St. John's Law Review

Volume 69
Number 3 *Volume 69, Summer-Fall 1995, Numbers 3-4*

Article 11

March 2012

United States v. Lopez: Reevaluating Congressional Authority Under the Commerce Clause

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Recommended Citation

Carroll, Michael C. and Dehmel, Paul R. (1995) "United States v. Lopez: Reevaluating Congressional Authority Under the Commerce Clause," *St. John's Law Review*: Vol. 69 : No. 3 , Article 11.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol69/iss3/11

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COMMENTS

UNITED STATES v. LOPEZ: REEVALUATING CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE

INTRODUCTION

Throughout our nation's history, the Supreme Court has scrutinized Congressional legislation to determine whether it passed constitutional muster.[1] Many of the resulting interpretive controversies have involved

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[1] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (legislative finding that judiciary has duty to determine what law is); United States v. Carolene Prod. Co., 304 U.S. 144, 153 (1938) (expressing need for judicial scrutiny). The judicial exercise of review is arguably a power that runs against representative democracy theory, but has long been embedded in the American form of government. *See Marbury*, 5 U.S. (1 Cranch) at 177. In *Marbury*, the Court established the concept of "judicial review" when it invalidated a portion of an act of Congress, deeming it "repugnant" to the Constitution. *See id.* at 180. Interestingly, the Court had previously *upheld* an act of Congress. Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796). Although seemingly anti-democratic, because the federal judiciary consists of a life-tenured minority, judicial review and the judiciary itself were of major importance to the framers of the Constitution. *See* THE FEDERALIST No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961):

> No Legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid. . . . The interpretation of the laws is the proper and peculiar province of the courts.

Id.

Moreover, at the beginning of the nineteenth century, the Supreme Court extended its power of judicial review to include the review of state court interpretations of both the United States Constitution and federal law, as well as state law in conflict with federal law. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (invalidating Virginia law which was in direct conflict with Treaty of Paris (1783)); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (holding that Court may review state court decisions interpreting federal law).

the Commerce Clause of the United States Constitution.[2] Such controversies have presented the Court with numerous opportunities to pronounce a sound legal framework for determining the scope of Congress' commerce power.[3] Instead, over the years, the Court has established a myriad of doctrines to determine whether a particular statute falls within the power granted to Congress by the Commerce Clause.[4] As a result of these

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Although ensconced in the American political system, the Court's invalidation power has been used sparingly; fewer than 100 acts of Congress have been invalidated. *See* WALTER F. MURPHY & JAMES E. FLEMING, AMERICAN CONSTITUTIONAL INTERPRETATION 191 (1986). In fact, until the Civil War, only two Supreme Court decisions invalidated federal law. *See Marbury*, 5 U.S. (1 Cranch) 137; Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (commonly known as Dred Scott case).

[2] *See, e.g.*, Champion v. Ames, 188 U.S. 321, 363 (1903) (holding valid federal law prohibiting interstate transportation of lottery tickets) (commonly referred to as "The Lottery Case"); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 240 (1824) (finding states' licensing of interstate travel unconstitutional because it interfered with commerce). The true starting point for Commerce Clause jurisprudence is the United States Constitution, which states that Congress has the authority "[t]o regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. The derivation of the Commerce Clause provides significant insight into the Framers' intentions in granting such power. The Madisonian view, developed at the time of drafting, contended that the Articles of Confederation failed because of interstate trade wars. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-3 (1988). Thus, in order to create a "more perfect union," interstate regulatory authority was shifted to Congress. *Id.* Under the Madisonian view; Congress was to play a dormant role in interstate commerce since "Congress would be expected to do very little in the field of commercial regulation, and the states would be powerless to regulate interstate commerce even when Congress did nothing at all." *Id.* (citing dictum in *Gibbons*, 22 U.S. (9 Wheat.) at 209).

[3] On the other hand, it is submitted that the Court's introduction of numerous tests employed to determine the extent of Congress' commerce power clouded its ability to discern a single standard, rather than creating a sound doctrinal framework.

[4] The first Supreme Court case that squarely dealt with the Commerce Clause was *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1. In *Gibbons*, Chief Justice John Marshall espoused a broad view of the commerce power, holding Congressional authority over commerce valid and absolute where such commerce "concerns more States than one." *Id.* at 194. Although a landmark case outlining the powers of Congress, *Gibbons* did not sacrifice any powers reserved to the states. "It is not intended to say that these words comprehend . . . commerce, which is completely internal, which is carried on between man and man in a State . . . . [S]uch a power would be inconvenient, and is certainly unnecessary." *Id.* Given the historical context of the then-fledgling nation, it is asserted that *Gibbons* stands as a symbolic example of Marshall's attempts to flex the muscles of the young federal government, ensuring that rather than serving at the behest of the states, it would work alongside them in the system of federal and state powers established by the Constitution.

Not until after the Civil War, however, did the Court begin to establish the boundaries of Congressional authority under the Commerce Clause. In *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870), the Court found that federal licensing of ships operating exclusively intrastate was permissible if the ships held cargo destined for other states. *Id.* at 565. Several months earlier, however, the Court invalidated for the first time a Congressional act as outside the scope of the commerce power. *See* United States v. DeWitt, 76 U.S. (9 Wall.) 41 (1869). In *DeWitt*, the Court stated that the Commerce Clause, while granting Congress the power to regulate commerce

shifting standards, Commerce Clause jurisprudence enjoyed little rhyme or reason and remained in a state of untidy confusion.[5] During much of the

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between the States, also operated "as a virtual denial of any power to interfere with the internal trade and business of the separate States . . . ." *Id.* at 43-44.

The next historical period of Commerce Clause jurisprudence began with the passage of the Interstate Commerce and Sherman Antitrust Acts. 49 U.S.C. §§ 1-1301 (1963 & Supp. 1995); 15 U.S.C. §§ 1-7 (1973 & Supp. 1995). These two Congressional acts signified the birth of the federal regulatory state; no federal legislation had previously attempted to regulate entire sectors of commercial business. Departing from the broad view set forth in *Gibbons*, the Court began to limit the bounds of the Commerce Clause. *See* United States v. E.C. Knight Co., 156 U.S. 1 (1895). In *E.C. Knight*, the Court adopted the present definition of commerce by formally separating commerce as distinct from manufacturing, agriculture, and mining. *Id.* at 16. The Court held that the American Sugar Refining Company's objective was clearly private gain in the *manufacture* of a commodity, and therefore was outside the scope of the Sherman Antitrust Act. *Id.* at 17. Justice Fuller reasoned, "[t]hat which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State." *Id.* at 12. The Court concluded, "[c]ommerce succeeds to manufacture, and is not a part of it." *Id.*; *see also* Hopkins v. United States, 171 U.S. 578, 603-04 (1898) (holding that livestock exchange rules were local and thus outside Sherman Antitrust Act); Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from* Swift *to* Jones & Laughlin, 61 FORDHAM L. REV. 105, 109-10 (1992) (discussing dual federalism and constraints it places upon commerce power); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986) (discussing Dormant Commerce Clause jurisprudence as applied to movement-of-goods cases and economic protectionism). The Court also checked Congressional authority under the Interstate Commerce Act. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 548 (1935) (distinguishing between direct and indirect effects on interstate commerce by invalidating regulations that related only indirectly to interstate commerce).

This period came to an abrupt conclusion during President Franklin Roosevelt's New Deal when the Court decided the landmark case of NLRB v. Jones & Laughlin Steel, 301 U.S. 1 (1937). Departing from the direct-indirect inquiry employed in *Schechter*, the Court held that intrastate activities that had "a close and substantial relation to interstate commerce [such] that their control is essential or appropriate to protect that commerce from burdens and obstructions" were within Congress' commerce power. *Id.* at 37. In effect, the Court returned to Marshall's broad strokes in *Gibbons*.

The historical context of the *Jones & Laughlin* decision is notable. In response to the Court's invalidation of some of his most important New Deal legislation, President Roosevelt devised the ill-fated "Court-packing" scheme. The scheme proposed to add additional justices to the Court, enabling Roosevelt to pack the high Court with justices of his favor. *See* Alpheus T. Mason, *Harlan Fiske Stone and FDR's Court Plan*, 61 YALE L.J. 791, 796 (1952); Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 677 (1946). Thus, the Court was under strong political pressure at the time of *Jones & Laughlin* and appears to have succumbed to that pressure. By ratifying the Congressional act, the Court discarded its previous Commerce Clause doctrine. *See* TRIBE, *supra* note 2, § 5-4.

[5] A variety of differing theories and approaches developed from court decisions which focused on the regulation of local activities related to interstate commerce, none of which were formally renounced by later decisions. *See* Wickard v. Filburn, 317 U.S. 111, 124-25 (1942) (establishing cumulative, additive effect principle which recognized that although acts of single party had minimal effect on interstate commerce, same acts by multiple parties sufficiently affected commerce and thus single party was subject to regulation); *Jones & Laughlin*, 301 U.S.

twentieth century, the Court employed various tests to dismiss every challenge to Congressional Commerce Clause legislation.[6] Recently, however, in *United States v. Lopez*,[7] the Supreme Court, for the first time in sixty years, found a federal law violative of the Constitution on the ground that it exceeded Congress' power under the Commerce Clause.[8]

In *Lopez*, the defendant, a 12th-grade student at a public high school in San Antonio, Texas, brought a concealed handgun onto school grounds[9] in violation of both federal[10] and state laws.[11] After school officials

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at 37 (disagreeing with direct-indirect test and employing substantial relation to interstate commerce test); *Schechter*, 295 U.S. at 548 (expressing concern with ability to regulate where link to interstate commerce is indirect); Houston, E. & W. Texas Ry. Co. v. United States, 234 U.S. 342 (1914) (supporting practical economic standard); Swift & Co. v. United States, 196 U.S. 375, 398 (1905) (advocating "current of commerce" theory where local activities are subject to regulation "in" interstate commerce); *E.C. Knight*, 156 U.S. at 1 (espousing logical nexus standard between regulation and interstate commerce). The Court's Commerce Clause analyses were most confusing prior to the decision in *Jones & Laughlin*. *See* Stuart Taylor Jr., *The Court is Not a Right-Wing Nut*, LEGAL TIMES, May 1, 1995, at 26 ("The Supreme Court's efforts to delimit Congress' commerce power from the 1890's until 1937—the year of the Court's tactical surrender to the New Deal—were replete with inconsistencies, arbitrary distinctions . . . and intellectually shabby opinions that ill-concealed justices' political biases. . . .").

[6] Following the New Deal and *Jones & Laughlin*, the Court repeatedly upheld Congress' authority under the commerce power to regulate many different areas of the law. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (upholding application of federal wage-and-hour laws to state and local governments as employers), *cert. denied*, 488 U.S. 889 (1988); Perez v. United States, 402 U.S. 146 (1971) (stating that intrastate loan sharking, primarily controlled by organized crime, affected interstate commerce); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (finding that race discrimination by motel affected interstate commerce); Katzenbach v. McClung, 379 U.S. 294 (1964) (holding that race discrimination by small restaurant affects interstate commerce); *Wickard*, 317 U.S. at 111 (1942) (holding that completely intrastate activity under cumulative principle affected interstate commerce). *See generally* Vicki C. Jackson, *Cautioning Congress to Pull Back*, LEGAL TIMES, July 31, 1995, at S31 (presenting United States v. Lopez as shift away from string of decisions upholding federal laws).

[7] 115 S. Ct. 1624 (1995).

[8] *Id.* at 1630-31 (holding that act "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms").

[9] *Id.* at 1624, 1626; *see* Scott W. Wright, *Ruling Casts Doubt on School Gun Ban; Appeals Court Clouds Use of Federal Law*, HOUS. CHRON., Oct. 17, 1993, at 2 (noting that Lopez was paid $40 for carrying gun and five bullets which were to be used by another student for "gang war").

[10] 18 U.S.C. § 922(q) (Supp. V 1988). Specifically, the statute provides: "It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(2)(A) (Supp. V 1988). It is notable that Congress, in enacting the statute, did not provide any findings regarding a connection to interstate commerce. In fact, Congress amended the statute in 1994 to include such findings:

(q)(1) The Congress finds and declares that -

(A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide

discovered the firearm, the defendant was charged with violating Texas law.[12] The state law charges were dismissed,[13] however, when federal agents charged the defendant with violating the Gun-Free School Zones Act[14] ("section 922(q)").[15]

The defendant contended that the statute exceeded Congress' power to legislate under the Commerce Clause because the prohibited activity had no connection to interstate commerce.[16] The district court, on the basis of prior Commerce Clause decisions,[17] disagreed and held both that section

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> 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 . . .
> (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 . . . of the United States . . . .

18 U.S.C. § 922(q)(1) (1994).

Except for renumbering the statute to allow for the additions, there were no additional changes. Apparently, Congress amended the statute in reaction to the Fifth Circuit's decision in *Lopez*. *See* United States v. Glover, 842 F. Supp. 1327, 1332 (D. Kan. 1994) (noting that amendment to Gun-Free School Zones Act was introduced into both houses of Congress subsequent to Fifth Circuit's decision in *Lopez*), *rev'd*, 57 F.3d 1081 (10th Cir. 1995). The Supreme Court in *Lopez*, however, was unimpressed by these late amendments. Moreover, the government did not rely strictly upon the amendments during oral argument of the case. *Lopez*, 115 S. Ct. at 1631 n.4. In short, the amendments "made no difference to the Court . . . [and] appears to have been a futile effort to bring the statute within Congress' interstate commerce clause authority." Kim Cauthorn, *Supreme Court Interprets Scope of Congressional Authority Under Interstate Commerce Clause*, 33 HOUS. LAW. 15, 15-16 (1995).

[11] TEX. PENAL CODE ANN. § 46.03 (West 1994) (originally enacted as § 46.04 and amended in 1991). The relevant portion of this statute reads:

> (a) A person commits an offense if, with a firearm . . . he intentionally, knowingly, or recklessly goes:
> > (1) on the physical premises of a school . . . whether the school or educational institution is public or private, unless pursuant to written regulations or written authorization of the institution . . . .

TEX. PENAL CODE ANN. § 46.03(a)(1) (West 1994).

[12] United States v. Lopez, 115 S. Ct. 1624, 1626 (1995).

[13] *Id.*

[14] *Id.*

[15] 18 U.S.C. § 922(q) (1994); Pub. L. No. 101-647, § 1702(a), 104 Stat. 4844 ("This section may be cited as the 'Gun-Free School Zones Act of 1990.'").

[16] *Lopez*, 115 S. Ct. at 1626. Lopez claimed Congress could not "legislate control over . . . public schools." *Id.* Additionally, Lopez asserted § 922(q) was not "enacted in furtherance of any of [Congress'] enumerated powers." United States v. Lopez, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995).

[17] *Id.* at 1360-68. *See generally supra* notes 1, 2, 4, 5 (summarizing Commerce Clause jurisprudence).

922(q) was constitutional[18] and that the defendant had violated the statute.[19] The United States Court of Appeals for the Fifth Circuit reversed, finding that section 922(q) had only a tenuous connection to interstate commerce,[20] and, therefore, failed to meet the substantial connection test required of Commerce Clause legislation.[21] In an opinion resembling that of the Fifth Circuit, the Supreme Court, in a 5-4 opinion, affirmed.[22]

Writing for the majority, Chief Justice Rehnquist found that enactment of the Gun-Free School Zones Act was beyond Congress' Commerce Clause powers since it neither regulated commercial activity[23] nor

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[18] *Lopez*, 115 S. Ct. at 1626. Specifically, the district court found that Congress had a "'well-defined power to regulate activities in and affecting commerce, and the 'business' of elementary, middle and high schools . . . affects interstate commerce.'" *Id.* (quoting district court opinion). It is unclear whether the district court's view was pervasive since Lopez seems to have been the first individual to challenge the constitutionality of § 922(q). *Lopez*, 2 F.3d at 1345.

[19] *Lopez*, 115 S. Ct. at 1626.

[20] *Lopez*, 2 F.3d at 1367. Although this view was followed by several other circuits, universal acceptance was hardly achieved. *See* United States v. Trigg, 842 F. Supp. 450, 453 (D. Kan. 1994) (finding that guns near schools did not affect interstate commerce); United States v. Morrow, 834 F. Supp. 364, 366 (N.D. Ala. 1993) (finding § 922(q) unrelated to interstate commerce). *But see* United States v. Edwards, 13 F.3d 291, 293 (9th Cir. 1993) (relying on United States v. Evans, 928 F.2d 858 (9th Cir. 1991)) (finding that Congress could have rational basis for regulating possession of guns), *cert. granted and judgment vacated by*, 115 S. Ct. 1819 (1995); United States v. Glover, 842 F. Supp. 1327, 1336-37 (D. Kan. 1994) (upholding validity of Gun-Free School Zones Act), *rev'd*, 57 F.3d 1081 (10th Cir. 1995). Interestingly, in *Edwards*, the government could have convicted the defendant solely under 26 U.S.C. § 5861(d) for the unauthorized possession of a sawed-off shotgun. *See Edwards*, 13 F.3d at 292. Additionally, in *Glover*, the court not only concluded that the act was valid, but believed measures should be taken to eliminate possessions of guns. *Glover*, 842 F. Supp. at 1337.

Specifically, the *Lopez* court noted that under § 922(q), the government was not required to show that plaintiff's act had any logical connection to interstate commerce. *Lopez*, 2 F.3d at 1348.

[21] *Lopez*, 2 F.3d at 1362. Specifically, the court noted:

> [i]f the reach of the commerce power to local activity that merely affects interstate commerce or its regulation is not understood as being limited by some concept such as "substantially" affects, then, contrary to Gibbons v. Ogden, the scope of the Commerce Clause would be unlimited, it would extend "to every description" of commerce and there would be no "exclusively internal commerce of a state" the existence of which the Commerce Clause itself "presupposes" and the regulation of which it "reserved for the state itself."

Id.; *see* U.S. CONST. art. I, § 8, cl. 3 (granting to Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); U.S. CONST. amend. X (reserving to States all powers not delegated to Congress by Constitution).

[22] *Lopez*, 115 S. Ct. at 1634.

[23] *Id.* at 1630-31 (recognizing that § 922(q) was solely criminal statute and had no connection to economic activity which could affect interstate commerce).

required that gun possession be linked to interstate commerce.[24] In tracing the development of Congress' Commerce Clause power,[25] Justice Rehnquist noted three categories which would permit regulation,[26] but determined that only the third was relevant to test the validity of section 922(q)[27]—namely, the activity must have "a substantial relation to interstate commerce."[28] Justice Rehnquist then set forth the definitive standard for adjudicating claims on this level: the activity must "substantially affect" interstate commerce.[29] Applying this test to section 922(q), the majority noted that Congress had no findings on which to base a connection between

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[24] *Id.* at 1631 (noting that there was no express requirement that gun possession be linked to interstate commerce).

[25] *See id.* at 1627-30. The majority pointed to an extensive body of case law which once focused on direct versus indirect effects on interstate commerce. *Id.* at 1627-28 (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)). In NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937), the Court rejected this test and instead focused on whether the activity had "a close and substantial relation to interstate commerce." *Lopez*, 115 S. Ct. at 1628 (citing *Jones & Laughlin*, 301 U.S. at 37). While this test remained valid until *Lopez*, it was significantly diminished by less stringent standards. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (employing test that simply questioned whether activity regulated "affects interstate commerce"). The diminished test is likely to have resulted from an additional inquiry which asked whether Congress had a rational basis for concluding whether the activity had a substantial effect upon interstate commerce. *See Lopez*, 115 S. Ct. at 1629; Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) ("[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."); *see also supra* notes 1, 2, 4, 5 (summarizing Commerce Clause jurisprudence).

[26] *Lopez*, 115 S. Ct. at 1629-30. The Court established the three categories in Perez v. United States, 402 U.S. 146, 150 (1971). The first area permitted Congress to regulate the use of the channels of interstate commerce. *Lopez*, 115 S. Ct. at 1629. Under the second, "Congress [was] empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Id.* Under the third, Congress was empowered to regulate "those activities having a substantial relation to interstate commerce." *Id.* at 1629-30.

[27] *Id.* at 1630 (stating that § 922(q) does not fit into first two categories and therefore must fit into third to be valid).

[28] *Id.* at 1629-30.

[29] *Lopez*, 115 S. Ct. at 1630; *see also Lopez*, 2 F.3d at 1363. Although this test was not new, *see, e.g., Jones & Laughlin*, 301 U.S. 1, over the years it had been diminished by the rational basis standard for judging a substantial effect. *See, e.g.*, *McClung*, 379 U.S. at 303-04 (stressing important need for rational basis while only briefly mentioning "substantial affect" requirement); *see infra* Part II.B. and accompanying notes (describing judicial history of erosion of rational basis standard). The Fifth Circuit noted that "[w]here 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." *Lopez*, 2 F.3d at 1363 (citations omitted). The court also noted that "[w]e know of no Supreme Court decision in the last half century that has set aside such a finding as without a rational basis." *Id.* at 1363 n.43.

the activity regulated by the statute and interstate commerce.[30] Moreover, the absence of Congressional findings, while not dispositive,[31] factored into the majority's inability to find a "rational basis" for the statute's enactment.[32] This was significant since the "rational basis" test had previously been the standard of review.[33] Most importantly, Justice Rehnquist reasoned that permitting such legislation would give Congress unlimited regulatory power since every activity, in some manner, can be traced to interstate commerce.[34]

In a concurring opinion, Justice Kennedy also traced the history of Commerce Clause decisions[35] and questioned whether the Court's opinion might upset established precedents.[36] Nevertheless, Justice Kennedy determined that section 922(q) must be deemed unconstitutional due to its harmful effect on the balance of federal and state relations.[37] Specifically, Justice Kennedy agreed that section 922(q) had no "evident commercial

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[30] *Lopez*, 115 S. Ct. at 1631 (noting that there were no express findings in either legislative history or congressional hearings); *see supra* note 10 (discussing that carrying of gun had no discernible ties to interstate commerce).

[31] *Lopez*, 115 S. Ct. at 1631 (noting that Congress is not required to make formal findings).

[32] *Id.* at 1632.

[33] Prior to *Lopez*, the "rational basis" test was the standard for judicial review of Commerce Clause challenges. *McClung*, 379 U.S. at 303-04; *see also* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1980); Perez v. United States, 402 U.S. 146, 155-57 (1971).

[34] *See Lopez*, 115 S. Ct. at 1632 (stating that Congress would be allowed to regulate family law "including marriage, divorce, and child custody" if it could be linked to economic productivity); *see also Lopez*, 2 F.3d at 1366 (noting that Gun-Free School Zones Act could be extended to "criminalize any person's carrying of any unloaded shotgun, in an unlocked pick-up truck gun rack, while driving on a county road that . . . happens to come within 950 feet of . . . a one-room church kindergarten located on the other side of a river, even during the summer when [it was] not in session"); United States v. Morrow, 834 F. Supp. 364, 365 (N.D. Ala. 1993) ("The air in the soccer ball used on the school playground, or a molecule or two of milk dispensed in the school cafeteria . . . undoubtedly crossed some state line before arriving at the school."). Moreover, neither the government nor Justice Breyer in his dissent could identify an activity which Congress could not regulate under their arguments. *Lopez*, 115 S. Ct. at 1632, 1658; *see* William Banks, *At the Halfway Point*, 81 A.B.A. J. 50 (Apr. 1995).

[35] *Lopez*, 115 S. Ct. at 1634-42 (Kennedy, J., concurring).

[36] *See id.* at 1634 (Kennedy, J., concurring).

[37] *See id.* at 1640-42 (Kennedy, J., concurring). In reaching this conclusion, Justice Kennedy considered the judiciary's role in determining "what the law is." *Id.* at 1639-40 (Kennedy, J., concurring) (referring to Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)). While questioning how the majority's opinion might affect prior Commerce Clause decisions, Justice Kennedy acknowledged that, despite the great deference given to Congress in this area, the Court still has a role "in determining the meaning of the Commerce Clause." *Id.* at 1640 (Kennedy, J., concurring).

nexus"[38] and thus regulated an area traditionally reserved to the states.[39]

In his concurring opinion, Justice Thomas agreed with the result, but urged a more thorough review of Congressional Commerce Clause powers.[40] Justice Thomas felt that the "substantially affects" test departed from the original intent of the Constitution.[41] He contended that the Court's prior decisions gave Congress excessively broad authority, which permitted it to regulate matters having only a remote connection to interstate commerce.[42] Thus, the case law provided Congress with inordinate "police powers" in contravention to the Constitution.[43]

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[38] *Lopez*, 115 S. Ct. at 1640 (Kennedy, J., concurring). To Justice Kennedy, the world we live in today makes all activities interdependent to some extent with commerce. *Id.* (Kennedy, J., concurring). Nonetheless, this incidental connection is not strong enough to support the conclusion that Congress has the authority to regulate all activities through the commerce power. *See id.* (Kennedy, J., concurring).

[39] *Id.* at 1640-41 (Kennedy, J., concurring) ("[E]ducation is a traditional concern of the States."). Even if one were to admit that the regulation of guns had nothing to do with the regulation of education, *see, e.g., Lopez*, 2 F.3d 1342, 1367 (stating that regulation of drugs on school property was within province of federal regulation, not element of education falling within province of states), Justice Kennedy properly tied the connection to a state's ability to best devise the means for controlling a local problem. *See Lopez*, 115 S. Ct. at 1641 (Kennedy, J., concurring) (noting that states are laboratories for test solutions best suited to local problems). To this end, Justice Kennedy noted that over 40 states had legislation banning the possession of guns in or near schools. *Id.* (Kennedy, J., concurring); *see infra* notes 99, 104, 105 (discussing conflict of federal regulation impinging upon areas traditionally regulated by states). Today, almost every state has enacted some type of gun-free school zone legislation. Maria Newman, *Some Progress Is Seen on Federal Initiative for Gun Free Schools*, N.Y. TIMES, Oct. 27, 1995, at A27.

[40] *Lopez*, 115 S. Ct. at 1642 (Thomas, J., concurring). Specifically, Justice Thomas urged the Court 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." *Id.* (Thomas, J., concurring). This belief was apparently based upon Justice Thomas' strong view that commerce did not include manufacturing or agriculture, but instead involved only exchange, trade, or traffic. *See id.* at 1643 (Thomas, J., concurring) (looking to definition of commerce as intended by Founding Fathers); S. Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE 361 (4th ed. 1773) (defining commerce as "exchange of one thing for another; interchange of any one thing; trade, traffic").

[41] *Lopez*, 115 S. Ct. at 1644 (Thomas, J., concurring) (stating that appending phrase "substantially affects" to Commerce Clause makes other enumerated powers superfluous since they could naturally be linked to expanded notion of Commerce Clause); *see also id.* at 1650 (Thomas, J., concurring) (noting that Court's continued use of "substantially affects" test is no longer "radical," but is still far removed from Constitution).

[42] *Id.* at 1650 (Thomas, J., concurring) (noting that "aggregation principle" focuses not on how particular individual activity affects commerce, but upon all activity as a whole). Justice Thomas correctly points out that "one *always* can draw [a] circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce." *Id.* (Thomas, J., concurring) (emphasis in original).

[43] *See id.* at 1649; Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1816 (1994) (recognizing that Court's prior decisions created risk of "a general federal police

Three separate dissenting opinions clearly revealed the fragmented 5-4 split of the Court.[44] Justice Stevens' dissent urged that guns are inherently "articles of commerce"[45] and are therefore necessarily subject to regulation.[46] He argued that, because firearms possess a great potential for harm, Congress' regulatory power includes the power to prohibit their possession at *any* location, including schools.[47]

In a separate dissent, Justice Souter argued that the majority took a step backward in its holding.[48] Justice Souter firmly believed in the rational basis test and argued that such a standard was the proper judicial inquiry.[49] He reasoned that, since the Court had to conduct an independent review of the challenged legislation, no conclusion could be drawn from the fact that Congress did not provide specific findings regarding an interstate commerce connection.[50] Therefore, based upon Justice Breyer's

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power").

[44] *Lopez* generated six different opinions including the Court's opinion, concurring opinions by Justices Kennedy and Thomas, and dissenting opinions by Justices Stevens, Souter, and Breyer. *See Lopez*, 115 S. Ct. at 1624.

[45] *Id.* at 1651 (Stevens, J., dissenting). Justice Stevens noted that "possession is the consequence, either directly or indirectly, of commercial activity." *Id.* (Stevens, J., dissenting). Apparently then, Justice Stevens would fit § 922(q) into the second category of possible Commerce Clause regulation articulated by Justice Rehnquist. *See id.* at 1629 (Stevens, J., dissenting).

[46] *Id.* at 1651 (Stevens, J., dissenting) (arguing that, because of harmful nature, Congress can determine where possession of guns is not allowed).

[47] *See Lopez*, 115 S. Ct. at 1651 (Stevens, J., dissenting). Justice Stevens implied that guns are particularly harmful to children because gun manufacturers specifically target them as a market. *See id.* (Stevens, J., dissenting).

[48] *Id.* at 1651, 1654 (Souter, J., dissenting). Justice Souter traced the development of Congress' Commerce Clause powers and was convinced that the Court was dangerously approaching the failed dichotomy of direct and indirect effects upon commerce. *See id.* at 1652-54 (Souter, J., dissenting).

[49] *See Lopez*, 115 S. Ct. at 1656-57 (Souter, J., dissenting). Justice Souter indicated that the rational basis requirement is the threshold determination in Commerce Clause analysis. *See id.* (Souter, J., dissenting). The Court's role, according to Justice Souter, is simply to determine whether Congress could rationally have found a substantial effect on interstate commerce since the mere fact that Congress enacted the legislation is proof that they did find such an impact. *Id.* (Souter, J., dissenting).

[50] *Lopez*, 115 S. Ct. at 1656 (Souter, J., dissenting). Even when Congress provided factual findings, Justice Souter argued that judicial review was necessary. *Id.* (Souter, J., dissenting). A review of the Court's history, however, shows that this is not the case. Specifically, under the rational basis test previously applied by the Court, Congressional statements were given great deference and the level of review simply amounted to determining whether the statements were rational. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) ("[W]here we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."). Such a reality is clearly evident in Justice Breyer's dissent in *Lopez*, in which Justice Souter joined. *See Lopez*, 115 S. Ct. at 1658 (Breyer, J., dissenting) (stating that question before Court is not whether activity affected

dissent, Justice Souter had no difficulty concluding that section 922(q) was constitutional, since Congress could rationally have found that guns have a significant effect upon interstate commerce.[51]

Justice Breyer authored the final and most notable dissent.[52] He gave little consideration to terms such as "substantial" or "significant."[53] Instead, Justice Breyer contended that the rational basis test alone was to be employed in determining the scope of Congress' Commerce Clause powers.[54] Justice Breyer conducted an independent review of the problems associated with guns on or near school grounds, applied the rational basis test, and concluded that there was clearly a problem which ultimately affected interstate commerce.[55] As a result, Justice Breyer found that "Congress could rationally have concluded that the links [were] 'substantial.'"[56] Justice Breyer also argued that such a finding comported with previous Court decisions, while the majority opinion upset "well settled" case law.[57]

This Comment examines the *Lopez* decision and suggests that it is an appropriate step in establishing a firm framework for marking the bounds

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commerce, but whether Congress could conclude it did). Nothwithstanding this view, it is submitted that such review amounts to nothing more than rubber-stamping the legislation. *See, e.g.*, Rebecca Frank Dallet, Foucha v. Louisiana: *The Danger of Commitment Based in Dangerousness*, 44 CASE W. RES. L. REV. 157, 191 (1993) ("A rational basis test is merely a rubber stamp of constitutionality."); George C. Hlavac, *Interpretation of the Equal Protection Clause: A Constitutional Shell Game*, 61 GEO. WASH. L. REV. 1349, 1377 (1993) ("[M]any commentators consider the rational-basis test to be a rubber stamp of constitutionality . . . . ").

[51] *See Lopez*, 115 S. Ct. at 1657 (Souter, J., dissenting) (noting that Justice Breyer conducted extensive research into problem Congress addressed and provided his findings in his dissent); *see also infra* note 55 and accompanying text (using Breyer's findings to support conclusion that substantial links to commerce could be shown).

[52] *Id.* at 1657 (Breyer, J., dissenting) (all other dissenting justices joined in this dissent).

[53] *Id.* at 1657-58 (Breyer, J., dissenting). Justice Breyer opined that the rational basis test was the Court's only concern since Congress is assumed to have found a sufficient connection between interstate commerce and the activity in issue. *Id.* (Breyer, J., dissenting). Like Justice Souter, he noted that Congress' express statements regarding the existence of a connection were not conclusive since the Court must still engage in verifying the rationality of this determination. *Id.* (Breyer, J., dissenting). Of course, the applicable degree of scrutiny is the subject of considerable debate. *See supra* note 49.

[54] *Lopez*, 115 S. Ct. at 1659-61 (Breyer, J., dissenting).

[55] *Id.* at 1659-61 (Breyer, J., dissenting) (stating that presence of guns affected learning, affecting job skills and making United States weaker, which in turn affected both national and international commerce).

[56] *Id.* at 1661 (Breyer, J., dissenting).

[57] *Id.* at 1662-65 (Breyer, J., dissenting). Justice Breyer made a compelling comparison of the facts at issue in *Lopez* with the civil rights case of Katzenbach v. McClung, 379 U.S. 294 (1964), which found that racial discrimination at a local restaurant had an effect on interstate commerce. *Id.* at 1662-63 (stating that violence inhibits families and businesses from moving into neighborhoods).

of Congressional authority. It is submitted that the Court must intervene when Congress promulgates laws which bear no real relationship to "interstate commerce" in its true sense: the transportation of goods, people, and services over state lines. The mere fact that Congress can point to connections to interstate commerce that may appear rational should not immunize legislation from judicial scrutiny. Instead, the Court must ascertain whether the act does indeed fall within Congress' power.

It is further suggested that the Court's reluctance to interfere with Congressional efforts to regulate those affairs traditionally reserved to the states under the Tenth Amendment (whether in the areas of crime, education, manufacture, agriculture, or civil rights) jeopardizes the system of federalism upon which the nation was founded. Furthermore, such reluctance will permit resources to be wasted by laying duplicative federal layers of bureaucracy over established state functions. Finally, this Comment concludes that *Lopez* sets the proper standard for judging the limits of Congress' commerce powers and sets forth a standard that should be maintained if we are to respect the integrity of the Constitution.

Part One of this Comment discusses the development of the "substantially affects" test used in *Lopez*. Part Two examines the effect of the *Lopez* decision on Commerce Clause jurisprudence, federalism principles, and the role of the Court in judicial review. Finally, this Comment discusses the future of federal legislation under the *Lopez* decision.

I. THE DEVELOPMENT OF THE "SUBSTANTIALLY AFFECTS" TEST

A. *The New Deal Era*

During the early years of Franklin D. Roosevelt's New Deal, the Supreme Court invalidated a number of federal programs on the ground that they exceeded Congress' Commerce Clause power.[58] These decisions

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[58] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding that Bituminous Coal Conservation Act of 1935 violated Commerce Clause); United States v. Butler, 297 U.S. 1 (1936) (stating that Agricultural Adjustment Act of 1933 was invalid under taxing clause); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating National Industrial Recovery Act ("NIRA") of 1933); Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) (striking down Railroad Retirement Act of 1934 as unconstitutional and remote from any regulation of commerce). In holding that the NIRA was outside the scope of the Commerce Clause, the *Schechter* Court reasoned:

> It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and development have called for wide use of the commerce power of the federal government in its control over the expanded activities of interstate commerce, and in protecting that commerce from burdens, interferences,

were met with much criticism from "New Dealers." The tenor of such criticism was perhaps best exemplified by President Roosevelt's famous remark, "[w]e have been relegated to the horse-and-buggy definition of interstate commerce."[59] President Roosevelt criticized the "Nine Old Men"[60] on the Court whose decisions stymied his New Deal programs. As a result of the Court's refusal to implement New Deal programs, Roosevelt devised his infamous Court-packing scheme to alter the composition of the Court.[61] During the Court-packing controversy, the

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> and conspiracies to restrain and monopolize it. But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State.

Schechter, 295 U.S. at 549-50. Even during this period, by upholding federal legislation regulating local activity when the Tenth Amendment was not in issue, the Court declined to limit federal power. *See* ROTUNDA & NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.7, at 392-93 (2d ed. 1992); *see also* United States v. Darby, 312 U.S. 100, 123-24 (1940) (stating that Tenth Amendment is not obstacle to federal power); Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118 (1939) (upholding establishment of federally controlled dam and hydroelectric power plant); Sonzinsky v. United States, 300 U.S. 506 (1937) (upholding tax on firearms that was clearly designed to regulate firearms); Norman v. Baltimore & O.R. Co., 294 U.S. 240 (1935) (upholding federal legislation abrogating contract clauses for payment in gold in order to regulate national currency).

[59] 31 May 1935 4 THE PUB. PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 200, 221 (Samuel I. Rosenman ed., 1938).

[60] Six of the nine Supreme Court justices in 1937 were over 70 years old. Justices Hughes, Sutherland, and McReynolds were 75, Justice Van Devanter was 78, and Justice Brandeis was 81.

[61] *See* David O. Stewart, *Back to the Commerce Clause: The Supreme Court Has Yet to Reveal the True Significance of* Lopez, 81 A.B.A. J. 46, 48 (July 1995). The "court packing plan" began in February of 1937 after President Roosevelt won a landslide victory in the 1936 presidential elections. "The President asked for legislative authority to appoint an additional federal judge for each judge who was 70 years of age" which would create a total of 15 members on the Supreme Court since six of the nine justices were over the age of 70. ROTUNDA & NOVAK, *supra* note 58, § 4.7, at 393 (discussing ages of Court justices); *see also supra* note 63 and accompanying text. The proposal was met with great controversy and disapproval even from Roosevelt's own party. ROTUNDA & NOWAK, *supra* note 58, § 2.7, at 108. After heated debate and extensive hearings conducted by the Senate Judiciary Committee, the plan was flatly rejected "as a needless, futile, and utterly dangerous abandonment of constitutional principle." S. REP. No. 711, 75th Cong., 1st Sess., at 23 (1937). Although the plan was ultimately defeated, the Court began to uphold several substantial New Deal measures. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1. (1937) (upholding NLRB's authority under the Commerce Clause to enforce fair labor practices); Helvering v. Davis, 301 U.S. 619 (1937) (upholding old-age benefit through social security tax); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) (upholding provisions of federal unemployment insurance benefits). Whether the Court's about-face resulted from the "Court-packing plan" or other reasons is debatable; nevertheless, the dissent apparent in the pre-1937 cases became the majority thereafter. *See generally* LEONARD BAKER, BACK TO BACK—THE DUEL BETWEEN FDR AND THE SUPREME COURT (1967) (discussing introduction of Court-packing and ultimate victory of President Roosevelt);

Court announced a surprising decision in *N.L.R.B. v. Jones & Laughlin Steel Corp.*,[62] which upheld the National Labor Relations Act of 1935 on the ground that the act had "a close and substantial relation to interstate commerce . . . ."[63] This decision marked a major expansion of Congressional authority under the Commerce Clause.[64] Soon after *Jones & Laughlin*, the Court decided *United States v. Darby*,[65] which ratified the new "substantially affects" test.[66]

The Court's 1942 decision in *Wickard v. Filburn*[67] opened the floodgates of Congressional authority.[68] The *Wickard* Court, while

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ARCHIBALD COX, THE COURT AND THE CONSTITUTION 156-73 (1987) (explaining expansion of federal power); GERALD GUNTHER, CONSTITUTIONAL LAW 122-24 (12th ed. 1991) (describing defeat of and opposition to court-packing plan and Roosevelt's attempts to implement it); WALLACE MENDELSON, THE AMERICAN CONSTITUTION AND THE JUDICIAL PROCESS, 107-27 (1980) (enumerating post-New Deal cases that deemed Court reorganization plan unnecessary); JOHN R. SCHMIDHAUSER, CONSTITUTIONAL LAW IN AMERICAN POLITICS 382-83 (1984) (noting New Deal's acceptance in 1936 as defeating underlying reason for Court-packing plan).

[62] 301 U.S. 1 (1937).

[63] *Id.* at 37 ("Although activities may be intrastate . . . if they have such a *close and substantial relation to interstate commerce* . . . Congress cannot be denied the power to exercise that control.") (emphasis added).

[64] *See* COX, *supra* note 61, at 156; ROTUNDA & NOWAK, *supra* note 58, § 4.9. With the decision handed down by the Court in *Jones & Laughlin*, the Court's change in philosophy created a "revolutionary turning point toward modern interpretation of the scope of congressional power to regulate interstate commerce." COX, *supra* note 61, at 156; *see also* ROTUNDA & NOWAK, *supra* note 58, § 4.9 (noting that approach in *Jones & Laughlin* was "quite different" from previous cases). Professor Barry Cushman commented that "[m]ore than a generation of constitutional historians have viewed the events of 1937 as a political drama in which a recalcitrant judiciary reluctantly knuckled under to the political muscle of Franklin Roosevelt." Cushman, *supra* note 4, at 105. The *Jones & Laughlin* decision returned to Justice Marshall's definition of Congress' "plenary powers," discarding the "current of commerce" theory as an inappropriate judicial restriction on the commerce power. *See* ROTUNDA & NOWAK, *supra* note 58, § 4.8; *Jones & Laughlin*, 301 U.S. at 36 ("The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate . . . commerce.").

[65] 312 U.S. 100 (1941).

[66] *Id.* at 119-20 (stating that Congress can regulate activity which has "substantial effect" on interstate commerce). The *Darby* Court also broke new ground by finding that the Commerce Clause "extends to those activities intrastate which so affect interstate commerce . . . to make regulation of them [an] appropriate means to the attainment of a legitimate end . . . ." *Id.* at 118.

[67] 317 U.S. 111 (1942).

[68] *See Lopez*, 115 S. Ct. at 1630 (stating that *Wickard* "is perhaps the most far reaching example of Commerce Clause authority over intrastate activity"); Pennsylvania v. Union Gas Co., 491 U.S. 1, 20 (1989) ("It would be difficult to overstate the breadth and depth of the commerce power."); SCHMIDHAUSER, *supra* note 61, at 397 ("The Filburn case demonstrated the extent to which the broad construction of the commerce clause could be carried . . . ."); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 857 n.255 (1995) (*Wickard* "construed Congress's commerce powers as virtually unlimited"); John A. Leman, Comment, *The Birds: Regulation of Isolated Wetlands and the Limits of the Commerce Clause*, 28 U.C.

employing the "substantially affects" test,[69] found that Congress could regulate local activity which, standing alone, may be trivial but, if "taken together with that of many others similarly situated, is far from trivial."[70] After *Wickard*, the conventional wisdom was that "the [C]ommerce [C]lause was infinitely elastic,"[71] and that challenges to federal statutes on the grounds that Congress had exceeded its commerce power were "invariably doomed."[72]

B. Erosion of the "Substantially Affects" Test

In the Court's struggle to define Congress' Commerce Clause power, the "substantially affects" test was quickly eroded. *Wickard* had empowered Congress with considerable authority to enact seemingly unlimited legislation under the Commerce Clause.[73] Moreover, the Court expanded

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DAVIS L. REV. 1237, 1247 n.48 (1995) ("Perhaps the single greatest expansion of the commerce power came in the Supreme Court's decision in *Wickard v. Filburn* . . . ."); James Podgers, *The Longest Victory*, 81 A.B.A. J. 58, 64 (May 1995) (stating that *Wickard* "marked a high point in the Court's deference to federal regulation . . . under the commerce clause" and that "there was virtually no area of the economy that the commerce clause couldn't touch").

[69] *Wickard*, 317 U.S. at 125 (finding that Congress may reach activity "if it exerts a substantial economic effect on interstate commerce").

[70] *Id.* at 127-28. *Wickard* involved a farmer who grew his own wheat, some for his own consumption. *Id.* at 114. In violation of the Agricultural Adjustment Act of 1938, he grew more than his quota. *Id.* This violation resulted in a federally-imposed fine, measured by the excess wheat. *Id.*

[71] Paul D. Kamenar, United States v. Lopez: *The Feds Lose a Piece of Their Rock*, LEGAL TIMES, May 8, 1995, at 25.

[72] *Id.* Constitutional law scholar Ronald Rotunda commented that since *Jones & Laughlin*, "a typical question mooted in constitutional law classes was whether there were any limits to the federal commerce power." Ronald D. Rotunda, *Cases Refine Definition of Federal Powers*, NAT'L L.J., July 31, 1995, at C9. The power of the federal government has widened via increasingly liberal interpretations of the constitutional power granted under the Commerce Clause. Carter H. Strickland, Jr., *The Scope of Authority of Natural Resource Trustees*, 20 COLUM. J. ENVTL. L. 301, 319 n.106 (1995). Further, Professor Archibald Cox has noted:

> [T]he possession of congressional power should not be confused with its exercise. Logically, Congress can regulate every detail of almost every commercial transaction, ... It has not exercised its full power, at least partly because of concern for the balance of the federal system . . . . The principal issue becomes, how widely should Congress choose to extend federal regulation. Political opinions upon the wisdom of that transfer of responsibility differ widely . . . .

Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 118-19 (1966).

[73] *See Wickard*, 317 U.S. at 124. By holding that Congress' commerce powers "extend to those activities intrastate which so affect interstate commerce," *id.* (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)), the *Wickard* Court "completed the move to recognizing a plenary commerce power based on economic theory." ROTUNDA & NOWAK, *supra* note 58, § 4.9; *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824) ("This power [of Congress over interstate commerce] is complete in itself, may be exercised to its utmost extent,

this authority when it departed from the "substantially affects" test in *Katzenbach v. McClung*,[74] and instead applied the "rational basis" test to evaluate Commerce Clause legislation.[75] Relying primarily on legislative history,[76] the Court had only to determine whether Congress had a rational basis to support a connection between the legislation and interstate commerce.[77] While the test was intended merely to define the standard of

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and acknowledges no limitations, other than as prescribed in the constitution."). The articulation of the rational basis test established this deference toward the legislature. *See infra* notes 76-83 and accompanying text (explaining rational basis test); *see also* United States v. Lopez, 115 S. Ct. 1624, 1653 (1995) (Souter, J., dissenting) ("[D]eference became articulate in the standard of rationality review."); United States v. Bishop, 66 F.3d 569, 576 (3d Cir.) ("We therefore must give substantial deference to a [c]ongressional determination . . . . ") (citing *Lopez*, 115 S. Ct. at 1634 (Kennedy, J., concurring)), *cert. denied*, 116 S. Ct. 750 (1995); Leslie Salt Co. v. United States, 55 F.3d 1388, 1395 (9th Cir. 1995) ("A court's review of congressional enactments under the Commerce Clause should be highly deferential.") (citing United States v. Evans, 928 F.2d 858, 862 (9th Cir. 1991)); United States v. Edwards, 13 F.3d 291, 293 (9th Cir. 1993) (stating that Commerce Clause review is highly deferential), *cert. granted and judg. vacated by*, 115 S. Ct. 1819 (1995).

[74] 379 U.S. 294 (1964).

[75] *Id.* at 303-04 ("[W]here we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.").

[76] *See id.* at 299-300. *McClung* applied the rational basis test to a regulation which did not include an express statement drawing a connection to commerce. Its legislative history, however, expressed such a connection. *Id.* at 300 (finding ample evidence that racial discrimination affected interstate travel and interstate commerce). *McClung* followed the companion civil rights case, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), in which the Court relied on legislative history in the absence of formal congressional findings. The Court did not require formal findings, stating that "this is a matter of policy that rests entirely with the Congress not with the courts. . . . The Constitution requires no more." *Id.* at 261-62; *see also* Perez v. United States, 402 U.S. 146, 156 (1971) ("We do so not to infer that Congress need make particularized findings in order to legislate."); United States v. Bass, 404 U.S. 336, 347 (1971) (finding ambiguous congressional purpose in Omnibus Crime Control and Safe Streets Act of 1968); United States v. Five Gambling Devices, 346 U.S. 441, 450-51 (1953) (relying on Congressional findings of connection between gambling and commerce).

The test's application was not limited to instances where there were no formal findings by Congress. The test was first applied to legislation in which Congress expressly included findings drawing a connection to commerce. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 277 (1981) (stating that Congress included findings of harmful effects of surface coal mining in act); Scarborough v. United States, 431 U.S. 563, 571 (1977) (noting that Congress provided express link of firearm possession to commerce); *Perez*, 402 U.S. at 156 (relying upon formalized findings of Congress pertaining to effect of loan sharking on commerce).

Secondly, the test applied to legislation that revealed no Congressional link to commerce, either in the legislative history or in the statute itself. United States v. Lopez, 2 F.3d 1342, 1367-68 (5th Cir. 1993) (stating that there were "insufficient" legislative findings and history), *aff'd*, 115 S. Ct. 1624 (1995). *Lopez* was the first case to reach the Court without such findings, illustrating the ease with which Congress could enact legislation.

[77] *See, e.g.*, *Virginia Surface*, 452 U.S. at 277-78 ("[T]he courts need inquire only whether the finding is rational . . . . The legislative record provides ample support for these statutory

judicial review, it, in effect, stripped the "substantially affects" test of considerable "bite."[78] Rather than focusing on Congress' commerce powers, the rational basis test examined (in a rather cursory manner) the problem which Congress sought to remedy through the legislation.[79]

A fundamental criticism of the rational basis test is that it enabled Congress to enact virtually any type of legislation, asserting the Commerce Clause as its source of authority.[80] As Justice Breyer's dissent in *Lopez*

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findings."); *McClung*, 379 U.S. at 303-04 ("[W]e must conclude that [Congress] had a rational basis for finding that racial discrimination . . . had a direct . . . effect on . . . interstate commerce."); *Heart of Atlanta*, 379 U.S. at 261 (concluding that racial discrimination rationally had effect on commerce). The test, however, resulted in the presumption that Congress had found a sufficient nexus, and the Court merely had to determine whether this conclusion was reasonable. "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." Hodel v. Indiana, 452 U.S. 314, 323-24 (1981); *Scarborough*, 431 U.S. at 567-68 (showing that movement of firearms through interstate commerce created sufficient minimal nexus). Thus, the test seems completely to ignore the issue of whether there is in fact a substantial effect and instead focuses on the ends which the legislation seeks to achieve. In view of the deference given to Congress, it is easy to see how the Supreme Court, or any lower federal court, could conclude there is a rational basis upon the most minimal Congressional findings. *See also Bass*, 404 U.S. at 347 (requiring nexus with interstate commerce); *Scarborough*, 431 U.S. at 568 (finding that single movement through interstate commerce satisfied nexus requirement).

[78] It is very easy to make a compelling argument that something is rational. "Benjamin Franklin said, it is wonderful to be a rational animal, that there is a reason for everything that one does." Joseph Calve, *Anatomy of a Landmark*, RECORDER, Aug. 3, 1995, at 1 (quoting Justice Scalia from oral argument in *Lopez*).

[79] *See Virginia Surface*, 452 U.S. at 326. The Court stated:

> Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is *primarily for Congress* to consider and decide the fact of danger and meet it. This Court will certainly not *substitute its judgment for that of Congress* unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent.

Id. (citing Stafford v. Wallace, 258 U.S. 495, 521 (1922) (emphasis added)).

In most instances, it is difficult to challenge the end Congress has sought to achieve. *See Lopez*, 115 S. Ct. at 1641 (Kennedy, J., concurring) (noting that few "would argue that it is wise policy to allow students to carry guns on school premises"). However, to be accepted, such legislation must be within Congress' actual power to enact. *See* United States v. Trigg, 842 F. Supp. 450, 453 (D. Kan. 1994) ("There is no place for weapons— particularly firearms—in and around schools. Nevertheless, Congress must legislate in the area of firearms within the constraints imposed by the Commerce Clause."); United States v. Morrow, 834 F. Supp. 364, 366 (N.D. Ala. 1993) ("A generalized salutary purpose is simply not enough to justify the creation of a new federal crime.").

[80] Since its inception, Congress has used the test as its primary means for legislating in the criminal arena. *See* United States v. Cortner, 834 F. Supp. 242, 244 (M.D. Tenn. 1993) ("Congress has had a recent penchant for passing a federal criminal statute on any well-publicized criminal activity. The courts, in . . . deference to the legislative branch, . . . have stretched the Commerce Clause . . . beyond the wildest imagination of the Framers . . . ."), *rev'd*, 30 F.3d

illustrates, it is quite easy to rationalize how particular legislation may affect interstate commerce.[81] Congress' exercise of such enormous power clearly does harm to the independence and sovereignty of the states. Further, the application of the rational basis test also has led Congress to include express findings in its legislative enactments. Such findings virtually ensure that the legislation will survive limited judicial scrutiny. Thus, for decades, Congress grew accustomed to legislating in practically any area it wished, provided the legislation was accompanied by a general statement alleging that the activity affected interstate commerce. The *Lopez* decision ensures that Congress may no longer employ such verbal niceties in order to pass constitutional muster.[82]

The Court further diminished the "substantially affects" test by lowering the requisite nexus to interstate commerce. For example, rather than requiring a substantial effect, some courts merely required *any* effect

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135 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 1825 (1995); *see also* Joseph Calve, *What Does* Lopez *Mean?*, CONN. L. TRIB., Aug. 14, 1995, at 1. ("[The] Supreme Court may have been sending a political message . . . about the over-federalization of street crime."). In fact, the states have not challenged a good portion of such legislation since its effect is to take away from the states the blame for problems in the system or its implementation. *See, e.g., The Gun-Free School Zones Act of 1995: Hearings on S. 890 Before the Subcomm. on Youth Violence of the Senate Comm. of the Judiciary*, 104th Cong., 1st Sess. (1995) (statement of Barry Friedman, Prof. of Law, Vanderbilt Univ.) (The Act serves "to deflect state and local governments from their responsibilities . . . . Citizens are led to believe this is a problem that can and should be solved in Washington.").

[81] *See* United States v. Bishop, 66 F.3d 569, 581 (3d Cir.) (rejecting Commerce Clause challenge to 18 U.S.C § 2119, federal carjacking statute, because court could "easily appreciate how Congress could readily (and rationally) have believed that carjacking" affects commerce), *cert. denied*, 116 S. Ct. 750 (1995).

[82] The *Lopez* decision not only eliminated the rational basis test, but also resurrected the "substantially affects" test. Courts must now examine the actual effect of a particular act on interstate commerce. Under this test, Congress cannot simply declare a nexus between the activity and interstate commerce; Congress must now actually establish the connection. Prior to the required connection, Congress' rational basis could apply to a substantial effect upon commerce, any mere effect, or no effect, engendering serious confusion. It confused the distinction between the effect and whether Congress had a reason for finding that effect.

Following Justice Thomas' concurrence, it is inevitable that problems will arise as to whose determination controls whether there is a substantial effect on interstate commerce. *See Lopez*, 115 S. Ct. at 1638 (Kennedy, J., concurring). *But see* Cargill v. United States, 116 S. Ct. 407, 409 (1995) (Thomas, J., dissenting) (rejecting finding that presence of migratory birds on wetlands could have been rationally related to interstate commerce). Furthermore, the method used for making this determination is not clear. *See supra* note 41-42 and accompanying text (noting uncertainty surrounding substantial effects test). However, Congressional enactments lacking substantive findings should not be upheld solely on the premise that they were enacted and must therefore be valid. *See Lopez*, 115 S. Ct. at 1656-57 (Souter, J., dissenting). Such logic places "the cart before the horse."

on commerce.[83] This particular erosion occurred primarily because Congress, in some instances, asserted links to interstate commerce in the statute.[84] By doing so, the government's burden was substantially reduced, often permitting the government to prove only that the article being regulated had once moved in interstate commerce.[85] Such a relaxed standard is easily satisfied and thus has often permitted Congress to regulate activities having little actual connection with commerce.[86]

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[83] *See, e.g.*, *Virginia Surface*, 452 U.S. at 276 (stating that courts must defer to Congressional findings that regulated activity affects interstate commerce); Fry v. United States, 421 U.S. 542, 547 (permitting regulation when activity affects interstate commerce), *cert. denied*, 421 U.S. 1014 (1975). In some instances, this lower standard resulted from incorrectly interpreting the *Wickard* standard. *See, e.g.*, United States v. Ramey, 24 F.3d 602, 606 (4th Cir. 1994) ("Congress may regulate non-commercial activities that merely 'affect' interstate commerce . . ."), *cert. denied*, 115 S. Ct. 1838 (1995). Aside from the misapplication of *Wickard*, there were numerous other instances when this reduced standard was applied. *See, e.g.*, United States v. Holland, 841 F. Supp. 143, 145 (E.D. Pa. 1993) (holding that possession of gun on school grounds affects interstate commerce); United States v. Peay, 972 F.2d 71, 75 (4th Cir. 1992) (stating that property designation "affects" commerce), *cert. denied*, 506 U.S. 1071 (1993); United States v. McDougherty, 920 F.2d 569, 572 (9th Cir. 1990) (finding that "drug trafficking affects interstate commerce"), *cert. denied*, 499 U.S. 911 (1991).

[84] *See, e.g.*, 18 U.S.C. § 844(i) (1994) (federal arson statute making it illegal to "damage or destroy, by means of fire or an explosive, any building, vehicle or other real or personal property used in interstate or foreign commerce or in any activity *affecting* interstate or foreign commerce") (emphasis added); 18 U.S.C. § 922(g)(8) (1994) (federal gun control provision making it illegal for convicted felon "to ship or transport in interstate or foreign commerce, or possess in or *affecting* commerce, any firearm or ammunition; or to receive any firearm . . . shipped . . . in interstate or foreign commerce") (emphasis added); 18 U.S.C. § 1952(a) (1994) (Travel Act prohibiting "[w]hoever travels in interstate commerce . . . with intent to distribute the proceeds of any unlawful activity").

[85] *See, e.g.*, Scarborough v. United States, 431 U.S. 563, 575 (1977) (only minimal showing must be made that gun had been in commerce at some point); United States v. Hanna, 55 F.3d 1456, 1462 (9th Cir. 1995) (holding that proof that gun was stolen in Nevada and found in California was sufficient link); United States v. Campbell, 891 F. Supp. 210, 212 (M.D. Pa. 1995) (only need to show gun had once moved in interstate commerce); United States v. Burns, 529 F.2d 114 (9th Cir. 1975) (nexus existed even though gun was out of commerce for eleven months). *But see* United States v. Cortner, 834 F. Supp. 242, 242 (M.D. Tenn. 1993) (rejecting contention that carjacking implicated interstate commerce on sole basis that car was not from Tennessee), *rev'd*, 30 F.3d 135 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 1825 (1995). In *Cortner*, Judge Wiseman questioned whether "a 1932 Ford which was manufactured in Detroit in the year 1931 and transported to the state of Tennessee" remaining there for over sixty years could "still [be] in interstate commerce." *Id.* at 243.

[86] *See, e.g.*, United States v. Moore, 25 F.3d 1042 (4th Cir. 1994) (stating that use of interstate phone service and out-of-state mortgage was sufficient), *cert. denied*, 115 S. Ct. 1985 (1995); *Ramey*, 24 F.3d at 607 (holding that use from out-of-state source was sufficient), *cert. denied*, 115 S. Ct. 1838 (1995). *But see* United States v. Pappadopoulos, 64 F.3d 522, 527 (9th Cir. 1995) (stating that use of out-of-state gas line as commerce link was insufficient effect on interstate commerce). All three cases involved arson charges under 18 U.S.C. § 844(i). *See supra* note 84. It is interesting to note that both *Moore* and *Ramey* used the "effect on commerce" standard, while *Pappadopoulos* was swayed by *Lopez* and required a greater connection. *See also*

The Court, in its post-New Deal Commerce Clause decisions, developed several new tests and amended existing ones, but failed to invalidate any challenged federal legislation until the *Lopez* decision.[87]

Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968) ("Neither here nor in *Wickard* had the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."). Even *Wickard*, however, allowed a relatively weak connection by finding that the activity, despite being local, did exert a substantial effect on interstate commerce when viewed as a whole. *Wickard*, 317 U.S. at 111 (holding that homegrown wheat can substantially affect interstate commerce).

[87] *See* Vicki C. Jackson, *Cautioning Congress to Pull Back*, LEGAL TIMES, July 31, 1995, at S31 (noting that *Lopez* represents first time since New Deal that Court struck down federal statute which was enacted under Commerce Clause). Justice Kennedy, in his concurring opinion, reflected on the Court's treatment of the Commerce Clause, and succinctly concluded that "[t]he progression of our Commerce Clause cases from *Gibbons* to the present was not marked . . . by a coherent or consistent course of interpretation." *Lopez*, 115 S. Ct. at 1634 (Kennedy, J., concurring); *see supra* note 4 (discussing *Gibbons*). Of the six written opinions spawned by *Lopez*, however, it seems that Justice Thomas' concurrence displayed the most frustration over the differing and confusing tests employed by the Court over the years. One commentator described Thomas' concurrence as "an intellectual tour de force [which] takes both the majority and the dissent to task for straying from the framers' original intent for the [C]ommerce [C]lause." Kamenar, *supra* note 71, at 27. Justice Thomas clearly felt that the Court had drifted far from the original import of the Clause, and believed the Court was long overdue in setting the limits of federal power. *Lopez*, 115 S. Ct. at 1642 (Thomas, J., concurring) ("[O]ur case law has drifted far from the original understanding of the Commerce Clause."). Analyzing the original understanding of the Commerce Clause at the time it was drafted, Justice Thomas referred to dictionaries which defined commerce as "selling, buying, and bartering, as well as transporting for these purposes . . . [and concluded that] this understanding finds support in the etymology of the word, which literally means 'with merchandise.'" *Id.* at 1643 (Thomas, J., concurring) (citations omitted). Justice Thomas also found that the framers used the terms "trade" and "commerce" interchangeably throughout their debates, and "commerce," "manufacture," and "agriculture" were treated as three distinct functions of business. *Id.* (Thomas, J., concurring). Further, he argued that the Court's expansive reading of the Commerce Clause in connection with the Necessary and Proper Clause, U.S. CONST., art. I, § 8, cl. 18, was so broad that it effectively rendered the other Article I, section 8 powers superfluous and largely unnecessary. *Lopez*, 115 S. Ct. at 1644 (Thomas, J., concurring). Thomas argued that to "be true to a Constitution that does not cede a police power to the Federal Government . . . we must modify our Commerce Clause jurisprudence." *Id.* at 1650-51 (Thomas, J., concurring). One commentator has suggested that, to Justice Thomas, this would mean a revival of the literal distinctions between commerce, manufacturing, and agriculture. Jackson, *supra*, at S31. One pre-New Deal Commerce Clause decision which closely followed the distinctions Justice Thomas advocated was United States v. E.C. Knight Co., 156 U.S. 1, 14 (1895):

> Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. . . . If it be held that the term includes the regulation of all such manufactures as are intended to be subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining; in short, every branch of human industry.

Id. (quoting Kidd v. Pearson, 128 U.S. 1, 20 (1888)).

II. THE EFFECT OF *LOPEZ*: WHAT DOES IT ALL MEAN?

A. *Establishment of the "New" Test*

Rather than creating certainty, these reduced standards turned the lower courts into "rubber stamps," approving almost any regulation which Congress could pass under the guise of the Commerce Clause.[88] *Lopez* presented the Court with an opportunity to remedy this. Faced for the first time in sixty years[89] with a statute that possessed no connections to interstate commerce either in the legislative process or in the act itself,[90] the Court seized the opportunity to change the law. Chief Justice Rehnquist, eager to reestablish the "substantially affects" test,[91] accordingly fashioned the opinion.[92]

In effect, the *Lopez* decision made the "substantially affects" test the sole test to apply in evaluating whether an activity is sufficiently related to interstate commerce.[93] By announcing the test immediately after reiterating the three areas in which Congress is empowered to regulate under the Commerce Clause,[94] it is evident that the Court intended the test to have a broad reach.[95] Moreover, it appears that the test is to be utilized

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[88] *See* Dallet, *supra* note 50, at 191; Hlavac, *supra* note 50 at 1377.

[89] *See* Calve, *supra* note 80, at 1 (noting that for first time in 60 years, Court invalidated law enacted under Commerce Clause).

[90] *Lopez*, 115 S. Ct. at 1630-31. The Supreme Court was not the first federal court to find that there was no connection between the act and interstate commerce. *See* United States v. Morrow, 834 F. Supp. 364, 366 (N.D. Ala. 1993) ("Congress may be able to invent a convincing relationship between the proscription in [section] 922(q) [of the Gun-Free School Zones Act] and its right to regulate interstate commerce, but this court should not be called upon to dream it up for Congress.").

[91] *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 312 (1981) (Rehnquist, J., concurring) ("There must . . . be a showing that regulated activity has a *substantial effect* on . . . commerce.") (emphasis added). Specifically in *Virginia Surface*, Justice Rehnquist worried that the "substantially affects" test had been severely weakened and noted that there was "a troublesome difference between what the Court does and what it says" in applying the test. *Id.* at 311. Justice Rehnquist concluded there were limits to Congress' power and "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.*

[92] *Lopez*, 115 S. Ct. at 1630 ("We conclude . . . that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce.").

[93] *Id.* at 1630; *see supra* note 91 and accompanying text (discussing Court's application of "substantially affects" test).

[94] *See Lopez*, 115 S. Ct. at 1630 (reiterating three categories of activities which Congress could regulate under Commerce Clause); *supra* note 26 (discussing three categories in which Congress has power to regulate).

[95] Chief Justice Rehnquist announced the standard in connection with the third category: "those activities having a substantial relation to interstate commerce." *Lopez*, 115 S. Ct. at 1629-

regardless of whether Congress expressed a connection between the activity and interstate commerce.[96] By reestablishing the "substantially affects" test, the majority discredited the rational basis test,[97] reasoning that continued adherence to that standard would give Congress uncontrolled access into any area of American life.[98]

B. *Affirmation of the Principles of Federalism*

In addition to clarifying a murky area of jurisprudence, the *Lopez* decision reaffirmed the separation of powers doctrine constructed to protect citizens from abuse by the state or federal government.[99] Many commentators welcomed this recognition of the importance of federalism.[100] While the Court acknowledged prior Supreme Court decisions that espoused broad readings of the Commerce Clause, it pointed out that even those holdings recognized a limit on Congress' Commerce power based upon the system of federalism.[101] More specifically, Justice Kennedy's

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[96] Such a broad statement cannot be used to limit the Court's holding to instances where Congress was silent since Chief Justice Rehnquist made no such distinction within the category. *Id.* Indeed, the Court noted that Congressional findings were merely illustrative rather than dispositive. *Id.* at 1631-32. Thus, whether Congress expressly stated a connection to interstate commerce is irrelevant—review must nonetheless be undertaken.

[97] *See id.* at 1632 (suggesting that bare acceptance of Congress' rationale for federal legislation would leave Congress' power devoid of limits).

[98] *See id.* at 1631 n.3 (stating that President Bush, in signing the Crime Control Act of 1990, remarked that § 922(q) "inappropriately overrides legitimate state firearms laws with a new and unnecessary Federal Law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed upon the States by Congress") (citing 26 WEEKLY COMP. PRES. DOC. 1944-45 (Nov. 29, 1990)). Similar to Congress' adoption of the Gun-Free School Zones Act, over 40 states already had similar "crime control" statutes on the books. *Lopez*, 115 S. Ct. at 1641 (Kennedy, J., concurring).

[99] This system of federalism is defined as one "which includes interrelationships among the states and relationship between the states and the federal government." BLACK'S LAW DICTIONARY 612 (6th ed. 1990). Justice O'Connor has characterized the division of authority between the states and the federal government as the "oldest constitutional question." Bennett L. Gershman, *Judicial "Conservatism"*, N.Y. L.J., June 21, 1995, at 2 (quoting New York v. United States, 505 U.S. 144, 149 (1992)).

[100] *See* Kamenar, *supra* note 71, at 27 (supporting decision as "an important reaffirmation of federalism principles"). "The Court provided a much needed firebreak to check the rapidly spreading exercise of federal power over activities that are traditionally local in nature . . . ." *Id.* at 27; Gershman, *supra* note 99, at 2 (reporting that act invalidated in *Lopez* "intruded upon traditional state functions over education and criminal law, and if allowed, would have given Congress virtually unlimited power to regulate any activity it chose"); Rotunda, *supra* note 72, at C9 (describing effect of *Lopez* as "a reminder . . . that Americans live in a federal structure, with constitutional limits on the power that the federal government may exert").

[101] *Lopez*, 115 S. Ct. at 1628. Discussing the commerce power, the Court noted:

> [It] must be considered in the light of our dual system of government and may not be

concurring opinion stressed the importance of maintaining the federal system of power, and the need for the Court to keep Congress within the bounds of its constitutional mandate.[102]

The Gun-Free School Zones Act of 1990 was an example of federal involvement in an area traditionally reserved to the states—criminal law and its enforcement. The significance of such a far-reaching federal statute is illustrated by constitutional law scholar Laurence Tribe's remark, "[i]f ever there was an act that exceeded Congress' commerce power, this was it."[103] Political philosophy aside, there are two practical reasons why it is of paramount importance to maintain the federal-state balance. First, the "federalization" of crimes that displace existing state criminal laws serves no reasonable purpose other than to bolster the political capital of members

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> extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

Id. at 1628-29 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)). Further, the Court opined that the Constitution outlined separate spheres of power which withheld from the federal government a "plenary police power," that could be used to justify any type of legislation. *Id.* at 1633. Rather, "[t]he enumeration [of powers granted to Congress under the Constitution] presupposes something not enumerated" must be left to the exercise of the several states. *Id.* (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824)).

[102] *Lopez*, 115 S. Ct. at 1637-38. Justice Kennedy drew upon the Federalist papers and caselaw to emphasize the values of federalism. *Id.* at 1638-39. Complimenting the Framers for their creation of the dual-government system, Justice Kennedy referred to James Madison's oft-quoted passage on the effect of federalism:

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

Id. at 1638 (Kennedy, J., concurring) (citing THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961)). Justice Kennedy also relied on Gregory v. Ashcroft, 501 U.S. 452, 458-59 (1991), where the Court reasoned "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 115 S. Ct. at 1638 (Kennedy, J., concurring).

Justice Kennedy advocated intervention when necessary to maintain the cherished tenets of federalism: "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the Supreme Court] to admit inability to intervene when one or the other level of government has tipped the scales too far." *Id.* at 1639 (Kennedy, J., concurring). He also reasoned that political accountability and responsibility would be jeopardized and the boundaries of state and federal powers obfuscated if the federal government was allowed to regulate areas with a tenuous connection to commerce. *Id.* at 1638 (Kennedy, J., concurring).

[103] Joan Biskupic, *Ban on Guns Near Schools Rejected; Congress Exceeded Commerce Power, High Court Holds*, WASH. POST, Apr. 27, 1995, at A1, A6. Another factor that may have prompted Tribe to make this comment may have been the absence of legislative findings claiming a relation between the act and interstate commerce. *See supra* note 90 and accompanying text (discussing absence of legislative findings).

of Congress.[104] Indeed, prior to the enactment of section 922(q), over forty states already had criminal codes on the books proscribing gun possession in or near schools.[105] Therefore, in reality, such federal laws are a "wasteful duplication of resources where federal resources are desperately needed for other functions."[106] Second, federalization denies states the opportunity to tailor criminal laws to their specific needs, and precludes the states from "exercising their own judgment in an area to which states lay claim by right of history and expertise . . . ."[107] Thus,

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[104] *See* Sanford H. Kadish, *The Folly of Overfederalization*, 46 HASTINGS L.J. 1247, 1248-49 (1995) (arguing that legislatures pass such acts in part to gain political popularity). Professor Kadish asserted that the federalization of local crime results in legislation which is "no better than the process that produced it—the process of congressmen and women following the politically profitable example of state legislators in buying popularity with essentially bogus anticrime laws." *Id.* at 1249. Political realities are such that federal officials cater to constituents by promising panaceas to societal problems; rarely do they take into account whether they have the authority to legislate the solutions. *See infra* Part II.C. and accompanying notes (arguing that *Lopez* serves as warning to legislators attempting to remedy "the nation's ills").

[105] *Lopez*, 115 S. Ct. at 1641 (Kennedy, J., concurring). Professor Kadish wrote that the burgeoning federalization of crime tends to crowd the federal courts with disputes which are more appropriate for state courts. Kadish, *supra* note 104, at 1250-51 (noting that expansion of federal criminal jurisdiction has moved Court away from its traditional role of resolving civil disputes). Kadish noted that:

> Chief Justice Rehnquist told Congress . . . "[w]e must decide whether we want the federal courts to spend . . . their time hearing general criminal cases or whether we want the federal courts to occupy their traditional role as a forum for civil disputes on nationally important issues such as commerce, constitutional questions, civil rights and civil liberties."

Kadish, *supra* note 104, at 1251 (quoting Robert Raven, *Federal Courts as Police Courts: Federalism Revisited*, FIFTH CIRCUIT JUDICIAL CONFERENCE (May 13, 1993)).

[106] *Kadish*, *supra* note 104, at 1249.

[107] *Lopez*, 115 S. Ct. at 1641 (Kennedy, J., concurring). In concluding that this area of regulation was not one which the federal government should regulate, Justice Kennedy—and the Court opinion—did not question the seriousness of gun violence near schools. *See id.* at 1641 (Kennedy, J., concurring) (acknowledging need to keep guns out of schools). Nor did the Court question the admirable ends which Congress sought to achieve. It did question, however, the means with which Congress sought to achieve its end, and specifically whether Congress was constitutionally able to interfere in an area that the states were better equipped to regulate:

> While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how to best accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.

Id. at 1641 (Kennedy, J., concurring). Professor Jackson agreed that the Kennedy concurrence "point[ed] out how many different approaches are, in fact, taken by state and local governments toward the goal of preventing guns in schools." Jackson, *supra* note 87, at S32. Further, Jackson believed that the opinion "document[ed] a practical value to states' continuing experimentation with the best means of controlling school violence." *Id.*; *see* Taylor, *supra* note 5, at 26-30 ("The

the need to maintain our federal-state balance is supported by practical reasons as well as the need to preserve that which our founding fathers established.

C. *The Importance of Judicial Review*

As previously stated,[108] the concept of judicial review is firmly embedded in the Court's jurisprudence and today is a hallmark of our system of government. The *Lopez* decision signals to Congress that legislative enactments must fall within the confines of the Constitution or face invalidation by the Court.[109] In short, *Lopez* puts legislators on guard as they attempt to remedy society's ills. To what extent the decision will influence Congress in this regard remains to be seen. One judicially-minded senator has recently proposed a bill which would require Congress to justify every law it passes by indicating how the law falls within an enumerated congressional power.[110]

Two renowned legal scholars, Dean Choper and Professor Wechsler, believe that the Court should avoid cases that review the "scope of national

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states are perfectly capable of banning possession of guns in or near schools . . . . And it makes no sense to waste scarce federal law enforcement resources on such quintessentially local police functions as patrolling schools . . . . In short the federal statute was duplicative and wasteful."). *But see* Tracey W. Resch, Comment, *The Scope of Federal Criminal Jurisdiction Under the Commerce Clause*, 1972 U. ILL. L. FORUM 805, 821-22.

> Despite the multiplication of federal criminal legislation and the enlarged jurisdictional power of the federal government, the states remain active in the area of crime control . . . . The federal government has entered this area gradually, reluctantly, and primarily with programs aimed at organized crime, a problem generally felt to be incapable of solution by the states acting alone.

Id.

[108] *See supra* note 1 and accompanying text (discussing establishment and jurisprudential history of review).

[109] *See* David O. Stewart, *Back to the Commerce Clause: The Supreme Court Has Yet to Reveal the True Significance of* Lopez, 81 A.B.A. J. 46, 46 (1995) ("By enforcing limits on the commerce power, the Court effectively warned Congress to move carefully when federalizing criminal law or setting federal standards. . . ."); *see also* Kamenar, *supra* note 71, at 27 ("[P]erhaps most important, the *Lopez* decision will give members of Congress a principled reason to oppose legislation by their colleagues who grandstand before their constituents by rushing to federalize all of society's ills."); Rotunda, *supra* note 72, at C9 ("*Lopez* . . . may encourage Congress to think about the source of its authority when enacting new laws.").

[110] Senator Spencer Abraham (R-Michigan), a member of the Senate Judiciary Committee, proposed the legislation. H.R. REP. NO. 2270, 104th Cong., 1st Sess. (1995). *See State Sovereignty and the Role of the Federal Government: Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Judiciary Comm.*, 104th Cong., 1st Sess. (1995) (statement of John R. Carter, Assistant Fed. Pub. Defender) ("The proposed Federalism Act of 1995 . . . requires that Congress indicate the constitutional authority for its laws, and consider the extent to which they preempt state or local law."); Kamenar, *supra* note 71, at 25.

power versus the scope of states' rights"[111] because the political process naturally protects the federal-state balance.[112] Professor Wechsler contends that the political process provides a safeguard on Congressional authority because the federal government is elected by all citizens. Further, considerations of states' rights permeate the thinking of federal officials, since they are each elected by residents of the individual states.[113] Political mechanisms and party machinery, according to the argument, are an important factor in decision making, because the machinery and voters may become disenchanted with those representatives who cast federal votes that adversely affect the states.[114] Such reasoning, while valid, nonetheless disregards Chief Justice John Marshall's seminal statement in *McCulloch v. Maryland*:[115] "[w]e admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended . . . . Let the end be legitimate, let it be within the scope of the Constitution."[116] *McCulloch* and *Marbury v. Madison*[117] reflect the Court's vital role in protecting these limits.[118] In *Lopez*, both the

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[111] Jesse H. Choper, *The Supreme Court and Unconstitutional Conditions: Federalism and Individual Rights*, 4 CORNELL J.L. & PUB. POL'Y 460, 462 (1995). "I do not believe the Court should be an enforcer of the values of federalism through its power of judicial review . . . ." *Id.* at 465. In his book, Dean Choper asserted that "[n]umerous structural aspects of the national political system serve to assure that states' rights will not be trampled," making judicial review unnecessary. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 295-96 (1980) [hereinafter JUDICIAL REVIEW]. Choper argues that the states have an adequate voice in issues concerning the federal-state balance, and the Court need not be involved even where "Congress and the president [are] joining forces and ignoring clear constitutional mandate." *Id.*

Professor Wechsler, who maintained a similar view, conceded "[t]his is not to say that the Court can decline to measure national enactments by the Constitution when it is called upon to face the question in the course of ordinary litigation." Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954).

[112] JUDICIAL REVIEW, *supra* note 111, at 295-96.

[113] Tape of Constitutional Law Course Lecture by Distinguished Professor of Law Albert J. Rosenthal, held at St. John's University School of Law (September 15, 1995) (on file with author).

[114] *Id.*

[115] 17 U.S. (4 Wheat.) 316 (1819).

[116] *Id.* at 421. It is evident that Chief Justice Marshall recognized the inherent limitation on Congress' power and the responsibility of the Court to quash the impermissible exercise of that power.

[117] 5 U.S. (1 Cranch) 137 (1803).

[118] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 152 ("It is emphatically the province and duty of the judicial department to say what the law is."); *supra* note 1 and accompanying text (discussing commentary and case law emphasizing Court's duty to interpret and uphold Constitution). While the Court in the past and in *Lopez* affirmed the difficult, yet critical role of judicial review, Dean Choper strenuously argues that "the unconstitutional conditions principle has little practical significance in the federalism area because there . . . is very little, if anything, Congress

Court's opinion and Justice Kennedy's concurring opinion conclude that judicial review, while at times difficult, is indispensable.[119] It is suggested that Dean Choper and Professor Wechsler, as well as the *Lopez* dissenters,[120] fail to recognize that the political process is a poor safeguard of federalism.

Thus, if the individual citizen and the individual state cannot effectively check federal laws which are repugnant to the Constitution, who can? Only the courts can. Not only are its powers of judicial review a hallmark of our government, but its justices are politically isolated. They alone are charged with the duty to "say what the law is."[121]

III. THE EFFECT OF *LOPEZ* ON THE FUTURE

Shortly after the Court decided *Lopez*, President Clinton attacked the decision in his weekly radio address, stating that he was "terribly disappointed" and pledging to keep guns out of schools because "[t]hat's what the American people want, and it's the right thing to do."[122] The

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cannot do under the Commerce Clause." Choper, *supra* note 111, at 462.

[119] Chief Justice Rehnquist opined that distinguishing between commercial and non-commercial to determine Congressional authority would result in "legal uncertainty." *Lopez*, 115 S. Ct. at 1633. However, regardless of how "uncertain" such determinations may be, Chief Justice Rhenquist contended that they are a necessary part of the task since our Constitution is one of enumerated, limited powers. *Id.* "Any possible benefit from eliminating this 'legal uncertainty' would be at the expense of the Constitution's system of enumerated powers." *Id.*

Justices Souter and Breyer, however, in their dissenting opinions, seemed to agree with Dean Choper and Professor Wechsler in urging judicial restraint and deference to Congress. *See Lopez*, 115 S. Ct. at 1651 (Souter, J., dissenting) (emphasizing that "[t]he practice of deferring to rationally based legislative judgments 'is a paradigm of judicial restraint'") (quoting FCC v. Beach Community, Inc., 113 S. Ct. 2096, 2101 (1993)); *see also* Taylor, *supra* note 5, at 30 ("The best argument for [Justice Breyer's] dissent may be that [the notion of limited powers] should be a dead letter—or, at least, that we should rely on 'the political process,' rather than on 'judicially created limitations,' to set boundaries on congressional power.") (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 555-57 (1984)). Justice Breyer views Commerce Clause jurisprudence "not as a 'technical legal exception,' but as 'a practical one.'" *Lopez*, 115 S. Ct. at 1659 (Breyer, J., dissenting) (quoting Swift & Co. v. United States, 196 U.S. 375, 398 (1905)).

Justice Kennedy, while acknowledging the importance of the "flexibility" afforded Congress by the Supreme Court, concluded that "[i]t does not follow, however, that in every instance the Court lacks the authority and responsibility to review congressional attempts to alter the federal balance." *Lopez*, 115 S. Ct. at 1637 (Kennedy, J., concurring).

[120] *Id.* at 1651 (Souter, J., dissenting) ("In judicial review under the Commerce Clause, it reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress' political accountability.").

[121] *Marbury*, 5 U.S. (1 Cranch) at 177.

[122] Todd S. Purdum, *Clinton Seeks Way to Retain Gun Ban in Schools*, N.Y. TIMES, Apr. 30, 1995, at 1.

President directed the Attorney General to find methods to circumvent the decision, remarking, "I want the action to be constitutional, but I am determined to keep guns away from schools."[123]

Commentators speculate that *Lopez* calls into question other areas of federal legislation that stand on uncertain constitutional grounds. These areas include the Freedom of Access to Clinic Entrances Act,[124] wetland and various environmental legislation,[125] tort reform,[126] and federal

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Senator Herbert Kohl, who introduced the Gun-Free School Zones Act of 1990, referred to *Lopez* as "a piece of judicial activism that ignores children's safety for the sake of legal nitpicking." Biskupic, *supra* note 103, at A1. *But see Lopez*, 115 S. Ct. at 1641 (Kennedy, J., concurring) (stressing that gun violence near schools is important matter that must be addressed by states). *See also supra* note 105 (stressing importance of traditional state functions).

[123] Purdum, *supra* note 122, at 1. As promised, President Clinton sent Congress the "Gun-Free School Zones Amendments Act of 1995" for the express purpose of legislatively overruling the *Lopez* decision. *See* President's Calendar, *Congressional and Presidential Activity*, DAILY REPORT FOR EXECUTIVES, May 11, 1995, § F. In July, the Subcommittee on Youth Violence of the United States Senate Committee on the Judiciary held hearings on this matter. Capitol Hill Hearing Testimony, *Federal Document Clearing House* (July 18, 1995). Walter Dellinger, an Assistant Attorney General, found that the proposed legislation would probably pass judicial review. *Id.* As proposed, the Act, like the legislation prohibiting felons from possessing firearms, would require the government to prove that the gun moved in interstate commerce. *Id.* Using the *Scarborough* standard, the government would only have to prove that the gun had moved in commerce. Scarborough v. United States, 431 U.S. 563, 567-68 (1977) (allowing conviction on basis that gun was once in commerce). Senator Orrin G. Hatch argued that the proposed legislation was "short-sighted" and amounted to a "technical fix" which violated the principles of federalism. *Guns in Schools: Hearing of Subcomm. on Youth Violence of the Senate Judiciary Comm.*, 104th Cong., 1st Sess. (1995) (statement of Orrin Hatch, Senator).

Alternative constitutional powers under which the Gun-Free School Zones Act might survive (such as the spending power) are beyond the scope of this Comment. *See generally* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1191 (1995) (discussing alternative use of spending power to counter invalidations under other powers of various federal laws).

[124] 18 U.S.C.A. § 248 (West 1988).

[125] Kamenar believes federal environmental laws are particularly vulnerable. Kamenar, *supra* note 71, at 25. He recalled the tenuous link which the Environmental Protection Agency used to justify federal jurisdiction over wetlands not located near navigable waterways: "[w]etlands trap pollutants that might otherwise run off into a drainage ditch leading into a brook, which becomes a stream, which eventually flows into a tributary of a navigable waterway used in interstate commerce." *Id.* Another justification for this federal power exists "solely because birds fly across state lines and land on wetlands in somebody's backyard." *Id. But see* Cargill v. United States, 55 F.3d 1388 (9th Cir. 1995) (upholding federal law because presence of migratory birds on wetlands was sufficient to link to interstate commerce), *cert. denied*, 116 S. Ct. 407 (1995). The circuit court was led by Congressional findings and, ignoring *Lopez*, applied the rational basis test. *Id.* at 1394. *But see* Cargill v. United States, 116 S. Ct. 407, 409 (1995) (Thomas, J., dissenting from a denial of certiorari) (arguing that government's case was very weak).

Also at risk is the Clean Water Act, which made express findings that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources." CLEAN WATER ACT, 33 U.S.C.A. § 1251(b) (West 1988).

carjacking[127] and arson[128] statutes.

Lower courts are also uncertain about the future effect of *Lopez*.[129] Numerous Commerce Clause challenges have been brought before the courts and many have found *Lopez* inapplicable.[130] It is suggested that these courts take a closer look at the *Lopez* decision. While there are some cases which may satisfy the "substantially affects" test, there are numerous others that do not.[131] In light of *Lopez*, it is troubling that some courts

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[126] The area of tort reform is thrown into question by the *Lopez* decision. Federal legislators and supporters of the movement, to curb tort damage awards, have grounded their proposal in a cumulative effect theory similar to the government's argument in *Lopez*. *See* T.R. Goldman, *Tort Reform Opponents Have New Weapon in Lopez*, CONN. L. TRIB., May 15, 1995, at 15. The supporters argued that "[t]he cost of massive punitive-damage awards are passed on to consumers through increased insurance costs, increased product costs, reduced availability or products and the impairment of the ability [of U.S. companies] to compete with other countries that don't have this tort tax." *Id.* (quoting lobbyist Theodore Olson). Trial lawyers and consumer groups opposed to the reform argue that state tort law has little, if any, connection to interstate commerce. *Id.* Whether tort reform will survive under *Lopez* remains to be seen. The proponent's arguments are substantially similar to the government's "national productivity" argument asserted in *Lopez* which the Court rejected under the "substantially affects" test.

[127] 18 U.S.C. § 2119 (Supp. 1995) (imposing fines and imprisonment for "[w]hoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported . . . in interstate . . . commerce").

[128] Stewart reasoned that "the destruction of a building is not easily described as a 'commercial activity'" under *Lopez*. Stewart, *supra* note 61, at 48. Further, land use and arson laws are areas of "traditional concern of the States." *Lopez*, 115 S. Ct. at 1640 (Kennedy, J., concurring); *see supra* notes 111-114 and accompanying text (stressing importance of traditional state functions).

[129] *Compare* United States v. Campbell, 891 F. Supp. 210, 212 (M.D. Pa. 1995) (noting that *Lopez* was not binding because government had to prove link to interstate commerce from possession of firearm by felon) *with* United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995) (finding insufficient connection to commerce on basis of gas supplied to residence by out-of-state company). The Ninth Circuit applied *Lopez* to invalidate 18 U.S.C. § 844(j), a federal arson statute. The court held that an out-of-state gas line attached to a private home did not have a substantial effect upon interstate commerce to justify a federal arson investigation. The *Pappadopoulos* Court distinguished this holding from its previous federal carjacking decisions, reasoning that "[u]nlike a firearm or a car, both of which can readily move in interstate commerce, a house has a particularly local rather than interstate character." *Id.* at 527-28.

[130] *See, e.g.*, United States v. Stillo, 57 F.3d 553 (7th Cir.) (finding that bribery affects law firms' ability to purchase interstate goods), *cert. denied* 116 S. Ct. 383 (1995); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995) (stating that provision of abortion services exerted sufficient link to commerce); United States v. Garcia-Beltan, 890 F. Supp. 67 (D.P.R. 1995) (holding that carjacking had strong relation to interstate commerce); United States v. Edwards, 894 F. Supp. 340 (E.D. Wis. 1995) (stating that proof felon possessed gun which was once in commerce was sufficient).

[131] *See, e.g.*, *Stillo*, 57 F.3d at 558 (stating that acceptance of bribe would have depleted funds from which interstate items could be purchased). While conceivably rational, the finding in *Stillo* highlighted the need for a standard test. The *Stillo* court argued that *Lopez* was not binding because *Lopez* interpreted a different law. *Id.* Instead, the court reasoned that prior judicial decisions enabled the court to find a minimal, potential effect sufficient. *Id.* This position is

continue to adhere to outmoded standards of judicial review. *Lopez* made it quite clear that the "substantially affects" test was to be employed for specific Commerce Clause challenges and that the effect upon interstate commerce must indeed be a *substantial* one.

CONCLUSION

The *Lopez* decision represents an important change in the judicial interpretation of the Commerce Clause. No longer willing to permit Congress to legislate its every wish, the Court now demands that the regulated activity have a substantial effect on interstate commerce. While the test itself is not new, its reemergence as the principal test is noteworthy. Congress, long accustomed to the expansion of its powers, must now learn to temper its lawmaking in accordance with stricter constitutional limits. Furthermore, the decision reflects a respect for federalism by allowing the states to solve problems of a local character. While many commentators have recognized the importance of *Lopez*, the lower federal courts have been slow to follow suit. In light of lower court attempts to narrow the holding of *Lopez*, the Court is urged to issue further pronouncements of the "substantially affects" test. The Court would be remiss if it overlooked any opportunity to reinforce the strong message it sent in *Lopez*, a long overdue precedent in Commerce Clause jurisprudence.

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somewhat absurd since it enables Congress to regulate virtually any activity—a result clearly prohibited by *Lopez*. It is submitted that the *Stillo* court erred by not following the binding authority set forth by the Supreme Court in *Lopez*.

Likewise, in *Garcia-Beltran*, the district court found a sufficient nexus with interstate commerce, since carjacking necessarily involved the dismantling of cars and sending them to other states. *Garcia-Beltran*, 890 F. Supp. at 70. While this may often be the actual motivation for the carjacking, in *Garcia-Beltran* the motivation was gang animosities and the car was used to facilitate a murder. *Id.* at 68-69. Any potential connection to interstate commerce on the basis that the parts may be shipped across state lines was terminated when the car was blown up to hide the evidence.

See also United States v. White, 893 F. Supp. 1423 (C.D. Cal. 1995) (stating that *Lopez* was not applicable to decide challenge to Freedom of Access to Clinic Entrances Act on basis of Congressional findings and used rational basis test to uphold law). While the Congressional record may have in fact been sufficient, in light of *Lopez*, the use of the now-discarded rational basis test was inappropriate.