CONSTITUTIONAL LAW—COMMERCE CLAUSE—MERE POSSESSION OF A FIREARM DOES NOT SUBSTANTIALLY AFFECT INTERSTATE COMMERCE; AND A FEDERAL LAW, 18 U.S.C. § 922(q), MAKING MERE POSSESSION A CRIME, EXCEEDS CONGRESSIONAL POWER PURSUANT TO THE COMMERCE CLAUSE—*United States v. Lopez*, 115 S. Ct. 1624 (1995).

The debate over the division of powers in a governmental system based on federalism[1] sparks fierce controversy.[2] As history reveals, such controversies can ultimately lead to civil war.[3] More often, however, they are peacefully resolved by the Supreme Court, which is responsible for articulating the constitutional balance between the states and the federal government.[4] Recent case law indicates that the Court has varied its decisions so often and, in fact,

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[1] "Federalism" is "[t]he federal (national) government and individual state government principle of organization. Term which includes interrelationships among the states and relationship between the states and the federal government." BLACK'S LAW DICTIONARY 424 (6th ed. 1991). The United States was born federalist pursuant to the Constitution; there was no choice or coercion to become a federalist society. *See* Henry J. Friendly, *Federalism: A Forward*, 86 YALE L.J. 1019, 1019 (1977). Presently, the United States is "in the midst of a confused era for federalism doctrine." Mark Tushnet, *Why the Supreme Court Overruled* National League of Cities, 47 VAND. L. REV. 1623, 1623 (1994). Since the formation of our nation, jurists have been confused as to the proper relationship between federal and state powers. Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1563 (1994).

Deborah Jones Merritt's article offered three distinct approaches used by the Court in attempting to define the proper relationship. *Id.* First, noted Merritt, is the territorial model. *Id.* at 1564. Under this approach, goods are labeled as either state- or nationally-regulated. *Id.* Violations occur under the territorial model when the federal government attempts to invade an area specifically left to the states. *Id.* Second is the federal process model. *Id.* at 1566. Under this approach, a state's powers are protected by the structure of the federal government, not through judicially-imposed limitations on the range of federal regulatory power. *Id.* The third approach, the autonomy model, is the one most recently used by the Court. *Id.* at 1570 (citation omitted). Under this approach, courts should intervene to protect a state's sovereignty only upon the federal government's tampering with the relationship between a "state government and its voters." *Id.* at 1570-71. *See also* William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355, 1369-95 (1994) (providing a structural history of judicial enforcement of federalism norms from 1800 to the present and discussing the Supreme Court's history of protecting state sovereignty).

[2] American Survey, *Nine for the Seesaw*, THE ECONOMIST, Mar. 2, 1985, at 21. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6.3, at 404 (2d ed. 1988) (discussing the original interpretations of the Commerce Clause).

[3] *Nine for the Seesaw*, *supra* note 2, at 21.

[4] *Id.*; *see* GERALD GUNTHER, CONSTITUTIONAL LAW 66-67 (12th ed. 1991) (noting the early conflicts addressed by the Supreme Court).

so radically, that the definition has ultimately become blurred.[5]

The first judicial concepts of federalism were enunciated in 1793 in *Chisholm v. Georgia*.[6] In that case, the United States Supreme Court rejected the State of Georgia's claim of immunity from a lawsuit by a private citizen.[7] The decision was immediately faced with harsh criticism,[8] but nevertheless expressed the Supreme Court's notion that the individual states could be subject to the national judicial process.[9]

The Framers of our nation's Constitution established a form of government premised on enumerated powers.[10] This structure dictates that the federal government may only employ those powers granted to it under the Constitution.[11] Among such enumerated powers granted to Congress, however, was the ability to adopt any legislation "necessary and proper"[12] to achieve a congressional

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5 *Nine for the Seesaw*, *supra* note 2, at 21; *see infra* note 101 and accompanying text (noting the Supreme Court's treatment of Commerce Clause issues in recent case law).

6 2 U.S. (2 Dall.) 419 (1793).

7 *See* ALPHEUS T. MASON & DONALD G. STEPHENSON, JR., AMERICAN CONSTITUTIONAL LAW 122, 135 (9th ed. 1990). On October 31, 1777, the Executive Council of Georgia authorized two state commissioners to purchase certain merchandise from Robert Farquhar, a South Carolina merchant, for an agreed sum of $169,613.33. *Id.* Before receiving the money, Farquhar died. *Id.* The State appointed Alexander Chisholm as Farquhar's executor and proceeded to pursue the debt from the State of Georgia. *Id.* Georgia refused to pay, and Chisholm brought suit for the debt in the United States Circuit Court for the District of Georgia. *Id.* Georgia defended on the basis of its sovereign and independent status pursuant to the Constitution. *Id.* Thus, it was exempt from being named a party to any lawsuit brought by a non-Georgia citizen. *Id.* The circuit court initially accepted this assertion. *Id.* Subsequently, Chisholm brought his suit to the Supreme Court. *Id.* No representative of Georgia appeared before the Court after several invitations; accordingly, the Court entered judgment for Chisholm on February 19, 1793. *Id.*

8 *Id.* On the same day as the *Chisholm* decision, the House filed a resolution seeking an amendment to the Constitution, and the next day the Senate followed with a supportive resolution. *Id.* On March 4, 1794, Congress proposed the Eleventh Amendment, which was ratified in 11 months. *Id.* The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

9 MASON & STEPHENSON, *supra* note 7, at 125.

10 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819). Chief Justice Marshall explained:

> This [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist.

Id.

11 *Id.*

12 *Id.* at 411-12, 420. The Necessary and Proper Clause provides that "Congress

goal.[13] This ability led Congress to allot itself a number of implied powers.[14]

These implied powers, arising out of the Necessary and Proper Clause, came into direct conflict with the states' abilities to regulate and exercise their police powers[15] under the Tenth Amendment.[16]

At the forefront of these conflicts between the federal and

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shall have the power . . . [t]o 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, § 8, cl. 18.

13 *See McCulloch*, 17 U.S. (4 Wheat.) at 413-14; *see also* TRIBE, *supra* note 2, § 5.2, at 298-300 (discussing the doctrine of enumerated powers).

14 *McCulloch*, 17 U.S. (4 Wheat.) at 406 (explaining that the Framers of the Constitution intended to create "implied" federal powers). "Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers . . . ." *Id.*; *see also* GUNTHER, *supra* note 4, at 77 (outlining the historical context of the Necessary and Proper Clause and Congress's implied national powers). According to Gunther, the Framers of the Constitution never discussed the Necessary and Proper Clause at the Constitutional Convention. Gunther, *supra* note 4 at 78. The clause, however, was discussed in great detail during the ratification years of the Constitution because many people feared a strong, centralized government. *Id.* Moreover, noted Gunther, those in favor of the Constitution insisted that the clause was "harmless" and that the objections to the clause were "pretext." *Id.* "Had the Constitution been silent on this head, there can be no doubt that all particular powers requisite as means of executing the general powers would have resulted to the government, by unavoidable implication." *Id.*

15 "Police power" is defined as:

> An authority conferred by the American constitutional system in the Tenth Amendment, U.S. Const., upon the individual states, and, in turn, delegated to local governments, through which they are enabled to establish a special department of police; adopt such laws and regulations as tend to prevent the commission of fraud and crime, and secure generally the comfort, safety, morals, health, and prosperity of its citizens by preserving the public order, preventing a conflict of rights in the common intercourse of the citizens, and insuring to each an uninterrupted enjoyment of all the privileges conferred upon him or her by the general laws. The power of the State to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity. The police power is subject to limitations of the federal and State constitutions, and especially to the requirement of due process. Police power is the exercise of the sovereign right of a government to promote order, safety, security, health, morals and general welfare within constitutional limits and is an essential attribute of government.

BLACK'S LAW DICTIONARY 801 (6th ed. 1991).

16 Alan N. Greenspan, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND. L. REV. 1019, 1021 (1988). According to Greenspan, the expansion of a federal police power pursuant to the Commerce Clause disturbs the delicate balance of the federal system. *Id.* Greenspan noted further that

state governments were cases involving the constitutional power of Congress to regulate commerce.[17] The Supreme Court first de-

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the demise of federalism, resulting from increased federal power, could threaten individual rights on the theory of regulation without sufficient representation. *Id.*

The Tenth Amendment provides: "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. The Tenth Amendment should be seen as an umbrella that protects a whole constellation of state rights and obligations, and it is the responsibility of the judiciary to determine which rights are protected by the Tenth Amendment umbrella and which restrictions may be imposed on the states without piercing this umbrella. Robert H. Freilich, *Returning to a General Theory of Federalism: Framing a New Tenth Amendment United States Supreme Court Case*, 26 URB. LAW. 215, 217 (1994) (citing Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 293 (1968)).

The Framers intended the Tenth Amendment as a means to preserve state power. *See* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 14 (1950). When state and national powers conflict, however, the state's power must yield. *Id. But see* Ronald A. Giller, *Federal Gun Control in the United States: Revival of the Tenth Amendment*, 10 ST. JOHN'S J. LEGAL COMMENT. 151, 162-76 (1994) (detailing the history of the Tenth Amendment while focusing on congressional powers arising pursuant to the Commerce Clause); Richard E. Levy, New York v. United States*: An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 KAN. L. REV. 493, 496 (1993) (claiming that the federal government has become ubiquitous in terms of its regulations on every aspect of daily life).

The Supreme Court cases dealing with Congress's prohibition of activities deleterious to public safety illustrates this struggle between the state's police power and the power of Congress to regulate pursuant to the Commerce Clause. *See* TRIBE, *supra* note 2, § 5-6 at 312-13; *see also* Greenspan, *supra* at 1024-28 (discussing Congress's success in enacting public protection legislation). *See generally* Richard A. Epstein, *The Proper Scope of the Commerce Clause*, 73 VA. L. REV. 1387, 1421-28 (1987) (discussing various Supreme Court decisions involving congressional regulation of harmful activities flowing through interstate commerce).

In Hammer v. Dagenhart, 247 U.S. 251 (1918), Congress passed legislation that prohibited the shipment of any good in interstate commerce that was manufactured in any facility that was in violation of the federal act. *Id.* at 1427. Because the legislation at issue in *Hammer* failed to require that the specific good must travel through interstate commerce, and instead simply required that the manufacturer produce some good that was made by children in violation of the Act, the Supreme Court struck down the regulation as an improper use of the Commerce Clause. *Id.*

[17] *See, e.g.*, Kidd v. Pearson, 128 U.S. 1, 22-23 (1888) (upholding the police power of a state to restrict the manufacture of liquor); The Steamer Daniel Ball v. United States, 77 U.S. (10 Wall.) 557, 564-65 (1871) [hereinafter *The Daniel Ball*] (holding that Congress could regulate the licensing of ships operating solely intrastate if the cargo that those ships were carrying were involved with any form of interstate movement); Veazie v. Moor, 14 U.S. (1 How.) 568, 573-75 (1852) (rejecting a Commerce Clause attack on a state-granted monopoly to operate steamships entirely within intrastate waters); United States v. Marigold, 50 U.S. (9 How.) 560, 566-68 (1850) (holding that Congress's power to regulate commerce included the power to exclude commerce and, thus, Congress could prohibit the importation of counterfeit currency); Gibbons v. Odgen, 22 U.S. (9 Wheat.) 1, 210-11 (1824) (declaring a federally-granted monopoly to operate steamships superior to a state-granted right); Epstein, *supra* note 16, at 1393-1408 (breaking down the text of the Commerce Clause and analyzing its application prior to 1937).

"Commerce" is:

fined the scope of Congress's power to regulate commerce in *Gibbons v. Ogden*,[18] holding that a state-granted monopoly with respect to navigable waters was subordinate to a federally-licensed activity involving the same waters.[19] The early Commerce Clause[20] debates following *Gibbons* focused on whether commerce was analogous to manufacturing.[21] During the next 150 years, the Supreme Court's

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> [T]he exchange of goods, productions, or property of any kind; the buying, selling, and exchanging of articles. The transportation of persons and property by land, water and air. Intercourse by way of trade and traffic between different peoples or states and the citizens or inhabitants thereof, including not only the purchase, sale, and exchange of commodities, but also the instrumentalities and agencies by which it is promoted and the means and appliances by which it is carried on, and transportation of persons as well as of goods, both by land and sea. Also interchange of ideas, sentiments, etc., as between man and man. The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia, or any Territory . . . or between points in the same State but through any other State or Territory or the District of Columbia or any foreign country.

BLACK'S LAW DICTIONARY 183 (6th ed. 1991).

18 22 U.S. (9 Wheat.) 1 (1824). *See infra* notes 46-53.

19 *Gibbons*, 22 U.S. (9 Wheat.) at 210-11.

20 U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause states that "Congress shall have the Power to . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*; *see* Jacques Leboeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Powers*, 31 SAN DIEGO L. REV. 555, 592-607 (1994) (noting the Framers' intentions in constructing the powers of the Commerce Clause). The majority of today's federal power may be traced back to this particular clause in the Constitution. Epstein, *supra* note 16, at 1387. The Commerce Clause powers developed and expanded into three distinct areas: instrumentalities of commerce, regulation of goods traveling through interstate commerce, and those cases examining the subtlety between commerce and manufacturing among the states. *Id.* at 1409-10.

The Court has applied the instrumentalities of commerce theory and has upheld an order by the Interstate Commerce Commission that fixed intrastate railroad rates because of their effect on interstate commerce. *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342, 354, 358 (1914) [hereinafter *Shreveport Rate Case*]. The Court announced that "Congress is empowered to regulate—that is, to provide the law for the government of interstate commerce; to enact 'all appropriate legislation' for its 'protection and advancement[.]'" *Id.* at 351 (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) at 564). See *supra* note 16 for a discussion of the scope of regulation of goods flowing through interstate commerce. See *infra* note 21 for an overview of the Supreme Court's treatment of the distinction between commerce and manufacturing.

21 In *United States v. E.C. Knight Co.*, the Government sought to enjoin the American Sugar Refining Company, which controlled a significant majority of the sugar-refining companies within the United States, from acquiring the E.C. Knight Company and three other companies. United States v. E.C. Knight Co., 156 U.S. 1, 9 (1895). The Government contended that the proposed acquisition violated the Sherman Act of 1890, 15 U.S.C. §§ 1-3 (1994), which makes it illegal for anyone to enter into a contract that interferes with trade or commerce between the states or who seeks to monopolize in any aspect involving commerce among the states. *Id.* at 6-7. The

treatment of the Commerce Clause enabled Congress to regulate many activities that were generally considered to be left to the states as provided by the Tenth Amendment.[22] As Congress continued to federalize those areas presumed to belong to the states, serious doubt arose regarding the vitality of the Tenth Amendment.[23]

In a recent case, *United States v. Lopez*,[24] the United States Supreme Court considered the constitutionality of 18 U.S.C. § 922(q),[25] which criminalizes possession of a firearm within the

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Supreme Court affirmed the decision of the United States Court of Appeals for the Third Circuit, holding that the acquisition of the E.C. Knight Company along with the other three companies was for private gain and in no way related to interstate commerce either between states or foreign nations. *Id.* at 17. In reaching this decision, Chief Justice Fuller quoted the following language, expressed in *Kidd v. Pearson*:

> "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce. . . ."

Id. at 14 (quoting Kidd v. Pearson, 128 U.S. 1, 20 (1888)).

22 Ronald A. Giller, *supra* note 16, at 157. Giller rejected the 19th century view mandating the rigid separation of federal and state governments to preserve their coexistence as equivalent sovereign entities. *Id.*; *see also* Martha A. Field, *The Supreme Court, 1984 Term: Comment:* Garcia v. San Antonio Metropolitan Transit Authority*: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 84 (1985) (discussing the increase of federal Commerce Clause power as it relates to the passing of the Thirteenth, Fourteenth, Sixteenth, and Seventeenth Amendments).

23 Stephen Chippendale, Note, *More Harm than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, 459-60 (1994). Noting the proliferation of federal statutes, Chippendale indicated a yearly increase of 70% of criminal case filings in the federal courts. *Id.* at 456; *see also* Robert D. Raven, *Don't Wage War on Crime in Federal Courts*, TEX. LAW., August 31, 1992, at 12 (noting the increased volume of criminal case filings in federal courts). Chief Justice Rehnquist informed Congress in his 1992 State of the Judiciary Report that the federal courts are experiencing a "caseload crisis." Raven, *supra*, at 12. The predominant reason set forth is the federalization of criminal law. *Id.* Currently, there are more than 3000 federal offenses, each separate and distinct from one another. Chippendale, *supra* at 455-56. United States District Judge Judith Keep asserted that the courts are overwhelmed by the amount of criminal cases and that they have turned into somewhat of a "police court." Raven, *supra* at 12. There is now a serious push, apparently headed by the Supreme Court, to decrease the number of criminal cases in the federal court system and return such cases back to the state courts. *Id.* at 12-13. Doing so, argues Raven, would give the states the deference and respect dictated by the principles of federalism. *Id.* at 13.

24 115 S. Ct. 1624 (1995).

25 Section 922(q) of the Gun-Free School Zones Act of 1990 provides in part:

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

confines of an area that a person knows or should know is a local school zone.[26] The Court held that 18 U.S.C. § 922(q) did not fall within the scope of the Commerce Clause power because the mere possession of a handgun in or around a school does not substantially affect interstate commerce.[27]

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documented in numerous hearings in both the Judiciary Committee of the House of Representatives and Judiciary Committee of the Senate;

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

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

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

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

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

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

(2)

(A) It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone . . . .

18 U.S.C. § 922(q) (1994).

[26] *See id.*; *see also Lopez*, 115 S. Ct. at 1626. The Act defines a "school zone" as the area "in, or on the grounds of, a public, parochial or private school; or within a distance of 1,000 feet from the grounds of a public, parochial or private school." 18 U.S.C. § 921(a)(25) (1994). The term "school" is defined by Congress as "a school which provides elementary or secondary education under State law." 18 U.S.C. § 921(a)(26) (1994).

[27] *Lopez*, 115 S. Ct. at 1634. *Lopez* arrived at the Supreme Court after the United States Court of Appeals for the Fifth Circuit ruled that the Gun-Free School Zones Act of 1990 was an unconstitutional statute, outside the powers given to Congress by the Commerce Clause. United States v. Lopez, 2 F.3d 1342, 1367-68 (5th Cir. 1993), *reh'g denied*, 9 F.3d 105 (5th Cir.), *cert. granted*, 114 S. Ct. 1536 (1994). This decision of the court of appeals was significant because it ignored precedent established by prior Supreme Court decisions mandating the "rational basis" form of review. *See, e.g.*, Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 17 (1990) (noting the Court's deference to congressional findings when reviewing activities affecting interstate commerce); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (stating that the Court must yield to any congressional finding that a particular activity affects interstate commerce, provided there is a rational basis for such a finding); *see infra* notes 84-91 and accompanying text (discussing Maryland v. Wirtz,

On March 10, 1992, Alfonso Lopez, Jr., arrived at school in possession of a concealed .38 caliber handgun.[28] School officials, acting on an anonymous tip, confronted and questioned Lopez, who thereafter admitted to carrying the weapon.[29] Authorities charged Lopez with violating section 46.03(a)(1) of the Texas Penal Code,[30] which prohibits the possession of a firearm on school premises.[31] The following day, however, federal agents charged Lopez with violating 18 U.S.C. § 922(q)(1)(a) and, as a result, the state charges against Lopez were dismissed.[32]

Following the filing of the complaint against Lopez and the subsequent grand jury indictment, Lopez filed a motion with the United States District Court for the Western District of Texas to dismiss the complaint.[33] In denying the motion for dismissal, the district court held that § 922(q) was a constitutional exercise of

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392 U.S. 183, 190 (1968), which stated that the Court's investigation is at an end upon determining that Congress possessed a rational basis to regulate an activity affecting interstate commerce).

Three months after the Fifth Circuit decided *Lopez*, the United States Court of Appeals for the Ninth Circuit reached the opposite conclusion in holding that 18 U.S.C. § 922(q) was constitutional as a valid exercise of Congress's Commerce Clause power in *United States v. Edwards*, 13 F.3d 291, 294 (9th Cir. 1993), *cert. filed*, Mar. 25, 1994 (No. 93-8487). *See* James M. Maloney, Note, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 FORDHAM L. REV. 1795, 1822-23 (1994) (noting that the decision by the court of appeals in *Lopez* was more consistent with the concepts of federalism than the decision reached by the court of appeals in *Edwards*). Subsequently, the Supreme Court remanded *Edwards* to the Ninth Circuit for reconsideration. United States v. Edwards, 55 F.3d 428, 428 (9th Cir. 1995). On remand, the Ninth Circuit reversed the conviction, citing the Court's holding in *Lopez*. *Id.*

[28] *Lopez*, 115 S. Ct. at 1626. Lopez, at the time of his arrest, was a 12th-grade student at Edison High School in San Antonio, Texas. *Id.* Although the gun was not loaded, Lopez also had in his possession five bullets. *Id.*

[29] *Id.* Upon questioning Lopez, school officials learned that the gun had been given to Lopez by a fellow student and that he was to deliver the gun to a third student. *Lopez*, 2 F.3d at 1345. Lopez acknowledged that the gun was to be used in a "gang war" and that he was to receive 40 dollars upon delivering the gun. *Id.*

[30] The relevant part of the statute under which Lopez was initially charged states:

> § 46.03. Places Weapons Prohibited
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> (a) A person commits an offense if, with a firearm, illegal knife, club, or prohibited weapon listed in Section 46.05 (a) [not provided here], he intentionally, knowingly, or recklessly goes:
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> (1) on the physical premises of a school, an educational institution, or a passenger transportation vehicle of a school or an educational institution, whether the school or educational institution is public or private, unless pursuant to written regulations or written authorization of the institution.

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

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

[32] *Id.*; *see supra* note 25, for the text of § 922(q).

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

congressional power pursuant to the Commerce Clause.[34] In an unpublished opinion, the district court judge, sitting without a jury,[35] found Lopez guilty of knowingly possessing a firearm in a school zone.[36]

On appeal to the United States Court of Appeals for the Fifth Circuit, Lopez again challenged the constitutionality of § 922(q) as an excessive use of Congress's Commerce Clause power.[37] Writing for the court in a per curiam opinion,[38] Judge Garwood reversed Lopez's conviction, stating that § 922(q) in its then present format was an unconstitutional use of the Commerce Clause power.[39] Judge Garwood found that the Government failed to allege a nexus between Lopez's possession of the gun and interstate commerce.[40]

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[34] *Id.*; *see also Lopez*, 2 F.3d at 1345 (concluding that 18 U.S.C. § 922(q) is a constitutional means of regulation under the Commerce Clause and that interstate commerce is affected by the "business" of education, specifically at the elementary, middle, and high school levels).

[35] *Lopez*, 115 S. Ct. at 1626 (noting that Lopez's right to a trial by jury was waived).

[36] *Id.* Lopez received a six-month sentence followed by a two-year supervised release from the district court. *Id.*

[37] *Lopez*, 2 F.3d at 1345. The circuit court stipulated that the only objection raised by Lopez was the constitutionality of § 922(q). *Id.* Thus, the circuit court did not have to consider Lopez's guilt or innocence. *Id.*

[38] *Id.* at 1342; *see* Deborah L. Farmer, Recent Development, United States v. Lopez*: The Fifth Circuit Declares The Gun-Free School Zones Act of 1990 an Unconstitutional Extension of Congressional Power Under the Commerce Clause*, 68 TUL. L. REV. 1674 (1994) (analyzing and synthesizing the Fifth Circuit's opinion in *Lopez*).

[39] *Lopez*, 2 F.3d at 1367-68. Section 922(q), at the time it was reviewed by the court of appeals, did not contain the preamble now provided in § 922(q)(1). *See* 18 U.S.C. § 922(q)(1). The statute started with the language that is now § 922(q)(2)(A). *Id.* Judge Garwood expressly left open the question regarding the constitutionality of § 922(q) in other scenarios. *Lopez*, 2 F.3d at 1368. The Fifth Circuit's holding was, therefore, narrow. *Id.* The court simply stated that Congress had failed to bring § 922(q) within the realm of the Commerce Clause in the immediate case. *Id.* Moreover, the court concluded that Lopez's conviction would still have been reversed—even though the gun that Lopez possessed had been manufactured in another state—because the Government failed to allege any connection to interstate commerce. *Id.*

[40] *Lopez*, 2 F.3d at 1368. However, Judge Garwood surmised that a conviction under § 922(q) could be possible if the Government were to show the requisite nexus in a future case. *Id.* The court began its analysis to determine whether such nexus is needed by exploring Supreme Court precedent, specifically United States v. Bass, 404 U.S. 336 (1971). *Id.* at 1347; *see also* David S. Gehrig, Note, *The Gun-Free School Zones Act: The Shootout Over Legislative Findings, the Commerce Clause, and Federalism*, 22 HASTINGS CONST. L.Q. 179, 195-96 (1994) (discussing the relationship between *Bass* and *Lopez* in greater detail).

In *Bass*, the Supreme Court confronted the question of whether such a nexus to interstate commerce must be shown when the Government is prosecuting for the possession of a firearm. *Bass*, 404 U.S. at 338. In answering this question in the affirmative, the *Bass* Court announced that without some showing of a nexus between the activity sought to be regulated and interstate commerce, the statute at issue substantially interferes with traditional state criminal jurisdiction. *Id.* at 350; *see* Gehrig, *supra*,

Moreover, the appellate court held that a nexus was an essential component for a conviction under 18 U.S.C. § 922(q).[41]

Subsequently, the United States Supreme Court granted the Government's petition for certiorari.[42] In affirming the holding of the circuit court, Chief Justice Rehnquist, writing for the majority, stated that the mere possession of a firearm does not substantially affect interstate commerce.[43] The Chief Justice remarked that in order to reinstate the conviction under § 922(q), the Government must show that the actions of the defendant substantially affect interstate commerce.[44] Moreover, Chief Justice Rehnquist con-

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at 197 (noting that most prior federal firearm statutes mandated a nexus to interstate commerce for each individual case); Maloney, *supra* note 27, at 1815-16 (referring to the Second Circuit's ruling in *Bass* that indicated by allowing prosecution under the statute without showing a nexus to interstate commerce federal power would be extended to an unprecedented level). *But see* Scarborough v. United States, 431 U.S. 563, 575 (1977) (finding that to support the required nexus, all that need be shown is that the firearm had, at some time, traveled through interstate commerce).

41 *Lopez*, 2 F.3d at 1368; *see also* Giller, *supra* note 16, at 165 (stating that absent a distinct nexus between interstate commerce and gun possession within a school zone, the statute was unconstitutional).

42 United States v. Lopez, 114 S. Ct. 1536 (1994). Chief Justice Rehnquist stated that the petition for certiorari was granted due to the significance of the issue. *United States v. Lopez*, 115 S. Ct. at 1626.

43 *Lopez*, 115 S. Ct. at 1634.

44 *Id.* at 1632. The Government may have been able to show such a burden on interstate commerce by either alleging so in its indictment or by offering previous congressional findings. *Lopez*, 2 F.3d at 1368. The Supreme Court then noted the benefits of Congressional findings in interpreting the intent of congressional statutes. *Lopez*, 115 S. Ct. at 1632 (footnote omitted).

Chief Justice Rehnquist discussed two arguments made by the Government in regard to interpreting congressional statutes. *Id.* at 1631-32. The first was that Congress, typically, did not have to show such findings when passing legislation. *Id.* at 1631; *see, e.g.*, Perez v. United States, 402 U.S. 146, 156 (1971) (noting that in order to legislate, Congress does not have to make particularized findings); United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) (declaring that the Court, in the absence of such findings, is to presume all the necessary facts that would support the congressional legislation and that such legislation should not be pronounced unconstitutional unless, considering all express and presumed facts, the Court finds that there was no rational basis for such legislation). Chief Justice Rehnquist acknowledged that Congress is not typically required to formulate findings to justify its legislation, but stated that a finding in the immediate case, involving Lopez, would have aided the Government's position. *Lopez*, 115 S. Ct. at 1632.

The second argument was that Congress had, through prior legislation, "accumulated institutional expertise regarding the regulation of firearms." *Id.* (citing Fullilove v. Klutznick, 448 U.S. 448, 503 (1980) (Powell, J., concurring) (declaring that when Congress repeatedly legislates in a specific area, its members acquire experience that reduces the need for prolonged debate or new hearings in subsequent legislation involving similar matters)). Chief Justice Rehnquist posited that this argument is not applicable to Congress's enactment of § 922(q) because its scope reached beyond that of its past firearm legislation. *Lopez*, 115 S. Ct. at 1632 (citing *Lopez*, 2 F.3d at 1366).

The circuit court's opinion in *Lopez* reveals that when Congress introduced the

cluded that because of the lack of Congressional findings clarifying the connection of firearms to interstate commerce, § 922(q) could not be upheld in the instant case.[45]

The genesis of the Supreme Court's rulings regarding Congress's ability to regulate pursuant to the Commerce Clause extends back to 1824 and the landmark decision of *Gibbons v. Ogden*.[46] In *Gibbons*, the Court confronted the problem of deciphering between two individuals' state-granted right to monopolize the operation of steamships within the state's waterways and a third individual's right, pursuant to a federal license, to operate his steamships in those same waterways.[47] More specifically, the Court defined the parameters of the Commerce Clause power and the extent to which that power could be applied.[48]

Gun-Free School Zones Act of 1990, it was to be included as part of a different federal law. *Lopez*, 2 F.3d at 1358-59. Further, the circuit court noted that the House Report on the Crime Control Act made absolutely no mention of the impact that firearms had on interstate commerce, as did past legislation regarding the possession of firearms. *Id.* at 1359. Moreover, no member of Congress, in advocating the Gun-Free School Zones Act of 1990 by lengthy floor statements, made reference to its relationship to interstate commerce. *Id.* at 1360. Finally, the circuit court noted that President Bush expressed general criticism before signing the Act. *Id.* President Bush specifically stated that the Act "'inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law.'" *Id.* (quotation omitted). President Bush further stated that "[t]he policies reflected in . . . [this] provision could legitimately be adopted by the States, but they should not be imposed on the States by the Congress." *Id.*

45 *Lopez*, 115 S. Ct. at 1632.

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

47 *Id.* at 1-2. Respondent, Ogden, received the rights to the monopoly of New York waters by assignment. *Id.* The assignment stated that respondent would be the sole navigator of any boat powered by fire or steam. *Id.* at 2. Petitioner, Gibbons, engaged in navigating the waters within New York's border pursuant to a federal licensing act which was entitled: "An act for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same." *Id.*

48 *Id.* at 194-96. Gibbons argued that the powers held by the states are concurrent with those of Congress. *Id.* at 24. Therefore, he argued that the states are free to regulate an area of interest until the federal government regulates that area through constitutional measures. *Id.* at 19. However, while admitting this concurrent power, Gibbons further argued that the state's power is subordinate to the federal power. *Id.* at 24. Thus, when the two powers conflict with one another, the federal laws must take precedence. *Id.* at 19, 24. Finally, the petitioner stated that Congress must have sole and exclusive power to regulate commerce. *Id.* at 12. Hence, the federal license held by the petitioner must prevail over the state grant to the monopoly. *Id.* at 27-28.

The Attorney General agreed with the petitioner and further argued that the monopoly was unconstitutional. *Id.* at 159. In support of that argument, the Attorney General noted that the federal government was comprised of enumerated powers. *Id.* at 160. Referring to respondent's admission of the presence of implied powers, the Attorney General stated that all enumerated powers were to be construed strictly, and the implied powers liberally. *Id.* at 160-61. Lastly, the Attorney General urged that the power of the federal government to regulate pursuant the Commerce Clause is

Chief Justice Marshall, writing for the Court, held that Congress's Commerce Clause power consists of the power to regulate and prescribe the laws by which commerce is to operate.[49] This power, asserted the Chief Justice, is absolute and subject only to those limits expressly stated in the Constitution.[50] Chief Justice Marshall further explained that the power to regulate commerce may be stretched to all circumstances involving commerce among the states.[51] The Chief Justice noted that such power, in certain circumstances, could conceivably reach activities occurring within the borders of a single state.[52] In so holding, Chief Justice Marshall concluded that the license granted by the federal government must be superior to the state's grant of the monopoly.[53]

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entirely separate from the power of the state to prohibit under its police powers. *Id.* at 178. For a definition of police power, see *supra* note 15.

Respondent, Ogden, relying heavily on the Tenth Amendment, argued that the Commerce Clause power could not enjoin the state-granted monopoly. *Id.* at 34. The crux of respondent's argument was that the powers under the Commerce Clause must originate from the Constitution. *Id.* at 34-35. The respondent concluded that the federal powers may be either concurrent or exclusive. *Id.* at 37. If exclusive, then federal law dictates. *Id.* If concurrent, such power should reside in the states. *Id.* Moreover, respondent proffered that any implied federal power must be concurrent rather than exclusive. *Id.* at 36-37. Respondent warned that if this were not so, the powers of the federal government "would deprive the States almost entirely of sovereignty, as these implied powers must inevitably be very numerous, and must embrace a wide field of legislation." *Id.* at 37.

The second argument made by the respondent was also based on the Tenth Amendment. *Id.* at 87. The respondent focused on the fact that the Constitution gave no true power to the states, declaring that such power already existed prior to the creation of the Constitution. *Id.* Moreover, this argument rejected the term "concurrent" to describe the relationship between state and federal law. *Id.* at 88. The respondent adopted the term "coordinate" instead. *Id.* Respondent suggested that the term concurrent led to the constant conclusion that federal was superior to state. *Id.* In concluding that the monopoly was beyond the reach of the Commerce Clause power, respondent argued that such a grant was a valid state exercise of its police power. *Id.* at 112-13.

49 *Id.* at 196.

50 *Id.* at 197.

51 *Id.* at 194. According to the Chief Justice, commerce among the states necessarily is commerce between the states. *Id.* at 196. Chief Justice Marshall noted here that the term among is synonymous with intermingled. *Id.* at 194. Clarifying, the Court recognized that although the word among is comprehensive, the Commerce Clause power may be limited only to commerce that affects more than one state. *Id.* Chief Justice Marshall expressly remarked that commerce occurring completely within a state is reserved for the state to regulate. *Id.* at 195.

52 *Id.* at 194.

53 *Id.* at 210. Chief Justice Marshall explained that the Framers of the Constitution foresaw the possibility of conflicts between state and federal laws and provided for such occurrences by stating that the Constitution is to be considered the supreme law of the land. *Id.* at 210-11. The Court declared that in every case in which a state enacts a law contrary to an act of Congress, or federal treaty, the state action must yield. *Id.* at 211. Applying this principle, the Chief Justice concluded that the state-

In the years following *Gibbons*, the Court dealt with increasing amounts of congressional Commerce Clause legislation that regulated intrastate activities.[54] To combat this trend, the Court adopted a direct-indirect test in *A.L.A. Schechter Corp. v. United States*,[55] which involved a federal law intended to regulate the hours and wages of slaughterhouse workers.[56] The Court held that the

granted monopoly assigned to Ogden must yield to the federal license issued to Gibbons. *Id.* at 210.

Justice Johnson filed a concurring opinion, expressing his view that the Constitution must be interpreted and executed as the Founders intended. *Id.* at 223 (Johnson, J., concurring). Justice Johnson believed that commerce was an "exchange of goods" that included the means of getting those goods to market. *Id.* at 229-30 (Johnson, J., concurring). Hence, Justice Johnson defined commerce broadly. *Id.* Concluding, Justice Johnson believed that if the federal power did not extend to the regulation of shipping and navigation, it would lack the power to regulate interstate commerce. *Id.* at 230.

54 *See* GUNTHER, *supra* note 4, at 99-116 (detailing the beginnings of Congress's economic regulations premised on its Commerce Clause power). *See generally* Stafford v. Wallace, 258 U.S. 495 (1922) (upholding congressional regulation of meat-packing industry); Hammer v. Dagenhart, 247 U.S. 251 (1918) (overruling child-labor laws regulating local manufacturers); Hoke v. United States, 227 U.S. 308 (1913) (upholding ban on transportation of prostitutes across state lines); Swift v. United States, 196 U.S. 375 (1905) (upholding Congress's application of the Sherman Act, *supra* note 21, on meatpackers); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (holding manufacturing regulations unconstitutional).

The significance of the *Stafford* decision concerns the Court's "stream of commerce" or "flow of commerce" analysis. *See Stafford*, 258 U.S. at 516. Chief Justice Taft explained that the nation's stockyards are not designed to be a final destination. *Id.* at 515. Rather, the Chief Justice noted, they are but "a throat through which the current flows." *Id.* at 516. The Court concluded that because the stockyards were an essential element in the interstate business of distribution of beef, Congress could constitutionally regulate such practices deemed necessary within stockyards. *Id.* at 515-16, 528. Furthermore, the Court in *Swift* found that although the restraint on trade and potential monopoly of such trade would be confined in a single state, the effect on interstate commerce is certain. *Swift*, 196 U.S. at 396-97; *see also* Friendly, *supra* note 1, at 1023 (noting the growth of a stunning array of federal statutes designed to remedy economic and social harms showing no signs of abatement).

55 295 U.S. 495 (1935).

56 *Id.* at 524. Defendant, A.L.A. Schechter Corporation, was prosecuted for violation of the Live Poultry Code, which was incorporated into section three of the National Industrial Recovery Act, 15 U.S.C. §§ 701-713 (1977). *Id.* at 521. The corporation purchased its live poultry either in New York City, at the West Washington Market, or at railroad stations serving New York. *Id.* at 520. Occasionally, defendant would purchase poultry from Philadelphia. *Id.* Upon purchasing the poultry, defendant sold it to retail stores and butcher shops, which in turn sold the poultry directly to consumers. *Id.* at 521. The Court made special mention that defendant sold no poultry interstate. *Id.*

Defendant argued that its operations were intrastate and that the Live Poultry Code was beyond Congress's Commerce Clause powers. *Id.* at 519. The Government contended that unfair labor practices affected both the quality and supply of poultry involved in interstate commerce and, thus, Congress had the right to regulate those activities that lead to the unfair practices. *Id.* at 509; *see also* Robert L. Stern, *The*

law was an unconstitutional exercise of the Commerce Clause power, reasoning that because the corporation made no interstate sales, Congress's power could not reach its activities.[57] The *Schechter* Court stated that the standard used to determine the extent of Congress's Commerce Clause power was whether the transactions of the defendant directly affected interstate commerce.[58] Chief Justice Hughes, writing for the Court, stated that such a determination must be made on a case-by-case basis, and although the line between direct and indirect effects might not be obvious, the distinction between the two is clear in principle.[59]

One year later, the Court seized the opportunity to broaden the *Schechter* holding by deciding, in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[60] that the Commerce Clause power could reach intrastate manufacturing.[61] In *Jones & Laughlin Steel*,

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Commerce Clause and the National Economy, 1933-1946, 59 HARV. L. REV. 645, 660-64 (1946) (describing the litigation strategy for the Government regarding *Schechter*).

57 *Schechter*, 295 U.S. at 550. The Court rejected the proposition that the poultry was in the "flow" or "current" of interstate commerce. *Id.* at 543. The *Schechter* Court, in reaching this conclusion, determined that the mere fact there exists a "current" of commodities flowing into a state does not imply that such a flow necessarily continues out of the state. *Id.*

58 *Id.* at 546. The direct-indirect test formed in *Schechter* attempted to limit the scope of the Commerce Clause power. *See id.* The Court warned that if the federal powers could reach all activities that indirectly affected interstate commerce, such powers would consume every part of human life, to the point that any state authority would have to be implemented by permission of the federal government. *Id.*

The Court held that the scope of the Commerce Clause power in relation to intrastate regulation must be defined by drawing a precise line between those activities directly affecting interstate commerce and those with only an indirect effect. *Id.* The states retain the power to regulate those activities indirectly affecting interstate commerce. *Id.*

59 *Id.* Chief Justice Hughes stated that the distinction between indirect and direct effects must be viewed as fundamental. *Id.* at 548. Without this distinction, according to Chief Justice Hughes, the constitutional system would be jeopardized. *Id.* The Court cited the *Shreveport Rate Case* as an illustrative direct effects case. *Id.* at 544. In that case, the Supreme Court upheld Congress's authority to regulate the cost of a ticket. *Shreveport Rate Case*, 234 U.S. at 360. The Court indicated that the commerce of those cities on the interstate line were being substantially affected because the cost of the intrastate-operated railroad was substantially lower than the railroad line operating interstate. *Id.* at 346-47. Chief Justice Hughes stated that Congress retains the right to regulate common carriers' intrastate activities because common carriers have a "close and substantial relation to interstate traffic and that the control is essential . . . to secure the freedom of that traffic from interference or unjust discrimination and to promote the efficiency of the interstate service." *Schechter*, 295 U.S. at 544.

60 301 U.S. 1 (1937). The case reached the Supreme Court on appeal by the Government from the United States Court of Appeals for the Fifth Circuit. *Id.* at 22. The lower court ruled that the specific act in question was a violation of Congress's Commerce Clause powers, as applied to the corporation's activities regarding its own employees. *Id.*

61 *Id.* at 43.

the Court considered whether Congress could enjoin a corporation, with multistate operations, from firing labor union employees.[62] Respondent, Jones & Laughlin Steel Corporation, challenged the National Labor Relations Act of 1935 on the ground that its aim was to regulate labor, not interstate commerce.[63]

Chief Justice Hughes, again writing for the Court, concluded that the Federal Commerce Clause power could be extended to a corporation's labor relations activities because they normally substantially affect interstate commerce.[64] The Court noted that the corporation operated concurrently in a large number of states[65] and any work stoppage occurring because of "unfair labor practices" at its manufacturing plant would have major consequences relating to interstate commerce.

Just five years after *Jones & Laughlin Steel,* the Court granted Congress further latitude to regulate intrastate activities in *United States v. Darby.*[66] The Court in *Darby* upheld a congressional law that set maximum hours and minimum wages for employees en-

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62 *Id.* at 22. The specific act in question was the National Labor Relations Act of 1935, 29 U.S.C. §§ 151-169 (1971). *Id.*; *see also* Friendly, *supra* note 1, at 1023 (emphasizing the change in national labor relations after passage of the National Labor Relations Act of 1935). The government's argument stressed that the Act was prima facie constitutional and that the Court need only consider whether the Act was constitutionally applied to respondent. *Jones & Laughlin Steel,* 301 U.S. at 8. The Government distinguished both *Schechter* and Carter v. Carter Coal Co., 298 U.S. 238, 315 (1936), finding both inapposite to the present case. *Id.* at 11. The Government argued that, unlike *Schechter* and *Carter,* the statute dealt with issues closely connected to interstate commerce and that the statute was narrowly tailored to regulate no more than was necessary to protect commerce. *Id.*

63 *Jones & Laughlin Steel,* 301 U.S. at 12. Respondent argued that the statute was a regulation of labor because the case involved 10 individuals who filed suit as a result of their dismissal for their involvement in a labor union. *Id.* In the alternative, respondent asserted that even if a Commerce Clause issue was present, the Court should take caution because, if upheld, there would be uncertainty as to the limits of the Commerce Clause power. *Id.* at 19. Respondent further argued that such broad power could "stifle the sovereignty of the States." *Id.* Moreover, respondent argued that any interstate consequences occurring because of a strike at its manufacturing plant would be both unforeseeable and independent intervening acts, thus excusing respondent from liability. *Id.* at 18.

64 *Id.* at 41. Chief Justice Hughes explained that "the term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." *Id.* at 31.

65 *See id.* at 27. Respondent employed approximately 533,000 persons and conducted operations in nearly every state. *Id.* at 26-27. The Court noted that respondent shipped about 75% of his product out of Pennsylvania. *Id.* at 27.

66 312 U.S. 100 (1941). This case arrived at the Supreme Court on appeal by the Government from a lower court's quashing of the governmental indictment that charged Darby with violating a federal law which regulated hours and wages of em-

gaged in the production or manufacture of goods to be used in interstate commerce.[67] Writing for a unanimous Court, Justice Stone upheld the federal law.[68] The *Darby* Court reasoned that while production and manufacturing activities are not in themselves interstate commerce, the shipment and movement of goods resulting from these activities do involve interstate commerce.[69] Therefore, the Court concluded, a federal law regulating such production and manufacturing activities is a valid exercise of Congress's Commerce Clause power.[70] Further, Justice Stone officially announced that the Tenth Amendment no longer represented a limitation of federal power under the Commerce Clause.[71]

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ployees. *Id.* at 111; *see* Leboeuf, *supra* note 20, at 585-86 (discussing federal intervention in the field of labor law).

67 *Darby*, 312 U.S. at 109. The particular legislation at issue was the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1971). *Id.* (citation omitted). The Act prohibited the shipment in interstate commerce of all goods produced or manufactured in the United States under conditions that failed to conform to the standards set forth in the Act. *Id.* Appellee, Darby, owned a lumber factory in Georgia and was charged with failing to comply with the provisions of the Act. Greenspan, *supra* note 16, at 1029.

The Government's argument centered around the inability of the states to regulate the evil of long hours and poor wages that the Government believed to be infecting the industrial markets. *Darby*, 312 U.S. at 102. Moreover, the Government believed that even if such control could be obtained within the particular state, "it could not safeguard them against the loss of their markets in other States." *Id.* Thus, the federal government, pursuant to the Commerce Clause, is empowered to cope with such problems. *Id.* The argument supporting such intervention is founded on the incorrect notion that the states are not capable of creating redistributive legislation to counterbalance the unwanted results of supposedly beneficial legislation. Leboeuf, *supra* note 20, at 585.

Appellee, Darby, conceded that the federal government may prohibit the interstate shipments of baneful and pernicious goods. *Darby*, 312 U.S. at 105; *see, e.g.*, Hipolite Egg Co. v. United States, 220 U.S. 45, 57-58 (1911) (banning the sale of eggs whose labels failed to conform to a federal enactment). Darby argued that there was a material difference between the manufacture and production of harmful goods and, as in its case, the manufacture and production of useful goods. *Darby*, 312 U.S. at 105. Further, Darby, citing the *Schechter* case, contended that the law was merely an indirect attack on the state's power to regulate pursuant to the Constitution. *Id.* at 107 (citing A.L.A. Schechter Corp. v. United States, 295 U.S. 495, 549 (1935)).

68 *Darby*, 312 U.S. at 125.

69 *Id.* at 113.

70 *Darby*, 312 U.S. at 117. The *Darby* Court expanded Congress's power to regulate intrastate commerce by expressly overruling Hammer v. Dagenhart, 247 U.S. 251 (1918). *Id.* at 116-17.

71 *Id.* at 113. The Court expressed two justifications for sustaining the Act. Greenspan, *supra* note 16, at 1030. First, noted the Court, Congress may regulate any good traveling through interstate commerce by any reasonable means. *Id.* (citing *Darby*, 312 U.S. at 121). Second, the Court believed that goods manufactured under nonconforming conditions act as a detriment to the interstate sales of goods manufactured in compliance with the Act. *Id.* (citing *Darby*, 312 U.S. at 122).

The following year, the Supreme Court rendered its most radical decision to date involving a Commerce Clause issue.[72] In *Wickard v. Filburn*, a local farmer violated a federal act that restricted the production of wheat in excess of a mandated allotment.[73] The parties maintained opposing views concerning the power of Congress to control the quantity of wheat an individual could produce.[74]

In reversing the district court's ruling, which had adopted Wickard's position, the Court replaced the traditional tests concerning interstate Commerce Clause issues with a "cumulative-effects" theory.[75] Writing for the Court, Justice Jackson explained that the federal act could properly reach a single individual acting solely intrastate.[76] The Court acknowledged that while one individual's acts alone would have a *de minimis* effect on interstate commerce, the combination of a group of persons, each acting alone, would have a substantial effect on interstate commerce.[77]

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72 *See* Wickard v. Filburn, 317 U.S. 111 (1942). This case came to the Supreme Court on appeal by the Government from the United States District Court for the District of Ohio, which had ruled that the Agriculture Adjustment Act of 1938, 7 U.S.C. §§ 1281-1393 (1989), could not be applied to the appellee. *Id.* at 116-17. The purpose of the Act was to control the amount of wheat moving in interstate commerce. *Id.* at 115.

73 *Id.* at 114-15. Specifically, Wickard owned a farm in Ohio where, among other activities, Wickard grew and harvested wheat. *Id.* at 114. With knowledge of the allotment established for him under the Act, Wickard harvested more than the allotment and was fined for doing so. *Id.* at 114-15.

74 *Id.* at 113-14, 119-20. Wickard argued that the Act was a regulation of both production and consumption of wheat and therefore went beyond the reach of the Commerce Clause. *Id.* at 119. The Government argued that the Act's purpose was to control the abnormally high and low prices for wheat resulting from excessive surpluses and shortages. *Id.* The Government argued further that the Act regulated marketing and was constitutional as a "necessary and proper" regulation of interstate commerce. *Id.*

75 *Id.* at 122-23, 124 (noting the use of such terms as "direct," "substantial," and "material" have ceased to be used in Commerce Clause issues). The Court reasoned that the traditional tests once used were no longer feasible due to the change in the economy. *Id.* at 123-24. The Court proclaimed that once Congress's power to regulate an economic activity is recognized, questions of that power cannot be reconciled by the labeling of certain activities as "production" or their effects as "indirect." *Id.* at 124. Commerce among the states, noted the Court, is a practical conception created from the course of business, not a technical conception drawn from the law. *Id.* at 122 (quoting Swift v. United States, 196 U.S. 375, 398 (1905)). Although the Court did not expressly state a "cumulative-effects" test or theory, the dictum of the Court led to the formation of such a label. *See generally* TRIBE, *supra* note 2, § 5.5, at 310-11.

76 *Wickard*, 317 U.S. at 128-29.

77 *Id.* at 127-28. The Court noted that while "appellee's own contribution to the demand for wheat may be trivial by itself it is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that

In *Katzenbach v. McClung*,[78] the Court implemented the "cumulative-effects" theory set forth in *Wickard* while officially adopting the rational basis test alluded to in *Darby* to extend the Commerce Clause power to Civil Rights issues.[79] More specifically, the Court considered whether Title II of the Civil Rights Act of 1964[80] could be applied to a local restaurant.[81] Reversing the district court's decision, Justice Clark, expressing the opinion of the Court, reviewed the Act and applied *Wickard*'s "cumulative effects" theory to the restaurant because the majority of food served in the restaurant had moved through interstate commerce.[82] Further, Justice Clark noted that the fact that Congress had made no formal findings was irrelevant because there was a rational basis for choosing such a regulatory scheme to protect commerce.[83]

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of many others similarly situated, is far from trivial." *Id.* (citing United States v. Darby, 312 U.S. 100, 123 (1941)).

78 379 U.S. 294 (1964).

79 *Id.* at 300-01, 303-04.

80 42 U.S.C. §§ 2000a-2000a6 (1989).

81 *Katzenbach*, 379 U.S. at 295. The restaurant purchased 46% of its food from a supplier who had purchased the meat from outside the state. *Id.* at 296. Thus, the district court found that a significant percentage of food sold in the restaurant was a product of interstate commerce. *Id.* at 296-97.

82 *Id.* at 304-05. The Court stated that African-Americans would be less likely to travel, knowing that food could not be purchased easily, and such lack of travel substantially affects interstate commerce. *Id.* at 300. The Court stipulated that the matter could not be settled based on the Fourteenth Amendment because the State was not encouraging the discrimination of African-Americans. *Id.* at 297.

83 *Id.* at 303, 304. The Court expressed that once it is established that Congress has a rational basis for its regulation, the Court's investigation is at an end. *Id.* at 304. Thus, noted the Court, it need only make one other inquiry: whether the restaurant offers to serve or serves interstate customers or if it sells or serves meat that has traveled through interstate commerce. *Id.* Finding the answer to this inquiry in the affirmative, the Court declared the Act valid. *Id.* at 305.

On the same day the Supreme Court decided *Katzenbach*, the Court handed down a decision in Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) [hereinafter *Heart of Atlanta*]. *Id.* at 295. Like *Katzenbach*, *Heart of Atlanta* also dealt with Title II of the Civil Rights Act of 1964. *Heart of Atlanta*, 379 U.S. at 242-43. *See also* GUNTHER, *supra* note 4, at 151-56 (synthesizing the Supreme Court's decisions in *Katzenbach* and *Heart of Atlanta*). In *Heart of Atlanta*, the Court issued a declaratory judgment stating that Congress could constitutionally prohibit racial discrimination occurring in motels servicing either interstate or intrastate travelers. *Heart of Atlanta*, 379 U.S. at 250. The Court reasoned that African-Americans would be less likely to travel knowing that accommodations were not available and such restraint would then affect commerce between the states. *Id.* at 252-53. The Court further noted that the determinative test when dealing with a Commerce Clause issue is whether the activity sought to be regulated concerns more than one state: if so, it may be regulated. *Id.* at 255.

Both opinions in *Heart of Atlanta* and *Katzenbach* contain references to Congress's hearings concerning the Act. *Katzenbach*, 379 U.S. at 299. Each opinion noted further that although no formal findings were made, the congressional record was replete with evidence that the actions sought to be regulated affected interstate

The Supreme Court's decision in *Maryland v. Wirtz*[84] further expanded Congress's Commerce Clause power by holding congressional legislation applicable to such state-run institutions as schools and hospitals.[85] The *Wirtz* holding demonstrated the extent to which the Court viewed Congress's powers under the Commerce Clause to be superior to the states' powers under the Tenth Amendment.[86] Justice Harlan, writing for the majority, acknowledged that the Commerce Clause power has limits.[87] The Court, however, held that cases involving the Commerce Clause would

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commerce. *Id.*; *see also* GUNTHER, *supra* note 4, at 151 n.5 (quoting Senator Cooper, who argued that such discrimination should be handled under the Fourteenth Amendment and that by using a Commerce Clause analysis, Congress was placing the rights of African-Americans on less important grounds).

84 392 U.S. 183 (1968).

85 *Id.* at 200-01.

86 *Id.* at 198-99. The particular act at issue in *Wirtz* was, as in United States v. Darby, 312 U.S. 100, 109 (1941), the Fair Labor Standards Act of 1938. *Id.* at 185-86. In 1961, Congress amended the Act to include in its provisions any employee of any "enterprise" dealing in the production of commerce. *Id.* at 186. In 1966, Congress again amended the Act by adding hospitals and schools to the list of "enterprises" involved in interstate commerce. *Id.* at 186-87. The challenges to the amendments contended that the expansion of coverage by using the term "enterprise" was beyond the scope of the Commerce Clause power, that state-run hospitals and schools were also beyond the scope of the Commerce Clause power, and such institutions were not involved with interstate commerce. *Id.* at 187. The appellants in *Wirtz* were the State of Maryland and 27 other states who had subsequently joined the lawsuit. *Id.*

The Court affirmed the decision of the district court, holding that the amendments to the Act were permissible. *Id.* at 188. Relying on *Darby*, *Katzenbach*, and *Wickard*, the Court concluded that the issues raised by appellants were previously settled. *Id.* at 188, 190-91, 192-93. First, noted the Court, *Darby* established that Congress may regulate a class of activities—manufacturing—that it finds affecting interstate commerce. *Id.* at 192. Second, the Court opined that *Katzenbach* enabled Congress to regulate activities affecting interstate commerce if it had a rational reason to do so. *Id.* at 190. Finally, the Court referred to the decision in *Wickard* as establishing that the Court may not trivialize individual instances because they occur purely intrastate. *Id.* at 192-93.

Justice Douglas wrote a dissenting opinion with Justice Stewart concurring, denouncing the decision of the majority because it ignored the implications of the Tenth Amendment. *Id.* at 201 (Douglas, J., dissenting). Justice Douglas distinguished several cases which held the states subject to federal regulation, stating that in none of those cases did the regulation conflict with state fiscal policy. *Id.* at 203 (Douglas, J., dissenting). Justice Douglas specifically questioned the extent to which the Commerce Clause power could be extended under the majority's reasoning. *Id.* at 204-05 (Douglas, J., dissenting). Concluding, Justice Douglas declared that "[t]he Court must draw the 'constitutional line between the State as government and the State as trader[.]'" *Id.* at 205 (Douglas, J., dissenting) (quotation omitted).

87 *Wirtz*, 392 U.S. at 196. Justice Harlan addressed the concern that Congress could declare an entire state an "enterprise" affecting interstate commerce, thus obtaining power over the entire state. *Id.* at 196 n.27. The Justice noted, however, that the Court has sufficient power to prevent such utter destruction of state sovereignty. *Id.* at 196.

continue to be decided on the basis of whether Congress had a rational reason for regulating the particular activity.[88] According to Justice Harlan, this held true whether or not the activity at issue is run by the state with the purpose of benefiting its own citizens.[89] Moreover, Justice Harlan proclaimed, when a class of activities is being regulated by Congress, the Court need not consider whether a particular defendant individually affected interstate commerce.[90] The Justice concluded that if the class being regulated affects interstate commerce, any individual doing that act has affected it as well.[91]

In *Perez v. United States*,[92] the Court supported Congress's use of its Commerce Clause power to enact legislation regulating criminal activity previously left to the states.[93] The district court convicted Perez of violating a federal law prohibiting the practice of loansharking,[94] and on appeal, the Supreme Court affirmed the

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88 *Id.* at 190 (quoting *Katzenbach*, 379 U.S. at 303-04). The Court concluded that Congress clearly had a rational basis to regulate schools and hospitals. *Id.* Among the reasons given by the Court was the fact that strikes and work stoppages at such institutions as schools and hospitals undoubtedly affect the flow of goods crossing state lines. *Id.* at 195.

89 *Id.* at 198-99. In reaching this determination, Justice Harlan discussed *United States v. California*, 297 U.S. 175 (1935). *Id.* at 197. In *United States v. California*, the Court addressed whether a state-run railroad, operated entirely intrastate, was subject to a federal law. *United States v. California*, 297 U.S. at 180. The Court, concluding that the railroad was subject to the Act, stated that the railroad involved interstate commerce and, hence, was subject to federal regulation. *Id.* at 184. The Court conceded that the railroad was operated by the State as an exercise of state sovereignty, but held that such sovereignty must yield to the powers of the federal government. *Id.* at 184-85. Moreover, the *Wirtz* Court announced that a state has no more power to deny a valid exercise of federal power than an individual. *Wirtz*, 392 U.S. at 199.

90 *Wirtz*, 392 U.S. at 192-93.

91 *Id.* at 193.

92 402 U.S. 146 (1971). This case was brought to the Supreme Court on appeal after the United States Court of Appeals for the Second Circuit affirmed the conviction of the appellant. *Id.* at 147.

93 *Id.* at 156-57. Armed with such broad leeway, Congress began to increase its regulation of criminal activity pursuant to its Commerce Clause powers. *See* Chippendale, *supra* note 23, at 455. Over the past 20 years, Congress has redefined federal law enforcement by enacting mandatory sentencing statutes, sentencing schemes, and criminal statutes virtually identical to state codes. *Id.* at 461-62.

94 "Loansharking" is the "[p]ractice of lending money at excessive and usurious interest rates, with the threat or employment of extortionate means to enforce repayment of the loan. Such activities are termed 'extortionate credit transactions' under the Federal Criminal Code." BLACK'S LAW DICTIONARY 648 (6th ed. 1991).

Defendant loaned $1000 to an individual, Miranda, who agreed to repay the loan over 14 weeks at $105 a week. *Perez*, 402 U.S. at 147-148. After six or eight weeks, defendant increased the amount of weekly payments to $330. *Id.* at 148. When it appeared that the weekly payments could not be met, defendant threatened Miranda with violence. *Id.* Subsequently, defendant was arrested and charged with violating a federal act. *Id.* Defendant challenged only the constitutionality of the two "loan

conviction.[95] The Court stated that a crime involving loansharking contributed significantly to the deterioration of interstate commerce.[96]

The Court, in an opinion by Justice Douglas, upheld the criminal statute's constitutionality in this particular case because loansharking dealt directly with money, and because organized crime is a national problem.[97] Borrowing the concepts of *Darby*, *Wickard*, and *Wirtz*, Justice Douglas concluded that the defendant's convic-

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shark" amendments attached to the Act. *Id.* at 149. The Court noted that the amendments were met with criticism by certain individuals who claimed that the amendments, if adopted, would take a substantial step toward a general federal police power. *Id.* The Court further maintained that Congress took no heed of this criticism and subsequently adopted the amendments. *Id.* at 155.

95 *Perez*, 402 U.S. at 157.

96 *Id.* The Court, in reaching its decision, looked to the congressional records, which indicated that loansharking was the second highest source of income for organized crime operations. *Id.* at 155. The Court noted that organized crime netted roughly $350 million yearly. *Id.* (citation omitted).

Justice Douglas began the Court's analysis with the principles outlined in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), stating that the Supreme Court decisions after *Gibbons* were not in accord with those principles. *Id.* at 150-51. The Court continued, stating that the decisions in United States v. Darby, 312 U.S. 100 (1941), and Wickard v. Filburn, 102 U.S. 111 (1942), had restored the broad Commerce Clause view expressed by Chief Justice Marshall in *Gibbons*. *Id.* at 151. Justice Douglas made special note of *Darby* because it dealt with criminal charges. *Id.* at 152-53. Moreover, the Court noted that the rule set forth in *Darby*, with regard to regulating a class, was applied in Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964). *Id.* at 153-54. Building on this, Justice Douglas cited Maryland v. Wirtz, 392 U.S. 183 (1968), for the proposition that once this class of activities is determined to be within congressional reach, the Court may not trivialize the actions of an individual of the class. *Id.* at 154.

With the foundation laid, Justice Douglas narrowed the Court's discussion to an analogous case, Westfall v. United States, 274 U.S. 256 (1927). *Id.* In *Westfall*, an employee at a state bank, in affiliation with the Federal Reserve System, created a fraudulent deposit and paid it with bank funds. *Westfall*, 274 U.S. at 257. The employee in *Westfall* was charged with violating a federal act. *Westfall*, *Id.* at 258. Westfall argued that the act was not applicable because the Federal Reserve System was unaffected by his actions. *Id.* Justice Douglas noted that the Court in *Westfall* proclaimed, "'[b]ut every fraud like the one before us weakens the member bank and therefore weakens the System.'" *Perez*, 402 U.S. at 155 (quoting *Westfall*, 274 U.S. at 259). The Court in *Perez* used this line of thinking to conclude that there existed a nexus between loansharking and interstate commerce. *Id.*

Justice Stewart filed a dissenting opinion in *Perez* and attacked the majority's finding that the crime of loansharking had distinguishable characteristics from any other crime in relation to interstate commerce. *Id.* at 157 (Stewart, J., dissenting). Justice Stewart suggested that the majority must go further than merely stating that such a crime is a national problem that affects interstate business. *Id.* Justice Stewart offered the proposition that all crime presents a national problem, and all crime affects interstate business. *Id.* Justice Stewart stated that he could not detect any rational difference between loansharking and other crimes occurring in the local arena. *Id.* at 158 (Stewart, J., dissenting).

97 *Perez*, 402 U.S. at 156-57.

tion affected interstate commerce even though it occurred within a state.[98] The *Perez* decision was followed by several additional United States Supreme Court cases that further evidenced the Court's lack of clarity regarding the scope of Congress's powers under the Commerce Clause.[99]

The recent case of *United States v. Lopez*[100] reflects the current Court's perspective in the area of federalism and its five-to-four decision[101] offers insight to the varying points of view of the present

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98 *Id.* at 151-53.

99 *See* Field, *supra* note 22, at 86-87. First, in National League of Cities v. Usery, the Court struck down a federal law imposing minimum wage and overtime rules on state employees. National League of Cities v. Usery, 426 U.S. 833, 840 (1976). The majority concluded that the law impaired the states' ability to function effectively within the federal system. *Id.* at 851-52; *see also* Field, *supra* note 22, at 86 (noting that the Court based its decision in *National League* on the express constitutional prohibition of the federal powers). The Court articulated two reasons for its holding: first, the Court indicated that the cost of compliance was excessively high, *National League*, 426 U.S. at 846, and second, that the law infringed upon the states' abilities to spend their money. *National League*, 426 U.S. at 845, 849; *see* Friendly, *supra* note 1, at 1031-33 (labeling *National League* as a "thunderclap" regarding the state-federal relationship and warning that *National League* is not the end of the Court's inquiry into the Commerce Clause).

Despite the apparent narrowing of the Commerce Clause powers in *National League*, the Court decided differently nine years later in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985); *see* Tushnet, *supra* note 1, at 1625 (detailing the background, insight, and reasoning of the *Garcia* decision). In another five-to-four vote, with Justice Blackmun changing his vote, the *Garcia* Court overruled *National League*. *Garcia*, 469 U.S. at 557. For a discussion of Justice Blackmun's changed vote, see Richard S. Myers, *The Burger Court and the Commerce Clause: An Evaluation of the Role of State Sovereignty*, 60 NOTRE DAME L. REV. 1056, 1067-68 (1985).

Once again, the issue involved the minimum wage and overtime provisions set forth in the Fair Labor Standards Act as applied to a mass transit system owned and operated by a municipality. *Garcia*, 469 U.S. at 533. The Court, finding such provisions applicable, concluded that a transit system was not a "traditional governmental function." *Id.* at 546-47. The majority in *Garcia* insisted that the Commerce Clause power has limits and that state sovereignty was protected by certain procedural safeguards provided for in the Constitution. *Id.* at 556. *See generally* Field, *supra* note 22, at 88 (expressing the Court's opinion that the Constitution dictates that federal powers must be placed before state powers).

In dissent, Justice Powell expressed the view that the Tenth Amendment was created for a reason and that the majority had ignored its purpose and had merely paid "lipservice to the role of the States." *Garcia*, 469 U.S. at 574 (Powell, J., dissenting). Justice Powell referred to the concept of democracy in stating that such institutions are created and run by the states' citizens and are better off being left to the states to control. *Id.* at 576-77 (Powell, J., dissenting). Chief Justice Rehnquist, also dissenting, forewarned that the principles set forth in *National League* would again dictate the support of the majority. *Id.* at 580 (Rehnquist, J., dissenting).

100 115 S. Ct. 1624 (1995).

101 *Id.* at 1625. The majority was comprised of Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas. *Id.* Justice Kennedy wrote a concurring opinion, in which Justice O'Connor joined. *Id.*; *see generally infra* notes 135-38 and accompanying text (discussing Justice Kennedy's concurring opinion). Justice

Court's membership.[102] The *Lopez* Court held that the mere possession of a firearm did not substantially affect interstate commerce and, consequently, that the application of a federal statute to make such possession a crime was beyond the scope of the Commerce Clause power.[103] Chief Justice Rehnquist, writing for the majority, began the Court's analysis by reiterating the early principles of federalism.[104] Building on these principles, Chief Justice Rehnquist explained that the delegation to Congress of the power to regulate commerce stemmed from the Constitution itself.[105] The majority noted, initially, that a common finding by the Court in the early Commerce Clause cases concerned the express limitations on the power of Congress to regulate pursuant to the clause.[106]

The Chief Justice's analysis continued, noting Congress's expansion of federal regulation in the areas of interstate commerce and antitrust.[107] Chief Justice Rehnquist emphasized, however, the Court's reluctance to expand Congress's Commerce Clause powers.[108] The Chief Justice then noted the Supreme Court's change in view regarding Commerce Clause jurisprudence.[109] While ac-

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Thomas also filed a concurring opinion. *Id.* *See generally infra* notes 139-44 and accompanying text (discussing Justice Thomas's concurring opinion). Justice Stevens wrote a dissenting opinion. *Lopez*, 115 S. Ct. at 1625; *see generally infra* notes 149-52 and accompanying text (discussing Justice Stevens's dissenting opinion). Justice Souter wrote a dissenting opinion. *Lopez*, 115 S. Ct. at 1625; *see generally infra* notes 153-61 and accompanying text (discussing Justice Souter's dissenting opinion). Justice Breyer also wrote a dissenting opinion, in which Justices Stevens, Souter, and Ginsburg joined. *Lopez*, 115 S. Ct. at 1625; *see generally infra* notes 162-71 and accompanying text (discussing Justice Breyer's dissenting opinion).

102 *See generally* Linda Greenhouse, *Farewell to the Old Order in the Court*, N.Y. TIMES, July 2, 1995, at 1, 4 (analyzing the factions of the current Court); Richard Lacayo, *The Soul of a New Majority*, TIME, July 10, 1995, at 46 (claiming that Justices O'Connor and Kennedy are "the swing votes" of the *Lopez* decision).

103 *Lopez*, 115 S. Ct. at 1626, 1634. Chief Justice Rehnquist noted that even where gun possession occurs more than once, the effect on interstate commerce would remain insubstantial. *Id.* at 1634.

104 *Id.* at 1626. The Court enunciated the need for a healthy balance of power between federal and state governments to diminish the threat of "tyranny and abuse from either front." *Id.*

105 *Id.* (quoting U.S. CONST. art. I, § 8, cl. 3). *See supra* note 20 (defining the Commerce Clause).

106 *Lopez*, 115 S. Ct. at 1627.

107 *Id.* Specifically, Chief Justice Rehnquist referred to the Interstate Commerce Act and the Sherman Antitrust Act. *Id.* Chief Justice Rehnquist noted that the amount of federal regulation pursuant to these Acts was numerous enough to be considered a new era in Commerce Clause jurisprudence. *Id.*

108 *Id.* Chief Justice Rehnquist noted that the Court rejected federal legislation because it did not directly affect interstate commerce. *Id.* (citing A.L.A. Schechter Corp. v. United States, 295 U.S. 495, 550 (1935)). Similarly, the Court further noted a distinction between commerce and other activities, such as mining. *Id.*

109 *Id.* at 1628 (citing National Labor Relations Bd. v. Jones & Laughlin Steel Corp.,

knowledging that the change permitted regulation of many activities, both of a national and local nature, the majority emphasized that prior decisions cautioned Congress that its powers under the Commerce Clause were not unlimited.[110]

Next, Chief Justice Rehnquist identified the three broad categories under which Congress is permitted to regulate: channels of interstate commerce, instrumentalities of interstate commerce, and activities that substantially affect interstate commerce.[111] The majority noted that prior Supreme Court decisions were vague in determining whether an activity needed to "substantially affect" or merely "affect" interstate commerce.[112] In attempting to clarify this ambiguity, the Chief Justice declared acceptable legislation to be that which endeavors to regulate economic activity substantially affecting interstate commerce.[113] Moreover, the Court proclaimed, in order to sustain § 922(q), the statute must fall within Congress's ability to regulate such substantially-affecting activities.[114] Chief Justice Rehnquist concluded that § 922(q) was nothing more than a criminal statute, lacking any economic substance whatsoever.[115]

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301 U.S. 1, 36-38 (1936)). Chief Justice Rehnquist labeled *Jones & Laughlin Steel* as the "watershed" case. *Id.* The Court recognized that *Jones & Laughlin Steel* was the first case to abandon the distinction between what was a "direct" effect upon interstate commerce and what was "indirect." *Id.* Instead, noted Chief Justice Rehnquist, the Court in *Jones & Laughlin Steel* declared any activity substantially affecting interstate commerce to be subject to federal regulation. *Id.* (citing *Jones & Laughlin Steel*, 301 U.S. at 37). Chief Justice Rehnquist attributed the Court's change in view to the realization that the United States had changed greatly in the economic and business spheres. *Id.*

110 *Id.* at 1628-29 (quoting *Jones & Laughlin Steel*, 301 U.S. at 37). Chief Justice Rehnquist noted that later Supreme Court decisions heeded these early warnings by imposing the rational basis test to Commerce Clause issues. *Id.*

111 *Lopez*, 115 S. Ct. at 1629-30 (citing United States v. Perez, 402 U.S. 146, 150 (1971)). The Court, in identifying the channels of interstate commerce, cited *Darby*, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), and Caminetti v. United States, 242 U.S. 470 (1917). *Id.* at 1629. The Court noted that "'[t]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.'" *Id.* (quoting *Caminetti*, 242 U.S. at 491). Chief Justice Rehnquist indicated that Congress's power to regulate the instrumentalities of interstate commerce may extend to intrastate affairs. *Id.*

112 *Id.* at 1630.

113 *Id.* In reaching this conclusion, the Court looked to past Supreme Court decisions upholding federal regulation of such activities found to substantially affect interstate commerce. *Id.*

114 *Id.* Chief Justice Rehnquist tersely disposed of the contention that § 922(q) is either a regulation of a channel or instrumentality of interstate commerce. *Id.*

115 *Id.* at 1630-31. The Court further noted that § 922(q) did not contain a jurisdictional component that would ensure that a particular firearm possession in some way

Noting that § 922(q) contains no economic fabric, the majority admitted that legislative findings, expressing the intent of Congress in creating a law, may be used by the Court to determine its validity.[116] Chief Justice Rehnquist observed that no such findings were present in the passage of § 922(q).[117] The Court further rejected the Government's claim that Congress had acquired expertise in regulating firearm possession through past legislation, stating that § 922(q) entered ground never before regulated by prior enactments.[118] Continuing, Chief Justice Rehnquist cautioned that if the Court were to sustain § 922(q), it would be difficult to recognize any limitation on the Commerce Clause power.[119]

Next, the majority addressed Justice Breyer's dissenting opinion.[120] Chief Justice Rehnquist remarked that the principal dissent failed to enunciate any activity that only the states may regulate.[121]

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affected interstate commerce. *Id.* at 1631. Chief Justice Rehnquist explained this through a discussion of United States v. Bass, 404 U.S. 336 (1971). *Id.* In *Bass*, noted Chief Justice Rehnquist, the Court struck down a federal law criminalizing the possession, receipt, or transportation of a firearm by any felon. *Id.* (citing *Bass*, 404 U.S. at 339). Chief Justice Rehnquist, explaining the *Bass* decision, stated that the Government failed to show a sufficient nexus between gun possession and interstate commerce. *Lopez*, 115 S. Ct. at 1631. In May of 1995, President Clinton submitted to Congress a proposed Gun-Free School Zones Amendment Act of 1995. 141 CONG. REC. H4680 (daily ed. May 10, 1995) (statement of President Clinton); 141 CONG. REC. S6459 (daily ed. May 10, 1995) (statement of President Clinton). This Act, suggested the President, would establish the requisite nexus to obtain a conviction under the Act. *Id.*

116 *Lopez*, 115 S. Ct. at 1631. The Court clarified that such findings are not essential. *Id.* (citing Katzenbach v. McClung, 379 U.S. 294, 304 (1964)). Chief Justice Rehnquist explained, however, that such findings are beneficial to the Court when evaluating the judgment of the legislature. *Id.* at 1632.

117 *Id.* at 1632.

118 *Id.* (citing Fullilove v. Klutznick, 448 U.S. 448, 503 (1980) (Powell, J., concurring) (claiming that when Congress has legislated continually in an area of national interest, it gains experience that may decrease the need for further hearings or extended debate when Congress considers future action in that area)). For a detailed history of federal firearm legislation, see *Lopez*, 2 F.3d at 1348-60; *see also* Giller, *supra* note 16, at 164-76 (discussing the various gun possession laws imposed by Congress).

119 *Lopez*, 115 S. Ct. at 1632. The Government defended § 922(q) on the ground that the overall cost of crime is a national problem because of its effect on insurance. *Id.* The Government also claimed that violent crime prevents people from moving through interstate commerce to areas known to be troubled with such crimes. *Id.* Moreover, the Government believed that gun possession in and around schools has an adverse affect on education, thus affecting interstate commerce. *Id.* Chief Justice Rehnquist warned that if § 922(q) were upheld, Congress could use similar reasoning to regulate such things as curriculum. *Id.* at 1633; *see also Lopez*, 2 F.3d at 1367 (warning that the progeny of § 922(q) would lead to the possible regulation of "lead pencils, 'sneakers,' Game Boys or slide rules").

120 *Lopez*, 115 S. Ct. at 1632.

121 *Id.* Although Justice Breyer conceded that the Commerce Clause could have limitations in areas of education and family law, Chief Justice Rehnquist gave no

Using the dissent's theory to illustrate this point, the majority noted that such legislation would enable Congress to dictate the curriculum taught in local schools because the education of children substantially affects commerce.[122] Chief Justice Rehnquist criticized Justice Breyer's interpretation of Supreme Court precedent, stating that Justice Breyer's analysis acknowledges no limitations on the Commerce Clause where precedent specifically states otherwise.[123]

Concluding, Chief Justice Rehnquist held that the possession of a firearm within a local school zone cannot be viewed as an activity that substantially affects interstate commerce, even if repeated elsewhere.[124] The majority stated that if it agreed with the Government's position, Congress would obtain authority that was reserved to the states under the Constitution.[125] Finally, Chief Justice Rehnquist proclaimed that the Court's holding, although sounding broad, should be viewed as limited in scope.[126]

In a lengthy concurring opinion, Justice Kennedy, joined by Justice O'Connor, emphasized that the holding of the Court was necessary, yet limited.[127] By synthesizing the history of the Com-

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credence to such suggested limitations. *Id.* at 1633. Chief Justice Rehnquist stated that under the principal dissent's expansive analysis, these suggested limitations are "devoid of substance." *Id.* at 1632.

122 *Id.* at 1633.

123 *Id.* at 1633. Chief Justice Rehnquist noted that the Constitution demands some degree of uncertainty by withholding a general police power from the federal government. *Id.* Continuing, Chief Justice Rehnquist declared that any attempt to try to alleviate this uncertainty would conflict with the system of enumerated powers mandated by the Constitution. *Id.*

The Court, in rejecting Justice Breyer's analysis, proclaimed that any activity could be generalized to affect interstate commerce. *Id.* Specifically, Chief Justice Rehnquist illustrated the rationale used by the dissent with the example of child rearing. *Id.* Chief Justice Rehnquist stated that Congress could declare child rearing a commercial activity because it provides children with requisite skills needed to compete in both the workplace and in life. *Id.* Thus, according to the majority, Congress could regulate how a person raises his or her child. *Id.* Concluding the point, the Court indicated that although Congress has the right to regulate commercial activity, that right does not include every aspect of the commercial activity and, more specifically, not every aspect of local schools. *Id.*

124 *Id.* at 1634. The Court further noted that § 922(q) also failed to allege any nexus between interstate commerce and firearm possession. *Id.*

125 *Lopez*, 115 S. Ct. at 1634. Chief Justice Rehnquist acknowledged that prior Supreme Court decisions have granted Congress great deference in converting the Commerce Clause into a federal police power. *Id.* Chief Justice Rehnquist noted, however, that to sustain § 922(q), the Court would have to "pile inference upon inference," which in turn would give Congress power that, according to the Constitution, resides in the states. *Id.*

126 *Id.*

127 *Lopez* 115 S. Ct. at 1634 (Kennedy, J., concurring).

merce Clause decisions, Justice Kennedy depicted an ever-dynamic Court.[128] Justice Kennedy continued by indicating the inconsistencies of past Supreme Court decisions and the various interpretations the Court utilized in reaching those decisions.[129]

Justice Kennedy suggested that there are two lessons that can be drawn from Commerce Clause jurisprudence.[130] The first, announced Justice Kennedy, is the overall ineffectiveness of subject matter distinctions when analyzing the constitutionality of a particular statute, and the second is the overall need for consistency in

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128 *Id.* at 1634-36 (Kennedy, J., concurring). Beginning the synthesis, Justice Kennedy recalled the principles set forth in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), which stated that the Commerce Clause power extends to commerce involving more than one state; is complete in itself; may be utilized to its maximum potential; and is only limited by express constitutional provisions. *Id.* at 1634 (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 194, 196). Justice Kennedy remarked that the majority of cases following *Gibbons* that dealt with Commerce Clause issues called for a Dormant Commerce Clause analysis. *Id.* at 1634-35; *see generally* Steven Breker-Cooper, *The Commerce Clause: The Case for Judicial Non-Intervention*, 69 OR. L. REV. 895, 935 (1990) (arguing that the judiciary should not interfere with the regulation of states' commercial enactments until Congress has first acted).

Justice Kennedy explained that one approach used by the Court in the early Commerce Clause cases was to determine the validity of state action based on the subject matter or content of the regulated activity. *Lopez*, 115 S. Ct. at 1635 (Kennedy, J., concurring). Further explaining this approach, Justice Kennedy examined the distinction between commerce and manufacturing. *Id.* Justice Kennedy indicated that this distinction became increasingly prevalent as a means of countering the rapid growth of industrial development in the United States. *Id.* (citing United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895)).

Next, Justice Kennedy discussed the Supreme Court decisions involving Congress's ability to regulate and prohibit the interstate movement of harmful goods. *Id.* Justice Kennedy further noted that the Supreme Court has upheld Congress's power to prohibit as well as to regulate. *Id.* (citing Champion v. Ames, 188 U.S. 321, 363-64 (1903)). Justice Kennedy then offered Hammer v. Dagenhart, 247 U.S. 251 (1918), to express the Court's change of view with regard to manufacturing and commerce. *Id.* at 1636 (Kennedy, J., concurring).

Moreover, Justice Kennedy opined that the Court achieved a more practicable approach in its application of the "substantially affects" standard. *Id.* Justice Kennedy, however, noted that the failure to apply the "substantially affects" test in all Commerce Clause cases tainted this practical approach. *Id.* at 1637 (Kennedy, J., concurring). Concluding the synthesis, Justice Kennedy examined the modern Supreme Court treatment of Commerce Clause issues. *Id.* Justice Kennedy indicated the more recent decisions involving the Commerce Clause powers encompassed broader views that supersede the earlier, narrower views. *Id.* (citing Wickard v. Filburn, 317 U.S. 111, 112 (1942)).

129 *Id.* at 1636 (Kennedy, J., concurring).

130 *Id.* at 1637 (Kennedy, J., concurring). Justice Kennedy suggested that there are two lessons that can be drawn from the history of Commerce Clause jurisprudence. *Id.* The first, announced Justice Kennedy, is the overall ineffectiveness of subject matter distinctions when analyzing the constitutionality of a particular statute, and the second is the overall need for consistency in such analysis. *Id.*

such analysis.[131] Justice Kennedy further noted that stare decisis[132] prevents the Court from applying an archaic, eighteenth-century analysis to Commerce Clause issues.[133] According to Justice Kennedy, Congress has the authority to regulate any commercial activity because the United States has developed into a single market coupled with a unified purpose to fashion a sound national economy.[134]

Justice Kennedy also recognized the concept of federalism, as established by the Constitution,[135] and stressed the need for a healthy balance between the federal and state governments.[136] In emphasizing such a need, Justice Kennedy suggested that § 922(q) is unconstitutional as an excessive use of the Commerce Clause, which upsets the balance between federal and state powers.[137]

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131 *Id.*

132 Stare decisis refers to the

> [p]olicy of courts to stand by precedent and not to disturb settled point. Doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same. . . . Under doctrine, when point of law has been settled by decision, it forms precedent which is not afterwards to be departed from, and, while it should ordinarily be strictly adhered to, there are occasions when departure is rendered necessary to vindicate plain, obvious principles of law and remedy continued injustice. The doctrine is not ordinarily departed from where decision is of long-standing and rights have been acquired under it, unless considerations of public policy demand it.

BLACK'S LAW DICTIONARY 978-79 (6th ed. 1991).

133 *Lopez*, 115 S. Ct. at 1637 (Kennedy, J., concurring). *But see infra* notes 139-48 and accompanying text (discussing Justice Thomas's argument that the Court's Commerce Clause Jurisprudence should return to its original intent). Justice Kennedy further maintained that stare *decisis* prevented the Court from rejecting the ability of Congress to regulate commercial activity on the basis that there was an insufficient connection to interstate commerce. *Lopez*, 115 S. Ct. at 1637 (Kennedy, J., concurring).

134 *Lopez*, 115 S. Ct. at 1637 (Kennedy, J., concurring).

135 *Id.* at 1637-38 (Kennedy, J., concurring). Justice Kennedy noted that the Constitution contains several elements that dictate the structure of the federal government: judicial review, checks and balances, separation of powers, and federalism. *Id.* Justice Kennedy further noted that only federalism has resulted in judicial uncertainty. *Id.* at 1638 (Kennedy, J., concurring).

136 *Id.* Justice Kennedy proclaimed that the purpose of federalism is to "assign political responsibility, not to obscure it." *Id.* Justice Kennedy warned that if the federal government was permitted to regulate areas generally considered to be left to the states, the states' political responsibility would become blurred. *Id.*

137 *Id.* at 1640 (Kennedy, J., concurring). Justice Kennedy noted that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Id.* at 1639 (Kennedy, J., concurring). Thus, Justice Kennedy declared that because § 922(q) contained no commercial

Moreover, Justice Kennedy asserted that the states are sufficiently capable of handling the problems that § 922(q) sought to remedy.[138]

Writing a separate concurring opinion, Justice Thomas stressed the need for the Court's Commerce Clause jurisprudence to return to its original intent, as construed by the Framers of the Constitution.[139] Justice Thomas noted that both the majority and the principal dissent agreed that the federal government has no police power.[140] Justice Thomas further suggested that the Court must reexamine the "substantially affects" test to reflect more closely the intention of the Framers of the Constitution in drafting the Commerce Clause.[141]

Justice Thomas stated that the purpose of the concurring opinion was to illustrate the Court's departure from the original intent of the Commerce Clause.[142] If the Constitution granted

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nexus to interstate commerce and neither the actor nor his action affected interstate commerce, the statute was unconstitutional as it interfered with a traditional state concern. *Id.* at 1640 (Kennedy, J., concurring).

138 *Id.* at 1641 (Kennedy, J., concurring). Justice Kennedy observed that over 40 states have statutes criminalizing the possession of firearms on and around school grounds. *Id.* Moreover, Justice Kennedy recognized that the local citizenry has more expertise in how best to rid themselves of such problems as gun violence. *Id.* Concluding, Justice Kennedy believed § 922(q) to be unconstitutional as it prevents the states from utilizing their own discretion in an area traditionally belonging to the states. *Id.*

139 *Lopez*, 115 S. Ct. at 1642 (Thomas, J., concurring). *Id.* Justice Thomas suggested that, in the future, the Court should qualify its Commerce Clause jurisprudence to adhere to both past law and the original intent of the Founders. *Id.*

140 *Id.* Justice Thomas explained that the Court has always rejected readings of the Commerce Clause that enabled Congress to exercise a general police power. *Id.* Although the principal dissent acknowledged that the federal commerce power has limits, Justice Thomas opined that the current "substantially affects" test enhances the possibility that Congress would regulate activities generally considered to be left to the states as an exercise of police powers. *Id.*

141 *Id.* at 1645 (Thomas, J., concurring). Justice Thomas further noted that the Court has, in prior decisions, afforded Congress more power and deference than was constitutionally allocated. *Id.* at 1644 (Thomas, J., concurring). Justice Thomas indicated that commerce was initially considered to be analogous to trade. *Id.* at 1643 (Thomas, J., concurring). Justice Thomas declared, however, that commerce was also used in contradistinction to certain activities, such as agriculture and manufacturing. *Id.* Justice Thomas noted that agriculture and manufacturing deal with the production of goods, while commerce involves the traffic of such goods. *Id.* Justice Thomas concluded that if the framers intended the Court to use a "substantially affects" test in adjudicating Commerce Clause issues, the Constitution would have reflected such an intention. *Id.* at 1644 (Thomas, J., concurring).

142 *Id.* at 1643 (Thomas, J., concurring). Moreover, Justice Thomas proclaimed that the majority's decision was in no way radical. *Id.* Justice Thomas lastly expressed the need to reproduce a coherent test that would honor the distinction between the federal and state governments. *Id.*

Congress the power to regulate any activity that "substantially affects" commerce, stated Justice Thomas, then other enumerated powers such as the authority to sanction counterfeiters or the power to pass bankruptcy laws would have no meaning.[143] Hence, Justice Thomas believed that the Framers intended the Commerce Clause to reach only a limited amount of activities.[144]

Addressing Justice Breyer's dissent, Justice Thomas opined that Justice Breyer had misread precedent, specifically the reasoning of *Gibbons v. Ogden*.[145] Justice Thomas continued by reviewing the early history of Commerce Clause decisions.[146] While highlighting these past decisions, Justice Thomas noted the federal government's limited powers.[147] Turning to the specific statute at issue, Justice Thomas then explained that upholding § 922(q)

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143 *Id.* at 1644 (Thomas, J., concurring). Justice Thomas derived this reasoning from an analysis of the Necessary and Proper Clause. *Id.*; *see supra* note 12. Justice Thomas announced that if Congress retained a plenary power to regulate any activity that substantially affects interstate commerce, there would have been no reason for the Constitution to specify Congress's power to regulate trade with foreign nations and Indians. *Lopez*, 115 S. Ct. at 1644 (Thomas, J., concurring).

144 *Id.*

145 *Id.* at 1646 (Thomas, J., concurring). Justice Thomas believed that the dissent's misreading of Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), resulted from two statements made by Chief Justice Marshall. *Id.* at 1647 (Thomas, J., concurring). First, noted Justice Thomas, the *Gibbons* decision declared that "the federal power does not encompass 'commerce' that 'does not extend to other States.'" *Id.* (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 194). Justice Thomas concluded that the principal dissent misinterpreted this statement to mean that when interstate commerce is affected by an activity, Congress retains the right to regulate that activity. *Id.*

The second statement of Chief Justice Marshall that was misinterpreted by the dissent, opined Justice Thomas, was the Court's praise for the constitutional separation of powers between the states and the federal government. *Id.* (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 195). Justice Thomas clarified this misunderstanding by stating that the Constitution was merely expressing that national concerns were delegated to Congress, while local concerns were delegated to the states. *Id.* at 1647-48 (Thomas, J., concurring). Moreover, Justice Thomas denied an interpretation that would grant Congress power to regulate any activity it believed was a national matter. *Id.* at 1648 (Thomas, J., concurring). Justice Thomas proceeded to list "war, taxes, patents, and copyrights, uniform rules of naturalization and bankruptcy" as matters that were under Congress's regulatory control. *Id.* (citing U.S. CONST., art. I., § 8).

146 *Id.* Justice Thomas explained that prior to the landmark decision in *Gibbons*, Congress's power could only be exercised in "places where it enjoyed plenary powers." *Id.* Continuing, Justice Thomas stressed the efforts made by the Court, during the late 19th and early 20th centuries, to continually strike down federal legislation that attempted to regulate manufacturing. *Id.* at 1648, 1649 (Thomas, J., concurring).

147 *Lopez*, 115 S. Ct. at 1648, 1649 (Thomas, J., concurring). Specifically, Justice Thomas indicated that the decisions, in the time period between the ratification of the Constitution and the mid-1930s, reflected the limited powers held by the federal government. *Id.* at 1649 (Thomas, J., concurring). Justice Thomas declared the "wrong turn" in Commerce Clause jurisprudence to which the principal dissent al-

would lead to a general police power created in the federal government, something not provided for in the Constitution.[148]

Justice Stevens, in a terse dissent, stressed that the future of our country's commerce is crucially dependent upon the educational system.[149] Therefore, Justice Stevens proclaimed, Congress could regulate possession of guns, alcohol, and controlled substances in and around schools.[150] Moreover, Justice Stevens labeled guns as articles of commerce as well as articles that restrain commerce.[151] Lastly, Justice Stevens remarked that the national interests at the time the Constitution was created are not relevant to the interests of today.[152]

Also dissenting, Justice Souter emphasized the Court's use of

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luded, to be those decisions following the 1930s in which the Court departed from 150 years of precedent. *Id.*

148 *Id.* at 1650 (Thomas, J., concurring). This general police power, noted Justice Thomas, was a direct result of the Court's "substantially affects" test. *Id.* Justice Thomas revealed that the principal dissent failed to express a single instance in which the federal government would be limited in its Commerce Clause powers. *Id.* at 1649 (Thomas, J., concurring). Developing the principle depicted in Maryland v. Wirtz, 392 U.S. 183 (1968), Justice Thomas stated that "one *always* can draw the circle broadly enough to cover an activity that when taken in isolation, would not have substantial effects on commerce." *Id.* at 1650 (Thomas, J., concurring). Therefore, Justice Thomas cautioned that taking this approach to its logical conclusion, Congress could enact an all-encompassing "substantially effects" Commerce Clause legislation that would regulate each element of human existence. *Id.* Concluding, Justice Thomas offered the metaphor of a "blank check" to describe such an approach maintained by the principal dissent. *Id.* at 1651 (Thomas, J., concurring).

149 *Lopez*, 115 S. Ct. at 1651 (Stevens, J., dissenting). Thus, Justice Stevens expressed his agreement with the principal dissent. *Id.* Justice Stevens also concurred with Justice Souter's dissent, finding the majority's decision "radical." *Id.* (citation omitted).

150 *Id.* Approximately 135,000 students carried handguns each day while attending school in 1987. 135 CONG. REC. E3988 (daily ed. Nov. 20, 1989) (statement of Hon. Edward F. Feighan). Another 270,000 students carried a handgun once to school in 1987. *Id.* Over 5000 secondary school teachers are threatened or physically attacked each month. *Id. See also* Herman Schwartz, United States v. Lopez; *The Feds Lose a Piece of Their Rock; Courts Tries to Patrol a Political Line*, LEGAL TIMES, May 8, 1995, at 25 (noting that 4% of American students carry guns to school, 6% of inner-city students carry guns to school, 12% of students have fired guns while in school and 20% of students have used guns to threaten others while in school). Moreover, roughly eight percent of junior high and high school students reported missing school out of fear. *Id.* Further, schools have been forced to take affirmative action to help children handle the gun violence present in local schools, such as practicing gunfire drills, constructing protective walls surrounding the school, and holding special classes designed to inform kindergarten students about the danger of guns. *Id.*

151 *Id.* at 1651 (Stevens, J., dissenting).

152 *Id.* Justice Stevens noted that in 1789, the market for school children possessing handguns was nonexistent, while such a market in today's society is, distressingly, significant. *Id.*

the rational basis test as a "paradigm of judicial restraint."[153] Noting that the majority decision deviated from the Court's modern view of the Commerce Clause, Justice Souter expressed concern that the majority's decision would lead to further destruction of that restraint.[154] While retracing the history of the Court, Justice Souter noted a similarity between the Court's Commerce Clause and Due Process Clause jurisprudence.[155] Justice Souter expounded on the creation and utilization of the rational basis test, through both the Commerce and Due Process Clauses.[156] While acknowledging that the rational basis test brought stability to issues involving the Commerce Clause, Justice Souter expressed concern that the immediate decision portends a regression to the untenable jurisprudence before the adoption of the rational basis standard.[157]

Continuing, Justice Souter explained that the Commerce Clause power should be plenary.[158] In concluding that such power may be used as a valid means of regulating firearm possession in schools, Justice Souter admitted that the connection to interstate

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153 *Lopez*, 115 S. Ct. at 1651 (Souter, J., dissenting).

154 *Id.* at 1652 (Souter, J., dissenting). Justice Souter explained that a history of the Commerce Clause demonstrated the Court's deviation from the modern view of the Commerce Clause. *Id.*

155 *Id.* Specifically, Justice Souter proclaimed that in 1937, the year the Court decided West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), the Court abandoned the expansive protectionist precedent of contractual freedom by rejecting a Due Process Clause challenge against a state law imposing minimum wages for women and children. *Id.*

156 *Id.* Justice Souter indicated that the change in the Court's analysis with regard to the rational basis standard and the Commerce Clause was subsequent to that involving the Due Process Clause, because of the adoption of the "cumulative-effects" theory expressed in Wickard v. Filburn, 317 U.S. 111, 125, 127-29 (1942). *Id.* Justice Souter remarked that the "cumulative-effects" theory was lauded and, thus, the Court's approach was not altered for a number of years. *Id.* Continuing, Justice Souter noted that the Court eventually altered the approach taken with regard to civil rights issues. *Id.*; *see supra* notes 79-83 (discussing the civil rights cases).

157 *Lopez*, 115 S. Ct. at 1654 (Souter, J., dissenting). Justice Souter stated that with the adoption of the rational basis standard of review, the Court has never, prior to the immediate decision, taken steps to return to the "pre-rational basis" days, in either Due Process or Commerce Clause analyses. *Id.* at 1653 (Souter, J., dissenting). Justice Souter proceeded to describe the majority's decision as a return to the direct-indirect approach vacated nearly 60 years ago. *Id.* at 1654 (Souter, J., dissenting).

158 *Id.* Justice Souter expanded his analysis by stating that the Court has set forth maxims that determine intent where certain legislation fails to address intent. *Id.* at 1655 (Souter, J., dissenting). One such maxim dealing with federal criminal statutes, noted Justice Souter, is that the Court, when faced with two conceivable interpretations, will select the alternative that "does not force us to impute an intention to Congress to use its full commerce power to regulate conduct traditionally and ably regulated by the States." *Id.*

commerce is obscure.[159] Justice Souter noted, however, that the Court must still abide by the rational basis standard of review.[160] Accordingly, the Justice agreed with the principal dissent that § 922(q) passed the Court's rational basis review.[161]

Writing for the principal dissent, Justice Breyer concluded that § 922(q) falls within Congress's Commerce Clause power as a rational means to regulate interstate commerce.[162] The Justice began by outlining the three principles used to reach this conclusion: the broad power to regulate commerce between the states, the "cumulative-effects" theory, and the duty of the Court to grant Congress deference in enacting legislation.[163] Justice Breyer maintained that Congress had a rational basis for its attempt to regulate firearms in local schools.[164] The Justice continued by at-

159 *Id.* at 1656 (Souter, J., dissenting). Justice Souter suggested that a challenge to a federal regulation involving interstate garbage hauling, for example, would present a much clearer issue. *Id.*

160 *Id.* The question for the Court, added Justice Souter, was not whether Congress found a particular activity to substantially affect interstate commerce, nor was it whether Congress was correct in such a finding. *Id.* Rather, Justice Souter maintained the question for the Court was whether such legislative judgment was "within the realm of reason." *Id.* Justice Souter further expressed the notion that express legislative findings are not necessary in order to sustain legislation. *Id.* at 1655-56 (Souter, J., dissenting). *See* Maloney, *supra* note 27, at 1817 (discussing the relevance of legislative findings).

161 *Lopez*, 115 S. Ct. at 1657 (Souter, J., dissenting). Justice Souter deferred to the principal dissent, *see infra* notes 162-71, stating that under such findings, there can be no doubt that Congress had a rational basis for such a regulation. *Id.* Justice Souter remarked that the majority's decision should not be regarded as a significant departure from the general trend of the Court's rulings supporting the powers of Congress to regulate relevant activities under the Commerce Clause. *Id.* Justice Souter noted, however, that while National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1936), did not expressly overrule the direct-indirect standard set forth in A.L.A. Schechter Corp. v. United States, 295 U.S. 495 (1935), the decisions following *Jones & Laughlin Steel* indicated to the contrary. *Id.*

162 *Id.* at 1657 (Breyer, J., dissenting).

163 *Id.* at 1657-58 (Breyer, J., dissenting). Justice Breyer stipulated that the term "significant" would be used instead of the term "substantial" when referring to effects on interstate commerce. *Id.* (citing United States v. Perez, 402 U.S. 146, 154 (1971)). The reason for this, noted Justice Breyer, was that "substantial" implied a narrower power than recent Supreme Court decisions have granted. *Id.*

Justice Breyer stated that the Court must consider not a single gun possession but the overall effect of every gun possession on interstate commerce. *Id.* at 1658 (Breyer, J., dissenting). Continuing, Justice Breyer suggested that the Court must grant Congress great latitude when determining the requisite nexus between a regulated activity and interstate commerce. *Id.* Furthermore, Justice Breyer believed that the term "rational basis" effected such latitude. *Id.*

164 *Id.* at 1659 (Breyer, J., dissenting). First, Justice Breyer recognized that Congress need not make particular findings in order to legislate. *Id.* at 1658 (Breyer, J., dissenting). However, Justice Breyer introduced considerable reports, articles, and studies evidencing the effects of gun possession and the relation between gun posses-

tacking the majority's contention that § 922(q) unduly expanded the scope of federal power pursuant to the Commerce Clause.[165] Justice Breyer claimed that, if upheld, the Court would simply be applying existing law and precedent to changing economic circumstances.[166]

Justice Breyer expressed three distinct legal problems created by the majority's decision.[167] First, noted Justice Breyer, the immediate decision runs afoul of the Court's modern trend of affording deference to Congress in situations with less direct involvement to interstate commerce.[168] Second, argued Justice Breyer, the majority incorrectly makes a distinction between what is and what is not a commercial transaction.[169] Finally, the Justice maintained that the majority's decision creates uncertainty to what was previously con-

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sion and interstate commerce. *Id.* at 1659-60, 1665-71 (Breyer, J., dissenting). The statistics of the studies, reported Justice Breyer, indicated that "several hundred thousand schoolchildren are victims of violent crimes in or near their schools" each year. *Id.* at 1659 (Breyer, J., dissenting). *See supra* note 150 (reporting statistics of students carrying, shooting, and threatening others with guns). Thus, Justice Breyer concluded that Congress, armed with such reports, could have acquired a rational basis for regulating gun possession in and around schools. *Lopez*, 115 S. Ct. at 1659 (Breyer, J., dissenting). Justice Breyer offered the proposition that the educational system directly affects commerce; more specifically, commerce between the foreign nations. *Id.* at 1659-60 (Breyer, J., dissenting).

Justice Breyer explored this proposition by noting that education was initially acquired in the workplace. *Id.* Continuing, Justice Breyer expounded on how the country's educational system is directly linked to industrial productivity. *Id.* at 1660 (Breyer, J., dissenting). Justice Breyer stressed the need for greater quality in American education to maintain a competitive level with Asian and European students. *Id.* Moreover, Justice Breyer suggested that more businesses are likely to base their operations in areas where there is a work force equipped with sufficient education. *Id.* at 1660-61 (Breyer, J., dissenting). If there are not enough qualified workers, warned Justice Breyer, businesses will move out of the United States. *Id.*

165 *Id.* at 1662 (Breyer, J., dissenting). Justice Breyer relied on *Perez* in stating that the majority ignored precedent that upheld federal legislation with a weaker nexus to interstate commerce. *Id.* Moreover, Justice Breyer compared *Katzenbach* to the immediate case. *Id.* In *Katzenbach*, noted Justice Breyer, the Court upheld congressional legislation applicable to restaurants because it was determined that the food served in the restaurant traveled through interstate commerce. *Id.* The Court further concluded that in *Katzenbach*, it was determined that African-Americans were less likely to travel through interstate commerce knowing that food would be difficult to obtain. *Id.* Hence, Justice Breyer questioned the majority's reasoning, stating that book suppliers sell less books and school supplies when the educational process is continually affected by gun violence. *Id.* at 1663 (Breyer, J., disseneting).

166 *Lopez*, 115 S. Ct. at 1662 (Breyer, J., dissenting) (citing Heart of Atlanta Motel v. United States, 379 U.S. 241, 251 (1964)).

167 *Id.*

168 *Id.*; *see supra* notes 92-100 (discussing United States v. Perez, 402 U.S. 146 (1971)).

169 *Lopez*, 115 S. Ct. at 1663 (Breyer, J., dissenting). Justice Breyer disagreed with the majority that the decisions in *Wickard*, *Perez*, and *Katzenbach* were decided on economic terms. *Id.* at 1663-64 (Breyer, J., dissenting). Rather, opined Justice Breyer,

sidered a settled area of law.[170] In conclusion, Justice Breyer contended that the Court should have recognized the rational basis for Congress's belief that there is a significant connection between interstate commerce and firearm possession in and around local schools.[171]

It is axiomatic that a properly functioning society must have laws that punish individuals for the crimes they commit. It is also clear that the United States, a nation that prides itself on the fundamental principles of liberty, freedom, and justice, is overwhelmed by a crime wave that is increasing annually.[172] One understands, therefore, that Congress would want to take affirmative steps to address these problems.[173]

It is undisputed, however, that Congress has, with increasing frequency, been enacting criminal legislation regulating conduct that is also the subject matter of state criminal legislation.[174] Despite the good intentions of Congress, it was inevitable that the Court would finally agree to decide a criminal conduct case that presented a clear issue regarding Congress's Commerce Clause power and the states' police powers under the Tenth Amendment.

In analyzing the various opinions in *Lopez*, it is important to

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the Court's focus in those cases concerned whether the particular activity substantially affected interstate commerce. *Id.*

Moreover, Justice Breyer noted that it is improper to make a distinction in this case between educational and commercial activities. *Id.* at 1664 (Breyer, J., dissenting). Justice Breyer proffered that schools provide both educational and commercial skills. *Id.* Thus, Justice Breyer concluded, the line between education and commerce is impossible to draw. *Id.*

170 *Id.* Justice Breyer noted that Congress has enacted a considerable amount of laws that contain the phrase "affecting commerce" to characterize their scope. *Id. See* Harvey Burkman, *Supreme Court Heading For the Home Stretch; Commerce Clause Reaches Limit in Gun Zone Ruling*, NAT'L L.J., May 8, 1995, at A14. Lamenting, Justice Breyer stated that the majority's decision will impede Congress's ability to create criminal laws that affect the nation both economically and socially. *Lopez*, 115 S. Ct. at 1665 (Breyer, J., dissenting).

171 *Lopez*, 115 S. Ct. at 1665 (Breyer, J., dissenting); *see supra* notes 149, 150-52 (noting Justice Stevens's similar reasoning).

172 *See generally supra* note 150 (offering statistics on school gun violence).

173 *See generally* Constance Johnson, *When Washington Takes on Crime, Its Bark is Far Worse than Its Bite*, U.S. NEWS & WORLD REPORT, Mar. 28, 1994, at 35 (noting that there are more than 3000 federal criminal statutes); Naftali Bendavid, *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 (stating that "the quickest and easiest way to respond to something that's been defined as a major problem is to federalize it"); Raven, *supra* note 23, at 12 (noting that the federal government has doubled the number of prosecutors between 1980 and 1990).

174 *See* Raven, *supra* note 23, at 12 (noting that the American politicians have "waged war" on crime, "essentially creating an entire body of law that duplicates state criminal codes").

remember that at the time the defendant was charged with violating 18 U.S.C. § 922(q), over forty states had laws proscribing gun possession within local school zones.[175] Thus, the criminal conduct that Congress was attempting to regulate was already heavily regulated by the states. In short, Congress was attempting to fix something that did not need fixing. Therefore, the majority opinion of the *Lopez* Court must be lauded. Also laudable was the willingness of some members of the majority to reject previously held views espousing judicial restraint and stare decisis.[176]

It is regrettable, however, that the majority, while making such a momentous decision, tainted the message by emphasizing the narrowness of its holding. The Court should have seized the opportunity to give better guidance and clarity regarding past Commerce Clause cases that continue as precedent, although arguably inconsistent with *Lopez*.[177] This especially holds true as the most recent Commerce Clause decisions have been decided by five-to-four votes.[178] With the change of one member of the Court, a future case could likely reverse the *Lopez* decision, thereby creating further confusion in an already confusing area.[179]

Instead of delivering a clear directive to Congress to refrain from enacting unnecessary federal laws in areas already sufficiently covered by the states, the Court has provided Congress a protocol to use when adopting legislation that will ensure its validity. This will almost certainly lead to more federal regulation and diminished state power, a circumstance never intended by the Framers of the Constitution.

Douglas A. Stevinson

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175 *Lopez*, 115 S. Ct. at 1641 (Kennedy, J., concurring).

176 *See, e.g., id.* at 1650 (Thomas, J., concurring) (noting that the *Lopez* decision was necessary in order to abandon the "substantially affects" test).

177 *See id.* at 1634 (stating that "the broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further"); *see also id.* (Kennedy, J., concurring) (stressing the Justice's hesitation with joining the majority and emphasizing the limited holding of the Court); Greenhouse, *supra* note 102, at 1 (acknowledging that the Court, during the past term, muddled holdings with notes of equivocation and compromise).

178 *See, e.g., supra* note 99 (discussing National League of Cities v. Usery, 426 U.S. 833 (1976), and Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)).

179 *See* Lacayo, *supra* note 102, at 48 (quoting former United States Supreme Court Justice William Brennan, who said that "[f]ive votes can do anything around here").