

# Michigan Law Review

---

Volume 94 | Issue 3

---

1995

## Foreword

Louis H. Pollak

*United States District Court, East District of Pennsylvania*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Commercial Law Commons](#), [Constitutional Law Commons](#), [Legislation Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Louis H. Pollak, *Foreword*, 94 MICH. L. REV. 533 (1995).

Available at: <https://repository.law.umich.edu/mlr/vol94/iss3/2>

This Foreword is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# FOREWORD

*Judge Louis H. Pollak\**

## I.

In the October Term 1994 — in other words, October 1994 through June 1995 — the Supreme Court invalidated four federal statutes. Statistically speaking, this was a bumper crop of judicial harvesting, given that, in the 191 years from *Marbury v. Madison*<sup>1</sup> through June 1994, only 129 federal statutes were gathered in by the grim reaper of judicial review,<sup>2</sup> substantially less than one legislative demise a year. But numbers tell very little because some federal statutes are more equal than others. None of the four federal statutes laid to rest in the October Term 1994 deserves mention in the same breath with such venerable judicially ambushed statutes of yesteryear as the Missouri Compromise of 1820,<sup>3</sup> the Civil Rights Act of 1875,<sup>4</sup> the income tax provisions of the Tariff Act of August 15, 1894,<sup>5</sup> and the Child Labor Act of September 1, 1916.<sup>6</sup> The four federal statutes that lost their way in the October Term 1994 were: (1) section 5(e)(2) of the Federal Alcohol Administration Act of 1935,<sup>7</sup> barring the inclusion on beer labels of information respecting the alcohol content of the beer — a restriction found incompatible with the First Amendment;<sup>8</sup> (2) provisions of the Ethics Reform Act of 1989,<sup>9</sup> prohibiting federal employees from receiving compensation for lectures or writings, even when entirely non-job-related

---

\* Judge, United States District Court, Eastern District of Pennsylvania—Ed.

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

2. See Linda Greenhouse, *Farewell to the Old Order in the Court*, N.Y. TIMES, July 2, 1995, at E4.

3. Act of Mar. 6, 1820, ch. 22, 3 Stat. 545 (repealed 1854). The Missouri Compromise was held unconstitutional in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

4. Act of Mar. 1, 1875, ch. 114, 18 Stat. 336-37 (Sections 3 and 4 were repealed in 1948; § 5 presently codified at 42 U.S.C. § 1984 (1994)). The Civil Rights Act of 1875 was held unconstitutional in *Civil Rights Cases*, 109 U.S. 3 (1883).

5. Act of Aug. 27, 1894, ch. 349, 28 Stat. 509 (superseded by scattered sections of 26 U.S.C.). The Tariff Act of August 15, 1894 was held unconstitutional in *Pollock v. Farmers Loan & Trust Co.*, 158 U.S. 601 (1895).

6. Act of Sept. 1, 1916, ch. 432, 39 Stat. 675. The Child Labor Act of September 1, 1916 was held unconstitutional in *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

7. 27 U.S.C. §§ 201-19 (1988).

8. See *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995) (Thomas, J.; Stevens, J., concurring).

9. 18 U.S.C. § 208 (1990).

— a restriction also found not in accord with the First Amendment;<sup>10</sup> (3) section 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991,<sup>11</sup> which undertook to reinstate on federal judicial dockets certain categories of civil suits arising under section 10(b) of the Securities Exchange Act of 1934 that had been held time-barred pursuant to a 1991 Supreme Court decision — a congressional directive to courts to disregard a Supreme Court ruling that was held to contravene the separation of powers;<sup>12</sup> and (4) the Gun-Free School Zones Act of 1990,<sup>13</sup> which made it a federal crime to possess a firearm on the premises or within a 1000 foot radius of a school<sup>14</sup> — a prohibition held to be beyond the power conferred on Congress by Article I, Section 8, Clause 3 of the Constitution to “regulate Commerce . . . among the several States.”<sup>15</sup>

While the Gun-Free School Zones Act does not seem to have been of greater intrinsic importance than its three fellow legislative

10. See *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995) (Stevens, J.; O'Connor, J., concurring in part and dissenting in part; Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting).

11. Pub. L. No. 102-242, 105 Stat. 2236 (codified as amended in scattered sections of 12 U.S.C.).

12. See *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995) (Scalia, J.; Breyer, J., concurring; Stevens, J., joined by Ginsburg, J., dissenting).

13. 18 U.S.C. § 922(q)(2)(A) (1994).

14. The Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(2)(A) (1994) provided, in pertinent part:

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

18 U.S.C. § 921(a)(25) (1994) provided:

The term “school zone” means —

(A) in, or on the ground of, a public, parochial or private school; or

(B) within a distance of 1,000 feet from the grounds of a public, parochial or private school.

The statute provided for various situations in which the prohibition on the possession of firearms was not applicable — for example, possession “by a law enforcement officer,” 18 U.S.C. § 922(q)(2)(B)(vi) (1994), and possession “on private property not part of school grounds,” 18 U.S.C. § 922(q)(2)(B)(i) (1994).

Section 922(q) was amended in 1994 to add numerous findings relating to: the pervasiveness of crime involving guns and drugs; the tendency of such crime to be exacerbated by the interstate movement of guns, drugs, and criminals; the fear of crime that retards the interstate movement of peaceful citizens and the readiness of parents to send their children to school in high-crime areas; the correlation between crime in school and “a decline in the quality of education”; the “adverse impact on interstate commerce and . . . foreign commerce” of declining educational quality; and the authority of Congress under the Commerce Clause and other constitutional provisions “to enact measures to ensure the integrity and safety of the Nation’s schools.” Gun-Free School Zones Act, ch. 44, sec. 320904, § 922(q)(1)-(3), 108 Stat. 1796, 2125-26 (1994). This 1994 amendment to § 922(q) was adopted two years after the gun possession by Alfonso Lopez, Jr., which gave rise to the criminal prosecution that resulted, in 1995, in the invalidation of § 922(q) in *United States v. Lopez*, 115 S. Ct. 1624 (1995).

15. 115 S. Ct. at 1626.

casualties,<sup>16</sup> its demise as announced in *United States v. Lopez*<sup>17</sup> by a Court divided five to four,<sup>18</sup> has been thought to merit the attention of a symposium issue of the *Michigan Law Review*, while the other demises have not. Why the difference?

## II.

The difference lies in the fact that *Lopez* was the first time since *Carter v. Carter Coal Co.*,<sup>19</sup> decided fifty-nine years before — in the spring of 1936, the fourth year of Franklin Roosevelt's first term — that the Court held that Congress had passed a law that exceeded its authority under the Commerce Clause. In *Carter* — by a vote of six to three — the Court held, inter alia, that the provisions of the Bituminous Coal Act of 1935 “in respect of minimum wages, wage agreements [and] collective bargaining”<sup>20</sup> in the Depression-stricken bituminous coal industry were unconstitutional. The Court reasoned that mining constituted “production” which is an “antecedent” of, not a part of, “commerce.”<sup>21</sup> “Mining,” said the *Carter* Court,

brings the subject matter of commerce into existence. Commerce disposes of it. . . . Everything which moves in interstate commerce has had a local origin. Without local production somewhere, interstate commerce, as now carried on, would practically disappear. Nevertheless, the local character of mining, of manufacturing and of crop growing is a fact, and remains a fact, whatever may be done with the products.<sup>22</sup>

*Carter* was the culmination of a series of decisions invalidating major New Deal initiatives on the ground that the transactions Congress sought to regulate were not part of “commerce” or that the

---

16. The invalidation of the Gun-Free School Zones Act would not seem to create a significant gap in law enforcement. In his concurring opinion in *Lopez*, Justice Kennedy (writing for himself and Justice O'Connor) notes that

[i]f a State or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are sufficient to enact those measures. Indeed, over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds.

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

17. 115 S. Ct. 1624 (1995).

18. The five Justices in the majority were Chief Justice Rehnquist — author of the Court's opinion — and Justices O'Connor, Kennedy, Scalia, and Thomas. The four Justices in the minority were Justices Stevens, Souter, Ginsburg, and Breyer — author of the principal dissent. For a breakdown of the other opinions filed, see *infra* note 40.

19. 298 U.S. 238 (1936).

20. 298 U.S. at 304 (holding unconstitutional 15 U.S.C. §§ 801-27 (1935) (repealed 1937)).

21. See 298 U.S. at 304.

22. 298 U.S. at 304.

transactions' effect on commerce was "indirect" rather than "direct."<sup>23</sup>

Less than a year after *Carter* — on April 12, 1937, three months after the commencement of Roosevelt's second term — the Court, in *NLRB v. Jones & Laughlin Steel Corp.*,<sup>24</sup> shifted gears. With hardly a backward glance at *Carter*, the Court — by a margin of five to four — sustained the directive of the National Labor Relations Board, issued pursuant to the National Labor Relations Act of 1935, that Jones & Laughlin, a major steel company, desist from discriminating against employees on the basis of union membership and in other respects interfering with attempts to organize the company's employees.<sup>25</sup> Chief Justice Hughes spoke for the Court:

When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that

---

23. See *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); cf. *United States v. Butler*, 297 U.S. 1 (1936) (spending power).

24. 301 U.S. 1 (1937).

25. Two members of the *Carter* majority — Chief Justice Hughes and Justice Roberts — voted with the majority in *Jones & Laughlin*. Indeed, Chief Justice Hughes wrote the Court's opinion in *Jones & Laughlin*. Two other National Labor Relations Board cases — *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937), and *Associated Press v. NLRB*, 301 U.S. 103 (1937) — were decided on the same day; the Labor Board's orders were sustained on the authority of *Jones & Laughlin*. Chief Justice Hughes wrote for the Court in *Fruehauf Trailer*, and Justice Roberts wrote for the Court in *Associated Press*. The Court's apparent change in direction in Commerce Clause jurisprudence, between 1936 and 1937, was mirrored by the Court's change in direction, between 1936 and 1937, in Due Process Clause jurisprudence. Relying on *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (invalidating a D.C. minimum-wage-for-women statute on due process grounds), the Court in 1936, in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), by a vote of five to four, invalidated New York's minimum-wage-for-women statute. A year later, in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), decided two weeks before *Jones & Laughlin*, the Court, by a vote of five to four, sustained a Washington statute decreeing a minimum wage for women. Chief Justice Hughes, who had written the principal dissent in *Tipaldo*, wrote for the Court in *West Coast Hotel*. Justice Roberts was in the majority in both cases. Justice Roberts's apparent shift of position at a time when the Court was coming under increasing public criticism for decisions blocking liberal federal and state legislation triggered some hostile commentary — including suggestions that Justice Roberts may have tailored his views to help ward off Franklin Roosevelt's (ill-fated) Court-packing plan. In a lecture delivered shortly after Justice Roberts's death, Justice Frankfurter strongly defended Justice Roberts. See Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955). Recently an article appeared which, *inter alia*, intimated that a memorandum by Justice Roberts on which Justice Frankfurter purported to rely in his defense of Justice Roberts never may have existed. See Michael Ariens, *A Thrice-Told Tale, or Felix The Cat*, 107 HARV. L. REV. 620, 644-49 (1994). That claim was quickly demolished. See Richard D. Friedman, *A Reaffirmation: The Authenticity of The Roberts Memorandum, or Felix The Non-Forger*, 142 U. PA. L. REV. 985 (1994).

interferences with that commerce must be appraised by a judgment that does not ignore actual experience.

Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances. . . .

. . . The steel industry is one of the great basic industries of the United States, with ramifying activities affecting interstate commerce at every point. The Government aptly refers to the steel strike of 1919-1920 with its far-reaching consequences. The fact that there appears to have been no major disturbance in that industry in the more recent period did not dispose of the possibilities of future and like dangers to interstate commerce which Congress was entitled to foresee and to exercise its protective power to forestall. It is not necessary again to detail the facts as to respondent's enterprise. Instead of being beyond the pale, we think that it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce and we have no doubt that Congress had constitutional authority to safeguard the right of respondent's employees to self-organization and freedom in the choice of representatives for collective bargaining.<sup>26</sup>

Writing for the Court in *Lopez*, Chief Justice Rehnquist characterizes Chief Justice Hughes's opinion in *Jones & Laughlin* as a "watershed" that "departed from the distinction between 'direct' and 'indirect' effects on interstate commerce" and held that "intra-state activities that 'have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions' are within Congress' power to regulate."<sup>27</sup>

The Court's post-*Jones & Laughlin* decisions have confirmed what was implicit in *Jones & Laughlin* itself — that federal legislation regulating activities having a rationally demonstrable substantial impact on interstate commerce would be sustained.<sup>28</sup> The decisions also have established that Congress does not have to show that each transaction it regulates has a substantial impact on commerce: "[W]here a general regulatory statute bears a substantial

---

26. *Fruehauf Trailer*, 301 U.S. 41-43 (footnote omitted).

27. *United States v. Lopez*, 115 S. Ct. 1624, 1628 (1995) (quoting *Jones & Laughlin*, 301 U.S. at 36-38).

28. See, e.g., *Perez v. United States*, 402 U.S. 146 (1971); *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968); *Katzenbach v. McClung*, 379 U.S. 294 (1964); see also *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941).

relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.”<sup>29</sup>

The paradigm illustration of this aggregation principle is *Wickard v. Filburn*,<sup>30</sup> in which the Court sustained a penalty imposed by the Secretary of Agriculture on Roscoe Filburn, an Ohio dairy farmer, who harvested more wheat than permitted by his wheat allotment under the Agricultural Adjustment Act of 1938. This statute enabled the Department of Agriculture to control the volume of American wheat production and thereby avoid calamitous swings in the price of a crop forming a major part of the world food supply. On Filburn’s small farm, the principal market products were milk, eggs, and poultry. In addition, he grew winter wheat — “home-grown” wheat — that was used as feed, retained as seed for the next season, or ground into flour for home consumption. Filburn’s permitted wheat acreage for 1941 was 11.1 acres; he also planted and harvested 11.9 excess acres that yielded 239 excess bushels — with a resultant penalty of forty cents per bushel, totaling \$117.11. As Justice Jackson explained for a unanimous Court, wheat harvested for home consumption

overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. . . . This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.<sup>31</sup>

Moreover, the fact “[t]hat [Filburn’s] own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.”<sup>32</sup>

In similar fashion, the Court in *Perez v. United States*<sup>33</sup> upheld a provision of the Consumer Credit Protection Act,<sup>34</sup> which makes it a crime to engage in “[e]xtortionate credit transactions” — in other

---

29. *Wirtz*, 392 U.S. at 197 n.27.

30. 317 U.S. 111 (1942).

31. 317 U.S. at 128-29.

32. 317 U.S. at 127-28.

33. 402 U.S. 146 (1971).

34. 18 U.S.C. §§ 891-96 (1968).

words, transactions involving “the use, or an express or implicit threat of use, of violence or other criminal means” to effectuate repayment. Alcides Perez was a “loan shark” who threatened Alexis Miranda with violence to himself and his family in order to collect loans of \$1,000 and \$2,000. The Court, speaking through Justice Douglas, noted that “[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power ‘to excise, as trivial, individual instances’ of the class.”<sup>35</sup> After stating that “[e]xtortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce,”<sup>36</sup> the Court reviewed the statute’s legislative history

in detail to answer the impassioned plea of petitioner that all that is involved in loan sharking is a traditionally local activity. It appears, instead, that loan sharking in its national setting is one way organized interstate crime holds its guns to the heads of the poor and the rich alike and syphons funds from numerous localities to finance its national operations.<sup>37</sup>

Thus, *Jones & Laughlin* and such subsequent cases as *Wickard* and *Perez* appeared to have put an effective quietus on judicial attempts to second-guess the political branches on substantive policy choices made under the aegis of the commerce power. Until *Lopez*.

Although Chief Justice Rehnquist’s *Lopez* opinion praises his predecessor’s *Jones & Laughlin* opinion as a “watershed,” Chief Justice Hughes’s spacious rhetoric finds little echo in *Lopez*. Chief Justice Rehnquist employs a rhetoric of caution in explaining the shortcomings of the Government’s arguments and of the arguments deployed by Justice Breyer in the principal dissenting opinion:<sup>38</sup>

The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government

35. *Perez*, 402 U.S. at 154 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)).

36. *Perez*, 402 U.S. at 154.

37. 402 U.S. at 156-57. Justice Stewart dissented:

[U]nder the statute before us a man can be convicted without any proof of interstate movement, of the use of the facilities of interstate commerce, or of facts showing that his conduct affected interstate commerce. I think the Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws.

402 U.S. at 157.

38. Justice Breyer’s opinion was joined by his three dissenting colleagues, Justices Stevens, Souter, and Ginsburg.



also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.

... Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's argument, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.

....

Justice BREYER focuses, for the most part, on the threat that firearm possession in and near schools poses to the educational process and the potential economic consequences flowing from that threat. Specifically, the dissent reasons that (1) gun-related violence is a serious problem; (2) that problem, in turn, has an adverse effect on classroom learning; and (3) that adverse effect on classroom learning, in turn, represents a substantial threat to trade and commerce. This analysis would be equally applicable, if not more so, to subjects such as family law and direct regulation of education.

....

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.<sup>39</sup>

And the question arises, does *Lopez* portend a major retreat from *Jones & Laughlin* and a return to a judicially jaundiced view of congressional exercise of the commerce power? Or will *Lopez* — notwithstanding that three of the five Justices in the majority and three of the four Justices in the minority filed opinions that seemed to attest to the case's potential importance<sup>40</sup> — be

---

39. *United States v. Lopez*, 115 S. Ct. 1624, 1632-34 (1995) (citations omitted).

40. Justice Kennedy, writing for himself and Justice O'Connor, filed a concurring opinion; the concurrence expressly states, "I join in the opinion and judgment of the Court." 115 S. Ct. at 1642. Justice Thomas also filed a concurring opinion that in certain aspects — chiefly, its rejection of the proposition that Congress can regulate activities which have a "substantial effect" on commerce, its suggestion that for the Framers "the term 'commerce' was used in

remembered simply as a case in which a provision of minor consequence, one that in effect merely would have replicated equivalent statutes already on the books in four-fifths of the states,<sup>41</sup> was deleted from Title 18? The ambiguity of what the majority have wrought in *Lopez* is best put in the closing paragraph of Justice Souter's dissent:

Because Justice BREYER's opinion demonstrates beyond any doubt that the Act in question passes the rationality review that the Court continues to espouse, today's decision may be seen as only a misstep, its reasoning and its suggestions not quite in gear with the prevailing standard, but hardly an epochal case. I would not argue otherwise, but I would raise a caveat. Not every epochal case has come in epochal trappings. *Jones & Laughlin* did not reject the direct-indirect standard in so many words; it just said the relation of the regulated subject matter to commerce was direct enough. But we know what happened.<sup>42</sup>

### III.

Are the trial and tribulations, and the ultimate deliverance, of Alfonso Lopez, Jr., likely to prove, in Justice Souter's word, "epochal"?<sup>43</sup> Or merely anecdotal? To attempt an answer it may be useful to look behind the Court's rhetoric and to examine more closely the underlying litigation. In particular, it may be useful to consider how *Lopez* arose and then to consider the analytic path along which the Court's opinion marched from the underlying facts to the conclusion that Lopez's conviction was unconstitutional.

In the academic year 1991-1992, Lopez was a senior at Edison High School in San Antonio, Texas. On March 10, he arrived at school carrying a concealed .38 caliber handgun and five bullets.<sup>44</sup> School staff had been alerted, anonymously, that Lopez was bring-

---

contradistinction to productive activities such as manufacturing and agriculture," 115 S. Ct. at 1643, and also its expressed hope that "[i]n a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause," 115 S. Ct. at 1642 — seems in tension with Chief Justice Rehnquist's opinion. Justice Thomas states that he "join[s] the majority," 115 S. Ct. at 1642, but whether that statement signifies joining the opinion as well as the judgment is unclear. Justice Kennedy's concurrence, in apparent response to Justice Thomas, states that stare decisis "forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy." 115 S. Ct. at 1637. The principal dissent, by Justice Breyer, is joined by Justices Stevens, Souter, and Ginsburg. Justices Stevens and Souter each filed separate dissents.

41. See *supra* note 16.

42. 115 S. Ct. at 1657 (citations omitted).

43. See 115 S. Ct. at 1657.

44. According to Lopez, his role was that of courier: for \$40, he agreed to carry the handgun from "Gilbert" to "Jason," who planned to use it in a "gang war." See *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *affd.*, 115 S. Ct. 1624 (1995).

ing a gun to school. Lopez was apprehended and charged with violating a Texas statute that bars gun possession on school premises. A day later, charges were filed against him under the Gun-Free School Zones Act.<sup>45</sup> Upon the filing of the federal charges, the Texas authorities discontinued the state prosecution.

Lopez moved to dismiss the federal charges, contending that section 922(q) of title 18 was "unconstitutional as it is beyond the power of Congress to legislate control over public schools."<sup>46</sup> District Judge H.F. Garcia denied the motion, ruling that the statute was "a constitutional exercise of Congress' well-defined power to regulate activities in an[d] affecting commerce, and the 'business' of elementary, middle and high schools . . . affects interstate commerce."<sup>47</sup> A bench trial on stipulated facts resulted in Lopez's conviction, followed by a sentence of six months in prison and two years of supervised release.

On appeal, Lopez again pressed his constitutional challenge to section 922(q). The Fifth Circuit, speaking through Judge Garwood, reversed.<sup>48</sup> The court pointed out that the statute — which in terms sought to criminalize mere possession of a firearm in a school zone, without more — was different in kind from most other federal gun-control statutes: "With the exception of a few relatively recent, special case provisions, federal laws proscribing firearm possession require the government to prove a connection to commerce."<sup>49</sup> The court then went on to examine in considerable detail "the history of presently relevant firearms control legislation."<sup>50</sup>

Judge Garwood summarized the legislative history of section 922(q) thus:

The Gun-Free School Zones Act of 1990, now section 922(q), was introduced in the Senate by Senator Herbert Kohl as S. 2070 and a virtually identical bill with the same title was introduced in the House by Representative Edward Feighan as H.R. 3757. The Senate version was eventually enacted as part of Title XVII of the Crime Control Act of 1990, P.L. 101-647 § 1702, 104 Stat. 4844-45. The House Report accompanying the Crime Control Act broadly declares that the intent of the Crime Control Act was "to provide a legislative response to various aspects of the problem of crime in the United States." H.R.Rep. No. 101-681(I), 101st Cong., 2d Sess. 69 (1990), *reprinted in*

---

45. For the text of 18 U.S.C. § 922(q) (1994) as it stood when Lopez was arrested, see *supra* note 14.

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

47. 2 F.3d at 1345.

48. *See* 2 F.3d at 1345.

49. 2 F.3d at 1347.

50. 2 F.3d at 1348.

1990 U.S.C.C.A.N. 6472, 6473. However, this report makes no mention whatsoever of the impact upon commerce of firearms in schools. Nor does the report even mention the Gun-Free School Zones Act. Although S. 2070 has no formal legislative history that we know of, a House subcommittee hearing was held on H.R. 3757. Witnesses told this subcommittee of tragic instances of gun violence in our schools, but there was no testimony concerning the effect of such violence upon interstate commerce.<sup>51</sup>

Garwood also pointed out that the Chief of the Firearms Division of the Federal Bureau of Alcohol, Tobacco and Firearms (BATF) and the BATF's Deputy Chief Counsel testified to this deficiency in the bill:

Finally, we would note that the source of constitutional authority to enact the legislation is not manifest on the face of the bill. By contrast, when Congress first enacted the prohibitions against possession of firearms by felons, mental incompetents and others, the legislation contained specific findings relating to the Commerce Clause and other constitutional bases, and the unlawful acts specifically included a commerce element.<sup>52</sup>

Garwood continued with his analysis:

Although both the House and Senate sponsors of the Gun-Free School Zones Act made fairly lengthy floor statements about it, neither congressman had anything to say about commerce in their remarks. See 136 Cong. Rec. S17595 (1990) (statement of Sen. Kohl); 136 Cong. Rec. S766 (1990) (same); 135 Cong. Rec. E3988 (1989) (inserted statement of Rep. Feighan).

The failure of section 922(q) to honor the traditional division of functions between the Federal Government and the States was commented upon by President Bush when he signed the Crime Control Act of 1990:

"I am also disturbed by provisions in S. 3266 that unnecessarily constrain the discretion of State and local governments. Examples are found in Title VIII's 'rural drug enforcement' program; in Title XV's 'drug-free school zones' program; and in Title XVIII's program for 'correctional options incentives.' *Most egregiously, Section 1702 [the section of the Crime Control Act embodying § 922(q)] inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law.* The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed on the States by the Congress."<sup>53</sup>

The absence of any inkling that Congress perceived a link between gun possession in schools and interstate commerce was, for

---

51. 2 F.3d at 1348 (quoting *Gun-Free School Zones Act of 1990: Hearings on H.R. 3757 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 10 (1990) (statements of Richard Cook and Bradley Buckles)).

52. *Lopez*, 2 F.3d at 1348.

53. 2 F.3d at 1359-60.

the Fifth Circuit, decisive. The court recognized Congress's power to regulate

a class of activities the individual instances of which have an interactive effect, usually because of market or competitive forces, on each other and on interstate commerce. A given local transaction in credit, or use of wheat, because of national market forces, has an effect on the cost of credit or price of wheat nationwide. . . . We see no basis for assuming, particularly in the absence of supporting Congressional findings or legislative history, that, for example, ordinary citizen possession of a shotgun during July 900 feet from the grounds of an out-of-session private first grade in rural Llano County, Texas, has any effect on education even in relatively nearby Austin, much less in Houston or New Orleans. . . . [A]ny such holding would open virtually all aspects of education, public and private, elementary and other, to the reach of the Commerce Clause.<sup>54</sup>

From this set of premises, the court moved to its conclusion:

We hold that section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause. Whether with adequate Congressional findings or legislative history, national legislation of similar scope could be sustained, we leave for another day. Here we merely hold that Congress has not done what is necessary to locate section 922(q) within the Commerce Clause. And, we expressly do not resolve the question whether section 922(q) can ever be constitutionally applied. Conceivably, a conviction under section 922(q) might be sustained if the government alleged and proved that the offense had a nexus to commerce. Here, in fact, the parties stipulated that a BATF agent was prepared to testify that Lopez's gun had been manufactured outside of the State of Texas. Lopez's conviction must still be reversed, however, because his indictment did not allege *any* connection to interstate commerce.<sup>55</sup>

It is against this background that the Court granted certiorari, heard argument in the fall of 1994,<sup>56</sup> and, five months later, announced its decision. The Chief Justice's opinion for the Court was joined by Justice Scalia without comment; it was joined by Justices O'Connor and Kennedy with comment, in the form of an extended concurring opinion written by Justice Kennedy. Justice Thomas, while stating that he "join[ed] the majority," wrote separately "to observe that our case law has drifted far from the original understanding of the Commerce Clause"<sup>57</sup> and then distances himself

---

54. 2 F.3d at 1367.

55. 2 F.3d at 1367-68.

56. The importance that the Government attached to the case is reflected in the fact that Solicitor General Days elected to present the Government's argument himself. Curiously, *Law Week* did not select the *Lopez* argument as one to be reported in its journalistic, as distinct from its formal, account of the Court's proceedings. See 63 U.S.L.W. 3409, 3419 (U.S. Nov. 29, 1994).

57. *United States v. Lopez*, 115 S. Ct. 1624, 1642 (1995) (Thomas, J., concurring).

from certain aspects of the Chief Justice's opinion. Without referring specifically to Justice Thomas's concurrence, Justice Kennedy's concurrence distances himself and Justice O'Connor from "reverting to an understanding of commerce that would serve only an 18th-century economy."<sup>58</sup> The four dissenters — Justices Stevens, Souter, Ginsburg, and Breyer — filed three opinions. The principal dissent — that of Justice Breyer — speaks for all four dissenters. Justice Stevens filed a brief separate dissent, and Justice Souter a longer one.

To determine whether the Court's decision in *Lopez* was "epochal" or not, the opinion that warrants chief attention is that of the Chief Justice because it speaks for at least four — and in some respects five — of the Justices. The Chief Justice's conclusions already have been set forth. What requires some scrutiny is the commerce power analysis that led to those conclusions. The Chief Justice very properly begins his analysis with Chief Justice Marshall's magisterial opinion in *Gibbons v. Ogden*.<sup>59</sup> After canvassing the major cases from *Gibbons v. Ogden* through *Jones & Laughlin*, *Wickard v. Filburn*, and beyond, the Chief Justice undertakes to synthesize the governing case law, stating that

we have identified three broad categories of activity that Congress may regulate under its commerce power. . . . First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce.<sup>60</sup>

---

58. 115 S. Ct. at 1637; see also *supra* note 40.

59. 22 U.S. (9 Wheat.) 1 (1824). The concurring opinions of Justices Kennedy and Thomas also pay homage to *Gibbons v. Ogden*, as do the dissenting opinions of Justices Breyer and Souter, albeit more briefly. Justice Thomas notes that Justice Breyer reads *Gibbons v. Ogden* as having "established that Congress may control all local activities that 'significantly affect interstate commerce,'" *Lopez*, 115 S. Ct. at 1646, a reading that Justice Thomas regards as "wrong," see 115 S. Ct. at 1646. Justice Thomas's view that the Constitution does not confer on Congress the authority to regulate matters that "affect" commerce — whether "significantly" or, as the Court's opinion has it, "substantially," see 115 S. Ct. at 1630 — places his Commerce Clause jurisprudence in tension not only with the dissenters but also with his four colleagues in the majority.

60. 115 S. Ct. at 1629-30. The Chief Justice's formulation appears to track closely Justice Douglas's formulation for the Court in *Perez*:

The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods (18 U.S.C. §§ 2312-2315) or of persons who have been kidnaped (18 U.S.C. § 1201). Second, protection of the instrumentalities of interstate commerce, as, for example, the destruction of an aircraft (18 U.S.C. § 32),

Having identified the three "broad categories of activity that Congress may regulate under its commerce power," the Chief Justice then addresses

the power of Congress, in the light of this framework, to enact § 922(q). The first two categories of authority may be quickly disposed of: § 922(q) is not a regulation of the use of the channels of interstate commerce; nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if § 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.<sup>61</sup>

In considering whether section 922(q) can be sustained as "a regulation of an activity that substantially affects interstate commerce," the Chief Justice's opinion pursues two alternative lines of authority, neither of which section 922(q) is thought to satisfy. Both lines of authority need to be addressed.

"First," notes the opinion, "we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce."<sup>62</sup> The opinion lists several examples — "intrastate coal mining,"<sup>63</sup> "intrastate extortionate credit transactions,"<sup>64</sup> "restaurants using substantial interstate supplies,"<sup>65</sup> "inns and hotels catering to interstate guests,"<sup>66</sup> and "consumption of home-grown wheat"<sup>67</sup> — and then observes:

Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not. . . . Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms.<sup>68</sup>

---

or persons or things in commerce, as, for example, thefts from interstate shipments (18 U.S.C. § 659). Third, those activities affecting commerce.

*Perez v. United States*, 402 U.S. 146, 150 (1971).

The one significant difference between the *Perez* and *Lopez* formulations is that the *Perez* third category — "those activities affecting commerce" — is in *Lopez* "those activities that substantially affect interstate commerce."

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

62. 115 S. Ct. at 1630.

63. See *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264 (1981).

64. See *Perez*, 402 U.S. at 146.

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

66. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

67. See *Wickard v. Filburn*, 317 U.S. 111 (1942).

68. *United States v. Lopez*, 115 S. Ct. 1624, 1630-31 (1995). The opinion goes on to state that "[s]ection 922(q) is not an essential part of a larger regulation of economic activity, in

The examples the opinion cites are, to be sure, instances in which the regulated activity substantially affecting commerce happens to be of a kind that can be characterized as “economic,” but it is not clear why that descriptive fact should be turned into a limiting constitutional principle. From a constitutional perspective, the important question should be whether the activity sought to be regulated has a substantial effect on commerce — in other words, a substantial “economic” effect — not whether the activity is itself “economic.” Indeed, that is what Justice Jackson apparently sought to convey in his opinion for the Court in *Wickard*, in a passage quoted by Chief Justice Rehnquist in *Lopez*: “[E]ven if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . .”<sup>69</sup>

It would appear, then, that the relevant inquiry would not be whether gun possession is “economic” but whether it has substantial economic consequences. That, in turn, makes pertinent the Chief Justice’s further point that section 922(q) is not buttressed by legislative findings of a sort that “would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye.”<sup>70</sup> The Chief Justice acknowledges “that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce.”<sup>71</sup> The point is simply that findings may clarify what otherwise is obscure. The dissenters, for their part, were prepared to do the work that Congress did not do. The result was an opinion by Justice Breyer — fortified by a bibliographic appendix almost as long as the opinion — demonstrating the linkages between violence in schools, an impoverished educational process, an unskilled work force, and weak national productivity. The opinion is a *tour de force*. It shows, beyond question, “that Congress could reasonably have found the empirical connection that its law, implicitly or explicitly, asserts.”<sup>72</sup> The difficulty is that Congress not only found

---

which the regulatory scheme could be undercut unless the intrastate activities were regulated.” 115 S. Ct. at 1631. It is not clear whether this sentence is merely a reformulation of the preceding recital, quoted in the text, that § 922(q) “has nothing to do with ‘commerce’ or any sort of economic enterprise.” 115 S. Ct. at 1631. Conceivably, the sentence is not just a reformulation but an extension pursuant to which activity that is not “economic” can be regulated if the regulation is “part of a larger regulation of economic activity.”

69. *Wickard*, 317 U.S. at 125, quoted in *Lopez*, 115 S. Ct. at 1628.

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

71. 115 S. Ct. at 1631.

72. 115 S. Ct. at 1659 (Breyer, J., dissenting).



nothing until 1994 — *ex post* insofar as Alfonso Lopez was concerned — when it amended the statute to add findings,<sup>73</sup> but Congress gave no indication of ever having looked for anything.

Having found that section 922(q) is not sufficiently “economic,” the Chief Justice’s opinion pursues an alternative analysis under which the statute is also found wanting: “Second, § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.”<sup>74</sup> The opinion here discusses *United States v. Bass*,<sup>75</sup> a case construing a statute making it a crime when one previously convicted of a felony “receives, possesses, or transports in commerce or affecting commerce”<sup>76</sup> any firearm. In *Bass*, the felon-defendant was found guilty of possession, and no showing was made that the possession was “in commerce or affecting commerce.”<sup>77</sup> The Court of Appeals reversed, concerned that the Government’s contention — namely, that the statute required a commerce connection only as to a firearm that a felon “transports,” not as to a firearm that a felon “receives” or “possesses” — would pose serious constitutional questions.<sup>78</sup> The Supreme Court affirmed. Justice Marshall, writing for a five-Justice majority, parsed the text of the statute and reviewed its legislative history and found that “we are left with an ambiguous statute.”<sup>79</sup> With matters in that posture, the Court rejected the Government’s construction of the statute for two reasons: *first*, because principles of lenity should govern in the construction of criminal statutes; and *second*, because principles of federalism counsel against reading a federal statute as trenching heavily upon matters of traditionally local concern unless Congress makes its purpose to do so abundantly clear. Justice Marshall’s opinion noted that, as a consequence of rejecting the Government’s construction of the statute, “we do not reach the question whether, upon appropriate findings, Congress can constitutionally punish the ‘mere possession’ of firearms.”<sup>80</sup>

---

73. See *supra* note 14.

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

75. 404 U.S. 336 (1971).

76. 18 U.S.C. § 1202(a) (1968).

77. See *United States v. Bass*, 308 F. Supp. 1385 (S.D.N.Y.), *revd.*, 434 F.2d 1296 (2d Cir. 1970), *affd.*, 404 U.S. 336 (1971).

78. *United States v. Bass*, 434 F.2d 1296, 1299-301 (2d Cir. 1970), *affd.*, 404 U.S. 336 (1971).

79. *Bass*, 404 U.S. at 347.

80. 404 U.S. at 339 n.4. Justices Blackmun and Burger were of the view that the statute was intended to “reach all possessions and receipts of firearms by convicted felons, and that

After summarizing the Court's decision in *Bass*, Chief Justice Rehnquist's *Lopez* opinion observes that "[u]nlike the statute in *Bass*, § 922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce."<sup>81</sup>

The *Lopez* opinion does not discuss how easy it is to add the necessary "jurisdictional element." No reference is made to *Scarborough v. United States*,<sup>82</sup> which followed *Bass*. In *Scarborough*, the Court again was called on to construe the felon-in-possession statute. This time, the question was whether the statute's "in commerce or affecting commerce" requirement — the so-called "nexus" to commerce — was satisfied by a showing that the firearms in question "had traveled in interstate commerce"<sup>83</sup> prior to the defendant's felony conviction and, indeed, so far as appears, prior to the defendant's acquisition of the firearms. Justice Marshall again wrote for the Court; this time, the conviction was sustained. "Congress," wrote Justice Marshall, "sought to reach possessions broadly, with little concern for when the nexus with commerce occurred."<sup>84</sup>

*Bass* reserved "the question whether, upon appropriate findings, Congress can constitutionally punish the 'mere possession' of firearms."<sup>85</sup> *Lopez* may be thought to stand for the proposition that the answer to that question is "no." Or *Lopez* may be thought to hold that section 922(q) is invalid because Congress did not make "appropriate findings" — indeed, made none.<sup>86</sup> Whichever reading of *Lopez* one chooses, the escape route — the "nexus" — is there for the asking. The Chief Justice's opinion for the Court beckons in that direction. The concurring opinion of Justice Kennedy, while noting "the tendency of [section 922(q)] to displace state regulation

---

the Court should move on and decide the constitutional issue present in this case." 404 U.S. at 356 (Blackmun, J., dissenting, joined by Burger, C.J.).

The *Bass* Court consisted of only seven Justices. Justices Powell and Rehnquist, nominated to succeed Justices Black and Harlan, had been confirmed and commissioned prior to the decision in *Bass*, but they did not take their seats until approximately three weeks after the decision.

81. *United States v. Lopez*, 115 S. Ct. 1624, 1631 (1995).

82. 431 U.S. 563 (1977).

83. 431 U.S. at 565.

84. 431 U.S. at 577 (Stewart, J., dissenting). Justice Rehnquist did not participate in the decision.

85. *United States v. Bass*, 404 U.S. 336, 339 n.4 (1971).

86. Taking it as common ground that Congress has no formal obligation to make findings, it would appear that in certain instances it has a prudential obligation to do so. See *supra* text accompanying note 28.

in areas of traditional state concern,"<sup>87</sup> offers no basis for concluding that he and Justice O'Connor have reservations about the Chief Justice's "jurisdictional element" analysis. Apart from Justice Thomas, whose concurrence voices his doubts about the entire "substantially affects commerce" jurisprudence, there appears to be no member of the Court who would resist a legislative face-lift of section 922(q) that added a "nexus" requiring that firearms subject to the statute have traveled in commerce. The ease of establishing such a connection to commerce is illustrated by *Lopez* itself, for, as the Fifth Circuit noted, the parties stipulated that a BATF agent could testify to the out-of-state provenance of the gun that Alfonso Lopez brought to school.<sup>88</sup> The commerce "nexus" may be seen as a "jurisdictional element" responsive to the scope and defined boundaries of Article I, Section 8, Clause 3 of the Constitution. Or it may be seen as just a lawyer's gimmick.

#### IV.

In the foregoing pages, an attempt has been made — primarily by parsing the Court's opinion at length — to determine whether *Lopez* should be tagged with the sobriquet Justice Souter hopes it does not deserve: "epochal." It is the verdict of this writer that *Lopez* will not prove "epochal." Further, *Lopez*, taken as a whole, does not even fully satisfy Justice Stevens's characterization as "radical."<sup>89</sup> Had the majority been guided by Justice Thomas's siren song "to temper our Commerce Clause jurisprudence in a manner that both makes sense of our recent case law and is more faithful to the original understanding of that Clause,"<sup>90</sup> the adjectives "radical" and "epochal" would have been examples of judicial restraint. For Justice Thomas apparently would jettison the "substantially affects" jurisprudence and at least cast a kindly eye on reconstricting the word "commerce" to equate it with bringing goods to market as distinct from growing or manufacturing such goods. But Chief Justice Rehnquist's opinion for the Court gives no comfort to such constitutional regression. And Justice Scalia, by his silence, expresses contentment with the Chief Justice's exposition. And Justice Kennedy, joined by Justice O'Connor, is adamant that the Court "not . . . call in question the essential principles now in

---

87. 115 S. Ct. at 1641.

88. See *supra* text accompanying note 55.

89. See *Lopez*, 115 S. Ct. at 1651.

90. 115 S. Ct. at 1642.

place”<sup>91</sup> and, in particular, that the Court responsibly cannot consider “reverting to an understanding of commerce that would serve only an 18th-century economy.”<sup>92</sup> Justice Thomas appears to have no allies in his campaign to downsize the Commerce Clause.

To be sure, there is one area in which, as Justice Breyer points out, the language in the Court’s opinion may seem to unsettle settled principles. “[T]he Court believes the Constitution would distinguish between two local activities, each of which has an identical effect on interstate commerce, if one, but not the other, is ‘commercial’ in nature.”<sup>93</sup> Justice Breyer is right to be concerned. The supposed distinction lacks adequate constitutional footing. For reasons noted earlier in this foreword,<sup>94</sup> it would not appear that the distinction would survive analysis in a case that centrally posed the question. Furthermore, it seems improbable that Justices Kennedy and O’Connor see constitutional merit in the distinction, given their awareness of “the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause.”<sup>95</sup>

This is not to say that *Lopez* is a decision without consequences. There will, at a minimum, be substantial transaction costs in the form of litigation fleshing out what *Lopez* means. Indeed, a flurry of litigation already is under way — and, not surprisingly, lower federal courts already have shown some signs of disagreement.<sup>96</sup> It may turn out, in the fullness of time, that a few statutes other than section 922(q) will be found wanting by the Supreme Court. But, to the extent that happens, it seems fair to surmise that a number of

---

91. 115 S. Ct. at 1637.

92. 115 S. Ct. at 1637.

93. 115 S. Ct. at 1663.

94. See *supra* text accompanying notes 68-70.

95. See *Lopez*, 115 S. Ct. at 1637.

96. Compare *United States v. Hampshire*, 892 F. Supp. 1327 (D. Kan. 1995) and *United States v. Sage*, No. 3:95cr108, 1995 U.S. Dist. LEXIS 15798 (D. Conn. Oct. 3, 1995) (holding the Child Support Recovery Act of 1992 constitutional) with *United States v. Mussari*, 894 F. Supp. 1360 (D. Ariz. 1995) and *United States v. Parker*, Cr. No. 95-352, 1995 U.S. Dist. LEXIS 17193 (E.D. Pa. Oct. 30, 1995) (Act unconstitutional). Compare *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995) (holding the Freedom of Access to Clinic Entrance Act of 1994 constitutional) with *United States v. Wilson*, 880 F. Supp. 621 (E.D. Wis. 1995) (holding the Act unconstitutional) (pre-*Lopez* decision). See *United States v. Bishop*, 66 F.3d 569 (3d Cir. 1995) (Judges Lewis and Garth hold that the federal carjacking act is unconstitutional; Judge Becker dissents.); see also *Cargill v. United States*, 64 U.S.L.W. 3313 (U.S. Oct. 30, 1995) (No. 95-73) (denying certiorari to *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995)). Justice Thomas filed an opinion dissenting from the denial of certiorari: “This case questions whether the Army Corps of Engineers can, under the Clean Water Act, constitutionally assert jurisdiction over private property based solely on the actual or potential presence of migratory birds that cross state lines. . . . In light of *Lopez*, I have serious doubts about the propriety of the Corps’ assertion of jurisdiction over petitioner’s land in this case.” 64 U.S.L.W. at 3313-14.

such casualties will be attributable not to a restless activism on the part of the Justices but to irresponsibility on the part of a Congress that has failed to make out even a minimally plausible case for utilizing the commerce power to undergird a new regulatory scheme, especially one that deals with problems historically regarded as chiefly of state and local concern. As Justice Kennedy states in his concurring opinion, "it would be mistaken and mischievous for the political branches to forget that their sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance."<sup>97</sup>

Certainly the Gun-Free School Zones Act of 1990 presented itself as an inviting target for Justices who felt it appropriate to remind Congress that even the commerce power has limits and that judicial scrutiny is not to be warded off by the simple process of passing a law and then relying on the Solicitor General to incant the word "commerce." The Gun-Free School Zones Act of 1990 was neither requested nor welcomed by those with responsibility for federal law enforcement. It was enacted, it seems reasonable to suppose, because most members of Congress have never met a crime-creating or sentence-enhancing bill that they didn't like. The Act, as President Bush said, was an enactment that "inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law."<sup>98</sup> Presumably President Bush would have vetoed the statute had Congress not arranged to wedge it into a comprehensive crime control package that the administration deemed of value. So, in lieu of the President, five of the Justices vetoed an "unnecessary" statute that for no demonstrated reason intruded substantially on areas of traditional and cherished local concern. Justice Breyer, as spokesperson for his dissenting colleagues, was heroic in defense of the statute, making the case that Congress had not bothered to articulate because Congress really did not care. But the significance of Justice Breyer's heroics lies in the skill with which his opinion makes the conceptual case for sustaining Congress's handiwork. By contrast, the fact that the statute was voted down by a majority of the Justices is of little consequence. In any event, it appears likely that the statute will re-emerge, in a shiny new 1995 or 1996 model, complete with a "nexus" — a requirement that the government establish that the firearm "has moved in or otherwise affects interstate or foreign

---

97. *Lopez*, 115 S. Ct. at 1639.

98. See *supra* text accompanying note 53.

commerce" — that presumably will be its constitutional bumper-guard when it comes to judgment.<sup>99</sup>

## V.

The foregoing discussion suggests that there is less in *Lopez* than meets the eye. That assessment may prove erroneous. But, whatever view one takes of the case, there is one respect in which *Lopez* undeniably has earned the thanks of scholars and practitioners alike — namely, that it is the catalyst of this important symposium on federalism. The valuable essays that follow confirm Justice Kennedy's dictum that "federalism was the unique contribution of the Framers to political science and political theory."<sup>100</sup> These essays also confirm that federalism is alive and well today.

---

99. The bill that is expected to accomplish this purpose is S. 890, the Gun-Free School Zones Act of 1995, introduced by Senator Kohl with bipartisan support. The current administration, while strongly endorsing the bill, has the good grace — or at least the prudence — not to contend that the bill is a priority matter from the perspective of national law enforcement. Assistant Attorney General Walter Dellinger testified that "[t]he Act will neither limit nor preempt state and local legislation forbidding firearms near schools, and the States will continue to play the primary role in this area of law enforcement. S. 890 should properly be viewed in most instances as a 'backup' to the State systems." *Guns in School: A Federal Role?: Hearings on S. 890 Before the Subcomm. on Youth Violence of the Senate Judiciary Comm.*, 104th Cong., 1st Sess. 6 (1995). Notwithstanding the testimony of the Assistant Attorney General, himself an eminent constitutional scholar, legislation of this sort is likely to have some impact on state law enforcement practices: As noted in the text, *see supra* text accompanying note 45, in the case of Alfonso Lopez, state charges were filed first but gave way to federal charges. This sequence was mentioned, albeit not discussed, in Judge Garwood's opinion for the Fifth Circuit. It was also mentioned, albeit not discussed, in the Chief Justice's opinion for the Supreme Court. It was not mentioned in either of the two concurring opinions or any of the dissents in the Supreme Court.

100. *Lopez*, 115 S. Ct. at 1638.