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THE ANTI CAR THEFT ACT OF 1992: FEDERAL COPS, HIGHWAY ROBBERS, AND THE CONSTITUTION

KEVIN J. COYLE*

INTRODUCTION

"Of all the inventions of the industrial age, none, perhaps, so changed American life as did the automobile."¹ During the twentieth century, at about the same time that state boundaries grew less important to a motorized citizenry, constitutional law underwent a similar transformation. Just as the car allowed average Americans to travel across the country at will, the Commerce Clause,² as interpreted by the Supreme Court, allowed the federal government to intervene in intrastate matters that had formerly been beyond its reach.³

One of the results of this transformation of the Commerce Clause was the expansion of federal criminal law.⁴ The federal criminal code currently includes more than 3000 crimes, and congressional efforts to add new crimes continue with each session.⁵ Much of the drive to federalize criminal law is the result of public pressure to do something—anything—to combat rising crime.⁶ The growth of federal ju-

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1. ARTHUR M. SCHLESINGER JR., *THE ALMANAC OF AMERICAN HISTORY* 454 (1993).

2. Congress shall have the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, sec. 8, cl. 3.

3. "It is generally agreed that the modern scope of the commerce power, as a source of legislative authority for Congress, is quite broad, even virtually unlimited." James M. Maloney, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 *FORDHAM L. REV.* 1795, 1796 (1994). See Alan R. Greenspan, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 *VAND. L. REV.* 1019, 1022-24 (1988).

4. "Under current case law, however, constitutional constraints on the growth of federal criminal law through the Commerce Clause are almost nonexistent." John S. Baker Jr., *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?*, 16 *RUTGERS L.J.* 495, 501 (1985). See Stephen Chippendale, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 *MINN. L. REV.* 455, 461-65 (1994); Robert L. Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 *ARIZ L. REV.* 271, 273-80 (1973).

5. Chippendale, *supra* note 4, at 455-56; Bill Rankin, *Congress Crossing the Line to Create New Federal Crimes?* *ATLANTA CONST.*, Jan. 30, 1994, at D1.

6. "Increasingly, though, the legislative and the executive branches have shown greater willingness to extend the federal police power into areas of traditionally local concern because of mounting public pressure for the government, state or federal, to 'do something' about crime." Baker, *supra* note 4, at 518. See Elaine S. Povich, *It's a Federal Offense: Crime Bill Loaded With*

risdiction over crimes threatens to overwhelm the federal court system with cases that, in the past, would have been handled by state courts.⁷

The most recent crime to capture national attention is "carjacking."⁸ Carjacking is the modern equivalent of highway robbery. Thieves steal cars from their drivers by use of intimidation or force, often resulting in the victim's serious injury or death. Some blame the rise of carjacking on sophisticated anti-theft devices, common in many cars today, that make "hotwiring" too difficult or inconvenient for the average thief.⁹ Carjacked vehicles are often sold to "chop shops," where they are stripped of their valuable parts, or shipped whole overseas for resale at several times their domestic value.¹⁰ This "multibillion-dollar black market"¹¹ is said to be largely controlled by organized crime.¹²

Amendments, CHI. TRIB., Nov. 14, 1993, at 1. In reaction to congressional obsession with anti-crime legislation, Sen. Joseph Biden of Delaware said, "If anyone proposed barbwiring the ankles of anyone who jaywalks, I think it would pass." *Id.*

7. The number of criminal charges filed in federal court rose from 27,910 in 1980, to 48,226 in 1992. In 1992, 17% of all federal cases were criminal, which has resulted in the tripling of the federal prison population during the last decade. Naftali Ben-David, *How Much More Can Courts, Prisons Take? It's Tempting to Federalize Crimes, But Opponents Are Gathering Momentum*, LEGAL TIMES, June 7, 1993, at 1. "The concern within the judiciary is that the courts may become so swamped with garden-variety criminal cases that their core functions of defining federal and constitutional rules, and perhaps their ability to handle civil cases at all, will be compromised." Daniel Wise, *U.S. Judges Are Wary of Fallout From Crime Bill: Concern That New Crimes Could Swamp the Courts*, N.Y.L.J., Dec. 7, 1993, at 1. Even the Chief Justice of the Supreme Court has addressed this issue:

Although legislative efforts are necessary in some areas, simple congressional self-restraint is called for in others, specifically, the federalization of crimes Those of you who have read my Annual Report on the Judiciary know what I have been saying about the recent tendency to federalize crimes for essentially political reasons without recognizing the impact federalization would have on the federal courts.

William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1657, 1660 (1992).

8. One report claimed that in 1992, carjacking incidents outnumbered bank robberies nationally. Adam Z. Horvath, *Hell on Wheels: Motorists Find 'Refuge' Gone as Carjacking Spreads*, L.I. NEWSDAY, Nov. 24, 1992, at 5 (citing Federal Bureau of Investigation statistics). *But see* Ross Daly, *Renewed Focus on Ancient Crime*, L.I. NEWSDAY, Aug. 17, 1993, at 17, in which Geoff Sundstrom, spokesman for the American Automobile Association of Orlando, Florida, said, "It's our feeling that the crimes [against motorists] themselves are increasing, especially carjacking, but we don't have any data to base this on."

9. "The crime has spread quickly from a few inner cities to become a nationwide source of fear, as thieves find it easier to victimize motorists than defeat new, high-tech alarms." Horvath, *supra* note 8, at 5. *See* F. Georgann Wing, *Putting the Breaks on Carjacking or Accelerating It? The Anti Car Theft Act of 1992*, 28 U. RICH. L. REV. 385 (1994).

10. Joseph A. Gambardello, *My Car Is Gone! You Probably Won't See It in 1 Piece Again*, N.Y. NEWSDAY, May 11, 1993, at 6.

11. *Id.*

12. "During the past few years, organized crime has recognized the tremendous profits that can be made by operating chop shops. Key syndicate figures are involved in chopshop activities across the nation." H.R. REP. NO. 102-851(II), 102d Cong., 2d Sess. 1, 18 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2829, 2851, *quoting* Memorandum of the National Automobile Theft Bureau (Nov. 20, 1984). "Organized crime syndicates have been involved in auto theft at least since the 1960's. But since the 1980's, car theft has grown increasingly organized, as a new breed of ex-

One particularly brutal carjacking incident is credited with provoking a federal response. On September 10, 1992, Pamela Basu and her infant daughter were abducted from the parking lot of a suburban mall in Maryland.¹³ As the carjackers sped away, they pushed Basu and her baby out of her car, but Basu's arm got caught in the seatbelt and she was dragged for a mile and a half to her death.¹⁴ The Anti Car Theft Act of 1992,¹⁵ which had been dormant for almost a year before the Basu incident,¹⁶ was quickly passed by outraged members of Congress and signed into law by President George Bush on October 25, 1992.¹⁷

Part I of this Note will chart the evolution of the federal government under the Constitution, from a limited government of enumerated powers to one of plenary powers that uses the Commerce Clause to usurp the traditional state role of protecting the public safety, health, and morals. Part II will discuss the Anti Car Theft Act of 1992 and examine it in light of the case law that has created what is essentially a "federal police power." Finally, this Note will conclude that, although much of the Anti Car Theft Act would pass constitutional muster under modern interpretations of the Commerce Clause, one section in particular is an improper exercise of police power best reserved to the states and should be found unconstitutional.

I. EVOLUTION OF FEDERAL POLICE POWER UNDER THE CONSTITUTION

A. Enumerated Powers

The concept of federalism, in which power is divided between the national and state governments,¹⁸ was made part of the Constitution

pensive and sophisticated cars, equipped with a growing array of gadgets and parts, multiplied the potential profits from theft." Norimitsu Onishi, *Your Car, the Sitting Duck*, N.Y. TIMES, Mar. 19, 1995, at 1, 10.

13. Horvath, *supra* note 8, at 5.

14. *Id.*

15. Pub. L. No. 102-519, 106 Stat. 3384 (1992) (codified as amended in scattered sections of 15 U.S.C., 18 U.S.C., 19 U.S.C., and 42 U.S.C.).

16. Ray Sanchez, *Carjacking: The New Menace on Highways*, N.Y. NEWSDAY, Nov. 8, 1992, at 54.

17. "This bill makes armed carjacking a Federal offense. The recent wave of these carjackings has made the need for action clear." Statement by President George Bush Upon Signing H.R. 4542 (Oct. 25, 1992), reprinted in 1992 U.S.C.C.A.N. 2903. *But see* Rankin, *supra* note 5, at D1, in which Bruce Harvey, an Atlanta defense attorney, said, "Why make something like carjacking a federal crime? . . . Shooting someone is already a state crime. Attacking and robbing someone of their car is already a state crime."

18. *See* THE FEDERALIST No. 32, at 220 (Alexander Hamilton) (Penguin Books ed. 1987), which states:

An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a

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with the adoption of the Tenth Amendment.¹⁹ The Framers of the Constitution intended the federal government to be a limited government of enumerated powers.²⁰ Since the Constitution expressly granted the federal government authority over only certain specified crimes, such as counterfeiting,²¹ "Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations,"²² and Treason,²³ general "police power" over the public safety, health, and morals was reserved to the states.²⁴

The Supreme Court, in *United States v. Hudson*²⁵ and *United States v. Coolidge*,²⁶ explicitly rejected the notion of federal jurisdiction over common-law crimes.²⁷ But in *Hudson*, the Court stated, "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of

partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.

19. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

20. "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." THE FEDERALIST No. 45, at 296 (James Madison) (Penguin Books ed. 1987). See Alexander Hamilton's opposition to the Bill of Rights in THE FEDERALIST No. 84, at 476 (Alexander Hamilton) (Penguin Books ed. 1987), in which he argued that a Bill of Rights would be "dangerous" because it "would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things should not be done which there is no power to do?"

21. U.S. CONST. art. I, sec. 8, cl. 6.

22. U.S. CONST. art. I, sec. 8, cl. 10.

23. U.S. CONST. art. III, sec. 3.

24. "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." THE FEDERALIST No. 45, at 296 (James Madison) (Penguin Books ed. 1987). The "ordinary administration of criminal and civil justice" was intended to belong "to the province of the State governments." THE FEDERALIST No. 17, at 157 (Alexander Hamilton) (Penguin Books ed. 1987).

However, the federal government was granted "exclusive Legislation in all Cases whatsoever" over territory ceded by the states to serve as the "Seat of the Government of the United States," namely Washington D.C., as well as forts and other needed federal facilities. U.S. CONST. art. I, sec. 8, cl. 17. The federal government was also given "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, sec. 3, cl. 2. By specifying the limited circumstances under which the federal government could exercise general police power, the Framers necessarily implied that such power was unavailable under ordinary circumstances, and thus was reserved to the states. "Police powers have always been identified as inherent powers of sovereignty. The federal government was not considered to have a general police power because the federal government would thereby have ceased to be a government of limited powers as intended by even the most nationalistic of the Founders." Baker, *supra* note 4, at 516-17.

25. 11 U.S. (7 Cranch) 32 (1812).

26. 14 U.S. (1 Wheat.) 415 (1816).

27. "Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers." *Hudson*, 11 U.S. at 34.

the offense.”²⁸ This affirmed the power of Congress to enact criminal statutes, but only when relating to the powers expressly granted by the Constitution.²⁹

B. *Implied Powers*

The Supreme Court expanded the legislative authority of Congress in *McCulloch v. Maryland*.³⁰ While acknowledging that the federal government was one of enumerated powers,³¹ Chief Justice John Marshall stated, “But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described.”³² Referring to the Necessary and Proper Clause,³³ Marshall found that several of the enumerated powers, read together, justified the implied power of Congress to charter a national bank.³⁴ “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”³⁵

In dicta, Marshall addressed implied powers in the criminal context. He pointed out that the power to “punish” was expressly granted in connection with only the crimes of counterfeiting, piracy, felonies committed on the high seas, and offenses against the law of nations.³⁶ However, he decided that the power to punish was implied in relation to the federal government’s other powers.³⁷

This reasoning has been instrumental in creating a federal police power. For example, Congress has been granted the power “[t]o establish Post Offices and post Roads.”³⁸ Pursuant to this power, Con-

28. *Id.*

29. “As a result, federal criminal law became purely statutory.” Baker, *supra* note 4, at 507.

30. 17 U.S. (4 Wheat.) 316 (1819).

31. *Id.* at 405.

32. *Id.* at 406.

33. Congress shall have the power “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, sec. 8, cl. 18.

See *M’Culloch*, 17 U.S. at 412-13. But see Baker, *supra* note 4, at 502, which states, “As the federal role was represented during the Constitution’s ratification debates, not even the ‘necessary and proper’ clause gives the national government any basis for exercising a general authority over ordinary crimes.”

34. *M’Culloch*, 17 U.S. at 407-08.

35. *Id.* at 421.

36. *Id.* at 417.

37. “The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers.” *Id.* at 418.

38. U.S. CONST. art. I, sec. 8, cl. 7.

gress enacted the predecessor to the Mail Fraud Act,³⁹ known as the Act of June 8, 1872.⁴⁰ This statute was upheld as constitutional in *Durland v. United States*.⁴¹ However, one commentator, a prominent federal jurist, criticized the statute as “covert legislation” — the use of a constitutional power as merely “a peg whereon to hang prosecution” of intrastate fraud in which use of the mails was nominally related, at best, to the fraudulent scheme and which should be left to the states for prosecution.⁴²

C. *The Commerce Clause*

The power most often used as the basis for federal authority is the Commerce Clause.⁴³ While the Framers may have viewed the Commerce Clause as a modest grant of power,⁴⁴ surely they could not have foreseen the vast expansion of its scope over intrastate activities, as interpreted by the Supreme Court.⁴⁵

1. *Gibbons v. Ogden*

In *Gibbons v. Ogden*,⁴⁶ the Supreme Court addressed the question of whether the State of New York could grant a monopoly over steamboat traffic that excluded others from running ferry service on the

39. 18 U.S.C. sec. 1341 (1994).

40. 17 Stat. 323 (1872).

41. 161 U.S. 306 (1896).

42. “Lawyers will increasingly deal with statutes whose constitutional support bears no sincere relation to the legislative and popular purposes sought to be attained. This is covert legislation.” Charles Merrill Hough, *Covert Legislation and the Constitution*, 30 HARV. L. REV. 801, 801 (1917) (the author, who served on the Court of Appeals for the Second Circuit at the time his article was written, became chief judge in 1926). See Camille Kenny, *Federal Criminal Jurisdiction: A Case Against Making Federal Cases*, 14 SETON HALL L. REV. 574, 580-86 (1984).

43. See *supra* note 2.

44. One commentator argued that the lack of extensive discussion and debate about the Commerce Clause at the Constitutional Convention, in the Federalist Papers, and other contemporary writings indicates that the Framers saw the Commerce Clause as uncontroversial and unthreatening to the principals of federalism.

If the power over commerce among the states was intended by the Framers to be an independent grant of affirmative power over domestic affairs, then there certainly would have been more conflict over it . . . Clearly, commerce was distinct from domestic affairs and the commerce clause was not perceived to be a broad grant of domestic power.

Greenspan, *supra* note 3, at 1023-24.

45. *Id.* at 1021, which states:

The growth of the federal police power based on the commerce clause disrupts the delicately balanced federal system. As federal power expands, state governments are displaced from their traditional role as the primary authority over individuals. Individuals increasingly are governed by a large federal bureaucracy that is not as accountable, democratic, or responsive as state and local governments and which cannot provide for local diversity. The demise of federalism ultimately will threaten individual rights because centralization eventually leads to regulation without adequate representation.

46. 22 U.S. (9 Wheat.) 1 (1824).

Hudson River between New York and New Jersey.⁴⁷ In striking down the New York statute, Chief Justice Marshall's opinion on the scope of the Commerce Clause has become the subject of lengthy debate, with both sides arguing that it supports their position.

Marshall held that the term "commerce" should not be construed so strictly⁴⁸ as to exclude "navigation" from its reach.⁴⁹ "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."⁵⁰ Marshall defined this "commercial intercourse" as something that "cannot stop at the external boundary line of each State, but may be introduced into the interior."⁵¹ The power of Congress to regulate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."⁵²

Marshall's pronouncements have been said to have authorized the expansion of federal power over intrastate and local activities that exists today.⁵³ However, his opinion does include indications to the contrary; that the Commerce Clause was not meant to serve as authority for vast federal police power that would override the limitations of the Tenth Amendment.⁵⁴ Marshall also said, "[t]he completely internal commerce of a State, then, may be considered as reserved for the State itself."⁵⁵ Marshall acknowledged the states' police power—their authority to pass inspection, quarantine, and health laws, and laws regulating internal commerce—and ruled that it is included within "a portion of that immense mass of legislation, which embraces every

47. *Id.* at 1-3.

48. "This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule?" *Id.* at 187.

49. "All America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed." *Id.* at 190.

50. *Id.* at 189-90.

51. *Id.* at 194.

52. *Id.* at 196.

53. See *infra* notes 150-55 and accompanying text.

54. "The *Gibbons* Court, however, acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause." *United States v. Lopez*, 115 S. Ct. 1624, 1627 (1995). See *infra* notes 205-19 and accompanying text. One commentator argued:

[T]he Tenth Amendment, as an articulation of the principle of a federal government of limited, enumerated powers, is dependent on the assumption that the Commerce Clause is not (or will not become) a grant of unlimited power. Indeed, if the commerce power is truly without limits, then there are no 'powers not delegated to the United States [that must be] reserved to the States[,] and the Tenth Amendment is without meaning.

Maloney, *supra* note 3, at 1802.

55. *Gibbons*, 22 U.S. at 195.

thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves."⁵⁶ The federal government could reach the internal activities of a state only for "national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given."⁵⁷

2. Commerce Power During the Nineteenth Century

In *Brown v. Maryland*,⁵⁸ the Court wrestled with the distinction between the commerce power following *Gibbons* and the reserved powers of the states. The Court struck down a Maryland tax on imported goods as violating the Commerce Clause, but recognized the difficulty in determining where the federal commerce power ended and the states' reserved powers began, and to what extent they could be exercised concurrently. Maryland's power of taxation, "and the [Commerce Clause] restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colours [sic] between white and black, approach so nearly as to perplex the understanding, as colours perplex the vision in marking the distinction between them."⁵⁹

Regardless of the commerce power's actual scope following *Gibbons*, the Supreme Court initially refused to allow its expansion at the expense of the states' police power. In *United States v. DeWitt*,⁶⁰ the Court ruled that a federal law⁶¹ regulating the quality of illuminating oils for sale went beyond the proper scope of the commerce power, since the statute was a "police regulation" that purported to reach the internal commerce of the states.⁶² The Court concluded that its holding, which recognized the limits of the commerce power over a state's internal commerce, was self-evident.⁶³ Essentially, the Court chastised Congress for attempting to exercise power that the Constitution

56. *Id.* at 203.

57. *Id.* at 203-04.

58. 25 U.S. (12 Wheat.) 419 (1827).

59. *Id.* at 441.

60. 76 U.S. (9 Wall.) 41 (1869).

61. Internal Revenue Act of March 2, 1867, 14 Stat. 484 (1867).

62. "As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as for example, in the District of Columbia. Within State limits, it can have no constitutional operation." *DeWitt*, 76 U.S. at 45.

63. "This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion." *Id.*, citing License Cases, 46 U.S. (5 How.) 504 (1847); Passenger Cases, 48 U.S. (7 How.) 283 (1849); and License Tax Cases, 72 U.S. (5 Wall.) 462, 470 (1866).

had reserved to the states by using its own power to preserve the principals of federalism.⁶⁴

In *United States v. E.C. Knight Co.*,⁶⁵ the Court attempted to clarify the distinction between the federal commerce power and the states' police power.⁶⁶ The Court defined each power as "exclusive"⁶⁷ and stated:

It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government. . . .⁶⁸

The Court rejected the idea that a manufacturer's intent to ship its goods interstate was alone sufficient to grant the federal government jurisdiction; the goods must in fact be "in commerce" before Congress can regulate the goods or their manufacturer.⁶⁹ The Court warned against applying a broader test that would extend national power to all activities in which the "ultimate result may affect external commerce, [because] comparatively little of business operations and affairs would be left for state control."⁷⁰

64. In *M'Culloch*, 17 U.S. at 423, Marshall defined the Court's duty as the guardian of federalism as follows:

Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

In recent years, the Court has abdicated its responsibility to federalism and left its preservation to the political process. See *infra* notes 200-04 and accompanying text. This is precisely the result Alexander Hamilton insisted would not occur under the Constitution. See *supra* note 18.

65. 156 U.S. 1 (1895).

66. "That 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.

67. *Id.* at 11, which states:

It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive On the other hand, the power of Congress to regulate commerce among the several states is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints.

68. *Id.* at 13.

69. "The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce." *Id.*

70. *Id.* at 16.

3. From Commerce Power to Federal Police Power

The police power reserved to the states, as recognized by the Supreme Court during the nineteenth century, concerned more than just internal commercial activities:

It is based on the great principle of securing the public safety and involves the protection of the lives, limbs, health and quiet of the person, and the security of property. It is co-extensive with self-protection; it is the law of overruling necessity, it is inherent in the State and plenary, and enables it to prohibit all things hurtful to the comfort and welfare of society.⁷¹

As a result, perhaps, most of the Commerce Clause cases to arise during that period concerned federal statutes that were clearly commercial in nature.⁷² The power to enact "criminal" laws was unquestionably that of the states, so Congress did not attempt to infiltrate this area.⁷³ However, during the twentieth century, the federal statutes challenged in the courts began to take on "criminal" characteristics, and the federal police power soon evolved.

In *Champion v. Ames*,⁷⁴ the Court addressed the constitutionality of a federal statute banning the interstate traffic of lottery tickets.⁷⁵ Although the "widespread pestilence of lotteries" had been criminalized by many states because they were thought to be "an evil of such appalling character,"⁷⁶ their interstate transport could not be prevented by the states due to the Supreme Court's invention of the "Dormant" Commerce Clause.⁷⁷ As a result, the Supreme Court

71. Paul Fuller, *Is There a Federal Police Power?*, 4 COLUM. L. REV. 563 (1904).

72. "It might be suggested that commerce can only be had in the recognized and admitted articles of commerce . . . articles which universal commercial usage recognizes as the subjects of commerce, and that commerce cannot be predicated of transactions in articles the use of which is branded as a crime." *Id.* at 584. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824), in which Chief Justice Marshall defines "commerce" as "commercial intercourse." Although the term "intercourse" can be said to broaden the idea of "commerce" to include navigation, the term "commercial" clearly limits "intercourse" to transactions that are commercial in the common-usage sense of the term.

73. "The restraint with which the commerce clause has been expounded for over a century is perhaps the most remarkable example of a certain continuity of thought in the Supreme Court persisting through generations of men and politics." Hough, *supra* note 42, at 806.

74. Also known as the Lottery Case, 188 U.S. 321 (1903).

75. Act of March 2, 1895, 28 Stat. 963 (1895) (codified as amended at 18 U.S.C. sec. 1301 (1994)).

76. *Champion*, 188 U.S. at 357-58.

77. The "Dormant" Commerce Clause prevents the states from erecting any barriers whatsoever to interstate commerce, even in the absence of federal legislation, and was recognized in *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 204 (1885). In *Leisy v. Hardin*, 135 U.S. 100 (1890), the Court, in a decision significantly limiting a state's police power, struck down a state statute prohibiting most liquor sales, including the sale of liquor imported from outside the state. The Court ruled:

[I]nasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform

made federal legislation the only available option to effectively control the sale of lottery tickets.⁷⁸

In a five-to-four decision, the Court upheld the statute and the federal government's ability to exclude from interstate commerce items that Congress finds to be "confessedly injurious to the public morals."⁷⁹ The *Champion* decision made significant inroads for the federal government into an area of the states' police power—the protection of the public morals—that had been untouched by previous federal legislation.⁸⁰ The Court justified this intrusion into the exclusive realm of the states by reasoning that Congress had intended merely to assist the states in protecting the morals of their own citizens.⁸¹ However, the Court cautiously limited its decision to the facts of that case.⁸²

For a short time, the Court declined to expand federal police power beyond the exclusion of lottery tickets from interstate commerce.⁸³ In

system, so long as Congress does not pass any law to regulate it, or allowing the States to do so, it thereby indicates its will that such commerce shall be free and untrammelled. *Id.* at 109-10 (citations omitted).

78. The Court found Congress to be the "only power competent" to prevent one state's lottery tickets from circumventing another state's ban by using interstate commerce. *Champion*, 188 U.S. at 357-58. "Thus, regardless of the congressional motive or the broad dicta in the *Champion* opinion, the Lottery Act regulated a matter which the Court had put beyond the power of the states." Baker, *supra* note 4, at 523-24 (characterizing the wisdom of the *Leisy* decision as "debatable"). The *Leisy* decision, as applied to state police power, appears to have gone beyond the limits of the Dormant Commerce Clause, as set forth five years earlier in *Gloucester* 114 U.S. at 215, which states:

Should such [state] regulations interfere with the commercial power of Congress, they may at any time be superseded by its action. It was not intended, however, by the grant to Congress to supersede or interfere with the power of the States to establish police regulations for the better protection and enjoyment of property.

79. *Champion*, 188 U.S. at 357.

80. "It is the moral foundation that makes this legislation, and the opinion approving it, so important. Congress was not regulating commerce for the purpose of protecting commercial transactions but for the purpose of protecting the public morals. No previous case had recognized such a power under the Commerce Clause." Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213, 218 (1984).

81. *Champion*, 188 U.S. at 357. The dissent argued that lottery tickets are not articles of commerce, and the mere transportation of non-commercial items across state lines was insufficient to transform them into commercial items subject to the federal commerce power. *Id.* at 371 (Fuller, C.J., dissenting).

It would be to say that everything is an article of commerce the moment it is taken to be transported from place to place, and of interstate commerce if from State to State . . . It is a long step in the direction of wiping out all traces of state lines, and the creation of a centralized Government.

Id.

82. "The whole subject is too important, and the questions suggested by its consideration are too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause." *Id.* at 363.

83. This judicial restraint did not last long. In *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311 (1916), the Court upheld a federal statute similar to the one at issue in *Champion* that banned the interstate transport of intoxicating liquors to states that had banned their intrastate sale.

Keller v. United States,⁸⁴ the Court acknowledged the federal government's power to enact terms and conditions for the admission of aliens into the United States,⁸⁵ but refused to grant Congress unlimited authority over the activities of resident aliens and to allow Congress to criminalize the acts of others who sought to "keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States. . . ."⁸⁶ In overturning the convictions under this federal statute, the Court stated that the power to protect the public morals was generally reserved to the states.⁸⁷ However, the Court recognized that Congress was poised to intervene in this area and may have the power to do so under different circumstances.⁸⁸

The Court revisited the issue of prostitution five years later, in *Hoke v. United States*.⁸⁹ Here, the Court upheld the "White Slave Act,"⁹⁰ which made it a federal crime for anyone knowingly to transport or assist in transporting a woman or girl in interstate commerce "for the purpose of prostitution or debauchery, or any other immoral purpose."⁹¹ The Court ruled that people can be said to move in interstate commerce and thus fall under federal regulation.⁹² The Court recognized the existence of a federal police power over interstate

84. 213 U.S. 138 (1908).

85. Congress shall have the power "[t]o establish a uniform Rule of Naturalization" U.S. CONST. art. I, sec. 8, cl. 4.

86. Act of Congress of February 20, 1907, sec. 3, 34 Stat. 898 (1907).

87. The Court ruled:

While the keeping of a house of ill-fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the States. Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, that power is reserved to the States, for there is in the Constitution no grant thereof to Congress.

Keller, 213 U.S. at 144.

88. The Court warned that:

[A]n immense body of legislation, which heretofore has been recognized as peculiarly within the jurisdiction of the States, may be taken by Congress away from them. Although Congress has not largely entered into this field of legislation, it may do so, if it has the power. Then we should be brought face to face with such a change in the internal conditions of this country as was never dreamed of by the framers of the Constitution.

Id. at 148-49. This change came three years later in *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911), which upheld the Pure Food and Drug Act, 34 Stat. 768 (1906). The Court ruled that Congress could ban impure food and drugs from interstate commerce and could seize them even after they left "commerce" and came to rest in a particular state. While this case dealt with a "regulatory" rather than a "criminal" statute, it significantly expanded the federal police power.

89. 227 U.S. 308 (1913).

90. Act of Congress of June 25, 1910, 36 Stat. 825 (1910), also known as the Mann Act.

91. *Id.* sec. 2. "The effect of regulating persons based on their purposes, i.e., motive or intent, however, was to create a 'true' crime rather than a regulatory offense." Baker, *supra* note 4, at 527.

92. "Commerce among the States, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property. There may be, therefore,

commerce, similar to what the states possessed within their borders, since the states could not criminalize what occurred "among the several States."⁹³ The Court further upheld the White Slave Act in *Caminetti v. United States*,⁹⁴ which held that the language of the statute did not limit its enforcement to transportation of women for the purpose of prostitution only, but for "any other immoral purpose," with or without the expectation of profit.⁹⁵ Thus, "commercial" interests were divorced from the notion of "interstate commerce," which could now be said to criminalize any activity at all that Congress found to threaten public morals and that crossed state lines.

The Court strayed somewhat from several of its contemporary decisions⁹⁶ in *Hammer v. Dagenhart*.⁹⁷ In this case, the Court struck down a federal statute that prohibited the interstate transport of goods manufactured in a factory that employed child labor.⁹⁸ Although the Court implicitly recognized a federal police power, and with it the power to exclude from interstate commerce goods that were harmful to the public health, safety, or morals, it limited this power to goods that were inherently harmful at the time of interstate shipment. The Court would not allow Congress to regulate goods that were not in-

a movement of persons as well as property; that is, a person may move or be moved in interstate commerce." *Hoke*, 227 U.S. at 320.

Later, the Court upheld federal jurisdiction over kidnapping in *Gooch v. United States*, 297 U.S. 124 (1936). The Act of May 18, 1934, 48 Stat. 781 (1934), also known as the Lindbergh Act, prohibited the interstate transport of a person who had been kidnapped or held for ransom. This statute made interstate transport a separate element of the offense, but included a rebuttable presumption that a kidnapping victim has been transported in interstate commerce if not released within three days. This time period was reduced to 24 hours in 1956. 18 U.S.C. sec. 1201(b) (1994).

93. The Court reasoned:

Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.

Hoke, 227 U.S. at 322. See *Westfall v. United States*, 274 U.S. 256, 259 (1927), which states, "[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so."

94. 242 U.S. 470 (1917).

95. The Court stated:

While such immoral purpose would be more culpable in morals and attributed to baser motives if accompanied with the expectation of pecuniary gain, such considerations do not prevent the lesser offense against morals of furnishing transportation in order that a woman may be debauched, or become a mistress or a concubine from being the execution of purposes within the meaning of this law.

Id. at 486.

96. *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311 (1916) (see *supra* note 83); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (see *supra* note 88); *Champion v. Ames*, 188 U.S. 321 (1903) (see *supra* notes 74-82 and accompanying text).

97. 247 U.S. 251 (1918).

98. Act of September 1, 1916, 39 Stat. 675 (1916).

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herently harmful, or goods that may have been manufactured intrastate under objectionable conditions.⁹⁹

Rather than overturn *Hammer*, the Court sidestepped its limitations in *Brooks v. United States*.¹⁰⁰ The Court upheld the Dyer Act¹⁰¹ and extended the federal government's power to ban interstate shipment of "contraband," such as stolen automobiles and presumably other stolen property specified in forthcoming statutes that may or may not otherwise be regulated under *Hammer*,¹⁰² because of "its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions."¹⁰³ Although the stolen cars themselves could not be said to be inherently harmful at the time of interstate transport, and although the theft that preceded the transport occurred entirely intrastate, the Court granted Congress the power to prevent the "misuse" of the channels of interstate commerce, similar to that available under *Champion, Hoke, and Caminetti*, to prevent car thieves from escaping capture by fleeing across state lines with the stolen cars.¹⁰⁴

99. The Court ruled:

Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation . . . There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition.

Hammer, 247 U.S. at 272-73. This appears to be an attempt to reconcile federal police power with the Court's holding in *United States v. E.C. Knight Co.*, 156 U.S. 1, 13 (1895), which limited the exercise of federal commerce power to only those goods actually "in commerce," regardless of a manufacturer's intent to later ship them interstate. See *supra* notes 65-70 and the accompanying text.

But the dissent in *Hammer* argued, "It does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil." *Hammer*, 247 U.S. at 279-80 (Holmes, J., dissenting). This view was eventually adopted by the majority of the Court, which later went beyond even its broad sweep. See *infra* notes 135-42 and the accompanying text.

100. 267 U.S. 432 (1925).

101. The National Motor Vehicle Theft Act, 41 Stat. 324 (1919) (codified as amended at 18 U.S.C. sec. 2312-2313 (1994)).

102. The Court stated:

Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce.

Brooks, 267 U.S. at 436-37.

103. *Id.* at 439.

104. One commentator stated:

While the Dyer Act did not break any new ground in the development of the jurisdictional authority of the federal government, it proved to be vital in the exercise of that authority. Despite the fact that detection and recovery of stolen vehicles remained overwhelmingly the province of state and local police, *prosecution* of those offenses was virtually completely taken over by the federal government, with Dyer Act cases making up nearly half of the FBI closed cases for many years.

Bradley, *supra* note 80, at 225.

The federal police power, as established by *Champion* and its progeny, may not have been what the Framers intended when they drafted the Commerce Clause, but at least it had limits. Congress could prevent the use of interstate commerce for what it found to be immoral purposes, but only when the person or property crossed state lines, and only while the "evil" sought to be eradicated was in existence while the person or property was "in commerce." This arrangement preserved the states' police power over the local activities of its citizens, since only the states could punish evils that existed before or after the person or property traveled interstate. The Eighteenth Amendment,¹⁰⁵ which heralded the era of Prohibition,¹⁰⁶ implicitly recognized these limits, since the Amendment purported to give Congress concurrent power over intrastate activities relating to alcohol that it otherwise did not have.¹⁰⁷ But these limits soon disappeared with the reign of President Franklin Delano Roosevelt.¹⁰⁸

4. The New Deal

Outraged by the Supreme Court's rejection of many of his New Deal legislative efforts, President Roosevelt unveiled a plan to reorganize the federal judiciary.¹⁰⁹ FDR's "court-packing plan," which would have added six justices—all FDR appointees—to the Supreme

105. U.S. CONST. amend. XVIII (repealed 1933), ratified on January 16, 1919, states, in relevant part:

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

106. Prohibition was repealed on December 5, 1933, by the adoption of the Twenty-First Amendment. However, this Amendment retained the federal power, first recognized by the Court in *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311 (1916), to prohibit the transportation of alcohol into states that have passed their own laws banning alcohol. U.S. CONST. amend. XXI, sec. 2.

107. See *Herbert v. Louisiana*, 272 U.S. 312, 315 (1926) (quoting *United States v. Lanza*, 260 U.S. 377, 381 (1922)), which states:

Save for some restrictions arising out of the Federal Constitution, chiefly the [dormant] commerce clause, *each State possessed that power in full measure* prior to the Amendment, and the probable purpose of declaring a concurrent power to be in the States was to negate any possible inference that in vesting the National Government with the power of country-wide prohibition, state power would be excluded.

(Emphasis added).

108. Roosevelt was inaugurated the 32d president of the United States on March 4, 1933. He was elected to an unprecedented four terms, and remained in office until his death in April 1945. His legislative program, and his presidency, was dubbed the "New Deal." SCHLESINGER, *supra* note 1, at 461-62. "In fact, the expansion of federal power under the commerce clause only began with the administration of President Franklin Roosevelt. During the first century under the Constitution, Congress rarely attempted to exercise its power over interstate commerce." Greenspan, *supra* note 3, at 1022.

109. SCHLESINGER, *supra* note 1, at 472-73.

Court if any of the justices over seventy years old refused to retire, was ostensibly designed to improve the Court's efficiency.¹¹⁰ In fact, this plan, if passed by Congress, would have given FDR the majority he needed to overturn *Lochner v. New York*,¹¹¹ the largest hurdle in his drive to centralize control of the Depression-Era economy.¹¹² Although the plan never went into effect,¹¹³ the Court got the message. Less than two months later,¹¹⁴ in the "switch in time that saved nine," the Court overruled *Adkins v. Children's Hospital*¹¹⁵—a progeny of *Lochner*—in *West Coast Hotel v. Parrish*.¹¹⁶ With *Lochner* called into question and a Court more willing to approve New Deal legislation, federal power under the Commerce Clause increased dramatically.¹¹⁷

Before FDR announced his court-packing plan, the Court had attempted to preserve the limits of the "in commerce" rationale justifying federal action. In *A.L.A. Schechter Poultry Corp. v. United States*,¹¹⁸ the Court addressed the constitutionality of the Live Poultry Code, promulgated under the National Industrial Recovery Act,¹¹⁹ which was intended to ensure "fair competition" in the New York City live poultry business.¹²⁰ The Court found that, although the chickens to be slaughtered originated largely out of state, the activities in the slaughterhouse were intrastate and could not be regulated by Congress.¹²¹ The Court ruled that the Code was unconstitutional because it sought to regulate activity that was beyond the "current" or "flow" of interstate commerce.¹²² The Court asserted that the distinction be-

110. *Id.*

111. 198 U.S. 45 (1905).

112. SCHLESINGER, *supra* note 1, at 472-73.

113. In March 1937, Congress passed the Supreme Court Retirement Act, which allowed justices to retire with full pay at seventy years old. This was passed in an attempt to entice the older, more conservative justices into retirement, and served as a compromise more acceptable than the controversial court-packing plan, which alienated many of FDR's allies. *Id.* at 473. However, by 1941 Roosevelt managed to appoint a majority of the Supreme Court anyway: Black replaced Van Devanter, who retired; Reed replaced Sutherland, who retired; Frankfurter replaced Cardozo, who died; Douglas replaced Brandeis, who retired; Murphy replaced Butler, who died; Byrnes replaced McReynolds, who retired; and Jackson filled the vacancy left when Stone was promoted to Chief Justice following the retirement of Hughes. Maloney, *supra* note 3, at 1808 n.82.

114. SCHLESINGER, *supra* note 1, at 472-73.

115. 261 U.S. 525 (1922).

116. 300 U.S. 379 (1937).

117. "In the course of five years, the Court completely reinterpreted the commerce clause to allow broad economic regulation." Greenspan, *supra* note 3, at 1028.

118. 295 U.S. 495 (1935).

119. Act of June 16, 1933, 48 Stat. 195, 196 (1933) (codified as amended at 15 U.S.C. sec. 703, now omitted).

120. *See id.* sec. 3.

121. *Schechter*, 295 U.S. at 542-43.

122. *Id.* at 543, which states:

tween “direct” and “indirect” effects of intrastate transactions on interstate commerce is “a fundamental one, essential to the maintenance of our constitutional system,”¹²³ and that activities that have merely an indirect effect on interstate commerce should remain within the states’ police power.¹²⁴ But only two years later, after the “switch in time that saved nine,” the Court reversed itself on a situation that was substantially the same as that presented in *Schechter*. In *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*,¹²⁵ the Court addressed the question of whether the federal government, through one of its agencies,¹²⁶ could prevent an employer from engaging in anti-union business practices. While acknowledging the importance of maintaining the distinction between “national” and “local” commerce,¹²⁷ the Court nevertheless adopted a broad constitutional test that allowed the federal government to regulate any activity, including that which takes place completely intrastate, that “affects commerce” or has a “close and substantial relationship” with interstate commerce.¹²⁸ This effectively overturned the Court’s prior holdings in *E. C. Knight*¹²⁹ and *Schechter*.¹³⁰

As the commerce power expanded, so did the federal police power that depended on it.¹³¹ In *United States v. Rock Royal Co-Op.*,¹³² the

The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had ceased.
123. *Id.* at 548.

124. *Id.* at 546, which states:

If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government.

125. 301 U.S. 1 (1937).

126. National Labor Relations Act, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. sec. 151) (1994)). The statute established the National Labor Relations Board and declared that inequality in bargaining power between corporations and employees, which leads to strikes and labor unrest, “substantially burdens and affects the flow of commerce . . .” 29 U.S.C. sec. 151 (1994).

127. *Jones & Laughlin*, 301 U.S. at 30, 37.

128. “Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.” *Id.* at 37.

129. See Maloney, *supra* note 3, at 1808. See *supra* notes 65-70 and accompanying text.

130. See *supra* notes 118-24 and accompanying text. “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 or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources.” *Jones & Laughlin*, 301 U.S. at 36.

131. One commentator argued:

When Congress later heavily regulated the economy under the Commerce Clause, and when the Court fully validated that power in the 1940’s, it made possible further expansion

Court upheld federal police power as defined by *Hoke* and *Caminetti*.¹³³ But the Court did not stop there—it ruled that when intrastate transactions were commingled with interstate transactions, the federal government could regulate both without having to distinguish between them,¹³⁴ undermining another aspect of *Schechter*.¹³⁵

The commerce power expanded further in *United States v. Darby*.¹³⁶ *Darby*, which expressly overruled *Hammer*,¹³⁷ held that the commerce power was plenary,¹³⁸ that it included the police power,¹³⁹ and that it could be exercised to exclude articles from interstate commerce regardless of whether the individual states enacted their own legislation.¹⁴⁰ The Court adopted the “rational relationship” test for determining the constitutionality of federal statutes that reached intrastate activities¹⁴¹ and stated that the motive for enacting legislation was irrelevant, even if Congress blatantly used the Commerce Clause as a mere “constitutional peg” on which to hang regulations that had little to do with interstate commerce.¹⁴² *Darby* held that the Tenth

of national police powers by merging the criminal and non-criminal lines of cases. Federal auxiliary criminal law could have enlarged to the point of placing most crime within the potential reach of the federal police power.

Baker, *supra* note 4, at 518.

132. 307 U.S. 533 (1939).

133. “The authority of the Federal Government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce.” *Id.* at 569-70.

134. “Activities conducted within state lines do not by this fact alone escape the sweep of the Commerce Clause. Interstate commerce may be dependent upon them.” *Id.* at 569.

135. *See supra* note 122.

136. 312 U.S. 100 (1941).

137. *Id.* at 116-17.

138. *Id.* at 115.

139. *Id.* at 114.

140. *Id.* This went beyond the justification for the federal police power first put forth in *Champion v. Ames*, 188 U.S. 321 (1903). The *Darby* Court stated:

Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.

Darby, 312 U.S. at 114. *See supra* notes 74-82 and accompanying text.

141. “It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.” *Darby*, 312 U.S. at 118. One commentator criticized this approach, stating, “The rational basis test supports legislation that regulates purely local behavior for the purpose of promoting or protecting the public health, welfare, or morality Not only has the commerce clause become the source of federal police power, it has become an unlimited source.” Greenspan, *supra* note 3, at 1020-21.

142. *Darby* 312 U.S. at 115. “In other words, under *Darby*, Congress could regulate intrastate work conditions as a means of enforcing its ‘permitted end’ of prohibiting the interstate transport of the products of such work conditions.” Maloney, *supra* note 3, at 1810. *See supra* notes 38-42 and accompanying text.

Amendment was a mere “truism” that would no longer serve as a bar to the growth of federal power.¹⁴³

In *Wickard v. Filburn*,¹⁴⁴ the Court decided whether wheat production quotas¹⁴⁵ were constitutional when applied to wheat that the farmer had no intention of selling but planned to grow for only himself and his family. The Court surpassed the limits of its previous holding in *Jones & Laughlin*, which gave the federal government power over intrastate activities only when they had a “close and substantial relationship” with interstate commerce.¹⁴⁶ The Court found that, although the amount of wheat in question was trivial, its potential effects on interstate commerce were substantial when considered in the aggregate with all other farmers similarly situated.¹⁴⁷ It made no difference that the wheat subject to regulation would never enter the stream of commerce, since it would compete with wheat that the farmer otherwise would have purchased at market for his family, and, therefore, it would have a “negative” effect on interstate commerce.¹⁴⁸ The Court expressly rejected the distinction between “direct” and “indirect” effects on interstate commerce, emphasized in *Schechter*, stating that “even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce. . . .”¹⁴⁹

The *Wickard* Court relied on *Gibbons* to justify the vast expansion in federal power that resulted from this decision.¹⁵⁰ The Court argued that, in overturning the narrow interpretation of the Commerce Clause that had persisted throughout most of the nineteenth and into the early twentieth century, it was in fact returning to the original,

143. Compare the Court’s view of the Tenth Amendment in *Darby* with that expressed 34 years earlier in *Kansas v. Colorado*, 206 U.S. 46, 90-91 (1907), which stated that the passage of the Tenth Amendment

disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be construed fairly and liberally so as to give effect to its scope and meaning.

144. 317 U.S. 111 (1942).

145. These quotas were established by the Agricultural Adjustment Act of 1938, 52 Stat. 31 (1938) (codified as amended at 7 U.S.C. sec. 1281 (1994) *et. seq.*), and were intended to stabilize the price of wheat by controlling the amount grown and made available for market. See 7 U.S.C. sec. 1301 (1994).

146. See *supra* notes 125-30 and accompanying text.

147. “That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.” *Wickard*, 317 U.S. at 127-28.

148. “Home-grown wheat in this sense competes with wheat in commerce.” *Id.* at 128.

149. *Id.* at 125. This completed the dismantling of the holding in *Schechter*, which had been handed down only eight years earlier.

150. *Id.* at 120.

expansive definition of the commerce power articulated by Chief Justice Marshall.¹⁵¹ The Court went on to state that Congress had not yet even come close to reaching the limits of Marshall's vision of the commerce power.¹⁵² In reaching this conclusion, however, the Court ignored the Framers' intent¹⁵³ and Marshall's own expressed limitations on this power.¹⁵⁴ The resulting demise of federalism is the legacy of the New Deal.¹⁵⁵

5. Modern Federal Police Power

Because of the expansion of the commerce power during the New Deal, the federal police power continued to grow¹⁵⁶ and gain a certain legitimacy.¹⁵⁷ However, even after the New Deal, the extent of the federal police power over criminal matters, as opposed to the expansive power to regulate commerce, remained in doubt. Generally, federal criminal statutes based on the commerce power were required to possess a "nexus" to interstate commerce that was somewhat stronger than that of the "affects commerce" rationale of *Darby*.¹⁵⁸

In *Tot v. United States*,¹⁵⁹ the Court addressed the constitutionality of the Federal Firearms Act,¹⁶⁰ which prohibited convicted felons from receiving guns and ammunition that had been transported in interstate commerce. This statute contained a presumption that if the federal prosecutor could prove a prior conviction for a crime of violence and present possession, the jury could presume that the gun or ammunition was received in interstate commerce after the effective date of the statute.¹⁶¹

151. "Even while important opinions in this line of restrictive authority were being written, however, other cases called forth broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall . . ." *Id.* at 122.

152. "At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded." *Id.* at 120.

153. *See supra* notes 18-24 and accompanying text.

154. *See supra* notes 53-57 and accompanying text.

155. "Thus, as part of the belief of the time that the solution to the nation's problems could come from Washington, a 'new deal' in criminal law enforcement began." Bradley, *supra* note 80, at 232.

156. "As already indicated, development of national police powers through the Commerce Clause has in large part resulted from not distinguishing between crimes and regulatory offenses and from disconnecting the jurisdictional and criminal elements." Baker, *supra* note 4, at 538.

157. The Act of June 5, 1948, 62 Stat. 686 (1948) (codified as amended at 18 U.S.C. sec. 10 (1994)) amended the statutory definition of "interstate commerce" by replacing the term "transportation" with "commerce," thereby adopting the broader connotation of the latter term to reflect the New Deal case law on the subject.

158. Chippendale, *supra* note 4, at 460; Maloney, *supra* note 3, at 1811.

159. 319 U.S. 463 (1943).

160. 52 Stat. 1250-1251 (1938) (codified as amended at 15 U.S.C. sec. 902(f) (1994)).

161. *Id.* *See Tot*, 319 U.S. at 466.

First, the Court pointed out that both of the courts below and the government agreed that enforcement of the statute was limited to receipt of the prohibited items as a part of interstate transportation “and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate.”¹⁶² Next, the Court struck down the presumption of interstate transport as violative of the Due Process Clauses of the Fifth and Fourteenth Amendments.¹⁶³ The resulting statute could reach firearms possession by felons only when the government could prove the required nexus to interstate commerce—that the felon received the contraband as part of an interstate transaction.

In *United States v. Five Gambling Devices*,¹⁶⁴ the Court, in a plurality opinion, affirmed the dismissal of indictments under a federal statute¹⁶⁵ that banned the shipment of gambling machines in interstate commerce and required the reporting of sales and deliveries to the Attorney General. The Court pointed to the government’s failure to allege that the gambling machines had moved in interstate commerce,¹⁶⁶ thereby making this fact an element of the offense necessary to find nexus, and read the prohibition and reporting requirements to apply to interstate transactions only, rather than striking down the statute in its entirety.¹⁶⁷ The dissent applied the *Darby* “affects commerce” rationale and found no need to read the statute restrictively.¹⁶⁸

Apparently, the dissent’s view in *Five Gambling Devices* began to take hold by the next decade in two cases resulting from the passage

162. *Tot*, 319 U.S. at 466.

163. “Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.” *Id.* at 467-68. See U.S. CONST. amend. V & XIV.

164. 346 U.S. 441 (1953).

165. Act of January 2, 1951, 64 Stat. 1134 (1951) (codified as amended at 15 U.S.C. secs. 1171-1177 (1994)).

166. *Five Gambling Devices*, 346 U.S. at 442.

167. *Id.* at 448-49, which states:

This is not because we would avoid or postpone difficult decisions. The predominant consideration is that we should be sure Congress has intentionally put its power in issue by the legislation in question before we undertake a pronouncement which may have far-reaching consequences upon the powers of the Congress or the powers reserved to the several states. However, one commentator argued that the reporting requirement, as applied to both intrastate and interstate transactions, should have been upheld because it would have facilitated effective enforcement of the interstate transport ban by helping the government weed out intrastate transactions. Stern, *supra* note 4, at 275-76. “Certainly, the relationship of the reporting requirement, even for intrastate transactions, to the enforcement of the substantive interstate prohibition was closer than the effect upon interstate commerce of the substantive prohibition of completely intrastate transactions in the more recent loan shark and firearms statutes to be discussed.” *Id.* at 276.

168. *Five Gambling Devices*, 346 U.S. at 460 (Clark, J., dissenting).

of the Civil Rights Act of 1964.¹⁶⁹ In *Heart of Atlanta Motel, Inc. v. United States*,¹⁷⁰ the Court upheld the commerce-based statute by applying *Darby's* "rational relationship" test,¹⁷¹ even though the Court admitted that the statute had criminal characteristics and was founded on the police power.¹⁷² In *Katzenbach v. McClung*,¹⁷³ the Court ruled that the federal government can criminalize local activities that have a "close and substantial relation" to interstate commerce, adopting the *Jones & Laughlin* test.¹⁷⁴ The Court also adopted the *Wickard* test. This test established that individual conduct may be criminalized, even though its own impact on interstate commerce is trivial, when its impact is considered in the aggregate with all others similarly situated and is found to be substantial.¹⁷⁵ These cases eliminated the distinction between regulatory and criminal statutes under the Commerce Clause and resulted in the establishment of a general federal police power with the potential to encompass all local crime.¹⁷⁶ Some commentators have suggested that, rather than ensuring this result under the Commerce Clause, the Civil Rights Act could have accomplished its purpose more effectively without the resulting damage to federalism if it had been based on the Enabling Clause of the Fourteenth Amendment.¹⁷⁷

The Court went even further in *Perez v. United States*.¹⁷⁸ In *Perez*, the Court upheld the Consumer Credit Protection Act,¹⁷⁹ which criminalized all acts of "loan sharking" by declaring that, due to the influence of organized crime, loan sharks affect interstate commerce.¹⁸⁰ The Court examined *Darby* and concluded that its holding authorized Congress to criminalize intrastate behavior that, as a "class," affected interstate commerce without requiring proof that the

169. 78 Stat. 243 (1964) (codified as amended at 42 U.S.C. sec. 2000a (1994)).

170. 379 U.S. 241 (1964).

171. *Id.* at 258-59. See *supra* notes 136-43 and accompanying text.

172. "It was this burden [racial discrimination] which empowered Congress to enact appropriate legislation and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong." *Heart of Atlanta*, 379 U.S. at 257.

173. 379 U.S. 294 (1964).

174. *Id.* at 297. See *supra* notes 125-30 and accompanying text.

175. *Katzenbach*, 379 U.S. at 300-01. See *supra* notes 144-49 and accompanying text.

176. See *infra* note 200.

177. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONSR., amend XIV, cl. 5. "A decision based on the Fourteenth Amendment would have a more settling effect, making unnecessary litigation over whether a particular restaurant or inn is within the commerce definitions of the Act or whether a particular customer is an interstate traveler." *Heart of Atlanta*, 379 U.S. at 280 (Douglas, J., concurring).

178. 402 U.S. 146 (1971).

179. 82 Stat. 159 (1964) (codified as amended at 18 U.S.C. sec. 891 (1994)).

180. "Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce." *Perez*, 402 U.S. at 154.

defendant's particular acts had any effect on interstate commerce.¹⁸¹ This ended the necessity, found under *Tot* and *Five Gambling Devices*, for federal prosecutors to prove federal jurisdiction as a separate element of the offense.¹⁸² The dissent criticized the majority opinion for opening the door to the federalization of all crime, whether interstate or intrastate, since no proof of the impact on interstate commerce would be required¹⁸³ and no logical distinction could be made between loan sharking and any other crime.¹⁸⁴

In light of contemporary decisions, the Court revisited the statute at issue in *Tot*,¹⁸⁵ which had been amended¹⁸⁶ to punish a convicted felon who "receives, possesses, or transports in commerce or affecting commerce" any firearm.¹⁸⁷ In *United States v. Bass*,¹⁸⁸ the Court used this statute's ambiguity¹⁸⁹ as a reason to read it narrowly and require the government to prove that the firearm had been possessed "in commerce or affecting commerce."¹⁹⁰ The Court reserved decision on whether Congress, upon appropriate findings, could ban the "mere" intrastate possession of firearms by felons under *Perez*.¹⁹¹

181. *Id.* at 152. "The Supreme Court decision sustaining *Perez*'s conviction did not point to any interstate element in the particular transaction, to any interstate effect it might have had or, indeed, to *Perez* being associated with 'organized crime.'" Stern, *supra* note 4, at 276. "Thus, the statute upon which the prosecution in *Perez* was based represents an unprecedented extension of federal power in the area of criminal justice." Patricia A. Hair, *Commerce Clause—National Police Power Justified by Economic Impact of Organized Crime*, 46 TUL. L. REV. 829, 832 (1972).

182. Federal jurisdiction must still be proved when the statute in question expressly lists jurisdiction as a separate element of the offense, such as kidnapping. See *supra* note 92.

183. *Perez*, 402 U.S. at 157 (Stewart, J., dissenting).

184. Justice Stewart argued:

But it is not enough to say that loansharking is a national problem, for all crime is a national problem. It is not enough to say that some loan-sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loansharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.

Id. at 157-58.

185. See *supra* notes 159-63 and accompanying text.

186. The Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-315, 82 Stat. 197 (1968), codified this provision at 18 U.S.C. secs. 1201-1203 and replaced the original version that existed under the Federal Firearms Act, which was codified at 15 U.S.C. secs. 902(e)-(f), *repealed by Firearms Owners' Protection Act*, Pub. L. 99-308, sec. 104, 100 Stat. 459 (1986).

187. 18 U.S.C. sec. 1202(a) (emphasis added) (repealed 1986).

188. 404 U.S. 336 (1971).

189. "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Id.* at 349.

190. "Given this ambiguity, we adopt the narrower reading: the phrase 'in commerce or affecting commerce' is part of all three offenses, and the present conviction must be set aside because the Government has failed to show the requisite nexus with interstate commerce." *Id.* at 347.

191. *Id.* at 339 n.4.

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However, *Bass* and *Tot* were effectively overruled in *Barrett v. United States*,¹⁹² which held that Congress had clearly intended the revised statute to apply to any firearm that, at one time, had moved in interstate commerce, and did not intend to limit the statute to firearms received as part of the interstate transaction.¹⁹³ A concurring opinion distinguished *Tot* by stating that the presumption of interstate transport,¹⁹⁴ which was struck down in *Tot* and was not included in the revised statute at issue in *Barrett*, necessarily implied that the statute, as originally written, was unable to reach receipts that were not themselves part of the interstate transaction.¹⁹⁵ Since the revised statute did not rely on a presumption of interstate transport, its broad language, although similar to the original, could be said to have the widest possible reach.¹⁹⁶ In *Scarborough v. United States*,¹⁹⁷ the Court put to rest any doubt that "Congress sought to reach possessions broadly, with little concern for when the nexus with commerce occurred."¹⁹⁸ In fact, in *Scarborough*, the Court dismissed the idea that once a firearm had moved in interstate commerce, it could ever be said to leave the "stream of commerce" and come to rest in a state.¹⁹⁹

Since the merger of the regulatory and criminal lines of Commerce Clause cases, it is difficult to say if there are any limits at all on the federal government's ability to criminalize local activity.²⁰⁰ In *Russell*

192. 423 U.S. 212 (1976).

193. "Thus, there is no warping or stretching of language when the statute is applied to a firearm that already has completed its interstate journey and has come to rest in the dealer's showcase at the time of its purchase and receipt by the felon." *Id.* at 217.

194. See *supra* notes 159-63 and accompanying text.

195. *Barrett*, 423 U.S. at 226 (White, J., concurring).

196. *Id.*

197. 431 U.S. 563 (1977).

198. *Id.* at 577.

199. "[W]e see no indication that Congress intended to require any more than the minimal nexus that the firearms have been, at some time, in interstate commerce." *Id.* at 575.

200. Subsequent cases have expanded congressional authority under the Commerce Clause significantly. In *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), and *Hodel v. Indiana*, 452 U.S. 314 (1981), the Court announced its intention to defer to Congress on this issue, stating, "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. at 323-24 (emphasis added). However, in a concurring opinion, then-Justice Rehnquist argued, "Nor is it sufficient that the person or activity reached have *some* nexus with interstate commerce. Our cases have consistently held that the regulated activity must have a *substantial* effect on interstate commerce." *Hodel v. Virginia Surface Mining*, 452 U.S. at 310-11 (Rehnquist, J., concurring in judgment) (citing *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

In *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Court overturned *National League of Cities v. Usery*, 426 U.S. 833 (1976), which had overturned *Maryland v. Wirtz*, 392 U.S. 183 (1968), and held that state governments were not exempt from federal labor regulations due to some concept of state sovereignty. *Garcia*, 469 U.S. at 546-67. After *Garcia*,

v. United States,²⁰¹ the Court upheld the conviction of the owner of an apartment building under a federal statute prohibiting arson,²⁰² stating, "The reference to 'any building . . . used . . . in any activity affecting interstate or foreign commerce' expresses an intent by Congress to exercise its full power under the Commerce Clause."²⁰³ Although the Court recognized that this statute may not apply to arson committed against a private home, the Court concluded that the rental of real estate is a "class" of activities that Congress may reasonably conclude affects interstate commerce without having to specify "the connection between the market for residential units and 'the interstate movement of people'"²⁰⁴

6. The Rebirth of Federalism?

While the power of Congress to criminalize local activity under the guise of commercial regulation may be broad, it is not unlimited, and the Supreme Court may again be ready to find and vigorously enforce its limits.²⁰⁵ In *United States v. Lopez*,²⁰⁶ the Court, in a five-to-four decision, struck down a commerce-based criminal statute for the first time since the New Deal.²⁰⁷

In March 1992, Alfonso Lopez Jr., a teenager from San Antonio, Texas, brought a pistol to school and was arrested and charged with violating the Gun-Free School Zones Act of 1990,²⁰⁸ resulting in the dismissal of similar state charges.²⁰⁹ The Court found that there are

federalism concerns would find their only voice in the "national political process," as the Court would no longer act in this regard. *Id.* at 554.

201. 471 U.S. 858 (1985).

202. 18 U.S.C. sec. 844(i) (1994).

203. *Russell*, 471 U.S. at 859 (quoting 18 U.S.C. sec. 844(i) (1994)).

204. *Id.* at 862.

205. Richard J. Lazarus, a law professor at Washington University, said, "The commerce clause has been a no-brainer for years As long as you could imagine some connection to interstate commerce, the court would uphold it. Now the court is saying there's a limit." William H. Freivogel, *High Court Puts Breaks on Congress*, ST. LOUIS POST-DISPATCH, Apr. 27, 1995, at A1.

206. 115 S. Ct. 1624 (1995). The question of "mere" intrastate gun possession had been left open by *United States v. Bass*, 404 U.S. 336, 339 n.4 (1971).

207. *Lopez vs. the State*, WASH. TIMES, Apr. 29, 1995, at A14. Laurence Tribe, a noted Harvard University professor of constitutional law, commented that "if ever there was an act that exceed Congress's commerce power, this was it." *Id.*

208. 18 U.S.C. sec. 922(q)(1)(A) (1988 Supp. V) prohibits "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." The term "school zone" is defined as "in, or on the grounds of," or "within a distance of 1,000 feet from the grounds of a public, parochial or private school." *Id.* sec. 921(a)(25). "The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." *Lopez*, 115 S. Ct. at 1626.

209. TEX. PENAL CODE ANN. sec. 46.03(a)(1) (Supp. 1994). "When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction." *Lopez*, 115 S. Ct. at 1631 n.3, quoting *United*

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three contexts in which Congress can regulate under the Commerce Clause: (1) "the use of the channels of interstate commerce,"²¹⁰ (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities,"²¹¹ and (3) "activities having a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce."²¹² The Court noted that the third context governed the statute at issue and stated, "Within this final category, admittedly, our case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause."²¹³

The Court concluded that "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."²¹⁴ In doing so, the Court revived the distinction between commercial regulation and criminal law under the Commerce Clause.²¹⁵ Although Congress retained vast power to regulate economic activity,²¹⁶ its power to regulate non-economic activity through the use of criminal statutes would be restricted to those activities sub-

States v. Enmons, 410 U.S. 396, 411-12 (1973), and *Bass*, 404 U.S. at 349 (internal quotation marks omitted).

210. *Lopez*, 115 S. Ct. at 1629 (citing *United States v. Darby*, 312 U.S. 100, 114 (1941); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964); *Caminetti v. United States*, 242 U.S. 470, 491 (1917)).

211. *Id.* (citing *Shreveport Rate Cases*, 234 U.S. 342 (1914); *Southern R. v. United States*, 222 U.S. 20 (1911); *Perez v. United States*, 402 U.S. 146, 150 (1971)).

212. *Id.* at 1629-30 (citing *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968)).

213. *Id.* at 1630.

214. *Id.*

215. "Section 922(g) 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." *Id.* at 1630-31. See *supra* note 158 and accompanying text.

While the majority agreed that the criminal statute in question went beyond congressional power, the justices had differing views on the proper scope of the commerce power over economic activities. In his concurring opinion, Justice Anthony Kennedy stated, "Stare decisis operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature." *Lopez*, 115 S. Ct. at 1637 (Kennedy, J., concurring). However, Justice Clarence Thomas advocated going even further by abandoning the position that allows Congress to regulate activities that have only an indirect effect on interstate commerce, and returning to the limited scope of the commerce power envisioned by the Framers and existing prior to the New Deal. "I am aware of no cases prior to the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test. My review of the case law indicates that the substantial effects test is but an innovation of the 20th century." *Id.* at 1648 (Thomas, J., concurring).

216. "Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not." *Lopez*, 115 S. Ct. at 1630.

stantially affecting interstate commerce.²¹⁷ The “substantially affects” test of *Lopez* threatens the holdings in *Katzenbach* in part, and *Perez* and its progeny, and purports to reinforce the limits of the federal police power found under *Jones & Laughlin*.²¹⁸ It is uncertain, however, whether *Lopez* is the beginning of the restoration of federalism or merely a speed bump in the race for federal domination.²¹⁹

217. The statute “cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.” *Id.* at 1631.

218. “To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” *Id.* at 1634. This position has been advocated by Chief Justice Rehnquist, the author of the majority opinion in *Lopez*, at least since his concurrence in *Hodel v. Virginia Surface Mining* in 1981. See *supra* note 200.

219. Glenn Harlan Reynolds, a law professor at the University of Tennessee, said the *Lopez* decision “is quite possibly the most important decision of the decade in how the country does business. It could mean a drastic reordering of roles of federal government and states.” *Lopez vs. the State, supra* note 207, at A14. One editorial argued:

[T]he major import of the ruling in *Lopez* is its reversal of a 60-year trend in the interpretation of the commerce clause in favor of expanded federal power over economic as well as social life. The coalition on the court that issued the ruling may thus be a harbinger that the court is beginning to reverse that trend, and if so, supporters of less government regulation and more state and local autonomy have good reason to hail the ruling in *Lopez*.

Id. But see *Federalism and Guns in School*, WASH. POST, Apr. 28, 1995, at A26, an opposing editorial that stated, “The *Lopez* opinion is limited to this single law, and there is no reason to assume it foreshadows a fundamental restructuring of federal-state relations.” Sen. Herb Kohl of Wisconsin, the author of the Gun-Free School Zones Act of 1990, dismissed *Lopez* as “a piece of judicial activism that ignores children’s safety for the sake of legal nit-picking.” *Id.*

Several lower federal courts apparently have refused to follow the Supreme Court’s lead and have distinguished *Lopez* from cases they have decided since the *Lopez* decision was handed down. See *United State v. Mosby*, 60 F.3d 454, 456 (8th Cir. 1995) (upheld conviction under 18 U.S.C. sec. 922(g)(1) (1994) for possession of ammunition by prior convicted felon, despite *Lopez*, when “component parts” of ammunition had traveled in interstate commerce before manufacturing process, even though completed ammunition had not); *United States v. Wilks*, 58 F.3d 1518, 1521 (10th Cir. 1995) (upheld conviction under 18 U.S.C. sec. 922(o) (1994) for “possession or transfer” of machineguns by distinguishing “mere possession,” found to be non-commercial under *Lopez*, from “transfer,” a commercial activity); *Cheffer v. Reno*, 55 F.3d 1517, 1520-21 & n.6 (11th Cir. 1995) (upheld penalties under 18 U.S.C. sec. 248 (1994) for blocking access to abortion clinic because of congressional findings that providing abortions is commercial activity, even though blocking access is not); *United States v. Hanna*, 55 F.3d 1456, 1462 n.2 (9th Cir. 1995) (upheld conviction under 18 U.S.C. sec. 922(g)(1) (1994) because statute contains jurisdictional element requiring that prosecution prove firearm had “been, at some time, in interstate commerce,” unlike the statute at issue in *Lopez*); *United States v. Garcia-Salazar*, 891 F. Supp. 568 (D. Kan. 1995) (upheld conviction under 21 U.S.C. sec. 860, the “Drug-Free School Zones Act,” even though statute had same constitutional infirmities as statute in *Lopez*, because “[d]rug trafficking is inherently commercial in nature; firearm possession is not”); *United States v. Campbell*, 891 F. Supp. 210 (M.D. Pa. 1995) (upheld conviction under 18 U.S.C. sec. 922(g)(1) (1994) because of jurisdictional element, but suggested that result might have been different if *Lopez* had expressly overturned *Scarborough*).

President Bill Clinton has already begun to seek proposals to amend the Gun-Free School Zones Act. By adding the requirement that the government prove that the firearm “moved in or the possession of such firearm otherwise affects interstate or foreign commerce,” Clinton believes that *Lopez* will be satisfied. *Letter from the President to Congress Regarding Gun Free Schools*, U.S. NEWSWIRE, May 10, 1995, available in WL, ALLNEWS. “Meanwhile, members of

II. THE CONSTITUTIONALITY OF THE ANTI CAR THEFT ACT OF 1992

A. Provisions of the Statute

The Anti Car Theft Act of 1992 (the "Act")²²⁰ is divided into four titles. Title I enhances law enforcement efforts against auto theft. Title II concerns automobile title fraud. Title III targets the activities of "chop shops" and the resale of stolen parts. Title IV seeks to prevent the export of stolen vehicles.²²¹

The Act's more controversial provisions are contained in Title I.²²² First, the Act creates the new federal crime of carjacking.²²³ The Act states:

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—

- (1) be fined under this title or imprisoned not more than 15 years, or both,
- (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
- (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.²²⁴

Congress would do well to pause and consider, before they pass additional laws that would make more crimes federal offenses, even though state statutes already apply." *Lawmaking Zeal Supreme Court Tightens Leash on Congress*, COLUMBUS DISPATCH, May 9, 1995, at 6A.

220. Pub. L. No. 102-519, 106 Stat. 3384 (1992) (codified as amended in scattered sections of 15 U.S.C., 18 U.S.C., 19 U.S.C., and 42 U.S.C.) [hereinafter "ACTA" or "Act"].

221. For a more detailed discussion of the provisions of the Act, see Wing, *supra* note 9.

222. Other sections include provisions for awarding grants to state and local law enforcement, secs. 130-133; establishing a federal task force to study problems associated with vehicle titling and registration, sec. 140; and randomly inspecting vehicles and containers that may contain vehicles scheduled for shipment overseas, secs. 401-402. These sections are not very controversial, since they address arguably commercial, as opposed to criminal, matters and discussion of them is beyond the scope of this Note.

223. ACTA sec. 101 (codified as amended at 18 U.S.C. sec. 2119 (1994)).

224. 18 U.S.C. sec. 2119 (1994). As originally enacted, sec. 2119 applied only when the carjacker possessed a firearm at the time of the carjacking, and did not include the death penalty as an option for punishment. Ironically, although the Basu incident served as the impetus behind the Act's passage, the carjackers involved could not have been convicted under the Act's original provisions since they had not possessed firearms during the incident. See *supra* notes 13-17 and accompanying text.

Under the original language of the Act, the question of double jeopardy arose, since a carjacker could potentially receive sentences under both sec. 2119 and sec. 924(c), which mandates the additional sentence of five years if a person uses or carries a firearm during the commission of any crime of violence. In *Blockburger v. United States*, 284 U.S. 299, 304 (1932), the Court found that multiple punishments for the same criminal offense violated the Double Jeopardy Clause of the Fifth Amendment. U.S. CONST. amend. V.

Several courts have applied the "Blockburger Test," which states, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to

Next, the Act increases the penalties for the existing crimes of importation, exportation,²²⁵ and interstate transportation of automobiles known to be stolen.²²⁶ The Act subjects to civil and criminal forfeiture “[a]ny property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly,” from violating the Act’s criminal provisions that prohibit carjacking, importing, exporting, possessing, or selling stolen vehicles, and altering or removing vehicle identification numbers.²²⁷ The Act also defines the term “chop shop” and makes it a federal crime to own or operate one.²²⁸

determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.” These courts reached different conclusions, although the majority of courts found no violation of *Blockburger*. For a more detailed discussion of this issue in relation to ACTA, see Mary C. Michenfelder, *The Federal Carjacking Statute: To Be or Not To Be? An Analysis of the Propriety of U.S.C. 2119*, 39 *St. Louis L.J.* 1009 (1995).

The cases that allowed multiple sentences are: *United States v. Martinez*, 49 F.3d 1398 (9th Cir. 1995); *United States v. Overstreet*, 40 F.3d 1090 (10th Cir. 1994); *United States v. Mohammed*, 27 F.3d 815 (2d Cir. 1994); *United States v. Johnson*, 22 F.3d 106 (6th Cir. 1994); *United States v. Singleton*, 16 F.3d 1419 (5th Cir. 1994); *United States v. Robertson*, 861 F. Supp. 1031 (W.D. Okla. 1994); *United States v. Grant*, 860 F. Supp. 843 (M.D. Ga. 1994); *United States v. Stokes* 858 F. Supp. 434 (D.N.J. 1994); *United States v. Hernandez*, 849 F. Supp. 150 (D.P.R. 1994); *United States v. Payne*, 841 F. Supp. 810 (S.D. Ohio 1994); *United States v. Harwood*, 834 F. Supp. 950 (W.D. Ky. 1993); *United States v. McHenry*, 830 F. Supp. 1020 (N.D. Ohio 1993); *United States v. Zukinta*, 830 F. Supp. 418 (E.D. Tenn. 1993). The cases that would not allow multiple sentences due to the Double Jeopardy Clause are: *United States v. Torres*, 857 F. Supp. 168 (D.P.R. 1994); *United States v. Moore*, 832 F. Supp. 335 (N.D. Ala. 1993); *United States v. Smith*, 831 F. Supp. 549 (E.D. Va. 1993).

This question was rendered moot with the enactment of Pub. L. No. 103-322, Title VI, sec. 60003(a)(14), 108 Stat. 1970 (1994). However, the effects of the amendment, which now limit sec. 2119 to those carjackers that the prosecutor can prove had the “intent to cause death or serious bodily harm,” have yet to be seen. See *Martinez*, 49 F.3d at 1401, which states that sec. 2119, as originally enacted, was a general intent crime that precluded the defense of diminished capacity. It has not been determined if this defense would be available under the amended section.

225. ACTA, Title I, sec. 102, 106 Stat. at 3385 (codified as amended at 18 U.S.C. sec. 553(a) (1994)).

226. *Id.* sec. 103 (codified as amended at 18 U.S.C. secs. 2312-2313 (1994)).

227. *Id.* sec. 104 (codified as amended at 18 U.S.C. secs. 981-982 (1994)). Civil forfeiture, in itself, has created much controversy because of its lower standard of proof for seizure and because the burden is on the property owner to prove that no ill-gotten gains were used in purchasing the forfeited property. Since this is a topic that deserves thorough examination, and since its operation under the Act is no different than under other federal statutes, discussion of this section is beyond the scope of this Note.

228. *Id.* sec. 105, 106 Stat. at 3385-86 (codified as amended at 18 U.S.C. sec. 2322 (1994)). “Chop shop” is defined as:

[A]ny building, lot, facility, or other structure or premise where one or more persons engage in receiving, concealing, destroying, disassembling, dismantling, reassembling, or storing any passenger motor vehicle or passenger motor vehicle part which has been unlawfully obtained in order to alter, counterfeit, deface, destroy, disguise, falsify, forge, obliterate, or remove the identity, including the vehicle identification number or derivative thereof, of such vehicle or vehicle part and to distribute, sell, or dispose of such vehicle or vehicle part in interstate or foreign commerce.

18 U.S.C. sec. 2322(b) (1994).

B. Interstate Transport of Stolen Automobiles

In assessing the constitutionality of the criminal provisions of the Act, the most logical place to begin would be section 103, which prohibits the interstate transport of vehicles known to be stolen²²⁹ and punishes anyone who "receives, conceals, stores, barter[s], sells, or disposes of any motor vehicle . . . moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen."²³⁰ The Dyer Act, which originally enacted the criminal provisions found in section 103,²³¹ was upheld long ago in *Brooks*.²³² That case extended the reasoning in *Champion*²³³ to allow Congress to prohibit the "misuse" of the channels of interstate commerce by transporting "contraband" such as stolen automobiles.²³⁴

The power exerted by section 103 represented the federal police power in its infancy, which posed little threat to the constitutional balance of power between the federal and state governments, both then and now. Its application was limited, by its terms and judicial interpretation, to those who had actually transported the stolen vehicle across state lines²³⁵ or who had done something with the vehicle while it was still "in commerce."²³⁶ Federal jurisdiction is justified over the stolen vehicles interstate journey because "[n]either state is able to protect it

229. 18 U.S.C. sec. 2312 (1994).

230. 18 U.S.C. sec. 2313 (1994).

231. See *supra* notes 100-103 and accompanying text.

232. 267 U.S. 432 (1925).

233. 188 U.S. 321 (1903).

234. *Brooks*, 267 U.S. at 438-39.

235. *Hostetter v. United States*, 16 F.2d 921, 924 (8th Cir. 1926) (contention that car taken across state lines under its own power, rather than by freight train, is not interstate commerce is "utterly unsound"); *Whitaker v. United States*, 5 F.2d 546, 548 (9th Cir. 1925) ("There can be no question but that the driving of a stolen automobile from one state to another on its own power is in itself interstate commerce notwithstanding that it carries no freight or passengers for hire."); *United States v. Winkler*, 299 F. 832, 833 (W.D. Tex. 1924) (crossing state lines is interstate commerce).

236. *Cox v. United States*, 96 F.2d 41, 43 (8th Cir. 1938) ("Unless the stolen automobile had moved and was still moving in interstate commerce when it was sold, the sale was not a federal offense and the court below was without jurisdiction to deal with it."); *Levi v. United States*, 71 F.2d 353, 354 (5th Cir. 1934) ("An article once placed in interstate commerce continues therein at least until it reaches the point of destination."); *McNally v. Hill*, 69 F.2d 38 (3d Cir. 1934), which states:

[B]y the two sections, the statute forbids and punishes the transportation and sale of a stolen motor vehicle in interstate commerce from its inception by theft to its termination by sale, yet even in the sale clause . . . the transaction must, of course, partake of or have the characteristic of interstate commerce as a necessary judicial ingredient. . . .

The Congress intended a sale of a stolen motor vehicle which, having been unlawfully moved in interstate commerce and coming to rest, continues so closely related to that commerce as to remain "a part of" it.

Id. at 40 (citations omitted). These cases necessarily imply that an automobile once transported interstate does not forever retain the characteristic of interstate commerce, but at some point "comes to rest" in a state when it is no longer "closely related" to commerce. See *Baugh v. United States*, 27 F.2d 257, 261 (9th Cir. 1928).

during the whole period of its transportation, and this fact makes federal control particularly necessary, as well as legally possible."²³⁷

C. *Owning or Operating a Chop Shop*

Section 105, which criminalizes the ownership or operation of a chop shop, is somewhat more difficult to justify. It is unclear whether or not this section is an attempt by Congress to assert its power under the Commerce Clause to its fullest extent as recognized by the Supreme Court. Although it is unlikely that Congress intended to exclude from federal jurisdiction owners and operators of chop shops who distribute their ill-gotten wares exclusively intrastate, the terms of this section purport to do just that. The definition of "chop shop" is limited to facilities that "distribute, sell, or dispose of such vehicle or vehicle part *in interstate or foreign commerce*."²³⁸ The phrase "in commerce" is a term of art the Court has found to be much narrower in scope than the phrase "affects commerce," and Congress is presumed to know this distinction.²³⁹ Under *Five Gambling Devices*²⁴⁰ and *Bass*,²⁴¹ then, this ambiguity would lead the Court to assume that Congress did not intend to put its power at issue and, therefore, to adopt the narrower reading of the section. Thus, federal prosecutors may be required to allege and prove the interstate commerce nexus, thereby restraining federal power somewhat over local activities.

However, if the Court found that such a narrow reading was contrary to the obvious intent of Congress,²⁴² the constitutionality of this section would depend heavily on *Perez*. In *Perez*, the Court upheld a federal statute that criminalized a "class" of activity because of findings that the class affected interstate commerce, without having to prove the effects of individual acts that fell within the class.²⁴³ These

237. *Yohn v. United States*, 280 F. 511, 512 (2d Cir. 1922).

238. 18 U.S.C. sec. 2322(b) (1994) (emphasis added). In *United States v. Lopez*, 115 S. Ct. 1624 (1995), the Court struck down the Gun-Free School Zones Act, a commerce-based criminal statute, in part because it lacked a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* at 1631. The jurisdictional element provided by ACTA sec. 103, if interpreted narrowly, would presumably satisfy this requirement.

239. *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271, 279-81 (1975).

240. See *supra* notes 164-68 and accompanying text.

241. See *supra* notes 185-87 and accompanying text.

242. "Enterprises using all three profiteering methods regularly engage in interstate, and even international, trafficking of automobiles and auto parts. *Just as important*, auto thieves have a severe and deleterious effect on interstate commerce by imposing significant costs on automobile owners." H.R. REP. NO. 102-851(I), 102d Cong., 2d Sess. 1, 14-15 (1992), reprinted in 1992 U.S.C.C.A.N. 2829, 2831 (emphasis added).

243. See *supra* notes 178-84 and accompanying text.

findings were based on the alleged influence of organized crime on the class of activity at issue.²⁴⁴

Many of the criminal statutes adopted by Congress, beginning with the Lottery Act and continuing to the present day, target activities that generally are considered to be under the control of organized crime.²⁴⁵ To many, this connection alone justifies federal involvement, since criminal organizations often operate interstate, and even internationally.²⁴⁶ But not only is there no precise definition of organized crime,²⁴⁷ *Perez's* reliance on the supposed interstate character of organized crime to justify the criminalization of classes of activities, such as those allegedly controlled by organized crime, is an act of circular reasoning.²⁴⁸

A challenge of section 105, if this section is given its broadest possible interpretation, would necessarily include a challenge of the Court's extension of federal authority over classes of criminal activity, set forth in *Perez*. Although "[t]he overruling of a case . . . should not be lightly undertaken,"²⁴⁹ there is authority supporting "the proposition that important decisions of constitutional law are not subject to the same command of *stare decisis* as are decisions of statutory questions."²⁵⁰ Although the Court in *Lopez* did not expressly overrule

244. "Organized crime is interstate and international in character A substantial part of the income of organized crime is generated by extortionate credit transactions Even when extortionate credit transactions are purely interstate in character, they nevertheless directly affect interstate and foreign commerce." *Perez v. United States*, 402 U.S. 146, 147 n.1 (quoting Consumer Credit Protection Act, Title II, sec. 201(a), 82 Stat. 159 (1964)).

245. "The threat of organized crime as a basis for the growth of federal power has been a particularly enduring phenomenon." Bradley, *supra* note 80, at 215.

246. One commentator argued:

[T]he economic characteristics of organized crime require law enforcement tools above and beyond those adequate for the apprehension and conviction of ordinary criminals. Since Congress has the power to control legitimate businesses involved in interstate commerce, illegitimate businesses organized upon the same national basis should not go uncontrolled due to the inability of local law enforcement agencies to work on a national scale. Hair, *supra* note 181, at 835. See *supra* note 244.

247. "Activity labeled as 'organized crime' has become almost indistinguishable from ordinary crime and from even some organized noncriminal activity. As a result, the role of federal law enforcement has expanded much more so than many realize." Baker, *supra* note 4, at 497.

248. See *supra* note 239. One commentator concluded:

Consequently, the statute did not require, as all previous statutes had, that a particular transaction specifically involve interstate commerce at all, because loan-sharking now affected interstate commerce by definition But unlike past legislation where the government's claim was that the *national* character of the criminal enterprise made local enforcement impossible, the peculiarly *local* nature of loan-sharking led to a statute where the interstate connection need not (because it generally could not) be proven.

Bradley, *supra* note 80, at 252.

249. *Fry v. United States*, 421 U.S. 542, 559 (1975) (Rehnquist, J., dissenting).

250. *Id.*, citing *The Passenger Cases*, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J., dissenting); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-11 (1932) (Brandeis, J., dissenting); *New York v. United States*, 326 U.S. 572, 590-91 (1946) (Douglas, J., dissenting). See *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (1936) (Stone and Cardozo, J.J., concurring).

Perez, it sufficiently undermined the reasoning in *Perez* to leave it open to constitutional challenge. In the interests of federalism, a principle central to the Constitution and necessary for the prevention of tyranny, *Perez* should be overruled, and section 105, if given its broadest possible interpretation, should be struck down.

D. Carjacking

In an attempt to avoid constitutional infirmities,²⁵¹ the drafters of section 101 of the Act expressly limited its application to carjackers who steal cars that have been “transported, shipped, or received in interstate or foreign commerce.”²⁵² Although this limitation provides the theoretical possibility that a carjacker could escape federal prosecution because the car he stole had never crossed state lines, in fact, the limitation is virtually meaningless since almost every car on the road today has crossed state lines at some point, and if not, the owner could avail himself of federal protection simply by heading for the nearest state boundary after purchase.²⁵³ Despite the farcical way this section attempts to placate concerns for federalism, it has been upheld

(“The doctrine of *stare decisis*, however appropriate and even necessary at times, has only a limited application in the field of constitutional law.”).

251. “There is little doubt that Congress’ choice to exclude the theft of *intrastate* cars from the sweep of the statute was based on congressional concern that failure to do so would render the statute constitutionally flawed.” *United States v. Watson*, 815 F. Supp. 827, 833 (E.D. Pa. 1993) (emphasis in original).

252. 18 U.S.C. sec. 2119 (1994). “[T]he stolen automobile must have moved in interstate commerce.” H.R. REP. NO. 102-851(I), 102d Cong., 2d Sess. 1, 17 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2829, 2834.

253. It is conceivable that car dealers, as a service to their customers, could provide decals for placement in the car’s window that state, “Warning! This automobile has crossed state lines and thus is subject to the Anti Car Theft Act. Theft of this vehicle will be punished to the fullest extent of federal law.” Foreign cars would automatically be protected; residents of Michigan, and residents of Tennessee who own Saturns manufactured locally, could be offered a test-drive prior to purchase that takes them across state lines. *See United States v. Cortner*, 834 F.Supp. 242, 243 (M.D. Tenn. 1993). Most certainly, the Framers would balk at the suggestion that federal jurisdiction could be permanently evoked over local activities by such a mere technicality.

However, even this might be unnecessary. In *United States v. Travisano*, 724 F.2d 341 (2d Cir. 1983), the court reversed the conviction for possession of a firearm by a previously convicted felon when the defendant, a Connecticut resident, had possessed a shotgun that had been manufactured in that state. Prosecutors failed to prove that the shotgun had at some time traveled interstate and the court rejected the notion that the mere “process of manufacturing” sufficiently affected commerce to provide nexus. *Id.* at 348. But in *United States v. Mosby*, 60 F.3d 454, 456 (8th Cir. 1995), decided after *Lopez*, the court rejected the Second Circuit’s “unjustifiedly narrow view of the relevant commerce” and found that even if the ammunition the defendant was convicted of possessing had been manufactured within the state he had possessed it in, the conviction would be upheld if any of the ammunition’s “component parts” had at any time prior to manufacture traveled interstate.

So if the rule in *Mosby* becomes the majority rule despite *Lopez*, residents of Michigan and Tennessee who purchase cars manufactured locally would not have to take that test-drive across state lines to permanently evoke federal jurisdiction under ACTA if a single fan belt, hubcap, or screw had been manufactured out of state.

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by almost every court called upon to render a decision on its constitutionality.²⁵⁴

1. *United States v. Watson*

The case most cited in support of section 101 is *United States v. Watson*.²⁵⁵ Although the court acknowledged that the Act "is a far reaching attempt by Congress to address many aspects of car theft on the federal level,"²⁵⁶ the court nevertheless upheld section 101 as constitutional. The court relied on the standard announced in *Hodel v. Indiana*,²⁵⁷ which allows courts to strike down Commerce Clause legislation "only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce. . . ."²⁵⁸

In determining whether section 101 of the Act meets the minimal *Hodel* standard, the court set forth three contexts in which the Commerce Clause will support the enactment of federal criminal statutes:

One, where the regulation relates to things "in commerce," be it misuse of the channels of interstate commerce²⁵⁹ . . . or legitimate use of the channels of interstate commerce²⁶⁰ . . . ; *two*, where the targeted activity occurs solely intrastate but affects interstate commerce²⁶¹ . . . ; and *three*, where the regulation involves protection of the instrumentalities of interstate commerce themselves. . . .²⁶²

Next, the court proceeded to justify section 101 within each of these three contexts, something the court claims it had "little difficulty" do-

254. *United States v. Oliver*, 60 F.3d 547 (9th Cir. 1995) (*Lopez* "does not alter our view"); *United States v. Martinez*, 49 F.3d 1398 (9th Cir. 1995); *United States v. Overstreet*, 40 F.3d 1090 (10th Cir. 1994); *United States v. Harris*, 25 F.3d 1275 (5th Cir. 1994); *United States v. Johnson*, 22 F.3d 106 (6th Cir. 1994); *United States v. Garcia-Beltran*, 890 F. Supp. 67 (D.P.R. 1995) (decided after *Lopez*); *United States v. Robertson*, 861 F. Supp. 1031 (W.D. Okla. 1994); *United States v. Grant*, 860 F. Supp. 843 (M.D. Ga. 1994); *United States v. Sabini*, 842 F. Supp. 1446 (S.D. Fla. 1994); *United States v. Payne*, 841 F. Supp. 810 (S.D. Ohio 1994); *United States v. Edmondson*, 1994 WL 723959 (D. Kan. 1994); *United States v. Watson*, 815 F. Supp. 827 (E.D. Pa. 1993); *United States v. Stith*, 824 F. Supp. 128 (S.D. Ohio 1993); *United States v. Eskridge*, 818 F. Supp. 259 (E.D. Wis. 1993).

255. 815 F. Supp. 827 (E.D. Pa. 1993).

256. *Id.* at 829 n.1.

257. 452 U.S. 314 (1981).

258. *Watson*, 815 F. Supp. at 829 (quoting *Hodel*, 452 U.S. at 323-24). See *supra* note 200.

259. *Watson*, 815 F. Supp. at 829 (citing *Gooch v. United States*, 297 U.S. 124 (1936); *Brooks v. United States*, 267 U.S. 432 (1925); *Hoke v. United States*, 227 U.S. 308 (1913)).

260. *Id.* at 829-30 (citing *Barrett v. United States*, 423 U.S. 212 (1976); *United States v. Darby*, 312 U.S. 100 (1941)).

261. *Id.* at 830 (citing 18 U.S.C. sec. 891 (1994), *et seq.*, which was upheld in *Perez v. United States*, 402 U.S. 146 (1971)).

262. *Id.* (citing 18 U.S.C. sec. 32 (1994), which criminalizes the destruction of aircraft). The three contexts described by the *Watson* court are similar to those described by the Supreme Court in *Lopez* with one important difference: in *Lopez*, activities must "substantially affect interstate commerce," not merely "affect" it, as in *Watson*. See *supra* notes 210-213 and accompanying text.

ing.²⁶³ Concerning the first context, the court summarily concluded, “[g]iven the Supreme Court’s historic acceptance of the assertion of federal control over things that travel, or have traveled, in interstate commerce, the power of Congress to regulate as it did in § 2119 cannot be seriously questioned.”²⁶⁴ For the second context, the court quoted legislative reports that set forth the effects car theft allegedly has on interstate commerce, namely higher insurance premiums and the cost of anti-theft devices endured by car owners, and ruled that these findings served as a rational basis for the federal statute criminalizing carjacking.²⁶⁵ Lastly, the court decided that automobiles were “instrumentalities of interstate commerce” without setting forth conclusive authority for this assertion.²⁶⁶

2. Cases Following *Watson*

Other courts have built upon the reasoning set forth in *Watson*. In *United States v. Johnson*,²⁶⁷ the court relied on *Barrett* and *Scarborough* in finding that section 101 of the Act applies to any car that had moved in interstate commerce at any time during its existence.²⁶⁸ The *Johnson* court combined the first two contexts set forth in *Watson* and stated, “[s]o long as the activity regulated has an effect on interstate commerce it makes no difference that the transported item is now ‘at rest’ and is no longer ‘in’ interstate commerce.”²⁶⁹ The court refused to apply the definition of “in commerce” used in early cases under the Dyer Act²⁷⁰ and emphasized in *Schechter*. In *United States v. Stith*,²⁷¹ the court affirmed the notion that automobiles are instrumentalities of interstate commerce, and thus subject to federal regulation.²⁷² At least one court has said that in applying the *Hodel* test, it would be

263. *Id.*

264. *Id.* at 830-31.

265. “As these passages demonstrate, the enactment of sec. 2119 was at least partly the result of a congressional finding that the post-theft sale of cars and their parts makes auto thefts, including those in which cars are obtained through carjacking, a problem that affects interstate commerce.” *Id.* at 831.

266. “Clearly, there is no reason to suggest that if the power of Congress can be applied to afford protection against destruction of aircraft, that power is not available to Congress to afford similar protection against theft of automobiles.” *Id.*

267. 22 F.2d 106 (6th Cir. 1994).

268. *Id.* at 108-09. “[A] present nexus between a regulated activity and interstate commerce is not required under the Commerce Clause.” *United States v. Martinez*, 49 F.3d 1398, 1401 (9th Cir. 1995).

269. *Johnson*, 22 F.3d at 109.

270. *Id.* at 108-09. See *supra* note 236.

271. 824 F. Supp. 128 (S.D. Ohio 1993), *aff’d*, 38 F.3d 1217 (6th Cir. 1994).

272. *Id.* at 129. See *United States v. Oliver*, 60 F.3d 547 (9th Cir. 1995), which upheld ACTA despite *Lopez* and decided, *inter alia*, that automobiles are instrumentalities of interstate commerce.

“impossible” to find that Congress had no rational basis whatsoever for concluding that carjacking affects interstate commerce.²⁷³

3. United States v. Cortner, and Criticism of *Watson*

A small minority of federal courts has taken a stand for federalism in the face of section 101 of the Act. In *United States v. Cortner*,²⁷⁴ the court was faced with a pair of carjackers who, while in Tennessee, stole a car that was later recovered in that state.²⁷⁵ Although there were no allegations that the stolen car was destined for a chop shop or intended to be shipped interstate, it had not been manufactured in Tennessee, so it was presumed that at some time in the past it had crossed state lines.²⁷⁶

In concluding that section 101 fails to satisfy the minimal constitutional test of *Hodel*, and thus “lacks any rational nexus to interstate commerce and that the Congress lacks the power to legislate thereon,”²⁷⁷ Judge Wiseman addressed the arguments raised in *Watson*. Relying on common sense,²⁷⁸ Judge Wiseman concluded that the assertion made in *Watson* that “because something once traveled interstate it remains in interstate commerce after coming to rest in a given state, is sheer sophistry.”²⁷⁹ If it were true that once something bathed in the stream of interstate commerce it was forever after washed in federal authority, there would be no point to maintaining the window dressing of federalism that still exists. Since people can be said to move in interstate commerce, the federal government would have the power to dictate the lives of anyone who had ever crossed state lines, all in the name of regulating commerce.²⁸⁰ There can be no justification for this result, and to whatever extent *Barrett* and

273. *United States v. Payne*, 841 F. Supp. 810, 812-13 (S.D. Ohio 1994), *aff'd*, 59 F.3d 171 (6th Cir. 1995).

274. 834 F. Supp. 242 (M.D. Tenn. 1993), *rev'd sub nom.*, *United States v. Osteen*, 30 F.3d 135 (6th Cir. 1994).

275. *Id.*

276. “This is a pure case of *intrastate* automobile theft at gunpoint.” *Id.*

277. *Id.* at 244.

278. “This Court, at one time, owned a 1932 Ford which was manufactured in Detroit in the year 1931 and transported to the state of Tennessee. It remained in the state of Tennessee thereafter. Now if this car were hijacked today, some sixty years later, is it still in interstate commerce?” *Id.* at 243. Other commentators have pointed out similar absurdities. “If a window washer in New York used a brush made in Ohio, that fact put the window washing into interstate commerce. There was almost no such thing, at law, as purely intrastate commerce. The very concept was pretty well buried.” James J. Kilpatrick, *Commerce Clause Due New Court Date*, SAN ANTONIO EXPRESS-NEWS, Apr. 27, 1995.

279. *Cortner*, 834 F. Supp. at 243. See *supra* note 253 and accompanying text. Early cases brought under the Dyer Act rejected this assertion. See *supra* note 236.

280. See *supra* note 92. “Thus, if we were to accept the Government’s arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.” *United States v. Lopez*, 115 S. Ct. 1624, 1632 (1995).

Scarborough support this unconstitutional assertion of federal power, these cases should be overruled, if they have not already been effectively overruled by *Lopez*.

By its terms, section 101 of the Act limits its jurisdiction so that the second and third contexts discussed in *Watson* are irrelevant to this section's constitutionality.²⁸¹ This is something the *Watson* court conceded in its opinion,²⁸² although given this concession it is not clear why the court then analyzed section 101 within these contexts.²⁸³ Nevertheless, in *Cortner*, the court addressed these contexts and re-futed them as authority for the constitutionality of section 101.

As for the "affects commerce" context, Judge Wiseman said, "any robbery of any merchant will cause an insurance loss which in turn must be accounted for in the premiums of every other insured. If this rationale can be used to justify this act under the Commerce Clause, then there is absolutely no limit to what the Congress can do."²⁸⁴ Not only has the Supreme Court long held that insurance contracts are not interstate commerce,²⁸⁵ and thus higher insurance premiums cannot logically be used to support Commerce Clause legislation, but the remaining findings on which Congress based the Act—higher costs borne by the consumer—are in no way distinguishable from the ramifications of every choice a person can make concerning his or her life. Deciding who to live with, what to eat, where to go to college, what job to take, whether to smoke or drink, or whether to have a child are all decisions that may result in higher costs to the person and

281. See *supra* notes 251-52 and accompanying text.

282. "Since the statute applies only to cars that have crossed state lines, it applies only to things which are said to be 'in commerce.'" *United States v. Watson*, 815 F. Supp. 827, 830 (E.D. Pa. 1993). Therefore, the statute does not apply to things that merely "affect commerce" or are "instrumentalities of commerce," so any justification of section 101 of the Act within these contexts is irrelevant. See *supra* note 239 and accompanying text.

283. *Watson*, 815 F. Supp. at 831. As for the second context, the "affects commerce" rationale, the congressional findings asserting that car theft affects commerce were probably intended to support the regulatory provisions of the Act, rather than section 101, a criminal provision expressly limited by its terms, though not limited enough.

284. *Cortner*, 834 F. Supp. at 243. Similar justifications were cited and rejected by the Court in *Lopez*, 115 S. Ct. at 1632. See also *supra* notes 183-84 and accompanying text.

285. *Nutting v. Massachusetts*, 183 U.S. 553, 556 (1902) ("A contract of marine insurance is not an instrumentality of commerce, but a mere incident of commercial intercourse."); *Allgeyer v. Louisiana*, 165 U.S. 578 (1896) (allowing states to prohibit foreign insurance companies from doing business within the state, despite the Dormant Commerce Clause); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1868), which states:

Issuing a policy of insurance is not a transaction of commerce These contracts are not articles of commerce in any proper meaning of the word They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different States They are, then, local transactions, and are governed by the local law.

The principle that the states may regulate insurance despite the Dormant Commerce Clause has been codified at 15 U.S.C. sec. 1011 (1994).

the community and certainly affect commerce.²⁸⁶ The Commerce Clause was never intended to give Congress that much power.

The third context, the assertion that automobiles are “instrumentalities of commerce,” is equally unfounded. The *Watson* court’s sole basis for this assertion is its analogy to airplanes,²⁸⁷ which have been judged to be instrumentalities of commerce.²⁸⁸ No decision prior to *Watson* has found that cars are instrumentalities of commerce. The “instrumentalities” concept has generally been limited to common carriers that operate interstate²⁸⁹ and are licensed by the federal government,²⁹⁰ and specifically, airplanes are clearly distinguishable from cars on this basis.²⁹¹ Although automobiles can enter interstate commerce merely by crossing state lines, the possibility of this act alone does not place them within the class of instrumentalities deserving special federal attention.²⁹²

286. In *Lopez*, the Court criticized Justice Breyer’s dissenting opinion, which would have upheld the Gun-Free School Zones Act by reasoning that gun violence near schools affects classroom learning, and thus affects interstate commerce as the adversely affected students enter the workforce. *Lopez*, 115 S. Ct. at 1659 (Breyer, J., dissenting). “This analysis would be equally applicable, if not more so, to subjects such as family law and direct regulation of education.” *Id.* at 1633.

287. See *supra* note 261.

288. *Perez v. United States*, 402 U.S. 146, 150 (1970). Cases following *Watson*, such as *Oliver and Stith*, that have upheld the application of the “instrumentalities” concept to automobiles have relied solely on *Watson* and its misapplication of *Perez* without providing any additional authority. In *United States v. Garcia-Beltran*, 890 F. Supp. 67 (D.P.R. 1995), the court upheld ACTA despite *Lopez* but rejected the idea that cars are instrumentalities of interstate commerce.

289. *Houston & Texas Ry. v. United States*, 234 U.S. 342 (1914) (applied “instrumentality” concept to interstate railroads because of their use as common carriers); *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196 (1885) (Dormant Commerce Clause prohibits state taxation of instrumentalities of interstate commerce); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870) (found that ferries that ply “navigable waters of the United States” are instrumentalities of interstate commerce, but refused to apply this categorization to ferries found in intrastate waters exclusively or land transportation).

290. Suggesting that cars are instrumentalities of interstate commerce, and therefore subject to federal regulation on that basis, ignores the fact that the states register cars and license drivers, not the federal government. If cars were instrumentalities, the states would be precluded under *Gloucester Ferry*, 144 U.S. at 204, from regulating the use of cars as they traditionally have done, and still do today. See *United States v. Best*, 573 F.2d 1095 (9th Cir. 1978), which refused to allow a federal magistrate to order the suspension of a driver’s license, issued by the state of California, for drunk driving on a federal enclave. “Thus, if we were to uphold the magistrate’s order, we would be authorizing a federal court to require a California agency to carry out the federal order to suspend a *state-created privilege* to drive on California’s highways.” *Id.* at 1102 (emphasis added).

291. “Air is an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water . . . [An airplane’s] privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.” *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring).

292. Judge Wiseman aptly pointed out:

If anything that will take you across a state line is an “instrumentality of commerce,” then there is justification for Congress to regulate anything done on a bicycle or, for that matter, on foot. The Framers traveled to Philadelphia on horseback or by horse and carriage. Can

Unfortunately, Judge Wiseman's reasoning did not fully convince the Sixth Circuit, which reluctantly overruled *Cortner*.²⁹³ However, *Cortner* should not be forgotten in this debate. Several of the courts that have found section 101 of the Act to be constitutional have agreed with Judge Wiseman that the federal police power, as conceived by the Supreme Court, is far too broad.²⁹⁴ If it were not for *stare decisis*, they probably would have found differently.²⁹⁵ Now, with the recent *Lopez* decision, it appears that the Supreme Court may yet again be willing to defend the principles of federalism and halt the expansion of the federal police power. It remains to be seen what impact *Lopez* will have on the Act, but it appears that a post-*Lopez* challenge will have a much greater chance of succeeding.²⁹⁶

it be imagined that in constructing the Commerce Clause they intended to regulate and punish horse stealing?

United States v. Cortner, 834 F. Supp. 242, 243 (M.D. Tenn. 1993).

293. United States v. Cortner, 834 F. Supp. 242 (M.D. Tenn. 1993), *rev'd sub nom.*, United States v. Osteen, 30 F.3d 135 (6th Cir. 1994) (opinion available at 1994 WL 389210) (upholding 18 U.S.C. sec. 2119 (1994) even though "the connection to interstate commerce here was extremely tenuous.").

294. United States v. Overstreet, 40 F.3d 1090, 1092-93 (10th Cir. 1994) (section "stretch[es] the outer limits of the Commerce Clause"); United States v. Johnson, 22 F.3d 106, 109 (6th Cir. 1994) ("It may be that the carjacking statute is unwise and encroaches on traditional views of federalism . . . but it is not unconstitutional under current Commerce Clause doctrine." (citations omitted)); United States v. Grant, 860 F. Supp. 843, 844 (M.D. Ga. 1994) ("While this court may agree with Judge Wiseman's outrage and frustration at criminalizing what are essentially state crimes, it must reluctantly disagree with his holding."); United States v. Sabini, 842 F. Supp. 1446, 1447 (S.D. Fla. 1994) (Highsmith, J.), which states:

In this regard, however, the Court disagrees with the *Watson* court's statement that such a conclusion can be reached with "little difficulty" Indeed, as demonstrated by the lengthy analysis required to reach such a determination in *Watson*, and the forceful arguments supporting the *Cortner* court's contrary findings of unconstitutionality, this further federal incursion into the realm of common law crimes should give pause to those who, like the undersigned, politically embrace the principles embodied by the concept known as "Our Federalism."

(Citations omitted).

295. *Cortner*, 834 F. Supp. at 244, which states:

The Congress has a recent penchant for passing a federal criminal statute on any well-publicized criminal activity. The courts, in an obeisant deference to the legislative branch, have stretched the Commerce Clause of the Constitution beyond the wildest imagination of the Framers and beyond any rational interpretation of the language itself The constant lament is that the constitutional concept of Federalism is being eviscerated by the Congress. The Congress is able to do this, however, only because we in the judicial branch are willing to interpret the Commerce Clause so broadly.

See supra notes 249-50 and accompanying text.

296. United States v. Mallory, 884 F. Supp. 496 (S.D. Fla. 1995), was decided before *Lopez* was decided by the Supreme Court. But in finding that ACTA sec. 101 was unconstitutional, the *Mallory* court relied heavily on the Fifth Circuit opinion in United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993). "[T]he presumption of constitutionality which attaches to congressional enactments is not as strong where the court is called upon to police the constitutional boundary between the Tenth Amendment . . . and the Commerce Clause." *Mallory*, 884 F. Supp. at 498-99.

However, two such challenges have fared little better after *Lopez*. *See* United States v. Oliver, 60 F.3d 547 (9th Cir. 1995); United States v. Garcia-Beltran, 890 F. Supp. 67 (D.P.R. 1995). It should be noted that before the Supreme Court upheld the Fifth Circuit's opinion in *Lopez*, the Fifth Circuit's views on the reach of the Commerce Clause were in the minority.

CONCLUSION

The assertion that section 101 of the Act, and section 105 if interpreted broadly, is unconstitutional should not be construed to imply that carjacking is not a serious problem. Violent crime in general, and carjacking in particular, is believed by many to be the greatest problem our country faces today, although few can agree on the best method of controlling this problem. In desperation, some have looked to the federal government to provide the solution. As tempting as it may be, we should not allow the federal government to wield power it has not been granted by the Constitution simply because violent crime appears to be out of control.²⁹⁷

“Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power.”²⁹⁸ These words were written at a time when the nation faced another crisis—the Great Depression. In trying to deal with the Depression, the federal government ignored these words and seized vast power over local activities that it has never relinquished. If federalism is disregarded for the sake of the public good and political expediency in the fight against carjacking, the Constitution, as the “law of the land,” will be substantially weakened and may not be able to serve its primary purpose—to prevent tyranny.

Without a doubt, carjackers should be punished severely. But this punishment should be dispensed only by the states, not the federal government, which the Framers did not trust with general police power. While fighting against carjacking, we risk facilitating the hijacking of the police power by the federal government and the loss of federalism, without which the rights embodied in the remaining amendments of the Bill of Rights are put in jeopardy.

297. “We shall never prevent the abuse of power if we are not prepared to limit power in a way which occasionally may also prevent its use for desirable purposes.” FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 258 (50th anniversary ed. 1994).

298. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528 (1935).