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A *Lopez* Legacy?: The Federalism Debate Renewed, But Not Resolved

INTRODUCTION

For nearly sixty years, the United States Supreme Court has allowed Congress free reign to legislate under its Commerce Clause power.¹ During that time, invoking its commerce power, Congress has passed laws regulating everything from civil rights to loan sharking.² No more. A divided Court, in a decision that generated six different opinions,³ found that Congress had stretched its commerce power beyond constitutional limits⁴ by enacting the Gun Free School Zones Act of 1990.⁵

In affirming the decision in *United States v. Lopez*,⁶ the Court invalidated the federal law aimed at curbing gun-related violence in schools. The majority indicated it would apply a stricter standard in the future when reviewing Congressional regulation of activities that "affect" interstate commerce.⁷ The Court might be sending a message to Congress to tread carefully when federalizing criminal law.⁸ In reaction to a rising tide of violent crime in America in recent years, Congress has used its commerce power to enact many criminal statutes, including those making car-jacking,⁹

1. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). This was the last time the Supreme Court struck down legislation Congress had passed using its Commerce Clause power.

2. See generally *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Perez v. United States*, 402 U.S. 146 (1971).

3. *United States v. Lopez*, 115 S. Ct. 1624 (1995).

4. *Id.* at 1626. Chief Justice Rehnquist wrote, "We hold that the Act exceeds the authority of Congress '[t]o regulate Commerce . . . among the several States . . .'" *Id.* (quoting U.S. CONST. art. I, § 8, cl. 3).

5. 18 U.S.C. § 922(q) (1994). The Act forbids "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." *Id.* at § 922(q)(2)(A).

6. 115 S. Ct. 1624 (1995).

7. *Id.* at 1630. ("[T]he proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce.")

8. See David O. Stewart, *Back to the Commerce Clause: The Supreme Court Has Yet to Reveal the True Significance of Lopez*, A.B.A. J., July 1995, at 46.

9. 18 U.S.C. § 2119 (1994).

machine gun possession,¹⁰ and destruction of buildings¹¹ federal crimes. Congress' power to legislate in the area of activities that only "affect" interstate commerce may be in question as a result of this ruling.¹²

In a more general sense, the Rehnquist majority may be signaling a continuing concern with federalism issues.¹³ The majority believed that to uphold the Congressional rationale (subsequently added to the Act after passage) for adopting this measure, the Court would have to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."¹⁴ The opinion indicates that the great deference shown to congressional enactments in the past may be coming to an end. If so, the decision could be even more far-reaching. In his concurrence, Justice Clarence Thomas advocates doing away with the "substantial effects [sic]" test altogether, calling it "but an innovation of the 20th century."¹⁵ A move away from giving great deference to Congress in deciding what "affects commerce" could also put civil rights and environmental legislation passed under the Commerce Clause power in some jeopardy.¹⁶

But the ruling may go even further. In his dissent, Justice Souter noted the parallel in development of Commerce Clause and Due Process jurisprudence in the late 1930s, when the Court began to show great deference to legislative policy judgments on commercial regulation.¹⁷ Souter questioned whether the Court would like to return to the pre-New Deal substantive due process doctrine epitomized by cases like *Lochner v. New York*,¹⁸ which he characterized as "the untenable jurisprudence from which the Court extricated itself almost 60 years ago."¹⁹ Souter observed that the majority's reference to activities that were commercial or noncommercial in nature sounded much like the old distinction between what directly and indirectly affected commerce and, as in *Lochner*, the process of deciding how much interference with contractual freedom was fatal.²⁰

10. 18 U.S.C. § 922(o)(1) (1994).

11. 18 U.S.C. § 844(i) (1994).

12. See Stewart, *supra* note 8, at 48. However, lower courts have, to date, been reluctant to invalidate many of these statutes post-*Lopez*. See *infra* Part IV.

13. See Stewart, *supra* note 8, at 46.

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

15. *Id.* at 1648 (Thomas, J., dissenting).

16. Stephen Chippendale, Note, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, 476 (1994).

17. *Lopez*, 115 S. Ct. at 1652 (Souter, J., dissenting).

18. 198 U.S. 45 (1905).

19. *Id.* at 1654.

20. *Id.*

Court review of congressional wisdom, he stated, is the "old judicial pretension discredited and abandoned in 1937."²¹

The *Lopez* opinion has the potential to inhibit Congress' ability to deal with the violent crime wave sweeping the country, upset the tenuous balance between federal and local government power in the federalism debate, and disturb decades of precedent in the area of judicial review of Congressional enactments under the Commerce Clause.

This casenote will trace the development of Commerce Clause jurisprudence throughout the years, culminating in this watershed ruling in *Lopez*, explore the majority reasoning in striking down the Gun Free School Zones Act, and explain how this Court's approach differs from that taken in the last half-century. It will also report how the lower federal courts are responding to a wave of appeals generated by *Lopez* and make some predictions as to what the decision may indicate about how the Court will analyze such cases in the future.

I. HISTORY

Article I, section 8 of the Constitution gives Congress the power "to regulate Commerce . . . among the several States . . ."²² It is the primary source of Congress' regulatory power and an implicit limitation on a state's regulatory power.²³ It was one of the enumerated powers that was not specifically addressed by the Constitutional Convention.²⁴ As a result, there is no direct history as to the meaning of the Clause, but one can examine the circumstances surrounding the call of the Convention to get some idea of what the Framers believed.²⁵

The Articles of Confederation did not grant the Continental Congress any power over commerce between the states, leading to the establishment by the states of trade barriers and tariffs.²⁶ The economic chaos which resulted prompted political leaders, fearing dissolution of the union, to call for the convention.²⁷ One of the primary goals was to amend the powers of the national government to allow it to deal more effectively with multi-

21. *Id.* at 1656.

22. U.S. CONST. art. I, § 8, cl. 3.

23. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, §5-4, at 305-06 (2nd ed. 1988).

24. See 1 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.3, at 263 (1986).

25. *Id.*

26. *Id.* at 264.

27. *Id.*

state problems.²⁸ Although there is little doubt that the Federalists intended Congress to have significant powers in this area, there were those opposed to a grant of a power great enough to remove all state autonomy.²⁹

This historical backdrop does give the Court at least some guidance in interpreting the Commerce Clause; this power was intended to remove the trade barrier situation which had plagued the states and was to be broad enough to deal with economic problems of the nation as a unit.³⁰ At the same time, there was some opposition to granting the federal government wide ranging power over local activities.³¹ Historical materials provide insufficient guidance as to how to reconcile concerns about the national economy with state autonomy.³² As a result, the Court, over the years, has had to analyze the purpose and meaning of the commerce power.³³

The scope of the federal commerce power was first suggested by Chief Justice Marshall in *Gibbons v. Ogden*.³⁴ In this case, Ogden challenged New York's grant of a steamboat monopoly to a private operator on the grounds that it violated the Commerce Clause because it was in conflict with a federal statute which licensed ships in the coastal trade.³⁵ The actual holding was narrow; the monopoly was invalidated under the Supremacy Clause.³⁶ But Marshall's opinion gave a broad reading to the powers of Congress under the Commerce Clause.³⁷ He defined commerce as "intercourse" extending into each state and suggested that Congress had the power to regulate "commerce which concerns more states than one."³⁸ He indicated the power extended to all activity having any interstate impact, however indirect.³⁹ Marshall's view was that the power was plenary: absolute within its sphere and subject only to the Constitution's affirmative prohibitions on the exercise of federal authority.⁴⁰ "The wisdom and the discretion of congress [sic], their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on

28. *Id.* at 264-65.

29. *Id.*

30. *Id.* at 265-66.

31. *Id.*

32. *Id.*

33. *Id.*

34. 22 U.S. (9 Wheat.) 1 (1824).

35. *Id.* at 1-2, 8.

36. *Gibbons*, 22 U.S. (9 Wheat.) at 210.

37. See ROTUNDA, *supra* note 24, at 267.

38. *Gibbons*, 22 U.S. (9 Wheat.) at 189, 194.

39. See TRIBE, *supra* note 23, §5-4, at 306.

40. See *Gibbons*, 22 U.S. (9 Wheat.) at 196.

. . . its abuse.”⁴¹ Marshall described the “internal commerce of a state” as beyond the reach of federal power, but had also created a standard under which few commercial activities would meet the definition of internal commerce.⁴² Historians are unsure of how Marshall would have viewed the tension which grew between the federal exercise of the commerce power and the protection of state autonomy, but Felix Frankfurter viewed the opinion as a rejection of the Tenth Amendment as a limitation on the commerce power.⁴³

The Court’s Commerce Clause decisions immediately following *Gibbons* dealt primarily with the validity of state action that might conflict with “dormant” federal commerce clause power as opposed to congressional enactments under the clause.⁴⁴ These decisions reflected inconsistent doctrine. Some cases decided during this period were consistent with Marshall’s view in *Gibbons*, suggesting that the primary limits on the commerce power were legislative and political instead of judicial and constitutional.⁴⁵ Others, however, began articulating a theory of dual sovereignty that would later be used to limit congressional power. In 1851, the Court decided *Cooley v. Board of Wardens*,⁴⁶ establishing the principle that commercial subjects requiring uniform national regulation could be regulated by Congress whereas subjects of local concern could be regulated by the states to some extent.⁴⁷ Although this opinion did not attempt to define federal commerce clause power, its distinctions between “national” and “local” would be used in the future by justices trying to restrict federal power.⁴⁸

In 1870, the Court for the first time struck down a Congressional enactment under the Commerce Clause. In *United States v. DeWitt*,⁴⁹ the Court invalidated a federal law prohibiting sales of illuminating oils flammable at less than 110 degrees as a “police regulation” relating exclusively to the internal trade of the states.⁵⁰ By the late 1800s, that distinction between interstate commerce and a state’s internal activities gave rise to the “dual federalism” concept: the theory that the Tenth Amendment

41. *Id.* at 197.

42. See ROTUNDA, *supra* note 24, §4.4, at 268 (citing *Gibbons*, 22 U.S. (9 Wheat.) at 194).

43. *Id.*

44. See TRIBE, *supra* note 23, §5-4, at 306-07.

45. *Id.* at 306 n.6.

46. 53 U.S. (12 How.) 299 (1851).

47. See ROTUNDA, *supra* note 24, §4.4, at 270.

48. *Id.*

49. 76 U.S. (9 Wall.) 41 (1869).

50. *Id.* at 41.

reserved the regulation of some activities to the states.⁵¹ This principle was underlying the Court's ruling that the Sherman Anti-Trust Act, passed by Congress in 1890, did not apply to manufacturing.⁵² Manufacturing was perceived as a "local activity" reserved for state regulation and the Court required a "direct" connection to interstate commerce for it to come under federal regulation.⁵³

This classification was far more restrictive of congressional power than the approach suggested by Marshall in *Gibbons*, but the Court did allow some exceptions.⁵⁴ Congress was able to regulate what seemed to be an intrastate activity if it was connected to the interstate movement of goods or services under the "stream of commerce" theory.⁵⁵ Justices also allowed federal regulation of intrastate railroad rates in competition with interstate routes, reasoning that Congress had the power to regulate intrastate matters that had a "close and substantial" relation to interstate traffic to preserve efficiency and safety.⁵⁶

By the early 1900s, the Court had apparently had enough of what it perceived as legislative tampering with social and economic matters and began to strike down a wide variety of state and federal laws.⁵⁷ Justices seemed most unhappy with laws that interfered with the employer and employee relationship.⁵⁸ In 1905, for example, the Court struck down state maximum hour legislation under the Due Process clause in *Lochner v. New York*.⁵⁹ During this period, the Court did sustain some Congressional enactments which established safety standards and regulation of hours for railroad employees,⁶⁰ and some actions that regulated the nature of items which could be shipped in interstate commerce to achieve "police power" ends.⁶¹ However, on a 5-4 vote in *Hammer v. Dagenhart*,⁶² the Court invalidated a federal law that prohibited interstate transportation of goods

51. See ROTUNDA, *supra* note 24, §4.5, at 274.

52. See *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

53. See ROTUNDA, *supra* note 24, §4.5, at 274.

54. See TRIBE, *supra* note 23, §5-4, at 308.

55. *Id.*; see, e.g., *Swift & Co. v. United States*, 196 U.S. 375 (1905) (stockyards can be regulated because they are part of interstate commerce).

56. *Shreveport Rate Case*, 234 U.S. 342, 351 (1914).

57. See ROTUNDA, *supra* note 24, §4.6, at 279.

58. *Id.* at 280.

59. 198 U.S. 45 (1905).

60. See, e.g., *Baltimore & Ohio R.R. Co. v. I.C.C.*, 221 U.S. 612 (1911).

61. See ROTUNDA, *supra* note 24, §4.6, at 281; see, e.g., *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (upholding prohibition of impure food and drugs).

62. 247 U.S. 251 (1918).

coming from a manufacturing facility that employed young children.⁶³ The majority found that the act exceeded federal commerce power because it regulated conditions of production, a matter reserved for state regulation by the Tenth Amendment.⁶⁴ The majority distinguished this from other cases where Congress had been permitted to set terms of interstate transportation of products by finding there is nothing harmful about products made by children. The previous cases, the Court found, eliminated harmful items from interstate commerce.⁶⁵

At the root of most of the decisions in this pre-Depression era was the Court's use of the Tenth Amendment to reserve some subjects for state authority.⁶⁶ The election of 1932 brought a public mandate for a new approach to ending the Depression, but the Court had indicated over the past fifty years that it might not allow new federal approaches to economic problems.⁶⁷ In fact, the Court did begin striking down the so-called "New Deal" legislation and in *Schechter Poultry Corp. v. United States*⁶⁸ the Court's discussion of the federal commerce power indicated it would continue to do so.⁶⁹ The Court's majority found that employment practices of a poultry business did not have sufficient "direct" connections to interstate commerce and flatly refused to find a national economic crisis sufficient to justify use of a federal power to deal with internal matters of a state which only indirectly affected commerce.⁷⁰ By the landmark *Carter v. Carter Coal Co.*,⁷¹ the Court's majority had made it clear it did not believe that labor relations had a close enough tie to interstate commerce for state regulation to be usurped by federal commerce power.⁷²

After President Roosevelt was re-elected in 1936, he unveiled his infamous "Court Packing Plan," asking for Congressional authority to appoint an additional federal judge for each judge who was seventy years old and had served on the Court for at least ten years.⁷³ Fifteen Supreme Court Justices could be appointed under the plan.⁷⁴ Roosevelt's plan was

63. *Id.* at 277.

64. *Id.* at 275-76.

65. See ROTUNDA, *supra* note 24, §4.6, at 282.

66. *Id.* at 284.

67. *Id.* at 285.

68. 295 U.S. 495 (1935).

69. See ROTUNDA, *supra* note 24, §4.7, at 286.

70. 295 U.S. 495, 548 (1935).

71. 298 U.S. 238 (1936) (holding federal regulation of miner's wages and hours was outside commerce power).

72. See ROTUNDA, *supra* note 24, §4.7, at 288.

73. *Id.* at 289.

74. *Id.*

to facilitate implementation of his New Deal legislation which had been thwarted by the Court.⁷⁵ Although the plan was never implemented, the current Court began to "reform" itself, no longer using substantive due process and equal protection to overturn laws which interfered with traditional ideas of economic freedom.⁷⁶ In the watershed case of *NLRB v. Jones & Laughlin Steel Corp.*,⁷⁷ the Court abandoned its analytical approach to the Commerce Clause and returned to Chief Justice Marshall's original view.⁷⁸ The federal commerce power was now interpreted as a plenary power and the case would be analyzed without first deciding whether the activity was one reserved for state authority under the Tenth Amendment.⁷⁹ Since that time, the Court has deferred to a finding by Congress that regulated activities have had a "substantial economic effect" on interstate commerce if those findings rest on a "rational basis."⁸⁰ This doctrine makes irrelevant any determination of what is "in" or "out" of the "current of commerce."⁸¹

In the next two years, the Court made it clear it was rejecting the Tenth Amendment as a limitation on federal power under the Commerce Clause.⁸² In *United States v. Darby*,⁸³ the Court upheld direct federal regulation of wages and hours of employees engaged in the production of goods for intrastate shipment, finding that Congress could regulate intrastate activities that "so affect interstate commerce or the exercise of the power of Congress over it"⁸⁴ The Court stated explicitly that the Tenth Amendment did not serve as a basis for restricting the commerce power:

Our conclusion is unaffected by the Tenth Amendment The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its

75. *Id.*

76. *Id.* at 290.

77. 301 U.S. 1 (1937) (holding Congress can regulate labor relations at integrated manufacturing facility; work stoppage would seriously affect interstate commerce).

78. See *TRIBE*, *supra* note 23, §5-4, at 309.

79. See *ROTUNDA*, *supra* note 24, §4.8, at 290.

80. See *TRIBE*, *supra* note 23, §5-4, at 309.

81. *Id.*

82. See *ROTUNDA*, *supra* note 24, §4.9, at 297.

83. 312 U.S. 100 (1941).

84. *Id.* at 118.

purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.⁸⁵

In 1942, the Court's move to recognizing a plenary commerce power based on economic theory was complete.⁸⁶ It found that an intrastate activity on a very small scale could be federally regulated if it might affect interstate commerce when combined with similar activities by others.⁸⁷ In recent years, Congress has relied on this "cumulative effect" or "aggregate economic effect" principle to constitutionally enact civil rights legislation,⁸⁸ some criminal statutes,⁸⁹ and others.

Since 1937, there have been only two Court decisions which directly limited congressional power under the Commerce Clause and both involved an attempt by Congress to directly regulate state, as opposed to private, activities.⁹⁰ Of those cases, *National League of Cities v. Ursery*⁹¹ and *New York v. United States*,⁹² the former was overruled by *Garcia v. San Antonio Metropolitan Transit Authority*⁹³ in 1985.⁹⁴ *Garcia* left the decision about what activities were for state regulation and which were for federal control up to the political system, holding that this "line" between interstate and local commerce was not for the courts to draw.⁹⁵

85. *Id.* at 123-24.

86. *See* ROTUNDA, *supra* note 24, §4.9, at 299.

87. *See* Wickard v. Filburn, 317 U.S. 111 (1942) (holding that a marketing quota could be applied to farmer growing wheat for himself, since that affects wheat supply which, in turn, affects commodity price).

88. *See, e.g.*, 42 U.S.C. § 201(a) (1994), upheld in Katzenbach v. McClung, 379 U.S. 294 (1964) (enforcing prohibition of racial discrimination against small restaurant, relying on the combined effect of segregated restaurants on interstate commerce).

89. *See, e.g.*, 18 U.S.C. §§ 891-896 (1994), upheld in Perez v. United States, 402 U.S. 146 (1971) (upholding federal criminalization of loan sharking because class of activity affects interstate commerce).

90. Herman Schwartz, *U.S. v. Lopez: The Feds Lose a Piece of Their Rock*, *LEGAL TIMES*, May 8, 1995, at 25.

91. 426 U.S. 833 (1976).

92. 505 U.S. 144 (1992).

93. 469 U.S. 528 (1985).

94. *See* Schwartz, *supra* note 90, at 25.

95. *Id.* at 28.

II. CASE FACTS

Twelfth-grader Alfonso Lopez, Jr., inadvertently began the Commerce Clause controversy generated by this case when he brought a concealed .38 caliber handgun to his school, Edison High, in San Antonio, Texas, on March 10, 1992.⁹⁶ Acting on a tip, authorities confiscated the unloaded weapon and five bullets from Lopez, who told them someone had given him the gun to deliver it after school to "Jason," who planned to use it in a gang war.⁹⁷ Lopez was to receive forty dollars for the delivery.⁹⁸

Lopez was initially charged with violating a Texas statute,⁹⁹ a third degree felony. Bringing a gun on to school grounds has been a felony under Texas law since at least 1974,¹⁰⁰ but those charges were dropped the next day when authorities decided to prosecute him under 18 U.S.C. § 922(q), the Federal Gun Free School Zones Act.¹⁰¹ Lopez pleaded not guilty and moved to dismiss his indictment on grounds that § 922(q) was unconstitutional because Congress had no power to legislate control over public schools.¹⁰² The district court found that § 922(q) was a legitimate exercise of Congress' power to regulate activities in and affecting commerce and that the "business" of schools affects interstate commerce.¹⁰³

Lopez was found guilty in a bench trial and was sentenced to six months in jail followed by two years of supervised release.¹⁰⁴ His appeal focused solely on the constitutionality of § 922(q).¹⁰⁵ The Fifth Circuit framed its discussion of the *Lopez* case in Tenth Amendment terms, characterizing the issue as one which "pits the states' traditional authority over education and schooling against the federal government's acknowledged power to regulate firearms in or affecting interstate commerce."¹⁰⁶

Because the government had argued that § 922(q) was no different than other federal firearm legislation Congress had enacted under the Commerce Clause, the court undertook a lengthy analysis of the legislative history of those laws.¹⁰⁷ The court found that the laws almost always require the

96. *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995).

97. *Id.*

98. *Id.*

99. Tex. Penal Code § 46.04(a).

100. *Lopez*, 2 F.3d at 1345 n.1.

101. *Id.* at 1345.

102. *Id.*

103. *Id.*

104. *Id.*

105. 2 F.3d at 1345.

106. *Id.* at 1346.

107. *Id.* at 1348-53.

government to prove a nexus, that is some connection between the firearm possession and interstate commerce.¹⁰⁸ The court found no such nexus requirement in § 922(q).¹⁰⁹ It also found that the valid federal gun laws which lacked such a nexus pertained to commercial actions involving the firearms business and not to simple individual possession.¹¹⁰

The Crime Control Act of 1990¹¹¹ included the Gun Free School Zones Act of 1990 and enacted § 922(q). Both the House and Senate sponsors of the Act made lengthy floor statements about the section, but neither mentioned anything about commerce.¹¹² Although the appellate court in *Lopez* did find reference to school violence in legislative debate on the Act, it found no testimony concerning the effect of the violence on schools or of the impact on commerce of firearms in schools.¹¹³ The court also noted an exchange between a House Subcommittee Chair and the head of a Bureau of Alcohol, Tobacco, and Firearms Division ("BATF"). The BATF agent opined that this Act would be a major departure from other federal firearms legislation in that it would give the federal government original jurisdiction in enforcement of a federal law at the local level.¹¹⁴ Subcommittee Chairman Rep. William Hughes found the Act to constitute a major departure from the traditional federalism concept which basically defers to state and local governments to enforce their laws.¹¹⁵

The *Lopez* court acknowledged precedent which indicate that courts must defer to congressional findings that regulated activity substantially affects interstate commerce, if there is any rational basis for the findings.¹¹⁶ However, it found that Congress made no such findings in enacting the Gun Free School Zones Act.¹¹⁷ While the court found that Congressional enactments are presumed Constitutional, in some areas the presumption has less force.¹¹⁸ The court found the issue to be a jurisdictional one and that any expansion of federal power is at the expense of the

108. *Id.* at 1347.

109. *Id.* at 1348.

110. *Id.*

111. P.L. 101-647, 101st. Cong., 2d Sess., 104 Stat. 4789-4968.

112. *See Lopez*, 2 F.3d at 1360.

113. *Id.* at 1359.

114. *Id.* at 1360 n.39.

115. *Id.*

116. *Id.* at 1363; *see, e.g.*, *Preseault v. I.C.C.*, 494 U.S. 1, 17 (1990).

117. *Lopez*, 2 F.3d at 1364.

118. *Id.* (citing *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) (stating that there may be less presumption of constitutionality when legislation is within specific prohibition of the Constitution)).

powers reserved to the state by the Tenth Amendment.¹¹⁹ The court reasoned that if Congress, without supportive findings or legislative history, could bar firearms possession based solely upon proximity to a school on the theory that education affects commerce, then Congress could also bar "lead pencils, 'sneakers,' Game Boys, or slide rules."¹²⁰ The court left open the possibility that similar legislation with adequate legislative findings could be sustained in the future and concluded that Congress failed to locate § 922(q) within the Commerce Clause.¹²¹

Reaching a contrary result, the Ninth Circuit also considered the Gun Free School Zones Act in *United States v. Edwards*.¹²² The defendant in *Edwards* was charged with violating the Act after officers from the Sacramento, California Police Department gang unit searched his car in a high school parking lot and found two rifles.¹²³ This defendant appealed his conviction on the theory that the Act violated the Tenth Amendment because Congress did not have authority under the Commerce Clause to enact the law.¹²⁴ He also relied on *United States v. Bass*,¹²⁵ where the Court reversed the conviction of a man charged with being a felon in possession of a firearm because of the government's failure to show a nexus between the activity regulated by the law and interstate commerce.¹²⁶ However, the *Edwards* court found the Gun Free School Zones Act distinguishable from the statute in *Bass* because the Act did not expressly require the government to establish the nexus between possession of a firearm in a school zone and interstate commerce.¹²⁷ The *Edwards* court relied instead on its decision in *United States v. Evans*¹²⁸ where it reviewed the enactment in a highly deferential manner and found it was reasonable for Congress to conclude that possession of firearms represents a class of activities which affects interstate commerce.¹²⁹ The court reasoned that violence created through the possession of firearms adversely affects the national economy and as a result, it was reasonable for Congress

119. *Id.*

120. *Id.* at 1367.

121. *Id.* at 1368.

122. 13 F.3d 291 (9th Cir. 1993).

123. *Id.* at 292.

124. *Id.*

125. 404 U.S. 336 (1971).

126. *Id.* at 347.

127. *Edwards*, 13 F.3d at 292-93.

128. 928 F.2d 858 (9th Cir. 1991) (defendant convicted of violating federal law prohibiting possession of unregistered machine gun).

129. *Id.* at 862.

to regulate firearm possession under the Commerce Clause.¹³⁰ The court found its decision consistent with both the Supreme Court's holding in *Perez v. United States*,¹³¹ which stated Congress need not make particularized findings in order to legislate,¹³² and with *Katzenbach v. McClung*¹³³ where the court found "that [where] 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."¹³⁴ The appellate opinion in *Lopez* stated that courts cannot determine if there is a rational basis for a Congressional finding if neither the legislative history nor the statute reveals such a finding.¹³⁵ The *Edwards* court called the Fifth Circuit's *Lopez* opinion "squarely contrary" to the Court's holding in *Perez* and accused the Fifth Circuit of ignoring *McClung*.¹³⁶ Thus, the Fifth Circuit reasoned that the lack of a nexus requirement in the law was a fatal flaw. The Ninth Circuit found such a requirement unnecessary.

For those anxious to discover whether the United States Supreme Court would strike down a Congressional enactment under the Commerce Clause for the first time in nearly 60 years, the news came quickly. In plain language in the third sentence of the majority opinion, Chief Justice William Rehnquist wrote: "We hold that the Act exceeds the authority of Congress '[t]o regulate Commerce . . . among the several States . . .'"¹³⁷

While tracing the history and development of congressional power under the Commerce Clause, the Chief Justice consistently emphasized the Court's findings of limitations on the power. He stressed that even though modern day precedents have greatly expanded the commerce power, beginning with *NLRB v. Jones & Laughlin Steel Corp.*¹³⁸ in 1937, the Court has also confirmed that it has an outer limit. Although the Court in *Jones & Laughlin Steel* did away with the "direct" and "indirect" effects on interstate commerce test¹³⁹ and substituted "close and substantial relation,"¹⁴⁰ the majority opinion also emphasized the warning that the power must be considered in light of "our dual system of government and may not be extended so as to embrace effects upon interstate commerce so remote

130. *Id.*

131. 402 U.S. 146 (1971).

132. *Id.* at 156.

133. 379 U.S. 294 (1964).

134. *Id.* at 303-04.

135. *Lopez*, 2 F.3d at 1363-64.

136. *Edwards*, 13 F.3d at 295.

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

138. 301 U.S. 1 (1937).

139. *Id.* at 36-38.

140. *Id.* at 37.

that to embrace them . . . would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."¹⁴¹

From precedent, the majority identified three areas of activity that Congress may regulate under the Commerce Power: use of the channels of interstate commerce; the instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threat may come only from intrastate activities; or those activities that substantially affect interstate commerce.¹⁴² Rehnquist then found that the *Lopez* case fell within the third category.¹⁴³ He also sought to clarify what he says has been some ambiguity in previous cases about whether the activity must "affect" or "substantially affect" interstate commerce and concludes the proper test is "substantially affect."¹⁴⁴

In applying precedent to the *Lopez* case itself, Rehnquist found that gun possession on school property, criminalized by § 922(q), had nothing to do with "commerce" and further, was not an essential part of a larger regulation of economic activity in which the regulatory scheme could be undercut unless the interstate activity were regulated.¹⁴⁵ In so finding, Rehnquist distinguished *Lopez* from previous cases which have used the aggregation principle of *Wickard v. Filburn*.¹⁴⁶

Second, the majority found no jurisdictional element in § 922(q) which would assure that, in each case, the firearm possession affected interstate commerce.¹⁴⁷ The Court in *United States v. Bass*¹⁴⁸ set aside the conviction of a defendant convicted of violating the former 18 U.S.C. § 1202(a) which made it illegal for a felon to "receive, possess, or transport in commerce or affecting commerce . . . any firearm."¹⁴⁹ The Court found that the government had failed to show the requisite nexus with interstate commerce.¹⁵⁰ The Rehnquist majority, however, wrote that unlike the *Bass* statute, § 922(q) has no nexus requirement that would limit its

141. *Id.*

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

143. *Id.* at 1630.

144. *Id.*

145. *Id.* at 1630-31.

146. 317 U.S. 111 (1942); see *supra* note 87 and accompanying text for explanation of aggregation principle.

147. *Lopez*, 115 S. Ct. at 1631.

148. 404 U.S. 336 (1971).

149. *Id.* at 337.

150. *Id.* at 347.

application to firearm possessions that have a connection with or an effect on interstate commerce.¹⁵¹

Although the Court notes that formal legislative findings regarding affects on interstate commerce are not mandatory in order for Congress to pass valid legislation under the Commerce Clause,¹⁵² it also said those findings, absent here, would help in evaluating the legislative judgment that the activity in question substantially affected interstate commerce.¹⁵³ The Court did "pause" to consider the arguments that the government in fact did assert in a subsequent amendment to § 922(q).¹⁵⁴

The government argued that Congress, through previous enactments, had expertise in gun regulation.¹⁵⁵ However, the Court found that such previous findings did not justify § 922(q) because they did not address the subject matter of this law nor its relationship to interstate commerce.¹⁵⁶ The Court agreed with the Fifth Circuit that new ground is broken with this legislation.¹⁵⁷

The amended congressional findings included an argument that possession of a gun in a school zone may result in violent crime which could be expected to affect the national economy through insurance costs, through discouraging travel to places that are perceived as dangerous, and by threatening the learning process resulting in a less productive citizenry.¹⁵⁸ All of this, the government argued, has an adverse affect on the country's economic well-being.¹⁵⁹ The majority was concerned about the implications of these "cost of crime" arguments, hypothesizing that under this reasoning, Congress could regulate not only violent crime, but all activities that might lead to it, regardless of how tenuous their connection to interstate commerce.¹⁶⁰ Also troubling to the Rehnquist majority was that under the "national productivity" reasoning, Congress could regulate any activity it found related to the economic productivity of citizens,

151. *Lopez*, 115 S. Ct. at 1631.

152. See *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964).

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

154. *Id.*

155. *Id.*

156. *Id.*

157. *Lopez*, 115 S. Ct. at 1632 (citing *United States v. Lopez*, 2 F.3d 1342, 1366 (5th Cir. 1993) ("[P]rior federal enactments . . . [do not] speak to the subject matter of section 922(q) or its relationship to interstate commerce. Indeed, section 922(q) plows thoroughly new ground . . .")).

158. *Id.* at 1632.

159. *Id.*

160. *Id.*

including marriage, divorce, and child custody.¹⁶¹ In conclusion, the Court could not perceive any limitation on federal power under this reasoning, even in areas where states historically have been sovereign.¹⁶² The majority was especially critical of Justice Breyer's dissent in this area. He reasoned that gun-related violence is a serious problem which has an adverse effect on classroom learning and that represents a substantial threat to trade and commerce.¹⁶³ The majority countered that under that reasoning, Congress could regulate the educational process directly by, for example, determining that a school's curriculum had a "significant" effect on classroom learning because such learning had a substantial effect on interstate commerce.¹⁶⁴ The majority also responded to the Breyer dissent's contention that the educational process was a commercial activity. Under that rationale, Rehnquist wrote, Congress could find that child rearing was commercial because it provides a service: to equip children with the skills they need to survive in life and in the workplace.¹⁶⁵

The Court acknowledged that a determination of whether an intrastate activity is commercial or noncommercial might result in some legal uncertainty, but, that it is inevitable.¹⁶⁶ It then concluded that possession of a gun in a local school zone is in no sense an "economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."¹⁶⁷ The Court found that the respondent was a local student, there was no indication that he had recently moved in interstate commerce and there was no requirement that his possession of the gun have any substantial tie to interstate commerce.¹⁶⁸ To uphold the government's contentions, Rehnquist wrote, would require the court to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."¹⁶⁹

In a concurring opinion, Justice Kennedy, joined by Justice O'Connor, noted the Court's historical struggle to interpret the Commerce Clause which gave him "pause" about the majority decision.¹⁷⁰ And although he reads James Madison's writings in *The Federalist Papers* to say the balance

161. *Id.*

162. *Id.*

163. *Id.* at 1659-61 (Breyer, J., dissenting).

164. *Lopez*, 115 S. Ct. at 1633.

165. *Id.*

166. *Id.*

167. *Id.* at 1634.

168. *Id.*

169. *Id.*

170. *Id.* at 1634 (Kennedy, J., concurring).

between state and federal power is entrusted to the political process, not the courts, Kennedy said the judicial role cannot be completely renounced.¹⁷¹ He found that the statute in *Lopez* "upsets the federal balance to such a degree that renders it an unconstitutional assertion of the commerce power."¹⁷²

In his concurring opinion, Justice Thomas went much further. He would completely restructure the "substantial effects" test which he believes "if taken to its logical extreme would give Congress a 'police power' over all aspects of American life."¹⁷³ Thomas indicated that if not for *stare decisis* and reliance concerns, he would vote to turn the clock back some sixty years to what he calls the "original understanding" of Commerce Clause analysis.¹⁷⁴

Justice Souter's dissenting opinion traces the parallel evolution of Commerce Clause and Due Process analysis by the Court over the years, criticizing the majority for returning to what he calls the "untenable jurisprudence from which the Court extricated itself almost 60 years ago."¹⁷⁵ Souter cautioned against returning to an era where the court reviewed legislation for congressional wisdom. He said the only question for the Court is whether the legislative judgment (that an activity substantially affects interstate commerce) is within the realm of reason.¹⁷⁶

Justice Breyer's heavily footnoted dissent, joined by Justices Ginsberg, Souter, and Stevens, attempted to demonstrate how Congress could have rationally found that possession of a gun in a school zone affects interstate commerce.¹⁷⁷ He emphasized that the question for the court is whether Congress could have rationally made that finding, not whether the activity did have sufficient impact on interstate commerce.¹⁷⁸ Breyer cites statistics to support his view that education has "long been inextricably intertwined with the Nation's economy."¹⁷⁹ He reasons that any widespread and serious threat to teaching and learning also threatens the commerce to which that educational process is tied.¹⁸⁰

171. *Id.* at 1639.

172. *Id.* at 1640.

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

174. *Id.* at 1650 n.8.

175. *Id.* at 1654 (Souter, J., dissenting).

176. *Id.* at 1656.

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

178. *Id.* at 1658.

179. *Id.* at 1659.

180. *Id.* at 1661.

III. ANALYSIS

The Court's conservative majority, long concerned about federalism issues, saw a perfect opportunity in *Lopez* to reign in Congress' power under the Commerce Clause.¹⁸¹ The majority's decision is inconsistent with precedent, and has potential adverse consequences, both short and long term. Some analysts believe that the firestorm of controversy over this opinion was overstated, due to the Court's decision in *United States v. Robertson*,¹⁸² just a month after *Lopez*.¹⁸³ In *Robertson*, the Court upheld the defendant's conviction under a section of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO").¹⁸⁴ It prohibits "acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."¹⁸⁵ Robertson had invested in a gold mine with proceeds from drug dealing.¹⁸⁶ The Ninth Circuit reversed his conviction on the grounds that the government had failed to introduce sufficient evidence proving that the mine was engaged in or affected interstate commerce.¹⁸⁷ Finding that Robertson moved equipment in interstate commerce, hired employees who traveled in interstate commerce and transported gold out of the state, the Supreme Court held that his corporation engaged in commerce.¹⁸⁸ As a result, the Court did not address the question of whether activities of the gold mine "affected" interstate commerce.¹⁸⁹ Consequently, *Robertson* can be easily distinguished from *Lopez*. In *Lopez*, the majority specifically held that the case was one which fell squarely into the "affecting" commerce category for analysis.¹⁹⁰

The first problem with the majority analysis is its disregard for *stare decisis*. In his dissent, Justice Souter succinctly stated the standard of

181. See generally 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 (1994) (observing that in the last twenty five years, the Supreme Court has invoked the Tenth Amendment more often to preserve state sovereignty and predicting that the Court would address these concerns when considering *Lopez*).

182. 115 S. Ct. 1732 (1995).

183. See Harvey Berkman, *Second Commerce Clause Ruling Calms the Waters*, NAT'L L.J., May 15, 1995 at A7.

184. *Robertson*, 115 S. Ct. at 1732.

185. 18 U.S.C. § 1962(a) (1994).

186. *Robertson*, 115 S. Ct. at 1732-33.

187. *United States v. Robertson*, 15 F.3d 862, 868 (9th. Cir. 1994), *rev'd*, 115 S. Ct. 1732 (1995).

188. *Robertson*, 115 S. Ct. at 1733.

189. *Id.*

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

review for Congressional legislation under the Commerce Clause: “[w]e defer to what is often merely implicit congressional judgment that its regulation addresses a subject substantially affecting interstate commerce ‘if there is any rational basis for such a finding.’”¹⁹¹ Since the mid 1930s, the Court has afforded great deference to policy judgments on the part of Congress under both the Commerce and Due Process Clauses.¹⁹² That deference in Due Process Clause cases actually became part of the standard of rational basis review.¹⁹³ As Justice Souter’s dissenting opinion in *Lopez* noted, the parallel in Commerce Clause analysis came later with acceptance of the aggregation doctrine in *Wickard v. Filburn*.¹⁹⁴ The Court adhered to the principle for many years and stated it outright in 1964 in *Katzenbach v. McClung*:¹⁹⁵ “where 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.”¹⁹⁶ The Court has followed this rational basis review, refraining from independent judicial policy judgments, for sixty years. The Rehnquist majority, therefore, disregarded precedent in framing the question as “Does the activity affect interstate commerce?” instead of “Is there a rational basis for Congress to find that the activity affects interstate commerce?”¹⁹⁷ The latter is the correct application of rational basis standard of review under the Court’s own precedent. As Justice Souter’s opinion noted, the *Lopez* majority indicated that the deference should not be as great if the activity is not commercial in nature, a distinction he compares with the old “directly affects” and “indirectly affects” commerce distinction discredited many years ago.¹⁹⁸

Even the concurring opinion by Justice Kennedy, joined by Justice O’Connor, noted the apparent detour from modern day Commerce Clause jurisprudence. A cautious Justice Kennedy wrote that the judicial struggle to interpret the Commerce Clause during the time our economic system was transformed into the single national market we have today gives him

191. *Id.* at 1651 (citing *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 276 (1981)).

192. *See Lopez*, 115 S. Ct. at 1652-53 (Souter, J., dissenting).

193. *See United States v. Carolene Products*, 304 U.S. 144, 152 (1938).

194. 317 U.S. 111, 125, 127-29 (1942).

195. 379 U.S. 294 (1964).

196. *Id.* at 303-04.

197. *See Lopez*, 115 S. Ct. at 1658 (Breyer, J., dissenting) (“[T]he specific question before us . . . is not whether the ‘regulated activity sufficiently affected interstate commerce,’ but rather, whether Congress could have had a ‘rational basis’ for so concluding”).

198. *Lopez*, 115 S. Ct. at 1653.

"pause" about the *Lopez* decision.¹⁹⁹ Kennedy tried to limit the scope of the majority opinion by assuring readers that "commercial" transactions will continue to fall under Congress' broad authority to regulate under the Commerce Clause.²⁰⁰ This is little comfort since the Court has such a difficult time defining what is "commercial." This is not surprising, since it is one of the reasons the distinction was deleted from Commerce Clause analysis many years ago.²⁰¹ Justice Rehnquist found that possession of a gun in a school zone is not an economic activity²⁰² but Justice Breyer found that the educational process itself is a commercial activity.²⁰³ Justice Rehnquist's view would arguably invalidate the foundation that upheld civil rights cases, like *Katzenbach v. McClung*,²⁰⁴ and some criminal statutes, like *Perez v. United States*,²⁰⁵ because in each case, the transaction, discrimination in *Katzenbach* and use of force in *Perez*, was not itself "commercial."²⁰⁶

Not only did the majority opinion fail to defer to Congress on the "rational basis" part of the analysis, it also revised the "affect" aspect. Justice Rehnquist, after conceding case law has not been clear on whether the regulated activity must "affect" or "substantially affect" interstate commerce to fall within Congress' power to regulate, proclaimed that the proper test henceforth will be the "substantially affects" standard.²⁰⁷ Even under that arguably higher standard the Court has, in the past, upheld regulation of activities which arguably have more tenuously "affected" interstate commerce than possession of a gun in a school zone: local loan sharking in *Perez*, local racial discrimination in *McClung*, and growth and consumption of home-grown wheat in *Wickard v. Filburn*.²⁰⁸ The Rehnquist opinion distinguished *Lopez* from these cases by asserting that the activities were economic in nature the way possession of a gun in a school zone was not.²⁰⁹ He said *Lopez* involved a criminal statute that had nothing to do with commerce or any sort of economic enterprise.²¹⁰ This goes back to the distinction between what is commercial and what is not.

199. *Id.* at 1634.

200. *Id.* at 1637.

201. See *supra* notes 78-79 and accompanying text.

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

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

204. 379 U.S. 294 (1964).

205. 402 U.S. 146 (1971).

206. *Id.* at 1663 (Breyer, J., dissenting).

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

208. 317 U.S. 111 (1942).

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

210. *Id.* at 1631.

Again, this is part of the discredited pre-New Deal Commerce Clause analysis. It is just too difficult for the Justices to make that decision, as the Court discovered before the Court Packing Plan in the 1930s.²¹¹ At the polls, the people indicated they wanted something done about the economy. Congress responded by enacting regulatory legislation. The Court struck it down. The Court, under great pressure, began showing more deference to Congress, abandoning the analysis which included a determination of what was commercial or not and what was local or not and instead, deferring to Congress. The situation is analogous today. The people have indicated they are concerned about crime in general and crime as it affects schools and education in particular. Congress responded by enacting a comprehensive crime bill of which the Gun Free School Zones Act, § 922(q), is a part. This Court struck it down.

Even using the Court's "commercial" analysis, a good argument can be made that educating children is an economic activity. In a heavily researched dissent, Justice Breyer concluded that Congress could rationally consider schools as roughly analogous to a commercial investment from which the nation derives the benefit of an educated workforce.²¹² Breyer noted that in the year Congress passed this statute, primary and secondary schools spent almost a quarter of a trillion dollars which amounts to a large part of the \$5.5 trillion Gross Domestic Product for that year.²¹³ Under this analysis, the activity in question is "commercial" in nature. Congress could rationally find that gun possession near schools threatens the educational process, a commercial activity which substantially affects commerce and subsequently, our country's economic well-being. This scenario is analogous to that in *Perez* where Congress apparently reasoned that the use of force, maybe a gun, on a local street corner, to collect a debt, aids organized crime, an activity which affects commerce. It consequently passed, under its commerce power, a law that made local loan sharking a federal crime.

The third problem with the majority decision is its further revitalization of federalism principles at a time in the nation's development when our economy is more integrated than ever before and crime fighting is one of the country's biggest challenges. The Justices in the majority were concerned that extension of the commerce power to a statute like § 922(q) would upset the federal-state balance in a way that would convert the commerce power to a general police power like that of the states.²¹⁴ Once

211. See *supra* notes 73-76 and accompanying text.

212. *Lopez*, 115 S. Ct. at 1664 (Breyer, J., dissenting).

213. *Id.*

214. *Lopez*, 115 S. Ct. at 1634; see also *id.* at 1640-41 (Kennedy, J., concurring)

again, the majority departed from precedent. In *Maryland v. Wirtz*,²¹⁵ the Court applied minimum wage standards to state schools and hospitals, explicitly finding that the commerce power outweighs concerns over state sovereignty.²¹⁶ Although this case was overruled by a 5-4 vote eight years later in *National League of Cities v. Ursery*,²¹⁷ it was reinstated in 1985 in *Garcia v. San Antonio Metro Transit Authority*.²¹⁸ The *Ursery* Court found that it was not within the commerce power to force directly on the states Congress' choices as to how decisions about local governmental functions should be made.²¹⁹ In *Garcia*, however, the Court reversed itself and held that states must look to the national political process for protection from Congressional regulation under the Commerce Clause.²²⁰ In other words, if the people do not want Congress to pass a law making possession of a gun near a school a federal crime, they will let it be known at the polls; it is not up to the Court to protect the state's sovereign interests in areas where they have traditionally regulated. The people can decide if they believe the problem is of such magnitude that it requires federal intervention. In 1991, the Court, in *Gregory v. Ashcroft*,²²¹ unveiled its "plain statement rule" which provides that "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"²²² Some scholars believe that this case invites the Court to search for the traditional government functions, which *Garcia* indicated was not within the judicial role.²²³ In its most recent case involving use of the Tenth Amendment to protect state sovereignty, *New York v. United States*,²²⁴ the Court invalidated part of a law enacted under the Commerce Clause, however, the statute involved was an attempt by Congress to directly force a state to regulate, it did not apply to private activities.²²⁵

(stating that because education is a traditional concern of the states, the Court has a "particular duty to see that the federal-state balance is not destroyed").

215. 392 U.S. 183 (1968).

216. *Id.* at 195.

217. 426 U.S. 833 (1976).

218. 469 U.S. 528 (1985).

219. *Ursery*, 426 U.S. at 852.

220. *Garcia*, 469 U.S. at 552.

221. 501 U.S. 452 (1991).

222. *Id.* at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

223. See generally Gehrig, *supra* note 181.

224. 112 S. Ct. 2408 (1992).

225. *Id.* at 2429-31.

In another area where the Court apparently departs from precedent, Chief Justice Rehnquist suggests that the outcome of *Lopez* might have been different if Congress had made formal findings of a substantial effect on commerce.²²⁶ However, at the same time, he acknowledges that precedent does not so require.²²⁷ Congress did subsequently amend the Gun Free School Zones Act to include findings. To ignore them, as Justice Breyer notes, "would appear to elevate form over substance."²²⁸

Finally, putting these kinds of judicial limits on how Congress may regulate private activities under the Commerce Clause constitutes a major shift in the Court's attitude. As Professor Herman Schwartz suggests, this is "another indication that the conservatives' allegiance to judicial restraint is selective, to say the least."²²⁹ Schwartz believes the goal of the Court's conservative majority is to cut back on federal power by invoking state sovereignty even though *Garcia* is still good law for the federal regulation of state activities that also extend to private activity.²³⁰

IV. PRACTICAL IMPACT

It is, of course, too early to determine exactly what the impact of the *Lopez* decision will be, although there have been a rash of appeals to the lower federal courts in its wake. Because *Lopez* found that Congress had exceeded its power under the Commerce Clause in passing the Gun Free School Zones Act of 1990,²³¹ petitioners convicted under other statutes enacted via the Commerce Clause power want their statutes invalidated as well. Generally, courts have declined to do so, sometimes over vehement protest from dissenters who accuse the majority of misreading the lessons of *Lopez*.²³²

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

227. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964) (noting that "no formal findings were made, which of course are not necessary"); *Fullilove v. Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring) ("After Congress has legislated repeatedly in an area of national concern, its members gain experience that may reduce the need for fresh hearings or prolonged debate").

228. *Lopez*, 115 S. Ct. at 1658 (Breyer, J., dissenting).

229. See Schwartz, *supra* note 90, at 25.

230. *Id.* at 28.

231. 18 U.S.C. § 922(q) (1994); see *Lopez*, 115 S. Ct. at 1624.

232. See, e.g., *United States v. Kuban*, 94 F.3d 971, 976-78 (5th Cir. 1996) (DeMoss, J., dissenting in part). Justice DeMoss found, in dissent, that *Lopez* is a "fundamental and landmark restatement . . . of the powers of Congress under the Commerce Clause" and stated that under 18 U.S.C. § 922(g)(1), the possession by a convicted felon of a firearm must now "substantially affect" interstate commerce; the fact that it traveled interstate many years before the current possession should not be sufficient under *Lopez*. *Id.* at 977-78. The Fifth

This section will review how the lower federal courts have analyzed Commerce Clause challenges since the decision was handed down in April of 1995.²³³

Post-*Lopez* courts may take a two-step approach to the analysis of a Commerce Clause challenge. First, they will decide in which of the three categories outlined in *Lopez*²³⁴ Congress is attempting to regulate. If a court finds that the case falls within the first two, regulating the use of the channels of interstate commerce or of activities that threaten instrumentalities or persons in interstate commerce, then the Congressional regulation is a proper exercise of the commerce power and no further analysis is needed. Therefore, the category determination is key to the outcome of the case. If the court determines that the regulation falls into the third category, affecting interstate commerce, a second analysis is necessary. As evidenced below, the lower courts appear to be unclear about exactly what that analysis should include.

The Ninth Circuit, in *U.S. v. Pappadopoulos*,²³⁵ was one of the first appellate courts to use the *Lopez* decision to reverse a conviction. The defendant had been charged with violating 18 U.S.C. § 844(i), which provides:

Whoever maliciously damages or destroys . . . by means of fire or explosive, any building, vehicle or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than 20 years, fined the greater of the fine under this title or the cost of repairing or replacing any property that is damaged or destroyed,, [sic] or both"²³⁶

In *Pappadopoulos*, the defendant and her husband, experiencing severe financial problems, were convicted of conspiring with another man to burn down the Pappadopoulos home.²³⁷ To establish the jurisdictional element

Circuit has upheld the constitutionality of § 922(g)(1) post-*Lopez*, as has each circuit which has considered the measure. *See, e.g.*, *United States v. Sorrentino*, 72 F.3d 294 (2d Cir. 1995); *United States v. Wells*, 98 F.3d 808 (4th Cir. 1996); *United States v. Chesney*, 86 F.3d 564 (6th Cir. 1996); *United States v. Bell*, 70 F.3d 495 (7th Cir. 1995); *United States v. Polanco*, 93 F.3d 555 (9th Cir. 1996); *United States v. Bolton*, 68 F.3d 396 (10th Cir. 1995); *United States v. McAllister*, 77 F.3d 387 (11th Cir. 1996).

233. Case review current as of December 30, 1996.

234. *See Lopez*, 115 S. Ct. at 1629-30.

235. 64 F.3d 522 (9th Cir. 1995).

236. 18 U.S.C. § 844(i) (1994).

237. *Pappadopoulos*, 64 F.3d at 524.

necessary (that the property was “used in” or “used in any activity affecting” interstate or foreign commerce), the government prosecutors relied on the theory that the home was “used in” or “used in an activity affecting” interstate commerce because it received natural gas from a company which obtained its product partially from out-of-state sources.²³⁸ Pappadopoulos argued that receiving natural gas from an out-of-state source was not sufficient as a matter of law to establish the requisite nexus to interstate commerce.²³⁹ The District Court found otherwise.²⁴⁰ The Supreme Court decided in *Russell v. United States*,²⁴¹ that § 844(i) reached all business property as well as some that might not fit in that category, but maybe not every private home.²⁴² The *Pappadopoulos* court, therefore, set out to decide whether Congress could constitutionally prohibit destruction of this private home under its commerce clause power.²⁴³ Using the three broad categories of activities that Congress may regulate under its commerce clause power as delineated in *Lopez*,²⁴⁴ the *Pappadopoulos* court determined that this case should be analyzed under Congress’ power to regulate intrastate activities that “substantially affect” interstate commerce, the third category.²⁴⁵ In prosecuting this defendant, the government relied on the *Wickard* line of cases, arguing that even though the effect on commerce of the destruction of one house that receives out-of-state gas may not be great, the combined effect “of many others similarly situated, is far from trivial.”²⁴⁶ The court found this argument unpersuasive and stated, quoting *Lopez*, that the *Wickard* line of cases “may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.”²⁴⁷ The Court cited again to *Lopez* for its conclusion that the activity in *Wickard*, raising wheat for home consumption, was an economic activity in a way that possession of a gun in a school zone was not.²⁴⁸

238. *Id.* at 525.

239. *Id.*

240. *Id.*

241. 471 U.S. 858 (1985).

242. *Id.* at 862.

243. *Pappadopoulos*, 64 F.3d at 525.

244. *Lopez*, 115 S. Ct. at 1629.

245. *Pappadopoulos*, 64 F.3d at 526.

246. *Wickard*, 317 U.S. at 128.

247. *Lopez*, 115 S. Ct. at 1628-29 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

248. *Id.* at 1630.

This court found that arson, the conduct regulated by § 844(i), is like that in *Lopez*, not commercial or economic in nature.²⁴⁹ It concluded that because arson is not economic in nature and because criminal law is primarily enforced by local authorities, the government must, on a case by case basis, prove the jurisdictional element in the statute; the nexus to interstate commerce.²⁵⁰ In this respect, *Pappadopoulos* is different than *Lopez* in that the Gun Free School Zones Act did not include a jurisdictional element. The Court found that omission to be one of its fatal flaws. This statute does contain such an element; the question is whether it had been met. The court determined that *Lopez* mandates a "substantial" effect on interstate commerce to assure that the statute is constitutional and holds that when Congress seeks to regulate an intrastate activity that has traditionally been exclusively regulated by local authorities and the connection of the activity to interstate commerce is not apparent nor illuminated by express constitutional findings, then the government must show a "substantial" effect on or connection to interstate commerce.²⁵¹ It then concluded that receiving natural gas from an out-of-state source is insufficient as a matter of law to confer federal jurisdiction over the § 844(i) count.²⁵² Again quoting *Lopez*, the court found that if the Commerce Clause were extended to reach activity at this private house the court would be "hard-pressed to posit any activity by an individual that Congress is without power to regulate."²⁵³ The court concluded its analysis with a warning that the *Wickard* line of cases poses a threat to federalism and a statement that simple state arson crime should be tried in state courts.²⁵⁴

While no circuit has explicitly disagreed with *Pappadopoulos*, several have held convictions under § 844(i) to be proper when the target of the arsonist was a business or rental property, as opposed to a private home.²⁵⁵ The Supreme Court had already determined, in *Russell v. United States*,²⁵⁶ that § 844(i) reached all business property, but left open the question of whether private homes would be covered.²⁵⁷

249. *Pappadopoulos*, 64 F.3d at 526.

250. *Id.* at 526-27.

251. *Id.* at 527.

252. *Id.*

253. *Id.* (quoting *Lopez*, 115 S. Ct. at 1632).

254. *Id.* at 528.

255. See, e.g., *United States v. DiSanto*, 86 F.3d 1238, 1245 (1st Cir. 1996) (holding that § 844(i) includes the requisite jurisdictional element which insures that the property damaged must have been used in intrastate commerce or in an activity affecting interstate commerce. Business property fits in these categories).

256. 471 U.S. 858 (1985).

257. *Id.* at 862.

In *Pappadopoulos*, the Ninth Circuit apparently read the *Lopez* decision as license for the courts to once again determine what is a local activity and what is not as well as what is a commercial/economic activity and what is not in analyzing Congressional enactments under the Commerce Clause. This kind of "super-review" is the antithesis of the sixty years of deference shown to Congress by the Court in its traditional rational basis review of laws passed under the Commerce Clause.

By contrast, the Seventh Circuit upheld a § 844(i) conviction, turning back a *Lopez*-based challenge, because the building involved was a rental.²⁵⁸ The court acknowledged it might be on shaky ground accepting the government's argument that the rental character of the property gave it its "interstate hook," stating that *Lopez* "suggests that the winds of interstate commerce jurisprudence may have shifted, albeit slightly, against these expansive understandings of what it means for a building to be 'used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.'"²⁵⁹

This judge is not alone in his uncertainty. In *United States v. Davis*,²⁶⁰ the Senior United States Judge for the Eastern District of Virginia concurred in the result, upholding a federal arson conviction, but wrote separately because of his Commerce Clause concerns.²⁶¹ The defendant was charged under 18 U.S.C. § 844(f) which makes it a federal crime to destroy or attempt to destroy by means of fire or explosive a building used by an organization receiving federal assistance.²⁶² The victim received a partial rent subsidy from a state agency, which received a portion of its funds from the federal government.²⁶³ The judge questioned whether this "lengthy chain" supports the assertion of federal jurisdiction to punish the defendant based simply on the fact that the townhouse that was damaged was used by an organization receiving federal funds.²⁶⁴ He writes, "Once we accept the reasoning necessary to permit this perhaps tolerable extension of federal jurisdiction, little is left to stop the intolerable. What local or state agency does not receive some form of federal assistance?"²⁶⁵ The judge concludes his opinion with his hope that

258. See *United States v. Martin*, 63 F.3d 1422 (7th Cir. 1995).

259. *Id.* at 1427.

260. 98 F.3d 141 (4th Cir. 1996).

261. *Id.* at 146 (Doumar, J., concurring).

262. 18 U.S.C. § 844(f) (1994).

263. *Davis*, 98 F.3d at 143-44.

264. *Id.* at 146.

265. *Id.* at 147. Note that among the state or local agencies mentioned is the public school, the same agency which is at issue in *Lopez*. *Id.*

the Supreme Court will continue the process begun in *Lopez* so that the extension of federal jurisdiction permitted in this case will no longer be acceptable today.²⁶⁶

Lower court analysis of challenges to the Hobbs Act are illustrative of lower court confusion in applying the *Lopez* rationale. In *United States v. Bolton*,²⁶⁷ the Tenth Circuit, in upholding a conviction under the Hobbs Act,²⁶⁸ found the Act, enacted under the Commerce Clause, was constitutional. The Hobbs Act provides for punishment of anyone who obstructs, delays, or affects commerce by robbery or extortion.²⁶⁹ Mr. Bolton was found guilty of four local robberies and convicted under the Hobbs Act, which he challenged as an unconstitutional extension of federal power under the Commerce Clause.²⁷⁰ He contended that *Lopez* required the government to show a substantial effect on commerce to support a conviction.²⁷¹ The government argued that the effect of the robberies was to prevent the victim businesses from buying supplies from out of state, in interstate commerce.²⁷² This court interpreted *Lopez* as holding that there is no requirement that the government show that individual instances of the regulated activity substantially affect commerce as long as the activity, in the aggregate, has that effect.²⁷³ It found that unlike possession of a firearm in a school zone, robbery and extortion are activities that through repetition can substantially affect interstate commerce and that robbery and extortion are economic activities.²⁷⁴ At least two other circuits concur.²⁷⁵

However, there seems to be a split in authority in the Ninth Circuit. In cases decided within days of each other, two different panels came to different results, at least as to what the prosecution must prove to satisfy the jurisdictional requirement after *Lopez*. In *United States v. Sherwood*,²⁷⁶ the court found that prior to *Lopez*, prosecutors in a Hobbs Act case only

266. *Id.* Note also that this judge, as per *Lopez*, cautions against "blind acceptance of incessant federal invasion into spheres which should be occupied by the States." *Id.*

267. 68 F.3d 396 (10th Cir. 1995).

268. 18 U.S.C. § 1951 (1994).

269. *Bolton*, 68 F.3d at 400.

270. *Id.* at 398.

271. *Id.*

272. *Id.*

273. *Id.* at 399.

274. *Id.*

275. See *United States v. Stillo*, 57 F.3d 553 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 383 (1995); *United States v. Farmer*, 73 F.3d 836, 843 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 2570 (1996) (holding that *Lopez* has no application to robbery of commercial establishments).

276. 98 F.3d 402 (9th Cir. 1996).

had to show a de minimis effect on interstate commerce to establish the federal jurisdiction requirement.²⁷⁷ Now, prosecutors must show a substantial effect on or connection to interstate commerce — if Congress is seeking to regulate purely intrastate noncommercial activity that has traditionally been subject to exclusive regulation by the state or local government — like robbery — and the link to interstate commerce is not readily apparent nor illuminated by Congressional findings.²⁷⁸ In *Sherwood*, the court wrote that “assuming” that the government had to show a substantial effect on interstate commerce, a scheme to extort more than a million dollars from a Las Vegas casino constituted the requisite effect.²⁷⁹ At the same time, in *United States v. Atcheson*,²⁸⁰ a different panel found that because the Hobbs Act is concerned only with interstate, rather than intrastate activities, the “substantially affects” test from *Lopez* is not applicable.²⁸¹ The court found that where the crime itself directly affects interstate commerce, as in the Hobbs Act, a substantial effect on interstate commerce need not be shown to empower Congress to regulate the activity; a de minimis effect is sufficient.²⁸²

To add to the confusion, a federal district court in the Ninth Circuit, deciding a Hobbs Act case at virtually the same time, found that “given *Lopez* and *Pappadopoulos*, it appears that the de minimis approach of the past to interstate commerce jurisdictional inquiries is no longer good law.”²⁸³ The court went on to find that the robbery of three local jewelry stores and the attempted robbery of a fourth did not have a “substantial effect” on interstate commerce and reversed a Hobbs Act conviction.²⁸⁴

Much controversy has been generated over a statute which is very similar to the one invalidated in *Lopez*, 18 U.S.C. § 922(o), which makes it unlawful for any person to transfer or possess a machine gun. Both are criminal statutes which regulate the purely intrastate possession of guns, both lack jurisdictional elements, and Congress made no findings regarding the link between the intrastate activity, possession, and interstate com-

277. *Id.* at 411.

278. *Id.*

279. *Id.*

280. 94 F.3d 1237 (9th Cir. 1996).

281. *Id.* at 1242.

282. *Id.* at 1242-43.

283. *United States v. Woodruff*, 941 F. Supp. 910, 923 (N.D. Cal. 1996).

284. *Id.* at 927. (“[T]he court . . . sees no necessary correlation between the local robberies at bar and a substantial aggregate effect on interstate commerce and is unwilling to engage in speculation in this regard.”) The court cited *Lopez* stating that “to uphold the Government’s contentions here, we would have to pile inference on top of inference.” *Id.*

merce.²⁸⁵ Despite the similarities, at least six circuits have upheld § 922(o) as a valid exercise of Congressional power under the Commerce Clause, using various rationales.²⁸⁶

Courts seem comfortable in upholding § 922(o), despite its similarity to the statute in *Lopez*, because of Congress' long history in regulating firearms. As the Third Circuit writes, § 922(o) did not "plow new ground" as the *Lopez* majority said § 922(q) did.²⁸⁷ The dissenting judge in the Third Circuit case, however, disagrees and finds no congressional findings regarding, specifically, the effect of possession of a machine gun on interstate commerce.²⁸⁸ The majority writes that *Lopez* does not require Congress to play "Show and Tell" with the judiciary,²⁸⁹ but one might argue this is precisely what the Court requires when a jurisdictional element is missing from the statute itself. In *Lopez*, the government argued that Congress, through previous enactments, had expertise in gun regulation²⁹⁰ but the Court found that such previous findings did not justify § 922(q) because they did not address the precise subject matter of this law nor its relationship with interstate commerce.²⁹¹ This is the same rationale the dissenting judge in the Third Circuit case uses in arguing that § 922(o) should be invalidated under *Lopez*.²⁹² A similar concern was raised in dissenting opinions filed in the Fifth and Sixth Circuit cases upholding § 922(o).²⁹³

285. See *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996) (Alito, J., dissenting).

286. Some courts have held that § 922(o)'s attempt to control the market for machine guns regulates the use of the channels of interstate commerce. See *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1996); *United States v. Beuckelaere*, 91 F.3d 781 (6th Cir. 1996); *United States v. Rambo*, 74 F.3d 948 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 72 (1996). Others have held that § 922(o) regulates activities that threaten the instrumentalities of interstate commerce. See *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995); see also *United States v. Kenney*, 91 F.3d 884 (7th Cir. 1996).

287. *Rybar*, 103 F.3d at 279.

288. *Id.* at 294 (Alito, J., dissenting).

289. *Rybar*, 103 F.3d at 282.

290. See *Lopez*, 115 S. Ct. at 1632 (1995).

291. *Id.*

292. *Rybar*, 103 F.3d at 294 (Alito, J., dissenting). Judge Alito stated that:

In sum, we are left with no congressional findings . . . for the proposition that the purely intrastate possession of machine guns . . . has a substantial effect on interstate commerce, and without such support I do not see how the statutory provision at issue here can be sustained — unless, contrary to the lesson that I take from *Lopez*, the "substantial effects" test is to be drained of all practical significance. *Id.*

293. See *Kirk*, 70 F.3d at 802 (Jones, J., dissenting) (stating that § 922(o) is a purely criminal law with no nexus to commercial activity and that congressional findings do not

The Fifth Circuit, the court which originally struck down the Gun Free School Zones Act in *Lopez*, upheld a conviction for unlawful possession of a machine gun under 18 U.S.C. § 922(o) in *United States v. Kirk*,²⁹⁴ finding Congress did not exceed its power under the Commerce Clause because machine guns are items in interstate commerce.²⁹⁵ This is an example of how a court's choice of category is key to the outcome of the case. The Fifth Circuit put the regulation in *Lopez*'s first category: attempts to prohibit the interstate transportation of a commodity through the channels of commerce, even if the activity itself is purely intrastate and is a lawful enactment under the commerce power.²⁹⁶ As a result, no "affects" analysis is necessary. However, the dissenting judge in *Kirk* would have struck down § 922(o) under the logic of *Lopez*.²⁹⁷ She found that mere intrastate possession of a machine gun is not a use of the channels of interstate commerce any more than mere intrastate possession of a basketball²⁹⁸ and refuses to analyze the statute under category one. She found that § 922(o), like the Gun Free School Zones Act, does not require a nexus to commerce nor does it include explicit findings by Congress that banning mere machine gun possession is essential to effectuate federal regulation.²⁹⁹ Taken along with her judgment that § 922(o), like the Gun Free School Zones Act, is a "criminal statute that has nothing to do with 'commerce' or any sort of economic enterprise,"³⁰⁰ she concluded that enforcement of § 922(o) would "intrude the federal police power into every village and remote enclave of this vast and diverse nation."³⁰¹

Since *Lopez*, several defendants have challenged their convictions on federal gun and ammunition possession charges, but their appeals have been rejected because courts are analyzing those enactments on the theory that the weapons and ammunition once traveled in interstate commerce, again avoiding the "affects" test.³⁰²

speak to the subject matter of the law or its relation to interstate commerce); *Beuckelaere*, 91 F.3d at 788 (Suhreinhich, J., dissenting) (stating that § 922(o), like § 922(q), has no requirement that possession have a concrete tie to interstate commerce).

294. 70 F.3d 791 (5th Cir. 1995).

295. *Id.* at 795-96.

296. *Id.*

297. *Id.* at 798 (Jones, J., dissenting) (finding no "meaningful" distinction between the statute challenged in this case and the Gun Free School Zones Act struck down in *Lopez*).

298. *Id.* at 800.

299. 70 F.3d at 800.

300. *See Lopez*, 115 S. Ct. at 1630-31.

301. *Kirk*, 70 F.3d at 802.

302. *See, e.g., United States v. Hanna*, 55 F.3d 1456 (9th Cir. 1995) (holding decision not predicated on whether firearm affected interstate commerce but that firearm had

Carjacking statutes are also surviving post-*Lopez* challenges, based on the same theory. Courts are finding that cars are instrumentalities of commerce and thus are in the "in commerce" category for analysis.³⁰³ It is, however, at least possible that, like in *Pappadopoulos*, a court could in the future apply *Lopez* and find that stealing a privately owned car intrastate is a purely state crime that should be handled by the state courts.³⁰⁴ That is the problem with the local/federal distinction *Lopez* now apparently allows courts to make when considering if an activity "affects" interstate commerce.

In the wake of *Lopez*, anti-abortion activists have unsuccessfully challenged the Freedom of Access to Clinic Entrances Act of 1994 ("FACE"),³⁰⁵ enacted by Congress using its Commerce Clause power. For example, the Eleventh Circuit, in *Cheffer v. Reno*,³⁰⁶ held that the Act, which prohibits violent and destructive conduct at abortion clinics, is within Congress' Commerce Clause power.³⁰⁷ It found that, unlike the *Lopez* statute, FACE regulates a commercial activity (provision of reproductive health services) and that Congress made extensive findings about the effect of the activity on interstate commerce.³⁰⁸ All other circuits considering similar challenges concurred,³⁰⁹ however, they used differing rationales to reach the same result. At least two found that the Act regulates provisions

previously moved in interstate commerce). *But see* the dissenting opinions in *Rybar*, 103 F.3d at 286-94 (Alito, J., dissenting), and *Beuckelaere*, 91 F.3d at 787-88 (Suhreinhreich, J., dissenting), each arguing that guns traveling in interstate commerce years before current possession is an insufficient tie to interstate commerce.

303. *See, e.g.*, *United States v. Oliver*, 60 F.3d 547 (9th Cir. 1994) (finding statute in question, 18 U.S.C. § 2, contains requisite jurisdictional requirement, cars moving in interstate commerce, lacking in Gun Free School Zones Act).

304. This is, in fact, the approach taken by the dissenting judge in *United States v. Bishop*, 66 F.3d 569, 590 (3d Cir. 1995) (Becker, J., concurring in part and dissenting in part). Justice Becker argues that in enacting the carjacking statute, Congress was not concerned about the effect of carjacking on interstate commerce, but in putting a stop to violent local crime — a matter for the states, not the federal government, to regulate. *Id.* at 600.

305. Pub. L. No. 103-259, 108 Stat. 694 (1994) (codified at 18 U.S.C. § 248).

306. 55 F.3d 1517 (11th Cir. 1995).

307. *Id.* at 1519.

308. *Id.* at 1520.

309. *See* *Planned Parenthood Assoc. of Southeastern Pa. v. Walton*, 949 F. Supp. 290, 295 (E.D. Pa. 1996) (stating that every post-*Lopez* appellate decision that has considered the Commerce Clause issue has rejected the position that protest activities do not have a substantial effect on interstate commerce).

of reproductive health services and thus is commercial in nature,³¹⁰ others have done the "affects" test required by category three.³¹¹

At the district court level, several judges were willing to invalidate FACE after considering *Lopez*-based challenges. For example, the court in *United States v. Wilson*³¹² found that the Act did not regulate the health providers — commercial entities — but private conduct affecting those entities.³¹³ It also found that abortion clinic demonstrations are like trespassing, a "local" offense for state or local, not federal, regulation.³¹⁴ However, the decision was reversed on appeal by the Seventh Circuit which held that Congress made several rational findings that FACE regulates activities that affect interstate commerce and therefore did not exceed its Commerce Clause power when enacting the statute.³¹⁵ One federal district court holding FACE unconstitutional found "no significant distinction" between FACE and the Gun Free School Zones Act struck down in *Lopez*.³¹⁶ An appeal is pending.³¹⁷

Other federal legislation under attack post-*Lopez* include those measures which attempt to regulate in the area of family law, an area both the majority and dissenting opinions in *Lopez* agreed was off-limits to Congress.³¹⁸ The U.S. district courts have split over the constitutionality of the Child Support Recovery Act³¹⁹ which makes it a federal crime to fail to pay child support when the payor lives in a different state from the child.³²⁰ Again, the courts are having difficulty determining if nonpayment of child support is an economic activity and if it has the requisite substantial effect on interstate commerce to survive post-*Lopez*.³²¹ The three circuit courts which have considered the case have found the requisite link to interstate commerce and have upheld the statute.³²² Another such

310. See, e.g., *United States v. Wilson*, 73 F.3d 675, 683 (7th Cir. 1995); *Cheffer v. Reno*, 55 F.3d 1517, 1520 (11th Cir. 1995).

311. See, e.g., *Terry v. Reno*, 101 F.3d 1412 (D.C. Cir. 1996).

312. 880 F. Supp. 621 (E.D. Wis. 1995), *rev'd*, 73 F.3d 675 (7th Cir. 1995).

313. *Id.* at 628.

314. *Id.* at 634.

315. *Wilson*, 73 F.3d 675, 688 (7th Cir. 1995).

316. See *Hoffman v. Hunt*, 923 F. Supp. 791 (W.D.N.C. 1996).

317. See *id.*

318. See *Lopez*, 115 S. Ct. at 1161-63.

319. 18 U.S.C. § 228 (1994). For a list of district courts which have considered challenges to this section post-*Lopez* and their holdings, see *United States v. Hampshire*, 95 F.3d 999, 1002-03 (10th Cir. 1996).

320. See 18 U.S.C. § 228(a) (1994).

321. See *Hampshire*, 95 F.3d at 1002-03.

322. *Id.* at 1003-04; see *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996); *United States v. Sage*, 92 F.3d 101 (2d Cir. 1996).

law, the Violence Against Women Act ("VAWA")³²³ gives victims of violence motivated by gender a federal civil rights cause of action and was enacted under the Commerce Clause.³²⁴ To date, only two district courts have considered post-*Lopez* challenges to VAWA and each came to a different conclusion regarding its constitutionality.³²⁵ These courts agreed that the regulation should be analyzed in category three — given the "affects" test³²⁶ — but the courts differed as to whether the impact of domestic violence was sufficient to meet the *Lopez* standard.³²⁷

At least one member of the Supreme Court has indicated he would take the *Lopez* decision further and into another area. Clarence Thomas dissented from the Court's decision to deny certiorari in *Cargill, Inc. v. United States*.³²⁸ In that case, a private company which owns land near a federal wildlife refuge, challenged the Army Corps of Engineers' jurisdiction over its property under the Clean Water Act.³²⁹ The Corps had ordered the company to halt activities on its land because of the presence of migratory birds.³³⁰ The regulations purport to give the Corps jurisdiction over waters which are or would be used as habitat by migratory birds which cross state lines.³³¹ The lower courts found that the presence on the property of birds that had crossed state lines creates a sufficient connection to interstate commerce to permit the regulation.³³² Thomas found this basis for federal jurisdiction over the private property to be more "far-fetched than that offered, and rejected, in *Lopez*."³³³ Thomas' remarks indicate that constitutional questions about the limits of federal land-use regulation under the Clean Water Act, enacted through the commerce power, may be raised by the Court in the future.³³⁴

323. 42 U.S.C. § 13981 (1994).

324. *Id.*

325. See *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 772 (W.D. Va. 1996); *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996).

326. See *Brzonkala*, 935 F. Supp. at 789; *Doe*, 929 F. Supp. at 615.

327. See *Brzonkala*, 935 F. Supp. at 792; *Doe*, 929 F. Supp. at 614-15.

328. 116 S. Ct. 407 (1995) (Thomas, J., dissenting).

329. 33 U.S.C. §§ 1251-1387 (1994).

330. *Cargill*, 116 S. Ct. at 407 (Thomas, J., dissenting).

331. *Id.* at 408.

332. *Id.*

333. *Id.* at 408-09.

334. Also note that there have been several challenges to federal environmental regulations post-*Lopez*. One such action challenged the constitutionality of a provision of the Endangered Species Act, 16 U.S.C. §§ 1531-44 (1994). See *National Assoc. of Home Builders v. Babbitt*, 949 F. Supp. 1, 7-8 (D. D.C. Dec. 6, 1996) (holding that a rare species of a fly is a "thing" in interstate commerce, even though it inhabits only one specific area in one state, because it is on display in out-of-state museums and has been traded interstate by

It appears that although most federal statutes are surviving post-*Lopez* challenges, the rationales for upholding them are not uniform between, or sometimes even within, the circuits.³³⁵ In addition, several of these challenged statutes have been upheld over vigorous dissents which chide their brethren on the bench for ignoring the teachings of *Lopez*.³³⁶ Whether or not the *Lopez* decision will have a major impact on commerce clause jurisprudence remains unknown. The lower courts may or may not be interpreting *Lopez* the way the Supreme Court intended. As the Sixth Circuit wrote in deciding a *Lopez*-based challenge to a federal gambling regulation:³³⁷

Lopez casts a shadow on regulation that is tenuously related to interstate commerce Until the Supreme Court provides a clearer signal or cogent framework to handle this type of legislation, this court is content to heed the concurrence of two Justices that the history of Commerce Clause jurisprudence still "counsels great restraint."³³⁸

The Third Circuit concurs, also referencing the opinion of those two Justices, O'Connor and Kennedy, that "despite protestations to the contrary, the winds have not shifted that much."³³⁹ However, the dissent observes that Justices O'Connor and Kennedy join in Chief Justice Rehnquist's

insect collectors). The constitutionality of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-75 (1994), has also been challenged. See *United States v. Olin Corp.*, 927 F. Supp. 1502, 1533 (S.D. Ala. 1996) (holding that the Congressional enactment of CERCLA regulates an activity, environmental cleanup, which has "virtually no effect on interstate commerce"). But see *United States v. NL Industries*, 936 F. Supp. 545, 562 (S.D. Ill. 1996) (CERCLA found constitutional because Congress had a "rational basis to conclude that the improper disposal of hazardous waste substantially affects interstate commerce").

335. See, e.g., notes 267-84 and accompanying text.

336. See, e.g., *United States v. Bishop*, 66 F.3d 569, 603 (3d Cir. 1995) (Becker, J., dissenting in part) (finding that pre-*Lopez*, federal courts were right to conclude that federal car-jacking statute was constitutional, even though it stretched the outer limits of the commerce clause; but after *Lopez*, it was correct to find the statute unconstitutional. "The outer boundary has shifted . . . *Lopez* is not just another Supreme Court case, but a watershed").

337. 18 U.S.C.A. § 1955 (1994).

338. See *United States v. Wall*, 92 F.3d 1444, 1451-52 (6th Cir. 1996) (quoting *Lopez*, 115 S. Ct. at 1634 (Kennedy, J., concurring)).

339. See *Bishop*, 66 F.3d at 590.

opinion and "since five is more than four, I view *Lopez* as a beacon that we must follow"³⁴⁰

V. FUTURE IMPACT

The future impact of *Lopez* may be difficult to gauge without further guidance from the Supreme Court. However, there has already been some speculation as to the effect of the decision, both substantively and in the area of constitutional law.

There are those who believe that substantively the case is not very important because there are still about forty state laws which cover possession of guns in school zones.³⁴¹ Others believe that, on principle, the Court should discourage federalization of criminal law, arguing that criminal cases now consume half of the federal judiciary's time.³⁴² The Commerce Clause is the primary basis for congressional authority in this area.³⁴³

However, a good argument can be made that some social ills, including school violence, are national in scope and require involvement by the federal government.³⁴⁴ The *Lopez* decision may discourage Congress from even attempting to legislate in areas where the effect on interstate commerce may be perceived as "insubstantial" under the *Lopez* analysis. And yet, the problem may be severe. In the area of school violence, for example, the National School Safety Center estimates that more than 100,000 students carry a gun to school every day, and in 1987, more than 250,000 students brought a gun to school at least once.³⁴⁵ Between July 1, 1992, and May 26, 1994, seventy-four intentional deaths were reported on school campuses and forty-seven of those were handgun-related.³⁴⁶ One could argue that federalism concerns are outweighed by a need to address this widespread and pervasive problem of gun violence in schools.³⁴⁷

As for other federal criminal enactments under the Commerce Clause, they may survive post-*Lopez* challenges or not, depending on how the Court classifies the activity being regulated. Crimes involving the instrumentalities

340. *Id.* at 591 (Becker, J., concurring in part and dissenting in part).

341. *See* Schwartz, *supra* note 90, at 25.

342. *See* Chippendale, *supra* note 16, at 456.

343. *Id.* at 459.

344. *See* Gehrig, *supra* note 181, at 180.

345. *Id.* at 216.

346. *Id.* at 180 (citing Amicus Brief for the National School Safety Center at 4, *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993) (No. 93-1260) (citing NATIONAL SCHOOL SAFETY CENTER, SCHOOL ASSOCIATED VIOLENT DEATHS 7 (1994))).

347. *Id.* at 217.

of interstate commerce (like destruction of an airplane) or involving the channels of interstate commerce (like shipment of stolen goods) should survive.³⁴⁸ But those involving activity that only "substantially affect" interstate commerce may be in jeopardy.³⁴⁹ As indicated above, appellate courts seem unsure how to look at federal arson laws³⁵⁰ and even gun possession statutes.³⁵¹ Should the courts determine that the building burned or the gun possessed are not instrumentalities of commerce and fall into the "affects" category, the link to commerce may not be strong enough to satisfy the *Lopez* standard.

The impact of the *Lopez* decision may reach other areas in addition to crime and education. As noted above, there have been post-*Lopez* challenges in areas such as the environment, child support and abortion clinic protests. Some suggest that any area where Congress is regulating local activities related to interstate commerce may be vulnerable to constitutional attack, including farming and mining legislation.³⁵² For example, the Clean Water Act was enacted under the Commerce Clause power. If potential use of wetlands by migratory birds is not considered a sufficient connection to interstate commerce to invoke the clause, Congress may not be able to regulate isolated wetlands.³⁵³ As indicated above, Justice Thomas has already indicated that he does not find that connection sufficient to trigger congressional Commerce Clause power.³⁵⁴

Substantive issues aside, *Lopez* may also signal a major change in constitutional law.³⁵⁵ However, because of a lack of clarity about the "substantially affects" standard and how closely the Court may scrutinize the link between the regulated activity and interstate commerce, it is too early to determine exactly what impact the decision will have on limiting the Commerce Clause power.³⁵⁶ It is probable, however, that the Court's

348. See Stewart, *supra* note 8, at 48.

349. *Id.*

350. See *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995); *United States v. Martin*, 63 F.3d 1422 (7th Cir. 1995).

351. See *United States v. Kirk*, 70 F.3d 791, 795-96 (5th Cir. 1995) (Jones, J., dissenting).

352. See Schwartz, *supra* note 90, at 28.

353. John A. Leman, Comment, *The Birds: Regulation of Isolated Wetlands and the Limits of the Commerce Clause*, 28 U.C. DAVIS L. REV. 1237, 1241-43 (1995).

354. See *Cargill, Inc. v. United States*, 116 S. Ct. 407 (1995) (Thomas, J., dissenting).

355. See Stewart, *supra* note 8, at 48 ("The potential impact of *Lopez* is intriguing because it may mark either a major change in constitutional law or only the boundary of the outer limits of congressional power.").

356. See Schwartz, *supra* note 90, at 28.

majority will turn back Congressional attempts to use the clause to regulate into areas where states have traditionally been in control.³⁵⁷

CONCLUSION

The *Lopez* case was about power — specifically, whether Congress has the power under the Commerce Clause to make a federal crime out of possession of a gun on school property. The answer was no. The real question for the future, though, is whether *Lopez* is sending a message to Congress that it should refrain from legislating in areas where states have traditionally had control or whether a future statute similar to *Lopez* would survive analysis if Congress initially made strong findings about the regulated activity's "effect" on interstate commerce and wrote a nexus requirement into the law.

Because of the majority's evident concern about federalism issues, it is likely Congress will face an uphill battle in legislating in areas that only "affect" interstate commerce, if the Court determines those activities are "local" in nature. Given the serious "local" issues, like those involving crime and education, facing the country on a nationwide scale today, it is likely the people may demand federal intervention. If so, this Court may find itself in the same position it did when opposing popular New Deal programs. And we know what happened then.

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357. *Id.*