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United States v. Lopez: Artificial Respiration for the Tenth Amendment

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I. INTRODUCTION

Conventional wisdom dictates that national problems require national solutions. Gun-related school violence is one such problem that has reached epidemic proportions.[1] Five years ago, Congress responded by enacting the Gun-Free School Zones Act of 1990 (hereinafter section 922(q)),[2] which made it a federal offense for anyone to possess a firearm within 1000 feet of a school.[3] The Act was seemingly consistent with Congress' trend of federalizing criminal law.[4] In *United States v. Lopez*,[5] however, the constitutionality of section 922(q) was challenged on grounds that Congress exceeded its authority under the Commerce

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1. Senator Lautenberg of New Jersey recently noted, "Every day 14 American children—14 kids here in America—are killed by guns." 140 CONG. REC. S12,806 (daily ed. Sept. 13, 1994) (statement of Sen. Lautenberg). He added that "according to the National Education Association, more than 100,000 students pack a gun with their school things every morning." *Id.* at S12,807. Data from the national school-based Youth Risk Behavior Survey showed that in 1991 approximately 26% of high school students reported carrying a weapon. BUREAU OF STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 319 (Kathleen Maguire et al. eds., 1992). Additionally, a nationwide survey of 2736 high school seniors from the Class of 1992 found that 91.6% worried "often" about crime and violence. *Id.* at 215.

2. Pub. L. No. 101-647, 104 Stat. 4789, 4884-85 (codified at 18 U.S.C. § 922(q) (1995)).

3. 18 U.S.C. § 922(q)(2)(A) provides, in pertinent part: "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." A "school zone" is defined as "(A) in, or on the grounds of, a public, parochial or private school; or (B) within a distance of 1000 feet from the grounds of a public, parochial or private school." 18 U.S.C. § 921(a)(25) (1988).

4. *See* Stephen Chippendale, Note, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, 455-56 (1994) (noting that the current federal criminal code includes more than 3000 offenses); *see also* Chief Justice William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 7 (1993) (asserting that "hardly a congressional session goes by without an attempt to add new sections").

5. 115 S. Ct. 1624 (1995).

Clause,[6] calling into question the future of federal regulation in a range of areas.[7]

The Constitution grants Congress specific enumerated powers, one of which is the power to regulate interstate commerce.[8] The United States Supreme Court greatly expanded the scope of this power during the New Deal era.[9] As a result, congressional authority under the Commerce Clause emerged as virtually unlimited,[10] thus weakening the reservation of power to the states under the Tenth Amendment.[11] This tension between the Commerce Clause and the Tenth Amendment was at the heart of the great federalist debate in *Lopez*, which resulted in a five to four ruling that section 922(q) went beyond the scope of Congress' delegated authority.[12]

This Note will examine the Court's decision in *Lopez* and discuss its implications for future Commerce Clause analysis. Part II traces the history of the Court's interpretation of Congress' commerce power.[13] Part III presents the facts and procedural history of *Lopez*,[14] followed by an analysis of the majority, concurring, and dissenting opinions in Part IV.[15] Part V then considers the judicial, legislative, and social impacts of *Lopez*.[16] Part VI concludes with a look at how this ruling will hold up in future litigation.[17]

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6. U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause provides: "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." *Id.*

7. In addition to federalizing criminal law, Congress regularly exercises its commerce power to pass legislation on such matters as civil rights, agriculture, labor, and environmental protection. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1387 (1987).

8. U.S. CONST. art. I, § 8, cl. 3.

9. *See* discussion *infra* part II.C.

10. *See* Chippendale, *supra* note 4, at 460. In particular, criminal prosecution, an area traditionally governed by the States, experienced an explosive proliferation of federal statutes targeting what was ostensibly intrastate crime. *Id.* at 463. In repeatedly upholding these statutes, the Court nonetheless recognized that Congress' commerce power was not unlimited, thus implying that the Tenth Amendment was still relevant. *See* Ronald A. Giller, Note, *Federal Gun Control in the United States: Revival of the Tenth Amendment*, 10 ST. JOHN'S J. LEGAL COMMENT. 151, 154 (1994).

11. U.S. CONST. amend. X. 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." *Id.*

12. United States v. Lopez, 115 S. Ct. 1624, 1634 (1995).

13. *See infra* notes 18-92 and accompanying text.

14. *See infra* notes 93-103 and accompanying text.

15. *See infra* notes 104-68 and accompanying text.

16. *See infra* notes 169-228 and accompanying text.

17. *See infra* note 229 and accompanying text.

II. HISTORICAL BACKGROUND

A. *The Constitutional Convention: Enumerated Powers and Limited Government*

When the Constitution's Framers adopted a scheme of enumerated powers to define Congress' authority, they reassured various state ratifying conventions that the powers of the new federal government would be limited to those enumerated in the Constitution and would be further limited by the Tenth Amendment.[18] As James Madison, a principal draftsman of the U.S. Constitution, wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[19]

The enumeration of congressional powers was outlined in Article I, Section 8 of the Constitution.[20] In addition to the power "[t]o regulate Commerce . . . among the several States," Congress was delegated the power to lay and collect taxes, enact bankruptcy laws, coin money, promote science and invention by granting patents and copyrights, declare war, and so on.[21] The enumeration itself seems to make clear that the Framers intended the federal government to be a government of limited, not general, powers; otherwise, enumeration would not have been necessary.[22] Further evidence that these powers were intended to be limited is the inclusion in the Bill of Rights of the Tenth Amendment, which provides that the federal government may exercise only those powers delegated to it by the Constitution.[23]

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18. Douglas W. Kmiec, *Commerce, the Tenth Amendment, and Guns in School*, UPDATE ON LAW-RELATED EDUC., Nov. 1995, at 4 (noting that "[e]ight of the nine original states needed to ratify the Constitution did so only after requiring that a statement of state sovereignty be added to the document").

19. THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

20. U.S. CONST. art. I, § 8.

21. *Id.*

22. It is also evident that the enumeration of powers was not merely illustrative given that the Framers took care to distinguish the power to "raise and support Armies" from the power to "provide and maintain a Navy." *Id.*; *see* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824) ("The enumeration presupposes something not enumerated. . . ."); New York v. United States, 505 U.S. 144, 155 (1992) ("[N]o one disputes the proposition that '[t]he Constitution created a Federal Government of limited powers.'" (quoting Gregory v. Ashcroft, 501 U.S. 452, 457 (1991))).

23. U.S. CONST. amend. X.

As stated above, the power to regulate interstate commerce was among those powers delegated to Congress. The need for commercial regulation was, perhaps, the most important reason for the adoption of the Constitution, given that under the Articles of Confederation, the federal government was unable to prevent individual states from enacting tariffs and regulations that impeded the free flow of interstate commerce.[24] Thus, the original purpose of the Commerce Clause was not so much a grant to Congress of a general police power, but rather a means of eliminating trade barriers among the states.[25] Much of the early case law made this clear.[26]

B. 1824-1936: The Limits of Congressional Power

Chief Justice Marshall first articulated the scope of Congress' commerce power in *Gibbons v. Ogden*.[27] The *Gibbons* Court defined interstate commerce as "that commerce which concerns more States than one."[28] The Court further noted that the commerce power "may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[29] Although this definition ap-

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24. *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 259 (Da Capo Press 1970) (1833) ("[T]he want of any power in congress to regulate foreign or domestic commerce was deemed a leading defect in the confederation."); Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 533-34 (1993) ("Under the Articles of Confederation, state legislatures had become dens of special-interest legislation aimed at protecting local manufacturers and sellers from out-of-state competitors.").

25. *See* Pilon, *supra* note 24, at 534 ("[The Commerce Clause] was thus not so much to convey a power 'to regulate'—in the affirmative sense in which we use that term today—as a power 'to make regular' the commerce that might take place among the states."); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1125 (1986) (arguing that the purpose of the commerce power "was not to empower Congress, but rather to disable the states from regulating commerce among themselves").

26. *See* discussion *infra* part II.B.

27. 22 U.S. (9 Wheat.) 1 (1824). *Gibbons* involved a dispute over a New York grant of a steamboat monopoly that affected navigation between New York and New Jersey. *Id.* The Court struck down the monopoly, stating that it conflicted with a federal statute licensing such interstate commerce. *Id.* at 190-91.

28. *Id.* at 194. Chief Justice Marshall observed that it would be a different case if New York had regulated matters "completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Id. Gibbons*' distinction between "internal commerce" and "interior traffic" was further articulated in *The Daniel Ball*, which upheld Congress' authority to require the licensing of ships operating exclusively intrastate so long as the ships were involved in the transportation of goods ultimately destined for other states. 77 U.S. (10 Wall.) 557, 565 (1870).

29. *Gibbons*, 22 U.S. (9 Wheat.) at 196. Chief Justice Marshall continued:

peared to give Congress broad discretion in exercising its authority,[30] for almost a century thereafter, the Court's Commerce Clause decisions rarely involved the extent of Congress' power.[31] Rather, the Court dealt almost exclusively with the validity of state actions that discriminated against interstate commerce.[32]

With the enactment of the Interstate Commerce Act in 1887 and the Sherman Antitrust Act in 1890, Congress vastly expanded the potential reach of federal law, and the Court faced new questions over the limits of congressional power.[33] The Court's approach to this legislation was restrictive.[34] For example, in *United States v. E.C. Knight Co.*,[35] the Court denied Congress the power to regulate activities such as "min-

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> If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.

Id. at 197.

30. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-4, at 306 (2d ed. 1988) (characterizing *Gibbons* as an extraordinarily broad interpretation of federal power). For criticism, see Epstein, *supra* note 7, at 1399-1408 (maintaining that when *Gibbons* is read as a whole, it is clear that Chief Justice Marshall did not intend to give such an extensive reading to the reach of the Commerce Clause).

31. United States v. Lopez, 115 S. Ct. 1624, 1627; *see* TRIBE, *supra* note 30, § 5-4, at 306 (observing that until the late 1800s, "commerce clause litigation only rarely involved the Supreme Court in review of congressional actions").

32. *Lopez*, 115 S. Ct. at 1627 (citing Veazie v. Moor, 55 U.S. (14 How.) 568, 573-75 (1853) (upholding a state-created steamboat monopoly because it involved regulation of wholly internal commerce); Kidd v. Pearson, 128 U.S. 1, 17, 20-22 (1888) (upholding a state prohibition on the manufacture of intoxicating liquor because the commerce power "does not comprehend the purely domestic commerce of a State which is carried on between man and man within a State or between different parts of the same State")).

33. *Lopez*, 115 S. Ct. at 1627. Prior to the Interstate Commerce Act and the Sherman Act, congressional legislation was, for the first time, struck down as exceeding the commerce power in United States v. DeWitt, 76 U.S. (9 Wall.) 41 (1869) (unanimous decision) (invalidating a federal law that sought to prohibit intrastate sales of hazardous fuels). In *DeWitt*, the Court acknowledged that the Commerce Clause "has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States." *Id.* at 44.

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

35. 156 U.S. 1 (1895). In *E.C. Knight*, the Court declined to enforce federal antitrust laws in order to break up a monopoly of sugar manufacturing. *Id.* at 13.

ing," "manufacturing," and "production," even though the products of these activities would subsequently enter interstate commerce.[36] The Court reasoned that the term "commerce" literally meant "trade," which would exclude from the scope of the Commerce Clause any activities that occurred before the products entered interstate trade.[37] In addition, the Court made a distinction between those activities that directly affected interstate commerce, and those that indirectly affected it, holding that the commerce power extended only to activities with a direct effect on interstate commerce.[38]

These distinctions between manufacturing and commerce and between direct and indirect effects on interstate commerce were the cornerstone of the Court's "dual federalism" approach.[39] This theory regarded the federal government and the separate states as two mutually exclusive systems of sovereignty; both were supreme within their respective spheres, and neither could intrude upon the sovereignty reserved to the other.[40] The Court encountered difficulties with this approach because the real world was rarely so neatly categorized.[41] Nevertheless, up until 1937, the Court continued to use these formal distinctions to invalidate federal laws that sought to regulate areas of local or state economic concern.[42]

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36. *Id.* at 12.

37. *Id.* ("Commerce succeeds to manufacture, and is not part of it."); *see* THE FEDERALIST No. 11, at 63 (Alexander Hamilton) (Modern Library College ed. 1937) (using "commerce" as a synonym for "trade" and "navigation"); *cf.* Carter v. Carter Coal Co., 298 U.S. 238, 304 (1935) ("Mining brings the subject matter of commerce into existence. Commerce disposes of it.").

38. *E.C. Knight*, 156 U.S. at 12.

39. DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 103 (2d ed. 1993).

40. Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950); *see* CRUMP ET AL., *supra* note 39, at 103 (noting that under a dual federalism approach, states could regulate manufacturing, but Congress could not).

41. CRUMP ET AL., *supra* note 39, at 103; *see* Houston E. & W. Tex. Ry. v. United States (The Shreveport Rate Case), 234 U.S. 342, 351 (1914) (acknowledging the interconnectedness of interstate and intrastate activities in holding that federal control of intrastate railroad rates was proper under the Commerce Clause because intrastate railroad rates had a "close and substantial relation" to interstate rates).

42. *See* Carter v. Carter Coal Co., 298 U.S. 238, 303-04 (1936) (invalidating the Bituminous Coal Conservation Act of 1935 in part because the act regulated production rather than trade); United States v. Butler, 297 U.S. 1, 68 (1936) (invalidating the Agricultural Adjustment Act because it invaded the reserved powers of the states); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935) (striking down the "Live Poultry Code" authorized by the National Industrial Recovery Act of 1933 because the regulated activity only indirectly affected interstate commerce).

C. The New Deal Era: Federal Authority Expanded

During the early 1930s, when the national economy slipped into the Great Depression, many looked to the federal government to intervene.[43] In response to this economic emergency, Congress and President Franklin D. Roosevelt began implementing the New Deal, which resulted in a proliferation of federal regulations.[44] At first, the Court resisted supporting the new regulations.[45] For instance, in 1935 the Court struck down as beyond the commerce power an industrial code that regulated intrastate sales of diseased chickens.[46] The Court observed: "Extraordinary conditions may call for extraordinary remedies. But . . . [e]xtraordinary conditions do not create or enlarge constitutional power. . . . Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment. . . ."[47]

Two years later, the Court finally relented in the watershed decision of *NLRB v. Jones & Laughlin Steel Corp.*[48] In the wake of President Roosevelt's landslide re-election in 1936, and his infamous "court-packing" scheme,[49] a narrow majority of the Court upheld the National Labor Relations Act, which extended federal jurisdiction to the regulation of labor disputes at manufacturing facilities engaged in interstate commerce.[50] The Court ruled that Congress may regulate those intrastate

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43. GERALD GUNTHER, CONSTITUTIONAL LAW 121 (11th ed. 1985).

44. *Id.*

45. *Id.* at 122-28.

46. *A.L.A. Schechter Poultry*, 295 U.S. at 551. Professor Crump and his co-authors explained the industrial code in question as follows:

> It prohibited the selling of uninspected or unfit birds, set minimum wages of fifty cents an hour, set maximum hours of forty-eight per week, and regulated such odd practices as "straight killing" (the customer had to accept "run of the coop," or birds selected by chance, rather than choose the best).

CRUMP ET AL., *supra* note 39, at 112.

47. *A.L.A. Schechter Poultry*, 295 U.S. at 528-29. Following the *Schechter* decision, President Roosevelt accused the Court of taking a "horse and buggy" approach to addressing national economic problems. LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 86 (1992).

48. 301 U.S. 1 (1937).

49. *See generally* William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court Packing" Plan*, 1966 SUP. CT. REV. 347 (discussing Roosevelt's battle with the Court in the early 1930s). President Roosevelt proposed reshaping the Court by adding six new justices—enough to give him the majority needed to uphold New Deal legislation. *Id.* at 392. Congress eventually rejected the plan. *Id.* at 347.

50. *Jones & Laughlin Steel*, 301 U.S. at 49 (5-4 decision).

activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions."[51] The Court's definition of commerce did not stress "commerce among the states" or "trade," but rather focused on the interconnectedness of the national economy.[52] Thus, *Jones & Laughlin Steel* began the Court's systematic process of erasing the previous limitations that had been placed on the scope of the commerce power.[53]

Four years later, in *United States v. Darby*,[54] a unanimous Court upheld the Fair Labor Standards Act, which regulated goods through the imposition of a minimum wage.[55] *Darby* marked the historical nadir for the restrictive effect of the Tenth Amendment, which the Court referred to as an ineffective "truism."[56] Thus, the Court rejected the idea that the Tenth Amendment acted as an independent limitation on congressional authority over interstate commerce.[57]

In subsequent decisions, the Court generally deferred to Congress on the issue of whether a regulated activity had the requisite "substantial relation" to interstate commerce, sometimes going to great lengths to show that it did.[58] For example, in *Wickard v. Filburn*,[59] the Court

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51. *Id.* at 37.

52. *Id.* at 37-39.

53. *Id.* at 40-41 (disregarding the distinctions used by the Court during the "dual federalism" era); *see* Epstein, *supra* note 7, at 1443 ("The old barriers were stripped away; in their place has emerged the vast and unwarranted concentration of power in Congress that remains the hallmark of the modern regulatory state."); *see also* 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) (stating that the Court, in the post-New Deal era, rarely addressed the detrimental effect of a federal law on state sovereignty and typically limited its Commerce Clause analyses to "whether the federal action was within the scope of federal power").

54. 312 U.S. 100 (1941).

55. *Id.* at 125. *Darby* expressly overruled Hammer v. Dagenhart (The Child Labor Case), 247 U.S. 251 (1918). *Darby*, 312 U.S. at 103. In *Hammer*, the Court struck down a federal statute that prohibited the interstate sale of products made by child labor. *Hammer*, 247 U.S. at 277. The Court reasoned that the statute unconstitutionally encroached upon the authority of the states because the employment of child labor did not directly affect interstate commerce. *Id.* at 276.

56. *Darby*, 312 U.S. at 124 ("The amendment states but a truism that all is retained which has not been surrendered.").

57. *Id.*

58. TRIBE, *supra* note 30, § 5-4.

59. 317 U.S. 111 (1942). In *Wickard*, an Ohio farmer named Filburn was prosecuted under the Federal Agriculture Adjustment Act, which authorized the establishment of production quotas for wheat sold into interstate commerce as well as for wheat consumed on the farm as food, seed, or feed for livestock. *Id.* at 114. Filburn produced 239 bushels of wheat in excess of his quota and refused to pay the subse-

held that a federal statute could regulate a farmer's production of wheat for home consumption, regardless of how trivial, because the "cumulative effect" of his consumption, taken together with that of many others, might alter the supply-and-demand relationships of the interstate commodity market.[60]

In the 1960s, the Court granted Congress even more deference with the development of the rational basis test.[61] Under the test, where a rational basis existed for concluding that a regulated activity substantially affected interstate commerce, the Court would defer to congressional wisdom and uphold the regulation.[62] The Court introduced this test in *Heart of Atlanta Motel, Inc. v. United States*[63] when it upheld federal civil rights legislation on grounds that Congress had a rational basis for finding that racial discrimination affected interstate commerce.[64] The Court reiterated the test in *Katzenbach v. McClung*,[65] stating: "[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."[66]

Also during the 1960s, Congress, with great regularity, began resorting to its commerce power in enacting a variety of federal criminal statutes.[67] This practice gave rise to concerns that national power was

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quently imposed penalty. *Id.* at 114-15.

60. *Id.* at 127-28.

61. CRUMP ET AL., *supra* note 39, at 130.

62. *Id.*

63. 379 U.S. 241 (1964).

64. *Id.* at 258. In *Heart of Atlanta Motel*, the defendant motel violated the Civil Rights Act of 1964 by turning away blacks on the basis of their race. *Id.* at 242-43. The Court stated that the only questions with regard to Congress' exercise of its commerce power were: "(1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate." *Id.* The Court took note of congressional findings that racial discrimination discouraged travel on the part of a substantial portion of the black community; consequently, such discrimination could be regulated by Congress in the aggregate. *Id.* at 252-53.

65. 379 U.S. 294 (1964). In *Katzenbach*, the defendant restaurant violated the Civil Rights Act of 1964 by refusing to serve black patrons in its dining area. *Id.* at 295.

66. *Id.* at 303-04; *see also* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) ("The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding.").

67. *See* GUNTHER, *supra* note 43, at 151 (observing that "commerce-based criminal laws received fresh impetus with the widely publicized war on crime that commenced

being abused because criminal law was historically an area of local concern.[68] The Court addressed this issue in *Perez v. United States*[69] when it examined whether the commerce power extended to a federal statute that criminalized loansharking.[70] The Court upheld the statute, finding that loansharking belonged to a "class of activity" that substantially affected interstate commerce, even though the activity in question was conducted on a purely local scale.[71] In the aftermath of *Perez*, courts employed the same lenient standard for reviewing commerce power-based criminal statutes.[72]

D. The Last Two Decades: A Renewed Battle over State Sovereignty

State sovereignty under the Tenth Amendment made a brief comeback in 1976, when the Court, in *National League of Cities v. Usery*,[73] ruled that the federal minimum wage law encroached upon a traditional state function.[74] In other words, the Court asserted that Congress could not use the commerce power in ways that directly displaced the states' ability to carry out functions that were historically governed by the states, such as "fire prevention, police protection, sanitation, public health, and parks and recreation."[75] Thus, the Court held that state sovereignty interests placed a limit upon Congress' commerce power.[76] This signaled a revival of the Tenth Amendment, which, the Court noted, "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."[77]

Nine years later, however, *National League of Cities* was overturned. In *Garcia v. San Antonio Metropolitan Transit Authority*,[78] the Court, faced with the issue of whether the minimum wage law applied to the

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in the 1960s").

68. *Id.* at 148.

69. 402 U.S. 146 (1971).

70. *Id.* at 147.

71. *Id.* at 153. The Court reasoned that loansharking as a whole had an effect on interstate commerce because organized crime relied on loansharking revenues from numerous local syndicates to finance its national operations. *Id.* at 157.

72. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 115 (4th ed. 1991).

73. 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

74. *Id.* at 852. *National League of Cities* expressly overruled *Maryland v. Wirtz*. *Id.* at 855. In *Wirtz*, the Court held that federal minimum wage standards applied to local schools and hospitals. Maryland v. Wirtz, 392 U.S. 183, 194 (1968).

75. *National League of Cities*, 426 U.S. at 851-52.

76. *Id.* at 842.

77. *Id.* at 843 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).

78. 469 U.S. 528 (1985).

municipal mass transit authority, found the "traditional state functions" test unworkable.[79] The Court observed that "identifying which particular state functions are immune [from federal regulation] remains difficult."[80] For example, lower courts applying this standard from *National League of Cities* found that activities such as operating a highway authority and licensing automobile drivers were traditionally subject to state control, whereas operating a mental health facility and regulating traffic were subject to federal control.[81] This distinction, noted the Court, was "elusive at best."[82] With regard to state sovereignty concerns, the Court opined that the national political process would preserve state interests.[83]

In the principal dissent, Justice Powell criticized the majority for "effectively reduc[ing] the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause."[84] In addition, Justice Rehnquist, in a four-sentence dissent, predicted that the principles protected in *National League of Cities* would "in time again command the support of a majority of this Court."[85]

This foreshadowing by Justice Rehnquist was somewhat fulfilled in *New York v. United States*[86] when the Court struck down a congressional regulatory scheme as an improper usurpation of state power.[87] In

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79. *Id.* at 546-47.

80. *Id.* at 538 (quoting San Antonio Metro. Transit Auth. v. Donovan, 557 F. Supp. 445, 447 (W.D. Tex. 1983)).

81. *Id.* at 538-39 (citations omitted).

82. *Id.* at 539.

83. *Id.* at 552; *see* Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977) (arguing that the issue of whether the federal government has encroached upon state sovereignty should be treated as nonjusticiable, with the final resolution left to the political branches). *But see Garcia*, 469 U.S. at 584 (O'Connor, J., dissenting) (observing that a number of changes in how Congress works—such as the direct election of Senators under the Seventeenth Amendment and the expanded influence of national interest groups—"lessened the weight Congress gives to the legitimate interests of States as States"); Kmiec, *supra* note 18, at 6 ("[In essence, the Court] told members of Congress to be sensitive to federalism. Congress found itself unable to exercise much, if any, self-restraint.").

84. *Garcia*, 469 U.S. at 560 (Powell, J., dissenting).

85. *Id.* at 579-80 (Rehnquist, J., dissenting).

86. 505 U.S. 144 (1992).

87. *Id.* at 175-76. At issue in *New York* was a regulatory scheme in the Low-Level Radioactive Waste Policy Amendments Act of 1985 that attempted to force each state to make its own arrangements for disposing low-level radioactive waste generated in that state. *Id.* at 174-75. Under one provision of the Act, any state that did not ar-

discussing the constitutional balance between the states and the federal government, the Court noted that the Commerce Clause and the Tenth Amendment are essentially mirror images:

> In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in this case as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.[88]

By restoring vitality to the Tenth Amendment, the Court reaffirmed that the reach of the Commerce Clause is not unlimited.[89] Nevertheless, inconsistencies in the Court's decisions since the mid-1970s left unresolved the extent to which the Tenth Amendment would impact future exercises of Congress' commerce power.[90] Consequently, a dispute between the Fifth and the Ninth Circuits arose over the constitutionality of the Gun-Free School Zones Act,[91] and in *Lopez*, the Court was once again asked to define the scope of the Commerce Clause.[92]

III. FACTS OF THE CASE

On March 10, 1992, Alfonso Lopez, Jr., a high school senior from San Antonio, Texas, came to school carrying a concealed .38-caliber handgun and five bullets.[93] Lopez planned to sell the gun to a classmate for use in a "gang war" after school.[94] School authorities received an anonymous tip and confronted Lopez.[95] Police subsequently arrested and charged Lopez under Texas law with possessing a firearm on school premises.[96]

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range for waste disposal would be required to take title to the waste and would be liable for damages in connection with the disposal of the waste. *Id.* The Court held that this "take title" provision was unconstitutional because "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

88. *Id.* at 159.

89. *Id.* at 156.

90. Giller, *supra* note 10, at 162.

91. *See* United States v. Edwards, 13 F.3d 291, 294 (9th Cir. 1993) (recognizing that by upholding the constitutionality of the Gun-Free School Zones Act, a conflict would be created with the Fifth Circuit's opinion in United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993), *aff'd*, United States v. Lopez, 115 S. Ct. 1624 (1995)).

92. United States v. Lopez, 115 S. Ct. 1624, 1626 (1995).

93. *Id.* The gun was unloaded, but Lopez had five bullets with him. *Lopez*, 2 F.3d at 1345.

94. *Lopez*, 2 F.3d at 1345.

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

96. *Id.* (citing TEX. PENAL CODE ANN. § 46.03(a)(1) (West Supp. 1994)).

The next day, the state dropped charges when federal authorities charged Lopez with violating section 922(q), the Gun-Free School Zones Act.[97] Lopez moved to dismiss the indictment, arguing that the statute was unconstitutional as beyond the scope of congressional authority.[98] The United States District Court for the Western District of Texas denied the motion, holding that the statute "is a constitutional exercise of Congress' well-defined power to regulate activities in and affecting commerce, and the 'business' of elementary, middle and high schools . . . affects interstate commerce."[99] The district court then conducted a bench trial in which Lopez was found guilty and sentenced to six months' imprisonment and two years' supervised release.[100]

On appeal to the United States Court of Appeals for the Fifth Circuit, Lopez again challenged the constitutionality of section 922(q).[101] This time, the court agreed with Lopez and reversed his conviction, holding that the federal statute was "invalid as beyond the power of Congress under the Commerce Clause."[102] The United States Supreme Court granted certiorari to determine whether Congress had the power to criminalize carrying a gun within 1000 feet of a school.[103]

IV. ANALYSIS OF THE COURT'S OPINION

A. The Majority Ruling

Invoking "first principles," Chief Justice Rehnquist[104] began his analysis with James Madison's assertion that the Constitution creates a federal government of "few and defined" powers and state governments of "numerous and indefinite" powers.[105] The Chief Justice noted that the

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97. *Id.*
98. *Id.*
99. *Lopez*, 2 F.3d at 1345.
100. *Lopez*, 115 S. Ct. at 1626
101. *Id.*
102. *Id.* (citing *Lopez*, 2 F.3d at 1367-68). The Fifth Circuit noted that the Tenth Amendment was relevant insofar as "[o]ur understanding of the breadth of Congress' commerce power is related to the degree to which its enactments raise Tenth Amendment concerns, that is concerns for the meaningful jurisdiction reserved to the states." *Lopez*, 2 F.3d at 1347.
103. *Lopez*, 115 S. Ct. at 1626.
104. Justices O'Connor, Scalia, Kennedy, and Thomas joined Chief Justice Rehnquist in the majority opinion. *Id.* at 1625.
105. *Id.* at 1626 (citing THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

Founders adopted this scheme "to ensure protection of our fundamental liberties."[106] Starting then with *Gibbons*,[107] Chief Justice Rehnquist traced the history of the Court's Commerce Clause interpretation to modern precedent, focusing specifically on the Court's acknowledgment of the inherent limits of federal power.[108]

Having established this framework, he identified "three broad categories of activity" subject to congressional regulation under the Commerce Clause: (1) "the use of the channels of interstate commerce;" (2) the "instrumentalities of interstate commerce, or persons or things in interstate commerce," even where the threat arises only from intrastate activities; and (3) activities that "substantially affect" interstate commerce.[109] Dismissing the first two classifications as inapplicable to *Lopez*, the Chief Justice concluded that the proper analysis was determining whether section 922(q) "substantially affects" interstate commerce.[110]

Chief Justice Rehnquist first noted that the Court has upheld a wide variety of legislation regulating intrastate economic activity when that activity substantially affected interstate commerce.[111] He then observed that "[e]ven *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not."[112] Thus, he reasoned, to hold that section 922(q) substantially affected interstate commerce would be inconsistent with this line of precedent.[113]

Chief Justice Rehnquist's second observation was that section 922(q) contained no jurisdictional element that would guarantee, on a case-by-

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106. *Id.* (citing Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

107. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

108. *Lopez*, 115 S. Ct. at 1626-29. For example, Chief Justice Rehnquist called attention to the Court's acknowledgment in *Gibbons* that the enumeration of powers in Article I "presupposes something not enumerated." *Id.* at 1627 (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824)).

109. *Id.* at 1629-30 (citations omitted).

110. *Id.* at 1630. Chief Justice Rehnquist rejected the lesser measure of "affects" and held that Congress could not exercise its commerce power unless an activity substantially affects interstate commerce. *Id.*

111. *Id.* (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 268 (1981) (intrastate coal mining); Perez v. United States, 402 U.S. 146, 147 (1971) (intrastate extortionate credit transactions); Katzenbach v. McClung, 379 U.S. 294, 299-301 (1964) (restaurants utilizing substantial interstate supplies); Heart of Atlanta Motel v. United States, 379 U.S. 241, 261 (1964) (inns and hotels catering to interstate guests); Wickard v. Filburn, 317 U.S. 111, 128-29 (1942) (production and consumption of home-grown wheat)).

112. *Id.* For a discussion of *Wickard*, see *supra* notes 59-60 and accompanying text.

113. *Lopez*, 115 S. Ct. at 1630-31. Chief Justice Rehnquist also asserted that under our federal system, the states have traditionally possessed primary authority over education and criminal law enforcement. *Id.* at 1632.

case basis, that the gun possession in question affected interstate commerce.[114] As an illustration, he referred to *United States v. Bass*,[115] wherein the Court reversed a man's conviction under a federal statute when the Court could not establish a sufficient nexus between the alleged crime of gun possession and interstate commerce.[116] The Chief Justice further noted the lack of congressional findings or legislative history that would suggest section 922(q) had a sufficient link to interstate commerce.[117]

Responding to the Court's principal dissent, Chief Justice Rehnquist pointed out that Justice Breyer failed to identify any activity beyond the scope of federal authority.[118] He further opined that if Congress could, as Justice Breyer suggested, regulate conditions that adversely affected classroom learning, there would be nothing to prevent it from regulating the educational process directly or from mandating a federal curriculum.[119]

The majority ruling, admitted the Chief Justice, gives rise to "legal uncertainty."[120] He noted, however, that ever since *Marbury v. Madison*[121] determined that it was the judiciary's duty to "say what the law is,"[122] such uncertainty has been inevitable.[123] In sum, Chief Justice

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114. *Id.* at 1631.

115. 404 U.S. 336 (1971).

116. *Lopez*, 115 S. Ct. at 1631 (citing *Bass*, 404 U.S. at 347). The federal statute in *Bass* made it a crime for a felon to "receiv[e], posses[s], or transpor[t] in commerce or affecting commerce . . . any firearm." *Bass*, 404 U.S. at 337 (alterations in original) (citing 18 U.S.C. app. § 1202(a) (repealed 1986)).

117. *Lopez*, 115 S. Ct. at 1631-32. The Chief Justice added that although the absence of such congressional findings is not dispositive, such findings may provide valuable insight. *Id.* It is important to note that Congress later amended § 922(q) to include congressional findings regarding the effects of gun possession near schools upon interstate commerce. *Id.* at 1632 n.4 (citing the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320904, 108 Stat. 1796, 2125 (1995)). The Government did not rely on the Act as a retroactive validation, but it insisted that these findings indicated Congress' rationale for wanting to regulate gun possession near schools. *Id.*

118. *Id.* at 1632.

119. *Id.* at 1633. Chief Justice Rehnquist further suggested that Justice Breyer's analysis would justify the federal regulation of family law, as even child rearing could be rationally seen to "fall on the commercial side of the line." *Id.*

120. *Id.*

121. 5 U.S. (1 Cranch) 137 (1803).

122. *Lopez*, 115 S. Ct. at 1633 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

123. *Id.* Chief Justice Rehnquist pointed out that even in the landmark New Deal decision of *Jones & Laughlin Steel*, the Court held that the question of Congress'

Rehnquist refused to add up numerous inferences so as to transform Congress' commerce power into a general police power, although he did acknowledge that some of the Court's prior rulings have gone in that direction.[124] Thus, the Fifth Circuit ruling was affirmed and section 922(q) was held to be an impermissible expansion of federal authority under the Commerce Clause.[125]

B. The Concurrences

1. Justice Kennedy

Justice Kennedy[126] joined the majority but maintained that the Court had reached a limited holding.[127] In tracing the history of Commerce Clause decisions, Justice Kennedy noted two lessons relevant to *Lopez*: (1) attempts to define the limits of Commerce Clause authority from content-based or subject-matter distinctions alone give rise to imprecision and inconsistencies,[128] and (2) the Court has an immense stake in the stability of its Commerce Clause jurisprudence.[129] Thus, he emphasized, the Court must exercise judicial restraint so as not to revert "to an understanding of commerce that would serve only an 18th-century economy."[130]

Justice Kennedy further stressed the significance of federalism within the structure of the Constitution, asserting that the Framers understood well that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny," thereby enhancing freedom.[131] He also observed that federalism serves a utilitarian function, allowing "the States [to] perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."[132] He concluded that section 922(q) went well beyond the scope

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commerce power "is necessarily one of degree," thus supporting the notion that Commerce Clause analysis does not rest on precise formulations. *Id.* at 1633-34 (quoting N.L.R.B. v. Jones & Laughlin Steel, 301 U.S. 1, 37 (1937)).

124. *Id.*

125. *Id.* at 1634.

126. Justice O'Connor joined Justice Kennedy in his concurring opinion. *Id.* (Kennedy, J., concurring).

127. *Id.* (Kennedy, J., concurring).

128. *Id.* at 1637 (Kennedy, J., concurring). Justice Kennedy referred to the distinction made between an activity's direct or indirect effect on interstate commerce, *id.* at 1636 (Kennedy, J., concurring), as well as the differentiation of commercial activities from activities such as manufacturing, production, and mining. *Id.* at 1635 (Kennedy, J., concurring).

129. *Id.* at 1637 (Kennedy, J., concurring).

130. *Id.* (Kennedy, J., concurring).

131. *Id.* at 1638 (Kennedy, J., concurring) (quoting Gregory v. Ashcroft, 501 U.S. 452, 458-59 (1991)).

132. *Id.* at 1641 (Kennedy, J., concurring). To support this contention, Justice Ken-

of Congress' commerce power because it "forecloses the States from . . . exercising their own judgment" in an area traditionally governed by the States.[133]

2. Justice Thomas

Justice Thomas agreed with the majority's conclusion but wrote separately to express his view that the Court has strayed "far from the original understanding of the Commerce Clause."[134] Justice Thomas especially criticized the "substantial effects" test, arguing that this standard is far removed from the Constitution and from early case law.[135] He further maintained that the "sweeping nature" of this test allows the dissent to make its argument that Congress has the power to regulate gun possession.[136] Additionally, because of the aggregation principle[137] of this test, he reasoned that "if Congress passed an omnibus 'substantially affects interstate commerce' statute, purporting to regulate every aspect of human existence, the Act apparently would be constitutional"[138]—a clear *reductio ad absurdum.*

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nedy made reference to an amicus brief from the National Conference of State Legislatures et al., which attested that the "injection of federal officials into local problems causes friction and diminishes political accountability of state and local governments." *Id.* (Kennedy, J., concurring) (citation omitted).

133. *Id.* (Kennedy, J., concurring).

134. *Id.* at 1642 (Thomas, J., concurring).

135. *Id.* (Thomas, J., concurring). Justice Thomas began by tracing the etymology of the word "commerce" and concluded that the word has a narrower meaning than what case law suggests. *Id.* at 1643-44 (Thomas, J., concurring). He added that if the Framers had wanted a "substantially affects interstate commerce" clause, they would have drafted one. *Id.* at 1644 (Thomas, J., concurring).

136. *Id.* at 1642 (Thomas, J., concurring). Justice Thomas also noted that many of Congress' other enumerated powers under Article I, Section 8 are wholly superfluous if the "substantial effects" test is used. *Id.* at 1644 (Thomas, J., concurring). Many of these powers, he observed, deal with matters that substantially affect commerce, such as the power to enact bankruptcy laws in Article I, Section 8, Clause 4. *Id.* (Thomas, J., concurring).

137. The "aggregation principle" states that "Congress can regulate whole categories of activities that are not themselves either 'interstate' or 'commerce.'" *Id.* at 1650 (Thomas, J., concurring). Thus, in applying the substantial effects test, the Court asks "whether the class of activities as a whole substantially affects interstate commerce, not whether any specific activity within the class has such effects when considered in isolation." *Id.* (Thomas, J., concurring).

138. *Id.* (Thomas, J., concurring).

Justice Thomas also endeavored to refute Justice Steven's characterization of the Court's opinion as "radical."[139] To the contrary, he asserted that *Lopez* marks a return to the long-held understanding of the limited nature of federal power.[140] He further challenged the dissent's use of precedent from the New Deal era, asserting that this case law was merely an innovation of the twentieth century and a dramatic departure from 150 years of precedent.[141] In conclusion, Justice Thomas insisted that the Court must modify its Commerce Clause jurisprudence so that it conforms with the Framers' original understanding of federal authority.[142]

C. The Dissents

1. Justice Stevens

Justice Stevens, in the shortest opinion of *Lopez*, expressed his agreement with the dissents of Justice Breyer and Justice Souter.[143] In addition, he expressed his belief that Congress' power to regulate commerce in firearms includes the power to outlaw gun possession at any location and in any market, including the market for school-age children, "because of their potentially harmful use."[144]

2. Justice Souter

In his dissent, Justice Souter faulted the majority for abandoning judicial restraint by not deferring to the "rationally based" judgments of Congress.[145] He characterized the Court's decision as a return to an untenable, pre-Depression conception of substantive due process and Commerce Clause interpretation.[146] He also expressed concerns that the

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139. *Id.* at 1643 (Thomas, J., concurring).

140. *Id.* at 1646 (Thomas, J., concurring).

141. *Id.* at 1649 (Thomas, J., concurring).

142. *Id.* at 1650-51 (Thomas, J., concurring). For an enthusiastic endorsement of Justice Thomas' approach, see Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167 (1996).

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

144. *Lopez*, 115 S. Ct. at 1651 (Stevens, J., dissenting). Justice Stevens insinuated that this market is substantial because firearm manufacturers specifically target young children by distributing hunting-related videos to schools. *Id.* at 1651 n.* (Stevens, J., dissenting).

145. *Id.* at 1651 (Souter, J., dissenting).

146. *Id.* at 1653 (Souter, J., dissenting). Justice Souter noted that it was not by mere coincidence that two weeks before the watershed case of *Jones & Laughlin Steel*, which affirmed the expansion of congressional commerce power, *see* discussion *supra* part II.C, a dramatic shift occurred in the Court's view of its authority under the Due Process Clause. *Lopez*, 115 S. Ct. at 1653 (Souter, J., dissenting) (referring to the Court's rejection of a substantive due process challenge to a state law fixing min-

majority's distinction between what is commercial and what is noncommercial resembles the old distinction between activities that directly or indirectly affect interstate commerce.[147]

Arguing *à la* Justice Harlan in *Maryland v. Wirtz*,[148] Justice Souter rejected Chief Justice Rehnquist's position that education and criminal law enforcement were areas over which states are historically sovereign.[149] Justice Souter also addressed the role of legislative findings, stating that the Court has no duty to defer to such findings, but pointing out that they may be a valuable reference for review.[150] He concluded by voicing his unequivocal support for the principal dissenting opinion, asserting that Justice Breyer undoubtedly established that section 922(q) passed the rational basis test.[151]

3. Justice Breyer

In the Court's principal dissent, Justice Breyer[152] argued that section 922(q) fell well within the scope of congressional power as the Court had interpreted it for almost sixty years.[153] He reached this conclusion by relying on three basic principles: (1) Congress may regulate local activities that "significantly" affect interstate commerce;[154] (2) in determining

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imum wages for women and children in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)).

147. *Lopez*, 115 S. Ct. at 1654 (Souter, J., dissenting).

148. 392 U.S. 183, 195-96 (1968) ("There is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.").

149. *Lopez*, 115 S. Ct. at 1654 (Souter, J., dissenting). Justice Souter further expounded upon the "clear statement rule," which essentially is a device used by the Court to avoid construing ambiguous legislation expansively. *Id.* at 1655 (Souter, J., dissenting). He stated that such rules of statutory interpretation are to be used only when legislation leaves intent subject to question and should not be used as a source of judicial activism. *Id.* (Souter, J., dissenting).

150. *Id.* at 1656-57 (Souter, J., dissenting). Justice Souter added that he saw no reason not to consider Congress' retroactive findings. *Id.* at 1656 n.2 (Souter, J., dissenting).

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

152. Justices Stevens, Souter, and Ginsburg joined Justice Breyer in his dissenting opinion. *Id.* (Breyer, J., dissenting).

153. *Id.* (Breyer, J., dissenting).

154. *Id.* (Breyer, J., dissenting). Justice Breyer maintained that the word "significant" was more appropriate than "substantial," because "substantial" implies a somewhat narrower power than recent precedent suggests." *Id.* (Breyer, J., dissenting).

whether a local activity has this significant effect, the Court must consider the cumulative effect of all similar instances;[155] and (3) the Court should judge only whether Congress had a rational basis for concluding that the regulated activity significantly affected interstate commerce.[156] Thus, Justice Breyer maintained that the issue in *Lopez* should not have been whether section 922(q) substantially affected interstate commerce, but whether Congress had a rational basis for concluding that it did.[157]

Citing numerous studies on guns in schools, Justice Breyer contended that Congress did indeed have a rational basis to establish an empirical connection between gun-related youth violence and interstate commerce.[158] He deduced that guns in schools are a serious problem, which, in turn, adversely impacts classroom learning.[159] He further argued that the quality of American education is directly linked to our nation's economic growth.[160] Therefore, he concluded that gun possession in school zones substantially affects interstate commerce.[161]

Justice Breyer also addressed what he believed were three major legal problems created by the majority ruling.[162] First, he asserted that the majority's holding was irreconcilable with Supreme Court precedent, which routinely upheld federal regulations despite having a lesser impact on interstate commerce than school violence.[163] Second, he rejected the majority's distinction between commercial and noncommercial transac-

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155. *Id.* at 1658 (Breyer, J., dissenting) (citing Wickard v. Filburn, 317 U.S. 111, 127-28 (1942)).

156. *Id.* (Breyer, J., dissenting). In essence, Justice Breyer was saying that the Court should accord great deference to Congress. *Id.* (Breyer, J., dissenting).

157. *Id.* (Breyer, J., dissenting).

158. *Id.* at 1659-62 (Breyer, J., dissenting). Justice Breyer also included a lengthy appendix of surveys and studies on violence. *Id.* at 1665-71 (Breyer, J., dissenting).

159. *Id.* at 1659 (Breyer, J., dissenting). He reasoned that guns in schools affect the quality of education received by the students through the effect of violence on teachers' ability to teach, students' ability to learn, and even the challenge of students to stay in school. *Id.* (Breyer, J., dissenting).

160. *Id.* 1659-60 (Breyer, J., dissenting). He made the connection between education and economic growth by discussing the effect of education on a business world that is becoming more technologically advanced, on increasing global competition, and on business location decisions. *Id.* at 1660-61 (Breyer, J., dissenting).

161. *Id.* at 1661 (Breyer, J., dissenting). He further suggested that if § 922(q) were upheld, the scope of the commerce power would not be expanded; "[r]ather, it simply would apply preexisting law to changing economic circumstances." *Id.* at 1662 (Breyer, J., dissenting). Chief Justice Rehnquist sharply attacked this reasoning. *See supra* notes 118-19 and accompanying text.

162. *Lopez*, 115 S. Ct. at 1662-65 (Breyer, J., dissenting).

163. *Id.* at 1662 (Breyer, J., dissenting) (citing Perez v. United States, 402 U.S. 146, 154 (1971) (upholding a federal statute making loansharking a crime); Katzenbach v. McClung, 379 U.S. 294, 300 (1964) (upholding a federal statute prohibiting racial discrimination at local restaurants)).

tions.[164] He argued that earlier cases had rejected such distinctions,[165] and, even if a separation could be made, schools could reasonably fall within the commercial category.[166] Third, he maintained that the majority threatened legal uncertainty in an area of law that was well settled.[167] In summary, he would have upheld section 922(q) as constitutional so as to allow Congress to act in terms of "economic realities."[168]

V. IMPACT OF THE COURT'S DECISION

A. Judicial Impact

The most immediate impact of *Lopez* was to resolve an intercircuit dispute over the constitutionality of section 922(q).[169] A broader implication is that *Lopez* will provide guidance to the lower courts in their interpretation of federal power. The next conundrum is whether *Lopez* actually offers a meaningful definition of the commerce power and whether the lower courts can apply this definition with any consistency.

1. Can the Commerce Power Be Meaningfully Defined after *Lopez*?

Lopez limited the scope of Congress' commerce power to three broad categories of activity: (1) "the use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and (3) activities that "substantially affect interstate commerce."[170] The first two categories are fairly straightforward: Congress may regulate commercial channels, such as highways,

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164. *Id.* at 1663-64 (Breyer, J., dissenting).

165. *Id.* at 1663 (Breyer, J., dissenting) (citing, *inter alia*, Wickard v. Filburn, 317 U.S. 111, 120 (1942) (rejecting the distinction between "direct" and "indirect" effects); United States v. Darby, 312 U.S. 100, 116-17 (1941) (overturning the distinction between "production" and "commerce")).

166. *Id.* at 1664 (Breyer, J., dissenting).

167. *Id.* (Breyer, J., dissenting). Of course, the case law from the last two decades cannot really be characterized as "well settled." *See* discussion *supra* part II.D. Another flaw in Justice Breyer's argument is that he seems to suggest that the Court should ignore jurisprudential errors simply because they have become entrenched in the legal system. *See* Epstein, *supra* note 7, at 1387 (arguing that Congress and the courts cannot disregard the tension between modern commerce clause jurisprudence and the original constitutional understanding).

168. *Lopez*, 115 S. Ct. at 1665 (Breyer, J., dissenting).

169. *See supra* note 91 and accompanying text.

170. *Lopez*, 115 S. Ct. at 1629-30; *see* discussion *supra* part IV.A.

waterways, and air traffic; it may also regulate and protect instrumentalities within those channels, such as people, machines, and vehicles.[171] The third category, as the Court readily admitted, is more nebulous.[172] Nevertheless, the Court gave some hints as to what is required for a federal statute in this third category to be upheld as a valid exercise of Congress' commerce power.[173]

The Court emphasized that a regulated activity's impact on interstate commerce must be substantial and not merely incidental.[174] The Court also seemed to make clear that when Congress exercises its commerce authority, the regulations it promulgates must have some real connection to commercial or economic activity.[175] Of course, this commercial-noncommercial distinction is not likely to be clear-cut in each case. It may be inferred from *Lopez*, however, that any connection to economic activity must at least be more obvious than the link between guns in schools and interstate commerce.[176]

The Court also implied that for a federal statute to be upheld it should be free from the two fatal flaws found in section 922(q): first, the statute "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce;" and second, Congress made no formal findings "regarding the effects upon interstate commerce of gun possession in a school zone."[177] The majority ruling does not state that the presence of a jurisdictional nexus is conclusive of a statute's validity, but the absence of any such nexus would appear to raise serious questions as to whether

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171. *Lopez*, 115 S. Ct. at 1629-30.

172. *Id.* at 1630; *see* notes 120-23 and accompanying text.

173. *Lopez*, 115 S. Ct. at 1630.

174. *Id.*; *see supra* note 110 and accompanying text. Congress may not "use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Lopez*, 115 S. Ct. at 1630 (citing Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968), *overruled by* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546-47 (1985)). However, Congress may still regulate an activity that has a trivial impact on interstate commerce so long as the "cumulative effect" of the activity substantially affects interstate commerce. *Id.* at 1630-31 (citing Wickard v. Filburn, 317 U.S. 111 (1942)).

175. *Lopez*, 115 S. Ct. at 1630-31.

176. If, on the other hand, the Court were to adopt Justice Thomas' narrow definition of commerce, regulation would be limited to trade or the actual exchange of goods or services. *Id.* at 1643-44 (Thomas, J., concurring). The obvious difficulty with this definition is that it would require the dismantling of massive portions of the modern federal government and would drastically impair the doctrine of stare decisis. *See* Epstein, *supra* note 7, at 1387 ("[T]oo much water has passed over the dam for there to be a candid judicial reexamination of the commerce clause that looks only to first principles.").

177. *Lopez*, 115 S. Ct. at 1631-32.

the law goes beyond the enumerated power under which it was enacted.[178] With regard to congressional findings, the Court recognized that while such findings are not dispositive, they may have some relevance in establishing a link to interstate commerce.[179]

Finally, *Lopez* recognized that states have historically possessed primary authority for regulating areas such as criminal law, family law, and education.[180] The Court asserted that if it placed no limits on Congress' commerce power, then the federal government would usurp these traditional state functions and thereby undermine the structural guarantee of freedom.[181] It is unlikely that *Lopez* goes so far as to prohibit direct federal regulation of traditional state functions, especially given that the Court rejected such an approach in *Garcia v. San Antonio Metropolitan Transit Authority*.[182] However, if a federal statute regulated an activity that has traditionally been the subject of state control, the Court is perhaps more likely to find the law invalid.[183] This is particularly true if the federal regulation disrupts the federal-state balance by foreclosing the states from "perform[ing] their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."[184]

Interestingly, the Court acknowledged that it will uphold a federal statute enacted under the commerce power so long as there is a "rational basis" for finding a substantial effect on interstate commerce.[185] In *Lopez*, the Court evidently found no such rational basis, emphasizing the lack of congressional findings and the distinguishable characteristics of prior case law.[186] This reasoning appears to have digressed from the standard rational basis approach, in which the Court is highly deferential

178. *Id.* at 1631.
179. *Id.* at 1631-32.
180. *Id.* at 1632-33.
181. *Id.* Preventing the accumulation of excessive power in the federal government reduces the risk of tyranny and thus enhances freedom. *Id.* at 1626 (citing Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).
182. 469 U.S. 528, 546-47 (1985), *overruling* National League of Cities v. Usery, 426 U.S. 833 (1976).
183. *See supra* part II.D, discussing New York v. United States, 505 U.S. 144 (1992).
184. *Lopez*, 115 S. Ct. at 1641 (Kennedy, J., concurring).
185. *Id.* at 1629. Note, however, that the majority ruling only mentioned the rational basis test once throughout the opinion. *Id.* Moreover, the Court mentioned the test not to show that the Court's review of congressional action was perfunctory, but rather as an example of the Court's continued recognition of the limits of Congress' commerce authority and of the Court's willingness to enforce those limits through judicial review. *Id.*
186. *Id.* at 1629-34.

to congressional actions.[187] Instead, the Court seems to have replaced this test with a tougher standard.[188] Hence, it is no longer likely that courts will routinely sign off on the issue of whether Congress exceeded the scope of its power.

2. *Lopez* in the Lower Courts

The precedential value of *Lopez* remains uncertain. Some commentators insist that the decision will have only a trivial impact,[189] while others suggest that *Lopez* may have far-reaching consequences.[190] Several courts have analyzed statutes under *Lopez* in the months since the decision. While most courts have upheld a wide variety of federal regulations by construing *Lopez* narrowly,[191] the courts are not without dissention.[192]

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187. *See* United States v. Lopez, 2 F.3d 1342, 1363 n.43 (5th Cir. 1993) ("[N]o Supreme Court decision in the last half century . . . has set aside [a congressional enactment based on the Commerce Clause] as without rational basis.").

188. *See* Epstein, *supra* note 142, at 189 (characterizing *Lopez'* rational basis test as "rational basis with a bite" and asserting that the proper standard of review is intermediate scrutiny); Deborah Jones Merritt, *Symposium—Reflections on* United States v. Lopez*: Commerce!*, 94 MICH. L. REV. 674, 682 (1995) (observing that *Lopez'* version of the rational basis test involved a heightened scrutiny).

189. *See* Lino A. Graglia, *Case Studies*, NAT'L REV., June 26, 1995, at 32 (opining that *Lopez* will doubtfully have any precedential impact and that gun possession in school zones "can easily and probably soon will be made a federal crime again").

190. *See* David G. Savage, *High Court to Rule on Law Barring Guns Near Schools*, L.A. TIMES, Apr. 19, 1994, at A17 (stating that *Lopez* has the potential of inhibiting Congress' power); Arthur Schlesinger Jr., *Board of Contributors: In Defense of Government*, WALL ST. J., June 7, 1995, at A14 (arguing that "the Supreme Court even seems to want to replace the Constitution by the Articles of Confederation").

191. *See, e.g.*, Kelley v. United States, 69 F.3d 1503, 1507-08 (10th Cir. 1995) (Federal Aviation Administration Authorization Act); United States v. Bolton, 68 F.3d 396, 399 (10th Cir. 1995) (Hobbs Act); Mack v. United States, 66 F.3d 1025, 1028 (9th Cir. 1995) (Brady Act); United States v. Leshuk, 65 F.3d 1105, 1111-12 (4th Cir. 1995) (Drug Abuse Prevention and Control Act); United States v. Oliver, 60 F.3d 547, 550 (9th Cir. 1995) (Anti Car Theft Act); Cheffer v. Reno, 55 F.3d 1517, 1520-21 (11th Cir. 1995) (Freedom of Access to Clinic Entrances Act); United States v. Hinton, No. 95-5095, 1995 WL 623876, at *2 (4th Cir. 1995) (per curiam) (federal statute prohibiting felons from possessing a firearm that has moved in interstate commerce).

192. *See, e.g.*, United States v. Kirk, 70 F.3d 791, 795 (5th Cir. 1995) (Jones, J., dissenting) (arguing that the court's validation of a statute which prohibits the possession of machine guns is inconsistent with the logic of *Lopez*); *see also* Cargill, Inc. v. United States, 116 S. Ct. 407 (1995), *denying cert. to* Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995). In *Cargill*, the U.S. Supreme Court declined to review a case involving wetlands regulations. *Id.* at 407. Justice Thomas dissented in the denial of certiorari, stating that the statute in question, which regulated *any* waters that might serve as a *potential* habitat for migratory birds, including private lands with occasional rainwater ponds, was even more far-fetched than the statute in *Lopez*. *Id.* (Thomas, J., dissenting). For an in-depth Commerce Clause analysis of this case, see John A. Leman, Comment, *The Birds: Regulation of Isolated Wetlands and*

For example, federal district courts are split with regard to the constitutionality of the Child Support Recovery Act,[193] which made it a federal offense to willfully withhold an overdue support obligation from a child residing in another state. Some courts have invalidated the statute as beyond the scope of the commerce power and in violation of the principles of federalism.[194] In particular, these courts have observed that *Lopez* explicitly singled out federal regulation of family law matters, such as child custody, as an unreasonable encroachment on state sovereignty.[195] Other courts have upheld the statute, asserting that the regulation of child support payments has a substantial effect on the national economy.[196] Their conclusion is based on the fact that Congress produced an abundance of legislative history regarding such economic effects and that the statute ensures, on a case-by-case basis, a jurisdictional nexus to interstate commercial activity.[197]

The cases upholding the Child Support Recovery Act appear to run contrary to the underlying spirit of *Lopez*, which endeavored to hold Congress to its constitutional limits and to restore some balance to the power relationship between the federal and state governments.[198] However, as Justice Thomas foreshadowed in his concurrence in *Lopez*, the analytically boundless nature of the "substantial effects" test encourages decisions which are inconsistent with the principles espoused in *Lopez*,[199] so it is perhaps not surprising that courts are confused.

It also should be noted that courts do not necessarily have to invalidate a federal statute to prevent a significant intrusion on the traditional federal-state balance. A Ninth Circuit case[200] involving a federal arson

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the Limits of the Commerce Clause, 28 U.C. DAVIS L. REV. 1237 (1995).

193. 18 U.S.C. § 228 (1995).

194. *See* United States v. Mussari, 894 F. Supp. 1360, 1368 (D. Ariz. 1995); United States v. Schroeder, 894 F. Supp. 360, 368-69 (D. Ariz. 1995); United States v. Bailey, 902 F. Supp. 727, 730 (W.D. Tex. 1995).

195. *See Mussari*, 894 F. Supp. at 1364; *Schroeder*, 894 F. Supp. at 365; *Bailey*, 902 F. Supp. at 728; *see also* Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787 (1995) (examining the resurgence of federalism into the realm of law governing domestic relations).

196. *See* United States v. Hampshire, 892 F. Supp. 1327, 1330 (D. Kan. 1995); United States v. Sage, 906 F. Supp. 84, 88-89 (D. Conn. 1995).

197. *See Hampshire*, 892 F. Supp. at 1329-30; *Sage*, 906 F. Supp. at 90-91.

198. United States v. Lopez, 115 S. Ct. 1624, 1634 (1995).

199. *Id.* at 1650 (Thomas, J., concurring).

200. United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995). In *Pappadopoulos*, the government argued that federal jurisdiction was conferred upon an arson prosecution because the private residence that was destroyed acquired natural gas from out-

statute[201] is illustrative in this regard. Like the statute at issue in *Lopez*, the activity regulated by the arson statute was noncommercial in nature and Congress revealed no connection to interstate commerce.[202] Unlike *Lopez*, however, the arson statute contained a jurisdictional element that required, in each case, a connection to interstate commerce.[203] Rather than invalidate the law, the court merely overturned the conviction on grounds that the jurisdictional requirement was not satisfied.[204] Thus, courts have the option of using narrow statutory construction to remain true to the values of *Lopez*.

In the long run, one benefit of the *Lopez* decision is that it may curb the flooding of criminal litigation in the federal courts.[205] In light of this situation, one must pause to consider the ramifications had Justice Breyer's opinion been the majority.[206] The result would have been a continued burden on the federal courts, as well as an invitation for Congress to federalize even more criminal law.[207]

B. Legislative Impact

Concerns that *Lopez* will put a "major crimp in Congress' power"[208] are overstated. As Justice Kennedy noted, the Court's holding was limited.[209] However, *Lopez* will probably affect the manner in which Con-

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of-state sources. *Id.* at 525. The court held that this was an insufficient connection to interstate commerce. *Id.* at 527.

201. 18 U.S.C. § 844(i) (1995).

202. *Pappadopoulos*, 64 F.3d at 527.

203. *Id.*

204. *Id.* at 526.

205. Chippendale, *supra* note 4, at 456. ("Criminal cases now consume half of the federal judiciary's total time, and criminal trials account for eighty percent of the caseload in some districts."). The *Lopez* decision should curtail this judicial backlog by discouraging federal prosecutions of local crime.

206. This situation is not so implausible given the Court's five-to-four split. It also should be noted that the *Lopez* decision says a great deal about the influence of the conservative wing on the Rehnquist Court. As vacancies arise, the selection of new justices with potentially different philosophies will certainly affect the stability of the Court's federalist sympathies. For a discussion of the Court's current ideological dynamics, see Joan Biskupic, *When Court Is Split, Kennedy Rules; On Key Pending Appeals, He and O'Connor Are Justices to Follow*, WASH. POST, June 11, 1995, at A14.

207. *See* Rachel J. Littman, Comment, *Gun-Free Schools: Constitutional Powers, Limitations, and Social Policy Concerns Surrounding Federal Regulation of Firearms in School*, 5 SETON HALL CONST. L.J. 723, 757 (1995) (arguing that if the Court were to uphold § 922(q), the implications would be "severe and far-reaching," significantly eroding the Tenth Amendment).

208. Savage, *supra* note 190, at A17; *cf.* Schlesinger Jr., *supra* note 190, at 14 (arguing that the Supreme Court made an "assault on the national government").

209. United States v. Lopez, 115 S. Ct. 1624, 1634 (1995) (Kennedy, J., concurring). Note also that Chief Justice Rehnquist, in the majority opinion, referred to precedents

gress passes legislation, as well as what type of legislation it introduces. The fact that Chief Justice Rehnquist noted the lack of legislative findings establishing a connection between gun possession in school zones and interstate commerce will presumably cause Congress to be more thorough in its formal findings.[210] In addition, Congress will likely be more cautious when exercising its commerce power to regulate non-commercial activities. For instance, when enacting a criminal statute that targets local activity, Congress might limit the statute's scope to such activity with a clear nexus to interstate commerce.[211]

If, in fact, *Lopez* prevents enforcement of other federal laws, that is not to say that the federal government would be powerless. Congress always has the option of regulating through its spending power.[212] Thus, even though Congress cannot exercise its commerce power to control gun possession in school zones, it could still exercise its spending power by offering states federal funds in exchange for adopting gun-free school policies.[213]

In sum, Congress may have to rethink its belief that it has the authority to intervene in every national problem.[214] It is worth noting that the

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such as *Hodel*, *Perez*, *McClung*, *Heart of Atlanta Motel*, and *Wickard*, to demonstrate a pattern of cases in which regulated activities substantially affected interstate commerce. *See supra* note 111 and accompanying text. Although these precedents are generally regarded as greatly expansive of federal authority, the majority would have upheld them under the "substantial effect" test. *Lopez*, 115 S. Ct. at 1630. Furthermore, it should be pointed out that *McClung* and *Heart of Atlanta Motel* would likely be upheld also as fitting Justice Rehnquist's second category of activity subject to regulation: persons or things in interstate commerce.

210. Another consequence might be that Congress, when passing legislation, will include findings composed of "boilerplate" language. 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, 205-06 (1994).

211. *See* Chippendale, *supra* note 4, at 479 (observing that a carjacking statute Congress was considering presented an opportunity to stop automobile theft "when combined with the movement of the stolen car or its parts across state lines").

212. U.S. CONST. art. I, § 8, cl. 1, provides Congress with the broad power to spend "for the common Defence and general Welfare of the United States."

213. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 206 (1987) (holding that Congress may regulate indirectly by using its spending power to promote uniformity in state drinking ages); *see also* Littman, *supra* note 207 at 760 (asserting that this method of indirect legislation achieved success in "Goals 2000," a project in which Congress used monetary incentives to encourage local communities to put together their own anti-violence programs).

214. Part of this belief stems from the political pressures on members of Congress to be regarded as "tough on crime." *See* Gehrig, *supra* note 210, at 214 (stating that

Lopez decision comes at a time when people are increasingly disenchanted with centralized government, and states are challenging unfunded federal mandates.[215] What is more, several prominent national political leaders are echoing these sentiments.[216] Thus, in the aftermath of *Lopez*, Congress might refrain from exercising its commerce power in enacting new laws and, perhaps, might even dismantle existing regulatory agencies.[217]

C. Social Impact

Justice Breyer characterized the majority's invalidation of section 922(q) as a serious threat to the social well-being of Americans,[218] but this is more a matter of perception than reality.[219] In fact, there is no real evidence that augmenting the federal contribution to criminal law

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such pressures weaken the theory that states should be able to rely on the national political process to prevent Congress from eroding state sovereignty). The result is that Congress is driven to federalize such "headline" crimes as carjacking, as well as such seemingly local offenses as arson. Chippendale, *supra* note 4, at 463-65.

215. *See* TRIBE, *supra* note 30, § 5-22 (asserting that, since the mid-1970s, the national mood has disfavored big government and preferred local autonomy); John Kincaid, *The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 913 (1995) (observing that the "new judicial federalism" has emerged during the "new political federalisms" of the past thirty years); Kmiec, *supra* note 18, at 6 (observing that various states are challenging unfunded mandates); George F. Will, *Events and Arguments: Modern life is imparting fresh momentum to an old vision of constitutional values*, NEWSWEEK, Oct. 16, 1995, at 88 (arguing that the Framers' constitutional vision of limited government is being rejuvenated).

216. *See* Ann Devroy & Helen Dewar, *Hailing Bipartisanship, Clinton Signs Bill to Restrict Unfunded Mandates*, WASH. POST, Mar. 23, 1995, at A10 (reporting that President Clinton signed into law a bill to restrict the imposition of unfunded mandates upon the states); Helen Dewar, *Senate Votes to Limit Unfunded Mandates*, WASH. POST, Jan. 28, 1995, at A1 (describing a bill to limit unfunded mandates as a "key part of the GOP effort to shrink the federal government and return power, responsibilities and dollars to states and municipalities"); Jerry Gray, *Welfare—G.O.P. Governors Make Their Pitch*, N.Y. TIMES, Jan. 7, 1995, at A8 (reporting that House Speaker Gingrich and Senate Majority Leader Dole focused on the Tenth Amendment when they met with Republican governors to discuss legislative goals).

217. *See, e.g.*, Regulatory Transition Act of 1995, H.R. 450, 104th Cong., 1st Sess. (1995) (providing a regulatory moratorium); Risk Assessment and Cost-Benefit Analysis Act of 1995, H.R. 690, 104th Cong., 1st Sess. (1995) (seeking to restrain federal regulation); *see also* Christopher Georges, *Senate Republicans Begin to Give Details on Spending Cuts They Intend to Seek*, WALL ST. J., Mar. 13, 1995, at A4 (reporting that Senator Gramm of Texas and Senate Majority Leader Dole have separately proposed abolishing the Department of Education).

218. United States v. Lopez, 115 S. Ct. 1624, 1665 (1995) (Breyer, J., dissenting).

219. Justice Breyer appears to obscure the negative effect of gun-related school violence, which is arguably substantial, *see supra* note 1 and accompanying text, with the negative effect resulting from § 922(q)'s nullification, which is arguably nonexistent.

enforcement has reduced the crime rate.[220] It is even arguable that the increasing number of state laws responding to school violence makes section 922(q) unnecessary.[221] In addition, given that increased federal regulation often leads to detrimental effects on the national economy, there are indeed benefits derived from decentralization.[222] As Professor Epstein observed, "The great peril of national regulation is that it may be taken too far, to impose national uniformity which frustrates, rather than facilitates markets."[223]

If *Lopez* and the surrounding political climate results in a rollback of the modern federal government, those hurt will be those with the greatest reliance interests in the status quo.[224] For example, gun control proponents will most likely view the *Lopez* decision as a significant setback,

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220. *See* Chippendale, *supra* note 4, at 467 (citing David Masci, *Long Arm of Federal Law Keeps Stretching*, ORLANDO SENTINEL TRIB., Dec. 6, 1992, at G1; Paul M. Barrett, *Clinton Wants to Broaden Federal Fight Against Crime, but Strategy has Critics*, WALL. ST. J., Mar. 12, 1993, at A10). Chippendale discusses three factors to explain why the expanding criminal code has failed to reduce the crime rate. *Id.* First, he asserts that the inconsistent enforcement of federal criminal statutes creates no deterrent effect. *Id.* at 467-68. Second, he argues that the blurred division of authority is less efficient and dilutes law enforcement resources. *Id.* at 468-69. Third, he maintains that national uniformity of federal criminal law stifles state innovation. *Id.* at 469-70.

221. Julius Menacker & Richard Mertz, *State Legislative Responses to School Crime*, 85 ED. LAW REP. 1, 1 (1993) (noting that at least thirty-six states had passed legislation responding to school violence concerns); *see* Littman, *supra* note 207, at 770. Littman offered the following hypothetical to support the idea that states are better suited to enforce criminal laws:

> [A] community school might wish to give a first-offender student who is found with a gun and who has little understanding of its potential danger a comprehensive and educational form of punishment. On the other hand, a local authority may choose to enforce a more severe punishment on a recidivist youth who is caught with a weapon intended for a gang fight. These two offenders, however different they appear to be, would fall equally within the net of a federal school gun law and perhaps frustrate the efforts of a community concerned with education and rehabilitation. In essence, the federal law would treat students no differently than the guns they possess.

Id. at 768-69.

222. *See generally* George Roche, AMERICA BY THE THROAT: THE STRANGLEHOLD OF FEDERAL BUREAUCRACY (1985) (documenting numerous examples of bureaucratic bungling, where good intentions led to disastrous results).

223. Epstein, *supra* note 7, at 1454; *see* Will, *supra* note 215, at 38 ("Centrally designed and controlled social policies no longer imply rationality and fairness but 'bureaucracy, Kafkaesque regulation and one-size-fits-all mass production.'").

224. Epstein, *supra* note 7, at 1455.

given that Congress had used its commerce power to enact almost all of its gun control laws.[225] On the other hand, organizations such as the National Rifle Association may, in light of the *Lopez* ruling, turn from their usual reliance on the Second Amendment to combat federal gun control laws and begin focusing more on the Tenth Amendment.[226]

In summary, the Court's ruling in *Lopez* will discourage those who feel that an expansive federal role is needed to address national social ills,[227] while those who believe that the growth of federal power has become too overwhelming will welcome the decision.[228]

VI. CONCLUSION

In *United States v. Lopez*, the Supreme Court held that Congress had no authority to determine whether guns would be allowed near school grounds in Texas—that decision, said the Court, was up to Texas. As a result, artificial respiration was given to the Tenth Amendment, which until recently might as well have been repealed. Given the five to four decision of *Lopez*, coupled with the Court's inconsistent interpretations over the last two decades, it is still too soon to know whether the Court's newfound reverence for state sovereignty will endure.

The Court could have decided *Lopez* differently, consistent with the modern trend of allowing great deference to congressional actions. However, instead of turning the Commerce Clause into a general police power, the Court declared that the commerce power is not without limits. This ruling undoubtedly gives rise to legal uncertainty, but, as Chief Justice Rehnquist noted, any advantage derived from eliminating this uncer-

225. Littman, *supra* note 207, at 745 n.91.

226. Interestingly, the Second Amendment, which provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed," U.S. CONST. amend. II, has not played a significant role in the challenges to federal gun control legislation. *See* Giller, *supra* note 10, at 153. Rather, judicial review of these laws generally focuses on whether Congress has properly exercised its authority under the Commerce Clause. *See id.*

227. *See* Gehrig, *supra* note 210, at 180 (arguing that the social problems of our country are often national in scope and require solutions from the federal government).

228. *See* Chippendale, *supra* note 4, at 474 (asserting that accumulation of federal criminal statutes disrupts the jurisdictional balance between the federal and state governments and, "if left unchanged, will damage the federal courts").

tainty would be at the expense of the Constitution's delicate system of enumerated powers.[229]

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229. United States v. Lopez, 115 S. Ct. 1624, 1633 (1995).