Tulsa Law Review

Volume 31
Issue 3 *Practitioner's Guide to the October 1994 Supreme Court Term*

Spring 1996

The Fourth Amendment: Reflections on the 1994 October Term

Janet K. Levit

Follow this and additional works at: https://digitalcommons.law.utulsa.edu/tlr

Part of the Law Commons

Recommended Citation

Janet K. Levit, *The Fourth Amendment: Reflections on the 1994 October Term*, 31 Tulsa L. J. 473 (2013).

Available at: https://digitalcommons.law.utulsa.edu/tlr/vol31/iss3/4

This Legal Scholarship Symposia Articles is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

THE FOURTH AMENDMENT: REFLECTIONS ON THE 1994 OCTOBER TERM*

Janet Koven Levit†

I. Introduction

The Fourth Amendment decisions from this past term have not presented the same drama as the Court's decisions on race,[1] church/state,[2] the Commerce Clause,[3] and federalism.[4] This lack of drama is not mere fortuity. Many Fourth Amendment rights that were bestowed upon criminal defendants during the early Warren Court years[5] were abruptly diluted by the Burger Court.[6] The Rehnquist Court, therefore, is left to tinker around the edges of what is already a rather constricted Fourth Amendment. I would characterize its contribution to the criminal procedure field as a second generation retrenchment that is dwarfed in both substance and drama by the first generation retrenchment that took place during the Burger Court years.

The Rehnquist Court nonetheless continues to define the contours of the Fourth Amendment. The overall picture is one of a Fourth Amendment that is further disintegrating with every passing term. The 1994 October Term is no exception to this rule.

* Based on remarks delivered at the Conference, *Practitioner's Guide to the October 1994 Supreme Court Term*, at The University of Tulsa College of Law, November 17, 1995.

† Visiting Assistant Professor, University of Tulsa College of Law; A.B., 1990, Princeton University; M.A., 1994, Yale University; J.D, 1994, Yale Law School.

1. Miller v. Johnson, 115 S. Ct. 2475 (1995); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); Missouri v. Jenkins, 115 S. Ct. 2038 (1995).
2. Rosenberger v. Rector and Visitors to the University of Virginia, 115 S. Ct. 2510 (1995); Capitol Square Review & Advisory Board v. Pinette, 115 S. Ct. 2440 (1995).
3. United States v. Lopez, 115 S. Ct. 1624 (1995).
4. U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995).
5. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (holding that the exclusionary rule is rooted in an attendant Fourth Amendment violation).
6. *See* United States v. Leon, 468 U.S. 897 (1984) (carving out the good faith exception to the exclusionary rule); Illinois v. Gates, 462 U.S. 213, 223 (1983) (delinking the exclusionary rule from the Fourth Amendment violation). *See generally* Yale Kamisar, *The Warren Court and Criminal Justice*, 31 Tulsa L.J. 1 (1995).

Published by TU Law Digital Commons, 1995

In general, there are two ways to curtail Fourth Amendment rights. First, by constraining the reach of the exclusionary rule, Fourth Amendment violations will not find effective remedies in courts of law. The exclusionary rule vindicates Fourth Amendment violations by making fruits of unconstitutional searches or seizures inadmissible. The Court has persistently carved out exceptions to the exclusionary rule, the most notable being *United States v. Leon*'s good faith exception.[7] By expanding existing exceptions or carving out additional exceptions, the Court narrows the scope of the exclusionary rule and blunts the impact of a Fourth Amendment violation. Second, the Court can expand notions of reasonableness. The Fourth Amendment proscribes only *unreasonable* searches and seizures.[8] By expanding what it deems a reasonable search and seizure, the Court can narrow the reach of the Fourth Amendment. During the 1994 October Term, the Court demonstrated its aptitude in using both of these methods, and the result will be further erosion of the Fourth Amendment.

II. *ARIZONA V. EVANS*[9]

In *Arizona v. Evans*, the Supreme Court narrowed the exclusionary rule by expanding the good faith exception to that rule. In *Evans*, the defendant was driving the wrong way down a one-way street.[10] Unfortunately for the defendant, he was driving in front of the police station,[11] and the police legitimately stopped Mr. Evans for his traffic offense.[12] During the stop, the police examined his driver's license and entered his name into a computer,[13] actions which are perfectly legitimate in the wake of a traffic stop.[14] The officer's computer revealed that the defendant's license had been suspended and that there was an outstanding warrant for his arrest because the defendant had "failed to appear to answer for several traffic offenses."[15] Because there was an outstanding warrant for the defendant's arrest, the police

7. *Leon*, 468 U.S. at 922 ("We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.").
8. U.S. CONST. amend. IV.
9. 115 S. Ct. 1185 (1995).
10. *Id.* at 1188.
11. *Id.*
12. *Id.*
13. *Id.*
14. *See, e.g.*, United States v. Jones, 44 F.3d 860, 872 (10th Cir. 1995); *see also, e.g.*, Delaware v. Prouse, 440 U.S. 648, 659 (1979) (permitting license checks following legitimate traffic stops).
15. *Evans*, 115 S. Ct. at 1188.

officers arrested him. While being handcuffed, the defendant dropped a marijuana cigarette, which lead to a search.[16] During this search, the officers found marijuana on the defendant's body and in his car. The state then charged him with possession of marijuana.[17]

Until this point, the encounter was perfectly legitimate — the initial computer search, the arrest pursuant to the outstanding warrant, the search pursuant to the arrest, and the arrest for possession of marijuana constituted legitimate manifestations of the state's police power. The catch, the issue that transformed this case into one that warranted Supreme Court review, was that the computer record contained an error. Although the computer showed an outstanding warrant for his arrest, the arrest warrant had actually been quashed seventeen days earlier.[18] Mr. Evans' initial arrest was patently unconstitutional because it was rooted in a substantively invalid arrest warrant. Concomitantly, the search that led to the discovery of the marijuana cigarette was unconstitutional because it stemmed from an unconstitutional arrest.[19] The trial court never attributed blame for the computer error, and it is unclear whether the error was the fault of court employees or sheriff's department personnel.[20]

The question that percolated through the Arizona state courts and eventually made its way to the U.S. Supreme Court was whether the exclusionary rule mandated suppression of the fruits of an unconstitutional search conducted pursuant to a non-existent arrest warrant that appeared on a faulty computer entry. The state trial court granted the motion to suppress,[21] the appellate court reversed,[22] and the Arizona Supreme Court reversed again, thereby upholding the

---

16. *Id.* For cases addressing search incident to arrest, see New York v. Belton, 453 U.S. 454, 460 (1981); United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973); Chimel v. California, 395 U.S. 752, 762-63 (1969).

17. *Evans*, 115 S. Ct. at 1188.

18. *Id.*

19. The state conceded that because the warrant had been quashed, and therefore the defendant was arrested and searched pursuant to a non-existent warrant, the search violated the Fourth Amendment. *Id.* at 1189 n.1.

20. *Id.* at 1188.

21. *Id.* (The trial court found that the facts supported inferences that could peg the error either with law enforcement personnel or court employees, but concluded that the precise source of the error was irrelevant to its decision to suppress the evidence pursuant to the exclusionary rule).

22. State v. Evans, 836 P.2d 1024, 1027 (Ariz. 1992) (Implicitly assuming that the error resulted from court personnel, a divided panel of the Arizona Court of Appeals reversed and remanded the trial court's decision, stating, "the exclusionary rule [was] not intended to deter justice court employees or Sheriff's Office employees who are not directly associated with the arresting officers or the arresting officers' police department.").

trial court's decision to grant the motion to suppress.[23] The U.S. Supreme Court ultimately reviewed the following question: Does the exclusionary rule require "suppression of evidence seized incident to an arrest resulting from an inaccurate computer record, regardless of whether police personnel or court personnel were responsible for the record's continued presence in the police computer?"[24]

Chief Justice Rehnquist, in a seven-to-two decision that was joined by all of his colleagues except for Justice Ginsburg and Justice Stevens, held that the exclusionary rule should not apply.[25] First, the Court reaffirmed the position taken in its previous opinions,[26] holding that the Fourth Amendment contains no provision precluding the use of evidence and that the mere fact that the state conceded a Fourth Amendment violation did not mandate use of the exclusionary rule.[27] Establishing that Fourth Amendment jurisprudence and exclusionary rule jurisprudence were not necessarily coterminous, the Court then held that the exclusionary rule was not applicable in this case.[28]

In so holding, the Court purported to squarely apply *United States v. Leon*.[29] As already mentioned, I would characterize *Leon* as one of the hallmark retrenchment cases of the Burger Court era.[30] *Leon* dealt with a search and subsequent seizure of evidence on the basis of a facially valid warrant which a magistrate later found invalid because it did not satisfy the probable cause requirement.[31] In holding that the exclusionary rule should not apply to effect suppression of the evidence which was discovered during the search, the Court carved out a major exception to the exclusionary rule — the good faith exception.[32] The Court in *Leon* held that evidence seized by an officer relying on a warrant issued by a detached and neutral magistrate should not be suppressed through the exclusionary rule because such reliance made the officer's actions objectively reasonable.[33] *Leon* further held that

23. State v. Evans, 866 P.2d 869, 871-72 (Ariz. 1994) (discarding the court of appeals' assumption that court employees, rather than law enforcement personnel, were responsible for the error and holding that the deterrent ends of the exclusionary rule would be served regardless of the source of the error).
24. *Evans*, 115 S. Ct. at 1189.
25. *Id.* at 1195.
26. *See* United States v. Leon, 468 U.S. 897, 906 (citing United States v. Calandra, 414 U.S. 338 (1974)).
27. *Evans*, 115 S. Ct. at 1191.
28. *Id.* at 1193.
29. *Id.* at 1194.
30. *See supra* text accompanying note 6.
31. *Leon*, 468 U.S. at 902.
32. *Id.* at 918.
33. *Id.* at 926.

suppression on the basis of such objectively reasonable conduct would not advance the exclusionary rule's deterrent ends and therefore was inappropriate.[34]

In *Arizona v. Evans*, the Court reasoned that the officers' behavior in arresting the defendant was objectively reasonable because they relied on a computer record of an arrest warrant, regardless of whether the record was in fact substantively accurate.[35] Because objectively reasonable conduct cannot be deterred through suppression of evidence and because deterrence is the underlying rationale of the exclusionary rule, the Court reasoned that *Evans* was not a case where the exclusionary rule should apply.[36] Relying on *Leon*, the *Evans* Court concluded that when the police act in good faith, in objectively reasonable reliance on a computer record, the deterrent ends of the exclusionary rule are not furthered in any appreciable way.

This case is significant for several reasons. The first is institutional. Although the Court has encountered cases dealing with the Fourth Amendment and the exclusionary rule throughout the last decade, this is the first major exclusionary rule case since *Leon*, and at that time only three current Justices — Chief Justice Rehnquist, Justice O'Connor, and Justice Stevens — were sitting on the Court. *Evans* serves as a resounding reaffirmation of the good faith exception to the exclusionary rule and thereby a resounding reaffirmation of the Burger Court's first generation retrenchment. It is also an indication that the current Court is willing to tinker with the Burger Court's major doctrinal shifts — in this case the staking out of a good faith exception — to embellish, expand, and fortify those doctrines.

Second, and even more significant, *Evans* greatly expanded the scope of the good faith exception, further narrowing the exclusionary rule's applicability. On the surface, *Evans* carves out another category of conduct that can satisfy the good faith exception — objectively reasonable reliance on computer records of arrest warrants. Thus, one pragmatic result of this case is that computer error, regardless of whether it was the fault of court or police personnel, will now benefit the police, and law enforcement agencies will have no incentive to keep their records up to date because careless reporting in essence provides the police with more authority to conduct searches.[37] This is

34. *Id.* at 918.
35. *Evans*, 115 S. Ct. at 1194.
36. *Id.* at 1191 (citing *Leon*, 468 U.S. at 916 and Illinois v. Krull, 480 U.S. 340, 348 (1987)).
37. Ira Mickenberg, *Court Settles on Narrower View of 4th Amendment*, NAT'L L.J., July 31, 1995, at C8.

Tulsa Law Review, Vol. 31 [1995], Iss. 3, Art. 4

a particularly disturbing development given the likelihood that even the smallest police departments increasingly rely on computer data bases for information concerning warrants and outstanding charges.[38]

I would argue, however, that the significance of this case transcends this ostensible catagorical expansion of the exclusionary rule. The Court, which purported to apply squarely *Leon*'s good faith exception, in reality broadened its underpinnings and thereby unleashed an accordion-like expansion of the good faith exception. *Leon* was premised on the synergy of two factors. The first was that objectively reasonable police conduct could not be deterred through the exclusionary rule.[39] The second was that reliance on the detached and neutral scrutiny of a magistrate constitutes objectively reasonable, and therefore non-deterrable, conduct.[40] Whereas the sequence of events in *Leon* was issuance of search warrant, execution of warrant, and quashing of warrant,[41] the sequence in *Evans* was issuance of arrest warrant, quashing of warrant, and then execution of warrant. In *Evans*, a detached and neutral magistrate decided in a detached and neutral way that an arrest warrant should be quashed prior to execution of that warrant. Using the reasoning of *Leon*, it is this detached, neutral judgment that should be determinative of the objective reasonableness of the arresting officer's behavior. In *Evans*, however, the Court applied the good faith exception despite the officer's reliance on an invalid warrant rather than because of the officer's reliance on a valid warrant. The Court looked only to the superficial validity of the warrant, determined that the officers could not have known the warrant had been previously quashed, and ruled the conduct in good faith and the evidence not subject to suppression. Thus, objective reasonableness has been delinked from the detached and neutral judgment of

38. *Id.; see also* State v. Evans, 866 P.2d 869, 872 (Ariz. 1994). The Arizona Supreme Court stated:

> It is repugnant to the principles of a free society that a person should ever be taken into police custody because of a computer error precipitated by government carelessness. As automation increasingly invades modern life, the potential for Orwellian mischief grows. Under such circumstances, the exclusionary rule is a cost we cannot afford to be without.

Id.

39. *Leon*, 468 U.S. at 918-19.

40. *See id.* at 913-15, 922 (Because judges, magistrates, or court personnel, unlike the police, have no stake in the outcome of the case there is no reason to believe that they attempt to ignore or subvert the Fourth Amendment. Therefore, reliance on their decisions — even a warrant that is subsequently determined to be without probable case — is objectively reasonable).

41. *Id.* at 902-03.

https://digitalcommons.law.utulsa.edu/tlr/vol31/iss3/4

Levit: The Fourth Amendment: Reflections on the 1994 October Term

a magistrate. The synergy we observed in *Leon* between the deterrence rationale and the detached and neutral magistrate's issuance of a warrant has been broken, and deterrence is the sole arbiter of the good faith exception.

What does this mean for practitioners? In answering this question, it is significant that the courts never determined whether court employees or police department personnel were responsible for the faulty computer record.[42] While the source of the computer error became a significant issue in the state courts,[43] the U.S. Supreme Court assumed that responsibility for the error had not been ascertained but nonetheless pursued its analysis because, presumably, the source was irrelevant to the legal issues at hand. Given the factual record that the Court accepted, it is very possible that police department personnel were responsible for the computer error. So when we hear about an exclusionary rule that is designed to combat and deter police misconduct,[44] it appears that deterrence is geared only toward police in the field who are making arrests and that police department personnel are not among those targeted for deterrence. *Evans* thereby narrowed the type of state action and the class of state actors that are susceptible to the exclusionary rule.

When we juxtapose the fact that deterrence remains the sole arbiter of the good faith exception with the fact that deterrence is only aimed at police officers in the field, the ramifications are potentially far reaching. The good faith exception could logically be utilized in situations where no warrant was ever issued.[45] "For example, if the police believed in good faith that a warrant or authorization was issued, based on information from a court clerk, a judge advocate, or other nonpolice personnel, the subsequent search may be justified

42. Arizona v. Evans, 115 S. Ct. 1185, 1189 (1995) ("grant[ing] certiorari to determine whether the exclusionary rule requires suppression of evidence seized incident to an arrest resulting from an inaccurate computer record, regardless of whether police personnel or court personnel were responsible for the record's continued presence in the police computer."); State v. Evans, 866 P.2d 869, 870 (Ariz. 1994) ("At the suppression hearing, there was conflicting evidence concerning" who was at fault for the computer error).

43. *See supra* text accompanying notes 21-23.

44. *Leon*, 468 U.S. at 916; Illinois v. Krull, 480 U.S. 340, 350-51 (1987).

45. Maj. Masterton, *A New Expansion of the Good Faith Exception:* Arizona v. Evans, ARMY LAW., July 1995, at 56, 57 ("the trial judge suppressed the evidence seized during the arrest without making any finding whether the court personnel or police personnel were responsible for the error.").

under the good faith exception, even though no warrant or authorization ever existed."[46] In other words, a police officer's conduct is objectively reasonable, and thereby protected by the good faith exception, not only through reliance on a judicial determination of probable cause, but also through reliance on other types of court records and written or oral information from court *or* police personnel. Through such fortification of the good faith exception, the Court in *Evans* further limited the scope of the exclusionary rule and, concomitantly, reduced the likelihood that undisputed Fourth Amendment violations will find effective remedies in courts.

III. *Vernonia School District 47J v. Acton*

Through *Evans*, the Court demonstrated that it could constrict Fourth Amendment rights by further limiting the scope of the exclusionary rule. In *Vernonia School District 47J v. Acton*,[47] however, the Court demonstrated its agility in deflating Fourth Amendment rights through expanding notions of reasonableness. *Acton* involved a challenge to a suspicionless drug testing program in a high school. The high school district in question instituted random drug testing of all student athletes involved in any type of school-sponsored athletic activity.[48] Justice Scalia, joined by a rather remarkable majority — Chief Justice Rehnquist, Justice Kennedy, Justice Thomas, Justice Ginsburg and Justice Breyer — held that drug testing of student athletes absent particularized suspicion is reasonable under the rubric of Fourth Amendment jurisprudence. In concluding that the drug testing program was a reasonable search, Justice Scalia balanced the student's legitimate expectation of privacy, the severity of the intrusion on individual privacy rights, and the nature of the government interest.[49] First, the Court held that students do not have and should not have a great expectation of privacy once they enter school.[50] Second, the Court held that the scope of the search, namely urine analysis, was not overly intrusive because the students were permitted to extract urine samples behind urinal doors.[51] Third, skirting the issue of

46. *Id.* at 58.
47. 115 S. Ct. 2386 (1995).
48. The plaintiffs in *Acton* were parents of a student who refused to sign a consent-to-search form. *Id.* at 2390.
49. *Id.* at 2391-94.
50. *Id.* at 2392.
51. *Id.* at 2393.

Levit: The Fourth Amendment: Reflections on the 1994 October Term

whether the countervailing government interest needed to be compelling or merely important, the Court concluded that the governmental interest in combatting a perceived drug problem in the school was sufficiently strong to justify the search.[52] After balancing these three factors, the Court concluded that random drug testing of student athletes without any individualized suspicion constituted a reasonable search under the Fourth Amendment.

Parenthetically, Justice O'Connor wrote a passionate, articulate, and deeply historical dissent that, in my opinion, overshadows the majority opinion.[53] Relying on the same cases as the majority,[54] Justice O'Connor underscores that it is truly the exception and not the rule to allow searches absent individualized suspicion.[55] She castigates the majority because they do not acknowledge that their holding — that individualized reasonable suspicion is not a necessary predicate to highly intrusive searching of high school students — is an extraordinary aberration from a steadfast rule deeply embedded in the Fourth Amendment's history.

Acton is clearly significant for many young people. We have a Supreme Court decision which states that high school athletes can constitutionally be tested for drugs absent particularized suspicion. But beyond the opinion's face value, *Acton* is important because it raises, and leaves conspicuously unanswered, some very significant questions. Does *Acton* allow expansion of drug testing to all students, regardless of whether they are athletes? Justice Ginsburg wrote a concurrence which addresses the potential slippery-slope expansion of random drug testing to all students, and she explicitly states that she joined the majority only in so far as it applies to student athletes.[56] No one joined her concurrence, which may indicate that there is a rather strong majority that would argue that *Acton* supports as constitutional random drug testing for all students in public schools.

Another question that this opinion leaves unanswered is the one raised by Justice O'Connor in her dissent. *Acton* sanctioned as constitutional a suspicionless and highly intrusive search. Will this effect a

52. *Id.* at 2396.

53. *Id.* at 2397 (O'Connor, J., dissenting).

54. *See, e.g.*, Skinner v. Railway Labor Executive Ass'n, 489 U.S. 602 (1989); Treasury Employees v. Von Raab, 489 U.S. 656 (1989); New Jersey v. TLO, 469 U.S. 325 (1985); Bell v. Wolfish, 441 U.S. 520 (1979); Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Martinez Fuerte, 428 U.S. 543 (1976).

55. *Acton*, 115 S. Ct. at 2388 (O'Connor, J., dissenting).

56. *Id.* at 2397 (Ginsburg, J., concurring).

dissipation of the time-honored and historically embedded individualized suspicion requirement? Will the Court's acceptance of suspicionless drug testing in this special school setting be used as carte blanche authority to extend suspicionless searches to other realms? Or will it remain the exception, rather than the rule, to condone Fourth Amendment searches absent particularized suspicion?

Finally, while it is unclear precisely how *Acton* is going to reverberate through the law, it is patently clear that the Court was willing to discount and to devalue individual rights to privacy — in this case by subjecting high school students to highly intrusive, yet suspicionless, searches — in the name of a "higher" state interest. The Court's willingness to discount individual privacy rights in *Acton* does not bode well for the "right to privacy" questions that will inevitably arise in future cases.

IV. *Wilson v. Arkansas*

Acton shows the Court's willingness to broadly define reasonableness and thereby narrow its view of what constitutes a Fourth Amendment violation. In passing, I would like to note an additional case addressing the Court's conception of reasonableness. In *Wilson v. Arkansas*,[57] a unanimous opinion drafted by Justice Thomas, the Court held that the common law "knock and announce" requirement constitutes part of the Fourth Amendment's reasonableness inquiry, but also held that it was not necessarily decisive of that inquiry.[58] The Court then examined a search in which the police did not knock and announce their presence before entering to execute a search warrant. The Court reversed the state courts' denial of the motion to suppress and remanded to the lower court for a determination of the reasonableness of the search in light of the its holding regarding the constitutional relevance of the "knock and announce" requirement.[59]

While the Court significantly broadened its conception of reasonableness in *Acton* by holding that suspicionless searches of student athletes are reasonable, it potentially narrowed its conception of reasonableness in *Wilson v. Arkansas* by mandating that courts consider the "knock and announce" requirement when determining the reasonableness of a search. I believe that the Fourth Amendment ramifications of *Acton*, the rather pronounced magnification of what is

57. 115 S. Ct. 1914 (1995).
58. *Id.* at 1916.
59. *Id.* at 1919.

deemed a reasonable search and the potential dissipation of the time-honored particularized suspicion requirement, are significantly more profound than the holding in *Wilson v. Arkansas*, which merely mandates that the "knock and announce" requirement become an integral consideration in determining the reasonableness of the execution of search warrants. Nonetheless, *Wilson v. Arkansas*, illustrates that we are not faced with a Court that is blindly reactive to Fourth Amendment reasonableness questions.

V. Conclusion

This past term illustrates that the Court is quite adept at reining in Fourth Amendment rights. It understands how to manipulate the exclusionary rule and how to expand notions of reasonableness to effect what I would characterize as a second generation retrenchment of Fourth Amendment rights.

Looking into the future, the Fourth Amendment is not one of those areas of constitutional law where the opinions rest on five-to-four majorities. Instead, these opinions are supported by very strong majorities. Six justices voted in favor of *Evans* and *Acton.* In addition, Justice Ginsburg was in the majority in *Acton*, and Justice O'Connor voted with the majority in *Evans.* Justice Stevens remains the lone protector of those more traditional Fourth Amendment rights that were granted in the early Warren Court years. I predict, therefore, a solid majority behind a continuing erosion of Fourth Amendment rights.

In closing I would like to suggest, however, that the most significant case in the criminal law and criminal procedure realm may not be a criminal law case at all but rather may be a case concerning the Commerce Clause — *United States v. Lopez.*[60] Many commentators believe that *Lopez* is indicative of the Court's willingness to rein in the Commerce Clause, which may negatively impact Congressional ability to define new federal crimes. We therefore may see a halt, or at least a slow down, in what has been a consistent trend over the last several years — the federalization of the criminal law. The impact of *Lopez*, however, is a subject for another panel, and I will leave a thorough discussion of this case to Professor Schwartz, whose discussion is presented in a subsequent article.

---

60. 115 S. Ct. 1624 (1995).