

# Michigan Law Review

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Volume 94 | Issue 3

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1995

## Commerce!

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### Recommended Citation

Deborah J. Merritt, *Commerce!*, 94 MICH. L. REV. 674 (1995).  
Available at: <https://repository.law.umich.edu/mlr/vol94/iss3/5>

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# COMMERCE!

*Deborah Jones Merritt\**

Commerce!

(sung to the tune of *Convoy*  
by an actor dressed as an FBI agent)<sup>1</sup>

His name was farmer Filburn, we looked in on his wheat sales.  
We caught him exceeding his quota. A criminal hard as nails.  
He said, "I don't sell none interstate."  
I said, "That don't mean cow flop.  
We think you're affecting commerce."  
And I set fire to his crop, HOT DAMN!  
Cause we got interstate commerce  
Ain't no where to run!  
We gone regulate you  
That's how we have fun.  
You made a call last Thursday long distance to Bayonne.  
We gone put you out of business, an' disconnect your phone.  
COMMERCE!

When I graduated from law school in 1980, my classmates and I believed that Congress could regulate any act — no matter how local — under the Commerce Clause. Harvesting wheat for home consumption in Ohio,<sup>2</sup> selling a plate of ribs at a local cafe in Alabama,<sup>3</sup> and threatening to break the legs of a New York butcher:<sup>4</sup> all of these activities fell within the vast sweep of the Commerce Clause. With rhetorical flourish, Congress and the Supreme Court had turned the most local activities into flotsam on a raging stream of interstate commerce. My classmates parodied the swollen Commerce Clause with the lyrics reprinted above and performed the song as part of Columbia Law School's annual musical.

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1. Lyrics from the 1980 "Rites of Spring" Musical at Columbia Law School, *reprinted in* 2 COLUM. Y.B. 101 (1980).

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

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

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

Enlightened by this song and confident that Congress could regulate any conduct under modern interpretations of the Commerce Clause, I originally dismissed the Fifth Circuit's decision in *United States v. Lopez*<sup>5</sup> as absurd. Of course Congress could regulate the possession of guns near schools. Don't guns travel in interstate commerce? Don't schools receive supplies from other states? Didn't the principal of Lopez's San Antonio high school occasionally call a colleague in New Orleans or Bayonne? Any second-year law student could devise a rationale linking the Gun-Free School Zones Act of 1990<sup>6</sup> to interstate commerce. Indeed, I suggested last year that the Fifth Circuit's *Lopez* decision was a mistake grounded in the Supreme Court's failure to distinguish adequately between an outdated territorial concept of federalism and a more contemporary autonomy model of federal-state relations.<sup>7</sup>

The Supreme Court, of course, disagreed. Surprising most academics and lower court judges, the Court ruled that the Gun-Free School Zones Act exceeded Congress's power under the Commerce Clause.<sup>8</sup> What does the Court's decision mean for the future of congressional regulation? Can Farmer Filburn begin raising marijuana or machine guns on his Ohio farm — as long as he retains the crop for home consumption and as long as the state of Ohio does not object? Will my classmates sing a new commerce tune at our twentieth reunion?

In this article, I explore the Supreme Court's new definition of "Commerce . . . among the several States."<sup>9</sup> In Part I, I examine three new principles that *Lopez* announces and that could significantly rework the Court's Commerce Clause jurisprudence. Part II, however, shows that these principles must be understood in the context of almost a dozen factors narrowing the Supreme Court's *Lopez* decision. Part II also demonstrates that the lower courts

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5. 2 F.3d 1342 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995).

6. 18 U.S.C. § 922(q)(1)(A) (1994).

7. See Deborah Jones Merritt, *The Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1582-83 (1994).

8. See *United States v. Lopez*, 115 S. Ct. 1624 (1995). The 5-4 result defied the predictions of most constitutional scholars and judges. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 460 n.80 (1994) ("We believe the Court should, and likely will, reverse the decision of the court of appeals."); Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1174 n.65 (1995) ("The Fifth Circuit's decision in *Lopez* will likely be reversed because it flies in the face of most Commerce Clause jurisprudence."). But see *United States v. Daniels*, 874 F. Supp. 1255, 1257 (N.D. Ala. 1995) (predicting, after reports of the oral argument before the Supreme Court in *Lopez*, that the Court would affirm the Fifth Circuit's decision).

9. U.S. CONST. art. I, § 8, cl. 3.

have understood the contextual uniqueness of *Lopez* and already have distinguished the decision in upholding more than half a dozen broad exercises of congressional authority. Part III then shows that the Supreme Court is unlikely to expand *Lopez* by building upon its principles or striking down other congressional statutes. A host of signals from the Supreme Court's 1994 Term suggests that the Court does not intend to apply *Lopez* broadly.

*Lopez* thus emerges as an important, but limited, rein on congressional power. The decision underscores both that Congress's authority under the Commerce Clause knows some bounds and that the Supreme Court will enforce that boundary through judicial review. Both of these principles have been subject to doubt in recent years,<sup>10</sup> so *Lopez* marks a minor constitutional revolution. The practical effect of the revolution in the courts, however, will be small.<sup>11</sup>

If *Lopez* imposes only a minor restraint on congressional power — a line drawn across the far reaches of the regulatory sand — then it is important to articulate the limiting features of the Court's decision. In the final part of this article, I draw upon the principles of fuzzy logic, a contemporary theory of mathematical sets with powerful implications for legal analysis, to summarize the Court's

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10. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985) (holding that the political process, rather than judicial enforcement, is "the principal and basic limit on the federal commerce power"). The Court in *New York v. United States*, 505 U.S. 144 (1992) alluded to doubts on the first principle:

The volume of interstate commerce and the range of commonly accepted objects of government regulation have . . . expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them. As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power.

505 U.S. at 158; see also *infra* notes 66-71 and accompanying text.

11. *Lopez* may have a somewhat greater impact in Congress by encouraging members to take federalism seriously and strengthening the hand of legislators who oppose national legislation. The concurring opinion of Justices Kennedy and O'Connor explicitly invited this type of congressional reaction:

[I]t would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. . . . The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.

115 S. Ct. at 1639 (Kennedy, J., concurring, joined by O'Connor, J.). Some legislators have invoked *Lopez* already to support proposals narrowing federal power. See, e.g., Spencer Abraham, "Dear Colleague" to Require All Laws to Contain a Statement of the Constitutional Authority Pursuant to Which They Are Enacted, July 11, 1995, available in LEXIS, Legis Library, CRNWS file; *Brown Will Introduce Bill to Limit Congress' Ability to Pre-Empt State Law*, July 12, 1995, available in Lexis, Legis library, BNAMB file. Political forces driving in that direction, however, were apparent in Congress well before the Supreme Court announced *Lopez*. Even in Congress, therefore, it is not clear how strong the practical effect of *Lopez* will be.

holding in *Lopez*. Fuzzy logic captures the many facets of *Lopez* and also demonstrates that the decision is capable of yielding a reasonably certain line between interstate commerce and other conduct. By applying fuzzy logic in this context, I aim both to illuminate *Lopez* and to demonstrate the utility of this analysis in constitutional law.<sup>12</sup>

### I. *UNITED STATES V. LOPEZ*: THREE NEW PRINCIPLES

The *Lopez* decision works three important changes in the Supreme Court's construction of the Commerce Clause. First, the decision holds that congressional power extends only to activity that "*substantially* affects" interstate commerce, rather than to any conduct that more broadly "affects" commerce among the states. Second, the opinion reduces judicial deference to congressional enactments because it subjects federal statutes to review under a toughened rational basis standard. Finally, the decision declares that Congress's power under the Commerce Clause cannot be all-encompassing; however broadly the Court construes the phrase "Commerce . . . among the several States," rationales for congressional regulation must recognize some bounds on federal power.<sup>13</sup>

I explore each of these changes briefly below. As I demonstrate in Part II of this article, however, these principles cannot be considered in isolation. The principles acquire their full meaning only through consideration of the facts and context of *Lopez*. I explore those aspects of the decision more fully after introducing the decision's three major principles.

#### A. *Substantial Effects*

Modern Supreme Court cases have recognized three categories of legislation authorized by the Commerce Clause: (1) statutes regulating "the use of the channels of interstate commerce;" (2) laws governing "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come

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12. For those who would rather "say it in song," I close with a new version of *Commerce!* See *infra* text accompanying note 324. Only readers who study the footnotes and follow this arcane cross-reference will be able to skip ahead to the song.

13. This final principle is closely related to the first two: the Court's commitment to enforcing an outer limit on Congress's commerce power drove both its endorsement of the "substantial" effects test and its toughening of rational basis review. The Court's quest for an outer boundary to the Commerce Clause, however, transcends its other doctrinal changes and merits separate discussion. The rhetoric in *Lopez*, strongly rejecting the Government's arguments that would have left the commerce power unbounded, suggests that the Court will adhere to this third principle even if it abandons the first two.

only from intrastate activities;" and (3) statutes regulating activities "that substantially affect interstate commerce."<sup>14</sup> The *Lopez* Court affirmed these three prongs of congressional power but underscored that regulations falling in the third category must bear a "substantial" relationship to interstate commerce.<sup>15</sup>

The magnitude of this change is debatable. As Chief Justice Rehnquist pointed out in his opinion for the *Lopez* majority and as Justice Breyer acknowledged in the principal dissent, several previous opinions had used the word "substantial" to describe the intensity of the required relationship between the regulated activity and interstate commerce.<sup>16</sup> Even when the Court omitted the word "substantial" from its earlier Commerce Clause discussions, it may not have attached meaning to that omission.<sup>17</sup> *Lopez*, therefore, changed this aspect of the Court's rhetoric slightly, if at all.

More important is the manner in which the *Lopez* majority employed the word "substantial." Justice Breyer's dissent interpreted "substantial effect" as a quantitative measure.<sup>18</sup> He convincingly showed that gun possession in schools has a sizable dollar effect on the economy by impairing the development of human capital and endangering the government's own multibillion dollar investment

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14. *Lopez*, 115 S. Ct. at 1629-30; see also *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 276-77 (1981); *Perez v. United States*, 402 U.S. 146, 150 (1971).

15. See 115 S. Ct. at 1630. The dissenting Justices offered a different semantic formulation, suggesting that Congress may regulate any activities that "significantly affect" interstate commerce. See 115 S. Ct. at 1657 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.). The dissenters contended that requiring a "substantial" rather than "significant" effect "implies a somewhat narrower power" in Congress but also urged that the result in *Lopez* would be the same under either formulation. 115 S. Ct. at 1657.

16. See, e.g., *North Am. Co. v. SEC*, 327 U.S. 686, 705 (1946) ("substantial relationship to interstate commerce"); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) ("substantial economic effect"); *United States v. Darby*, 312 U.S. 100, 119-20 (1941) ("substantial effect"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) ("close and substantial relation"); see also *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968) (Congress may not "use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.").

17. In *Hodel*, the Court spoke repeatedly of activities that "affect" interstate commerce, although it once alluded to "substantial effects." See 452 U.S. at 280. Justice Rehnquist noted this discrepancy in an opinion concurring in the judgment. See 452 U.S. at 312 (Rehnquist, J., concurring); see also 452 U.S. at 305 ("[W]e often seem to forget the doctrine that laws enacted by Congress under the Commerce Clause must be based on a *substantial* effect on interstate commerce.") (Burger, C.J., concurring). Justice Rehnquist's concurring opinion foreshadowed the result adopted by the majority in *Lopez*; see also *infra* notes 38-41 and accompanying text (discussing Justice Rehnquist's proposed standard of review in *Hodel*, 452 U.S. at 264).

18. See, e.g., 115 S. Ct. at 1663 (Breyer, J., dissenting) ("The Court believes the Constitution would distinguish between two local activities, each of which has an identical [dollar] effect upon interstate commerce, if one, but not the other, is 'commercial' in nature.").

in education.<sup>19</sup> Breyer was puzzled, even outraged, that the majority did not agree that this effect was "substantial."

The majority, however, did not use the adjective "substantial" to connote a simple tally of effects, a constitutional gate that would open once a prescribed number of interstate dollars had passed. The majority's use of "substantial effect" is more akin to the notion of proximate cause in tort law. The *Lopez* majority meant that the relationship between the regulated activity and interstate commerce must be strong enough or close enough to justify federal intervention, just as the concept of proximate cause means that a defendant's negligence must be closely enough related to the plaintiff's injury to justify forcing the defendant to bear the costs of the injury.<sup>20</sup> Both of these judgments are qualitative ones, resting on a host of contextual factors, rather than simple quantitative calculations.<sup>21</sup>

Applying this notion of "substantial effects," the majority rejected Justice Breyer's — and the Government's — arguments because they proved too much. The latter arguments would have allowed the national government to regulate any activity at all. The majority was seeking a more special or distinctive relationship to interstate commerce under the rubric "substantial."

This use of "substantial" in *Lopez* draws some support from previous cases. In *NLRB v. Jones & Laughlin Steel Corp.*,<sup>22</sup> the Court approved the congressional regulation of activities that have "a close and substantial relation to interstate commerce" or that enjoy a "close and intimate relation" to that commerce, contrasting those activities with conduct that has only "indirect and remote" effects on interstate commerce.<sup>23</sup> These words imply not a mere measure of quantitative effect on interstate commerce but the search for a particular type of relationship to that commerce. Even

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19. See 115 S. Ct. at 1659-62, 1664 (Breyer, J., dissenting).

20. See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 42, at 273 (5th ed. 1984) (explaining that proximate cause refers "to those more or less undefined considerations which limit liability even where the fact of causation is clearly established"). As Justice Andrews noted in his famous *Palsgraf* dissent, "it is all a question of fair judgment." *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting).

21. For a discussion of the many factors driving the Court's analysis in *Lopez*, see *infra* notes 72-153 and accompanying text. For a discussion of how legal analysis can articulate this type of multifactor analysis through fuzzy logic, see *infra* notes 290-320 and accompanying text.

22. 301 U.S. 1 (1937).

23. 301 U.S. at 37; see also 301 U.S. at 38 (Intrastate rates "bear such a close relation to interstate rates."); 301 U.S. at 38 ("close and intimate effect"); 301 U.S. at 40 ("direct and substantial effect").

in *Heart of Atlanta Motel v. United States*,<sup>24</sup> a case broadly construing congressional power, the Court declared that "the determinative test" under the Commerce Clause is whether "the activity sought to be regulated . . . has a real and substantial relation to the national interest."<sup>25</sup> Once again, the words connote a qualitative judgment about whether the link between the regulated activity and interstate commerce is sufficiently strong to justify congressional intervention.<sup>26</sup>

Other post-1937 commerce cases, however, used the words "substantial" and "effect" in their more quantitative sense.<sup>27</sup> At the

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24. 379 U.S. 241 (1964).

25. 379 U.S. at 255.

26. See also *United States v. Darby*, 312 U.S. 100, 117 (1941) ("[T]he validity of the prohibition turns on the question whether the employment . . . is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it."); 312 U.S. at 123 (explaining that the regulatory means chosen by Congress are "so related to the commerce and so affect[] it as to be within the reach of the commerce power").

Justice Cardozo's concurrence in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), clearly framed the Commerce Clause inquiry in proximate cause terms:

There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. . . . The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain.

295 U.S. at 554 (Cardozo, J., concurring). The majority in *Lopez* quoted part of this text, underscoring the proximate cause nature of its approach. *United States v. Lopez*, 115 S. Ct. 1624, 1633 (1995). The Fifth Circuit in *Lopez* expressed an analogous concern, noting that "there is no private activity, no matter how local and insignificant, the ripple effect from which is not in some theoretical measure ultimately felt beyond the borders of the state in which it took place." *United States v. Lopez*, 2 F.3d 1342, 1362 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995). The Fifth Circuit, like the Supreme Court, viewed the notion of "substantial effects" as a necessary limit on this "ripple effect," or no conduct would remain outside Congress's grasp.

27. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (Congress may regulate local activity "if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"); 317 U.S. at 128 ("It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions."); see also *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964).

In *Hodel v. Indiana*, 452 U.S. 314 (1981), several parties challenged the "prime farmland" portions of Congress's surface mining statute, arguing that surface mining disturbed only 0.006% of the country's prime farmland annually, so that there was no "substantial" effect on interstate commerce. See 452 U.S. at 321 (quoting the lower court's opinion). The Supreme Court rejected this argument, declaring that the challengers and the lower court "incorrectly assumed that the relevant inquiry under the rational-basis test is the volume of commerce actually affected by the regulated activity." 452 U.S. at 324. "The pertinent inquiry," the Court found, "is not how much commerce is involved but whether Congress could rationally conclude that the regulated activity affects interstate commerce." 452 U.S. at 324.

*Hodel v. Indiana* could be read either to eliminate the modifier "substantially" from the Court's Commerce Clause inquiry or to adopt a more qualitative measure of whether activity "substantially affects" commerce. The amount of affected farmland was small under the statute challenged in *Hodel v. Indiana* but the regulated activity was commercial and may have enjoyed a sufficient nexus with interstate commerce for that reason. The Court in *Hodel v. Indiana*, finally, hedged its pronouncement on quantitative effect — noting that the affected



very least, therefore, the *Lopez* Court resolved an ambiguity in favor of a more restrictive reading of the Commerce Clause. More likely, the Court subtly shifted its emphasis away from the quantitative measures used in some previous cases and toward a more qualitative review of the relationship between the regulated activity and congressional action. This change does not imply disagreement with the results of cases finding a "substantial effect" on interstate commerce in simple quantitative terms. As the majority pointed out in *Lopez*, all of those cases involved commercial activities.<sup>28</sup> The commercial nature of the regulated conduct, combined with its quantitative impact on interstate commerce, was enough to mark the connection with interstate commerce "substantial."

The dissenting Justices detected the majority's recharacterization of the "substantial effects" standard and accused the majority of reviving the discredited distinction between direct and indirect effects on interstate commerce.<sup>29</sup> The majority's standard probably does include some measure of the directness of the effect on interstate commerce; the notion of a "substantial relationship," like that of proximate cause, incorporates the idea of directness. The *Lopez* majority's focus, however, is more flexible than the old direct-indirect distinction. The direct-indirect test was flawed in part by the Court's rigidity and singlemindedness in applying the test. The *Lopez* decision suggests that the Court will not fall prey to this trap but will consider a host of factors in determining whether an activity is sufficiently related to interstate commerce to support congressional regulation.<sup>30</sup>

The Court's reshaping of the substantial effects standard in *Lopez* leaves two questions for further exploration: (1) What factors will the Court consider in determining whether conduct "substantially affects" interstate commerce, and (2) how high will the Court set the "substantial effects" threshold? Part II identifies some of the factors that influenced the Court in *Lopez* and should influence future assessments of "substantial effect." Part III then explores numerous Supreme Court signals suggesting that, despite any recharacterization of the substantial effects standard, most congressional action will continue to survive scrutiny under the Com-

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farmland produced about \$5 million of corn each year "which surely is not an insignificant amount of commerce." 452 U.S. at 325 n.11.

28. See 115 S. Ct. at 1630.

29. See 115 S. Ct. at 1654 (Souter, J., dissenting); 115 S. Ct. at 1663 (Breyer, J., dissenting).

30. See *infra* notes 72-153 and accompanying text.

merce Clause. *Lopez* sets an outer limit on congressional power, but the line is remote from most congressional work.

### B. *Rational Basis Review*

For at least thirty years, the Supreme Court has measured the scope of Congress's Commerce Clause power under a rational basis test.<sup>31</sup> "[W]hen Congress has determined that an activity affects interstate commerce," the Court observed in 1981, "the courts need inquire only whether the finding is rational."<sup>32</sup> Until *Lopez*, that inquiry invariably persuaded the Court that Congress had acted rationally; as the Fifth Circuit observed in *Lopez*, there is "no Supreme Court decision in the last half century that has set aside [a congressional enactment based on the Commerce Clause] as without rational basis."<sup>33</sup> At least before *Lopez*, the Court's rationality review of legislation based on the Commerce Clause was extremely deferential to Congress.

The *Lopez* majority acknowledged that, in deciding Commerce Clause cases, "the Court has . . . undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce."<sup>34</sup> Chief Justice Rehnquist, however, did not invoke this rational basis test as a restraint on the Court's authority; on the contrary, he cited the rational basis test as an example of the Court's continued recognition of some bounds on congressional power under the Commerce Clause and of the Court's willingness to enforce those limits through judicial review.<sup>35</sup> After this initial reference to the rational basis test, moreover, Chief Justice Rehnquist never mentioned the phrase again in his majority opinion. As the dissenters amply illustrated, the Gun-Free School Zones Act would have easily passed the weak rational basis

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31. See *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964). The Court did not explicitly adopt a rational basis test in its earlier New Deal rulings, but those decisions are consistent with such a test.

32. *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 277 (1981).

33. *United States v. Lopez*, 2 F.3d 1342, 1363 n.43, *aff'd*, 115 S. Ct. 1624 (1995). During the oral arguments, one of the Justices commented on the leniency of the Court's traditional rational basis test. See Transcript of Oral Argument on Behalf of the Petitioner at 19-20, *United States v. Lopez*, 115 S. Ct. 1624 (1995) (No. 93-1260), available in Westlaw, SCT-ORALARG Directory ("But one always can [identify a rational basis]. I mean, there is no limit. Benjamin Franklin said, it is so wonderful to be a rational animal, that there is a reason for everything that one does. . . . And if that's the test, it's all over."). The Court's official transcript does not identify the Justice who offered this comment. Contemporary reports, however, attribute the comment to Justice Souter. See Joseph Calve, *Anatomy of a Landmark Ruling*, LEGAL TIMES, Aug. 14, 1995, at 9.

34. *United States v. Lopez*, 115 S. Ct. 1624, 1629 (1995).

35. See 115 S. Ct. at 1629.

test commonly used by the Court to judge due process and other constitutional claims.<sup>36</sup> Clearly, the *Lopez* majority had a less deferential version of the rational basis test in mind than the Court had used in previous cases.<sup>37</sup>

How tough has the Court's rational basis standard become? A clue to Justice Rehnquist's version of the rational basis test for Commerce Clause cases appears in his concurring opinion to the Court's 1981 decision in *Hodel v. Virginia Surface Mining & Reclamation Assn.*<sup>38</sup> In that case, Justice Rehnquist reminded his colleagues that even a rational basis test demands some judicial review. "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce," Justice Rehnquist wrote, "does not necessarily make it so."<sup>39</sup> Even more intriguing, Justice Rehnquist suggested in *Hodel* that the rational basis test used under the Commerce Clause should be tougher than the rational basis test used to judge social and economic legislation under the Due Process Clause.<sup>40</sup> Courts, Justice Rehnquist suggested, play a more legitimate role in determining whether Congress "has the authority to act" than in judging "the manner in which that power is exercised."<sup>41</sup>

Although Justice Rehnquist did not elaborate on this suggestion in *Lopez*, Justices Kennedy and O'Connor offered some comments on the appropriate level of judicial scrutiny in their concurring opinion. These Justices first noted their agreement with Justice Rehnquist that the Court has a "role . . . in determining the meaning of the Commerce Clause" and that its scrutiny should not be

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36. See 115 S. Ct. at 1651 (Stevens, J., dissenting); 115 S. Ct. at 1657 (Souter, J., dissenting); 115 S. Ct. at 1659-62 (Breyer, J., dissenting).

37. The single reference to the rational basis standard in Justice Rehnquist's majority opinion might lead some scholars to question whether the Court has abandoned the rational basis test altogether, in favor of a de novo examination of whether regulated activity substantially affects interstate commerce. Justice Rehnquist's initial reference to the rational basis test, however, taken together with his earlier comments in *Hodel* and the views of concurring Justices O'Connor and Kennedy, see *infra* notes 38-46 and accompanying text, suggest that the Court has toughened the rational basis test in Commerce Clause cases, rather than abandoning the test altogether. See also 115 S. Ct. at 1657 (Souter, J., dissenting) (noting that "the Court continues to espouse" a "rationality review"); 115 S. Ct. at 1658 (Breyer, J., dissenting) (observing that "the specific question before us, as the Court recognizes, is not whether the 'regulated activity sufficiently affected interstate commerce,' but, rather, whether Congress could have had 'a rational basis' for so concluding").

38. 452 U.S. 264 (1981).

39. 452 U.S. at 311 (Rehnquist, J., concurring). Justice Rehnquist quoted this language in his opinion for the Court in *Lopez*. See 115 S. Ct. at 1629 n.2.

40. See 452 U.S. at 311 n.\* (construing *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980)).

41. 452 U.S. at 311 n.\*.

perfunctory.<sup>42</sup> "[T]he federal balance," Justices Kennedy and O'Connor concluded, "is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far."<sup>43</sup> At the same time, however, Justices Kennedy and O'Connor suggested that Commerce Clause cases implicate a "substantial element of political judgment" that "leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights."<sup>44</sup>

The concurring Justices did not convert these observations into a specific standard of review. Nor did they pen the words "rational basis" anywhere in their concurring opinion. The tenor of their comments, however, suggests that they would subject Commerce Clause challenges to a toughened rational basis standard or a rational basis with "bite,"<sup>45</sup> while still keeping the level of judicial inquiry far below the strict or intermediate levels of scrutiny used in some equal protection cases.<sup>46</sup> Justice Rehnquist's opinion for the Court, when combined with his comments in *Hodel*, suggests a similar level of review.

How sharp the teeth are in this toughened rational basis standard remains unclear. *Lopez* suggests that the standard is *not* merely a procedural one requiring Congress to demonstrate a rational basis through explicit findings. The Court noted that congressional findings would have been helpful in evaluating the Gun-Free School Zones Act, particularly because the connection between the Act and interstate commerce was not "visible to the naked eye,"<sup>47</sup> but the Court agreed with the Government that "Congress normally is not required to make formal findings as to

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42. 115 S. Ct. at 1637-38, 1640 (Kennedy, J., concurring).

43. 115 S. Ct. at 1639.

44. 115 S. Ct. at 1640.

45. Professor Gerald Gunther coined the phrase rationality review with "bite" in an article reviewing the Court's 1971 Term. See Gerald Gunther, *Newer Equal Protection*, 86 HARV. L. REV. 1, 20-48 (1972). For additional comments about that proposal, including its reception in the courts since 1971, see GERALD GUNTHER, *CONSTITUTIONAL LAW* 620-25 (12th ed. 1991). Other scholars have agreed with Gunther that rational basis review does not need to be "toothless." For a discussion of this point in the Commerce Clause context, see Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 45-49 (1987).

46. As Gerald Gunther has stressed, the concept of rationality review with "bite" was never intended to match the intermediate scrutiny applied in some equal protection cases. The concept "seeks to raise slightly the lowest tier of review under the two- or three-tier models; but it does *not* seek to raise the 'mere rationality' level appropriate for run-of-the-mill economic regulation cases all the way up to the level of 'intermediate' or of 'strict' scrutiny." GUNTHER, *supra* note 45, at 621 n.7.

47. 115 S. Ct. at 1632.

the substantial burdens that an activity has on interstate commerce."<sup>48</sup> Instead, the Court found no rational basis supporting the Act because it disagreed substantively with Congress's implicit conclusion that gun-free school zones substantially affect interstate commerce.

Procedure and substance, of course, are intertwined. If Congress had made more careful findings, the content of those findings might have persuaded the Court that there was a substantial relationship between gun-free schools and interstate commerce. The lack of a rational basis in *Lopez*, moreover, rests on the confluence of numerous factors explored in greater detail below. Even after accounting for these factors, however, the Court's decision suggests that it will be difficult for Congress to establish a rational basis for regulating intrastate conduct if (1) the conduct is noncommercial; (2) the statute lacks a jurisdictional element requiring a case-by-case determination of the interstate nexus; (3) Congress makes few findings supporting its claim of a substantial connection with interstate commerce; and (4) the justifications offered for the connection with interstate commerce are so broad that they impose no limit on federal power.<sup>49</sup> The final aspect of this formula reveals the Court's key concern in *Lopez*: that the Commerce Clause know some limits.

### C. Some Limit

Before *Lopez*, many academics and lower court judges speculated that the Commerce Clause no longer imposed any limits on congressional action.<sup>50</sup> The Supreme Court's decision in *Lopez* re-

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48. 115 S. Ct. at 1631.

49. Difficult, but perhaps not impossible. The four factors identified in the text appear to be the most important components of the Court's *Lopez* decision, but they are not the only factors guiding that decision. See *infra* notes 72-153 and accompanying text. A more complete restatement of the rules in *Lopez* would include all of the factors influencing the decision, see *infra* note 310 and accompanying text, and might uphold a congressional regulation that did not fit this briefer formula.

50. See, e.g., *United States v. Ornelas*, 841 F. Supp. 1087, 1092 (D. Colo. 1994), *rev'd mem.*, 56 F.3d 78 (10th Cir. 1995) ("Indeed, very few activities exist regarding which Congress could not reasonably find an interstate commerce nexus. . . . Perhaps unfortunately, Congress's legislative power under the Commerce Clause has become a virtual blank check . . . ."); *United States v. Morrow*, 834 F. Supp. 364, 365 (N.D. Ala. 1993) ("[H]as not everyone been conditioned to believe that there is nothing which moves or has ever moved which does not support an invocation of the Commerce Clause . . . ."); James L. Buckley, *Introduction — Federalism and the Scope of the Federal Criminal Law*, 26 AM. CRIM. L. REV. 1737, 1738 (1989) ("Today it is virtually impossible to conjure up any human activity . . . that some court will not find to burden interstate commerce."); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1236 (1994) ("[I]n this day and age, discussing the doctrine of enumerated powers is like discussing the redemption of Imperial Chinese bonds. There is now virtually no significant aspect of life that is not in some way

soundingly rejected that notion. Indeed, this may have been the primary point of the decision. Much of the majority's reasoning in *Lopez* reduces to this syllogism: (1) The text of the Commerce Clause and structure of the Constitution imply that some activities are not "Commerce . . . among the several States"; (2) Congress's power to enact the Gun-Free School Zones Act can be sustained only by endorsing arguments that would allow Congress to regulate any activity; and (3) therefore, the Gun-Free School Zones Act cannot be constitutional.<sup>51</sup>

The *Lopez* majority stressed that, since its very first Commerce Clause decision, the Supreme Court had recognized that "[t]he enumeration [of power in the Commerce Clause] presupposes something not enumerated."<sup>52</sup> Even in 1937, when the Court overturned its restrictive reading of the Commerce Clause, it declared that the definition of commerce "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."<sup>53</sup>

The Government's arguments in *Lopez* conflicted with this judicial commitment to recognize that Congress's powers are enumer-

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regulated by the federal government. This situation is not about to change."); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1259 (1995) ("[S]ince the New Deal 'switch,' the Commerce Clause power in particular has been understood to be remarkably inclusive. . . . [I]t now seems almost brazen to suggest that there is anything Congress may not do.").

My former colleague Donald Dripps tells me that he offered five bonus points on the final exam to any student in his constitutional law course who could identify a statute that Congress could *not* enact under the Commerce Clause. At least before *Lopez*, no student ever succeeded in winning the extra points. See also Ronald D. Rotunda, *Cases Refine Definition of Federal Powers*, NATL. L.J., July 31, 1995, at C9 (explaining that since the Court's New Deal cases, "a typical question mooted in constitutional law classes was whether there were any limits to the federal commerce power"); *Court Turns Sharply to Right; Rehnquist Making Mark*, BERGEN EVENING REC., July 3, 1995, at A1 ("In recent decades, many constitutional law classes have not even taught about the 'Commerce clause' because it has been considered a settled issue since 1937. Congress, it was said, could regulate any aspect of American life if it believed that doing so was in the national interest.").

51. Justice Stewart struck a similar chord in his 1971 dissent in *Perez v. United States*, 402 U.S. 146 (1971). Announcing that he was "unable to discern any rational distinction between loan sharking and other local crime" and finding that the Constitution's Framers could not have intended to allow Congress to prosecute all local crimes, Justice Stewart concluded that the loan sharking statute at issue in *Perez* "was beyond the power of Congress to enact." 402 U.S. at 158 (Stewart, J., dissenting).

The *Lopez* dissenters, notably, did not attack the first premise of this syllogism. See *infra* note 55. They challenged only the second premise and its resulting conclusion.

52. 115 S. Ct. at 1627 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824)).

53. 115 S. Ct. at 1628-29 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

ated rather than plenary. Under the Government's theories, the Court found it "difficult to perceive any limitations on federal power."<sup>54</sup> Upholding the Gun-Free School Zones Act, the majority concluded, "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."<sup>55</sup> To preserve that distinction and maintain some limit on congressional power under the Commerce Clause, the Court struck down the Gun-Free School Zones Act.

The Government's choice of theories in *Lopez* helped provoke this reaction from the Court. The Solicitor General defended the Gun-Free School Zones Act on three grounds: (1) that violent acts, wherever they occur, affect the national economy by raising insurance rates; (2) that violent crimes also affect the economy by discouraging interstate travel; and (3) that guns disrupt education, reducing workforce skills and ultimately diminishing productivity.<sup>56</sup> All three of these rationales required the Court to trace several steps from gun-free school zones to interstate commerce. Acceptance of the Government's second rationale, for example, would have required the Court to reason that guns near schools increase the likelihood of violent acts; that individuals learn about violent schoolyard acts in other states; that violent acts in schools discourage people from traveling to other states; and — the easiest step — that reductions in interstate travel reduce receipts for businesses catering to that travel. The Government's other two arguments relied upon similar domino chains to achieve an effect on interstate commerce.

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54. 115 S. Ct. at 1632.

55. 115 S. Ct. at 1634; *see also* 115 S. Ct. at 1632 ("[I]f we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate . . . Justice Breyer [in dissent] . . . is unable to identify any activity that the States may regulate but Congress may not."); 115 S. Ct. at 1634 ("[U]phold[ing] the Government's contentions here . . . would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."); 115 S. Ct. at 1649 (Thomas, J., concurring) ("When asked at oral argument if there were *any* limits to the Commerce Clause, the Government was at a loss for words. . . . Likewise, the principal dissent insists that there are limits, but it cannot muster even one example." (citation omitted)).

Even the dissenters showed some discomfort with the notion of an all-encompassing Commerce Clause. *See, e.g.*, 115 S. Ct. at 1661 (Breyer, J., dissenting) (arguing that upholding the Gun-Free School Zones Act would *not* mean "that the Commerce Clause permits the Federal Government to 'regulate any activity that it found was related to the economic productivity of individual citizens'").

56. *See* Brief for the United States at 17-25, *United States v. Lopez*, 115 S. Ct. 1624 (1995) (No. 93-1260); *Lopez*, 115 S. Ct. at 1632.

Acceptance of these theories would have required the Court to expand its precedents — or at least to combine them in creative ways. The Court had accepted diminished interstate travel as a rationale for congressional regulation, but the loss in those cases occurred from direct discrimination against restaurant and hotel customers — who included interstate travelers.<sup>57</sup> Similarly, the Court had approved congressional legislation aimed at enhancing worker productivity, but those laws directly regulated wages, hours, and other aspects of the employment relationship<sup>58</sup> — not the well-being of children who would move into the workforce someday. The Government's arguments added at least one link to every chain the Court was asked to forge between regulated conduct and interstate commerce.

Even more damaging, the Government was unable to identify any bounds to its theories. Although pressed repeatedly during oral argument, the Solicitor General could not offer a single example of conduct falling outside Congress's commerce power. Instead, his responses suggested that under the Government's "'costs of crime' reasoning . . . Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce."<sup>59</sup> Similarly, the argument suggested that "under the Government's 'national productivity' reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens," including such matters as "marriage, divorce, and child custody."<sup>60</sup>

The *Lopez* majority recoiled from these arguments. In part, the Court worried about preserving state control of traditional areas like education and domestic relations, but the Court's overriding concern was with the Government's style of argument. The Government's first two theories were so strained that they trivialized the question of congressional authority, suggesting that the Commerce Clause was a sport to be circumvented through disingenuous argument.<sup>61</sup> The third argument was more cogent, but the Govern-

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57. See *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

58. See *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

59. 115 S. Ct. at 1632; see Transcript of Oral Argument on Behalf of the Petitioner, *supra* note 33, at \*10-11, \*13.

60. 115 S. Ct. at 1632; see Transcript of Oral Argument on Behalf of the Petitioner, *supra* note 33, at \*15-16.

61. As William Van Alstyne has suggested about other Commerce Clause rationales, these arguments were dressed in "cellophane wrappers" of pretended interest in matters af-



ment erred in failing to acknowledge that the theory moved a step beyond the Court's precedents — and in neglecting to assure the Court that this step could be taken without obliterating the Commerce Clause. If the Government had discarded its first two arguments, admitted that the productivity theory had not been applied previously outside the workplace and argued that this theory narrowly could be extended to schools because they bear a unique relationship to productivity, the Court might have accepted the link to interstate commerce.<sup>62</sup>

The "limit" sought by the *Lopez* majority can be characterized in two ways. Some of the Court's rhetoric suggests that it wanted to return to a territorial principle of federalism, the notion that some subjects lie beyond Congress's regulatory reach.<sup>63</sup> The Court never explained, however, why state control of gun possession near schools is essential to preserving the federal-state balance. The majority admitted, moreover, that Congress could continue regulating many aspects of education and other areas traditionally reserved to the states — significantly undercutting any suggestion that the Commerce Clause preserves specific enclaves of state power.<sup>64</sup>

Instead, *Lopez* imposed a limit on the type of arguments the Government may advance under the Commerce Clause.<sup>65</sup> Each rationale invoked by the Government, *Lopez* suggests, must recognize the constitutional maxim that Congress possesses only enumerated, not plenary, powers. No rationale should be so unbounded, disingenuous, or convoluted that it trivializes this princi-

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fecting interstate commerce. See William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769. Congress was not really concerned with insurance rates or interstate vacationers when it enacted the Gun-Free School Zones Act. Feigning such an interest demeaned both the Commerce Clause and the entire method of constitutional inquiry.

62. The Government might also have defended the Gun-Free School Zones Act by stressing that schools draw supplies from interstate commerce, focusing the Court's attention on the immediate disruption of these interstate businesses, and drawing an analogy to the Hobbs Act — which prohibits any robbery or extortion that "affects commerce." See 18 U.S.C. § 1951(a) (1994); see also *infra* note 148.

63. For further discussion of the autonomy and territorial models of federalism, see Merritt, *supra* note 7.

64. See 115 S. Ct. at 1633. In addition, Congress regulates education and other matters of traditional state concern under its spending power. Congressional power to enforce the Fourteenth Amendment might provide another avenue for regulating such areas, although Congress's power to regulate private conduct under that Amendment is subject to debate.

65. "Government" refers either to Congress or, if Congress remains silent on the source of its authority, the attorneys who defend its legislation in court. The Supreme Court did not demand express congressional findings in *Lopez*, although the absence of those findings was influential, see *infra* notes 91-96 and accompanying text, but it wanted either Congress or the Solicitor General's office to articulate a limited rationale for this exercise of congressional power.

ple. If Congress and its attorneys abide by this limit in future cases, the Court may not care whether the states retain exclusive control over any pockets of regulatory authority. Once Congress has finished counting its enumerated powers, it may have invaded every enclave of state regulation. The important point is that Congress must proceed in a way that recognizes the possibility of some limits and takes the doctrine of enumerated powers seriously.

## II. THE LIMITS OF *LOPEZ*

*Lopez* is an important statement of constitutional principle. The opinion correctly reads both the text of the Commerce Clause and the structure of the Constitution to require some limits on congressional power under the Commerce Clause. The limit embraced by *Lopez* is more likely to constrain the rationales offered for congressional action than the ends of that action. The Court's search for Commerce Clause theories that express the limited nature of congressional power, however, is not empty formalism. Congress's powers *are* enumerated, not plenary, and the Constitution has never been amended to provide otherwise.<sup>66</sup> Even the New Deal cases, which greatly expanded the scope of Congress's commerce power, did not declare that Congress's power was unbounded or that legislation could be upheld simply by waving vaguely in the

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66. Bruce Ackerman has argued that the New Deal was a "constitutional moment" effectively amending the Constitution. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991). There are several difficulties with this argument. Most important for present purposes, even if the New Deal "amended" the Constitution in some respect, that change did not necessarily encompass the Gun-Free School Zones Act. To escape from the Depression and manage a modern economy, it is possible that the American people engaged in the "higher lawmaking" Ackerman describes to allow Congress to regulate commercial problems demanding national solutions. But neither the context driving this constitutional change nor the decisions rendered by the New Deal Court necessarily encompassed the type of police regulation at issue in *Lopez*. Indeed, one of the lawyers who successfully defended the New Deal cases for the Government later wrote that federal regulation of intrastate crimes "extend[ed] the commerce power beyond previous limits" set by the New Deal cases. See Robert L. Stern, *The Commerce Clause Revisited — The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271, 274 (1973).

Moreover, formal constitutional amendments to shift power from the states to the federal government have not proved so difficult. See, e.g., U.S. CONST. amend. XVI (federal income tax); U.S. CONST. amend. XVII (direct election of Senators); U.S. CONST. amend. XXIV (prohibition of state poll taxes in federal elections). In addition, of course, the Civil War Amendments effected a radical shift of power from the states to both Congress and the federal courts. If the people want to give Congress an unlimited police power, they have the formal power to do so; recognition of informal lawmaking may not be necessary in this area.

Finally, as Ackerman himself acknowledges, recognizing constitutional moments is a difficult task, fraught with the potential for antimajoritarian action. See ACKERMAN, *supra*, at 284, 291. Ackerman develops guidelines that help him recognize the New Deal as an instance of higher lawmaking, but the concern counsels caution in applying the entire theory. At the very least, it suggests wariness in pushing the outer bounds of an "amendment" to the Commerce Clause that was never formally proposed or ratified by the people.

direction of some interstate sale concluded somewhere by some person. The defenders of the New Deal showed how wages, hours, and employee strikes could affect interstate commerce in a modern economy, but they never ignored the principle of enumerated powers.

The Court's insistence that Congress respect the enumerated nature of its powers and that the Government offer regulatory rationales consistent with those restrictions is rooted in respect for both the Constitution's text and traditional methods of constitutional interpretation.<sup>67</sup> As my classmates' musical parody of *Wickard v. Filburn* suggests, the Commerce Clause had become an intellectual joke among academics and attorneys. A Constitution that is subject to ridicule, however, serves no one's interests. No one will take the Constitution seriously if Congress and the courts refuse to do so.<sup>68</sup> For these reasons, the Supreme Court concluded in *Lopez* that rationales expounding congressional power under the Commerce Clause must have some limit.

Equally important, *Lopez* affirmed the Court's responsibility to enforce the boundaries of the Commerce Clause through judicial review. Ten years ago, the Court announced that states should rely primarily on the political process to preserve the proper balance of state-federal power under the Commerce Clause.<sup>69</sup> Congress, however, has not proven particularly sensitive to the boundary between state and federal power, especially in enacting federal criminal laws.<sup>70</sup> Without some judicial enforcement of the Commerce Clause, the principles of federalism embodied in that clause might

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67. For scholarly arguments that the text and structure of the Constitution require some limits on congressional power to regulate interstate commerce, see, for example, Redish & Drizin, *supra* note 45; Van Alstyne, *supra* note 61. Richard Epstein makes some of the same arguments in Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987), although I do not believe that the text of the Commerce Clause compels an interpretation as narrow as the one he proposes.

68. See generally Tribe, *supra* note 50 (urging the importance of maintaining fidelity to constitutional text and structure in judicial decisionmaking).

69. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

70. Political pressures to look "tough on crime" create almost irresistible temptations for Congress to pass new federal criminal laws, regardless of whether the federal government can afford to enforce those laws and regardless of whether the laws duplicate existing state prohibitions. The court in *United States v. Ornelas*, 841 F. Supp. 1087 (D. Colo. 1994), *rev'd mem.*, 56 F.3d 78 (10th Cir. 1995), recognized this problem:

Unfortunately, the *Garcia* Court's confidence in the political process to deter the zeal of Congress to centralize prosecutorial power may have been too optimistic. Indeed, apparently irresistible political pressures to be perceived as 'tough on crime' are driving Congress to federalize crimes . . . in circumstances where clear-minded, objective analysis can discern no meaningful effect on interstate commerce in the sense intended by the Commerce Clause.

841 F. Supp. at 1093; see also *infra* notes 133-44 and accompanying text.

disappear. For these reasons, the *Lopez* majority correctly determined that the Court must retain some judicial oversight over the reach of the Commerce Clause.<sup>71</sup>

Despite the significance of these constitutional affirmations, *Lopez* is a narrow decision that will invalidate few congressional acts. The Court's decision rests on the confluence of almost a dozen factors making the case virtually unique. These distinguishing features of *Lopez* will prove essential in deciding future controversies over whether Congress has a rational basis for determining that regulated conduct "substantially affects" interstate commerce.

In this section, I first discuss the many factors contributing to the majority's decision in *Lopez*. I then examine more than three dozen opinions issued by the federal courts during the first three months after *Lopez*. These decisions confirm my prediction that *Lopez* rests on a combination of unusual circumstances that will lead to the judicial invalidation of few statutes. The U.S. Code contains thousands of laws; some of them may yet fall under *Lopez*. The work of the federal courts so far, however, suggests that the mark of *Lopez* will be small in that context.

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71. The scholarly debate over the proper role of the courts in enforcing the Commerce Clause is extensive and well-known. For arguments that the political process adequately protects state interests, so that little or no judicial enforcement is necessary, see, for example, JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779 (1982); Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 VAND. L. REV. 1623 (1994); and Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); see also Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994) (criticizing many of the traditional arguments made in favor of the political process model but suggesting that new institutions and political forces may play the same role). For arguments that the political process is not a sufficient check on federal power and that the courts should enforce federalism provisions like the Commerce Clause, see, for example, PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* (1970); MICHAEL D. REAGAN & JOHN G. SANZONE, *THE NEW FEDERALISM* (2d ed. 1981); MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* ch. 2 (1995); Stewart A. Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139, 182-84 (1977); A.E. Dick Howard, *Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 GA. L. REV. 789 (1985); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 15-22 (1988); William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

In *Lopez*, Justices Kennedy and O'Connor expressed understandable puzzlement over why this matter remains subject to so much doubt. As these Justices noted, the legitimacy of judicial review in other sensitive areas — including the separation of powers on the national level — is "undoubted." *United States v. Lopez*, 115 S. Ct. 1624, 1638 (1995) (Kennedy, J., concurring). These Justices also noted, in line with some of the scholarly commentary cited above, that the "structural mechanisms" ostensibly protecting state interests in Congress are few and that these minor restraints are easily overcome by "momentary political convenience." 115 S. Ct. at 1639. For these reasons, Justices Kennedy and O'Connor refused "complete renunciation of the judicial role." 115 S. Ct. at 1639.

### A. *The Distinguishing Features of Lopez*

Hard facts make new law. From the beginning, *United States v. Lopez* was a troubling case.<sup>72</sup> Congress's statute was broadly drawn, prohibiting gun possession by any person within 1000 feet — more than three football fields — of any public or private school. The statute condemned a pedestrian carrying a handgun in a briefcase for self protection or a hunter transporting a rifle to the hunting range if either one strayed within 1000 feet of a school — even if the transgression occurred at night, on a weekend, or during the summer.<sup>73</sup> The breadth of the statute allowed critics to mock Congress by posing a series of hypothetical cases that would be swept within the statute.<sup>74</sup> Congress compounded the statute's breadth by failing to require any effect on interstate commerce as a

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72. Cf. Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 503-05 (1995) (discussing the many "remarkable" features of *Lopez*).

73. These activities would be protected only if (1) the state maintained a gun licensing law, and the individual was properly licensed under that law, or (2) the gun was both unloaded and transported in a locked container or on a firearms rack. See 18 U.S.C. § 922(q)(2)(B)(ii)-(iii) (1994). The latter exception, of course, would offer scant comfort to the citizen carrying a gun for self-defense.

The statute contained several other exceptions, including protection for gun possession on private property not part of the school grounds. See 18 U.S.C. § 922(q)(2)(B)(i) (1994).

74. The Fifth Circuit observed that the statute:

makes it a federal offense to carry an unloaded firearm in an unlocked suitcase on a public sidewalk in front of one's residence, so long as that part of the sidewalk is within one thousand feet — two or three city blocks — of the boundary of the grounds of any public or private school anywhere in the United States, regardless of whether it is during the school year or the school is in session.

*United States v. Lopez*, 2 F.3d 1342, 1346 n.4 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995). The court also noted that the statute would prohibit carrying an unloaded shotgun:

in an unlocked pickup truck gun rack, while driving on a county road that at one turn happens to come within 950 feet of the boundary of the grounds of a one-room church kindergarten located on the other side of a river, even during the summer when the kindergarten is not in session.

2 F.3d at 1366. Lopez's attorneys offered a different example in their brief to the Supreme Court: "the licensed hunter transporting his sporting rifle on an elevated, controlled-access highway 999 feet from the farthest part of the school yard risks five years in a federal penitentiary." Brief for the Respondent at 45, *United States v. Lopez*, 115 S. Ct. 1624 (1995) (No. 93-1260). The court in *United States v. Morrow*, 834 F. Supp. 364 (N.D. Ala. 1993), similarly suggested that:

not every little old lady carrying a . . . gun for self-protection can be exposed to a federal felony prosecution just because she fails to measure the shortest distance between her usual vehicular route between home and the grocery store to the nearest point on the local school ground in order to ascertain whether her vehicle will come closer than 1,000 feet to the school.

834 F. Supp. at 365. The court in *Morrow* also noted that "every dove hunter, in order to stay out of a federal penitentiary, would need to carry a surveying instrument with him in the event there happens to be an elementary or secondary school, public, private, or parochial, anywhere near the publicly, heavily travelled route to the dove field." 834 F. Supp. at 365-66; see also *United States v. Edwards*, 13 F.3d 291, 295 (9th Cir. 1993), *vacated and remanded*, 115 S. Ct. 1819 (1995) (explaining that the statute "would criminalize driving past a school on the way to a skeet shooting range with a gun in the trunk of a car").

jurisdictional element of the statute and by omitting any explicit findings linking gun possession in school zones to interstate commerce.

Nor did the prosecution of Alfonso Lopez clarify the federal government's interest in regulating gun possession near schools. Lopez was a genuine wrongdoer, a high school senior caught carrying a concealed handgun and five bullets on school grounds. There was no evidence, however, that Lopez was a sophisticated criminal who might evade the clutches of local law enforcement officers. He had no prior criminal record, not even a disciplinary record at the high school.<sup>75</sup> Lopez was apprehended by school officials and charged under a state law prohibiting the possession of guns on school grounds. That statute had banned gun possession on school grounds for more than a century and had classified the offense as a felony since 1983.<sup>76</sup> The Government never explained why the Assistant U.S. Attorney in Lopez's district decided to initiate federal charges in this purely local case.

These factors, combined with others identified below, pushed five members of the Supreme Court to rule the Gun-Free School Zones Act unconstitutional. *Lopez* was a law professor's dream but a prosecutor's nightmare: a case testing the outer boundaries of the Commerce Clause. The extremity of the facts in *Lopez* suggests that courts will readily distinguish the case in future challenges to congressional action under the Commerce Clause.

### 1. *Noncommercial Activity*

The majority opinion in *Lopez* repeatedly noted that the Gun-Free School Zones Act did not regulate any "commercial transaction" or "economic activity."<sup>77</sup> The transgressions of farmer Filburn, the Court pointed out, "involved economic activity in a way that the possession of a gun in a school zone does not."<sup>78</sup> Simi-

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75. Lopez did testify that he was holding the gun for another student, "Jason," who planned to use it in a gang war. 2 F.3d at 1345. Even this tangential reference to gang shootings, however, did not explain why local authorities were unable to deal adequately with this gang.

76. See Act of Apr. 12, 1871, 1871 Tex. Gen. Laws ch. xxxiv, § 3 (current version codified at TEX. PENAL CODE ANN. § 46.03(a)(1) (West 1994)) (prohibiting intentional, knowing, or reckless possession of firearms and other designated weapons on school premises); TEX. PENAL CODE ANN. § 46.03(f) (West 1994) (designating such offenses third-degree felonies).

77. See, e.g., *United States v. Lopez*, 115 S. Ct. 1624, 1625, 1630-31 (1995).

78. 115 S. Ct. at 1630. Ironically, Lopez's conduct was partly commercial: an individual named "Gilbert" gave Lopez the gun and promised him \$40 if he would deliver it to "Jason" after school. 2 F.3d at 1345. The Gun-Free School Zones Act, however, broadly punishes those who "possess" guns in school zones; it does not focus on commercial transactions near

larly, the majority distinguished precedents in which the Court had "upheld a wide variety of congressional Acts regulating intrastate *economic activity*."<sup>79</sup> The Gun-Free School Zones Act, on the contrary, was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise."<sup>80</sup> Nor was the statute "an essential part of a larger regulation of economic activity."<sup>81</sup>

Justices Kennedy and O'Connor, concurring in the decision, also stressed the noncommercial character of the conduct at issue in *Lopez*.<sup>82</sup> This distinction appeared essential in capturing their votes. Justices Kennedy and O'Connor made clear that they would not "revert[] to an understanding of commerce that would serve only an 18th-century economy."<sup>83</sup> They embraced the Court's distinction between commercial and noncommercial conduct because it allowed them to adhere to all of the modern Court's rulings broadly construing congressional power to regulate commercial activities. "Congress," Justices Kennedy and O'Connor concluded, "can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy."<sup>84</sup> The Gun-Free School Zones Act did not raise these commercial concerns.

The noncommercial character of *Lopez*'s crime thus exerted a significant influence on the majority's decision. The distinction between commercial and noncommercial activities undoubtedly will play a prominent role in decisions entertaining Commerce Clause challenges under *Lopez*.<sup>85</sup>

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schools. The Government, therefore, did not attempt to rely upon this commercial aspect of *Lopez*'s behavior.

79. 115 S. Ct. at 1630 (emphasis added); see also 115 S. Ct. at 1630 ("Where *economic activity* substantially affects interstate commerce, legislation regulating that activity will be sustained." (emphasis added)).

80. 115 S. Ct. at 1630-31.

81. 115 S. Ct. at 1631.

82. See, e.g., 115 S. Ct. at 1640 (Kennedy, J., concurring) ("[H]ere neither the actors nor their conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus . . .").

83. 115 S. Ct. at 1637.

84. 115 S. Ct. at 1637. For further discussion of the views of Justices Kennedy and O'Connor, see *infra* notes 251-55 and accompanying text.

85. The *Lopez* dissenters contended that this distinction between commercial and noncommercial activities would prove unworkable. See 115 S. Ct. at 1663-64. As I explain below, however, *Lopez* does not require courts to draw sharp lines between commercial and noncommercial conduct; it merely requires them to locate conduct on a spectrum of activities that are more or less commercial. See *infra* Part IV. That task corresponds to a common-sense distinction that scholars themselves have drawn in discussing Commerce Clause cases. See, e.g., GUNTHER, *supra* note 45, at 99, 106 (discussing separately the development of

## 2. Lack of a Jurisdictional Element

Many of Congress's criminal statutes require the Government to prove a link to interstate commerce as part of its case-in-chief.<sup>86</sup> The Gun-Free School Zones Act, like some of Congress's other recent statutes, contains no such requirement. The Court obviously found this omission as troubling as the statute's noncommercial nature. In the opening paragraph of its opinion, the Court observed that the Gun-Free School Zones Act "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."<sup>87</sup>

A jurisdictional element would have signaled that Congress was aware of its limits under the Commerce Clause and took those limits seriously. The clause also would have narrowed, if only slightly, the scope of federal prosecutions in a way that might have made the federal interest more apparent. If the gun resting in the school cafeteria has crossed state lines or if the Government must prove some other link with interstate commerce, there is at least a suggestion that the case raises the type of multistate concerns justifying federal prosecution.<sup>88</sup> By failing to require federal prosecutors to satisfy any jurisdictional element, Congress almost dared the Court to find the statute unconstitutional.

The Clinton administration and numerous legislators have concluded that the lack of a jurisdictional element was the dispositive defect in the Gun-Free School Zones Act. Within six weeks of the

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"Modern Economic Regulation" and "National 'Police' Regulation" under the Commerce Clause); WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 90, 115, 120 (7th ed. 1991) (discussing separately the "Regulation of National Economic Problems Through the Commerce Power," "Regulation of Police Problems Through the Commerce Power," and "Protection of Other Interests [including Civil Rights and the Environment] Through the Commerce Clause"); Stern, *supra* note 66 (distinguishing economic regulations upheld during the New Deal from more recent attempts to federalize state crime).

86. See *United States v. Lopez*, 2 F.3d 1342, 1347 (5th Cir. 1993) ("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, or other federalizing feature, in individual cases."), *aff'd*, 115 S. Ct. 1624 (1995); 2 F.3d at 1348-60 (describing statutes).

87. 115 S. Ct. at 1626; see also 2 F.3d at 1631 (noting that the Act "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce").

88. A gun obtained out of state poses at least the possibility that it was supplied by an interstate gang or interstate drug dealers. A statute encompassing all guns that have crossed state lines would be overinclusive from this point of view; it would include many instances of schoolyard possession that local authorities could prosecute with ease. Congress, however, should not have to regulate with pinpoint precision under the Commerce Clause; the Court allowed Congress to punish all loansharking, even though some loansharking is not tied to organized crime. See *United States v. Perez*, 402 U.S. 146, 154-57 (1971); see also *infra* note 118 and accompanying text. For further discussion of when federal prosecution of crimes is most essential, see *infra* note 121 and accompanying text.



*Lopez* decision, both senators and representatives introduced bills to amend the Gun-Free School Zones Act by adding a jurisdictional element to the statute.<sup>89</sup> The new bills would limit punishment to individuals who "possess a firearm that has moved in or that otherwise affects interstate or foreign commerce," when that firearm is brought within a school zone.<sup>90</sup>

It is unclear whether a jurisdictional element alone or a jurisdictional element combined with more explicit congressional findings will resurrect the constitutionality of the Gun-Free School Zones Act. There is no doubt, however, that omission of a jurisdictional element was an important factor in the statute's demise.

### 3. *Lack of Express Findings or Legislative History*

When the Fifth Circuit struck down the Gun-Free School Zones Act, it rested heavily on Congress's failure to compile evidence or make express findings linking gun possession near schools with interstate commerce.<sup>91</sup> Indeed, the court of appeals hinted that it would uphold the constitutionality of the statute if Congress made appropriate findings or compiled a more extensive record.<sup>92</sup>

The Supreme Court's treatment of this factor was more ambivalent, perhaps because Congress had amended the statute after the Fifth Circuit's decision, inserting some findings linking the regulated conduct to interstate commerce.<sup>93</sup> On the one hand, the Court affirmed previous rulings that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."<sup>94</sup> On the other hand, the majority noted that "congressional findings 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>95</sup> In *Lopez*, not

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89. See Gun-Free School Zones Act of 1995, S. 890, 104th Cong., 1st Sess. (1995); H.R. 1608, 104th Cong., 1st Sess. (1995); see also President Clinton's Message to Congress Transmitting the Gun-Free School Zones Amendments Act of 1995, 31 WEEKLY COMP. PRES. DOC. 809 (May 10, 1995).

90. S. 890, 104th Cong., 1st Sess. § 2 (1995); H.R. 1608, 104th Cong., 1st Sess. § 1 (1995). The Senate bill also contains extensive findings on the connection between gun-free school zones and interstate commerce. See S. 890, 104th Cong., 1st Sess. § 2 (1995).

91. See *Lopez*, 2 F.3d at 1362-68.

92. 2 F.3d at 1368 ("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 [the Gun-Free School Zones Act] within the Commerce Clause.").

93. See *United States v. Lopez*, 115 S. Ct. 1624, 1632 n.4 (1995).

94. 115 S. Ct. at 1632; see also *Perez v. United States*, 402 U.S. 146, 156 (1971).

95. 115 S. Ct. at 1632.

even legislative history revealed the link Congress perceived between gun-free school zones and interstate commerce.<sup>96</sup>

Although the Supreme Court refused to require congressional findings or a legislative history as a prerequisite to sustaining a statute under the Commerce Clause, the lack of congressional attention undoubtedly contributed to the Court's decision. At the very least, express findings or relevant legislative history would have made the rationale for federal involvement immediately apparent to all judges hearing the case. Congress's silence forced the Government attorneys on the defensive, scrambling for arguments justifying the federal statute, while the defendant's attorneys scored points deriding the lack of federal interest in school gymnasiums and cafeterias.

The absence of findings or a legislative history also upset the careful minuet the Court and Congress had danced around the Commerce Clause during the past sixty years. Congress had drawn an ever-widening circle around activities that it found affected commerce, and the Court had bowed to each of those steps. The dance, however, depended on Congress taking its role seriously and demonstrating that each of these activities did in fact affect commerce. When Congress missed its step, barely seeming to notice the need for some nexus with interstate commerce, it almost seemed to taunt the Court — daring the Justices to find that the Commerce Clause was a completely dead letter. Instead, five Justices withdrew from the dance.

#### 4. *Regulation of Education*

The Government's strongest argument in support of the Gun-Free School Zones Act was its claim that guns hamper education and that an educated citizenry is essential to a healthy economy. As Justice Breyer's dissent so eloquently shows, both premises of this argument are true. One in five urban high school students has

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96. The only legislative history in *Lopez* was negative: two witnesses at the House hearings remarked that "the source of constitutional authority to enact the legislation is not manifest on the face of the bill." *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., 1st Sess. 10 (1990) (statement of Richard Cook, Chief, Firearms Division, Bureau of Alcohol, Tobacco, and Firearms, U.S. Department of the Treasury, and Bradley Buckles, Deputy Chief Counsel). The bill's sponsors, however, never responded to this question. See *Lopez*, 2 F.3d at 1360.

Previous Supreme Court cases look to legislative history, as well as to express findings, to discern links between congressional regulation and interstate commerce. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 299-301 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 252-53 (1964).

been threatened with a gun, and more than one in ten have actually been targets of gunfire.<sup>97</sup> This violence both impairs learning and increases dropout rates.<sup>98</sup>

These arguments, however, troubled the majority because they implied that Congress could regulate almost any aspect of education, a field "where States historically have been sovereign."<sup>99</sup> With some horror, the majority noted that acceptance of the Government's argument could empower Congress to "mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant 'effect on classroom learning,' and that, in turn, has a substantial effect on interstate commerce."<sup>100</sup> The five Justices comprising the majority clearly were not ready to countenance this possibility.<sup>101</sup>

Justices Kennedy and O'Connor, concurring in the judgment, displayed even more concern for Congress's intrusion into local control of education. These Justices suggested that when Congress attempts to push the Commerce Clause to its furthest reach, "then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern."<sup>102</sup> Justices Kennedy and O'Connor also stressed that "it is well established that education is a traditional concern of the States"<sup>103</sup> and that education is "an area to which States lay claim by right of history and expertise."<sup>104</sup> Under such circumstances, the concurring

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97. See 115 S. Ct. at 1659 (Breyer, J., dissenting) (citing Joseph F. Sheley et al., *Gun-Related Violence in and Around Inner-City Schools*, 146 AM. J. DISEASES IN CHILDREN 677, 679 (1992)).

98. See 115 S. Ct. at 1659. *But see infra* note 122 (raising some question about the extent of a national crisis involving guns in schools).

99. 115 S. Ct. at 1632.

100. 115 S. Ct. at 1633 (citation omitted).

101. Curiously, Congress might be able to justify a national curriculum more readily than it could defend the Gun-Free School Zones Act. *Cf. infra* note 152 and accompanying text (discussing congressional power to set licensing standards for teachers). Most federal regulation of education, moreover, rests on Congress's spending power. See Susan H. Fuhrman, *Clinton's Education Policy and Intergovernmental Relations in the 1990s*, PUBLIUS, Summer 1994, at 83; Richard W. Riley, *Redefining the Federal Role in Education: Toward a Framework for Higher Standards, Improved Schools, Broader Opportunities and New Responsibilities for All*, 23 J.L. & EDUC. 295 (1994). If Congress continues to support elementary and secondary education with sizable financial grants, it probably could prescribe curricular requirements for those schools. *Cf. South Dakota v. Dole*, 483 U.S. 203 (1987) (construing generously congressional power to attach conditions to grants). The Court's concern over congressional power to regulate education under the Commerce Clause, therefore, was somewhat antiquated.

102. 115 S. Ct. at 1640 (Kennedy, J., concurring).

103. 115 S. Ct. at 1640 (Kennedy, J., concurring).

104. 115 S. Ct. at 1641 (Kennedy, J., concurring).

Justices concluded, the Court has "a particular duty to insure that the federal-state balance is not destroyed."<sup>105</sup>

Despite this vigorous language, *Lopez* did not outlaw all congressional attempts to regulate education under the Commerce Clause. Indeed, the majority affirmed that "Congress has authority under the Commerce Clause to regulate numerous commercial activities that . . . affect the educational process."<sup>106</sup> As explained above, moreover, the Court may have been more concerned with the style of the Government's arguments than with Congress's attempt to regulate a matter touching education.<sup>107</sup> The statute's link to education nonetheless was an important factor for the majority — especially for Justices Kennedy and O'Connor.

### 5. *Gun Control and Private Property*

The Fifth Circuit observed that the Second Amendment might "be something of a brooding omnipresence" in *Lopez*'s attack on the Gun-Free School Zones Act.<sup>108</sup> *Lopez* did not challenge the statute under the Second Amendment, and the Supreme Court did not intimate any Second Amendment concerns about the Act's scope.<sup>109</sup> The statute's focus on gun possession, however, may have affected the Court's decision in several other ways.

First, gun-control statutes continue to provoke great controversy in our country. No one defends gun possession on school grounds, but the Gun-Free School Zones Act touched on a wider class of behavior that some citizens defend zealously. The statute's literal scope, moreover, included some forms of gun possession that posed little, if any, threat to school children.<sup>110</sup> It is unlikely that any U.S. Attorney would have prosecuted a citizen who walked past a school at night with a gun in a briefcase for self defense, but

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105. 115 S. Ct. at 1640 (Kennedy, J., concurring).

106. 115 S. Ct. at 1633.

107. See *supra* notes 63-65 and accompanying text.

108. See *United States v. Lopez*, 2 F.3d 1342, 1364 n.46 (5th Cir. 1993), *aff'd.*, 115 S. Ct. 1624 (1995).

109. *Lopez*'s attorneys, however, did note in their brief that "Second Amendment considerations are not insubstantial." Brief for Respondent, *supra* note 74, at 31 n.31; see also Amicus Brief on Behalf of Academics for the Second Amendment, *United States v. Lopez*, 115 S. Ct. 1624 (1995) (No. 93-1260) (arguing that the Second Amendment protects various types of private gun ownership but that *Lopez* did not fall within the Amendment's protections).

110. See *supra* notes 73-74 and accompanying text.

the fact that the statute embraced this type of behavior may have made the Court more suspicious of the statute's scope.<sup>111</sup>

Second, the nation's resistance to broader forms of gun control meant that Congress was forced to prohibit possession on school grounds of an article that is legally bought, sold, and used in other contexts. The distinction is defensible on policy grounds because gun possession in schools causes evils that gun possession in other contexts may not cause. The legality of gun possession outside school zones, however, robbed Congress of most legitimate techniques for tying the statute to interstate commerce. Most important, Congress could not prohibit possession of guns in schoolyards as a way of enforcing a broader prohibition on interstate gun sales — for the simple reason that Congress had not forbidden the latter.<sup>112</sup>

Finally, gun control is sharply contested in our society partly because guns are strongly associated with private property rights. Guns are both a form of personal property and a means of protecting other real and personal property. From the farmer standing guard with a shotgun, to the urban homeowner with a handgun in the bedside table, images of gun ownership are strongly linked to property rights in America. Just as *Lopez* touched the hot button of gun control, it touched the nerve of private property.

The Supreme Court long ago conceded that Congress may regulate privately owned possessions that move in interstate commerce, as well as a host of other property rights. With the Gun-Free School Zones Act, however, Congress evoked the notions of private property implicit in the gun-control debate. Rhetoric in some lower court opinions explicitly opposed the Gun-Free School Zones Act as contrary to the rights of private homeowners.<sup>113</sup> The *Lopez*

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111. Cf. *Staples v. United States*, 114 S. Ct. 1793, 1799 (1994) (reading a mens rea requirement into a statute prohibiting the possession of an unregistered, automatic firearm because "there is a long tradition of widespread lawful gun ownership by private individuals in this country").

112. This fact readily distinguishes the Gun-Free School Zones Act from both the Drug-Free School Zones Act, 21 U.S.C. § 860 (1994), and the federal prohibition on possession of machineguns, 18 U.S.C. § 922(o)(1) (1994). With minor exceptions, Congress has forbidden *all* sales and possessions of the latter items. See *infra* notes 157-65, 186-95 and accompanying text. The Fifth Circuit noted this important feature of the Gun-Free School Zones Act in its *Lopez* opinion: "The . . . proscription [of narcotics possession] was a necessary means to regulate the interstate commercial trafficking in narcotics. There is nothing analogous in the present case. . . . [T]here has been no general outlawing of the possession of ordinary firearms by ordinary citizens." *Lopez*, 2 F.3d at 1367 n.51.

113. See, e.g., 2 F.3d at 1346 n.4 (noting that the Act "makes it a federal offense to carry an unloaded firearm in an unlocked suitcase on a public sidewalk in front of one's residence"). One district court, writing shortly after the Fifth Circuit's decision, gave the following hypothetical:

majority, as well, may have been influenced by the concepts of private property, home ownership, and the right to do as one pleases while close to home — all of which reverberated from the gun-control debate.<sup>114</sup>

## 6. *Lack of National Necessity*

In each of the earlier cases endorsing a broad construction of the Commerce Clause, the Supreme Court was persuaded that an urgent national need justified Congress's action. The National Labor Relations Act responded to profound worker dissatisfaction and a series of violent strikes.<sup>115</sup> The Civil Rights Act of 1964 addressed a history of racial discrimination that had become endemic and that many states refused to end.<sup>116</sup> The price supports that stymied farmer Filburn were a part of economic controls designed

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If a backwoodsman had lived in his rustic retreat for 50 years, his trusty hunting rifle hanging over the fireplace the entire time, and suburbia encroaches, creating enough student population to justify the construction of a private grammar school in the deep woods next door to him, he would have to choose among (1) getting rid of his rifle, (2) moving, or (3) going to jail.

United States v. Morrow, 834 F. Supp. 364, 366 (N.D. Ala. 1993). The latter example is particularly remarkable because the Gun-Free School Zones Act did not actually create this dilemma for backwoodsmen; the Act exempted guns possessed on private property, even if the property fell within 1000 feet of a school. See 18 U.S.C. § 922(q)(2)(B)(i) (1994). The link between gun ownership and private property was so intense, however, that these examples persisted despite the Act's express exemption of possession on private property.

114. Cf. Robert C. Post, *Chief Justice William Howard Taft and the Concept of Federalism*, 9 CONST. COMMENTARY 199, 220-21 (1992) (arguing that Justice Taft enforced limits on federal power when he perceived them as infringing ordinary private property rights).

115. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 23 n.2 (1937) ("The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest." (quoting § 1 of the Act)); 301 U.S. at 41 ("[T]he stoppage of [respondent's] operations by industrial strife would have a most serious effect upon interstate commerce. . . . It is obvious that it would be immediate and might be catastrophic."); 301 U.S. at 42 ("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."); 301 U.S. at 43 ("The Government aptly refers to the steel strike of 1919-1920 with its far-reaching consequences."); see also Epstein, *supra* note 67, at 1447 (noting that Court upheld the National Labor Relations Act because "Congress and the NLRB believed that industry-wide unionizations could not succeed without federal assistance, and the Court accepted this belief"); Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 681 (1946).

116. In *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), the Court observed that discrimination against African Americans in hotel accommodations

had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself "dramatic testimony to the difficulties" Negroes encounter in travel. . . . We shall not burden this opinion with further details since the voluminous testimony [before Congress] presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel.

379 U.S. at 253 (citation omitted); see also *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964) ("[T]here was an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes."); 379 U.S. at 305 (Congress found this to be "a national commercial problem of the first magnitude.").

to pull the country out of the Depression.<sup>117</sup> Federal regulation of loan sharking and other organized crime activities rested on the common perception that organized crime empires were too far-flung for state law to handle, especially because some state and local officers were themselves on organized crime payrolls.<sup>118</sup> In each of these cases, federal regulation addressed a problem that not only was important but that could not be or was not being addressed by the states.

*Lopez* lacked this aura of national urgency. Most states, including Texas, already outlawed the possession of guns on school premises.<sup>119</sup> Indeed, Texas had prohibited gun possession on school property for more than a century.<sup>120</sup> Congress made no findings, and the Government made no argument in *Lopez*, that state and

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117. The Court described the agricultural crisis in these terms:

The wheat industry has been a problem industry for some years. . . . The decline in the export trade has left a large surplus in production which . . . caused congestion in a number of markets; tied up railroad cars; and caused elevators in some instances to turn away grains, and railroads to institute embargoes to prevent further congestion. . . . In the absence of regulation, the price of wheat in the United States would be much affected by world conditions.

Wickard v. Filburn, 317 U.S. 111, 125-26 (1942); see also 317 U.S. at 125-26 (noting that the four countries exporting the most wheat had all found it necessary to institute controls protecting domestic prices); Stern, *supra* note 115, at 685-86 (describing agricultural problems during the Depression and congressional attempts to overcome them); Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946, Part Two*, 59 HARV. L. REV. 883, 901-07 (1946) (describing the history of wheat regulation and *Wickard v. Filburn* specifically).

118. See *Perez v. United States*, 402 U.S. 146 (1971) ("Organized crime operates on a national scale. One of the principal sources of revenue of organized crime comes from loan sharking. If we are to win the battle against organized crime we must strike at their source of revenue. . . . The problem simply cannot be solved by the States alone." (quoting 114 CONG. REC. 14,490 (1968))); 402 U.S. at 157 ("[L]oan 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."); Patricia A. Hair, Note, *Commerce Clause—National Police Power Justified by Economic Impact of Organized Crime*, 46 TUL. L. REV. 829, 836 (1972) ("[T]he scope of organized crime has broadened across state lines, making purely local apprehension impossible.").

Robert Stern has pointed out that *Perez* is broader than *Wickard*, *Heart of Atlanta*, or *Katzenbach* because some loan sharks prosecuted under the federal statute have no connection with organized crime or interstate commerce. See Stern, *supra* note 66, at 277-78. Stern suggests, however, that the difficulty of proving an interstate connection in each case — and the perceived national need to regulate loansharking connected to organized crime — may have justified the sweeping regulation upheld in *Perez*. The strength of the national evil, in other words, justified federal regulation of a "well-defined but possibly overinclusive class" to insure that federal prosecutors could pursue all loansharks connected to organized crime. *Id.* at 279.

119. An amicus brief submitted by the National Conference of State Legislatures and several other amici listed laws from 43 states that established gun-free school zones or prohibited gun possession on school property. See Amicus Brief of the National Conference of State Legislatures at app. 1a-2a, *United States v. Lopez*, 115 S. Ct. 1624 (1995) (No. 93-1260); see also Charles J. Russo, *United States v. Lopez and the Demise of the Gun-Free School Zones Act: Legislative Over-Reaching or Judicial Nit-Picking?*, 99 EDUC. L. REP. 11, 22 & n.70 (1995).

120. See *supra* note 76.

local officials were unable to enforce these laws. There was no evidence of widespread corruption of officials entrusted with prosecuting school regulations; nor was there any evidence that the possession of guns in schools ordinarily was linked with sweeping, multistate crime empires.<sup>121</sup> The Government's brief contained compelling evidence that guns create problems in schools but no evidence that this problem was beyond the reach of state and local law enforcement.<sup>122</sup>

Even the education community divided over the constitutionality of the Gun-Free School Zones Act. Most educational organizations submitted amicus briefs supporting the federal regulation,<sup>123</sup>

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121. Two bits of testimony before the House Judiciary Subcommittee provided slim evidence of links between guns on school grounds and either interstate gangs or the drug trade. The Cleveland, Ohio, Police Chief testified: "We have identified gang members coming from Los Angeles, Chicago, Detroit, and other areas around the country, coming into the Cleveland area and trying to organize our gangs. . . . We have reason to believe that they are also supplying them with weapons." *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., 1st Sess. 25 (1990) (statement of Edward Kovacic). Similarly, an official from the Bureau of Alcohol, Tobacco, and Firearms described an operation against drug dealers near elementary and secondary schools in Detroit, Michigan. As part of the operation, law enforcement officers seized almost two dozen guns. *Id.* at 14-15. Congress, however, did not explore either of these references further, and the Government did not cite these pieces of testimony in its *Lopez* brief. Nor did the Government's argument in *Lopez* otherwise stress any connection between guns on school grounds and either interstate gangs, interstate drug trafficking, or organized crime.

For a description of factors justifying federal prosecution of local crimes, see Mengler, *supra* note 72, at 526. Dean Mengler, who has served as a consultant to the Long Range Planning Committee of the Judicial Conference of the United States, lists these circumstances justifying federal prosecution: (1) "state enforcement is impeded by the multistate or international aspects of the case"; (2) "[t]he conduct is so economically or technologically sophisticated that it takes the concentrated resources of the federal government to prosecute effectively"; (3) "[t]he conduct involves serious, high-level or widespread state or local government corruption"; or (4) "[t]he conduct, because it raises highly sensitive social (typically racial) issues in the local community, is perceived as being more objectively prosecuted in the federal system." *Id.* None of these factors appears to describe gun possession on school grounds. As Mengler recognizes, Congress undoubtedly has the power to regulate crimes falling outside these guidelines. These factors, however, serve to describe cases in which the courts might perceive a strong federal need to criminalize conduct. The lack of that urgency in *Lopez* was one of the factors contributing to the majority's decision.

122. Although any threat of violence to schoolchildren is a dire social issue demanding attention, there is also some question about the scope of the problem Congress addressed. As *Lopez*'s attorneys pointed out in their brief, the evidence before Congress was "tragic" but fell short of establishing a national crisis. Over half the school gun incidents reported to Congress involved only six states, and many of the students who habitually carried weapons to school carried weapons other than firearms. See Brief for Respondent, *supra* note 74, at 44. Most of the dramatic incidents of gun violence recounted to Congress, moreover, involved outsiders who entered school property and opened fire suddenly on the children. None of these incidents would have been prevented or the punishment for them enhanced through the Gun-Free School Zones Act.

123. The education-related organizations or individuals who joined amicus briefs in support of the Gun-Free School Zones Act included the American Federation of Teachers, National Association of Elementary School Principals, National Education Association, National PTA, Council of Great City Schools, National School Safety Center, American As-



but the National School Boards Association — representing approximately 97,000 school board members — joined a brief opposing the federal law. The National School Boards Association confessed that it was “deeply concerned about violence and crime in and around the schools” but complained that “redundant federal laws do not address the problem of violence in the schools.”<sup>124</sup> Drawing upon its own experience, the Board and other amici contended that “enactments such as the Gun-Free School Zones Act interject federal officials into longstanding and close working relationships which exist between local school administrators, police and prosecutors.”<sup>125</sup> These amici also noted that the federal government lacked “the resources and commitment to prosecute” cases involving gun possession in schools, so that the federal law induced a false sense of “complacency in the citizenry.”<sup>126</sup>

The *Lopez* majority, like the dissenters, undoubtedly perceived that gun possession on school grounds is a serious problem. The Government’s failure to identify an urgent *national* need to combat that problem, however, contributed to the majority’s rejection of congressional power.<sup>127</sup>

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sociation of School Administrators, National Association of Secondary School Principals, National Association of School Resource Officers, National Association of School Safety and Law Enforcement Officers, and Dr. Stuart Gothold (Superintendent of the Los Angeles County Schools).

124. Amicus Brief of National Conference of State Legislatures, *supra* note 119, at 2.

125. *Id.* at 26-27.

126. *Id.* at 27. August W. Steinhilber, General Counsel of the National School Boards Association, praised the *Lopez* decision after it was issued. See Mark Walsh, *Justices Reject Ban on Guns Near Schools*, EDUC. WEEK, May 3, 1995, at 1, 24 (quoting Steinhilber as saying “[w]e couldn’t have asked for a better opinion [than *Lopez*] in terms of corralling Congress in. Too often, members of Congress pass this feel-good legislation that has no real impact”). Other education groups, however, remained supportive of the federal law and criticized the Court’s ruling. See, e.g., *id.* (quoting both the Executive Director of the Council of the Great City Schools and the Vice President of the National Education Association); *Court’s Ruling on Gun-Free School Zones Harms Safe Schools Effort*, *Unions Say*, 33 Govt. Empl. Rel. Rep. (BNA) 614 (May 1, 1995) (Both Bob Chase, Vice President of the National Education Association, and Albert Shanker, President of the American Federation of Teachers, “expressed disappointment” in the *Lopez* ruling.).

127. President Clinton and Attorney General Reno continue to maintain that national protection of gun-free school zones is essential. See John M. Broder, *President Blasts Ruling on Firearms*, L.A. TIMES, Apr. 30, 1995, at A14; *Senate Judiciary Hearing*, FED. NEWS SERV., June 27, 1995, available in LEXIS, News Library, CURNWS File. (testimony of Attorney General Janet Reno). The administration has also introduced a new version of the Gun-Free School Zones Act designed to meet the Court’s constitutional objections in *Lopez*. See *supra* note 89. The brief statements issued by the President and Attorney General, however, continue to focus on the dangers of guns in schools rather than on the special need for federal regulation in this area.

### 7. Positive and Negative Competition Among the States

The need for national regulation is particularly strong when competition among the states prevents each state from addressing the problem in isolation. Individual states cannot regulate effectively wages and hours, the Court recognized in *United States v. Darby*, because competition from goods produced in more business-friendly states will drive the regulated businesses to ruin.<sup>128</sup> Imposition of collective bargaining by a single state similarly will encourage businesses to move to another state. The infamous "race to the bottom" inhibits many types of social and economic legislation in individual states.<sup>129</sup>

Scholars, however, have recognized that competitive pressures also encourage states to *improve* some types of services. States compete for families, businesses, and tourists by offering modern transportation networks, effective police forces, and other amenities.<sup>130</sup> Some evidence suggests that high-quality schools are particularly important in drawing high-income families and high-tech industries to a region.<sup>131</sup> States also compete by offering progressive regulations that appeal to some segments of the citizenry. Residents have flocked to some western states that use aggressive measures to protect the environment — despite the fact that these laws impose significant costs on business and taxpayers.<sup>132</sup>

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128. See *United States v. Darby*, 312 U.S. 100, 122 (1941). Similarly, in *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937), the Court observed:

With accepted competition between the industry's enterprises an accepted fact regardless of location, and bearing in mind the purpose and effect of the migration of enterprises, it seems unavoidable that the members of the Amalgamated Clothing Workers should . . . regard the industry as one . . . in which union conditions, to be maintained at all, must prevail generally.

301 U.S. at 59.

129. Professor William Cary coined the phrase "race to the bottom" in his discussion of effective corporate regulation. See William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 705 (1974).

130. See John Shannon, *Federalism's "Invisible Regulator"—Interjurisdictional Competition, in COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM* 117 (Daphne S. Kenyon & John Kincaid eds., 1991).

131. See *id.* In particular, Shannon cites the success of North Carolina in building its economy through heavy investment in education; the recent willingness of other southern states to raise taxes in order to improve their public schools and attract more residents; and the fact that "[t]he first-rate school systems of Montgomery County, Maryland, and Fairfax County, Virginia, are widely believed to be the magnets that help attract upper-income taxpayers and high-tech employers to their jurisdictions." *Id.* at 121.

132. See Ray M. Broughton, *Electronics Manufacturing: Oregon's Newest Growth Industry*, AM. BANKER, July 25, 1979, at 54 (describing Oregon's environmental standards as "stringent" and noting that the state's population grew twice as fast as that of the United States during the 1970s); Michael Satchell, *The West's Last Range War: How Much of Southern Utah Should Be Set Aside as Wilderness?*, U.S. NEWS & WORLD REP., Sept. 18, 1995, at 54, 55 (City-dwellers have "flock[ed]" to the mountain states and supported strict environmental laws to "protect the open spaces that attracted them."). For possible competition

When states compete by withholding services or legislative protections, and citizens would choose those protections in the absence of competition, federal regulation makes sense. When states compete to *offer* services and laws, however, federal intervention is redundant. Gun-free school zones fall into the second, rather than the first, of these categories. Both families and businesses will be attracted to states with safe, nonviolent schools; few residents would flee a state that adopted gun-free school zones. Although the Court did not explicitly acknowledge this factor in *Lopez*, it may have been influenced by a rationale opposite from the one motivating *Darby*: states not only regulate gun possession in schools, but they have every incentive to continue that regulation.

### 8. *The Federalization of Criminal Law*

The *Lopez* majority stressed that criminal law, like education, is a matter traditionally left to the states.<sup>133</sup> The intersection of two areas traditionally committed to state regulation may have made the Court particularly reluctant to uphold the Gun-Free School Zones Act. In addition to these federalism concerns, the *Lopez* majority may have been influenced by a more prosaic concern for the alarming growth in the criminal caseload of the federal courts. Since 1980, the annual number of federal criminal cases has expanded by more than fifty percent.<sup>134</sup> Criminal cases now account for almost one-half of all federal trials,<sup>135</sup> and, in some districts, criminal trials swamp civil ones. The federal courts of Southern California, for example, heard six criminal trials for every civil one during 1991.<sup>136</sup>

This ominous growth in the criminal docket has led to both formal and informal expressions of judicial concern. Almost ten years ago, Judge Roger Miner warned that with the escalating creation of new federal crimes, "we have the makings of a glut that threatens to

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among states over a different matter, see Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745 (1995) (suggesting how states may compete to become the first to recognize same-sex marriages, with a prize of over four billion dollars in revenue likely to flow to the first state).

133. See *United States v. Lopez*, 115 S. Ct. 1624, 1631 n.3 (1995); see also 115 S. Ct. at 1632 ("[A]reas such as criminal law enforcement or education [are ones] where States historically have been sovereign.").

134. In 1980, there were 27,968 federal criminal cases. By 1994, that number had grown to 44,919. See Mengler, *supra* note 72, at 505.

135. The percentage of criminal trials has reached 47% nationwide. See *id.* at 506.

136. See *id.* at 506 n.23 (noting that 86% of that district's trials were devoted to criminal matters). The Middle District of North Carolina (84.8%), District of New Mexico (76.4%), and District of Arizona (74.4%) also recorded remarkably high percentages of criminal trials. See *id.*

overwhelm the federal courts."<sup>137</sup> In 1990, a Federal Courts Study Committee cautioned that "the long-term health of the federal judicial system require[s] returning the federal courts to their proper, limited role in dealing with crime."<sup>138</sup> And Judge Thomas Wiseman recently reported:

At every meeting of federal judges that I attend there is the complaint that the Congress is broadening federal jurisdiction to the point where we are unable to do our jobs. The historically unique and discrete jurisdiction of the Federal Courts is being distorted. The constant lament is that the constitutional concept of Federalism is being eviscerated by the Congress.<sup>139</sup>

The expansion of federal crime control has created problems beyond the fatigue of overworked federal judges. Overlapping state and federal offenses give federal prosecutors unfettered power to decide which defendants will be prosecuted under federal law and which will be left to state law.<sup>140</sup> Penalties may differ substantially under the two codes; procedural rights for the defendant may also vary — with state courts sometimes offering protections that exceed those guaranteed by the Federal Constitution.<sup>141</sup> As one district judge has commented, this unfettered discretion to subject defendants to different criminal regimes is the type of abuse the Framers most feared in a central government with broad police power.<sup>142</sup>

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137. Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POLY. 117, 118 (1987); see also HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 58 (1973) ("The question whether federal criminal prosecutions have not greatly outreached any true federal interest . . . deserves the most serious examination, particularly in light of the tremendous increases in criminal filings.").

138. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 35-37 (1990).

139. *United States v. Cortner*, 834 F. Supp. 242, 244 (M.D. Tenn. 1993), *revd. sub nom. United States v. Osteen*, 30 F.3d 135 (6th Cir. 1994); see also *United States v. Morrow*, 834 F. Supp. 364, 365 (N.D. Ala. 1993) (referring to the "overworked federal courts upon which Congress thrusts the enforcement of an accelerating volume of federal crime fighting statutes").

140. See *United States v. Mallory*, 884 F. Supp. 496, 498 (S.D. Fla. 1995) ("[N]othing prevents a federal prosecutor from selectively overriding the state law for reasons that may be purely arbitrary" or that may reflect a "disdain for the zeal or competence of state prosecutors."); *United States v. Ornelas*, 841 F. Supp. 1087, 1093 n.11 (D. Colo. 1994), *revd.*, 56 F.3d 78 (10th Cir. 1995). *But cf.* *United States v. Williams*, 51 F.3d 1004 (11th Cir.) (disapproving the result in *Mallory*), *cert. denied*, 116 S. Ct. 258 (1995). Enforcement of federal statutes also varies from one part of the country to another. See Robert Chippendale, Note, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, 468 (1994).

141. See Amicus Brief of National Conference of State Legislatures, *supra* note 119, at 29-30; BARRY LATZER, *STATE CONSTITUTIONS AND CRIMINAL JUSTICE* (1991); William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

142. See *Ornelas*, 841 F. Supp. at 1093 n.11. For other criticisms of the growth of federal criminal law, see William Van Alstyne, *Dual Sovereignty, Federalism and National Criminal*

Equally troubling, duplicate state and federal crimes give prosecutors two chances to convict each defendant. Under the "dual sovereignty" doctrine, the Double Jeopardy Clause fails to protect defendants against successive state and federal prosecutions.<sup>143</sup> By duplicating so many traditional state crimes, Congress has aggravated this potential for abuse.

The Gun-Free School Zones Act thus touched another sensitive point. The Supreme Court, like the lower courts, may have been concerned about the dragging weight of criminal cases on the federal docket. Some Justices may also have been aware of the possibilities for abuse inherent in duplicate state and federal crimes. Without any urgent need for a federal prohibition against gun possession near schools, the Court may have been content to strike this addition to federal caseloads.<sup>144</sup>

### 9. *Conduct Outside the Workplace*

The Court's distinction between commercial and noncommercial activity, as well as its rejection of the Government's link between education and economic health, may rest on a perception that the workplace is more closely tied than other locales to interstate commerce. The Court has never explicitly recognized this distinction, but its most far-reaching commerce cases involve congressional regulation of the workplace. Filburn's farm was his workplace; he regularly sold some of his wheat, as well as milk,

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Law: *Modernist Constitutional Doctrine and the Nonrole of the Supreme Court*, 26 AM. CRIM. L. REV. 1740, 1753 (1989); and Chippendale, *supra* note 140, at 467-71.

143. See *Bartkus v. Illinois*, 359 U.S. 121 (1959); *United States v. Lanza*, 260 U.S. 377 (1922); Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159 (1995).

144. As Judge Wiseman noted after lamenting the growing scope of federal criminal jurisdiction, "The Congress is able [to expand jurisdiction in this manner], however, only because we in the judicial branch are willing to interpret the Commerce Clause of the Constitution so broadly." *United States v. Cortner*, 834 F. Supp. 242, 244 (M.D. Tenn. 1993); see also Ira Mickenberg, *Court Settles on Narrower View of 4th Amendment*, NAT'L L.J., July 31, 1995, at C8, C12 (stating that *Lopez* may constitute "a message to Congress expressing the court's displeasure with legislation that will increase federal caseloads while adding nothing to existing state criminal law").

poultry, and eggs.<sup>145</sup> Even *Perez v. United States*<sup>146</sup> upheld federal regulation of the illicit workplaces of organized crime.

The *Lopez* dissenters argued briefly that schools *are* workplaces and wondered why Congress could not regulate an industry that spends more than \$200 billion each year.<sup>147</sup> The Government, however, did not defend the Gun-Free School Zones Act on this ground, and the *Lopez* majority ignored the dissent's brief argument on this point. Instead, the Government and Court viewed schools as training grounds one step removed from the world of work. This characterization helped persuade the *Lopez* majority that gun-free school zones fell outside Congress's commerce power.<sup>148</sup>

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145. Most accounts of *Wickard v. Filburn*, 317 U.S. 111 (1942), suggest that Filburn grew his wheat purely for home consumption. In fact, his practice was "to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding." 317 U.S. at 114. The record did not reveal the "intended disposition of the crop . . . involved," 317 U.S. at 114, so the Court assumed that at least some of the crop would be consumed by Filburn's family and livestock. Filburn, however, plainly was a commercial farmer. See also *infra* notes 313-19 and accompanying text (discussing the limiting features of *Wickard*).

146. 402 U.S. 146, 155 (1971) ("[L]oan sharking was 'the second largest source of revenue for organized crime' . . . and is one way by which the underworld obtains control of legitimate businesses." (citations omitted) (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, CRIME IN A FREE SOCIETY 189 (1967))). The Court in *Perez* further observed that:

the loan shark racket is controlled by organized criminal syndicates, either directly or in partnership with independent operators . . . in most instances the racket is organized into three echelons, with the top underworld 'bosses' providing the money to their principal 'lieutenants,' who in turn distribute the money to the 'operators' who make the actual individual loans.

402 U.S. at 155-56; see also *Hair, supra* note 118, at 834 ("Although the Extortionate Credit Transactions Act sets out criminal penalties, its economic theme so predominates that the Act is in reality another congressional measure to regulate an interstate business—the unique business of organized crime.").

For other examples of decisions upholding workplace regulation, see *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264 (1981) (regulation of strip mining companies); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (discrimination by restaurant operators and employees); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (discrimination by hotel operators and employees); *United States v. Darby*, 312 U.S. 100 (1941) (wages and hours of employees); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (collective bargaining in the workplace).

147. See *United States v. Lopez*, 115 S. Ct. 1624, 1664 (1995) (Breyer, J., dissenting).

148. Even when regulating the workplace, Congress has been more likely to control employers and employees than to attempt regulation of customers, like students, or casual visitors, like those who might run afoul of the Gun-Free School Zones Act. *Perez* sustained punishment of the loan shark, not of his victim; *Heart of Atlanta* and *McClung* approved restrictions on hotel and restaurant operators, not on customers; and *Filburn* paid for his deeds as a producer, not as a consumer. The Supreme Court, however, long ago upheld federal punishment of criminals who rob or extort interstate businesses. See *United States v. Green*, 350 U.S. 415 (1956) (discussing the Hobbs Act, discussed *infra* notes 166-79 and accompanying text). Finally, just last Term, the Court enforced a federal arbitration law against the customer of a local business. See *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834 (1995), discussed *infra* notes 268-75 and accompanying text.

The Court, of course, has approved some exercises of congressional power that are not confined to the workplace. Congress may prohibit individuals from transporting alcoholic beverages, diseased livestock, and other articles in interstate commerce; the Court has upheld these prohibitions even as applied to purchasers or consumers.<sup>149</sup> The Court has also sustained punishment of convicted felons who acquire guns that have previously moved in interstate commerce.<sup>150</sup> Extending regulation beyond the conduct of employers and employees in the workplace, however, may raise constitutional questions when other connections to interstate commerce are weak.<sup>151</sup>

Conversely, the Supreme Court might be more willing to accept the Government's most expansive theories for congressional regulation if those theories are linked to employers and employees. Congress, for example, might set national licensing standards for teachers on the ground that well-trained teachers are essential for proper education and that effective education is necessary to feed a strong economy. The structure of the argument would be the same

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If the Government had characterized more aggressively schools as workplaces, it might have convinced the Court to uphold the Gun-Free School Zones Act by analogy to the Hobbs Act. The lower courts routinely have applied the latter Act to the robbery or extortion of any business making purchases or sales in interstate commerce. See *infra* note 171. Schools indisputably purchase supplies from other states and exert other economic effects on interstate commerce, so the Government could have argued that guns — like robbery or extortion — interfere with businesses operating in interstate commerce.

The Government may have avoided this argument for two reasons. First, it may have worried that the Court would refuse to characterize schools as "businesses," instead reviving its affection for "the States' freedom to structure integral operations in areas of traditional governmental functions." See *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976). Second, the Government may have recognized that guns interfere primarily with the quality of education, not with the quantity of books and rulers traded across state lines. This fact prompted the Government's focus on the theory embraced in Justice Breyer's dissent, that guns destroy education and thus harm future productivity.

Still, the analogy to the Hobbs Act suggests that the Government might have been more successful stressing the immediate obstruction of schools as businesses. The Court certainly would have found this theory more cabined than the alternative theories the Government offered. See *supra* notes 56-65 and accompanying text.

149. See, e.g., *United States v. Hill*, 248 U.S. 420 (1919) (transportation of liquor for personal use); *Caminetti v. United States*, 242 U.S. 470 (1917) (transportation of personal mistress); *Champion v. Ames*, 188 U.S. 321 (1903) (transportation of lottery tickets); *Reid v. Colorado*, 187 U.S. 137 (1902) (transportation of diseased livestock).

150. See *Scarborough v. United States*, 431 U.S. 563 (1977); *Barrett v. United States*, 423 U.S. 212 (1976). Both of these cases construed federal law to allow punishment under these circumstances, although neither one explicitly considered the constitutional issue. See also *infra* notes 180-85 and accompanying text.

151. In the first set of cases noted above, when Congress forbids the interstate transport of particular articles, it regulates the channels of commerce directly. The nexus with interstate commerce is thus more direct. The federal prohibition of firearm possession by convicted felons is one of the most dubious federal laws after *Lopez*, but it rests on an express jurisdictional element and other special factors that may save its constitutionality. See *infra* notes 180-85 and accompanying text.

as the one advanced in *Lopez*, but the regulation of work performed by employees in the workplace might make the Court more comfortable that the regulation "substantially affected" interstate commerce.<sup>152</sup>

### 10. *The Need To Set Some Limit*

The *Lopez* majority expressed grave concern that sustaining the Gun-Free School Zones Act under the Government's rationales would render Congress's commerce power completely unbounded.<sup>153</sup> This factor may have been the most influential one of all in *Lopez*; it motivated the Court's distinction between commercial and noncommercial activities, as well as its rejection of the Government's most plausible rationales for national power. The majority's wariness of regulatory rationales that would encompass all forms of human behavior may play a role in future cases as well.

On the other hand, now that *Lopez* has demonstrated some limit to congressional power under the Commerce Clause, the Court may feel less compelled to recognize other limits. At its narrowest, *Lopez* can be viewed as a case staking out the desperate position that *some* activity must fall beyond Congress's ken. Having made that point and encouraged Congress to think more carefully about its limited powers, the Court may be content to defer to most other exercises of congressional jurisdiction.

### B. *Lower Court Interpretations of Lopez*

In the first three months after *Lopez* was decided, the lower courts issued more than three dozen opinions exploring the bounds of *Lopez*.<sup>154</sup> These opinions confirm that the courts will identify the distinguishing features discussed above and treat *Lopez* as a narrow, exceptional ruling. Several decisions have followed the Supreme Court's specific ruling in *Lopez*, reversing convictions based on the Gun-Free School Zones Act,<sup>155</sup> but only one court has struck down another congressional statute under the Supreme

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152. Other factors, of course, might influence the constitutionality of this type of regulation. An absence of clear congressional findings on the link between education and the economy would reduce the chances that the Court would uphold the statute. The direct regulation of education might also dissuade some Justices.

153. See *supra* notes 50-65 and accompanying text.

154. This section of the article considers only opinions issued before August 1, 1995. Over the summer of 1995, lower court opinions citing *Lopez* appeared several times a week.

155. See, e.g., *United States v. Glover*, No. 94-3131, 1995 U.S. App. LEXIS 15113 (10th Cir. June 19, 1995); *United States v. Walker*, 59 F.3d 1196 (11th Cir. 1995); *United States v. Ornelas*, 56 F.3d 78 (10th Cir. 1995); *United States v. Edwards*, 55 F.3d 428 (9th Cir. 1995); *United States v. Murphy*, 53 F.3d 93 (5th Cir. 1995).



Court's *Lopez* decision. That ruling, as explained further below, is at odds with several other decisions and is likely to be reversed on appeal.<sup>156</sup> Other decisions uniformly uphold numerous broad congressional statutes under the Commerce Clause.

*Lopez* has stimulated some lower courts to interpret statutory language more cautiously. One court has construed the federal money laundering statute somewhat narrowly after *Lopez*, and another — in an opinion rendered between the Fifth Circuit and Supreme Court decisions in *Lopez* — has refused to apply the Hobbs Act to the robbery of a personally owned vehicle. In the courts, *Lopez* may have its major impact by encouraging courts to narrow slightly the scope of federal criminal statutes, rather than by leading to the wholesale invalidation of portions of the U.S. Code.

### 1. Drug-Free Schools

The Drug-Free School Zones Act,<sup>157</sup> which prohibits “distributing, possessing with intent to distribute, or manufacturing a controlled substance” within 1000 feet of a school,<sup>158</sup> is first cousin to the Gun-Free School Zones Act. Despite superficial resemblances between the two Acts, the District Court for the District of Kansas upheld the Drug-Free School Zones Act in *United States v. Garcia-Salazar*.<sup>159</sup>

The *Garcia-Salazar* court pointed to at least three differences between drug-free and gun-free school zones. First, the Drug-Free School Zones Act regulates commercial activity: it prohibits distribution, possession with intent to distribute, and manufacture of

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156. See *infra* notes 205-19 and accompanying text. Another district court, ruling before the Supreme Court's *Lopez* decision, invalidated the Freedom of Access to Clinic Entrances Act on commerce grounds. That decision also is likely to be reversed on appeal; it conflicts with the decisions of eight other courts, including two courts of appeal. See *infra* notes 220-33 and accompanying text.

157. 21 U.S.C. § 860 (1994).

158. 21 U.S.C. § 860(a) (1994). The Act erects a similar drug-free zone within 1000 feet of “a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority,” and within 100 feet of “a public or private youth center, public swimming pool, or video arcade facility.” 21 U.S.C. § 860(a) (1994).

159. 891 F. Supp. 568 (D. Kan. 1995); see also *United States v. Walker*, No. 94-40058-01-SAC (criminal trial pending in D. Kan.) (parties still briefing constitutionality of 21 U.S.C. § 860 (1994) after *Lopez*). Several other decisions had upheld the Drug-Free School Zones Act before *Lopez*. See, e.g., *United States v. McDougherty*, 920 F.2d 569 (9th Cir. 1990), *cert. denied*, 499 U.S. 911 (1991); *United States v. Thornton*, 901 F.2d 738 (9th Cir. 1990); *United States v. Martinez*, 1994 WL 424097 (N.D. Ill. Aug. 10, 1994), *affd.*, *Martinez v. United States*, 51 F.3d 275 (7th Cir. 1995) (dismissing the challenge to Drug-Free School Zones Act, based on Fifth Circuit's decision in *Lopez*, as “frivolous”).

controlled substances.<sup>160</sup> Unlike the Gun-Free School Zones Act, the Drug-Free School Zones Act does not regulate simple possession. The sale of controlled substances, whether in schoolyards or on street corners, is an economic act falling readily within the *Lopez* majority's solicitude for commercial regulation.<sup>161</sup>

Second, when Congress adopted a comprehensive ban against drug trafficking in 1970, it extensively documented the "substantial connection" between intrastate drug sales and interstate commerce.<sup>162</sup> The Drug-Free School Zones Act, enacted fourteen years later, merely enhances punishment for these existing offenses when they occur in a school zone. Because the Drug-Free School Zones Act built upon previous legislation, without criminalizing new conduct, the court was willing to rely upon Congress's 1970 findings to sustain the Act.<sup>163</sup> Once Congress had documented a substantial connection between all intrastate drug sales and interstate commerce, Congress did not have to re-establish a substantial connection between a subset of intrastate drug sales and interstate commerce.

Finally, the court stressed that federal law bans all manufacture and sale of narcotics and that the Supreme Court has readily upheld those bans under the Commerce Clause.<sup>164</sup> Because Congress has constitutionally prohibited all trade in controlled substances, it may enhance the punishment of defendants who carry out that trade near schoolyards. As the Ninth Circuit observed when upholding

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160. *Garcia-Salazar*, 891 F. Supp. at 572 ("Drug trafficking is inherently commercial in nature; firearm possession is not.").

161. This focus on manufacture and distribution makes the Drug-Free School Zones Act an "easy case" under *Lopez*. Even if Congress enhanced punishment for simple drug possession near schools, however, the statute likely would pass constitutional muster under the other rationales discussed in this section.

162. *See* 891 F. Supp. at 571.

163. *See* 891 F. Supp. at 571. The parties in *Garcia-Salazar* did not cite any more recent findings made in connection with the 1984 adoption of the Drug-Free School Zones Act. Thus, the court assumed that further findings tying that Act to interstate commerce did not exist. *See* 891 F. Supp. at 571.

As explained above, the Gun-Free School Zones Act created a federal prohibition against a wide range of conduct for the first time. *See supra* notes 73-74 and accompanying text. For that reason, the courts could not rely upon findings made in connection with earlier gun control statutes.

164. *See* 891 F. Supp. at 570-71 (citing *Minor v. United States*, 396 U.S. 87, 98 n.13 (1969); *Reina v. United States*, 364 U.S. 507, 511 (1960); *United States v. Walsh*, 331 U.S. 432, 434 (1947); *Hem v. United States*, 268 U.S. 178, 183 (1925); *McDermott v. Wisconsin*, 228 U.S. 115, 128 (1913)).

Since *Lopez*, several lower courts have confirmed Congress's power to regulate the manufacture and sale of narcotics under the Commerce Clause. *See United States v. Bramble*, 894 F. Supp. 1384, 1394-96 (D. Haw. 1995); *United States v. Gonzalez*, 893 F. Supp. 935, 936 (S.D. Cal. 1995); *United States v. Johnson*, 890 F. Supp. 504, 507 n.7 (W.D. Va. 1995).

the Drug-Free School Zones Act several years before *Lopez*, "It would be highly illogical to believe that [drug] trafficking somehow ceases to affect commerce when carried out within 1000 feet of a school."<sup>165</sup>

For these three reasons, the Drug-Free School Zones Act is likely to survive Commerce Clause scrutiny. Indeed, the Act demonstrates that Congress retains the power to regulate conduct touching education, to punish purely intrastate acts, and to regulate dangerous contraband after *Lopez*.

## 2. *Hobbs Act*

The Hobbs Act<sup>166</sup> prohibits extortion and robbery that "in any way or degree . . . affects commerce."<sup>167</sup> The Supreme Court upheld Congress's power to enact this statute in 1956,<sup>168</sup> and two lower courts have confirmed the Act's constitutionality in the wake of *Lopez*.<sup>169</sup> The Hobbs Act "is aimed at a type of economic activity, extortion," and also "contains an express jurisdictional element."<sup>170</sup> That element requires the prosecution to prove an obstruction of or other interference with commerce in each case. As the Supreme Court recognized almost forty years ago, Congress may "protect[ ] . . . interstate commerce against injury from extortion . . . racketeering," and other disruptive acts.<sup>171</sup>

Although the Hobbs Act is likely to withstand facial attack, *Lopez* may encourage lower courts to narrow the class of activities satisfying the Act's jurisdictional element. Even before the Supreme Court's *Lopez* ruling, the Fifth Circuit relied upon its *Lopez* decision to reject the application of the Hobbs Act to the

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165. *United States v. McDougherty*, 920 F.2d 569, 572 (9th Cir. 1990), *cert. denied*, 499 U.S. 911 (1991). When Congress bars interstate trade in a product, it may also punish local possession of the contraband as a way of enforcing its primary ban. See *United States v. Atkinson*, 513 F.2d 38, 39-40 (4th Cir. 1975) (invoking this rationale to uphold federal regulation of intrastate narcotics possession).

166. 18 U.S.C. § 1951 (1994).

167. 18 U.S.C. § 1951(a) (1994).

168. See *United States v. Green*, 350 U.S. 415 (1956).

169. See *United States v. Stillo*, 57 F.3d 553 (7th Cir. 1995); *United States v. Arena*, 894 F. Supp. 580 (N.D.N.Y. 1995).

170. *Stillo*, 57 F.3d at 553 n.2.

171. *Green*, 350 U.S. at 420-21. Both the Supreme Court and lower courts have upheld Hobbs Act prosecutions whenever the defendant threatened a business making purchases or sales across state lines. The potential interference with that trade is sufficient to demonstrate an effect on interstate commerce. See, e.g., *Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Davis*, 30 F.3d 613 (5th Cir. 1994); *United States v. Zeigler*, 19 F.3d 486 (10th Cir. 1994); *United States v. Scaife*, 749 F.2d 338 (6th Cir. 1984).

robbery of a homeowner's cash, jewelry, clothes, and car.<sup>172</sup> The Government argued that the victim worked for a national computer company, that the theft of his carphone and other belongings would disrupt his performance at work,<sup>173</sup> and that this disruption would affect the company's production in interstate commerce.

The Fifth Circuit correctly perceived that acceptance of the Government's "employee work disruption" rationale, as applied to the theft of private belongings from the employee's home, would render the Hobbs Act "ubiquitous, and any robbery . . . arguably would affect interstate commerce."<sup>174</sup> Like the Supreme Court in *Lopez*, the Fifth Circuit was not willing to countenance this type of open-ended argument. Instead, the court drew a line between thefts directly affecting a business engaged in interstate commerce and those affecting individuals employed by those businesses.<sup>175</sup> This distinction evokes the Supreme Court's separation of commercial and noncommercial activities in *Lopez* and also supports the observation — unarticulated in *Lopez* — that the courts are more willing to link acts in the workplace with interstate commerce.<sup>176</sup>

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172. See *United States v. Collins*, 40 F.3d 95 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1986 (1995).

173. In addition to stressing the loss of the carphone, the Government pointed out that the theft of the victim's car prevented him from attending a business meeting. See 40 F.3d at 99. The Government, however, apparently did not attempt to show any special link between these activities and interstate commerce — for example, that the meeting involved representatives from other states or that the calls involved the company's interstate business.

174. 40 F.3d at 100.

175. See 40 F.3d at 99-100.

176. The Fifth Circuit summarily rejected the Government's alternative argument that the theft affected interstate commerce because the stolen car previously had traveled interstate. See 40 F.3d at 99, 101 n.29. This ruling seems at odds with the Fifth Circuit's own decision that Congress could punish the theft of "a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce" under the federal carjacking statute. *United States v. Harris*, 25 F.3d 1275 (5th Cir.), *cert. denied*, 115 S. Ct. 458 (1994) (quoting 18 U.S.C. § 2119 (1992)). Proof that the stolen car previously traveled in interstate commerce is sufficient to satisfy the jurisdictional element of the carjacking statute. The difference may lie in the fact that the carjacking statute focuses exclusively on vehicles, which are closely associated with commerce, while acceptance of this argument under the Hobbs Act might prompt arguments that the theft of any other article that had previously moved in interstate commerce would also satisfy the jurisdictional requirement. Congress also made explicit findings that carjacking affects interstate commerce, and the courts appear persuaded that carjacking is a systematic, interstate criminal activity requiring federal prosecution. See *infra* notes 196-204 and accompanying text. These factors underscore the importance of context in drawing constitutional lines after *Lopez*.

The Fifth Circuit's refusal to allow prosecution under the Hobbs Act when the only link to interstate commerce is previous movement of a stolen vehicle is also at odds with the Supreme Court's decision that federal prosecutors may punish gun possession by convicted felons simply by showing that the gun once traveled in interstate commerce. See *Scarborough v. United States*, 431 U.S. 563 (1977). Once again, however, additional contextual features may reconcile these rulings. See *infra* notes 180-85 and accompanying text.

The Fifth Circuit drew upon both constitutional and nonconstitutional rationales for its narrow reading of the Hobbs Act. At one point, the court acknowledged that "[t]he Hobbs Act definition of commerce is coextensive with the constitutional definition"<sup>177</sup> and suggested that Congress could not constitutionally punish the theft of these private belongings. The court, however, also suggested that it would not construe the Hobbs Act this broadly without a clear signal from Congress that the statute "significantly changed the federal-state balance."<sup>178</sup> Under either of these rationales, lower courts may rely upon *Lopez* to uphold the Hobbs Act and other statutes with express jurisdictional elements but apply those elements cautiously to certain types of fact patterns.<sup>179</sup>

### 3. Firearms and Felons

Federal law prohibits any convicted felon to "possess in or affecting commerce, any firearm or ammunition."<sup>180</sup> Of all the statutes the lower courts have examined in light of *Lopez*, this one cuts closest to the constitutional line. The prohibition embraces non-commercial conduct and, like the Gun-Free School Zones Act, punishes the possession of guns that may be used lawfully in other contexts. Equally troubling, the Act's jurisdictional element has been construed to require only the most tenuous connection to interstate commerce. In *Scarborough v. United States*,<sup>181</sup> the Supreme Court held that the Government could satisfy this nexus simply by proving that the firearm moved across state lines sometime before coming to rest in the felon's hands. The Government does not have to show that the felon transported the gun personally across state lines.<sup>182</sup>

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177. 40 F.3d at 100 (quoting *United States v. Hanigan*, 681 F.2d 1127, 1130 (9th Cir. 1982), cert. denied, 459 U.S. 1203 (1983)).

178. 40 F.3d at 101 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

179. This tendency is not wholly novel. Even before *Lopez*, the federal courts sometimes dismissed convictions on the ground that the Government had failed to prove an effect on interstate commerce under the Hobbs Act. See, e.g., *United States v. Buffey*, 899 F.2d 1402 (4th Cir. 1990) (finding that attempted extortion did not sufficiently affect interstate commerce because victim would have used personal assets to respond to blackmail); *United States v. Mattson*, 671 F.2d 1020 (7th Cir. 1982) (finding that the depletion of the personal assets of an employee was not sufficient to show effect on interstate commerce). These rulings may expand after *Lopez*.

180. 18 U.S.C. § 922(g) (1994).

181. 431 U.S. 563 (1977).

182. See also *Barrett v. United States*, 423 U.S. 212 (1976) (upholding application of the statute to felon who purchased gun from local retailer, when gun had been shipped through interstate commerce to the retailer); *United States v. Bass*, 404 U.S. 336 (1971) (holding that statute requires individualized proof in each case of a connection with interstate commerce).

Despite these weak links with interstate commerce, the Supreme Court's own precedents support the authority of Congress to punish felons who possess guns that have moved in interstate commerce. By interpreting the jurisdictional element this broadly in *Scarborough*, the Court necessarily implied that Congress had the power to legislate that comprehensively. Narrowing the prohibition against gun possession by felons or striking down the entire statute would require the Court to renounce its own precedents — a prospect that appeared to discomfort most of the *Lopez* majority.

Relying upon *Scarborough*, more than a dozen lower court opinions have upheld readily the federal ban on guns for felons.<sup>183</sup> These courts also have pointed to the express jurisdictional element in the statute. Although the required link with interstate commerce is weak, the statute does compel the Government to prove some connection with interstate commerce in every case.<sup>184</sup>

If the Supreme Court were writing on a clean slate after *Lopez*, it might question the constitutionality of the broad federal ban against gun possession by felons.<sup>185</sup> Even if the Court reexamined *Scarborough*, however, it might find sufficient grounds to distinguish *Lopez*. The history of federal gun control is lengthy and convoluted; findings associated with a prior version of the felon provision might persuade the Court that Congress acted constitutionally. Apart from any legislative history, the Court might dis-

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183. See, e.g., *United States v. Rankin*, 64 F.3d 338 (8th Cir. 1995); *United States v. Collins*, 61 F.3d 1379 (9th Cir. 1995); *United States v. Pelkey*, 61 F.3d 914 (9th Cir. 1995); *United States v. Mosby*, 60 F.3d 454 (8th Cir. 1995); *United States v. Hanna*, 55 F.3d 1456 (9th Cir. 1995); *United States v. Tripp*, No. 94 CR 0567, 1995 WL 417591 (N.D. Ill. July 13, 1995); *United States v. Cole*, No. CIV.A.95-3190, 1995 WL 375833 (E.D. Pa. June 16, 1995); *United States v. Bramble*, 894 F. Supp. 1384 (D. Haw. 1995); *United States v. Hart*, 1995 WL 461801 (N.D. Ohio June 7, 1995); *United States v. Edwards*, 894 F. Supp. 340 (E.D. Wis. 1995); *United States v. Williams*, 893 F. Supp. 617 (S.D. W. Va. 1995); *United States v. Brown*, 893 F. Supp. 11 (M.D.N.C. 1995); *United States v. Campbell*, 891 F. Supp. 210 (M.D. Pa. 1995). Indeed, the Eighth Circuit in *Mosby* endorsed a particularly broad reading of the federal government's power to prosecute convicted felons who possess ammunition. The felon in that case possessed ammunition that had been manufactured in the same state. The court held, however, that federal prosecution could rest on proof that some components of the ammunition had been manufactured out-of-state because the statute defined "ammunition" to include those component parts.

One district court has also upheld a related statute, punishing firearm possession by an abuser of controlled substances. See *Bramble*, *supra* (upholding 18 U.S.C.A. § 922(g)(3) (1994)). The court in *Bramble*, finally, upheld an unrelated statute protecting bald and golden eagles.

184. See, e.g., *Tripp*, 1995 WL 417591, at \*2; *Brown*, 893 F. Supp. at 12; *Campbell*, 891 F. Supp. at 212.

185. See *Campbell*, 891 F. Supp. at 212 (noting that "[i]t may well be that *Lopez* signals an important change in the Supreme Court's commerce-clause jurisprudence" and that the Court will revisit earlier holdings but upholding the convicted felon statute until otherwise instructed by the Court).

cover that gun possession by convicted felons implicates national interests to a greater degree than do other types of gun possession. Former felons, for example, may be more likely than other gun-toting citizens to participate in interstate crime networks or to receive guns in violation of other federal gun control measures. Rationales of this nature might be developed to uphold the ban on gun ownership by felons. Meanwhile, the prohibition rests somewhat precariously on the Court's pre-*Lopez* precedents.

#### 4. *Machineguns*

Congress has forbidden broadly any person to "transfer or possess a machinegun."<sup>186</sup> Congressional regulation of the sale or "transfer" of machineguns after *Lopez* is uncontroversial; the sale of any article is commercial activity. At first glance, however, the possession prong of the statute raises serious questions under *Lopez*. The statute does not contain any jurisdictional element limiting its prohibition to conduct affecting interstate commerce. Nor did Congress make any findings that would explain the connection between machinegun possession and interstate commerce.<sup>187</sup>

The Tenth Circuit, however, has already upheld this statute against a Commerce Clause challenge.<sup>188</sup> Because the machinegun ban did not alter Congress's statutory approach to gun regulation, the court drew upon findings and legislative history in earlier statutes to illuminate Congress's purpose.<sup>189</sup> Those findings and history demonstrated that federal intervention is necessary to control all gun traffic and that machineguns in particular are linked to racketeering and drug distribution.<sup>190</sup>

In addition, the court noted that "Congress prohibited the . . . possession of . . . machineguns not merely to ban these firearms, but rather, to control their interstate movement by proscribing . . . possession."<sup>191</sup> The key distinction between the prohibition of posses-

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186. 18 U.S.C. § 922(o)(1) (1994).

187. Indeed, the Tenth Circuit has acknowledged that "[t]he legislative history surrounding" the challenged provision was "virtually nonexistent." *United States v. Wilks*, 58 F.3d 1518, 1519 (10th Cir. 1995). The only justification for the machinegun prohibition, which hardly addressed congressional power under the Commerce Clause, was a statement by the statute's sponsor that "I do not know why anyone would object to the banning of machine guns." 58 F.3d at 1519-20 (quoting 132 CONG. REC. H1750 (1986) (statement of Rep. Hughes)); see also *United States v. Lopez*, 2 F.3d 1342, 1356 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995) (discussing the legislative history of the machinegun statute).

188. See *Wilks*, 58 F.3d 1518.

189. See 58 F.3d at 1521 n.4.

190. See 58 F.3d at 1519.

191. 58 F. 3d at 1522.

sion in the machinegun statute and the prohibition of possession under the Gun-Free School Zones Act is that Congress has banned the interstate sale of machineguns. Having banned these interstate transfers, a commercial activity well within its power to regulate, Congress has the power to prohibit the possession of machineguns as a means of enforcing its primary regulation.<sup>192</sup> This type of rationale was not available to Congress under the Gun-Free School Zones Act because it had not banned interstate sales of all the guns regulated by that Act.

Other courts upheld congressional power to ban machineguns before *Lopez*,<sup>193</sup> with only one district court in the Fifth Circuit striking down the statute.<sup>194</sup> The Fifth Circuit has not ruled expressly on the constitutionality of federal regulation of machineguns but has declared in dictum that "no one could seriously contend that the regulation of machineguns could not . . . be upheld under Congress's power to regulate interstate commerce."<sup>195</sup> The unanimity of the rulings after *Lopez*, together with the rationales supporting those results, suggest that the machinegun statute will continue to be upheld.

### 5. Carjacking

Several post-*Lopez* decisions also sustained the federal carjacking statute.<sup>196</sup> That statute prohibits the taking of "a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce . . . by force and violence or by intimidation" and while in possession of a gun.<sup>197</sup> Courts upholding this statute have

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192. See *United States v. Hunter*, 843 F. Supp. 235, 246-49 (E.D. Mich. 1994); cf. *United States v. Atkinson*, 513 F.2d 38, 39-40 (4th Cir. 1975) (adopting a similar rationale to uphold regulation of intrastate possession of narcotics).

193. See, e.g., *United States v. Pearson*, 8 F.3d 631 (8th Cir. 1993), cert. denied, 114 S. Ct. 2132 (1994); *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992), cert. denied, 113 S. Ct. 1614 (1993); *United States v. Evans*, 928 F.2d 858 (9th Cir. 1991); *Hunter*, 843 F. Supp. at 235.

194. See *United States v. Bownds*, 860 F. Supp. 336 (S.D. Miss. 1994). The court focused both on the absence of an express jurisdictional element in the statute and the lack of any congressional findings expressing a link between machinegun possession and interstate commerce. On both counts, the court invoked the Fifth Circuit's decision in *Lopez*.

195. *United States v. Ardoin*, 19 F.3d 177, 180 (5th Cir.), cert. denied, 115 S. Ct. 327 (1994); see also *United States v. Lopez*, 2 F.3d 1342, 1356-57 (5th Cir. 1993) (noting the distinctions between the Gun-Free School Zones Act and regulation of machineguns), *aff'd*, 115 S. Ct. 1624 (1995).

196. See *United States v. Green*, No. 94-6215, 1995 WL 451782 (6th Cir. July 27, 1995); *United States v. Washington*, No. 94-5914, 1995 WL 408128 (6th Cir. July 10, 1995); *United States v. Carolina*, 61 F.3d 917 (10th Cir. 1995); *United States v. Oliver*, 60 F.3d 547 (9th Cir. 1995); *United States v. Williams*, 51 F.3d 1004 (11th Cir.), cert. denied, 116 S. Ct. 258 (1995); *United States v. Garcia-Beltran*, 890 F. Supp. 67 (D.P.R. 1995).

197. 18 U.S.C.A. § 2119 (West Supp. 1995).



identified a wide range of distinctions between this statute and the Gun-Free School Zones Act. The carjacking statute contains a jurisdictional element requiring proof that the car was "transported, shipped, or received in interstate . . . commerce."<sup>198</sup> Cars, unlike school zones, are "commodities and instruments of travel"; thus they are linked more closely to interstate commerce.<sup>199</sup> Carjacking is also an "economic activity,"<sup>200</sup> and the statute's legislative history contains express findings that carjacking affects interstate commerce.<sup>201</sup> Courts themselves have been convinced that "carjacking is a systematic criminal activity that substantially affects the interstate and foreign commerce of automobiles and the interstate commerce of automobile insurance" and must be controlled by federal action.<sup>202</sup> Finally, carjacking, like discrimination by hotels and restaurants, is an activity that may deter interstate travel.<sup>203</sup>

Before the Supreme Court's decision in *Lopez*, the courts of appeals agreed that the carjacking statute passed constitutional muster.<sup>204</sup> The combination of factors discussed above, added to the

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198. *Oliver*, 60 F.3d at 550; *Garcia-Beltran*, 890 F. Supp. at 71. The court in *United States v. Cortner*, 834 F. Supp. 242 (M.D. Tenn. 1993), *revd. sub nom. United States v. Osteen*, 30 F.3d 135 (6th Cir. 1994), disagreed with this reliance on the jurisdictional element:

To say . . . that because something once traveled interstate it remains in interstate commerce after coming to rest in a given state, is sheer sophistry. This Court, at one time, owned a 1932 Ford which was manufactured in Detroit in the year 1931 and transported to the state of Tennessee. It remained in the state of Tennessee thereafter. Now if this car were hijacked today, some sixty years later, is it still in interstate commerce? 834 F. Supp. at 243.

199. *See Oliver*, 60 F.3d at 550; *Garcia-Beltran*, 890 F. Supp. at 71.

200. *See Oliver*, 60 F.3d at 550.

201. *See* 60 F.3d at 550; *Garcia-Beltran*, 890 F. Supp. at 71. The court in *United States v. Mallory*, 884 F. Supp. 496 (S.D. Fla. 1995), found that the legislative history of the carjacking statute failed to show that carjacking "has any substantial impact on interstate commerce." 884 F. Supp. at 497-98. *But see* *United States v. Williams*, 51 F.3d 1004 (11th Cir.) (disapproving the interpretation by the court in *Mallory*), *cert. denied*, 116 S. Ct. 258 (1995).

202. *Garcia-Beltran*, 890 F. Supp. at 72.

203. *See* 890 F. Supp. at 72; *cf. Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

204. *See, e.g., Williams*, 51 F.3d at 1004; *United States v. Martinez*, 49 F.3d 1398 (9th Cir. 1995); *United States v. Overstreet*, 40 F.3d 1090 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1970 (1995); *United States v. Osteen*, 30 F.3d 135 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 1825 (1995); *United States v. Harris*, 25 F.3d 1275 (5th Cir.), *cert. denied*, 115 S. Ct. 458 (1994); *United States v. Johnson*, 22 F.3d 106 (6th Cir. 1994); *see also infra* notes 280-81 (discussing the Supreme Court's denial of certiorari in two of these cases).

Two district court judges struck down the carjacking statute after the Fifth Circuit's decision in *Lopez* but before the Supreme Court had ruled in that case. *See Mallory*, 884 F. Supp. at 496; *United States v. Cortner*, 834 F. Supp. 242 (M.D. Tenn. 1993). Both of those decisions, however, have been reversed or disapproved by their court of appeals. *See Williams*, 51 F.3d at 1004 (disapproving *Mallory* implicitly); *Osteen*, 30 F.3d at 135 (unpublished opinion at 1994 WL 389210) (reversing *Cortner*). The Sixth Circuit has twice reaffirmed its approval of the carjacking statute since *Lopez*. *See United States v. Green*, 64 F.3d 664 (6th Cir. 1995) (unpublished opinion at 1995 WL 492913); *United States v. Washington*, 61 F.3d 904 (6th Cir. 1995) (unpublished opinion at 1995 WL 424419).

courts' continued unanimity after *Lopez*, suggest that the statute is unlikely to succumb to attack under the Commerce Clause.

### 6. *Child Support*

The lower courts have divided over the constitutionality of the Child Support Recovery Act of 1992.<sup>205</sup> That statute punishes parents who "willfully fail[ ] to pay a past due support obligation with respect to a child who resides in another State."<sup>206</sup> District court judges in both West Virginia and Kansas have upheld this legislation in the wake of *Lopez*,<sup>207</sup> while a federal judge in Arizona has struck down the statute.<sup>208</sup>

Despite this division, powerful arguments support Congress's authority to enact the Child Support Recovery Act. The statute regulates an "economic activity,"<sup>209</sup> by enforcing an "obligation to transfer funds from one state to another."<sup>210</sup> The Act also contains an explicit interstate nexus: federal law applies only if the delinquent parent and affected child reside in different states. This link, requiring a current debt that crosses state lines, is much stronger than the jurisdictional elements contained in other contested laws.<sup>211</sup>

In adopting the Child Support Recovery Act, moreover, Congress expressly found that the states have had difficulty enforcing support obligations across state lines.<sup>212</sup> The failure to collect these obligations has contributed significantly to child poverty and has expanded the federal government's own obligations to support single parents and their dependent children.<sup>213</sup> These findings demonstrate an urgent national problem that can be addressed effectively only through federal action.

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205. Pub. L. No. 102-521, 106 Stat. 3403 (codified in scattered sections of 18 U.S.C. and 42 U.S.C.).

206. 18 U.S.C. § 228 (1994).

207. See *United States v. Murphy*, 893 F. Supp. 614 (W.D. W. Va. 1995); *United States v. Hampshire*, 892 F. Supp. 1327 (D. Kan. 1995).

208. See *United States v. Mussari*, 894 F. Supp. 1360 (D. Ariz. 1995); *United States v. Schroeder*, 894 F. Supp. 360 (D. Ariz. 1995). Judge Rosenblatt authored both of these decisions; except for the background facts, the two opinions are identical. For simplicity, I cite below only to *Mussari*.

209. See *United States v. Lopez*, 115 S. Ct. 1624, 1630 (1995).

210. *Murphy*, 893 F. Supp. at 616.

211. See, e.g., *supra* notes 181-82 and accompanying text (Ban on firearm possession by felons only requires proof that the gun crossed state lines at some point in the past.); note 198 and accompanying text (Carjacking statute applies if carjacked vehicle crossed state lines at any point before the carjacking.).

212. See H.R. Rep. No. 771, 102d Cong., 2d Sess. 5 (1992).

213. *Id.*; see also *United States v. Hampshire*, 892 F. Supp. 1327, 1329-30 (D. Kan. 1995).

One of the courts upholding the Child Support Recovery Act, finally, has pointed out that the Act is analogous to a federal statute punishing individuals who flee a state to avoid prosecution.<sup>214</sup> Both statutes are necessary to prevent individuals from “taking advantage of our federal system of government through flight to another state.”<sup>215</sup> In that sense, the Child Support Recovery Act reinforces state authority — by enforcing state-imposed obligations — rather than undermining that authority.

Judge Rosenblatt, the one district judge to invalidate the Child Support Recovery Act, rested his decision on the conviction that both “criminal law and child custody are traditionally delegated to the States for regulation.”<sup>216</sup> Rosenblatt also contended that the Child Support Recovery Act “has nothing to do with ‘commerce’ or any sort of economic enterprise,”<sup>217</sup> despite the Act’s application to monetary transactions. Rosenblatt, finally, believed that federal civil legislation would be sufficient to address any difficulties in enforcing child support obligations and that the statute’s interstate nexus was insufficient because it was “not tailored to address only those parents who specifically flee from a state in order to avoid paying child support.”<sup>218</sup>

Despite Judge Rosenblatt’s extensive analysis, his arguments are not persuasive. The *Lopez* dissenters, as well as most of the *Lopez* majority, undoubtedly would characterize an interstate monetary obligation as an “economic activity” within the core area of congressional authority. The fact that the debt arises in an area traditionally dominated by the states does not undercut this finding. In *Lopez* itself, the majority made clear that “Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect

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214. See *Murphy*, 893 F. Supp. at 616 (discussing 18 U.S.C. § 1073 (1994)).

215. 893 F. Supp. at 616.

216. *United States v. Mussari*, 894 F. Supp. 1360, 1367 (D. Ariz. 1995). Judge Rosenblatt buttressed this argument by noting that some states punish criminally the failure to pay child support, while others specifically reject that approach. For that reason, he believed that a uniform federal law imposing criminal sanctions would “usurp the authority” of states in an area traditionally subject to state regulation.

217. 894 F. Supp. at 1363 (quoting *United States v. Lopez* 115 S. Ct. 1624, 1630-31 (1995)).

218. 894 F. Supp. at 1364. The Supreme Court has not required Congress to regulate with such precision under the Commerce Clause. In *United States v. Perez*, 402 U.S. 146 (1971), for example, the Court held that Congress could regulate purely local acts of loan sharking because some of those acts contributed to organized crime. The Government did not have to show that a particular transaction was tied to organized crime.

[areas traditionally regulated by the states]."<sup>219</sup> The economic nature of a parent's failure to pay child support, together with the other considerations noted above, sustain the constitutionality of the Child Support Recovery Act after *Lopez*.

### 7. Freedom of Access Act

The Freedom of Access to Clinic Entrances Act of 1994<sup>220</sup> imposes civil and criminal penalties on any person who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with . . . any person . . . in order to intimidate such person or any other person . . . from[ ] obtaining or providing reproductive health services."<sup>221</sup> Before *Lopez*, the lower courts split over congressional power to enact this statute, with the Fourth Circuit and four district courts upholding the Act, while one other district court struck the Act down as outside Congress's Commerce Clause power.<sup>222</sup> Since the Supreme Court's *Lopez* decision, three more courts have addressed the constitutionality of the Access Act, and all three have sustained the Act.<sup>223</sup>

All three of these most recent decisions, including a decision by the Eleventh Circuit Court of Appeals, find that the Access Act "regulate[s] commercial activity"<sup>224</sup> and targets violence with "com-

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219. *Lopez*, 115 S. Ct. at 1633 (discussing regulation touching education); see also *United States v. Hampshire*, 892 F. Supp. 1327, 1330 (D. Kan. 1995) ("The Court's opinion [in *Lopez*] cannot be read to suggest that all federal legislation touching upon domestic relations is necessarily invalid.").

220. 18 U.S.C. § 248 (1994).

221. 18 U.S.C. § 248(a)(1) (1994). The Act also prohibits attempted interference with access to a reproductive health service; intimidation of or interference with a person who has obtained reproductive health services; and intentional damage or destruction of the property of a reproductive health services facility. See 18 U.S.C. § 248 (1994). The same types of interferences, finally, are prohibited when exercised against places of religious worship. See 18 U.S.C. § 247 (1994).

222. *Compare* *American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995) (upholding the Act) and *United States v. Dinwiddie*, 885 F. Supp. 1286 (W.D. Mo. 1995) (same) and *Riely v. Reno*, 860 F. Supp. 693 (D. Ariz. 1994) (same) and *Cook v. Reno*, 859 F. Supp. 1008 (W.D. La. 1994) (same) and *Council for Life Coalition v. Reno*, 856 F. Supp. 1422 (S.D. Cal. 1994) (same) with *United States v. Wilson*, 880 F. Supp. 621 (E.D. Wis. 1995) (holding the Access Act unconstitutional). This article examines only constitutional challenges to the Access Act based on the Commerce Clause or Tenth Amendment. Defendants have challenged the Act on First Amendment, vagueness, and other constitutional grounds, but those challenges are all beyond the scope of this article.

223. See *Cheffer v. Reno*, 55 F.3d 1517, 1520-21 (11th Cir. 1995); *United States v. Lucero*, 895 F. Supp. 1421 (D. Kan. 1995); *United States v. White*, 893 F. Supp. 1423, 1432-34 (C.D. Cal. 1995).

224. See *Cheffer*, 55 F.3d at 1520; see also *White*, 893 F. Supp. at 1433. In *United States v. Wilson*, 880 F. Supp. 621, 628 (E.D. Wis. 1995), the district court argued that the Access Act "regulates private conduct affecting commercial entities," rather than the commercial entities themselves. This argument, however, overlooks Supreme Court precedents upholding the Hobbs Act. See *supra* notes 166-71 and accompanying text.

mercial ramifications.”<sup>225</sup> The Act prevents disruption of commercial health facilities, many of which serve out-of-state patients or obtain out-of-state supplies. The purchase of medical services plainly is a commercial transaction.

The Access Act also rests on “extensive legislative findings” documenting a strong connection between reproductive health services and interstate commerce.<sup>226</sup> These findings include evidence that “[t]he increasing violence surrounding clinics is nationwide in focus” and that “existing [state] laws are inadequate to redress these problems.”<sup>227</sup> Congress found that “[s]ome jurisdictions have refused to respond at all to clinic violence and blockades,” while others “have found it difficult if not impossible to reach across state lines to prosecute the individuals or groups responsible for planning the actions.”<sup>228</sup>

The Access Act, finally, draws constitutional support from Supreme Court precedents approving congressional authority to enact the Hobbs Act. The Hobbs Act, like the Access Act, does not directly regulate businesses engaged in interstate commerce; instead, it prohibits extortion or robbery interfering with those businesses.<sup>229</sup> Although the Hobbs Act requires the Government to prove that the criminal act “affect[ed] commerce,” courts have readily concluded that extortion or robbery “affects commerce” whenever it targets a business purchasing supplies from other states, serving customers in other states, or otherwise operating in interstate commerce.<sup>230</sup> Multiple Supreme Court and lower court precedents suggest that Congress has ample authority to punish a defendant who robs from a health clinic that purchases supplies out-of-state.<sup>231</sup> By the same token, Congress may punish a defend-

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225. See *White*, 893 F. Supp. at 1433; see also *Cheffer*, 55 F.3d at 1520; *Lucero*, 895 F. Supp. at 1423-24.

226. See *Cheffer*, 55 F.3d at 1520; *White*, 893 F. Supp. at 1433; *Lucero*, 895 F. Supp. at 1423-24.

227. *White*, 893 F. Supp. at 1427 (citing S. REP. NO. 103-117, 103d Cong., 1st sess., at 13-14, 17-21 (1993)); see also 893 F. Supp. at 1433 (“The campaign against abortion clinics, moreover, was (and is) national.”).

228. 893 F. Supp. at 1427; see also Naftali Bendavid, *How Much More Can Courts, Prisons Take?: It's Tempting to Federalize Crimes, But Opponents Are Gathering Momentum*, LEGAL TIMES, June 7, 1993, at 1 (Attorney General Reno defends federal prosecution of abortion clinic blockers because militant blockers are “organized beyond state boundaries,” and abortion access “involves an important and fundamental constitutional right.”).

229. See *supra* notes 166-71 and accompanying text.

230. See *supra* note 171.

231. *E.g.*, *Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Green*, 350 U.S. 415 (1956); see also *supra* notes 166-71 and accompanying text.

The Supreme Court's recent decision in *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834 (1995), discussed *infra* notes 268-75 and accompanying text, lends further support to the

ant who steals receipts from the clinic by intentionally blocking potential customers from entering the building.<sup>232</sup>

For all of these reasons, courts are likely to follow the lead of the Fourth and Eleventh Circuits, as well as the overwhelming majority of district courts that have considered Congress's power to punish the obstruction of reproductive health clinics. The Commerce Clause grants Congress ample power to punish intentional obstruction of a business drawing customers and supplies from interstate commerce, especially when Congress makes findings to document both the impact of that obstruction on commerce and the special difficulties states have faced in punishing these acts.<sup>233</sup>

### 8. Money-Laundering

The federal money-laundering statute prohibits certain "financial transaction[s]" that "in any way or degree affect[ ] interstate or foreign commerce."<sup>234</sup> In *United States v. Grey*,<sup>235</sup> the Tenth Circuit held that the Government had failed to prove an effect on interstate commerce by simply showing that the defendant contributed \$200 in cash to feed the pot of a gambling operation at an American Legion Post. The Government argued that the defendant's cash transfer affected commerce because no money was coined in his state; therefore the cash must have crossed state lines before reach-

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constitutionality of both the Hobbs and Access Acts. In *Terminix*, the Supreme Court ruled that Congress could regulate the terms of a local customer's contract with a business operating in interstate commerce. If Congress may regulate cooperative interactions between individuals and interstate businesses, then surely it may regulate disruptive interactions of individuals with those businesses.

232. The one district court to invalidate the Access Act attempted to distinguish Hobbs Act precedents by arguing that violators of the Hobbs Act use "violent means to achieve an economic purpose," while violators of the Access Act use "non-violent means to achieve a purely political or social purpose." *United States v. Wilson*, 880 F. Supp. 621, 629 (E.D. Wis. 1995). Congress's power to regulate, however, rests on the effect on interstate commerce, not on the defendant's motive or means of interference with an interstate business. Preventing customers from entering the front door of a health clinic has the same economic effect as robbing supplies out the back door — regardless of the defendant's motive or degree of violence. See also *Green*, 350 U.S. at 420 (rejecting the claim that a defendant must be motivated by personal economic gain to violate the Hobbs Act).

The Access Act does not require the Government to prove an effect on commerce in each case, as the Hobbs Act does. Evidence before Congress, however, fully demonstrated the interstate connections of reproductive health clinics. Even if a clinic isolated from commerce could be found, the Access Act's across-the-board protection of health clinics is analogous to the total prohibition on loan sharking upheld in *Perez v. United States*, 402 U.S. 146 (1971).

233. Congress also invoked the Fourteenth Amendment when enacting the Access Act. See Pub. L. No. 103-259, § 2, 108 Stat. 694 (1994). If the Act does not survive scrutiny under the Commerce Clause, courts might turn to this source of authority. Upholding the Act under the Fourteenth Amendment would be controversial because the Act regulates private conduct. See *United States v. White*, 893 F. Supp. 1423, 1434-35 (C.D. Cal. 1995).

234. 18 U.S.C. § 1956(a)(1), (c)(4) (1994).

235. 56 F.3d 1219 (10th Cir. 1995).

ing the defendant's wallet.<sup>236</sup> The court refused to accept this broad rationale, holding that the Government must instead trace the disputed cash and show a specific effect on interstate commerce.

Although the court reached this result as a matter of statutory interpretation, it noted that "we doubt that even Congress could [punish any cash transaction] without offending the constitution"<sup>237</sup> and cited the Supreme Court's decision in *Lopez*.<sup>238</sup> Like the Fifth Circuit decision refusing to apply the Hobbs Act to the robbery of a homeowner,<sup>239</sup> the Tenth Circuit's decision in *Grey* suggests that courts may begin to read statutory "affecting commerce" requirements more narrowly after *Lopez*.

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In sum, *Lopez* has not had much effect on judicial assessments of Congress's Commerce Clause power. More than three dozen lower court opinions have considered the constitutionality of multiple federal statutes in the wake of *Lopez*. Only one district court decision authored before *Lopez* and another issued since that opinion have invalidated a federal law as exceeding Congress's commerce power. Both of those opinions express distinct minority views and are likely to be reversed on appeal.

The majority of post-*Lopez* opinions have proven adept at identifying the distinguishing features of *Lopez* and in recognizing the Gun-Free School Zones Act as an extreme exercise of congressional power. The federal statutes examined so far constitute some of the more wide-ranging exercises of congressional authority, suggesting that most other laws also will survive scrutiny. Without further action from the Supreme Court, it is unlikely that *Lopez* will cut a noticeable swath through federal law.

*Lopez* may have a somewhat stronger impact in encouraging courts to construe federal laws, particularly criminal laws, more narrowly. One court has already dismissed an action based on the money-laundering statute, and another rejected a Hobbs Act prose-

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236. See 56 F.3d at 1224. The Government's reasoning was similar to arguments the Government has made successfully in prosecutions of convicted felons for possession of a firearm. In *United States v. Cox*, 942 F.2d 1282 (8th Cir. 1991), *cert. denied*, 503 U.S. 921 (1992), for example, an expert testified that the weapon was manufactured by Colt and that Colt does not manufacture any weapons in Missouri. The Eighth Circuit held this evidence sufficient to uphold prosecution of a possession that occurred in Missouri. See also *United States v. Washington*, 17 F.3d 230, 232-33 (8th Cir.) (finding expert testimony that firearm was not made in Missouri sufficient to uphold conviction for possession in Missouri), *cert. denied*, 115 S. Ct. 153 (1994).

237. *Grey*, 56 F.3d at 1226.

238. See 56 F.3d at 1225-26 n.3.

239. See *supra* notes 172-79 and accompanying text.

cution based on the Fifth Circuit's *Lopez* opinion. These results are not unprecedented; even before *Lopez*, courts occasionally ruled crimes too local to satisfy the jurisdictional element of these and other federal laws.<sup>240</sup> *Lopez*, however, may encourage courts to become more aggressive in scrutinizing individual cases for a sufficient nexus with interstate commerce.

### III. THE FUTURE OF *LOPEZ*

The unusual combination of factors in *Lopez*, together with the opinion's cautious reception in the lower courts, suggest that the courts will construe *Lopez* narrowly. *Lopez* itself does not bode the reversal of the New Deal, the end of national crime control, or a significant shift in federal power. What are the chances, however, that *Lopez* marks only the first step in a series of decisions significantly cutting back congressional power to regulate "Commerce . . . among the several States"? Could *Lopez* be "a wedge, laying the groundwork for future attempts to roll back federal civil rights and social welfare legislation"?<sup>241</sup>

Justice Thomas enthusiastically concurred in the *Lopez* decision and urged the Court to "temper" Congress's commerce power further in future cases.<sup>242</sup> Justice Thomas even suggested that he "might be willing to return to the original understanding" of the Commerce Clause as a narrow grant of congressional power.<sup>243</sup> Is the rest of the Court likely to follow Justice Thomas's lead?

No, Justice Thomas's colleagues already have declined his invitation. The Supreme Court sprinkled its 1994 Term with repeated

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240. See, e.g., *United States v. Buffey*, 899 F.2d 1402 (4th Cir. 1990) (finding attempted extortion did not sufficiently affect interstate commerce because victim would have used personal assets to respond to the blackmail); *United States v. Mattson*, 671 F.2d 1020 (7th Cir. 1981) (finding the depletion of the personal assets of an employee was not sufficient to show an effect on interstate commerce); see also *infra* note 289 (discussing a recent Ninth Circuit decision construing the federal arson statute narrowly).

241. Mickenberg, *supra* note 144, at C12; see also Roger Pilon, *It's Not About Guns: The Court's Lopez Decision Is Really About Limits on Government*, WASH. POST, May 21, 1995, at C5 ("Could the New Deal be on the ropes not only in the political but in the legal arena as well? Not yet, but the potential is there."); *Judicial Activists*, ST. LOUIS POST-DISPATCH, July 9, 1995, at 2B (*Lopez* "struck at the foundation of court rulings dating back to the New Deal" and cast a "shadow . . . over a long-held interpretation of a key part of the Constitution.").

Even Justice Souter remarked dryly in his dissent:

[T]oday's decision may be seen as only a misstep . . . but hardly an epochal case. I would not argue otherwise, but . . . [n]ot 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.

*United States v. Lopez*, 115 S. Ct. 1624, 1657 (1995) (Souter, J., dissenting).

242. See 115 S. Ct. at 1642 (Thomas, J., concurring).

243. 115 S. Ct. at 1650 n.8.



clues that the Court does not intend further dramatic cuts in Congress's Commerce Clause power. Indeed, a January 1995 opinion — which has received surprisingly little attention from either journalists or scholars of federal-state relations — maintains a generous construction of the Commerce Clause.<sup>244</sup> In this section, I explore the Supreme Court's many signals about the future of *Lopez* — in the *Lopez* opinions themselves, in two other cases the Court decided on the merits during the 1994 Term, and in several non-precedential actions. All of these signals suggest that, although *Lopez* is an important reminder of the constitutional limits on Congress's power, the decision is unlikely to herald a new era of Commerce Clause jurisprudence.

### A. Signals from *Lopez*

*Lopez* was a sharply divided, five-four decision. Justice Breyer read portions of his dissent from the bench, evidencing a deep commitment to the ideals expressed there. These facts alone suggest that, until the Court's membership changes, any extension of *Lopez* would face an uphill battle.

Chief Justice Rehnquist's opinion for the majority, moreover, indicates little inclination to expand *Lopez*. The majority broadly endorsed previous cases upholding congressional regulation of economic activity, from *NLRB v. Jones & Laughlin Steel Corp.*<sup>245</sup> through *Katzenbach v. McClung*<sup>246</sup> and *Perez v. United States*.<sup>247</sup> The Court summarized this portion of its opinion by declaring that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."<sup>248</sup> Justice Rehnquist also closed his opinion for the majority by characterizing *Lopez* as a case in which the Court "decline[d] . . . to proceed any further" in enlarging congressional power, rather than as a case cutting back previous interpretations of that power.<sup>249</sup> Justice Rehnquist may have been overly modest in this characterization of *Lopez*, but it is instructive that his opinion strove to show that sustaining the Gun-Free School Zones Act would have re-

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244. See *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834 (1995), discussed *infra* notes 268-75 and accompanying text.

245. 301 U.S. 1 (1937).

246. 379 U.S. 294 (1964).

247. 402 U.S. 146 (1971).

248. *United States v. Lopez*, 115 S. Ct. 1624, 1630 (1995).

249. 115 S. Ct. at 1634.

quired the Court to move beyond previous interpretations of the Commerce Clause, rather than simply to apply those precedents.<sup>250</sup>

Justice Kennedy's concurring opinion, joined by Justice O'Connor, was even more cautious in endorsing *Lopez*'s result. Justices Kennedy and O'Connor noted that the history of the Commerce Clause "counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power" and admitted frankly that this "history [gave them] some pause about today's decision."<sup>251</sup> Justices Kennedy and O'Connor joined the majority but stressed its "limited holding."<sup>252</sup>

In joining *Lopez*, Justices Kennedy and O'Connor also made clear that they would not question any of the Court's prior decisions upholding commercial regulation — and that they did not view the majority opinion as undermining any of those precedents.<sup>253</sup> These two Justices also stressed the importance of stare decisis in promoting a stable government structure and empowering Congress to address a modern, integrated economy.<sup>254</sup> "Congress can regulate in the commercial sphere," Justices Kennedy and O'Connor concluded, "on the assumption that we have a single market and a unified purpose to build a stable national economy."<sup>255</sup> Like Justice Rehnquist, they viewed *Lopez* as portending no challenge to the Court's long line of post-New Deal commerce cases.

Even Justice Thomas, who called for a more wide-ranging review of the Court's Commerce Clause jurisprudence, suggested that he could conduct that review "without totally rejecting our more recent Commerce Clause jurisprudence."<sup>256</sup> Justice Thomas also admitted that "[c]onsideration of *stare decisis* and reliance interests

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250. See also 115 S. Ct. at 1626-30 (discussing the Court's Commerce Clause precedents at length).

251. 115 S. Ct. at 1634 (Kennedy, J., concurring).

252. See 115 S. Ct. at 1634.

253. See 115 S. Ct. at 1637 (*Heart of Atlanta, McClung, Perez*, "and like authorities are within the fair ambit of the Court's practical conception of commercial regulation and are not called in question by our decision today.").

254. See 115 S. Ct. at 1637. This reference to stare decisis cannot be taken lightly; the doctrine has played an important part in the rulings of both Justice Kennedy and Justice O'Connor. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804 (1992) (opinion of O'Connor, J., Kennedy, J., and Souter, J.) (explaining the importance of stare decisis in adhering to the Court's ruling in *Roe v. Wade*, 410 U.S. 113 (1973)).

255. 115 S. Ct. at 1637.

256. 115 S. Ct. at 1642-43 (Thomas, J., concurring); see also 115 S. Ct. at 1650 ("This extended discussion of the original understanding [of the Commerce Clause] . . . does not necessarily require a wholesale abandonment of our more recent opinions." (footnote omitted)).

may convince us that we cannot wipe the slate clean" in construing the Commerce Clause.<sup>257</sup> Justice Thomas undoubtedly would build upon *Lopez*, most likely to trim congressional regulation of non-commercial matters, but even he might not untie the knots of the New Deal. None of the other Justices in *Lopez* expressed even the slightest interest in joining Justice Thomas's reexamination of Commerce Clause principles.

### B. Other Decisions on the Merits: Termites and Gold Mines

In addition to *Lopez*, the Supreme Court's 1994 Term included two cases shedding significant light on the future of federal-state relations under the Commerce Clause.<sup>258</sup> Both of these decisions confirm that the Court is unlikely to enlarge *Lopez* and overturn previous Commerce Clause precedents. Indeed, one of the decisions appears to affirm congressional power in a new context.

#### 1. Gold Mines

One week after its *Lopez* decision, the Supreme Court issued a short per curiam opinion in *United States v. Robertson*.<sup>259</sup> Juan Robertson had been convicted of violating the Racketeer Influenced and Corrupt Organizations Act (RICO) by investing the proceeds of illegal drug activities in an Alaskan gold mine. To support a conviction under RICO, the Government had to show that the mine was an "enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."<sup>260</sup>

Robertson purchased supplies for the mine in California and shipped those materials to Alaska. He also hired employees from

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257. 115 S. Ct. at 1650 n.8.

258. The Court's landmark decision in *United States Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995), holding that states may not set term limits for federal senators and representatives, also has important implications for federal-state relations. In particular, the decision may presage the continued decline of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), in which the Court stated that states should look primarily to the political process — rather than the courts — to vindicate their sovereignty. In *Thornton*, the Court stressed the national character of Congress; the fact that representatives are not "dependent upon, nor controllable by, the states"; and the Framers' intent to create a national legislature that was "dependent on the people alone," rather than "too dependent on the State governments." 115 S. Ct. at 1853 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (5th ed. 1905)); 115 S. Ct. at 1857 (quoting THE FEDERALIST No. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961)). These assertions appear to undercut, perhaps unintentionally, *Garcia's* central premise that "the composition of the Federal Government was designed in large part to protect the States." 469 U.S. at 550-51. *Thornton*, however, does not directly affect the Court's construction of the Commerce Clause, and I do not discuss that case further here.

259. 115 S. Ct. 1732 (1995).

260. 18 U.S.C. § 1962(a) (1994).

outside Alaska to work in the mine and personally transported fifteen percent of the mine's product out of Alaska. The Supreme Court held that these activities were sufficient to prove that the gold mine was "engaged in . . . interstate . . . commerce" within the meaning of the statute.<sup>261</sup> Thus, the Court did not need to decide either whether the "affecting . . . commerce" prong of RICO requires the demonstration of a *substantial* effect or whether the facts in *Robertson* would have been sufficient to satisfy a substantial effect test.<sup>262</sup>

Technically, *Robertson* is not a constitutional decision; it construes the language of RICO. Congress, however, plainly drafted RICO's language to track the Court's Commerce Clause jurisprudence, and the Court would not construe the language consciously to reach conduct falling outside congressional power. The Court's decision in *Robertson*, therefore, is equivalent to a ruling that the Commerce Clause allows Congress to punish the investment of drug-trafficking proceeds in a business that purchases materials, hires employees, and exports goods across state lines.<sup>263</sup>

*Robertson* confirms that none of the Justices are ready to return all criminal regulation to the states. The Court issued its decision unanimously in a short per curiam opinion; even Justice Thomas was not prepared to question congressional power in this case. On the other hand, some commentators have gone too far in viewing *Robertson* as a retreat from *Lopez*.<sup>264</sup> *Robertson* was a far different case from *Lopez*; the disputed mine had multiple interstate contacts that formed an integral part of its operations. This was not a case in which the Court approved federal jurisdiction based upon a single telephone call or a single case of supplies purchased from out-of-state.<sup>265</sup>

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261. See 115 S. Ct. at 1733.

262. See 115 S. Ct. at 1733.

263. Cf. *United States v. Lopez*, 2 F.3d 1342, 1347-48 (5th Cir. 1993), *affd.*, 115 S. Ct. 1624 (1995) (observing that when "a commerce nexus is an element of the crime defined by [a statute], each application of that statute is within the commerce power").

264. See, e.g., Linda Greenhouse, *Supreme Court Roundup: Justices Forgo Opportunity to Expand on Recent Commerce-Clause Ruling in Gun Case*, N.Y. TIMES, May 2, 1995, at A13 (In *Robertson*, the Supreme Court "made a strategic, although perhaps only temporary, retreat from the constitutional battle lines it drew" in *Lopez*; *Robertson* shows the Court "pull[ing] back to await further developments in the lower courts."); W. John Moore, *A Landmark Decision? Maybe Not*, 27 NATL. J. 1131, 1131 (1995) (In *Robertson*, "the Court sent a clear message that *Lopez* was no blockbuster.").

265. Cf. *United States v. Malatesta*, 583 F.2d 748, 754 (5th Cir. 1978) ("[A]ny one" of several interstate telephone calls was sufficient to satisfy RICO's jurisdictional element.), *affd. en banc*, 590 F.2d 1379 (5th Cir.), *cert. denied*, 444 U.S. 846 (1979).

RICO, moreover, did not purport to regulate all aspects of the Alaskan gold mine; it punished Robertson's investment in that mine. Robertson invested money that he had obtained from illegal drug trafficking, a commercial activity that is part of an extensive interstate web and that Congress has forbidden *in toto*. Robertson's investment itself, finally, crossed state lines; he operated the Alaskan mine while living in Arizona, made numerous interstate trips to supervise the mine, and even purchased a small airplane to fly between Arizona and Alaska.<sup>266</sup> Although the Court did not focus on these aspects of the case, they should leave no doubt that Congress had the power to punish Robertson's acts under the Commerce Clause.<sup>267</sup>

*Robertson*, in sum, confirms that the Court does not intend an imminent, draconian reversal of its Commerce Clause jurisprudence with *Lopez*. The decision is important for that reason but does not portend more than that.

## 2. Termites

In the end-of-Term excitement over *Lopez*, commentators all but forgot an earlier Commerce Clause ruling that suggests much more clearly than *Robertson* that the Court intends no wholesale restructuring of its Commerce Clause jurisprudence. In *Allied-Bruce Terminix Cos. v. Dobson*,<sup>268</sup> the Court held that Congress intended to reach to the limits of its Commerce Clause power when it regulated any "contract evidencing a transaction involving commerce" under the Federal Arbitration Act.<sup>269</sup> After determining that the phrase "involving commerce" was "the functional equivalent of 'affecting' [commerce]"<sup>270</sup> and that Congress intended to reach as far as the Commerce Clause permitted in the Arbitration Act, the Court summarily concluded that the particular trans-

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266. See Brief for the United States at 18, *United States v. Robertson*, 115 S. Ct. 1732 (1995) (No. 94-251).

267. The Court may not have focused on these interstate components of Robertson's investment or previous drug dealing because RICO requires investment in "an enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(a) (1994) (emphasis added). Thus, the statute may require some relationship between the target enterprise and interstate commerce, in addition to any other interstate contacts in the case. As a constitutional matter, however, Congress surely can prohibit an investment that requires ongoing, personal supervision across state lines.

268. 115 S. Ct. 834 (1995).

269. 9 U.S.C. § 2 (1994).

270. 115 S. Ct. at 839.

action fell within Congress's power. Indeed, the parties did not contest that fact.<sup>271</sup>

The contract at issue in *Terminix* was a termite-protection plan that an Alabama homeowner had bought from the local office of a multistate termite-control company. Two facts amply connected the transaction to interstate commerce under pre-*Lopez* cases: the termite-control company and its parent both operated in several states, and the local Terminix office obtained supplies from out-of-state.<sup>272</sup>

A Court bent on using *Lopez* as a springboard for substantial reversals in Commerce Clause doctrine, however, might have raised some questions about the connections between this contract and interstate commerce. The contract covered a single Alabama home, and the Alabama homeowner had purchased the contract from a local franchisee. Employees of the local franchise stressed to customers that they were not dealing with a national organization but "just dealing with us as local companies."<sup>273</sup> At least from the homeowner's point of view, therefore, the transaction was quite local. The Alabama homeowner, moreover, was the party who objected to the arbitration clause in the contract. The Court thus approved federal power over a *customer* — and a homeowner, at that — who used a business operating in interstate commerce. Previous cases more readily affirmed congressional power over employers and employees associated with businesses affecting interstate commerce or wrongdoers who interfered with those businesses.<sup>274</sup> A Court determined to reconsider Commerce Clause precedent might have considered distinguishing local customers from the businesses they patronize.

None of the Justices, however, expressed any concern over Congress's power to regulate customers in such local transactions.<sup>275</sup> When federal legislation touches any type of commercial transac-

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271. See 115 S. Ct. at 843.

272. See 115 S. Ct. at 837.

273. Brief for Respondent at 2, *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834 (1995) (No. 93-1001).

274. See *supra* notes 145-52 and accompanying text.

275. Justices Thomas and Scalia dissented from the Court's judgment on the ground that Congress intended the Federal Arbitration Act to apply only to federal, not state, courts. 115 S. Ct. at 844-45 (Scalia, J., dissenting); 115 S. Ct. at 845 (Thomas, J., joined by Scalia, J., dissenting). Because this issue made it unnecessary for them to address other issues in the case, they might not have considered Congress's power to regulate the particular contract in *Terminix*. Justice Thomas's eagerness to urge the *Lopez* Court to broaden its holding, however, suggests that he might at least have noted his concern if he perceived the exercise of congressional power in *Terminix* as too extensive.

tion, the Court appears quite willing to continue upholding broad exercises of congressional power. Justice Breyer read his *Lopez* dissent from the bench, but his less-trumpeted opinion in *Terminix* may be more important in demonstrating the limits of the Court's new Commerce Clause doctrine.

### C. *Certiorari Denials*

When the Supreme Court receives petitions for certiorari in cases that are related to a case awaiting plenary disposition, the Court often defers action on the related petitions until after the fully briefed case has been decided.<sup>276</sup> Shortly after the main case has been decided, the Court will dispose of the "held" petitions by denying certiorari, by vacating the lower court opinion and remanding for reconsideration in light of the new Supreme Court decision, or, occasionally, by granting the related petition and setting that case for full argument.<sup>277</sup>

The first two actions do not constitute dispositions on the merits.<sup>278</sup> Some courtwatchers, however, have suggested that these actions contain important, initial clues about how the Court will construe a new precedent. In particular, the denial of certiorari in a held case may suggest that the Court sees no inconsistency between the lower court decision and its new precedent. If the Court per-

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276. See ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 243-44, 249 (7th ed. 1993); William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 477-78 (1973); Arthur D. Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 HASTINGS CONST. L.Q. 5 (1983).

277. See Hellman, *supra* note 276, at 38-39.

278. See STERN ET AL., *supra* note 276, at 239, 249; Hellman, *supra* note 276, at 9-11, 20. The Supreme Court frequently has declared that denials of certiorari carry no precedential weight. See, e.g., *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 366 n.1 (1973); *United States v. Carver*, 260 U.S. 482, 490 (1923). But see *infra* note 279 and accompanying text. The Court has less frequently discussed its practice of vacating lower court decisions and remanding for reconsideration in light of a new Supreme Court decision. In *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964), the Court observed that these orders do "not amount to a final determination on the merits." Instead, the Court explained, the Court may issue such an order when it is "not certain that the case [is] free from all obstacles to reversal on [the] intervening precedent." 376 U.S. at 776. The order "indicate[s]" that the Court finds the intervening precedent "sufficiently analogous and, perhaps, decisive to compel reexamination of the case." 376 U.S. at 777. As one scholar has pointed out, this language is somewhat ambiguous. On the one hand, the Court clearly stated that these remand orders are not decisions on the merits. On the other hand, the observation that the remanded case is not free from "all" obstacles to reversal suggests that the Court believes that the intervening precedent strongly counsels reversal. See Hellman, *supra* note 276, at 10; see also *Florida v. Burr*, 496 U.S. 914, 918 (1990) (Stevens, J., dissenting) ("[A]n order remanding a case to a lower court does 'not amount to a final decision on the merits,' but only a conclusion that an intervening decision is sufficiently analogous to make reexamination of the case appropriate." (citation omitted) (quoting *Henry*, 376 U.S. at 776)).

ceived a possible conflict, it would have the option of vacating the lower court decision and remanding for reconsideration in light of the intervening precedent.<sup>279</sup>

Shortly after deciding *Lopez*, the Supreme Court denied certiorari in four cases that appear to have been held pending that decision.<sup>280</sup> In two of the denied petitions, the lower courts had upheld the federal carjacking statute against a Commerce Clause attack.<sup>281</sup> The Court's denial of certiorari in these two cases, without recorded dissent, may suggest that the Court does not view the carjacking statute as vulnerable to constitutional attack after *Lopez*. At the very least, the denials suggest that the Court was not eager to push the boundaries of *Lopez*.

The Court also denied petitions for certiorari in two cases challenging Congress's power to punish the arson of private dwell-

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279. See Hellman, *supra* note 276, at 21 (suggesting, based on an empirical study, that "when the Court denies review rather than issuing a reconsideration order in a case obviously held pending the announcement of a plenary decision, its action — contrary to the usual rule — can be deemed to have at least some precedential significance" (footnotes omitted)).

The Supreme Court itself once attributed some significance to a denial of certiorari under these circumstances. See *United States v. Kras*, 409 U.S. 434, 443 (1973) (noting that "although a denial of certiorari normally carries no implication or inference," a denial over the "pointed dissents" of two Justices shortly after the decision of a related case "surely [was] not without some significance as to . . . the Court's attitude"). But see 409 U.S. at 460-61 (Marshall, J., dissenting) (protesting vigorously the attribution of any significance to denials of certiorari). Some lower courts also have noted the possible significance of certiorari denials in cases that were held pending another decision. See, e.g., *Awtry v. United States*, 684 F.2d 896, 899 (Ct. Cl. 1982) ("[W]e attach no significance to the denial of certiorari," but "the temptation to do otherwise is exceptionally great" when the petition was pending while the Court decided a related case on the merits.); *Wells v. Meyer's Bakery*, 561 F.2d 1268, 1275 (8th Cir. 1977) (The denial of certiorari four weeks after a related decision "cannot be overlooked.").

280. The Court also vacated and remanded for reconsideration one case in which the lower court had upheld a conviction under the Gun-Free School Zones Act. See *Edwards v. United States*, 115 S. Ct. 1819 (1995).

The fact that a petition was held pending another decision can only be deduced from the length of time that the petition remained on the Court's docket and the coincidence of denial shortly after the decision of a related case. The process of deduction, obviously, is not foolproof. See Hellman, *supra* note 276, at 16 n.48, 21 n.65. It is also difficult to trace criminal cases in which certiorari has been denied because so many of those cases appear on the Court's *in forma pauperis* docket and are not summarized in readily available sources. It is relatively clear that the four cases discussed in the text were held pending *Lopez*. It is possible, however, that the Court held and disposed of additional *in forma pauperis* petitions after its *Lopez* opinion.

281. See *Overstreet v. United States*, 115 S. Ct. 1970 (1995); *Osteen v. United States*, 115 S. Ct. 1825 (1995). For further discussion of the carjacking statute, see *supra* notes 196-204 and accompanying text. Curiously, the Court had denied certiorari in a third case upholding the carjacking statute shortly before hearing oral arguments in *Lopez*. See *Harris v. United States*, 115 S. Ct. 458 (1994). The Court may have missed the possible link between this case and *Lopez*, or an independent ground may have supported the lower court's decision. Cf. Hellman, *supra* note 276, at 38 n.127 (noting that the Court occasionally treats petitions in what appears to be an inconsistent manner, holding one and denying another immediately).



ings.<sup>282</sup> Federal law prohibits the arson of "any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."<sup>283</sup> Ten years ago, the Supreme Court upheld the application of this statute to rental property; that decision would fit comfortably with the *Lopez* Court's distinction between commercial and noncommercial activities.<sup>284</sup>

At least one of the cases pending after *Lopez*, however, presented a much closer question under the Court's new reading of the Commerce Clause.<sup>285</sup> In *Ramey v. United States*, the defendants had been convicted of burning a mobile home in Logan County, West Virginia.<sup>286</sup> The defendants lived near their victims' home; there was no evidence that they planned the arson in another state or purchased supplies for the crime outside West Virginia. The arson was not linked either to a larger criminal organization or to a commercial motive such as the receipt of insurance proceeds. This was an ugly, but local, crime of racial hatred: the defendants burned the home of an interracial couple to the ground because they objected to the interracial marriage. The Fourth Circuit upheld federal jurisdiction on the tenuous ground that the victims had purchased electricity from an interstate power grid. Destruction of their trailer, the court reasoned, "affected" interstate commerce by reducing slightly the demand for electricity.<sup>287</sup>

Justice Scalia dissented from the denial of certiorari in both *Ramey* and its companion case, calling for the Court to vacate the

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282. See *Ramey v. United States*, 115 S. Ct. 1838 (1995); *Moore v. United States*, 115 S. Ct. 1838 (1995).

283. 18 U.S.C. § 844(i) (1994).

284. See *Russell v. United States*, 471 U.S. 858 (1985).

285. The second case, *Moore v. United States*, more clearly fit the scope of congressional power recognized in *Lopez*. The defendants in *Moore* were hired to burn a private home so that the owner could claim insurance proceeds. The agreement to burn the house was a commercial transaction, as was the resulting fraud on the insurance company. The insurance company was located in another state, an out-of-state bank held a mortgage on the house, the house was being marketed for sale in several states, and the house was an asset held by the U.S. Bankruptcy Court in another state. See *Moore v. United States*, 25 F.3d 1042 (4th Cir. 1994). The arson's effect on interstate commerce, therefore, was sufficiently immediate and substantial to satisfy *Lopez*.

286. The facts of the case are recounted in the Court of Appeals' opinion, *Ramey v. United States*, 24 F.3d 602 (4th Cir. 1994).

287. See 24 F.3d at 607. The Government's alternative argument in *Ramey* was that the victims' mobile home had moved previously in interstate commerce. The court declined to decide whether this previous movement would be sufficient to sustain federal regulation, noting that the trailer had been stationary in West Virginia for 16 years. See 24 F.3d at 607 n.7. Some of the Supreme Court Justices conceivably concluded that this prior movement of the home was sufficient to link the crime to interstate commerce. Once again, however, this conclusion would suggest an aversion to expanding *Lopez*.

judgments and remand the cases for further consideration in light of *Lopez*. Scalia's proposal was plausible; the slender link to interstate commerce in *Ramey* at least raised questions after the Court's *Lopez* decision. No other Justice, however, joined Scalia in publicly calling for the Court to vacate and remand these cases.

An activist Court, either reading *Lopez* broadly or anxious to narrow the Commerce Clause further, easily could have remanded these four cases for further consideration. Indeed, if *Lopez* cast any significant doubt on the constitutionality of the carjacking statute or the contested applications of the arson statute, fairness to the individual criminal defendants would have called for a remand.<sup>288</sup> Circumstances peculiar to these cases might explain the Court's decision to deny certiorari rather than to remand the cases for reconsideration in light of *Lopez*. A majority of the Justices might still hold the carjacking statute unconstitutional or prune the scope of the arson statute.<sup>289</sup> The denial of these petitions, however, suggests that the Court was content to retreat from the Commerce Clause once *Lopez* had been decided.

#### IV. *LOPEZ* REFINED: DRAWING CONSTITUTIONAL LINES WITH FUZZY LOGIC

I have argued that *Lopez* is a limited decision, resting on multiple distinguishing features, and that the Supreme Court is unlikely

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288. The desire to treat litigants equally and not deprive a litigant of the benefit of a new legal rule because of an accident of timing is one of the justifications for the Court's practice of holding related certiorari petitions. Otherwise, litigants might be caught in a twilight zone: if their case had moved more slowly through the lower courts, they would have benefited from the Court's new rule. If their case had moved more rapidly, their petition might have been the one selected for review. See Hellman, *supra* note 276, at 31 & n.100.

289. While this article was being edited, the Ninth Circuit refused to apply the arson statute under circumstances quite similar to those in *Ramey*. See *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995). The defendant in *Pappadopoulos* conspired with two others to burn her residence and fraudulently collect the insurance proceeds. The Government's only evidence that the burned residence was "used in interstate or foreign commerce" was proof that the home had consumed natural gas from out-of-state sources. See 64 F.3d at 524. The Ninth Circuit held that this commerce link was too tenuous to withstand scrutiny after *Lopez*. In reaching this result, the court neither cited *Ramey* nor discussed the Supreme Court's nonprecedential denial of certiorari in that case.

The Ninth Circuit's decision in *Pappadopoulos* is similar to lower court opinions construing the Hobbs Act and federal money laundering statutes, see *supra* notes 172-79, 234-39 and accompanying text. The Ninth Circuit did not hold the federal arson statute unconstitutional; it narrowed slightly the jurisdictional element in that statute. The decision is a plausible one after *Lopez*, as the Seventh Circuit has also realized. See *United States v. Martin*, 63 F.3d 1422 (7th Cir. 1995) (*Lopez* may cast doubt on prior decisions applying the Arson Act to the burning of residential buildings with no interstate connection other than the consumption of power from out-of-state sources. (dictum)). The very plausibility of the result makes the Supreme Court's denial of certiorari in *Ramey* all the more remarkable. Although the Court ultimately may agree with the Ninth Circuit in *Pappadopoulos*, the Court's action in *Ramey* suggests that it was not eager to encourage even relatively restrained applications of *Lopez*.

to expand the *Lopez* ruling significantly. To understand *Lopez*, it is essential to capture the opinion's many nuances. There is no single "key" to *Lopez*, although certain facets of the case may have been more important than others to the majority.

Fuzzy logic, a contemporary theory of mathematical sets, offers a promising avenue for describing a multifaceted decision like *Lopez*. The principles of fuzzy logic allow computer scientists to model decisions based on the complex interaction of multiple factors, as well as to account for variability in each of those factors. Fuzzy logic masters both complexity and uncertainty in a manner that produces finely tuned results. Working with fuzzy logic, engineers have produced subway trains that glide smoothly to a stop within seven centimeters of their target, cameras that automatically compensate for jitter in the hand that holds them, and computerized databases that diagnose medical ailments in thousands of patients.<sup>290</sup>

Fuzzy logic suggests that the uncertain, fuzzy factors of constitutional cases like *Lopez* also can be tamed to yield well-defined results. In this final section, I explain the fundamentals of fuzzy logic and then build a "fuzzy" model of *Lopez*.<sup>291</sup> This model is quite similar to the traditional doctrinal analysis offered above. Indeed, one of the advantages of drawing upon fuzzy logic is that it amplifies important features of conventional legal thinking. Restating *Lopez* with fuzzy logic, however, stresses the importance of context in that decision and helps define the boundaries of the Court's new rule.<sup>292</sup>

### A. *The New Mathematics of Fuzzy Logic*

Conventional logic divides the world into crisp classes. This animal either is a bird or it is not a bird. That person either is bald

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290. See DANIEL MCNEILL & PAUL FREIBERGER, *FUZZY LOGIC* 156 (1993); Bart Kosko & Satoru Isaka, *Fuzzy Logic*, *SCI. AM.*, July 1993, at 76, 78-80. The subway driven by fuzzy logic is three times more precise in stopping than a subway driven by a human operator and cuts energy costs by 10%. See MCNEILL & FREIBERGER, *supra*, at 156.

291. My discussion of fuzzy logic draws upon BART KOSKO, *FUZZY THINKING: THE NEW SCIENCE OF FUZZY LOGIC* (1993); MCNEILL & FREIBERGER, *supra* note 290; and Kosko & Isaka, *supra* note 290. All three sources provide an excellent introduction to fuzzy logic. For those interested in reading the scholarly paper that is credited with starting the fuzzy revolution, see L.A. Zadeh, *Fuzzy Sets*, 8 *INFO. & CONTROL* 338 (1965).

292. The ability to explain the location of a constitutional line is different from the textual or policy considerations motivating the choice of one line over another. Fuzzy logic can help describe where *Lopez*'s constitutional boundary lies, but mathematical principles cannot choose between competing theories of the Commerce Clause. Judges still must decide which actions are "commerce" and which are not. Indeed, fuzzy logic helps illuminate this distinction. See *infra* notes 304-06 and accompanying text.

or is not bald. Conventional logic also depends on the law of the excluded middle: an object cannot belong both to a set and the set's complement. This feathered creature cannot be both a bird and not a bird. That woman cannot be both bald and hairy.<sup>293</sup>

Fuzzy logic recognizes that most sets do not have clearly marked boundaries. Many objects belong partly to a class and partly to its complement; sets are composed of objects that belong to the set to different degrees. A robin is more of a bird than an ostrich, an ostrich is more of a bird than a chicken, and all of these are more of a bird than a bat.<sup>294</sup> Men and women with receding hairlines are a little bit bald; women and men with half a bare scalp are partly bald; men and women with a few patches of hair are mostly bald; and Michael Jordan and Sinead O'Connor are completely bald.

Psychologists have confirmed that these fuzzy classifications correspond to human thought processes. When psychologist Eleanor Rosch asked students to rate how well particular words typified categories like "science," "vehicle," or "bird," the students had no difficulty responding to her directions.<sup>295</sup> They also displayed remarkable consensus on the rankings of words within each category. All 113 of Rosch's subjects thought that chemistry was more of a science than botany, that a car was more of a vehicle than a scooter, and that murder was more of a crime than stealing.<sup>296</sup> It also made sense to the students to say that a robin is a better bird than a chicken; that an apple is more of a fruit than an olive; and that a carrot is more vegetable-like than parsley or a pickle.<sup>297</sup>

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293. The law of the excluded middle produces a number of well-known paradoxes in traditional logic. Falakros, for example, proposed this paradox: "Pluck a hair from a normal man's head and he does not suddenly become bald. Pull out another, and a third, and a fourth, and he still isn't bald. Keep plucking and eventually the wincing man will have no hairs at all on his head, yet he isn't bald." McNEILL & FREIBERGER, *supra* note 290, at 27.

294. This example derives from a test psychologist Eleanor Rosch ran with college students in 1973. The test is described further below. See also McNEILL & FREIBERGER, *supra* note 290, at 84-85.

295. See Eleanor H. Rosch, *On the Internal Structure of Perceptual and Semantic Categories*, in COGNITIVE DEVELOPMENT AND THE ACQUISITION OF LANGUAGE 111 (Timothy E. Moore ed., 1973), discussed in McNEILL & FREIBERGER, *supra* note 290, at 84-85.

296. *Id.*

297. *Id.* Gregg Oden conducted further experiments demonstrating the natural ability of people to reason with fuzzy categories. Oden, for example, gave subjects pairs of statements like "A chair is furniture" and "An ostrich is a bird." He then asked the subjects which sentence was more true than the other, and how much more true it was. He thus showed, not only that people think in fuzzy categories but that they are capable of manipulating those categories by making statements like: "A chair is twice as much furniture as an ostrich is a bird." See Gregg Oden, *Fuzziness in Semantic Memory: Choosing Exemplars of Subjective Categories*, 5 MEMORY & COGNITION 198 (1977); see also McNEILL & FREIBERGER, *supra* note 290, at 91.

Fuzzy logic quantifies this natural thought process by ascribing numerical values to set membership: a chair is .9 furniture, meaning that it belongs very strongly to the category of furniture, while a filing cabinet might be only .5 furniture (somewhat furniture) and a bathtub might be only .3 furniture (a little bit furniture). Each of these pieces of "furniture" also belongs partly to the set of "not furniture." A chair is very slightly (.1) not furniture; a filing cabinet is somewhat (.5) not furniture; and a bathtub is mostly (.7) not furniture.<sup>298</sup> In fuzzy logic, the excluded middle disappears.

Fuzzy categories may be combined into fuzzy rules, and fuzzy rules can be joined to describe decisionmaking processes. These fuzzy algorithms are particularly apt at describing expert judgments, which may rely upon hundreds of simultaneous comparisons. A subway driver attempting to bring her train to a smooth stop at the station, for example, might apply a series of fuzzy rules like: (1) The closer I am to the station, the harder I should apply the brakes; (2) the more the track slopes down to the station, the harder I should apply the brakes; (3) the more the track slopes up to the station, the lighter I should apply the brakes; and (4) the wetter the track, the more I should pump the brakes.<sup>299</sup> In practice, the expert applies these rules rapidly and without articulating them; an experienced driver knows just how much to apply the brake under different circumstances. Articulating the rules through fuzzy logic illuminates the decisionmaking process and also allows computer-driven machines to reproduce that process.<sup>300</sup>

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298. These examples derive from experiments conducted by Gary Oden. See Oden, *supra* note 297. Oden used his results to calculate the degree to which subjects believed each of these items belonged to the category of "furniture." He obtained values of .960 for chair, .114 for filing cabinet, and .032 for bathtub, as well as .119 for picture, .091 for mirror, .053 for refrigerator, and .030 for carseat. See *id.* at 201. I have simplified his numbers, while maintaining the rank orders he found.

299. This example is based loosely on some of the problems encountered in designing the computerized subway system in Sendai, Japan. See Kosko & Isaka, *supra* note 290, at 78-79.

300. To accommodate the electrical pathways of a computer, fuzzy logic would state these rules somewhat differently when programming a machine. Programmers first would establish a series of more absolute rules such as: (1) If I am at the station, then press the brakes very hard; (2) If I am very close to the station, then press the brakes moderately hard; (3) If I am somewhat close to the station, then press the brakes a little bit hard; (4) If I am a little bit distant from the station, then press the brakes lightly; and (5) If I am moderately distant from the station, then press the brakes very lightly. System designers then would quantify each of the fuzzy terms in these rules with overlapping numerical ranges. "At the station," for example, might be defined as from 0 to 10 feet away from the station. "Very close to the station" might be defined as from 5 to 50 feet from the station, and "somewhat close to the station" might be defined as from 30 to 100 feet from the station. Depending on the exact position of a train, each of these rules would activate to a different degree. A train that was 9 feet from the station, for example, would be partly "at the station" and partly "very close to the station." Each of the rules governing those positions would fire to the appropriate degree, producing a braking pressure between "very hard" and "moderately hard." See generally,

The subway driver's judgment could also be expressed in a series of conventional yes-no rules, but the number of rules would be overwhelming. The first of these rules might read: "If I am 200 feet from the station, the track slopes down fifteen degrees toward the station, and the rails are completely dry, then depress the brakes one-eighth of an inch and hold them steady at that point."<sup>301</sup> To express the subway driver's judgment through a series of yes-no rules, a different rule would be necessary for each permutation of feet from the station, degree of track slope, and amount of water on the rails. Computerized systems based on conventional yes-no logic have proven both cumbersome and stiff. The number of programmed rules is unwieldy, and seams between the rules produce noticeable jerks or jumps — just as a car powered by conventional cruise control shifts noticeably from one engine speed to another as the car climbs a hill.

Both fuzzy rules and yes-no rules link an action to a condition, but fuzzy rules state both the action and condition as matters of degree. Yes-no rules, on the other hand, create strict categories that must be satisfied for the rule to apply. This simple shift, from yes-no rules to fuzzy ones, has produced both revolutionary consumer products and a more accurate model for human decision-making. The same shift illuminates traditional paths of constitutional interpretation.

### B. *The Fuzzy Logic of Interstate Commerce*

Interstate commerce, like birds and baldness, is not a crisp set. A ferry crossing the Hudson River from New Jersey to New York is very much interstate commerce; a strike in Pittsburgh that halts

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Kosko, *supra* note 291, at 156-76 (describing this process in greater detail, as applied to the regulator for an air conditioner).

In adapting fuzzy logic to legal thinking, I have by-stepped these steps because people can reason directly with statements like "the closer I am to the station, the harder I should press the brake." The process used to power machines, however, may provide a useful analogy in areas in which the courts traditionally have used a series of rigid categories. In construing the Equal Protection Clause, for example, the Supreme Court has applied three types of scrutiny to three types of rigidly defined classes. Pursuing the fuzzy logic analogy, we should consider whether some classifications fall partly in two or more categories — and should benefit from some combination of the scrutiny afforded those categories. The result would be similar to the 'sliding scale' of scrutiny proposed 25 years ago by Justice Marshall, *see* *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting); *Dandridge v. Williams*, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting), but might illuminate that approach more clearly. I leave further development of these ideas to another day.

301. This type of rule is a "yes-no" rule because the rule either applies or it does not. If the position of the train and condition of the track satisfy the premises of the rule, then the outcome applies. If any of the conditions vary from the rule's premises, then the rule does not apply, and the operator must consult another rule.

steel shipments to several other states is somewhat interstate commerce; and a farmer's decision to consume his wheat on the farm rather than sell it is a little bit interstate commerce.<sup>302</sup> In the everyday, nonlegal world around us, activities do not fall into sharply defined sets of interstate commerce and noninterstate commerce.<sup>303</sup>

Judicial dispositions, on the other hand, must be crisp. At the end of a judicial opinion, the challenged conduct either is interstate commerce or it is not interstate commerce. The Court's challenge is to sort a fuzzy set of everyday activities into two watertight constitutional compartments: "Commerce . . . among the several States" and all other conduct.

The first lesson of fuzzy logic is that the Court must choose this boundary; it cannot simply discover a well-defined class of activities called "interstate commerce" in the outside world.<sup>304</sup> Instead, the

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302. Focusing on the words "interstate commerce" in these examples is somewhat artificial because Congress's power under the Commerce Clause depends upon the meaning of the word "regulate" and the meaning of the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18 (Congress shall have power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."), as well as on the meaning of the words "Commerce . . . among the several States." I have followed the convention of most judges and scholars in collapsing all of these sources into a single reference to "interstate commerce."

Once all of these powers are considered, it is possible to see why the strike and decision to withhold wheat from the market are at least somewhat "interstate commerce." The power to "regulate" interstate commerce includes the power to promote interstate commerce, and Congress might reasonably decide that strikes and restless labor conditions reduce the interstate flow of goods. Similarly, Congress has the power to set prices for interstate wheat sales; those sales indisputably constitute "interstate commerce." In an integrated market, however, Congress can only maintain those interstate price supports by fixing prices of intrastate sales and controlling goods withheld from the market; under these circumstances, the Necessary and Proper Clause makes the latter decision at least a little bit "interstate commerce."

Recognizing that these activities are somewhat commerce-like does not mean that the Court must include them within Congress's power to regulate interstate commerce. To enforce the federal-state balance built into the Constitution, the Court might decide that the Commerce Clause demands a high degree of commerce-likeness to support congressional regulation. The Court, however, cannot reach that result simply by denying all connection between these activities and interstate commerce.

303. Some scholars argue that the words "Commerce . . . among the several States" imply a narrow, well-defined category of activities. Richard Epstein, for example, suggests that "commerce" means "shipping and navigation, and the contracts regulating buying and selling." Epstein, *supra* note 67, at 1394. Further examination of Epstein's argument, however, reveals that he rejects broader definitions of interstate commerce because they would conflict with the Tenth Amendment or structural assumptions of federalism in the Constitution. His argument does not rest on the simple assertion that "commerce" is a sharply defined set of activities. Epstein's final definition of interstate commerce, moreover, is distinctly fuzzy: "interstate transportation, navigation and sales, and the activities *closely incident* to them." *Id.* at 1454 (emphasis added).

304. Fuzzy logic alone does not prove that interstate commerce is a fuzzy set; that conclusion about interstate commerce is an empirical judgment. The principles of fuzzy logic, however, help to express what we notice in the world around us and from reading the Supreme Court's commerce cases — that some things are more like interstate commerce than others but that there is no *a priori* line separating interstate commerce from other conduct.

Justices must decide what degree of "commerce-likeness" will satisfy the constitutional definition of interstate commerce.<sup>305</sup> That decision may be influenced by the Constitution's text or structure, the history of our government, or any other source that the Justices feel authorized to consult.<sup>306</sup> The concept of "commerce" alone will not produce a sharply defined set of activities for congressional regulation.

The Supreme Court itself has recognized the fuzziness of interstate commerce. In 1937, the Court admitted that the definition of interstate commerce "is necessarily one of degree,"<sup>307</sup> and the majority confirmed that observation in *Lopez*.<sup>308</sup> The Court, however, has always seemed apologetic about this inability to identify a single, crisp definition of interstate commerce. Fuzzy logic teaches that there is no shame in complexity. Admitting the fuzziness of interstate commerce and the need for the Court to choose a level of commerce-likeness that will support congressional power is more productive than engaging in a fruitless quest for a closed set of activities defined as "interstate commerce."

More important, fuzzy logic demonstrates that it is possible to work logically with imprecise categories. The fact that interstate

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305. Critics of judicial review may argue that it is inappropriate for the Court, rather than an elected legislature, to decide this question. When enforcing the Commerce Clause, however, the Court does not dispute the legitimacy of social or economic ends — as it did under the discredited line of due process cases originating with *Lochner v. New York*, 198 U.S. 45 (1905). Instead, the Court is enforcing a division of power between Congress and the state governments. Common sense suggests that policing this boundary should not be left to one of the interested parties. The scholarly and judicial debate over the appropriateness of judicial review in Commerce Clause cases, however, is long-standing and spirited. See *supra* note 71. Fuzzy logic does not change the terms of that debate; it merely clarifies that courts inevitably assume an active role when enforcing the Commerce Clause because they must choose an appropriate level of commerce-likeness rather than passively applying one that is preordained by a clear definition of "interstate commerce."

306. A vast literature exists on the legitimate sources of constitutional interpretation, and that debate is well beyond the scope of this article. Fuzzy logic does not determine what sources the Court may consult; it merely clarifies that the Court is unlikely to find a sharply bounded category of activities corresponding with the constitutional text. Some additional sources of authority, therefore, will be necessary.

307. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); see also *Wickard v. Filburn*, 317 U.S. 111, 123 n.24 (1942) ("[T]he criterion necessarily is one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas.").

308. *United States v. Lopez*, 115 S. Ct. 1624, 1633-34 (1995); see also 115 S. Ct. at 1637 (Kennedy, J., concurring); 115 S. Ct. at 1657 (Breyer, J., dissenting) ("[T]he question of degree (how much effect) requires an estimate of the 'size' of the effect that no verbal formulation can capture with precision."). Members of both the *Lopez* majority and dissent also used comparative terms to describe some activities as "more like" interstate commerce than others. See, e.g., 115 S. Ct. at 1636 (Kennedy, J., concurring) ("Even the most confined interpretation of 'commerce' would embrace transportation between the States."); 115 S. Ct. at 1656 (Souter, J., dissenting) ("A challenge to congressional regulation of interstate garbage hauling would be easy to resolve; review of congressional regulation of gun possession in school yards is more difficult.").



commerce is fuzzy does not mean that the Court will render illogical, woolly headed opinions about interstate commerce. On the contrary, fuzzy categories and fuzzy rules can lead to very precise results — like a computerized subway that stops within centimeters of its target.

Fuzzy logic might frame the issues in *Lopez* like this: How much is gun possession in a school zone like interstate commerce? And, how much like interstate commerce must an action be for Congress to regulate it? Stating the issues this way helps illuminate the Court's reasoning on both scores. Supreme Court opinions, for example, reveal at least five factors that have influenced the Court's answer to the second question. Since the New Deal, the Court has acknowledged that elected legislators, rather than appointed judges, should set economic and social goals in a democratic society. Congress is also more knowledgeable than the Court about the economic effects of legislation. A complex modern economy, moreover, requires national solutions to many problems. These three factors have pushed the Court to set the judicially enforceable level of commerce-likeness quite low. On the other hand, the Court has recognized that the text of the Commerce Clause implies that some activities are *not* interstate commerce. The Court has also decided that the structure of our federal system requires a level of commerce-likeness that is not so low that it "would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."<sup>309</sup> These two factors argue that the level of commerce-likeness should not be trivial and certainly should not be zero.

Fuzzy logicians would attach weights to these five forces and then find their fuzzy weighted average. The resulting average would represent a precise level of commerce-likeness accommodating these countervailing forces. The Supreme Court cannot express its decision in such quantitative terms, but fuzzy logic still underlies its reasoning process and illuminates its result. The fuzzy logic model, for example, explains that the Court chose a higher level of commerce-likeness in *Lopez* than some recent cases had suggested because it feared that the Commerce Clause had expanded to encompass all human activity. The last two forces identified above deserved *some* weight, the Court concluded, so it raised the required level of commerce-likeness above zero.

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309. *Jones & Laughlin Steel Corp.*, 301 U.S. at 37.

The analogy to fuzzy logic, moreover, suggests that the current level of commerce-likeness demanded by the Commerce Clause may be quite specific — even though words cannot express that specificity. The Supreme Court can only say that the Constitution requires a “substantial effect” on interstate commerce for Congress to act, which may be the same as saying that Congress may regulate things that have a “low” level of commerce-likeness but not things with a “very low” level of commerce-likeness. The fuzziness of these words may mask a very precise point at which the Court would allow congressional regulation — just as we know that there is a particular level of braking pressure that will bring the car to a smooth stop at a red light but can only tell a new driver to apply the brake “lightly” and then yell “more” or “less” until the neophyte gets it right.

The Supreme Court, however, did not merely announce a result in *Lopez*; it explained why gun-free school zones, as regulated by the Gun-Free School Zones Act, were not sufficiently commerce-like to support congressional regulation. Fuzzy logic can help us organize those reasons by stating as a series of fuzzy rules both the Court’s express reasons and the contextual factors that might have influenced its decision. *Lopez* tells us to measure how commerce-like an activity is by applying these rules:

- (1) The more an activity is like commercial or economic conduct, the more likely it is to be interstate commerce.
- (2) The less clearly Congress’s statute provides a jurisdictional element, the less likely the regulated activity is to be interstate commerce.<sup>310</sup>
- (3) The less explicitly Congress makes findings tying the regulated activity to interstate commerce, the less likely the activity is to be interstate commerce.
- (4) The more an activity is like education or another area traditionally regulated by the states, the less likely it is to be interstate commerce.
- (5) The more an activity is linked to cherished notions of private property, the less likely it is to be interstate commerce.
- (6) The more an activity falls within an area in which national regulation is necessary, the more likely it is to be interstate commerce.

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310. At first glance, a “jurisdictional element” might seem to be an exception to the proposition that all sets are fuzzy. Surely a statute either has a jurisdictional element or it does not have one. Jurisdictional elements, however, come in many guises. Some statutes require the government to prove a particular link to interstate commerce, such as that a gun moved across state lines or that a defendant placed an interstate phone call. Other statutes simply empower the government to regulate any activity “substantially affecting interstate commerce.” Stating the jurisdictional element rule as a fuzzy one allows for the possibility that the Court will decide in a future case that the type of jurisdictional element affects its decision.

(7) The more likely it is that competition among the states will provide the desired regulatory end, the less likely it is that the regulated activity is interstate commerce.

(8) The more an activity resembles a crime punished under state law, the less likely it is to be interstate commerce.

(9) The more an activity is linked to the workplace, particularly to the conduct of employers or employees, the more likely it is to be interstate commerce.

(10) The more likely it is that regulation of this activity would allow congressional regulation of all conduct, the less likely this activity is to be interstate commerce.

Future decisions will refine these rules, discarding some principles and adding others. The Supreme Court, for example, might reject my rule about workplaces, finding that criterion irrelevant to how much an activity is like interstate commerce. The Court might also indicate that some of these rules have more weight than others in determining the commerce-likeness of regulated conduct. The *Lopez* opinion itself suggests that rules one, two, and ten are most important in determining how much an activity is like interstate commerce.

Future decisions are also necessary to reveal whether gun-free school zones set the high water mark of state-controlled behavior, so that even conduct that is only marginally more like interstate commerce will fall within congressional control, or whether the tide of things that are not sufficiently like interstate commerce will wash even higher. Numerous signs from the Supreme Court, discussed in Part III above, suggest that *Lopez* is at or near the high water mark, but future decisions are needed to confirm that.

Rephrasing *Lopez* in this fuzzy manner is helpful for several reasons. First, the fuzzy rules provide a framework for exploring open questions. The rules outlined above highlight the need to determine the weight of each factor in determining how much an activity is like interstate commerce, as well as the need to clarify the degree of overall commerce-likeness needed to support congressional action.

Second, the fuzzy algorithm allows fuzziness in each of its components. Commercial conduct, congressional findings, national need, and traditional state activities are all fuzzy sets. Courts, as the dissent pointed out in *Lopez*, are not very successful in identifying sharply bounded sets like "commercial conduct" or "traditional state activities."<sup>311</sup> Casting *Lopez* in fuzzy terms avoids this diffi-

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311. 115 S. Ct. at 1663-65 (Breyer, J., dissenting). The inability to identify a crisp set of "traditional governmental functions" also motivated the Supreme Court's 1985 decision to

culty. Courts do not need to draw sharp lines separating commercial conduct from noncommercial conduct; they only need to decide matters of degree. It is hard to create crisp categories of commercial and noncommercial conduct, but it is not so hard to say that this action is more or less commercial than that one.<sup>312</sup> Fuzzy logic demands no more — and teaches that it is possible to reach precise results by combining rules stated as matters of degree.

Third, this outline of fuzzy rules demonstrates that judicial decisions based on multiple factors are not just ad hoc pronouncements. Instead, these decisions rest on complex algorithms. Fuzzy logic makes it easier to express these decisionmaking steps, so that the court's reasoning is more clear. Over time, moreover, algorithms based on fuzzy rules can be amended to incorporate more information and yield more certain results.

Finally, fuzzy rules preserve more information and more fully describe a Court's decision than blunt, categorical statements. The danger of simple, unqualified statements can be seen in the history of *Wickard v. Filburn*,<sup>313</sup> the case my classmates parodied in song. *Wickard* frequently is cited for the categorical proposition that "in determining whether a local activity will likely have a significant effect upon interstate commerce, a court must consider, not the effect of an individual act . . . but rather the cumulative effect of all similar instances."<sup>314</sup> In refining *Wickard* to this rule, courts have omitted the facts that:

- (1) Farmer Filburn was not an organic home baker who had decided to raise wheat for a few loaves of bread. He raised wheat commer-

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overrule *National League of Cities v. Usery*, 426 U.S. 833 (1976), and withdraw from judicial enforcement of the Commerce Clause. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). *Usery* suffered from a remarkable degree of rigidity, in requiring courts to determine whether a congressional action (1) "regulate[d] the 'States as States'"; (2) "address[ed] matters that are indisputably 'attribute[s] of state sovereignty'"; and (3) "directly impair[ed] [the States'] ability 'to structure integral operations in areas of traditional governmental functions.'" *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 287-88 (1981). It would be interesting to revisit *Usery* and determine whether the decision would be more workable if courts determined *how much* a federal statute regulated the "States as States," *the extent to which* the statute addressed "attributes of state sovereignty," and the *degree to which* the governmental function was "traditional."

312. Much of the *Lopez* majority's opinion expresses the fuzziness of the Commerce Clause inquiry. In discussing the distinction between commercial and noncommercial conduct, however, the Court lapsed into conventional black-white categories. *Lopez's* conduct, Rehnquist declared, "is in *no sense* an economic activity." 115 S. Ct. at 1634 (emphasis added). This declaration elicited the dissent's accurate observation that schools and the activities taking place in them are somewhat commercial. See 115 S. Ct. at 1664 (Breyer, J., dissenting). The majority would have fared better by adhering to fuzzy logic and noting that *Lopez's* behavior was "very little like economic activity."

313. 317 U.S. 111 (1942).

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

cially and regularly sold a portion of that wheat; indeed, the record was not clear whether Filburn intended to sell the disputed wheat or consume it on the farm.<sup>315</sup>

(2) "Home consumption" of wheat does not refer primarily to bread and pies baked by wheat growers. Instead, most farm consumption of wheat is devoted to feeding livestock who are then sold commercially and to reseeding fields to produce more wheat for commercial sale.<sup>316</sup>

(3) Price controls for wheat could be enforced only on a national level, and Congress believed those controls were essential to help pull the country out of the Depression.<sup>317</sup>

(4) Farm consumption of wheat was a major variable in the market for that product. The quantity of wheat required for household food, livestock food, and seed is relatively inelastic. Therefore, small reductions in the wheat supply through increased farm consumption can place dramatic pressure on price and easily undercut a price-control program.<sup>318</sup>

(5) The aggregated effect of home wheat consumption on interstate commerce, a possible fall in wheat prices, was exactly the effect Congress sought to regulate; there was no suggestion that Congress pretended an interest in wheat prices in order to regulate other conduct.<sup>319</sup>

The cumulative effect of decisions to withhold wheat from a market subject to national price controls, in other words, is more commerce-like than the cumulative effect of guns possessed within 1000 feet of schools. Blindly transferring the aggregation principle from *Wickard* to other contexts distorts the meaning of *Wickard* and suggests that the decision is much broader than it was intended. *Wickard* is not as broad an endorsement of national power as courts have sometimes declared, and *Lopez* is not as forceful a protection of state interests as some commentators have suggested. Both opinions reflect careful attention to facts and context and draw reasoned lines in the fuzzy set of interstate commerce. Rephrasing the decisions as fuzzy rules helps preserve both their context and their meaning.

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315. See *supra* note 145.

316. See Stern, *supra* note 117, at 902 (Farm consumption of wheat included 28-174 million bushels consumed annually as livestock food, 73-97 million bushels used each year for reseeding, and just 10-16 million bushels consumed annually as household food.). Despite these facts, the myth of Filburn as an organic home baker persists. See, e.g., *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) ("We know from *Wickard v. Filburn* . . . that wheat a farmer bakes into bread and eats at home is part of 'interstate commerce'. . . ." (citation omitted)).

317. See Stern, *supra* note 117, at 901-04.

318. See *Wickard v. Filburn*, 317 U.S. 111, 127 (1942); Stern, *supra* note 117, at 904.

319. Cf. Van Alstyne, *supra* note 61, at 783-99 (criticizing courts for upholding legislation based on the Commerce Clause when the statute is dressed in a "cellophane wrapper" of feigned interest in matters affecting interstate commerce).

Fuzzy logic is not necessary to preserve the fine points of judicial decisions; careful doctrinal analysis could do the same. The pressures of legal advocacy, however, tend to squeeze judicial statements into rigid categories. The desire for certainty in organizing vast quantities of legal doctrine has the same effect. Fuzzy logic is a convenient tool for combatting these tendencies and remembering that constitutional categories are inevitably fuzzy. Most important, fuzzy logic reminds us that "fuzzy" is not the opposite of "logical." Combining fuzzy rules yields reasoned decisions and well-defined results — like a high speed train capable of stopping on a dime.<sup>320</sup>

## V. CONCLUSION: A COMMERCE SONG FOR THE NINETIES

A nihilist might sneer at the seeming insignificance of *United States v. Lopez*. The decision overturned a minor federal law that Congress promptly moved to reenact in different form.<sup>321</sup> With or without federal action, school principals and state prosecutors will continue to punish individuals who bring guns to schools. The lower courts are unlikely to apply *Lopez* to invalidate many federal laws, and the Supreme Court is unlikely to expand the opinion's scope.

The strength of *Lopez*, however, lies in its narrow impact. Despite the decision's limited potential for striking federal legislation, *Lopez* confirmed two fundamental constitutional principles: that the Commerce Clause confers a limited grant of authority on Congress and that the courts will enforce that limit through deferential, but authentic, review. The modest ambition proclaimed by the majority — to prune an excessive and unnecessary piece of congressional meddling while leaving prior Commerce Clause decisions untouched — insulates those two principles from reversal. *Lopez* will be distinguished, but it is unlikely to be reversed.<sup>322</sup> In that way, *Lopez* makes a lasting contribution to constitutional doctrine.

Does this mean my classmates will need a new commerce song when we cross state lines to celebrate our twentieth reunion? The

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320. Once again, fuzzy logic cannot tell us where to place the dime. Fuzzy logic only describes how to find a destination the Supreme Court has chosen on other grounds.

321. See *supra* note 89.

322. In contrast, *National League of Cities v. Usery*, 426 U.S. 833 (1976), involved an application of the Fair Labor Standards Act that was worth millions of dollars to state and local governments. Continued litigation was inevitable, as the courts struggled to determine which employees were protected by the decision's shield of state sovereignty and which workers fell outside that stronghold. The stakes were high enough, for both governments and their employees, to keep the issue before the Court in the hopes that the Court would change its mind. Nine years later, the Court overruled its decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

ruling in *Wickard v. Filburn*<sup>323</sup> will survive until our fiftieth reunion and beyond. But a song is worth a megabyte of fuzzy logic, so I offer this final tribute to *Lopez*:

Commerce (Revised!)  
(sung to the tune of Achy Breaky Heart<sup>324</sup>)

The Feds can put the heat on a farmer growing wheat  
(as long as he's consuming it at home),  
Interstate extortion, obstructing an abortion,  
And having drugs within a schooling zone.

Tell Ollie's Barbecue how not to sell its food,  
And loan sharks not to break a butcher's leg.  
Transactions dealing drugs, machine guns owned by thugs  
Are all round holes that fit the "commerce" peg.

But don't regulate things that aren't so interstate;  
The Court has said it may not understand  
Those yuppie carphones or Gun-Free School Zones,  
These aren't the kind of laws the Framers planned.

Contracts to arbitrate are on the federal plate,  
though the bugs involved are in a 'Bama home.  
The feds can draw the line at drugs financing a mine  
or bigots who won't rent a hotel room.

But they can't regulate things that aren't so interstate;  
I just don't think the Court would understand.  
So gamble what you've got in an American Legion pot;  
Now *Lopez* draws a line across the sand.

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323. 317 U.S. 111 (1942).

324. The original lyrics to this song are among the worst ever written. You wouldn't think that I need authority for that assertion, but I have one: See Dave Barry, *Baby, Baby, Don't Get Hooked on These Songs*, ORLANDO SENTINEL TRIB., Jan. 26, 1993, at E1.

I am grateful to Andrew Lloyd Merritt, still my favorite classmate after 15 years, for composing this new version of "Commerce!" As the only country musician who has published an article on securities fraud in the *Texas Law Review*, he was uniquely qualified for the task.