Lawyers, Guns, and Commerce: United States v. Lopez and the New Commerce Clause Doctrine

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Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitutions of the States.

—James Madison

INTRODUCTION

United States v. Lopez2 is the first United States Supreme Court decision to strike down legislation based on the Commerce Clause since National League of Cities v. Usery3 in 1976, which was overruled by Garcia v. San Antonio Metropolitan Transit Authority4 in 1984.5 Previous to National League, the Court had not struck down legislation based upon the Commerce Clause since 1936 when it did so in Carter v. Carter Coal Co.,6 where the Court declared the establishment of industrial codes of fair competition unconstitutional. After President Roosevelt's "Court-packing" plan, Congress expanded national regulation based upon the Commerce Clause and the Court

1. 2 Annals of Cong. 1897 (1791).
5. In National League, the Court struck down the 1974 amendments to the Fair Labor Standards Act ("FLSA") as being outside the authority granted to Congress by the Commerce Clause because the amendments interfered with the states' freedom to structure employer-employee relationships in areas including fire prevention, police protection, sanitation, and public health—areas which the Court termed "areas of traditional governmental functions." 426 U.S. at 851-52. In Garcia, the Court overruled National League, held that the 1974 amendments to FLSA were valid, and stated that the National League Court's attempt to draw the boundaries of state regulatory immunity in terms of traditional governmental functions was "unsound in principle and unworkable in practice." 469 U.S. at 546. Because National League and Garcia involved congressional efforts to regulate the states (thus triggering a Tenth Amendment analysis), these two cases are distinguishable from United States v. Lopez which involved congressional efforts to regulate the activity of private persons within the states. Jesse H. Choper, Did Last Term Reveal "A Revolutionary States' Rights Movement Within the Supreme Court"?, 46 Case W. Res. L. Rev. 663, 663 (1996). Therefore, in light of this distinction, this Note does not address National League and Garcia in the background of case law leading up to the Lopez decision.
consistently upheld the legislation. Statutes such as Title II of the Civil Rights Act of 1964 and the Racketeer Influenced and Corrupt Organization Act ("RICO"), in particular, were major expansions of federal regulation based upon the Commerce Clause.

The holding of Lopez signifies a limit to national regulation. It also threatens a retreat to the dark ages of formalism which existed prior to the New Deal. This formalism began in 1895 with United States v. E.C. Knight Co., in which the Court based its determination of what constitutes "commerce" on whether the subject matter of regulation was considered part of "production" or "manufacturing," as opposed to "commerce." This retreat to formalism is surprising in light of the history of the Court's Commerce Clause jurisprudence.

Part I of this Note discusses the history of the Commerce Clause jurisprudence leading up to Lopez. Part II provides a brief synopsis of the facts and issues and conveys the Justices' varying points of view in the Lopez decision. Part III then highlights lower court decisions in the wake of Lopez. Part IV analyzes how the majority's narrowing of the scope of the Commerce Clause is inconsistent with the development of the Commerce Clause jurisprudence. Finally, Part V discusses the impact of the Lopez decision.

I. BACKGROUND

In order to appreciate the importance of the Lopez decision, one must first understand the origin of the definition of "commerce" and the doctrines that emanated from that definition. In the first subsection, the definition of commerce is discussed. In the second subsection, the author analyzes several doctrines which developed from the late 1890s to the mid-1930s and the one doctrine that would ultimately

10. 156 U.S. 1 (1895).
11. See infra notes 16-110 and accompanying text (discussing the development of the Commerce Clause).
12. See infra notes 111-89 and accompanying text (providing an overview of the Lopez decision).
13. See infra notes 190-244 and accompanying text (analyzing cases which have been decided since Lopez).
14. See infra notes 245-368 and accompanying text (providing a critical analysis of the Lopez decision).
15. See infra notes 369-84 and accompanying text (discussing the impact of Lopez).
16. See infra notes 18-30 and accompanying text.
guide the Court's analysis of Commerce Clause cases for over half of a century.\textsuperscript{17}

\section*{A. Gibbons v. Ogden and the Definition of Commerce}

Article I, Section 8 of the United States Constitution gives Congress the authority to "regulate Commerce . . . among the several States."\textsuperscript{18} This phrase, however, was not interpreted until the decision of \textit{Gibbons v. Ogden} in 1824.\textsuperscript{19} In \textit{Gibbons}, Aaron Ogden, who held a New York license to run a steamboat monopoly, brought an injunction proceeding against Thomas Gibbons, who held a license under federal law to engage in coastal trade.\textsuperscript{20} In his majority opinion, Chief Justice John Marshall originally defined interstate commerce as "intercourse" based upon very broad grounds to enhance federal power.\textsuperscript{21} Chief Justice Marshall conceded that "[t]he completely internal commerce of a State . . . may be considered as reserved for the State itself."\textsuperscript{22} However, he emphasized that "[c]ommerce among the States must, of necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a State."\textsuperscript{23} Chief Justice Mar-

\begin{footnotesize}
17. See infra notes 31-110 and accompanying text.
18. U.S. Const. art. I, § 8, cl. 3.
19. 22 U.S. (9 Wheat.) 1 (1824). Robert Fulton acquired a monopoly under New York law to run his steam-powered boats along the Hudson River. \textit{Id.} at 6. While Aaron Ogden obtained a Fulton license from New York, Thomas Gibbons had a federal license to run competing boats under the Act of Feb. 18, 1793, c.8, 1 Stat. 305 (1793). \textit{Id.} at 1-6.
20. \textit{Id.}
21. \textit{Id.} at 189-90. Chief Justice Marshall's famous definition outlined the parameters of commerce:

\begin{quote}
Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.
\end{quote}

23. \textit{Id.} at 196.
\end{footnotesize}
shall added that "[c]ommerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior."\textsuperscript{24} Chief Justice Marshall did not define commerce narrowly, such as defining commerce as any activity which crossed state lines. Instead, he expanded the definition of commerce beyond the inclusion of goods in trade to that of people and steamboats and the Court held that Congress had the power to regulate navigation under the Commerce Clause.\textsuperscript{25}

During the period between \textit{Gibbons} and the enactment of the Interstate Commerce Act in 1887, the Court decided very few cases involving congressional action.\textsuperscript{26} Most cases dealt with the validity of state actions, which were purportedly in conflict with Congress' dormant commerce power.\textsuperscript{27} After the enactment of the Sherman Act in 1890,\textsuperscript{28} however, when the Court did review cases involving congressional power, the Court did not utilize Chief Justice Marshall's expansive and empirical definition of commerce. Instead, the Court created new classifications of economic activity which reflected a more restrictive interpretation of the limits upon congressional power.\textsuperscript{29} Through these various tests, the Court sought to categorize whether commerce was "local" or "interstate" in character.\textsuperscript{30}

\begin{thebibliography}{99}
\bibitem{24} \textit{Id.} at 194.
\bibitem{25} \textsc{Kermit L. Hall}, \textsc{The Oxford Companion to the Supreme Court of the United States} 337 (James J. Ely, Jr. et al. eds., 1992) (discussing Chief Justice Marshall's definition of commerce).
\bibitem{26} \textsc{Tribe, supra} note 21, at 306 (citation omitted).
\bibitem{27} \textit{Id.} at 207-07. Because this Note does not focus on the dormant Commerce Clause power, these cases will not be discussed. \textit{See Wickard v. Filburn}, 317 U.S. 111, 121 (1942) (noting the lack of cases involving the affirmative exercise of the commerce power during this period of time). In the cases discussed in this Note, Congress affirmatively enacted a law under its Commerce Clause power. Cases involving the dormant commerce power are ones in which Congress has not enacted a law, yet the Court holds that state regulations are either invalid because the regulations interfere with interstate commerce or valid because the regulations are permissible under the states' police power. \textsc{Tribe, supra} note 21, at 406 (citing \textit{Willson v. Black-Bird Creek Marsh Co.}, 27 U.S. (2 Pet.) 245 (1829) and \textit{Mayor of New York v. Miln}, 36 U.S. (11 Pet.) 102 (1837)).
\bibitem{28} Sherman Act, ch. 647, 26 Stat. 209, 209 (1890).
\bibitem{29} \textsc{Tribe, supra} note 21, at 307-08.
\bibitem{30} \textit{See infra} notes 31-110 and accompanying text (outlining the history of Commerce Clause jurisprudence).
\end{thebibliography}
B. The Development of Doctrinal Analysis Under the Commerce Clause

1. Direct/Indirect Doctrine

The direct/indirect doctrine was the first formal approach to define the activity which Congress could regulate. In United States v. E.C. Knight Co., the "Sugar Trust Case," where the government brought a civil suit against a sugar refining company for violating the Sherman Antitrust Act of 1890, the Court held that by promulgating the Act Congress exceeded its power to regulate manufacturing activities. The Court categorized the activity of refining sugar as "precommerce," as contrasted with "commerce," which the Court defined as buying, selling, and transporting goods. In doing so, the Court limited the interstate commerce definition by adding a requirement that the activity "directly" affect more than one state.

Perhaps the most highly criticized decision utilizing the "direct/indirect" doctrine developed in E.C. Knight was Hammer v. Dagenhart. In Hammer, the Court struck down a federal statute prohibiting producers, manufacturers, and dealers from shipping products interstate when the entity employed children under the age of sixteen within thirty days prior to shipment. While the Court recognized that the statute's purpose was to protect children from being exploited in work conditions, it nevertheless utilized the formalistic approach and held that the undesired use of child labor preceded shipping and could not be categorized as commerce. The decision was especially surprising...
because the Court contemporaneously had developed the "injurious to the public doctrine" which allowed Congress to regulate intrastate activity to promote public morals.\textsuperscript{41}

In \textit{A.L.A. Schechter Poultry Corp. v. United States},\textsuperscript{42} despite the Roosevelt administration's attempt to remedy the results of the Great Depression by regulating wage and hour requirements via the "Live Poultry Code" of the National Industrial Recovery Act ("NIRA"),\textsuperscript{43} the Court used the direct/indirect test to strike down the NIRA.\textsuperscript{44} Chief Justice Hughes refused to apply the "current of commerce" doctrine\textsuperscript{45} and stated that the sale of poultry was not a transaction in interstate commerce because interstate transactions involving poultry ended when the chickens reached local slaughterhouses.\textsuperscript{46} Chief Justice Hughes also rejected the use of the "affecting commerce" doctrine.\textsuperscript{47} He stated that because the sale of chicken to local dealers only had an "indirect" effect on commerce, congressional regulation of local slaughterhouses for selling unfit chickens to local dealers exceeded Congress' power to regulate under the Commerce Clause.\textsuperscript{48}

In \textit{Carter v. Carter Coal Co.}\textsuperscript{49} the Court utilized the direct/indirect doctrine to strike down another NIRA statute, the Bituminous Coal

\begin{itemize}
  \item \textsuperscript{41} See \textit{Currie}, supra note 7, at 96 (outlining the history surrounding \textit{Hammer}); \textit{infra} notes 69-80 and accompanying text (discussing the "injurious to the public" doctrine).
  \item \textsuperscript{42} 295 U.S. 495 (1935).
  \item \textsuperscript{43} National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933).
  \item \textsuperscript{44} \textit{Schechter}, 295 U.S. at 546-51.
  \item \textsuperscript{45} See \textit{infra} notes 61-68 and accompanying text (discussing the "current of commerce" test).
  \item \textsuperscript{46} See \textit{Schechter}, 295 U.S. at 542-44 (finding that the undisputed facts of the case did not warrant the argument that the poultry handled by the defendants at their slaughterhouse markets was in a "current" of interstate commerce).
  \item \textsuperscript{47} See \textit{infra} notes 53-60 and accompanying text (analyzing the "close and substantial effect" doctrine).
  \item \textsuperscript{48} \textit{Schechter}, 295 U.S. at 544-51. Chief Justice Hughes stated that to determine "how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects." \textit{Id.} at 546. "The precise line can be drawn only as individual cases arise, but the distinction is clear in principle." \textit{Id.}

In his concurring opinion, Justice Cardozo stated that "[t]o find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system." \textit{Id.} at 554 (Cardozo, J., concurring).
  \item \textsuperscript{49} 298 U.S. 238 (1936).
\end{itemize}
Conservation Act of 1935.\textsuperscript{50} The Court followed the holding of \textit{E.C. Knight},\textsuperscript{51} which categorized the manufacture of coal as an activity which preceded commerce and found that the activity only indirectly affected commerce.\textsuperscript{52}

2. "Close and Substantial Effect" Doctrine

In addition to the direct/indirect test, the Court developed another test, the "close and substantial effect" test, which served to expand the federal government's power. In \textit{Houston, East & West Texas Railway Co. v. United States},\textsuperscript{53} the "Shreveport Rate Case," the Court upheld an order given by the Interstate Commerce Commission ("ICC"), which required the Texas Railroad Commission to equalize Texas' intrastate rates.\textsuperscript{54} The Court ruled that Congress could regulate intrastate rates of interstate carriers and prescribe the "final and dominant" rule\textsuperscript{55} because the intrastate rates of the railroad company had such a "close and substantial effect" on interstate commerce that the control of rates was essential or appropriate to the security of the traffic.\textsuperscript{56}

At least one critic viewed Justice Hughes' majority opinion in the Shreveport Rate Case as an attempt to limit the implication of its holding to instrumentalities of commerce, such as railroads.\textsuperscript{57} However, in the \textit{Standard Oil} case,\textsuperscript{58} the Court, in dismissing the contention that Congress' reach of authority did not extend to intrastate

\textsuperscript{50} \textit{Id.} at 297-310. The Court discussed the underlying purposes of the statute as follows: The purposes of the "Bituminous Coal Conservation Act of 1935"... are to stabilize the bituminous coal-mining industry and promote its interstate commerce; to provide for cooperative marketing of bituminous coal; to levy a tax on such coal and provide for a drawback under certain conditions; to declare the production, distribution, and use of such coal to be affected with a national public interest; to conserve the national resources of such coal; to provide for the general welfare, and for other purposes.

\textit{Id.} at 278.

\textsuperscript{51} See \textit{supra} notes 32-36 and accompanying text (analyzing the rationale employed by the Court in \textit{E.C. Knight}).

\textsuperscript{52} \textit{Carter}, 298 U.S. at 300 (relying on Chief Justice Fuller's opinion in \textit{United States v. E.C. Knight Co.}, 156 U.S. 1, 12-13 (1895)). The Court's later decision in \textit{United States v. Darby}, 312 U.S. 100, 115-23 (1941), explicitly overruled \textit{Hammer} and limited the holding of \textit{Carter} and implicitly drove a nail into \textit{Schechter}'s coffin by upholding federal minimum wages for employees engaged in production. See \textit{Currie}, \textit{supra} note 7, at 238 (providing a historical analysis of the direct/indirect test).

\textsuperscript{53} 234 U.S. 342 (1914).

\textsuperscript{54} See \textit{Currie}, \textit{supra} note 7, at 94 (discussing the "Shreveport Rate Case").

\textsuperscript{55} 234 U.S. at 343.

\textsuperscript{56} \textit{Id.} (stating that Congress has a constitutional authority to regulate wherever interstate and intrastate transactions are so related that one involves the control of the other).

\textsuperscript{57} \textit{Currie}, \textit{supra} note 7, at 95 (citation omitted).

\textsuperscript{58} \textit{Standard Oil Co. v. United States}, 221 U.S. 1 (1911).
production of commodities, clearly expanded the scope to articles of commerce as well as instrumentalities of commerce.

3. The “Current of Commerce” Doctrine

After the turn of the century, and concurrent to its use of the formalistic categorization doctrine, the Court created yet another doctrine, the “current of commerce” test. In a case concerning the intrastate sale of livestock and price fixing, Swift & Co. v. United States, the Court took a pragmatic approach and unanimously rejected the local/national dichotomy of the previous tests stating that “commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.” The Court ruled that the sale of cattle by meat sellers who transported cattle between states in the current of commerce was an incident of such commerce.

In Stafford v. Wallace, a case involving the constitutionality of the federal act which regulated intrastate activity of stockyards, the Court held that Congress had the power to regulate such activity because stockyards were the “throat through which the current [of commerce] flow[ed].” Signifying a retreat from the judicial review created in Marbury v. Madison, the Court deferred to Congress when Chief Justice Taft stated that it was “primarily for Congress to consider and decide the fact of the danger and meet it” and that the Court would “not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent.”

59. Id. at 68-69.
60. Id. The Court stated that the commerce/precommerce rationale of E.C. Knight was inapplicable to the case because it had been repeatedly and necessarily decided to be unsound. Id.
61. 196 U.S. 375 (1905).
62. Id. at 398.
63. Id. at 398-99.
64. 258 U.S. 495 (1922).
65. Id. at 516. The Court indicated that sales are not merely local transactions and that sales do not stop the current of commerce but, instead, are necessary factors in the middle of the current of commerce. Id. at 518-19.
66. 5 U.S. (1 Cranch) 137 (1803) (establishing the judiciary’s power to review the constitutionality of laws enacted by Congress).
67. Stafford, 258 U.S. at 521-22 (noting that Congress’ power to regulate must include the authority to deal with acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves).
68. Id.
4. The "Injurious to the Public" Doctrine

While the battle between the categorical tests ensued, the "injurious to the public" doctrine developed, which increased Congress' ability to regulate activity and created a national police power. Under this doctrine, the Court upheld regulations that forbade the use of interstate commerce as a channel for transactions that menaced the national health, morals, or general welfare.\(^{69}\) In *Champion v. Ames*,\(^{70}\) the "Lottery Case," the Court upheld a federal act that prohibited shipping Paraguayan lottery tickets from Texas to California.\(^{71}\) The Court held that regulation of interstate commerce necessarily included prohibition of articles of commerce and reasoned that because participation in lotteries was injurious to the morals of citizens, prohibition fell within Congress' power to regulate under the Commerce Clause.\(^{72}\) Although Champion argued that permitting the prohibition of lottery tickets would lead to Congress' arbitrary exclusion of any item from commerce, the Court noted that "the possible abuse of a power . . . [was] not an argument against its existence."\(^{73}\)

After deciding *Champion*, the Court upheld numerous other acts using the same rationale. In *Hipolite Egg Co. v. United States*,\(^{74}\) the Court upheld the Pure Food and Drugs Act which allowed a federal agency to confiscate adulterated food which had been transported between states.\(^{75}\) In another case, *Hoke v. United States*,\(^{76}\) the Court followed *Champion* in upholding the Mann Act which prohibited the transportation of women and girls for immoral purposes.\(^{77}\) The Court

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70. 188 U.S. 321 (1903).

71. *Id.* at 363.

72. *Id.* at 358-59 (emphasizing that Congress alone has the power to occupy, by legislation, the entire field of interstate commerce).

73. *Id.* at 363 (explaining that "[t]here is probably no governmental power that may not be exerted to the injury of the public"). In his majority opinion, Justice Harlan also quoted Chief Justice Marshall's reasoning in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824): "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from abuse. They are the restraints on which the people must often rely solely, in all representative governments."

74. 220 U.S. 45 (1911).

75. *Id.* at 58 (discussing Congress' discretion to not only prevent the physical movement of adulterated articles but also to prevent the use of such articles denying them the facilities of interstate commerce and seizing them at their point of destination).

76. 227 U.S. 308 (1913).

77. *Id.* at 326.
noted that in Hipolite it rejected the plaintiffs' arguments that regulation produced a clash of national legislation with the power of the states. Justice McKenna, writing for the majority in Hoke, stated:

Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.

The broad strokes of Justice McKenna's words expanded the impact of the Champion holding. The Court held that Congress had the power to regulate and, therefore, prohibit interstate commerce not only when the articles or transactions themselves are injurious to the public health, morals, or safety, but also when such prohibition would contribute substantially to the national welfare, regardless of the character of the subject matter being prohibited.

5. Roosevelt's Court-Packing Plan and the Development of the "Substantial Effects" Doctrine

After two National Industrial Recovery Acts were struck down, President Franklin Delano Roosevelt, frustrated and desperate, announced on February 5, 1937, his proposal to enlarge the Court from nine to fifteen members, questioning the capacity of aged judges and reinforcing the need to appoint judges more sympathetic to his legis-

78. Id. at 322-23.
79. Id. at 322.
80. Id. at 322-23; see Cushman, supra note 69, at 391-92 (surmising that Justice McKenna's expansive view of congressional authority to regulate interstate commerce affected his decision to join the dissent in Hammer v. Dagenhart, 247 U.S. 251 (1918)).
82. Under the President's proposal, one new judge would be appointed for each member of the Court who reached the age of seventy, sat for ten years, and did not resign or retire within six months after reaching the age of seventy. See Retirement of Supreme Court Justices, S. Rep. No. 75-119, at 1 (1937).
tive program. One commentator has argued that Roosevelt's Court-packing plan, had it been successfully implemented, would have ultimately diluted the votes of uncooperative Justices and would have drastically weakened the Court's ability to enforce the Constitution against other branches. Two years after his Court-packing plan was rejected, President Roosevelt claimed that he had "lost the battle but won the war." Indeed, it was only after Roosevelt's proposal that the Court rejected the formal categorization doctrine which had been utilized to strike down so many federal statutes.

The first case which reflected this change was *NLRB v. Jones & Laughlin Steel Corp.*, in which the Court faced the issue of whether Congress could regulate the labor practices of manufacturers. In holding that Congress could, the Court notably rejected the formalistic categorization of the "direct/indirect" test. For the first time, the Court actually relied on statistics in its analysis of whether Congress could conclude that labor practices could have an effect on interstate commerce. The Court emphasized that a direct effect was the equivalent of a practical effect. This decision marked the beginning of the movement toward the "aggregate effects" test.

The second case that was decided after the failed Court-packing plan and served to punctuate the end of formalistic categorization was *United States v. Darby*. In *Darby*, where a lumber manufacturer challenged the constitutionality of the Fair Labor Standards Act, the

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83. See Currie, supra note 7, at 235 (explaining that President Roosevelt made no secret of his real purpose); see also Gerald Gunther, Constitutional Law 123 (12th ed. 1991) (quoting President Roosevelt's message to Congress).
84. Currie, supra note 7, at 235 n.159.
85. Gunther, supra note 83, at 124.
86. Id.
87. 301 U.S. 1 (1937).
88. Id. at 29-30.
89. Id. at 39 (refusing to apply the commerce/precommerce rationale used in United States v. E.C. Knight Co., 156 U.S. 1 (1895)).
90. The Court analyzed the statistics of activities of the entire steel industry to emphasize the practical effect of Jones & Laughlin Steel Corporation's labor practices on commerce: "33,000 men mine ore, 44,000 men mine coal, 4,000 men quarry limestone, 16,000 men manufacture coke, 343,000 men manufacture steel, and 83,000 men transport its product. Respondent has about 10,000 employees in its Aliquippa plant, which is located in a community of about 30,000 persons." Jones & Laughlin Steel, 301 U.S. at 27.
91. Chief Justice Hughes emphasized that "[i]t is the effect upon commerce, not the source of the injury, which is the criterion." Id. at 32 (emphasis added).
93. 312 U.S. 100 (1940).
94. Id. at 111-12. More specifically, the manufacturer challenged: (1) the prohibition of the interstate shipment of lumber manufactured by employees making less than the prescribed minimum wage or working more than the prescribed maximum number of hours at the prescribed wage; and (2) the prohibition of employing workmen in the production of goods for interstate
Court sustained the federal power to regulate the production of goods for commerce. The Darby decision explicitly overruled Hammer v. Dagenhart and explicitly limited the holding in Carter v. Carter Coal Co. thereby finally making the old "manufacturing versus commerce" dichotomy irrelevant. Darby reaffirmed the deference given to Congress in previous cases, including Hoke v. United States by holding that "[t]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control." It was the third case, Wickard v. Filburn, however, which would set the standard of judicial review for congressional regulation of interstate and intrastate commerce for almost five and a half decades. In Wickard, the Court utilized the rational basis scrutiny laid out in NLRB v. Jones & Laughlin Steel Corp. and held that Congress could regulate a farmer's production of wheat for personal consumption because, in the aggregate, such activity could affect the supply and demand for wheat. The Court stated that the fact that the individual's activity alone seemed trivial was not enough to protect his activity from federal regulation. Wickard also reaffirmed the commerce who did not make the prescribed minimum wage or worked more than the prescribed maximum number of hours. Id. at 108.

95. Id. at 121-24.
96. 247 U.S. 251 (1918); see supra notes 37-41 and accompanying text (discussing Hammer).
97. 298 U.S. 238 (1936); see supra notes 49-52 and accompanying text (discussing Carter).
98. United States v. Darby, 312 U.S. 100, 116-17, 123 (1941); see Currie, supra note 7, at 238 (indicating that several decisions confirmed that "the game was over").
99. 227 U.S. 308 (1913); see supra notes 76-80 and accompanying text (discussing Hoke).
100. Darby, 312 U.S. at 115 (citing McCray v. United States, 195 U.S. 27 (1904) and Sonzinsky v. United States, 300 U.S. 506 (1937)). "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power." Id. (citing Veazie Bank v. Fenno, 68 U.S. (8 Wall.) 533 (1869)).
103. 301 U.S. 1 (1937); see supra notes 87-92 and accompanying text (discussing Jones & Laughlin Steel).
105. Id.
cept that Congress may regulate wholly intrastate activities which have a substantial effect upon interstate commerce and rejected the categorization of activity as being either "local" or "national." After Wickard, the Court used the "substantial effects" doctrine combined with rational basis scrutiny to uphold numerous congressional regulations based upon the Commerce Clause, including the Surface Mining Control and Reclamation Act of 1977, the Consumer Credit Protection Act, Title II of the Civil Rights Act of 1964, and the Fair Labor Standards Act.

II. SUBJECT OPINION

A. Facts

On March 10, 1992, school officials at Edison High School in San Antonio, Texas, received an anonymous tip that a twelfth-grade student named Alphonso Lopez possessed a handgun in school that day. When the school policeman asked Lopez about the gun, Lopez admitted that he had a gun. Officials found an unloaded, .38-caliber handgun in his waistband and five cartridges in his pocket. Lopez explained to a San Antonio police officer that he was holding the items during the school day for delivery to a third person after school for use in a gang war. Lopez would have received forty dollars from the third person for the gun and his services.

Lopez was arrested and charged with violating a federal statute, section 922(q)(2)(A) of the Gun-Free School Zones Act of 1990, which forbids "any individual knowingly to possess a firearm at a place that

106. Id. at 119-20 (dismissing distinctions between "local" and "national" activity in prior decisions as being mere dicta).
109. Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); cf. Perez, 402 U.S. at 153-54 (explaining that in Heart of Atlanta and McClung, the Court implemented the "class of activities" test to sustain acts of Congress holding that where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to trivialize individual instances of the class). But cf. CURRIE, supra note 7, at 425 (criticizing the Court and stating that "[s]ustaining federal prohibition of discrimination in hotels, restaurants, and other 'public accommodations' under the commerce power required the Court only to construct more of those embarrassing for-want-of-a-nail causal chains").
112. Id.
113. Id.
114. Id.; United States v. Lopez, 2 F.3d 1342, 1345 (5th Cir. 1993).
115. Lopez, 2 F.3d at 1345.
the individual knows, or has reasonable cause to believe, is a school zone."\textsuperscript{116} The statute provided that:

\textquote[\cite{116}]{116}The term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destruction device. Such term does not include an antique firearm.\textsuperscript{117}

The term "school" means "a school which provides elementary or secondary education, as determined under State law."\textsuperscript{118} In addition, Congress defined "school zone" as "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1,000 feet from the grounds of a public, parochial or private school."\textsuperscript{119}

\textsuperscript{116} 18 U.S.C. § 922(q)(2)(A) (1994). Subsequent to the Lopez trial, Congress amended section 922(q) to include findings that:

(A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;
(B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;
(C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Judiciary Committee of the House of Representatives and Judiciary Committee of the Senate;
(D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;
(E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;
(F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;
(G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;
(H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves; even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and
(I) Congress has power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.

\textsuperscript{117} Id. § 922(q)(1).
\textsuperscript{118} Id. § 921(a)(3).
\textsuperscript{119} Id. § 921(a)(25). Section 922 (q)(2)(B) states that:

Subparagraph(A) shall not apply to the possession of a firearm—
(i) on private property not part of school grounds;
(ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or
B. Procedural History

During the district court proceedings, Lopez, the respondent, made a motion to dismiss on the ground that section 922(q) was unconstitutional, arguing that it was beyond the power of Congress to legislate control over public schools. The district court, however, denied the motion. Lopez then waived his right to a jury trial and the court conducted a bench trial and convicted Lopez. The court held that section 922(q) was a valid exercise of Congress' power to regulate activities in and affecting commerce and that the "business" of elementary, middle, and high schools affected interstate commerce.

Lopez appealed his conviction on the grounds that section 922(q) "in the full reach of its terms, . . . [was] invalid as beyond the power of Congress under the Commerce Clause." The Court of Appeals for the Fifth Circuit agreed and reversed the conviction. Because of the importance of determining the scope of the Commerce Clause, the United States Supreme Court granted certiorari.

The issue before the Court was whether the federal Gun-Free School Zones Act affected interstate commerce so as to be a proper exercise of congressional power to legislate under the Commerce Clause.
A bare majority of the Court affirmed the Fifth Circuit's ruling and struck down the Gun-Free School Zones Act as being beyond Congress' power under the Commerce Clause.128

C. The Supreme Court's Opinion

Each Justice who wrote an opinion (except for Justice Stevens) outlined the Commerce Clause jurisprudence.129 Because each Justice interpreted the history of the Commerce Clause in a different way, this section divides the opinions of the majority and the dissenting justices and discusses each analysis individually.

I. The Majority Opinion

a. Chief Justice Rehnquist

In writing the majority opinion, Chief Justice Rehnquist reviewed the evolution of the Commerce Clause and posited that in the past, Congress had been permitted to regulate only where the subject matter of the regulation involved three categories:130 (1) the use of the channels of interstate commerce;131 (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;132 and (3) those activities having a substantial relation to interstate commerce.133 Chief Justice Rehnquist, with little discussion, decided that section 922(q)(2)(A) did not fit into the first or second categories, thereby defining the issue as whether the possession of a gun in school had a "substantial relation to interstate commerce."134 The majority distin-

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127. Lopez, 115 S. Ct. at 1626 (reiterating the issue addressed by the Fifth Circuit and announcing the Court's affirmance).
128. Id. at 1634.
129. Chief Justice Rehnquist delivered the opinion of the Court, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. Justice Kennedy, with whom Justice O'Connor joined, wrote a concurring opinion. Justice Thomas wrote a concurring opinion. Justices Stevens and Souter wrote separate dissenting opinions. Justice Breyer, with whom Justices Stevens, Souter, and Ginsburg joined, wrote a dissenting opinion.
130. Id. at 1629 (citing Perez v. United States, 402 U.S. 146, 50 (1971) and Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 276-77 (1981)).
131. Id. (citing United States v. Darby, 312 U.S. 100, 150 (1941) and Heart of Atlanta Motel, Inc. v. United States, 370 U.S. 241, 256 (1963)).
132. Id. (citing as an example Houston, E. & W. Texas Ry. Co. v. United States, 234 U.S. 342 (1914) (the "Shreveport Rate Case").)
133. Id. at 1630 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)).
134. Id. (disposing of the first two categories while admitting that in addressing the third category, "case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause").
guished *Wickard v. Filburn*, in which the Court held that a farmer's activity of growing wheat for personal consumption substantially affected interstate commerce in the aggregate. The Court did so by noting that while the Agricultural Adjustment Act at issue in *Wickard* regulated the volume of wheat moving in interstate commerce, the Gun-Free School Zones Act at issue in *Lopez* "had nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms."

The majority opinion held that the Gun-Free School Zones Act did not contain any jurisdictional element which would serve to limit the Act's reach to a narrow set of firearm possessions that has a sufficient nexus with commerce. Chief Justice Rehnquist refused to defer to Congress, thereby rejecting the argument that Congress had expertise regarding the nexus between firearms and interstate commerce as demonstrated by previous statutory enactments. Although he admitted that Congress was not required to make findings as to the burden that an activity has on interstate commerce, the Chief Justice stated that findings would enable the Court to evaluate a legislature's judgment that the proscribed activity substantially affected interstate commerce, especially where no such substantial effect was "visible to the naked eye."

Chief Justice Rehnquist, writing for the majority, rejected the arguments that possession of a gun in school impacted the U.S. economy by (1) resulting in a significant nationwide cost of insurance associated

135. 317 U.S. 111 (1938).
136. Id. at 128-29.
137. *Lopez*, 115 S. Ct. at 1630-31. The majority urged that the states possess primary authority for defining and enforcing criminal law. *Id.*
138. *Id.* at 1631. A jurisdictional element is language that limits the scope of a statute to activity that is in commerce or affecting commerce. *Cf. id.* Chief Justice Rehnquist compared the statute in *Lopez*, 18 U.S.C. § 922(q), with the statute in question in *United States v. Bass*, 404 U.S. 336 (1971). According to the Chief Justice, the *Bass* Court held that the statute, 18 U.S.C. § 1202(a), which prohibited a felon "to receive[], possess[], or transport[] in commerce or affecting commerce... any firearm," required an additional nexus to interstate commerce because it was ambiguous and because Congress must clearly state when it changes the federal-state balance. *Lopez*, 115 S. Ct. at 1631 (citing *Bass*, 404 U.S. 336).
139. Although the Chief Justice mentioned the "clear statement" rule by which he could have avoided the constitutional issue, he spent a mere paragraph discussing this point. *Lopez*, 115 S. Ct. at 1631. The "clear statement" rule is a rule of statutory interpretation that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Bass*, 404 U.S. at 349. The Court's reluctance to apply this rule arguably signified the Court's desire to base its rationale on broader, constitutional grounds.
140. *Lopez*, 115 S. Ct. at 1632. The Court agreed with the Fifth Circuit that reliance on previous findings to justify section 922(q) was inappropriate because prior congressional findings did not speak to the subject matter of section 922(q). *Id.*
141. *Id.*
with violent crime, (2) harming the economy by limiting the willingness of individuals to travel to areas that are believed to be unsafe, or (3) posing a serious threat to the educated citizenry supporting the nation's work force.\textsuperscript{142} Chief Justice Rehnquist opined that if the Court accepted the chain of causality upon which these rationales were based and deferred to Congress as the Court had in the past, there would be no activity that Congress could not regulate.\textsuperscript{143} Finally, to drive the point home, and to seemingly chastise Congress for its legislative overreaching, the Chief Justice quoted \textit{Marbury v. Madison},\textsuperscript{144} to remind Congress that it is the judiciary's duty "to say what the law is."\textsuperscript{145}

b. Justice Kennedy

Justice Kennedy, with whom Justice O'Connor joined, began his concurrence by outlining the evolution of the Commerce Clause.\textsuperscript{146} In reviewing the Commerce Clause jurisprudence, Justice Kennedy conceded that content-based boundaries, such as defining whether something was "commerce" or "not commerce," if used without more, were imprecise.\textsuperscript{147} However, Justice Kennedy argued that Congress had tipped the scales and that it was the judiciary's duty to ensure that the federal-state balance was not destroyed.\textsuperscript{148} According to Justice Kennedy, federalism ruled the day;\textsuperscript{149} if the Court did not strike down the Gun-Free School Zones Act, it would be sanctioning congressional intrusion on state sovereignty and foreclosing the states from "experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise."\textsuperscript{150} According to

\textsuperscript{142} \textit{Id.} at 1632-33.
\textsuperscript{143} \textit{Id.} at 1632. The majority stated that "[i]t is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign." \textit{Id.; see also} Official Transcript of Oral Argument, United States v. Lopez, 115 S. Ct. 1624 (1995) (No. 93-1260), 1994 WL 758950, at *18-19 (proposing that exercising deference to Congress has the consequence of relying on Congress to preserve the federal structure).
\textsuperscript{144} 5 U.S. (1 Cranch) 137 (1803).
\textsuperscript{145} \textit{Lopez}, 115 S. Ct. at 1633.
\textsuperscript{146} \textit{Id.} at 1634-40 (Kennedy, J., concurring).
\textsuperscript{147} \textit{Id.} at 1637. Justice Kennedy asserted that the history of Commerce Clause decisions should provide a lesson in the futility of content-based boundaries to define the limits of the Commerce Clause. \textit{Id.}
\textsuperscript{148} \textit{Id.} at 1639-40.
\textsuperscript{149} \textit{Id.} at 1638. Justice Kennedy argued that "[w]ere the federal government to take over the regulation of entire areas of traditional state concern . . . , the boundaries between the sphere of federal and state authority would blur and political responsibility would become illusory." \textit{Id.}
\textsuperscript{150} \textit{Id.} at 1641. Justice Kennedy also indicated that with over 100,000 elementary and secondary schools in the United States, it would be "difficult to navigate" through those school zones without infringing upon an area of federal jurisdiction. \textit{Id.}
Justice Kennedy, the Act was an interference imposed by Congress on state sovereignty. In turn, this interference contradicted the federal balance that the Framers designed and that the Court was obligated to enforce.

c. Justice Thomas

Justice Thomas, in his concurrence, concentrated on the "original understanding" of the Commerce Clause and how far the Court had departed from that understanding. First, Justice Thomas returned to the eighteenth century to define "commerce" as "selling, buying, bartering as well as transporting for such purposes." Second, Justice Thomas relied upon Gibbons v. Ogden to analyze what was meant by "commerce among the several states." To Justice Thomas, the Gibbons holding meant that although the line between intrastate and interstate commerce would be difficult to draw, federal authority could not be construed to include purely intrastate commerce. Commerce that did not affect another state could never be said to be commerce "among the several states." Thus, because Alphonso Lopez' gun possession in school did not "affect" another state, Justice Thomas concluded that the Gun-Free School Zones Act exceeded the authority of Congress to regulate commerce. According to Justice Thomas, Lopez signified a long-awaited return to the "original understanding" of Congress' Commerce Clause power after sixty years of misinterpretation.

2. The Dissent

a. Justice Stevens

Justice Stevens, in his brief dissent, stated that the majority's holding was a radical departure from the status quo because in the previous sixty years the Court had deferred to Congress regarding

151. Id. at 1642.
152. Id.
153. Id. (Thomas, J., concurring).
154. Id. at 1643.
155. 22 U.S. (9 Wheat.) 1 (1824); see supra notes 18-25 and accompanying text (discussing the holding of Gibbons).
156. U.S. Const. art. I, § 8, cl. 3.
158. Id. at 1643. Justice Thomas emphasized that the result reached by the majority was by "no means radical." Id.
Congress' exercise of the Commerce Clause power.\textsuperscript{161} In addition, Justice Stevens stressed that guns are an instrument of commerce and may be used to restrain commerce.\textsuperscript{162} Therefore, Justice Stevens believed that Congress had a duty to regulate the possession of guns, which included prohibition of the possession of guns.\textsuperscript{163} Although the majority quickly excluded section 922(q) from the first two categories of subject matter that Congress has authority to regulate, Justice Stevens unfortunately did not expound upon his criticisms of this hasty dismissal.\textsuperscript{164}

b. Justice Souter

In his dissenting opinion, Justice Souter criticized the majority for its lack of judicial restraint.\textsuperscript{165} According to Justice Souter, judicial review of congressional legislation under the Commerce Clause involves deference to an "implicit congressional judgment that its regulation addresses a subject substantially affecting interstate commerce 'if there is any rational basis for such a finding.'"\textsuperscript{166} Justice Souter noted that under rational basis scrutiny, the majority's formalistic "commerce" versus "noncommerce" categorization was reminiscent of the pre-New Deal years and should not have had any bearing on the outcome.\textsuperscript{167} In addition, Justice Souter averred that the majority's emphasis on whether gun possession was a subject of traditional state regulation was misplaced.\textsuperscript{168} Finally, Justice Souter argued that the majority's requirement that the statute contain explicit factual findings that the regulated activity substantially affect interstate commerce could not square with rational basis scrutiny.\textsuperscript{169} Thus, Justice

\textsuperscript{161} Id. at 1651 (Stevens, J., dissenting). According to Justice Stevens, the character of the majority's holding was similar to the discredited version of due process which required a person to define traditional rights. Id.

\textsuperscript{162} Id.

\textsuperscript{163} Id.

\textsuperscript{164} Id.

\textsuperscript{165} Id. at 1651-52 (Souter, J., dissenting). Justice Souter argued that "[t]he modern respect for the competence and primacy of Congress in matters affecting commerce developed only after one of this Court's most chastening experiences, when it perforce repudiated an earlier and untenably expansive conception of judicial review in derogation of congressional commerce power." Id. at 1652.

\textsuperscript{166} Id. (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 276 (1981)).

\textsuperscript{167} Id. at 1653-54. In addition, Justice Souter criticized the majority for using a sliding scale of deference according to the commercial or noncommercial nature of proscribed activity being regulated. Id.

\textsuperscript{168} Id. at 1654.

\textsuperscript{169} Id. at 1655-56.
Souter believed that the Gun-Free School Zones Act clearly passed rational basis scrutiny.\footnote{170.}  

\section*{c. Justice Breyer}

According to Justice Breyer's dissent,\footnote{171.} the Gun-Free School Zones Act was within the scope of the Commerce Clause and was fully consistent with the past fifty years of Commerce Clause jurisprudence.\footnote{172.} Justice Breyer determined that the true issue in this case was whether Congress had a rational basis for finding that the gun-related school violence had a sufficient impact on interstate commerce.\footnote{173.} A rational basis scrutiny did not require specific congressional findings that there was an interstate commerce effect.\footnote{174.} Justice Breyer emphasized that Congress could have rationally found a relationship between violence in schools and interstate commerce because guns in schools significantly undermine the quality of education which, in turn, affects economic productivity and competitiveness.\footnote{175.} In support of this argument, Justice Breyer offered violence-related, educational, and economic statistics to prove that Congress could have found the correlation between guns and commerce.\footnote{176.}  

Justice Breyer also discussed three legal problems with the majority's reasoning. First, according to Justice Breyer, the majority's holding ran contrary to modern Court cases that have upheld congressional actions despite rather tenuous connections to interstate commerce that have a less significant effect than school violence.\footnote{177.} In support of this argument, Justice Breyer cited *Perez v. United States,*\footnote{178.} in which the Court upheld a federal statute that made purely

\begin{footnotesize}
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  \item \footnote{170.} Id. at 1657. Justice Souter characterized the *Lopez* case as being a misstep and not an epochal case. *Id.*
  \item \footnote{171.} Justices Souter, Stevens, and Ginsburg joined Justice Breyer's dissent. *Id.* (Breyer, J., dissenting).
  \item \footnote{172.} *Id.*
  \item \footnote{173.} *Id.* at 1659.
  \item \footnote{174.} *See id.* at 1658 ("There is no special need here for a clear indication of Congress' rationale."). Justice Breyer argued that a clear statement of congressional findings would only serve to determine Congress' intended result and that there was "no doubt as to which activities Congress intended to regulate" with the Gun-Free School Zones Act. *Id.* at 1659.
  \item \footnote{175.} *Id.* at 1659-62.
  \item \footnote{176.} Justice Breyer stated that "in any 6-month period, several hundred-thousand schoolchildren are victims of violent crimes in or near their schools." *Id.* at 1659 (citing *Children and Guns: Hearing Before the House Select Comm. on Children, Youth, and Families,* 101st Cong. 15 (1989)). Justice Breyer also noted that there is an empirical link between school violence and dropout rates. *Id.* (citing *Gun-Free School Zones Act of 1990: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary,* 101st Cong. 44 (1990)).
  \item \footnote{177.} *Id.* at 1662.
  \item \footnote{178.} 402 U.S. 146 (1971).
\end{itemize}
\end{footnotesize}
intrastate, extortionate credit transactions a federal crime. Further, Justice Breyer noted that the Court upheld a statute that prohibited racial discrimination at local restaurants in part because it affected purchases of restaurant supplies from other states in *Katzenbach v. McClung.* Finally, Justice Breyer discussed *Wickard v. Filburn,* in which the Court upheld an act that prohibited a farmer from producing wheat grown and consumed on his own local farm and emphasized that it was the aggregate effect on commerce (if all farmers were to produce wheat for their personal consumption), not an individual act in isolation, which was dispositive. Justice Breyer argued that based on the statistics he cited, violence in schools has had a greater affect on interstate commerce than the activities that were deemed to affect interstate commerce in *Perez, Katzenbach,* and *Wickard.*

The second legal problem in the majority's opinion, according to Justice Breyer, was the distinction that the majority made between "commercial" and "noncommercial" transactions. Quoting Justice Holmes, Justice Breyer reasoned that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." Justice Breyer argued that Congress could have rationally concluded that schools fell on the commercial side of the line since Congress treated primary and secondary schools as a $230-billion-dollar business when allocating resources.

The third legal defect in the majority's opinion to which Justice Breyer alluded was that the decision issued in *Lopez* produced "legal uncertainty in an area of law that, until this case, seemed reasonably well settled." According to Justice Breyer, this legal uncertainty re-

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179. Id. at 157. In particular, the intrastate transaction in *Perez* involved the defendant's advance of money to the victim, after which the defendant threatened to castrate the victim and put him in the hospital. Id. at 147-48.
182. See *supra* notes 101-10 and accompanying text (analyzing *Wickard* and its progeny).
183. See *supra* note 176 and accompanying text (describing the statistics upon which Justice Breyer relied).
184. United States v. Lopez, 115 S. Ct. 1624, 1662-63 (1995) (Breyer, J., dissenting). Disagreeing with the majority, Justice Breyer emphasized that "[i]t is enough that the individual activity when multiplied into a general practice . . . contains a threat to the interstate economy that requires preventative regulation." Id. at 1663 (citing Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948)).
185. Id.
186. Id. (citing Swift & Co. v. United States, 196 U.S. 375, 398 (1905)).
187. Id. at 1664. Justice Breyer further explained that the business of schools requires spending funds on transportation, food, custodial services, books, and teachers' salaries. Id.
188. Id. In addition, Justice Breyer noted that Congress had enacted more than one hundred sections of the United States Code, including at least twenty-five sections that use the words "affecting commerce" to define their scope. Id.
stricted Congress' ability to enact criminal laws aimed at behavior that seriously threatened economic harm.\textsuperscript{189} Because of these three problems with the majority's rationale, Justice Breyer would have reversed the Fifth Circuit's ruling and upheld the Gun-Free School Zones Act.

### III. \textit{Post-Lopez} Cases

Although lower courts have applied the \textit{Lopez} holding in a variety of contexts,\textsuperscript{190} no uniform doctrine has emerged from the \textit{Lopez} decision. For this reason, this section divides representative cases according to the three rationales used by lower courts, including: (1) categorization of the prohibited items as "things in commerce," (2) deference to explicit jurisdictional elements and explicit congressional findings of a nexus between the proscribed activity and interstate commerce, and (3) whether the person or entity committing the prohibited activity was "engaged in interstate commerce" because he or she purchased or had the ability to purchase supplies from out of state.

#### A. Categorization of Prohibited Items as "Things in Commerce"

In the following cases, the courts seem to dodge the question of whether possession of prohibited items substantially affects interstate commerce by thrusting the activity at issue into Chief Justice Rehnquist's second category: persons or things in interstate commerce.\textsuperscript{191} The courts' rationale in these cases seem to fill in the gaps of what Justice Stevens omitted in his dissenting opinion.\textsuperscript{192}

In \textit{United States v. Mosby},\textsuperscript{193} the Eighth Circuit upheld a federal ammunition statute\textsuperscript{194} and ruled that a felon's possession in Minnesota of cartridges which were assembled in Minnesota was also possession of individual components which were items in interstate

\textsuperscript{189} \textit{Id.} at 1665. Justice Breyer also questioned the validity of \textit{Wickard} in light of the majority's increased scrutiny of Congress' regulation. \textit{Id.}


\textsuperscript{191} \textit{Lopez}, 115 S. Ct. at 1629.

\textsuperscript{192} Although Justice Stevens mentioned briefly that the Gun-Free School Zones Act regulated articles or things in commerce, he did not provide a detailed analysis. \textit{Id.} at 1651 (Stevens, J., dissenting); see \textit{supra} notes 161-64 and accompanying text (discussing Justice Stevens' dissent).

\textsuperscript{193} 60 F.3d 454 (8th Cir. 1995), \textit{cert. denied}, 116 S. Ct. 938 (1996).

\textsuperscript{194} 18 U.S.C. § 922(g)(1).
commerce. Although the Eighth Circuit recognized that the Lopez decision narrowed Congress' power to regulate under the Commerce Clause, it held that Congress' power was still broad enough to justify the validity of section 922(g)(1).

In United States v. Kirk, the Fifth Circuit held that a federal statute prohibiting the possession of post-1986 machine guns did not violate the Commerce Clause. According to the Fifth Circuit, Lopez was not controlling because unlike section 922(q), the machine gun statute at issue embodied a proper exercise of Congress' power to regulate "things in interstate commerce." The court championed Congress' power to decide whether it was necessary to control intrastate activity in order to curb interstate activity.

B. Deference to Congress To Determine Nexus

Most of the post-Lopez cases address this category, which may signify that this area contains the most unanswered questions regarding adjudication of the proper scope of the Commerce Clause. The cases fit into three categories: (1) those cases in which the court declares that a statute has a jurisdictional element, thereby ending the Commerce Clause analysis; (2) those cases in which the court looks for a jurisdictional element and, if the element is not apparent, defers to explicit congressional findings determining that the nexus is adequate; and (3) those cases in which the court makes its own deter-

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195. United States v. Mosby, 60 F.3d 454, 457 (8th Cir. 1995).
196. Id. at 456. Congress' "power remains broad enough to support application of § 922(g)(1) in this case." Id.
197. 70 F.3d 791 (5th Cir. 1995).
199. Kirk, 70 F.3d at 795-96 (5th Cir. 1995) (following the holding of United States v. Wilks, 58 F.3d 1518 (10th Cir. 1995)).
200. Id.
201. The subject of federal machine-gun laws was mentioned during the oral argument of Lopez. Official Transcript of Oral Argument, United States v. Lopez, 115 S. Ct. 1624 (1995) (No. 93-1260), 1994 WL 758950, at *32-33. One of the Justices asked Mr. Carter, counsel for the respondent, whether a federal law, exactly the same as the one at issue in Lopez with the exception that the term "firearm" was replaced with "machine gun or explosive device," would be a valid exercise of Congress' power to regulate under the Commerce Clause. Id. Mr. Carter replied, "Absent some finding by Congress linking it to its commerce power—" and the Justice interrupted by saying, "It would be the same case." Id. at *33.
mination and does not defer to Congress because there is no nexus to support a substantial effect on interstate commerce.\textsuperscript{204}

1. Jurisdictional Element Triggers Deference to Congress

Two cases in which a court automatically deferred to Congress after finding a jurisdictional element in the statute are \textit{United States v. Bolton}\textsuperscript{205} and \textit{United States v. Shelton}.\textsuperscript{206} Both \textit{Bolton} and \textit{Shelton} involved defendants who were convicted under 18 U.S.C. \textsection{} 922(g), which prohibits felons from possessing firearms.\textsuperscript{207} In \textit{Bolton} and \textit{Shelton}, the respective courts held that the jurisdictional element requiring that the firearms were shipped, transported, or possessed "in or affecting" interstate commerce ensured that the firearm possession in question affected interstate commerce.\textsuperscript{208} Neither court questioned Congress' determination of the nexus between felons possessing firearms and interstate commerce and neither court attempted to explain the connection;\textsuperscript{209} both courts merely deferred to Congress upon a finding of a jurisdictional element.\textsuperscript{210}

2. When Jurisdictional Element Is Not Present, the Plain Meaning of the Statute or Congressional Findings of an Interstate-Commerce Nexus Triggers Deference

Where no jurisdictional element exists, the plain language of the statute may determine whether a jurisdictional element may be inferred from the language itself.\textsuperscript{211} In addition, where no jurisdictional element exists, whether Congress made explicit findings of a nexus to interstate commerce may also be determinative.\textsuperscript{212}

\textsuperscript{204} United States v. Pappadopoulos, 64 F.3d 522, 528 (9th Cir. 1995).
\textsuperscript{205} 68 F.3d 396 (10th Cir. 1995).
\textsuperscript{206} 66 F.3d 991 (8th Cir. 1995).
\textsuperscript{207} 18 U.S.C. \textsection{} 922(g) (1994).
\textsuperscript{208} See \textit{Bolton}, 68 F.3d at 400 (stating that "[s]ection 922(g)'s requirement that the firearm have been, at some time, in interstate commerce is sufficient to establish its constitutionality under the Commerce Clause"); \textit{Shelton}, 66 F.3d at 992 (stating that the defendant admitted that the particular firearms at some point traveled in interstate commerce because firearms were no longer manufactured in the state in which he was convicted).
\textsuperscript{209} \textit{Bolton}, 68 F.3d at 400; \textit{Shelton}, 66 F.3d at 992.
\textsuperscript{210} \textit{Bolton}, 68 F.3d at 400; \textit{Shelton}, 66 F.3d at 992.
\textsuperscript{212} See, e.g., United States v. Leshuk, 65 F.3d 1105, 1112 (4th Cir. 1995) (stating that congressional findings that controlling intrastate possession of drugs was necessary to control interstate commerce were dispositive).
In *United States v. Garcia-Salazar*, the defendant was charged with possession with intent to distribute marijuana within 1,000 feet of an elementary school, a violation of the Drug-Free School Zones Act. The court upheld the constitutionality of the Drug-Free School Zones Act by distinguishing its language from the Gun-Free School Zones Act that the Supreme Court had struck down in *Lopez*. Although the Drug-Free School Zones Act was similar to Gun-Free School Zones Act in that it did not have a jurisdictional element requiring proof of a nexus with interstate commerce, the *Garcia-Salazar* court observed that, unlike the firearms statute, the Drug-Free School Zones Act did not criminalize mere possession of drugs but only possession with the intent to distribute.

The court stated that drug possession with the intent to distribute was inherently commercial in nature, while firearm possession was not. It is arguable that Lopez's firearm possession, although not inherently commercial, became commercial when Lopez possessed the gun with the intent to deliver and sell the gun at his high school. However, section 922(q) contained no provision under which Lopez could have been charged with possession with intent to deliver a firearm.

In contrast to the firearm possession in *Lopez*, the court in *Garcia-Salazar* also held that possession of drugs in school with the intent to distribute was an economic activity that, through repetition elsewhere, substantially affected interstate commerce. This, ironically, is reminiscent of the *Wickard* aggregate-effect test that was abandoned by

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214. *Id.* at 568.
Any person who violates section 841(a)(1) . . . or section 856 . . . by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority . . . [is subject to] (1) twice the maximum punishment authorized by section 841(b) . . . and (2) at least twice any term of supervised release authorized by section 841(b) . . . for a first offense.

*Id.*

217. *Id.* Utilizing the *Garcia-Salazar* court's interpretation of *Lopez*, if Congress hypothetically had added to section 922(q) the words, "with intent to distribute," the statute could have been upheld by the Court.
218. *Id.* at 572.
the Court in *Lopez*.\(^{222}\) In contrast with the holding in *Garcia-Salazar*,\(^{223}\) it was the Court's argument in *Lopez* that the aggregate-effect doctrine could be applied to *any* individual activity to support the finding that the activity substantially affected interstate commerce.\(^{224}\)

Another case which illustrates a court's desire to find an explicit congressional purpose where the jurisdictional element was not apparent is *United States v. Leshuk*.\(^{225}\) In *Leshuk*, the defendant was charged with cultivating marijuana in a rural county in West Virginia in violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970.\(^{226}\) The court upheld the constitutionality of the Act in light of *Lopez*, concluding that Congress' explicit finding that drug possession of controlled substances had a substantial and direct effect upon interstate drug trafficking was controlling.\(^{227}\)

3. *Jurisdictional Element Present, No Congressional Finding*

Courts have taken another approach where the connection of the regulated activity in the aggregate to interstate commerce is neither readily apparent nor supported by an express congressional purpose. These courts have held that the government must satisfy the jurisdictional-element requirement by pointing to the proscribed activity's substantial effect upon, or connection to, interstate commerce.\(^{228}\) In *United States v. Pappadopoulos*,\(^{229}\) the defendant was convicted of arson of her own house\(^ {230}\) and the court was forced to address the issue

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222. *United States v. Lopez*, 115 S. Ct. 1624, 1665 (1995) (Breyer, J., dissenting) (questioning the validity of *Wickard* after the majority posited that there was no limit to Congress' power using the *Wickard* "aggregate effects" test).

223. 891 F. Supp. 568 (D. Kan. 1995); see supra notes 213-20 and accompanying text (delineating the holding of *Garcia-Salazar*).

224. *See supra* note 143 and accompanying text (discussing the majority's contention that if the Court deferred to Congress as it had in the past, there would be no limit to Congress' power to regulate under the Commerce Clause).

225. 65 F.3d 1105 (4th Cir. 1995).

226. *Id.* at 1107 (referring to 18 U.S.C. § 841(a)(1) (1994)).

227. *Id.* at 1112.

228. *E.g.*, *United States v. Pappadopoulos*, 64 F.3d 522, 527-28 (9th Cir. 1995) (reversing a conviction under a federal arson statute because the government could not uphold its burden of pointing to a substantial connection between the proscribed arson and interstate commerce).

229. *Id.*

230. *Id.* at 524. The statute provides:

Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than 20 years, fined the greater of the fine under this title or the cost of repairing or replacing any property that is damaged or destroyed [, or both].
of whether the jurisdictional-element requirement that ensured the constitutional application of the statute had been met. The government attempted to establish the jurisdictional-element requirement by proving that the Pappadoppoulos' residence was used in interstate commerce because it received natural gas from out-of-state sources.

The court held that Lopez demonstrated that the receipt of natural gas at the Pappadoppoulos' residence from out-of-state sources was insufficient as a matter of law to confer federal jurisdiction over the individual case of arson. The opinion echoed the resounding cry of federalism articulated in Lopez, stating that given the importance of federalism to the nation's scheme of government and its central role in the preservation of liberty, the courts must zealously preserve the balance of power between the federal and state governments.

C. Whether the Person or Entity Committing the Prohibited Activity Was "Engaged in Interstate Commerce"

In cases involving the Racketeer Influenced and Corrupt Organization ("RICO") statute, which is based upon Congress' power to regulate under the Commerce Clause, courts use a different analysis than that applied in Lopez because one of the RICO requirements is that the activity of the enterprise affect interstate or foreign commerce. In the RICO context, courts have held that an enterprise's minimal effect on interstate commerce is sufficient to support Congress' power to regulate under the Commerce Clause as long as the enterprise is "engaged in" interstate commerce.

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231. Pappadopoulos, 64 F.3d at 527.
232. Id. at 525.
233. Id. at 527 (emphasizing that the residence was not used for commercial activity and was purely a private residence). The court reasoned that "[i]f the Commerce Clause were extended to reach the activity that the government seeks to punish here, we would be 'hard-pressed to posit any activity by an individual that Congress is without power to regulate.'" Id. (quoting Chief Justice Rehnquist in United States v. Lopez, 115 S. Ct. 1624, 1632 (1995)).
234. Id. at 528 (admonishing the government by declaring that the arson crime was a simple state crime and should have been tried in state court).
235. 18 U.S.C. § 1962(b). To establish a prima facie RICO claim, a civil plaintiff or prosecutor must allege the existence of seven factors: (1) that the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, or maintains an interest in or participates in (6) an "enterprise" (7) the activities of which affect interstate or foreign commerce. Id.
236. Id.
237. See United States v. Bagnariol, 665 F.2d 877, 893-94 (9th Cir. 1981) (holding that the activities of the Cook County Circuit Court affect interstate commerce simply because the court purchases supplies and office equipment from companies located outside of Illinois); United States v. Barton, 647 F.2d 224, 234 (2d Cir. 1981) (finding that an arsonist affected interstate commerce merely because the car that was bombed was insured by an interstate carrier).
Lawyers, Guns, and Commerce

In United States v. Robertson, the Court, in a per curiam opinion handed down during the same term as Lopez, upheld the defendant's conviction under RICO. The Court held that the defendant's Alaskan silver mine was "engaged in" interstate commerce since it purchased out-of-state supplies.

Because the Court did not apply Lopez to Robertson, it is arguable that the reasoning used in Lopez is not applicable in RICO cases. This may result in two divergent treatments under the Commerce Clause. On one hand, under RICO, extremely tenuous connections to interstate commerce will be sufficient for courts to uphold convictions. On the other hand, in cases not involving RICO, the courts will need to scrutinize the activity's connection to commerce more closely.

In United States v. Stillo, which was decided by the Seventh Circuit after Lopez, the defendants, a judge and his nephew, an attorney, were convicted of conducting and participating in an enterprise (the Circuit Court of Cook County) through a pattern of racketeering activity that violated RICO. The defendants argued that Lopez should control. However, the Seventh Circuit held that because numerous items were purchased by the firm employing the attorney who made the bribe, including an out-of-state calculator and will covers, the general set-up was sufficient to support the jury's finding that the payment of a bribe might deplete the assets of the firm, thus making it impossible for the firm to purchase goods and services in interstate commerce.

IV. Analysis

As evidenced by the courts' use of varying methods of analysis in the wake of Lopez, it would seem that the Lopez decision has caused confusion in the lower courts. It is the author's position that this confusion is due to the fact that the Court's narrowing of Congress' Commerce Clause power in Lopez is doctrinally inconsistent in numerous ways with the great weight of Commerce Clause jurisprudence. The Court's decision in Lopez invents a threshold inquiry and a new procedural hurdle to rational basis scrutiny by stating that congressional findings and a jurisdictional-element requirement may be necessary to
determine whether a statute is constitutional. Although the Court disingenuously espoused the use of rational basis scrutiny in striking down section 922(q), the *Lopez* decision marks a surprising departure from true rational basis scrutiny. In inventing its own brand of rational basis scrutiny, the majority fell into the trap of formalistically categorizing and summarily dismissing Alphonso Lopez' proscribed activity as noncommercial. The majority's preoccupation with whether an activity is "commercial" or "noncommercial" presages the beginning of a retreat to the abandoned formalistic analysis. Finally, underlying this newly announced Commerce Clause doctrine lies a presumption—a presumption of what is truly "national" versus what is truly "local." Although the rationale of Chief Justice Rehnquist encompassed federalism ideals, it presupposes what may be categorized as "local" and "national," a task that earlier Court decisions have proven impossible.

Before the *Lopez* decision, the Commerce Clause doctrine was well settled law. Congress merely had to have a rational basis for concluding that a proscribed activity sufficiently affected interstate commerce. After the *Lopez* decision, which purports to affirm the use of rational basis scrutiny, the doctrine ends up looking quite different than it did prior to *Lopez*. The Court's opinion is inconsistent with precedent because the court utilized rational basis scrutiny "with bite."

### A. Adding Procedural "Bite" to Rational Basis Scrutiny

Under traditional rational basis scrutiny, the Court has never discussed jurisdictional-element requirements or explicit congressional findings. In the *Lopez* decision, however, Chief Justice Rehnquist raised two new threshold procedural barriers to upholding statutes


246. Id.

247. Id. at 1634.

248. *See supra* notes 16-110 and accompanying text (providing a historical overview of the attempts to distinguish "national" and "local" activity).


252. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 (1938) (stating that under the rational basis scrutiny, the Court would sustain regulation in the socioeconomic sphere if any state of facts either known or reasonably inferable afforded support for the legislative judgment to forward the general public interest).
based upon the Commerce Clause. First, the Chief Justice reasoned that a jurisdictional-element requirement would ensure, through case-by-case inquiry, that the firearm possession at issue affected interstate commerce. Second, when no substantial effect is “visible to the naked eye,” Chief Justice Rehnquist stated that congressional findings would enable the Court to evaluate the legislative judgment that the activity in question substantially affected interstate commerce.

1. The Jurisdictional-Element Requirement Argument Is Flawed

To support his theory of a jurisdictional-element requirement, Chief Justice Rehnquist cited United States v. Bass, in which the Court required an additional nexus between receiving, possessing, and transporting a gun and interstate commerce because the Omnibus Crime Control and Safe Streets Act of 1968 was ambiguous and because Congress did not clearly convey its purpose. However, Chief Justice Rehnquist admitted that the Court in Bass was avoiding the constitutional issue. Therefore, the procedural requirement of a jurisdictional element was merely a method of evading the constitutional question of whether Congress could regulate the possession of firearms. The jurisdictional-element requirement as formulated by the Court in Bass was not the doctrinal solution to the constitutional question and, therefore, should not be relied upon as such.

In addition, a close reading of the Bass decision reveals that the Court was primarily influenced by the rule of lenity, a canon of statutory construction which requires that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” According to the Bass decision, the rule of lenity is based on the concept that criminal punishment is so serious that fair warning should be given by the legislature. However, the Court also stated in Bass that it

253. Lopez, 115 S. Ct. at 1631.
254. Id. at 1632.
255. Although Chief Justice Rehnquist's majority opinion is the only opinion to suggest a jurisdictional-element requirement, Justices Kennedy, O'Connor, Thomas, and Scalia seemingly acquiesce with the Chief Justice on this point because none of them addressed the issue separately.
259. Lopez, 115 S. Ct. at 1631.
261. Id. at 339.
262. Id. at 347 (citing Rewis v. United States, 401 U.S. 808, 812 (1971)).
263. Id. at 348.
would be "unreal to argue" that there are notice problems under federal law when a state statute prohibits the same conduct as the federal law.264 Such was the case in Lopez, where Texas state law also prohibited firearm possession on school premises.265 Therefore, Chief Justice Rehnquist's reliance on Bass is seemingly flawed in its application to Lopez.

An important and unresolved issue is whether the jurisdictional-element requirement can be applied to cases other than those involving criminal statutes. It is at least a colorable argument that the jurisdictional element should only be required in criminal cases given the Chief Justice's reliance on Bass. There is no support in the Lopez opinion for extending the requirement to cases involving noncriminal statutes because the Chief Justice cites only to criminal cases266 and the rationale is based upon the rule of lenity which is unique to criminal cases.

2. The Congressional-Finding Argument Is Novel

Although Chief Justice Rehnquist agreed with the government that Congress normally is not required to make formal findings as to the burdens an activity has upon interstate commerce, he boldly created the "visible to the naked eye" test—which now triggers the necessity of legislative or congressional committee findings—without citing support for doing so.268 Justice Breyer, in his dissent, disagreed with Chief Justice Rehnquist's "naked eye" test.269 Indeed, the standard is novel in light of Katzenbach v. McClung,270 in which the Court held that although Congress included no formal findings in Title II of the Civil Rights Act of 1964, "their absence is not fatal to the validity of the statute for the evidence presented at the hearings fully indicated the nature and effect of the burdens on commerce which Congress meant to alleviate."271

264. Id. at 348 n.15.
267. See supra note 141 and accompanying text.
268. Lopez, 115 S. Ct. at 1632.
269. Id. at 1658 (Breyer, J., dissenting) (admitting that Congress did not write specific "interstate commerce" findings into 18 U.S.C. § 922(q) under which Lopez was convicted but emphasizing that findings were never required).
271. Id. at 304 (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938)); see, e.g., Wickard v. Filburn, 317 U.S. 111, 128-29 (1942) (validating a statute which set a quota for the production of wheat intended wholly for home consumption because Congress may properly
Similarly, in Lopez, there was evidence presented at the hearings regarding the Gun-Free School Zones Act to support a substantial effect on interstate commerce. At a Senate hearing on the Gun-Free School Zones Act before the Subcommittee on Crime and the Judiciary Committee, the police chief of Cleveland, Ohio, testified, "We have identified gang members coming from Los Angeles, Chicago, Detroit, and other areas of 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."272 The police chief testified that gang members brought weapons into Ohio from other states and asked Congress to help solve the problem.273 There is no doubt that Congress, after considering the police chief's testimony, had a rational basis to conclude that the class of activity—possession of a firearm on school premises—substantially affected the interstate commerce.

More notable is the fact that Chief Justice Rehnquist did not and could not rely on Perez v. United States274 or Preseault v. ICC,275 two Commerce Clause cases in which the Court explicitly mentioned reliance on findings, to support his "visible to the naked eye" test.276 In Perez, although the Court looked to congressional findings that intrastate, extortionate credit transactions affected interstate commerce, the Court specifically stated that it did not mean "to infer that Congress need make particularized findings in order to legislate."277 In Preseault, a unanimous Court stated that it "must defer to a congressional finding that a regulated activity affects interstate commerce 'if there is any rational basis for such a finding.'"278 However, although the statute and committee reports were devoid of findings or even a

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273. Id.; see also United States v. Ornelas, 841 F. Supp. 1087, 1092 (D. Colo. 1994) (relying on Edward Kovacic's testimony as providing a rational basis for Congress to regulate guns in schools). But see Lopez, 115 S. Ct. at 1634 (Chief Justice Rehnquist stating that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce").


276. For a discussion of the congressional findings as they relate to Commerce Clause cases, see James M. Maloney, Note, Shooting for an Omnipotent Congress: The Constitutionality of Regulation of Intrastate Firearms Possession, 62 FORDHAM L. REV. 1795, 1817-32 (1994).

277. Perez, 402 U.S. at 156.

mention of the Commerce Clause, the Court held that the history of Congress' attempts to address the problem provided sufficient reason to defer to Congress' judgment that the statute addressed the problem at hand. If the rationale of the Court in Preseault was applied to Lopez, Congress' history of creating laws to prohibit possession of firearms should have triggered deference to Congress' judgment to enact the Gun-Free School Zones Act.

In his dissent, Justice Breyer strongly questioned the new requirement of a congressional finding. He did so in light of the fact that the majority supposedly reaffirmed using rational basis scrutiny, which asks whether Congress could have had a rational basis for so concluding that the regulated activity had a sufficient effect upon interstate commerce. Therefore, the procedural requirement of congressional findings was also utilized to add substantively more "bite" to rational basis scrutiny. Because there is no precedent for requiring such findings, it seems that the addition of the new procedural requirements "plows new ground and represents a sharp break with the long-standing pattern" of Commerce Clause cases.


280. Preseault, 494 U.S. at 19 (holding that the National Trails System Act amendments were constitutional under the Commerce Clause).

281. See, e.g., 18 U.S.C. § 922(s)(2) (1994) (making it unlawful for anyone to knowingly violate the Brady Act, which mandates law-enforcement officers to make reasonable efforts within five business days to ascertain whether receipt or possession of a handgun by a prospective buyer would be in violation of the law); id. § 922(o)(1) (making it unlawful for any person to transfer or possess a machine-gun); see also Ronald A. Giller, Note, Federal Gun Control in the United States: Revival of the Tenth Amendment, 10 St. John's J. Legal Comment. 151 (1994) (analyzing constitutional problems encountered by recent federal gun control legislation).


284. Id. at 1658.

285. Id. at 1629.

286. Id. at 1658 (Breyer, J., dissenting).

287. This is the same language that the Fifth Circuit used to strike down the Gun-Free School Zones Act. United States v. Lopez, 2 F.3d 1342, 1366 (1993); see Official Transcript of Oral Argument, United States v. Lopez, 115 S. Ct. 1624 (1995) (No. 93-1260), 1994 WL 758950, at *34 (stating from the bench that "[w]e're making up this procedural requirement, anyway. . . . (Laughter.)").
B. Adding Substantive “Bite” to Rational Basis Scrutiny: A Little Formalism Goes a Long Way

The majority’s rationale in Lopez increased the level at which the Court scrutinized the statute in question and utilized three formalistic doctrines to strike down the law. First, Chief Justice Rehnquist categorized the activities which Congress is permitted to regulate or protect. Second, he determined whether the activity was “commercial” or “noncommercial.” Finally, the Chief Justice acted on the presumption that it is possible to discern what constitutes a “national” concern as opposed to a “local” concern. The misguided use of these three tests throughout the majority opinion only serves to enhance the confusion caused by the Lopez decision.

1. The Hasty Disposal of a Category of Permissible Legislation

Chief Justice Rehnquist lists three categories of activity that Congress may regulate under its Commerce Clause power, but he “quickly disposed” of the first two. The second category that was disregarded included Congress’ power to regulate and protect persons or things in interstate commerce, even though the threat may come only from intrastate activities. A closer look at the second category, however, reveals that the Gun-Free School Zones Act could have also fit within its parameters.

Alphonso Lopez carried a .38-caliber handgun to school with him in order to deliver it to another individual for forty dollars. Although

289. Id. at 1630-31.
290. Id. at 1634.
291. Id. at 1629. The three categories were first raised using the “affecting commerce” standard instead of the “substantially affecting commerce” standard in Perez v. United States, 402 U.S. 146, 150 (1971).
292. Lopez, 115 S. Ct. at 1629. First, Congress may regulate the use of the channels of interstate commerce. Id. (citing Perez, 402 U.S. at 150). Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activity. Id. Third, Congress’ commerce power includes the authority to regulate those activities having a substantial relation to interstate commerce. Id.
293. Id. (citing Southern Ry. Co. v. United States, 222 U.S. 20 (1911) as an example); see United States v. Wilson, 73 F.3d 675, 686-87 (7th Cir. 1995) (analyzing in depth the second category, which provides that Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activity).
294. Mr. Lopez stated that he was to receive forty dollars for delivering the weapon. Brief for the United States, United States v. Lopez, 115 S. Ct. 1524 (1995) (No. 93-1260) (LEXIS, Genfed Library, Briefs File).
this was mentioned in the petitioner's and respondent's briefs,\textsuperscript{295} it was never mentioned in the majority opinion. This is seemingly due to the fact that the majority refused to recognize Congress' ability to rationally find that regulation of gun possession was necessary to regulate interstate gun trafficking.\textsuperscript{296}

In addition, according to the definition of "firearm" in the Gun-Free School Zones Act, a firearm also includes its subcomponents, such as its receiver and frame,\textsuperscript{297} meaning that its subcomponents could also be considered "things" in interstate commerce. Utilizing traditional rational basis scrutiny, the \textit{Lopez} case could easily have been placed into Chief Justice Rehnquist's second category rather than the third category.\textsuperscript{298} This is a colorable argument because other federal criminal statutes controlling solely intrastate possession have been upheld based upon the rationale that Congress rationally could have concluded that controlling intrastate possession was necessary to control interstate trafficking.\textsuperscript{299}

By treating the three categories as separate tests and by applying rational basis scrutiny "with bite," Chief Justice Rehnquist divided and conquered. The strategy quickly and effectively excluded \textit{Lopez} from the second category by refusing to defer to Congress' conclusion that the guns were things in commerce, thereby stripping the argument down to just one prong.\textsuperscript{300} In one fell swoop, Chief Justice Rehnquist's selection of the third category created a diversion which masked his crucial decision to use rational basis scrutiny "with bite" in balancing Congress' desired ends and means.

2. \textit{Commercial Versus Noncommercial Activity}

The Justices who composed the majority in \textit{Lopez} emphasized the commerce versus noncommerce dichotomy in their rationales.\textsuperscript{301}


\textsuperscript{296} \textit{See supra} notes 139-40 and accompanying text (noting the majority's refusal to defer to Congress' judgment concerning the effect of guns in schools on interstate commerce).


\textsuperscript{298} \textit{See, e.g.}, United States v. Wilson, 73 F.3d 675, 686 (7th Cir. 1995) (chastising the district court for dismissing the second category without discussion).

\textsuperscript{299} \textit{See United States v. Atkinson, 513 F.2d 38, 40 (4th Cir. 1975}) (holding that Congress could regulate narcotics, including intrastate narcotics possession, to regulate effectively the interstate trafficking in narcotics).


\textsuperscript{301} In his dissent, Justice Souter criticized the majority for this formalism by stating that "the Court treats deference under the rationality rule as subject to gradation according to the commercial or noncommercial nature of the immediate subject of the challenged regulation." \textit{Id.} at 1653 (Souter, J., dissenting). In his dissenting opinion, Justice Breyer stated that "the Court believes the Constitution would distinguish between two local activities, each of which has an
Although Chief Justice Rehnquist repeatedly referred to the commerce/noncommerce dichotomy, he never defined “commercial” or “economic” activity. Similarly, Justice Kennedy, joined by Justice O'Connor, failed to define commerce in his concurring opinions, yet he argued for an even stricter adherence to the commerce/noncommerce dichotomy. In his concurring opinion, Justice Thomas defined “commerce” and even suggested total reliance on this categorical test. While each Justice offered his or her own unique approach to formalism, the end result is that all of the Justices in the majority perceived gun possession in schools as entirely “outside” the realm of activities which could be considered commercial or economic.

According to Chief Justice Rehnquist, because possession of a gun in school may not be considered commercial behavior, Congress may not regulate it. While Chief Justice Rehnquist did not offer a definition for commerce, he apparently took an “I know it when I see it” approach and gun possession did not fit his conception of commerce.

Perhaps Chief Justice Rehnquist’s most notable statement from Lopez was that “[s]ection 922(q) is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” The presumption underlying this statement is that if one were to identify a common thread running through criminal cases under the Commerce Clause, it would be that the activity being regulated was deemed commercial in nature. Hence, since the possession of a gun in Lopez was not com-

identical effect upon interstate commerce, if one, but not the other is ‘commercial’ in nature.” Id. at 1663 (Breyer, J., dissenting). But see United States v. Wilson, 73 F.3d 675, 685 (7th Cir. 1995) (arguing that the dissent in Lopez misread the majority’s discussion of commerce as delineating the substantial-effects test).

302. Lopez, 115 S. Ct. at 1626-34.
303. See supra notes 146-52 and accompanying text (outlining Justice Kennedy’s concurring opinion).
304. See supra notes 153-60 and accompanying text (discussing Justice Thomas’ concurring opinion).
305. Lopez, 115 S. Ct. at 1634. As Justice Souter stated in his dissent:

The distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly. And the act of calibrating the level of deference by drawing a line between what is patently commercial and what is less purely so will probably resemble the process of deciding how much interference with contractual freedom was fatal.

Id. at 1654 (Souter, J., dissenting).
306. The “I know it when I see it” phrase was coined by Justice Stewart in his concurrence in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (discussing hard-core pornography and the limit of both federal and state power to regulate it).
mercial in nature, *Lopez* was distinguishable. There are, however, numerous cases in which the Court upheld criminal statutes under the Commerce Clause without regard to the proscribed behavior being commercial.\(^{308}\) Therefore, the logical underpinning supporting the majority's commerce/noncommerce categorization appears unsound.

In addition, Chief Justice Rehnquist's determination of whether an intrastate activity was commercial or noncommercial disregarded the line of Commerce Clause cases that emphasized the practical, substantial effects of the activity on interstate commerce.\(^{309}\) As early as 1905 in *Swift & Co. v. United States*\(^{310}\) and 1922 in *Stafford v. Wallace*,\(^{311}\) the Court looked at the pragmatic effects of the regulated activity at issue on interstate commerce.\(^{312}\) This approach was also implemented by the Court in *NLRB v. Jones & Laughlin Steel Corp.*,\(^{313}\) *United States v. Darby*,\(^{314}\) *Wickard v. Filburn*,\(^{315}\) and *Katzenbach v. McClung*.\(^{316}\) The majority's categorization of activity as commerce was diametrically opposed to the practical effect analysis espoused by these cases because the *Lopez* majority's formalistic test used a subjective, as op-

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308. See Cheffer v. Reno, 55 F.3d 1517, 1520 n.6 (11th Cir. 1995) (upholding the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (1994), and citing as examples: Russell v. United States, 471 U.S. 858, 859 (1985) (upholding 18 U.S.C. § 844(i) which penalizes "[w]hoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in . . . any activity affecting interstate or foreign commerce") and Stirone v. United States, 361 U.S. 212, 215 (1960) (upholding the Hobbs Act, 18 U.S.C. § 1951, which criminally penalizes, "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion . . . or [by] commit[ting] or threaten[ing] physical violence to any person or property"); see also Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 Mich. L. Rev. 554, 563-64 (1995) (discussing Justice Breyer's mischaracterization of the precedent of *Katzenbach, Daniel*, and *Perez*).

309. See Regan, *supra* note 308, at 564.

310. 196 U.S. 375, 398-401 (1905); see *supra* notes 61-63 and accompanying text (discussing *Swift*).

311. 258 U.S. 495, 502-03 (1922); see *supra* notes 64-68 and accompanying text (discussing *Stafford*).

312. See *supra* notes 53-68 and accompanying text (discussing the "close and substantial" test and the "current of commerce" test).

313. 301 U.S. 1, 37 (1937) (stating that when a constant practice threatens to obstruct or to unduly burden the freedom of interstate commerce it is within the regulatory power of Congress under the Commerce Clause).

314. 312 U.S. 100, 117 (1941) (stating that manufacturing may be regulated if, during the normal course of business, the manufactured products may be shipped interstate).


316. 379 U.S. 294, 303-04 (1964) (explaining how a restaurant's refusal to serve African-Americans has the practical effect of burdening the interstate of food and other products).
posed to an objective, analysis. In his dissenting opinion, Justice Breyer repeated Justice Jackson’s warning in *Wickard*:

We believe that a review of the course of decision under the Commerce Clause will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as “production” and “indirect” and foreclose consideration of the actual effects of the activity in question upon interstate commerce.

In response to Justice Breyer’s recantation of Justice Jackson’s warning in *Wickard*, Chief Justice Rehnquist stated:

Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress’ authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender “legal uncertainty.”

The fact that there will always be uncertainty, however, is not a convincing argument for reverting to formalism. This is especially true given the fact that such formalism has long since been criticized as being unworkable and unpractical. More importantly, because Chief Justice Rehnquist refused to define “commerce,” the division between commercial and noncommercial activity is not only elusive, it is logistically impossible.

Justices Kennedy unabashedly stated in his concurring opinion that “Congress 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.” He also opined that stare decisis “mandate[d] against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system.” Therefore, according to Justices Kennedy, anything deemed to be “commerce” may be regulated by Congress—no matter how private the activity and no matter how insubstantial the effect on

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317. United States v. Lopez, 115 S. Ct. 1624, 1663 (1995); see supra notes 101-10 and accompanying text (discussing *Wickard*).
318. *Wickard*, 317 U.S. at 120.
320. *Wickard*, 317 U.S. at 120; see supra notes 101-10 and accompanying text (discussing *Wickard*).
322. Id.
interstate commerce. However, if the activity is not "commerce," then it is within the province of the Court to decide whether Congress had any right to regulate the activity. Unfortunately, like Chief Justice Rehnquist, Justice Kennedy failed to define "commerce" or presumed that it was a term so easily defined that it needed no clarification. Such a presumption is unwarranted given the difficulty of past courts to define exactly what constitutes "commerce."324

Unlike Chief Justice Rehnquist and Justice Kennedy, Justice Thomas recommended going two steps further in constructing a commerce/noncommerce doctrine. First, Justice Thomas went to the trouble of defining "commerce."325 Second, he recommended the reconsideration of the "substantial effects" test and the implementation of a more coherent categorical test.326

According to Justice Thomas, although "case law has drifted far from the original understanding of the Commerce Clause[,]" the meaning of "commerce" was cast at the time the original Constitution was ratified.328 Commerce means "selling, buying, and bartering, as well as transporting for these purposes."329 Under Justice Thomas' paradigm, agriculture and manufacturing would not be included in that definition.330

Therefore, utilizing Justice Thomas' test, it is arguable that the statutes in *Wickard v. Filburn*, which regulated agriculture, and *NLRB v. Jones & Laughlin Steel Corp.*, which regulated manufacturing, would not have been upheld. When applied, Justice Thomas' test is strikingly similar to the direct/indirect test utilized in *United States v.

323. See Regan, supra note 308, at 565-66 (interpreting Justice Kennedy's concurrence in *Lopez* to mean that as long as Congress is regulating commercial behavior, the Court need not consider effects on interstate commerce at all).

324. See supra notes 16-110 and accompanying text (providing an overview of the Commerce Clause history in its attempt to define "commerce").

325. *Lopez*, 115 S. Ct. at 1642-43 (Thomas, J., concurring); see supra notes 153-60 and accompanying text (outlining Justice Thomas' concurring opinion).


327. *Id.*

328. *Id.* at 1643.

329. *Id.* (citing 1 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 361 (4th ed. 1773), N. BAILEY, AN universal ETYMOLOGICAL ENGLISH DICTIONARY (26th ed. 1789), T. SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796), and 3 OXFORD ENGLISH DICTIONARY 552 (2d ed. 1989)).

330. *Id.* Justice Thomas noted that "the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture." *Id.*

331. 317 U.S. 111 (1942); see supra notes 101-10 and accompanying text (outlining the rationale of *Wickard*).

332. 301 U.S. 1 (1937); see supra notes 87-92 and accompanying text (discussing *Jones & Laughlin Steel* and the manufacturing regulations).
E.C. Knight Co.,\textsuperscript{333} Hammer v. Dagenhart,\textsuperscript{334} A.L.A. Schechter Poultry Corp. v. United States,\textsuperscript{335} and Carter v. Carter Coal Co.\textsuperscript{336} since manufacturing and agriculture were not deemed "commerce."

Likewise, the Civil Rights Act of 1964,\textsuperscript{337} the statute in question in Katzenbach v. McClung,\textsuperscript{338} would also be struck down using Justice Thomas' test because it did not regulate the sale, purchase, or barter of goods or the transportation of goods for the purpose of sale, purchase, or barter; it merely prohibited discrimination in restaurants. To Justice Thomas, it did not matter whether a regulated activity had a substantial effect on commerce.\textsuperscript{339} All that mattered was that the activity fit the definition of commerce.\textsuperscript{340}

Although Justice Thomas' test may be easier to apply, the Court has rarely sacrificed stability for the sake of simplicity. The adoption of Justice Thomas' interpretation of the "original understanding" of the Commerce Clause would essentially nullify over sixty years of Commerce Clause decisions.\textsuperscript{341} This is more than merely "reconsidering" the substantial effects test.

Justice Thomas also suggested a wholesale diminishment of Congress' power under the Commerce Clause and that cannot be done "without totally rejecting our more recent Commerce Clause jurisprudence."\textsuperscript{342} It is in reaction to Justice Thomas' own view of the "original understanding" of the Commerce Clause that Justices Kennedy and O'Connor declared that "the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point."\textsuperscript{343} How-

\textsuperscript{333} 156 U.S. 1 (1895); see supra notes 32-36 and accompanying text (analyzing E.C. Knight).
\textsuperscript{334} 247 U.S. 251 (1918); see supra notes 37-41 and accompanying text (discussing Hammer and its direct/indirect test).
\textsuperscript{335} 295 U.S. 495 (1934); see supra notes 42-48 and accompanying text (analyzing Schechter).
\textsuperscript{336} 298 U.S. 238 (1936); see supra notes 49-52 and accompanying text (discussing Carter).
\textsuperscript{338} 379 U.S. 294 (1964); see supra note 180 and accompanying text (delineating the holding of McClung).
\textsuperscript{339} United States v. Lopez, 115 S. Ct. 1624, 1650 (1995) (Thomas, J., concurring). Justice Thomas denounced the "substantial effects" test as being of "recent vintage" and "flawed." \textit{Id.}
\textsuperscript{340} \textit{Id.} Justice Thomas defended his position by noting that "[e]ven though the boundary between commerce and other matters may ignore 'economic reality' and thus seem arbitrary or artificial to some, we must nevertheless respect a constitutional line that does not grant Congress power over all that substantially affects interstate commerce." \textit{Id.} at 1646.
\textsuperscript{341} Justice Thomas argued that his original understanding discussion did not require a "wholesale abandonment" of recent opinions because he recognized considerations of stare decisis and reliance interests. \textit{Id.}
\textsuperscript{342} \textit{Id.} at 1642-43.
\textsuperscript{343} \textit{Id.} at 1637 (Kennedy, J., concurring). Justice Kennedy stated that stare decisis prevents the Court from "reverting to an understanding of commerce that would serve only an 18th-century economy" and "mandates against returning to the time when congressional authority to
ever, this chastising is a bit disingenuous considering that the majority resorted to modified doctrines inconsistent with established Commerce Clause jurisprudence in order to strike down the Gun-Free School Zones Act.

By concentrating on what constitutes commerce and what does not, the Justices promoted a technical conception of commerce rather than a practical one, a methodology that was denounced by Justice Holmes in *Swift & Co. v. United States*.344 This formalistic methodology forces judges to subjectively sketch arbitrary and artificial lines between what is deemed “commerce” and what is not.345 Moreover, this subjective line drawing will, no doubt, be guided and driven by each judge’s individual concept of federalism.

3. National Versus Local Activity

Instead of adhering to precedent and asking whether Congress could have reasonably concluded that gun possession affects interstate commerce, the majority treated the issue as whether a judicial nod would signify the end of the division of two allegedly mutually exclusive realms: local and national activity.346 After *Lopez*, the distinction between “national” and “local” activity is critical in analyzing the constitutionality of laws based upon the Commerce Clause power. If the proscribed activity is considered traditionally local and is not categorized as commerce, the federal statute will be struck down regardless of whether Congress had a rational basis to conclude that the activity substantially affected commerce.347

Emphasizing federalism348 ideals, the majority defined what is “national” and what is “local” by implementing a “test of conse-

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344. 196 U.S. 375, 398 (1905); see supra notes 61-63 and accompanying text (discussing *Swift*); see also Regan, *supra* note 308, at 564 (arguing that Chief Justice Rehnquist offered an unacceptable gloss on existing doctrine).


346. *Lopez,* 115 S. Ct. at 1633-34. Chief Justice Rehnquist asserted that if the Court gave deference to Congress there would never be a distinction between what is truly national and what is truly local. *Id.*


quences." The test asked whether a hypothetical statute in the future could ever be struck down using the chain of causality offered by the government in *Lopez*. The majority's use of this test to define traditionally "national" and "local" activities is inappropriate because the test is based upon mere speculation. In addition, by focusing solely on future decisions, the Court's test ignores present realities and past decisions.

Chief Justice Rehnquist's view that any hypothetical statute would be upheld utilizing the dissent's chain of causality presumes that there are no other limits to Congress' power to legislate other than the language of the Commerce Clause. As Justice Blackmun stated in *Garcia v. San Antonio Metropolitan Transit Authority*, "behind the words of the constitutional provisions are postulates which limit and control." According to Justice Blackmun, in addition to the Constitution, the basic structure of the federal government controls what Congress may or may not regulate. The states' role in the political process provides the necessary protection of the states' interests.

In essence, the majority's "test of consequences" assumes that legislators in Congress will not be responsive to the needs of citizens of the states who elect them into office. However, using the same cynical

(Kermit L. Hall et al. eds. 1992) (providing an excellent and concise history of federalism and the Court); William H. Stewart, Concepts of Federalism 29-177 (1984) (providing an exhaustive list of different concepts of federalism, their origin, and a detailed description).

349. Though the Court does not use the phrase "test of consequences," one analyst has termed Chief Justice Rehnquist's analysis as such. H. Jefferson Powell, Enumerated Means and Unlimited Ends, 94 Mich. L. Rev. 651, 656 (1995). Powell articulated the test of consequences as follows:

[I]f the argument that must be made to justify a particular statute leaves one unable to hypothesize any piece of legislation that Congress could not lawfully enact under the same reasoning, the argument and the statute stand self-condemned as invalid attempts to ignore the principle of enumerated and limited federal power.

*Id.* at 655.

350. See supra notes 139-40 and accompanying text (discussing the majority's refusal to defer to Congress).

351. As Chief Justice Rehnquist stated: "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 115 S. Ct. at 1634.

352. 469 U.S. 528 (1985) (upholding the Fair Labor Standards Act stating that the principal limit on the federal commerce power is the states' participation in the political system).

353. *Id.* at 547 (citing *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934)).

354. *Id.* at 550-51.

355. *Id.* at 551-52. "[T]he National political process ... and especially the role of the states in the composition and selection of the central government—is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states." Herbert Weschler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 558 (1954).
presumption, it is arguable that the state legislators will be equally negligent in responding to the needs of their constituents. Therefore, some states will choose not to ban guns in schools,\(^{356}\) despite the fact that guns are coming into the schools via gang members from other areas of the country\(^{357}\) and despite citizens' concerns that gun-related violence in schools is depriving their children of a quality education and the ability to succeed in the work force.\(^{358}\) The *Lopez* decision signifies the Court's willingness to set affirmative limits on Congress' power under the Commerce Clause without analyzing the practical effect that some states may never respond to those very same state citizens who elect their representatives in Congress.\(^{359}\)

Another criticism of the majority's *ex ante* perspective is that what may or could happen in the future is uncertain and, therefore, it is faulty reasoning to treat unknown factors as known factors.\(^{360}\) Chief Justice Rehnquist utilized this reasoning when he stated that under the dissent's chain of causality, family law, which has traditionally been regulated by the states, could be directly regulated by Congress.


\(357\). In the area of crime control, the states have not opposed the use of the Commerce Clause as an expansive basis for federal intervention. Tracy W. Resch, *The Scope of Federal Criminal Jurisdiction Under the Commerce Clause*, 1972 U. Ill. L. F. 805, 822 (1972). State acquiescence is attributable to the following fact:

[T]he federal government has not preempted state powers; federal intervention has helped states deal with problems serious enough to override the usual states' rights fears; and the federal government has entered this area gradually, reluctantly, and primarily with programs aimed at organized crime, a problem generally felt to be incapable of solution by the states acting alone.

*Id.*

\(358\). See *Lopez*, 115 S. Ct. at 1659-62 (Breyer, J., dissenting) (explaining how guns in schools substantially affects the quality of education which is inextricably entwined with the nation's economy).

\(359\). *Id.* at 1633 (declining to expand Congress' Commerce Clause power). However, Justice Breyer opined that holding the Gun-Free School Zones Act as within the commerce power would acknowledge that the "commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy." *Id.* at 1662 (Breyer, J., dissenting) (citing *North American Co. v. SEC*, 327 U.S. 686, 705 (1946)).

\(360\). The majority's viewpoint may be described as that of a pragmatist. "The pragmatist thinks judges should always do the best they can for the future, in the circumstances, unchecked by any need to respect or secure consistency in principle with what other officials have done or will do." *Ronald Dworkin, Law's Empire* 161 (1986).
in the future.\textsuperscript{361} The concrete facts of the specific case, the rationale of Congress, and the statutory language regarding a federal family law (all of which are important considerations) are simply nonexistent. Therefore, it is difficult to argue with Chief Justice Rehnquist's reasoning, not because it is so powerful and true to the text of the Constitution, but because it is grounded in possibilities, not actualities.\textsuperscript{362} After all, merely because something is possible does not make it reasonably probable.

The dissenting opinions did not succumb to reliance on possibilities. Instead, the dissent was grounded in practicality. The dissent emphasized that gun-related school violence affects commerce in a very real sense.\textsuperscript{363} Justice Breyer addressed known factors, such as reports and studies which documented the connection between gun-related violence in schools and its effect on the quality of education and interstate commerce.\textsuperscript{364} For example, Justice Breyer stated that in any six-month period, several hundred-thousand school children are victims of violent crimes in or near their schools and that school violence is linked to drop-out rates.\textsuperscript{365} Justice Breyer also argued that functionally and technologically illiterate Americans in the work force erode our economic standing in the international marketplace.\textsuperscript{366} In addition, Justice Stevens explained that the market for the possession of handguns by school-age children is substantial.\textsuperscript{367} By concentrating on the actual effects of gun possession on interstate commerce rather than the possibility that other statutes in the future will be upheld using the same rationale, the dissent permits Congress to act in terms of "economic realities"\textsuperscript{368} and according to well accepted precedent.

\textsuperscript{361} Lopez, 115 S. Ct. at 1632.

\textsuperscript{362} Justice Blackmun, speaking for the Court in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1984), argued that "[t]he process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency." \textit{Id.} at 556 (citing \textit{New York v. United States}, 326 U.S. 572, 583 (1946)). Justice Blackmun therefore refused to identify the affirmative limits the constitutional structure might impose upon federal action affecting the states under the Commerce Clause. \textit{Id.}

\textsuperscript{363} \textit{See supra} note 176 and accompanying text (noting Justice Breyer's reliance on statistics of the effect of gun-related violence in schools on commerce).

\textsuperscript{364} \textit{Lopez}, 115 S. Ct. at 1659-62 (Breyer, J., dissenting). Justice Breyer mentioned that during the nation's economic boon, "investment in 'human capital,' (through spending on education) exceeded investment in 'physical capital' by a ratio of almost two to one." \textit{Id.} at 1660 (citation omitted).

\textsuperscript{365} \textit{Id.} at 1659.

\textsuperscript{366} \textit{Id.} at 1660.

\textsuperscript{367} \textit{Id.} at 1651 (Stevens, J., dissenting). Justice Stevens stated that there is evidence that firearm manufacturers target school children as consumers by distributing hunting-related videos in the guise of educational materials. \textit{Id.} at 1651 n.*.

\textsuperscript{368} \textit{Id.} at 1662 (Breyer, J., dissenting).
and not in terms of hypothetical situations or unprincipled definitions of "local" or "national" activities.

V. IMPACT

_Lopez_ is a pebble that has been thrown into a still pond, sending ripples to the mossy edges. Only time will tell whether that pebble will be followed by a boulder.369 _Lopez_ is a significant case because it indicates that the Court will not readily defer to Congress to regulate under the Commerce Clause unless it sees proof that Congress found justification in enacting a law. However, an outline of the new paradigm under the Commerce Clause after _Lopez_ demonstrates that it is still very easy to avoid the invalidation of statutes.

A. The Invalidation of Statutes After _Lopez_

The most efficient way to strike down a statute after _Lopez_ is for a court to declare that the regulated activity has nothing to do with commerce.370 The following template will be used by courts to invalidate statutes after _Lopez_. After finding that the proscribed activity is not an instrumentality of commerce or a person or thing in commerce, a judge may merely determine whether the activity has a substantial effect on interstate commerce.371 Under this template, jurisdictional elements are necessary for criminal statutes and arguably optional for other statutes.372 A judge, using his or her own definition (or Justice Thomas' definition) of what is "commercial" or "economic," will then state that the activity is not commerce and will strike down the law as having an insufficient impact upon interstate commerce. This is perhaps the most disturbing effect of _Lopez_ in that the invalidation of the law primarily hinges on the judge's individual definition of commerce.373

369. "Not every epochal case has come in epochal trappings." _Id._ at 1657.

370. See, e.g., _id._ at 1630-31 (striking down the Gun-Free School Zones Act stating that the proscribed activity had nothing to do with commerce); United States v. Pappadopoulos, No. 93-10577, 1995 WL 502907, at *4 (9th Cir. Aug. 25, 1995) (stating that the residence subject to arson was not used at all for commercial activity).

371. See, e.g., United States v. Mussari, 894 F. Supp. 1360, 1365 (D. Ariz. 1995) (striking down the Child Support Recovery Act and asserting that the statute was aimed at an area of activity not substantially related to interstate commerce).

372. See _supra_ notes 255-66 and accompanying text (discussing the new jurisdictional-element requirement).

373. See _supra_ notes 301-45 and accompanying text (analyzing the new commerce/noncommerce dichotomy).
Next, if there are congressional findings, the judge will state that the court need not always defer to findings. If there are no findings, the judge may mention their absence but can assert that findings are not required.

Finally, a judge will emphasize that federalism concerns now play an important role in the Commerce Clause analysis. Under the "test of consequences," the judge may declare that federalism as society knows it would be obliterated if the court upheld the law. The court will therefore conclude that the statute must be invalid as being beyond Congress' power to regulate under the Commerce Clause.

B. The Validation of Statutes After Lopez

The easiest way for a court to uphold a statute after Lopez is to emphasize that rational basis scrutiny is still the appropriate standard, even after the Lopez decision. A court may use the existence of a jurisdictional element to distinguish Lopez from the statute at hand. In addition, if applicable, a court may use the existence of an explicit congressional finding to distinguish Lopez. In either situation, a court may defer to Congress' superior ability to assess the need for federal regulation of the activity or conduct in question. Further, a court may try to fit the activity or conduct under Justice Rehnquist's second category: things or people in commerce or channels of commerce.

If a court cannot use any of the aforementioned strategies to avoid the "substantial effects" doctrine, it is arguable that the court may still be able to uphold the law if the causal chain is not too attenuated. Thus, the court will apply the "test of consequences" and assert that the succinct causal chain satisfies the direct-causality requirement which prevents Congress from being able to regulate all conduct. Fi-


375. See supra notes 267-87 and accompanying text (criticizing the majority's emphasis on congressional findings).

376. See supra notes 346-68 and accompanying text (discussing federalism concerns); see, e.g., Mussari, 894 F. Supp. at 1364-65 (emphasizing principles of federalism and comity).


378. See, e.g., United States v. Wilson, 73 F.3d 675, 680 (7th Cir. 1995).

379. See supra notes 205-10 and accompanying text (analyzing post-Lopez cases which discuss a jurisdictional-element requirement).

380. See supra notes 211-27 and accompanying text (discussing post-Lopez decisions addressing congressional findings).

381. Id.

382. See supra notes 191-201 and accompanying text (analyzing post-Lopez cases which categorize activity as "things in commerce").
nally, the court may declare that the law is a valid exercise of Congress' power to regulate under the Commerce Clause.

The *Lopez* decision created a major change in the Court's evaluation process. Other than effecting this change, the impact of *Lopez* has not been monumental due to an understandable reluctance of courts to abandon the previous paradigm which lasted over sixty years. Therefore, the effect of *Lopez* thus far has not thwarted Congress' jurisdiction over interstate commerce but has promoted judicial and congressional discourse regarding Congress' justifications for exercising its legislative power. Now that jurisdictional elements are required, the next dispute will be over whether explicit congressional findings are required in a federal law based upon the Commerce Clause.

**CONCLUSION**

The nationalization and globalization of commerce in the United States puts the scope of the Commerce Clause on a collision course with state sovereignty over traditionally local matters. Finding a well principled test to define a "traditionally" local matter, however, has eluded the United States Supreme Court for over a century. As Justice Blackmun once said, the "traditional nature of a particular governmental function can be a matter of historical nearsightedness" and "today's self-evidently 'traditional' function is often yesterday's suspect innovation." As long as the Court continues to recognize procedural protections (that is, the jurisdictional-element requirement) and to uphold rational basis scrutiny, the Court is preventing a return to the day when judges engaged in pernicious categorical balancing to determine the scope of the commerce power and cast aside Congress' expertise and knowledge. However, if rational basis scrutiny is repudiated and a heightened scrutiny is employed, the Court will, no doubt, submerge itself into another dark age of formalism.

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383. See Merritt, supra note 345, at 712-13 (emphasizing that *Lopez* has not resulted in many successful constitutional challenges based upon the Commerce Clause).
384. See supra notes 101-16 and accompanying text (analyzing *Wickard* and its progeny).
386. Id.