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 24 (11th ed. 1985) (describing Roosevelt's suggestion that Congress proceed with legislation, notwithstanding "doubts as to constitutionality").

101. *See supra* note 89 (discussing the interaction of government branches in the context of statutory interpretation).

102. *See supra* note 87 and accompanying text (explaining PPT's presumption that insti-

this way, the PPT literature is valuable to explain strategic behavior by the Supreme Court, and also to aid the courts in the more traditional practice of ascertaining legislative intent. In either event, PPT suggests that in interpreting the legislative record, courts must separate the "pivotal" voters from the legislative body as a whole, distinguish "cheap talk" from "sincere statements" and then read those statements for the "signals" they contain.[103] Each of these concepts is also important to the reading of cases, although—given the very different institutional environments—the concepts mean somewhat different things.

Because of the nature of Supreme Court decisionmaking, the concept of the pivotal voter is far simpler than in the legislative context. Several authors have discussed the legislative process as containing a number of "veto gates," at which principal players have the ability to advance or forestall legislation.[104] In the context of Supreme Court decisionmaking, there are only two such junctures, one at the granting of certiorari to hear a case and the other at the decision on the merits. Although the interplay between the two can be important, the merits decision is the critical juncture. This is simply because it takes five votes to decide a case on the merits and only four to grant a writ of certiorari. Identifying pivotal votes at the merits stage is relatively simple. One need only string out the Justices along a continuum, determining which votes are relatively strong or weak for the proposition under consideration. Those close to the five vote decision point are going to be pivotal.

Distinguishing cheap talk from sincere statements provides further insight into the reading of cases. In the realm of interpreting legislative history, courts need to read the record with care because opportunities for strategic behavior are rife. Thus, PPT counsels distinguishing cheap talk from sincere statements. Sincere statements are more likely made in situations where speakers may

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tutions have policy preferences and seek to advance them).

103. McNollgast, *Legislative Intent*, *supra* note 90, at 7, 16-21, 25-29; McNollgast, *Positive Canons*, *supra* note 90, at 725-27. *See also* Farber & Frickey, *supra* note 87, at 473-74 (recognizing the use of median voter models by PPT theorists that provide more stable outcomes than multidimensional models and avoid the incoherence problem posed by Arrow's Theorem).

104. *See, e.g.*, McNollgast, *Legislative Intent*, *supra* note 90, at 7, 16-21 (arguing that by following the legislative path of a bill, an observer can identify the implicit elements of the agreement); *see also* McNollgast, *Positive Canons*, *supra* note 90, at 707-08 (referring to a "sequence of veto points through which a statute must pass").

be held accountable for displaying insincere preferences.[105] Although the judicial arena is quite different, parallel principles apply. Their application suggests a valuing of judicial opinions that is a bit the reverse from traditional readings.

For one thing, a search for sincere indicators would suggest discounting the language in majority opinions somewhat, while valuing more highly the separate opinions of individual Justices. In the traditional reading of cases, the majority opinion is seen as a good indicator of the views of a majority, and such opinions appropriately are viewed as carrying great weight. They are the law. However, a Justice writing for the majority of the Supreme Court often has to hedge and fill to obtain the necessary votes. Drafting to satisfy enough Justices to make a majority often yields a decision that is not wholly indicative of all the Justices' views, especially when there is some institutional compulsion to join the majority opinion.[106] A majority opinion may not reveal which votes might easily switch under the different circumstances of the next case. The majority opinion may indicate the preferences of its author, but even here, care must be taken to assess whether the author's views were modified to pick up the necessary votes.[107] In short, the majority opinion may be closer to the views of the median, rather than pivotal, members of the Supreme Court.

Admittedly, stare decisis somewhat mitigates these concerns. Stare decisis is a rule of precommitment, giving binding effect to the compromises represented by majority opinions. One must be candid about the "rule" of stare decisis, however. The binding effect of any decision is the function of an individual Justice's commitment to stare decisis in constitutional cases and the similarity between two cases (or a Justice's view of the similarity of two

105. *See* McNollgast, *Legislative Intent, supra* note 90, at 21-29 (arguing that cheap talk results when legislators are not held accountable); McNollgast, *Positive Canons, supra* note 90, at 726 (discussing incentives for legislative participants to act sincerely).

106. *Cf.* Robert H. Jackson, *The Law Is a Rule for Men to Live By*, 9 VITAL SPEECHES OF THE DAY 664, 665 (1943) ("Dissenting opinions . . . have a way of better pleasing those who read as well as those who write them. They are apt to be more individual and colorful. Opinions which must meet the ideas of many minds may in comparison seem dull and undistinguished.").

107. This suggests that the larger the majority, the more sincere the opinion might be. However, this is not necessarily the case; the majority opinion author still might have traded off language to buy more votes. *See* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 43-44 (1979) (discussing how Chief Justice Earl Warren drafted *Brown v. Board of Education* in order to obtain unanimity).

cases). The binding effect of stare decisis can easily be overstated.[108]

For these reasons, separate opinions may deserve greater weight than they would receive under a traditional reading. Because no Justice is compelled to write, separate opinions are likely to be quite sincere statements of the views of individual Justices, and to some extent those that join them. Separate opinions are properly viewed as statements made precisely to offer an individual explanation for joining or not joining the majority. Similarly, because there is no need for a certain number of concurring or dissenting votes, no Justice is compelled in this sense to join another's statement.[109]

Perhaps the most interesting aspect of reading judicial decisions is in locating and interpreting the signals that reveal judicial preferences. In a traditional reading of cases, valuable signals are found by separating the holding from dicta. The holding, or at least what a separate opinion would hold, is seen as central. For reasons that will be apparent momentarily, this distinction has some real meaning even under a positive political approach. But most readers of decisions understand that even the dicta carries some weight as a "road map" of the author's views regarding other cases.[110] Thus, the dicta in a decision regularly is deemed important to the understanding of governing legal principles.

Something is necessary, however, beyond the simple reading of a decision, as lawyers do, even when dicta is taken into account. Lawyers tend to overread or underread decisions. On the one hand, they read for doctrinal formulas and then simply apply those formulas to predict the outcome of the next case. On the other hand, lawyers tend to glean a great deal from supposed ideological preferences of Justices, assuming that in one type of case a given Justice will predictably vote a certain way. What lawyers seldom discuss is what bothered a Justice about a specific case, or why a

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108. Indeed, in a recent article, McNollgast argues explicitly that stare decisis is a function of the pursuit of "personal policy objectives." McNollgast, *supra* note 95, at 1668; *see also* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2050 (1994) ("It could be argued that precedent is always a matter of degree."); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 76 (1991) (discussing inconsistency in Justices' "standards or reasons for overruling precedents").

109. Nonetheless, similar to logrolling in the legislative arena, for a variety of reasons Justices might seek support for their own opinions by signing on to those of others.

110. Eskridge & Frickey, *supra* note 88, at 39-40.

Justice felt compelled to join one opinion. However, the critical question ought to be what the opinion in one case reveals about a Justice's preferences and how that might be important in a subsequent case. The proposition is that judges do send very clear preferential signals, but understanding them requires focusing on different parts of an opinion than often catch lawyers' eyes and upon reading those opinions in a different way.

All of this is complicated by the difficulty in identifying the motivations of judges. Political policymakers like the President and members of Congress are assumed to be motivated by ideology or by a desire for reelection.[111] Identifying the motivation of judges has proven difficult because the latter is so important in the political arena and because federal judges do not stand for reelection.[112] John Ferejohn, Richard Posner, and Daniel Rodriguez, among others, have discussed the interpretive background against which judges work.[113] Judges likely have ideological preferences,[114] a point some even question,[115] but they also have institutional preferences that may enhance or weaken the strength of these ideological preferences. Common examples are a concern for a coherent body of doctrine or adherence to the principle of stare decisis.[116] Moreover, judges may be lazy and seek to reduce their workload or simply may desire popularity.[117] Factoring in these preferences makes the act of prediction much harder for judges than for legislators, in part because one case cannot yield a full glimpse of any judge's utility function.[118]

Finally, as Professors Eskridge and Frickey acknowledge, the interaction, or dialogue, that occurs between Congress and the

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111. *See supra* note 59 and accompanying text.

112. Jack M. Beermann, *Interest Group Politics and Judicial Behavior: Macey's Public Choice*, 67 NOTRE DAME L. REV. 183, 221 (1991).

113. *See* RICHARD POSNER, OVERCOMING LAW 109-43 (1995); Beermann, *supra* note 112, at 221-23; Rodriguez, *supra* note 87, at 91-105.

114. Gely & Spiller, *supra* note 91, at 47 ("the source of the preferences of the Supreme Court is basically ideological"); McNollgast, *supra* note 95, at 1667. McNollgast argues that "larger, socially valuable goals, such as the respect for precedent and the rule of law, are a by-product of the more narrow and limited goals of pursuing personal policy objectives." *Id.* at 1668.

115. *E.g.*, Abner J. Mikva, *Foreword*, 74 VA. L. REV. 167, 177 (1988) (arguing that motivations of governmental institutions are far too mixed to be understood through generalizations).

116. Rodriguez, *supra* note 87, at 104.

117. POSNER, *supra* note 113, at 115, 117; Beermann, *supra* note 112, at 223.

118. For a notable attempt, factoring in leisure time, popularity, pecuniary remuneration and voting, among other things, see POSNER, *supra* note 113, at 135-44.

Supreme Court is both cooperative and competitive.[119] Reading the signals provided by the Justices requires, at the first level, an intuition about what is being communicated. When courts are being cooperative they likely are dropping hints about what path Congress might pursue. But at times the Justices may be bluffing; a warning stoutly given may evaporate in the face of congressional insistence. In a sense, this simply reflects the inherent tension between the deference due to coordinate branches and the imposition of judicial preferences, a tension *Lopez* reflects.

These then are the tools from PPT. By way of illustration, I apply them to read *Lopez*. The question provoked by any reading of *Lopez* is whether the decision represents a deviation from the existing body of Supreme Court pronouncements as to the scope of Congress's power under the Commerce Clause, and if so, what does that deviation portend? What follows is not just an abstract reading of *Lopez*, but one framed against pending congressional legislation. That legislation is the Gun-Free School Zones Act of 1995.

B. The Gun-Free School Zones Act of 1995

The political response to *Lopez* was swift. Although many in the media focused on the broad impact of the *Lopez* ruling, a large number of those in the political realm concentrated narrowly on guns in schools. Several legislators vowed to revisit the problem.[120] The President of the United States spoke out against the evil of guns in schools and immediately directed the Attorney General to examine ways in which Congress might assert its authority constitutionally.[121]

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119. Eskridge & Frickey, *supra* note 88, at 40-41 (predicting "both sincere signals and bluffs" in the bargaining process).

120. For instance, Senator Herbert Kohl, the Democratic sponsor of the 1990 Act, promised immediately to reintroduce the Act in a form that the Court would uphold. John M. Broder, *President Blasts Ruling on Firearms*, L.A. TIMES, Apr. 30, 1995, at A14. Other lawmakers in both parties were quick to express their concern over *Lopez* and their desire to rewrite the 1990 Act as well. *See* Joan Biskupic, *Ruling Puts Brakes on Congress's Regulation*, AUSTIN AMERICAN-STATESMAN, Apr. 30, 1995, at J7. Senator Arlen Specter responded by asking, "What comes next, drugs? . . . I think that crime is a national problem. . . . Guns and drugs are the principal instrumentalities of crime." *Id.*

121. *See* PROPOSED LEGISLATION: "THE GUN-FREE SCHOOL ZONES AMENDMENTS ACT OF 1995," H.R. DOC. NO. 72, 104th Cong., 1st Sess. 1-2 (1995) (message from President Clinton to Congress on May 10, 1995, transmitting a draft of proposed legislation to amend the Gun-Free School Zones Act of 1990 to provide the necessary nexus with interstate commerce).

Following *Lopez,* three options for repairing the 1990 Act existed. First, Congress could reenact the same statute, but preface it with legislative findings, and create a record to clarify that it was regulating commerce. Second, Congress might pass the same statute, but include a requirement that the possession of the gun have a substantial effect upon interstate commerce (the "substantial effect" nexus). Finally, Congress could include a requirement that the gun possessed in the school zone have traveled in interstate commerce (the "once traveled in interstate commerce" nexus). No one option is exclusive of the others, and as it happens, Congress has all three under consideration.[122] Under the direction of the President, the Attorney General recommended legislation that contained both of the nexus ideas.[123] Such legislation has been introduced in the House of Representatives[124] and in the Senate.[125] The Senate legislation not only contains the two nexus provisions,[126] but also is accompanied by extensive findings.[127]

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122. Although, oddly enough, the "substantial effect" nexus is only an "effect" nexus in the statutes under consideration: there is no requirement that the possession of firearms in or around schools have a *substantial* effect on interstate commerce, only that such possession "affects" interstate commerce. *See infra* notes 123-27 and accompanying text.

123. *See* PROPOSED LEGISLATION: "THE GUN-FREE SCHOOL ZONES AMENDMENTS ACT OF 1995," *supra* note 121, at 1, 3. (The legislation recommended by Attorney General Reno amends § 922(q)(2)(A) of the 1990 Act "by inserting after 'zone' the following: ', if that firearm has moved in or the possession of such firearm otherwise affects interstate or foreign commerce.'").

124. On May 10, 1995, Rep. Schumer introduced H.R. 1608, 104th Cong., 1st Sess. (1995) (amending paragraphs (2)(A) and (3)(A) of § 922(q), as amended by section 320904 of the Violent Crime Control and Law Enforcement Act of 1994, "by inserting 'that has moved in or that otherwise affects interstate or foreign commerce,' after 'firearm'.").

125. On June 7, 1995, Senator Kohl introduced the Gun-Free School Zones Act of 1995, S. 890, 104th Cong., 1st Sess. (1995).

126. Like H.R. 1608, S. 890 amends § 922(q) by inserting the following after "firearm" in paragraphs 2(A) and 3(A): "that has moved in or that otherwise affects interstate or foreign commerce." S. 890, 104th Cong., 1st Sess. 3 (1995).

127. The extensive findings were previously enacted under § 320904 of the Violent Crime Control and Law Enforcement Act of 1994 which amended § 922(q)—the Gun-Free School Zones Act of 1990—to include congressional findings establishing a nexus between guns and schools and interstate commerce:

> (1) The Congress finds and declares that—
>
> (A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;
>
> (B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;
>
> (C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Judiciary Committee of the House of Repre-

It is impossible to know, of course, if introduction of the 1995 Act signals a sincere interest in Congress to actually enact it. It is quite possible that mere introduction of the legislation serves the electioneering goals of the relevant parties. Hearings have been held at least twice in the Senate on the proposed legislation,[128] providing even further publicity to the sponsors. There may not be widespread support either for passage of the law or for confronting the Supreme Court in this way. Indeed, the *Lopez* decision may be strategically useful because the Supreme Court can be cast as scapegoat for Congress's failure to enact the legislation, taking Congress off the hook if it chooses to do nothing.

Whatever the fate of the 1995 Act in Congress, there are lessons to be learned from examining whether the Supreme Court likely would uphold it. First, the judicial/legislative interaction provides an illustration of the application of PPT to the reading of constitutional decisions. Second, discussion of this particular legislation yields some insight into the broader impact of *Lopez*.

Before proceeding to apply the lessons of PPT to an examination of *Lopez*, it is useful to identify precisely what is at stake. Even a lawyer's reading of *Lopez* suggests that some of the fixes

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sentatives and the Judiciary Committee of the Senate;

(D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;

(E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;

(F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;

(G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;

(H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves; even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and

(I) Congress has power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.

Pub. L. No. 103-322, § 320904, 108 Stat. 1796, 2125-26 (1994).

128. *See, e.g., Guns in Schools—A Federal Role?: Hearing on S. 890 Before the Subcomm. on Youth Violence of the Senate Judiciary Comm.*, 104th Cong., 1st Sess. (1995). At this hearing, which I attended, the witnesses did not attempt to establish on the record the connection between guns near schools and interstate commerce.

in the 1995 Act have no realistic chance of success. For example, the Senate Bill, finding a toehold in the Court's comment that findings might be important, incorporates a long list of findings in an effort to establish that commerce is being regulated. In light of the discussion above, however, it seems apparent that the findings will not be persuasive to the Supreme Court.[129] The 1995 Act's findings are identical to the post hoc findings to which the Court paid no attention when it had the opportunity.

Similarly unlikely to succeed in shifting the balance toward constitutionality is the substantial effect nexus. Both the House and Senate bills would criminalize guns in schools if the possession "otherwise affects interstate or foreign commerce."[130] Leaving to one side the obvious failure to require a *substantial* effect, such a nexus has limited utility. If Congress's view is that any gun possession near a school affects interstate commerce, the *Lopez* Court already has rejected the contention unequivocally.[131] The alternative is that Congress intended to leave it open in any individual case for the United States Attorney to prove the substantial effect. While this is legally unobjectionable, the case-by-case burden lessens the utility of the statute.

The important battle, therefore, is over the "once traveled in interstate commerce" nexus. This nexus rests on the seminal case of *Champion v. Ames*,[132] in which the Supreme Court upheld the power of Congress to ban the transportation of lottery tickets in interstate commerce. The constitutional validity of the nexus finds initial support in the *Lopez* decision. One of the categories that the Court said might be regulated by Congress was the "use of the channels of interstate commerce."[133] The once traveled in interstate commerce nexus goes one step further than *Champion*, however, not by banning guns from traveling in interstate commerce,

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129. *See supra* notes 71-86 and accompanying text.

130. H.R. 1608, 104th Cong., 1st Sess. (1995); S. 890, 104th Cong., 1st Sess. (1995); *see also supra* notes 124, 126.

131. *See Lopez*, 115 S. Ct. at 1634 ("The 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."). In addition, the Court concluded the following: "Section 922(q) 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, therefore, 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." (footnote omitted). *Id.* at 1630-31.

132. The Lottery Case, 188 U.S. 321 (1903).

133. *Lopez*, 115 S. Ct. at 1629.

but by regulating an activity in which they are used *after* they have traveled in commerce. Upholding the 1995 Act's validity essentially would mean that Congress may regulate any activity if any of its components has ever traveled in interstate commerce. This aspect of Congress's power is up for grabs after *Lopez*. The key question after *Lopez* is whether the Supreme Court is prepared to uphold commerce legislation based solely on the "once traveled in interstate commerce" nexus. This is a question squarely put by the 1995 Act. The correct answer to the question is a matter of sharp debate.

C. *A Positive Political Reading of* Lopez

A doctrinal, or traditional, reading of *Lopez* identifies support in the decision for all of the techniques Congress adopted in framing the 1995 Act, but particularly for the once traveled in commerce nexus. A traditional reading of the *Lopez* decision would identify numerous points that appear to support the legitimacy of this modification of the statute. Discussing a prior precedent, *United States v. Bass*,[134] the *Lopez* Court stated that the 1990 Act "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[135] Although this might be ambiguous as to which nexus was under discussion, the Court's use of the disjunctive in its conclusion of the discussion left no doubt. "Unlike the statute in *Bass*, [the 1990 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."[136] Moreover, the opinion suggests that if the gun *or* Lopez recently had moved in commerce previously, the statute would have been valid: "Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce."[137]

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134. 404 U.S. 336 (1971).

135. 115 S. Ct. at 1631.

136. *Id.* (emphasis added).

137. *Id.* at 1634. Similar suggestions are found in Justice Kennedy's concurrence: "[N]either the actors nor their conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus." *Id.* at 1640 (Kennedy, J., concurring). "Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce." *Id.* at 1642

Despite the appearance created by a lawyer's reading of *Lopez*, a positive political reading of the same case creates quite a different impression. Proceeding to that reading involves three steps. First, there is identification of the pivotal votes. Second, there is the related assessment of the extent to which any opinion reflects sincere preferences. Finally, there is the reading of signals in the decisions as to what is really at stake for each Justice.

Identifying the pivotal voters on commerce issues after *Lopez* is relatively easy. Four Justices voted in dissent, and none of them is likely to come over to the other side if the 1995 Act is at issue. The likeliest candidate would have been Justice Souter, given his widely expressed views of adherence to stare decisis.[138] However, he was an extraordinarily firm vote on the 1990 Act, and the 1995 Act is distinguishable in ways he clearly would seize upon in remaining with the dissent. Five Justices voted in the majority, one of whom must be pried away to change the result in the case. Justice Thomas is not even a remote possibility; his concurrence basically calls for a pre-New Deal understanding of the commerce power.[139] That leaves us with Chief Justice Rehnquist and Justices Scalia, O'Connor, and Kennedy.

Three of these four Justices are on record in *Lopez*, while one is silent. Chief Justice Rehnquist wrote the majority opinion. The prior discussion suggests that overcrediting the majority view may be a mistake.[140] Nonetheless, given the Chief Justice's strong views in favor of state autonomy[141] and the fact that we are hunting for a breakaway vote, it would be surprising to learn that the majority decision is *less favorable* to Congress's power than

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(Kennedy, J., concurring).

138. *See* Planned Parenthood v. Casey, 505 U.S. 833, 861 (1992) (Joint opinion of O'Connor, Kennedy, and Souter, JJ.) ("Within the bounds of normal *stare decisis* analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming *Roe's* central holding, with whatever degree of personal reluctance any of us may have, not for overruling it.").

139. *See* 115 S. Ct. at 1642 (Thomas, J., concurring) ("In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.").

140. *See supra* notes 107-09 and accompanying text.

141. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 579-80 (1985); *see also id.* at 581 (Rehnquist, J., dissenting) (expressing such a view and predicting that the *National League of Cities* principle would "in time again command the support of a majority of this Court"); National League of Cities v. Usery, 426 U.S. 833, 852 (1976) (Rehnquist, J.). *But see* South Dakota v. Dole, 483 U.S. 203, 210 (1987) (Rehnquist, C.J.) (holding that the Tenth Amendment does not necessarily limit conditions that may be placed on federal grants to state and local governments).

Rehnquist would vote alone. Justice Kennedy concurred separately, joined by Justice O'Connor. Only Justice Scalia silently joined the majority opinion.

Assuming that the majority decision authored by the Chief Justice is sincere, the question is what signal was he sending? We have already seen how a traditional lawyer's reading of *Lopez* would find support in that decision for the once traveled in interstate commerce nexus, but that reading would be a serious mistake. The trick is to read the *Lopez* majority decision while asking the following question: what is bothering the Chief Justice? Reading the decision with this question in mind reveals a plain answer.

The Chief Justice is concerned that to uphold the 1990 Act is to take a trip down the slippery slope, leaving no limits on Congress's power to regulate in the name of interstate commerce. His decision "start[s] with first principles. The Constitution creates a Federal Government of enumerated powers."[142] After probing this point he turns to the case law, describing the now discredited *A.L.A. Schechter Poultry Corp. v. United States*[143] decision. "[T]he justification for the formal distinction was rooted in the fear that otherwise 'there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government.'"[144] Rehnquist concludes his discussion of case law with the concern that commerce not be defined so as to "'obliterate the distinction between what is national and what is local and create a completely centralized government.'"[145] The concern that the Government's and Justice Breyer's positions lack any real limits[146] prompts the Chief Justice to conclude that "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[147]

It is difficult to see how concerns about the slippery slope are ameliorated by inclusion of the once traveled in interstate commerce nexus. In a superficial way, perhaps they are. After all,

142. *Lopez*, 115 S. Ct. at 1626.

143. 295 U.S. 495 (1935).

144. *Lopez*, 115 S. Ct. at 1628 (citation omitted).

145. *Id.* at 1629 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

146. *Id.* at 1633 (expressing concern that those positions would allow Congress to regulate in such traditionally local areas as family law and education).

147. *Id.* at 1634.

family law and education might still remain sacrosanct. Or would they? In today's world, it is extraordinarily difficult to identify *anything* that has not traveled in interstate commerce, and it is equally difficult to identify any conduct Congress might regulate that does not involve goods or persons that have traveled in interstate commerce. For example, Congress might prohibit divorce if either party has traveled in or is going to travel in interstate commerce. In today's integrated economy, pressing the constitutionality of a federal ban in schools based on the fact that a gun traveled, perhaps thirty years ago, in interstate commerce is unlikely to address the Chief Justice's real concerns and win his vote.[148]

This conclusion also seems to be correct for either or both of the Justices who signed Justice Kennedy's opinion, albeit for different reasons. The concern of the concurrence is not the slippery slope but the preservation of a sphere of autonomy for state experimentation. In addition, the separate opinion is a strong statement in favor of judicial review. It is unclear whether this results in a view that traditional state functions like education cannot be regulated or only that they may not be regulated in a manner that forecloses experimentation. In either event, addition of the once traveled in interstate commerce nexus is unlikely to be very persuasive to the concurring Justices.

The Kennedy concurrence admittedly is a bit odd because it starts off appearing to head in one direction but ends in another. It begins as a strong statement about the difficulty of applying "content-based or subject-matter distinctions, thus defining by semantic or formalistic categories those activities that were commerce and those that were not."[149] This portion of the opinion also addresses the dangers of applying formal distinctions to limit Congress's power.[150] Then, mid-way through, the opinion seems to turn on its head. First, there is a paean to federalism as a safeguard of liberty.[151] This is followed by an extremely strong iteration of the view that if the political branches will not restrain themselves, the courts will do it for them.[152] Ultimately, the concurrence con-

148. Dan Farber points out that perhaps the "once traveled in commerce" nexus *would* appease the Chief Justice, simply because it provides for some role for judicial review.

149. *Lopez*, 115 S. Ct. at 1635 (Kennedy, J., concurring).

150. *See id.* at 1635-37; *see also id.* at 1638 ("[M]athematical or rigid formulas . . . are not provided by the great concepts of the Constitution.").

151. *See id.* at 1638-39 ("[F]ederalism was the unique contribution of the Framers to political science and political theory.").

152. *See id.* at 1639-40 (stressing the importance of judicial review).

cludes that the statute is invalid because "neither the actors nor their conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus."[153] What makes the statute even more troublesome, according to the concurrence, is that it intrudes into a "traditional concern of the States."[154] This hardly seems the same decision that began by rejecting formal considerations.[155]

One reason for the opinion's odd turn may be that it was jointly authored, suggesting that if there is a wedge in the five vote majority, this is a likely spot. There is precedent for Justices Kennedy and O'Connor jointly authoring decisions.[156] Although Justice Kennedy is the putative author, the latter half of the opinion, beginning with the liberty-enhancing nature of federalism, sounds very much like other O'Connor decisions, notably *New York v. United States*,[157] *Gregory v. Ashcroft*,[158] and *FERC v. Mississippi*.[159] If this reading is correct, Justice Kennedy may be a loose vote.[160]

Whatever the case about loose votes, the key to the opinion, the signal, seems to come at the end. Leaving general talk behind, the concurrence emphasizes that education is a traditional state function.[161] The opinion then stresses that over forty states have their own laws criminalizing guns in or near schools.[162] Perhaps more importantly, the opinion reviews alternative approaches employed by state and local governments to remove guns from schools, such as fining parents, rewarding informers, encouraging voluntary surrender, and suspending or expelling students.[163] The 1990 Act interfered with all this. "The statute now before us fore-

153. *Id.* at 1640.

154. *Id.* ("[I]t is well established that education is a traditional concern of the States.").

155. *Cf.* Fried, *supra* note 11, at 44 (suggesting that Kennedy's concurrence in *Lopez* may turn out to be another *National League of Cities*).

156. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 833-911 (1992) (joint opinion of O'Connor, Kennedy, and Souter, J.J.).

157. 505 U.S. 144 (1992) (striking down the Low Level Radioactive Waste Policy Amendments Act of 1985 on grounds that parts of it violated the Tenth Amendment).

158. 501 U.S. 452 (1991) (upholding state statute requiring judges to retire at age 70).

159. 456 U.S. 742 (1982) (upholding Congress's power to regulate public utilities, even those that only operate in one state).

160. *See* Sullivan, *supra* note 12, at 105 (suggesting that Justice Kennedy is a swing vote in federalism cases).

161. *See Lopez*, 115 S. Ct. at 1640 (Kennedy, J., concurring).

162. *Id.* at 1641 (Kennedy, J., concurring).

163. *Id.*

closes the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term."[164]

Whoever the author of, or adherent to, this part of the opinion, he, she, or they are unlikely to be impressed by the 1995 Act's inclusion of the once traveled in interstate commerce nexus. Virtually all guns travel in interstate commerce or have done so at one time. The nexus will not preserve the state and local sphere that seems so important. Indeed, the irony is that the 1995 Act contains a non-preemption clause, but that clause is telling, as is Justice Breyer's conclusion that the 1990 Act did not displace state choices.[165] In the sense of the concurrence, these state choices inevitably are displaced by the federal law. A voluntary surrender program, for example, is not likely to be effective if surrendering a gun is legal under state law but subjects one to federal criminal prosecution. The issue is not preemption for these Justices, it is displacement.

Were there no more evidence than the *Lopez* decision itself, this reading of *Lopez* would suggest that the Supreme Court might not uphold the 1995 Act simply because of the addition of the once traveled in interstate commerce nexus. The conclusion is not a firm one, however. First, it is difficult to know where Justice Scalia stands. Second, the odd Kennedy concurrence might suggest Justice Kennedy himself could be swayed in the appropriate case. Finally, the reading of *Lopez* fails to consider the additional values that might influence the preferences of any Justice, such as adherence to stare decisis or an amount of deference to strongly stated views of a coordinate branch.

Lopez is typical of many cases, however, in that additional information almost always will exist that may fill out the impressions created by one decision. For example, to get a firm read on any Justice, it might be necessary to canvass related decisions they have joined, as well as decisions that reveal the strength of their adherence to stare decisis, and like factors. Although canvassing all or even most of the possible additional sources is beyond the scope

164. *Id.*

165. *See id.* at 1661 (Breyer, J., concurring) ("To hold this statute constitutional is not to 'obliterate' the 'distinction of what is national and what is local,' . . . or to regulate any and all aspects of education.").

of this paper, there are several pertinent sources that fill out the picture in significant ways and that provide further insight into the application of PPT to the reading of constitutional cases.

First, there is a precedent identified by other commentators as relevant to the constitutionality of the once traveled in interstate commerce nexus, but which would be unlikely to have significant impact were the 1995 Act adopted.[166] That precedent is *Scarborough v. United States*,[167] in which the question was whether Congress intended to criminalize possession of a gun by a convicted felon simply because the gun once traveled in interstate commerce.[168] Under a traditional reading, *Scarborough* is of potential importance because it could be "binding" precedent. But even binding precedents might be swept away. The question from a PPT perspective is how close the precedent really is and how firm is an individual Justice's adherence to stare decisis. Both variables must be taken into account in order to determine how binding a precedent will be. A Justice who is not overly concerned with stare decisis or preferring a different outcome will work to distinguish prior precedent. A Justice who feels strongly about stare decisis might feel bound by a precedent that is close, albeit not altogether on point.

Even without mapping the preferences of the Justices as to stare decisis, *Scarborough* likely will have little significance. The Supreme Court did uphold the conviction of the prior felon for possessing guns even though the guns had traveled several years earlier in commerce.[169] But despite appearances, *Scarborough* is of dubious relevance on the once traveled in interstate commerce question. In any event, the decision contains so much room to

166. In addition to the precedents discussed here, see also Perez v. United States, 402 U.S. 146 (1971) (upholding the federal loan sharking statute, relying heavily on congressional findings regarding an impact on interstate commerce) and United States v. Bass, 404 U.S. 336 (1971) (overturning conviction for violation of federal firearms statute on grounds that statute did not draw a connection between firearm possession and interstate commerce). I discount *Perez* because, as previously discussed, there *were* findings and a record available in *Lopez*, had the Court cared to rely upon them. *Bass* is trickier because the *Lopez* Court cited *Bass* to suggest a commerce nexus might suffice. *See* 115 S. Ct. at 1631. For the reasons described above, however, I believe this "traditional" reading leads to an incorrect conclusion.

167. 431 U.S. 563 (1977).

168. *Id.* at 564.

169. *See id.* at 577-78 ("Here, the intent of Congress is clear. . . . [T]here is no question that Congress intended no more than a minimal nexus requirement. . . . [W]e affirm the conviction of petitioner.").

maneuver, it is unlikely to be binding to any Justice that is not already ideologically predisposed to be bound. None of the Justices in the *Lopez* majority sat on *Scarborough*.[170] Further, the decision plainly is framed as a question of statutory interpretation,[171] leaving any subsequent Court free to claim that the constitutional question had been left open. Moreover, to the extent the once traveled in interstate commerce constitutional question was lurking, the Court seemed to duck it intentionally by finding that the substantial effect nexus would do in that case.[172] According to the Court, possession of guns by convicted felons could be seen to have a substantial effect on commerce.[173]

Of greater relevance than *Scarborough* are some much older decisions that seem to deal directly with the once traveled in interstate commerce nexus.[174] Chief among these is *United States v. Sullivan*,[175] in which a pharmacist was prosecuted for violating the Federal Food, Drug, and Cosmetic Act of 1938, which prohibited misbranding a drug. Sullivan removed sulfathiazole pills from a properly labeled container and sold small quantities of them in an unbranded pillbox lacking statutorily required usage and cantronany information.[176] The sale occurred nine months after

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170. Justices Rehnquist and Stevens were on the Supreme Court at the time. Justice Stevens joined the *Scarborough* majority, 431 U.S. at 563-78, but he dissented in *Lopez*, 115 S. Ct. at 1651. Justice Rehnquist did not participate in *Scarborough*, 431 U.S. at 578.

171. *See Scarborough*, 431 U.S. at 564 ("The issue in this case is whether proof that the possessed firearm previously traveled in interstate commerce is sufficient to satisfy the *statutorily required* nexus between the possession of a firearm by a convicted felon and commerce." (emphasis added)).

172. *See id.* at 571-72 ("As we have previously observed, Congress is aware of the 'distinction between legislation limited to activities "in commerce" and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce.' Indeed, that awareness was explicitly demonstrated here. . . . And we see no basis for contending that a weapon acquired after a conviction affects commerce differently from one acquired before and retained." (citations omitted)).

173. *Id.* at 572-73.

174. *See* United States v. Sullivan, 332 U.S. 689 (1948) (upholding Congress's power to ban retail pharmacists' relabeling of drugs that have been shipped in interstate commerce with correct labels); Weigle v. Curtice Bros. Co., 248 U.S. 285 (1919) (upholding a Wisconsin statute prohibiting resale of certain food removed from its original packaging after moving in interstate commerce and then held for sale on the ground that it did not interfere with the 1906 Food and Drug Act); McDermott v. Wisconsin, 228 U.S. 115 (1913) (upholding congressionally authorized regulation requiring the seizure of mislabeled goods shipped in interstate commerce).

175. 332 U.S. 689 (1948).

176. *Id.* at 691-92.

the interstate transportation of the pills had ceased.[177] Nonetheless, the Supreme Court upheld the conviction against a Commerce Clause challenge.[178]

Although *Sullivan* and related cases may or may not bear directly upon the question raised by the 1995 Act, the important point to bear in mind about these cases, from a PPT perspective, is their age and how that might relate to the factors that motivated *Lopez*. A case like *Sullivan* might be distinguished from *Lopez*, in that the very purpose of the branding requirement is defeated if a sale such as Sullivan's is not covered. But, what is important is that the *Lopez* Court might distinguish such a case simply because the dynamic has changed so much since 1948, when *Sullivan* was decided. PPT would suggest that precedents such as *Sullivan* are strongest when the congressional coalition that passed the statutes is still in place. The makeup of Congress has changed recently with regard to federalism questions. In light of this and of the age of *Sullivan* and *Scarborough*, the Supreme Court might feel comfortable distinguishing or overruling these older precedents. It is noteworthy that neither decision was cited in the majority opinion in *Lopez*.

Lopez cannot be fully understood, as Professor Sara Sun Beale[179] makes plain, without taking into account the context in which the decision was rendered. Members of the judiciary have joined lately in expressing concern about the increasing federalization of criminal offenses and the impact of that federalization on the dockets of federal courts. Chief Justice Rehnquist and other members of the Court have expressed such concern in extra-judicial statements.[180] The Long Range Plan of the Judicial Conference of the United States[181] raises such concern as one of the most pressing issues facing the judiciary. Present concern about federalization may well work to move the Supreme Court to read prior decisions quite narrowly or to overrule them.

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177. *Id.* at 692.

178. *Id.* at 697-98 (rejecting the Fifth Circuit's narrow construction of the Federal Food, Drug, and Cosmetic Act of 1938, on the ground, among others, that the Act was a proper exercise of Congress's commerce power based on a comparison of *Sullivan* and *McDermott v. Wisconsin*, 228 U.S. 115 (1913)).

179. Professor Sara Sun Beale, Address at the *Case Western Reserve Law Review* Symposium The New Federalism after *United States v. Lopez* (Nov. 10, 1995).

180. *Id.*

181. *Id.*

Indeed, in this context, one interesting piece of evidence is several cases in which the Court denied certiorari after the *Lopez* decision,[182] or in one case simply issued a short *per curiam* opinion.[183] Technically speaking, all of these cases involved a question different than the question raised by the once traveled in interstate commerce nexus.[184] *Ramey* and *Moore* involved convictions under, inter alia, the federal arson statute. These were "affecting commerce" cases; the only nexus to commerce was that the structure burned had used electricity or gas from an interstate grid.[185] *Robertson* was a case arising under the Racketeering Influenced and Corrupt Organizations Act.[186] At issue was whether the investment of criminal proceeds in a gold mine, which was engaged in commerce, met the statutory "engaged in" requirement.[187] Although the ties were slight, the Court found in its *per curiam* opinion that the mine received supplies and equipment in commerce and some of the gold from the mine also entered interstate commerce.[188] Although, strictly speaking, these actions by the Court suggest a narrow interpretation of *Lopez*, at least insofar as the affecting commerce part of the decision goes, it is unwise to ascribe any particular motive to the denial of certiorari. Justice

182. *See, e.g.*, Ramey v. United States, 24 F.3d 602 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1838 (1995); Moore v. United States, No. 93-5273, 1994 WL 251174 (4th Cir. June 10, 1994), *cert. denied*, 115 S. Ct. 1838 (1995).

183. *See* United States v. Robertson, 115 S. Ct. 1732 (1995) (per curiam).

184. Despite the denials of certiorari in *Ramey* and *Moore*, the Supreme Court may be confronted with the "substantial effect" question shortly. In United States v. Pappadopoulos, 64 F.3d 522, 528 (9th Cir. 1995), the Ninth Circuit invalidated a conviction under the federal arson statute, 18 U.S.C. § 844(i), on the ground that the building destroyed had only "a remote and indirect effect on interstate commerce," thus rejecting the government's argument that it was enough that the private home received natural gas from out-of-state sources. 64 F.3d at 528. Because the Ninth Circuit ruled against the government, the Supreme Court might—if asked—take the case.

185. *See Ramey*, 24 F.3d at 607 (finding the burned trailer had received electricity from an interstate power grid); *Moore*, 1994 WL 251174, at *3 (finding the burned house was connected to interstate gas lines).

186. 18 U.S.C. §§ 1961-1968 (1988 & Supp. V). Robertson allegedly violated a provision of the RICO Act that prohibits the investment of proceeds obtained through illegal activities in the "acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." *Id.* § 1962(a).

187. 115 S. Ct. at 1733. However, the Court clearly stated that it would not consider whether the activities of the gold mine "affected" interstate commerce. "Whether or not these activities met . . . the requirement of substantially affecting interstate commerce, they assuredly brought the gold mine within § 1962(a)'s alternative criterion of 'any enterprise . . . engaged in . . . interstate or foreign commerce.'" *Id.*

188. *Id.*

Scalia's dissents from the denials of certiorari in *Ramey* and *Moore*, however, suggest he is not a weak adherent to *Lopez*, thereby strengthening the force of that decision.

The truly interesting question, however, is whether the Supreme Court, having made its views known in *Lopez*, simply is biding its time, watching to see what a very different Congress might do with regard to new legislation. Between the time Congress passed the post hoc findings ignored in *Lopez* and the *Lopez* decision itself, Congress dramatically shifted into Republican hands. A good part of the Contract With America, upon which the Republicans ran, rests on notions of greater respect for federalism and devolution of power from the national government to the States.[189] That change in power and perspective having taken place, the members of the *Lopez* majority may be taking a wait-and-see attitude, declining to strike down more laws if Congress seems to have gotten the message. Indeed, for this very reason, one might be skeptical that the 1995 Act would ever become law. The 1990 Act was adopted by a Democratic Congress and signed by a very reluctant Republican President.[190] The 1995 Act was introduced in the House at the behest of a Democratic President and in the Senate by one of the original Democratic sponsors of the 1990 Act. The same dynamic upon which the Court is banking may prevent passage of the 1995 Act. For the very same reason, the Supreme Court may have been emboldened in handing down its *Lopez* decision by the existence of the Republican Congress. As I indicated earlier, the institutional interaction is both competitive and cooperative.[191] Because *Lopez* was handed down after the pro-federalism Congress was elected, the Court might have felt safer moving to the right in the tenor of its decision. Although Congress cannot technically overrule a Supreme Court constitutional decision, it could generate heat for the Court by forcing a showdown. If the composition of Congress were to change again, it is less clear how firm the Court would be in sticking to *Lopez*.[192]

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189. Professor Tushnet makes just this point. *See* Mark Tushnet, *Living in a Constitutional Moment*, 46 CASE WES. L. REV. 845, 845 (1996).

190. *See* Statement by President George Bush On Signing the Crime Control Act of 1990, *supra* note 52, at 1945 ("Most egregiously, section 1702 inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law.").

191. *See supra* notes 87-88 and accompanying text.

192. *See generally* Gely & Spiller, *supra* note 91 (discussing impact on Supreme Court constitutional decisionmaking of changes in composition of Congress).

Nonetheless, this positive political reading of *Lopez* suggests Congress ought to take seriously the *Lopez* decision. *Lopez* appears to be the work of a Supreme Court that has grown increasingly troubled by congressional expansion of its authority, particularly when the expansion involves federalization of criminal conduct typically dealt with under state law. Congress's power rests on several doctrinal threads. One of them involves keeping the channels of commerce free from injurious goods.[193] But it is a stretch from this position to the position that simply because an article once traveled in commerce, Congress may regulate any activity involving that article. The positive political reading of *Lopez* presented here suggests that stretch may be one the Supreme Court is ready to eliminate and counsels against any congressional attempts to push the point without a sincere belief that the national interest requires it.

This interpretation of *Lopez* is, of course, tenuous given the many factors that play into judicial preferences. One of those factors undoubtedly is, and should be, the extent to which the Supreme Court is confronted with a sincere Congress pushing the scope of its authority where Congress believes national interests are at stake. Even if the exercise of power is doubtful, a Justice may well vote to affirm Congress's exercise if convinced of the importance of the national interests at stake. All this serves to underscore, however, the need for Congress to exercise the full reach of its powers only when necessary and to justify doing so with an ample record. That is why Professor Frickey's contribution of a legislative record canon makes such great sense.

IV. CONCLUSION

The legislative record canon advanced by Professor Frickey is a good idea, but that canon had little role to play in *Lopez*. Rather, *Lopez* was a strong statement by the Supreme Court that, whatever the record might have been, it was unprepared to uphold the 1990 Act. The question remains exactly what that strong statement means for future Commerce Clause legislation.

193. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964) ("'The authority of Congress to keep the channels of interstate commerce free from moral or injurious uses has been frequently sustained, and is also no longer open to question.'" (citations omitted)).

PPT has much to add to our reading of constitutional cases. Indeed, to the extent that the lessons of PPT already are incorporated in the reading of cases, this only reinforces PPT's value. But close attention to the techniques of PPT, identification of pivotal judicial voters, determination of which judicial language is sincere, and assessment of the signals sent by the Justices can enhance our understanding of a decision's scope. PPT suggests *Lopez* may have a serious impact on future Commerce Clause doctrine. One of Congress's doctrinal tools to regulate commerce has been the regulation of activities involving goods that once traveled in interstate commerce. A positive political reading of *Lopez* suggests that, at the very least, Congress should not take for granted that such a nexus will satisfy the Supreme Court in future cases.