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## Crime Control and the Commerce Clause: Life after *Lopez*

Kathleen F. Brickey

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# CRIME CONTROL AND THE COMMERCE CLAUSE: LIFE AFTER *LOPEZ*

*Kathleen F. Brickey*\*\*

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## INTRODUCTION

The commerce power is the power to regulate.<sup>1</sup> It binds the nation into a single economic unit and bars local burdens on interstate trade.<sup>2</sup> The commerce power operates in a vast array of spheres: from wages and working conditions in local factories<sup>3</sup> to corporate acquisitions,<sup>4</sup> shipment of adulterated food,<sup>5</sup> racial discrimination,<sup>6</sup> price fixing,<sup>7</sup> loan sharking,<sup>8</sup> and infinitely much more.<sup>9</sup>

Because it is "one of the most prolific sources of national power," the Commerce Clause can be a source of conflict with state law.<sup>10</sup> And when wielded too broadly, it can usurp the role of the states. Thus, courts have long recognized the need to maintain the distinction between what is truly national and what is merely local.<sup>11</sup>

Historically, a clear line of demarcation differentiated national and local police power, relegating the federal government to a minor role in defining crimes and enforcing criminal laws.<sup>12</sup> But as commerce inexorably forged a national economy, the line began to blur. And when technological progress ushered in the era of modern transportation, the rapid circulation of goods in commerce

1. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824).

2. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949) ("This principle that our economic unit is the Nation . . . has as its corollary that the states are not separable economic units . . .").

3. *See, e.g., NLRB v. Fainblatt*, 306 U.S. 601, 602, 605 (1939) (construing § 2(6) of the National Labor Relations Act).

4. *See, e.g., United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271, 275 (1975) (construing § 7 of the Clayton Act).

5. *See, e.g., Hipolite Egg Co. v. United States*, 220 U.S. 45, 51 (1911) (construing § 10 of the Food and Drug Act).

6. *See, e.g., Daniel v. Paul*, 395 U.S. 298, 301 (1969); *Katzenbach v. McClung*, 379 U.S. 294, 298 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 245 (1964) (all construing § 201 of the Civil Rights Act of 1964).

7. *See, e.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 227 (1948) (construing § 1 of the Sherman Act).

8. *See, e.g., Perez v. United States*, 402 U.S. 146, 146-47 (1971) (construing Title II of the Consumer Credit Protection Act).

9. *See, e.g., infra* notes 68-75, 80 and accompanying text.

10. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534-35 (1949).

11. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

12. Primary criminal jurisdiction remained with the states because crime was viewed as a distinctly local concern. John S. Baker, Jr., *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?*, 16 RUTGERS L.J. 495, 502 (1985).

created the need for national regulation<sup>13</sup>—hence, the rise of federal regulatory crimes and the corollary ascendancy of federal criminal law, both premised on liberal invocation of commerce-based jurisdiction.<sup>14</sup>

A line of Supreme Court decisions that clung to the “horse-and-buggy definition of interstate commerce” slowed the growth of commerce-based jurisdiction.<sup>15</sup> But once the Court committed itself to “a practical conception of the commerce power,”<sup>16</sup> commerce-based jurisdiction became so commonplace that judicial review was regarded as “largely a formality.”<sup>17</sup> Indeed, the Supreme Court’s modern Commerce Clause jurisprudence could be read as recognizing the Commerce Clause as “a complete grant of power.”<sup>18</sup>

The Court abruptly departed from that mode in *United States v. Lopez*,<sup>19</sup> where for the first time in nearly sixty years it invalidated a statute as an unconstitutional exercise of the commerce power. Notably, the Court accomplished this feat without expressly overruling any Commerce Clause precedent. This Article is a quest for the meaning of *Lopez*. In pursuit of that end, the Article explores the anomalies of *Lopez*, its potential impact on the now substantial body of federal criminal law,<sup>20</sup> and its possible reper-

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13. The interstate shipment of diseased livestock by rail, for example, could rapidly transform an isolated phenomenon into a national epidemic. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 116 (1994).

14. See Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1137-45 (1995) [hereinafter Brickey, *Criminal Mischief*].

15. Franklin D. Roosevelt, Press conference in response to Supreme Court decisions overturning New Deal legislation (May 31, 1935), in 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 200, 221 (Samuel I. Rosenman ed., 1938).

16. *United States v. Lopez*, 115 S. Ct. 1624, 1636 (1995) (Kennedy, J., concurring).

17. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-8, at 316 (2d ed. 1988).

18. RONALD ROTUNDA & JOHN NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 4.8, at 394 (2d ed. 1992). Indeed, the Supreme Court has stated on several occasions that the commerce power is plenary. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985); *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 276 (1981); *United States v. Darby*, 312 U.S. 100, 114 (1941); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196-97 (1824). The Court in *Lopez* countered that “[t]he Constitution [withholds] from Congress a plenary police power that would authorize enactment of every type of legislation.” *United States v. Lopez*, 115 S. Ct. 1624, 1633 (1995).

19. 115 S. Ct. 1624 (1995).

20. Today there are more than 3,000 federal crimes on the books. W. John Moore, *The High Price of Good Intentions*, 25 NAT’L J. 1140, 1140 (1993). According to a Library of Congress study, as many as 1,600 of these crimes may have been enacted since the early 1980s. *Press Conference with Representative Don Edwards (D-CA) and J. Michael Quinlan, Former Director of the Federal Bureau of Prisons*, FED. NEWS SERVICE,

cussions in Congress—the driving force behind the move to federalize crime.

### LOPEZ IN A NUTSHELL

Alphonso Lopez was an unlikely candidate to become a federal cause célèbre. He was a twelfth-grade student at Edison High School in San Antonio. His name became a household word only because he carried a concealed handgun to school one day. Acting on an anonymous tip, school officials confronted him, and he admitted he had the gun.<sup>21</sup> He was then arrested and charged under Texas law with possessing a gun on school premises.<sup>22</sup> The next day his odyssey to fame began when the state charges were dropped and he was charged in federal court<sup>23</sup> with violating the

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Nov. 1, 1993. In stark contrast, the entire body of federal criminal law consisted of 17 crimes in 1790. DWIGHT F. HENDERSON, CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW 1801-1829, at 7 (1985).

21. He explained that "Gilbert" had given him the gun to deliver to "Jason" after school for use in a "gang war." *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993).

22. TEX. PENAL CODE ANN. § 46.03(a) (West 1994) makes it a felony to possess a firearm or other prohibited weapon on school premises or in a school passenger transportation vehicle, at a polling place during an election, in a court or court offices, at a race-track, or in a secured area of an airport.

23. *Lopez*, 115 S. Ct. at 1626. Although successive federal and state prosecutions for the same conduct do not violate the Fifth Amendment prohibition against double jeopardy, *Abbate v. United States*, 359 U.S. 187, 194-95 (1959), successive prosecutions could implicate statutory double jeopardy bars under federal or state law. *See, e.g.*, 18 U.S.C. § 660 (1994); ALASKA STAT. § 12.20.010 (1990); ARK. CODE ANN. § 5-1-114 (Michie 1993); CAL. PENAL CODE § 656 (West 1992); COLO. REV. STAT. § 18-1-303 (1990); DEL. CODE ANN. tit. 11, § 209 (1987); GA. CODE ANN. § 16-1-8 (1992); HAW. REV. STAT. § 701-112 (1985); ILL. ANN. STAT. ch. 720, ¶ 5/3-4 (Smith-Hurd 1993); IND. CODE ANN. § 35-41-4-5 (Burns 1994); KAN. STAT. ANN. § 21-3108 (1988); KY. REV. STAT. ANN. § 505.050 (Baldwin 1993); MONT. CODE ANN. § 46-11-504 (1986); N.J. STAT. ANN. § 2C:1-11 (West 1982); 18 PA. CONS. STAT. ANN. § 111 (1983); UTAH CODE ANN. § 76-1-404 (1995); VA. CODE ANN. § 19.2-294 (Michie 1995); WIS. STAT. ANN. § 939.71 (West 1982). *See generally* Harry Litman & Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72 (1996) (endorsing the *Petite* Policy as a model for limiting the exercise of federal criminal jurisdiction).

Successive state and federal prosecutions could also implicate the federal *Petite* Policy. *See Petite v. United States*, 361 U.S. 529, 531 (1960). Under the *Petite* Policy, a federal prosecution will normally not be instituted after a state prosecution for the same conduct unless the federal prosecution would serve "compelling interests of federal law enforcement." *Thompson v. United States*, 444 U.S. 248, 248 (1980). The current version of the *Petite* Policy is set forth in U.S. DEP'T OF JUSTICE, 3(a) UNITED STATES ATTORNEYS' MANUAL § 9-2.142, at 19 (1988).

Gun-Free School Zones Act.<sup>24</sup>

Lopez was convicted of the federal charge.<sup>25</sup> On appeal, he challenged the Act as an impermissible exercise of Commerce Clause jurisdiction. The case reached the Supreme Court after the Fifth Circuit held that Congress had indeed exceeded its authority under the Commerce Clause.<sup>26</sup> A divided high Court agreed.<sup>27</sup>

Since the Act purported neither to regulate the use of the channels of interstate commerce<sup>28</sup> nor to protect persons or things

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The federal civil rights prosecution of four Los Angeles police officers following their acquittal on state charges in the Rodney King case sparked renewed debate about whether and how to reform the dual sovereignty doctrine. For a sampling of views on this subject, see generally Akhil R. Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1 (1995), Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine*, 41 UCLA L. REV. 693 (1994), Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609 (1994), Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception,"* 41 UCLA L. REV. 649 (1994), and Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509 (1994).

24. 18 U.S.C. § 922(q) (1994). The decision to make this a federal case is curious. While it is not unusual in some districts for federal prosecutors to assert jurisdiction over crimes that are customarily tried in state court, their reason for doing so is typically to capitalize on the availability of harsher federal penalties, including mandatory minimum prison terms. See Brickey, *Criminal Mischief*, *supra* note 14, at 1159 & nn.138-39, 1165 (discussing Mayor Giuliani's federal day initiative in New York City, Senator Biden's effort to create a national federal day, and the Justice Department's effort to use federal firearms laws against violent offenders). But the decision to prosecute Lopez under the Gun-Free School Zones Act resulted in charging him under a statute that had no mandatory minimum sentence and that authorized a shorter maximum prison term and smaller fine than was authorized under Texas law, which imposed a mandatory minimum prison term. Compare 18 U.S.C. §§ 922(q), 924(a)(4) (1994) with TEX. PENAL CODE ANN. §§ 46.03(a) & (f), 12.34 (West 1994).

The decision is all the more curious because Lopez had neither a prior criminal record nor a disciplinary record at Edison High. Brief for Respondent at 3, *United States v. Lopez*, 115 S. Ct. 1624 (1995) (No. 93-1260) [hereinafter Respondent's Brief]. Lopez told a police officer that the reason Gilbert had selected him to deliver the gun was because Lopez was a good student who rarely got into trouble. See *Lopez*, 2 F.3d at 1345; Respondent's Brief, *supra*, at 3. Indeed, Lopez had been accepted by the Marine Corps under a delayed entry program, and at his sentencing hearing the recruiter testified that Lopez had the qualities to make a good marine. Joseph Calve, *Anatomy of a Landmark*, TEX. LAW., July 31, 1995, at 1.

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

26. *Id.*

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

28. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62 (1964) (upholding civil rights legislation prohibiting racial discrimination in local restaurants and motels).

in commerce,<sup>29</sup> it could be upheld under the Commerce Clause only if it regulated activities that "substantially affect" interstate commerce.<sup>30</sup> The Court found the Act constitutionally deficient in several respects. First, it had nothing to do with commerce or any commercial enterprise.<sup>31</sup> Second, it did not contain a jurisdictional element to ensure that the regulated conduct affects commerce.<sup>32</sup> And last, Congress provided neither legislative findings nor legislative history that spelled out how the prohibited activity affects commerce.<sup>33</sup>

#### COMMERCIAL OR ECONOMIC ACTIVITY

The Court found the Act flawed as an exercise of the commerce power because gun possession in or near schools is unrelated to commerce or commercial activity. Although the Court initially characterized the problem as that of an effort to regulate purely intrastate activities that are not *commercial*, when the Court returned to this theme it referred to case law upholding statutes that regulate intrastate *economic* activity.<sup>34</sup> "Where economic activity substantially affects interstate commerce," the Court wrote, "legislation regulating that activity will be sustained."<sup>35</sup>

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29. See, e.g., *Perez v. United States*, 402 U.S. 146, 150 (1971) (citing as examples 18 U.S.C. § 32 (destruction of an aircraft) and 18 U.S.C. § 659 (theft from interstate shipments)); *Houston, E. & W.T.R. Co. v. United States*, 234 U.S. 342 (1914) (upholding application of amendments to Safety Appliance Act to intrastate railroads that compete with interstate railroads).

30. See, e.g., *United States v. Darby*, 312 U.S. 100, 122-23 (1941) (upholding the Fair Labor Standards Act that, in this context, regulated the working conditions of employees whose work-related activity was primarily intrastate).

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

32. *Id.* at 1631. As a criminal statute, the Gun-Free School Zones Act had nothing to do with regulating the channels of commerce or prohibiting the interstate transportation of something through channels of commerce. Nor did it purport to protect instrumentalities of interstate commerce or things in commerce. *Id.* at 1630-31.

33. *Id.* at 1630-32.

34. Although the Court does not expressly articulate the distinction between commercial and economic activity, the Court's usage suggests the following. Commercial activity is monetary activity. It occurs during the course of conducting a trade or business or otherwise seeking monetary gain. Economic activity is activity that, while not necessarily mercantile, has monetary consequences. It has (or is likely to have) a financial impact on another party and, when repeated by others, on the economy. This distinction is explored more fully below. See *infra* notes 35-64 and accompanying text.

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

This shift in terminology from “commercial” to “economic” activity occurred first in *Wickard v. Filburn*.<sup>36</sup> *Wickard* upheld a provision in the Agricultural Adjustment Act limiting the amount of wheat that farmers could grow. The Court held that even though a farmer’s production of wheat for home consumption was a purely local activity, it nonetheless substantially affected interstate commerce. Because *Wickard*’s excess wheat was never intended to enter the stream of commerce, his act of producing it was not “commercial” activity.<sup>37</sup> It was nonetheless “economic” activity in the sense that it fulfilled his individual need for wheat. If *Wickard* had not grown the excess wheat, he would have bought it in the open market.<sup>38</sup> Thus, his local production of wheat for home consumption influenced price and market conditions.<sup>39</sup> In consequence, Congress could regulate *Wickard*’s production of wheat because that endeavor—though not commercial—had a “substantial economic effect” on commerce.<sup>40</sup>

Unlike *Wickard*’s production of excess wheat, *Lopez*’s gun possession in a school zone was not, in the Court’s view, “an essential part of a larger regulation of economic activity.”<sup>41</sup> Thus, the Gun-Free School Zones Act was not within the ambit of prior cases upholding the regulation of activities that “arise out of” or are “connected with” a commercial transaction.<sup>42</sup>

Notwithstanding the *Lopez* majority’s emphasis on commercial or economic activity, the Court has never held that Commerce Clause jurisdiction extends only to commercial or economic actors. Commerce-based jurisdiction has been extended to noneconomic activity like possessing a firearm “affecting commerce,” for example.<sup>43</sup> That being true, what does *Lopez* mean when it says

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36. 317 U.S. 111, 125 (1942).

37. *Id.*

38. *Id.* at 128. Although *Wickard* may have been financially motivated to grow his own wheat, he did not reap any profit from it. Thus, economic activity encompasses conduct that is not actuated by a profit-seeking motive.

39. *Id.* at 127-28.

40. *Id.* at 125. While now characterizing *Wickard* as a “far reaching example” of the breadth of the commerce power, the *Lopez* Court maintained that “[e]ven *Wickard* . . . involved economic activity in a way that the possession of a gun in a school zone does not.” *Lopez*, 115 S. Ct. at 1630.

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

42. *Id.*

43. See, e.g., *Scarborough v. United States*, 431 U.S. 563, 571-75 (1977) (upholding a statute prohibiting convicted felons from possessing firearms “in commerce or affecting commerce” as a valid exercise of full congressional power under the Commerce Clause—the requisite minimal nexus exists if the firearm has been in interstate commerce



that gun possession in or near schools does not affect commerce because it is not *commercial* or *economic* activity?<sup>44</sup>

A year before it decided *Lopez*, the Court confronted a variant of this problem in *National Organization for Women, Inc. v. Scheidler*.<sup>45</sup> In *NOW*, a civil RICO suit, the National Organization for Women and two women's health organizations sued members of a coalition of anti-abortion groups. The plaintiffs alleged that the defendants engaged in a pattern of extortion committed through arson, fire bombings, and other criminal acts designed to intimidate abortion clinic employees and women seeking abortions.<sup>46</sup> To sustain the suit, the plaintiffs had to prove that the protesters conducted the affairs of an enterprise—here, the coalition of anti-abortion groups—through a pattern of extortionate activity.<sup>47</sup>

The issue in *NOW* was whether a RICO enterprise must have an economic motive or goal. Partly because of the arguably economic nature of other conduct prohibited by RICO<sup>48</sup> and partly because of the legislative findings Congress adopted,<sup>49</sup> three circuits had held that the enterprise must have an economic purpose or goal.<sup>50</sup> The Court in *NOW* disagreed.<sup>51</sup>

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at some point in time); see also *infra* text accompanying notes 70-88.

44. Cf. *United States v. Bishop*, 66 F.3d 569, 581 (3d Cir. 1995) (the term "commercial" is "arguably potentially ambiguous").

45. 114 S. Ct. 798 (1994).

46. *Id.* at 801-02.

47. *Id.*

48. In addition to prohibiting conducting an enterprise's affairs through a pattern of racketeering activity, RICO also prohibits investing the proceeds of racketeering activity to acquire an interest in or to establish or operate an enterprise, and acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962(a)-(c) (1994). Although the investment and acquisition provisions are arguably more closely aligned with economic activity, the Court in *NOW* declined to hold that they required such activity. *NOW*, 114 S. Ct. at 804.

49. The findings are replete with references to the millions of dollars that organized crime activities drain from the economy and to organized crime's reliance on syndicated gambling, loan sharking, theft, fencing stolen property, and drug trafficking as sources of power. See 18 U.S.C. § 1961 (1994) (Congressional Statement of Findings and Purpose).

50. See *NOW v. Scheidler*, 968 F.2d 612, 625-30 (7th Cir. 1992) (stating that the enterprise must have an economic motive—abortion protesters who allegedly have an economic effect on commerce do not have the requisite motivation), *rev'd*, 114 S. Ct. 798 (1994); *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir.) (stating that the enterprise must be directed toward an economic goal—activities directed toward controlling local labor unions promote an economic goal), *cert. denied*, 488 U.S. 974 (1988); *United States v. Bagaric*, 706 F.2d 42, 55-58 (2d Cir.) (stating that while the enterprise must seek economic gain, that need not be its overriding motive—political terrorists who promote their cause through extortion to finance it have an economic goal), *cert. denied*, 464 U.S. 840, and *cert. denied*, 464 U.S. 917 (1983); *United States v. Ivic*, 700 F.2d 51, 59-65

RICO requires the same nexus between the enterprise and commerce as the Commerce Clause requires.<sup>52</sup> The enterprise must either be “engaged” in or “affect” commerce. According to the Court’s dictionary of choice, the word “affect” means “to have a detrimental influence on—used especially in the phrase *affecting commerce*.”<sup>53</sup> Thus, an enterprise could have a detrimental effect on commerce even though it had no profit-seeking motive or goal.<sup>54</sup>

Could the abortion protesters “affect” commerce if they were not conducting the affairs of an economically motivated enterprise? Their purpose was to shut down the clinics. They allegedly pursued this objective through intimidation, arson, and other criminal acts. Although these activities might not financially benefit the protesters, their very purpose was to inflict financial harm. In that sense, then, the protesters could be said to have some economic motive. But the *NOW* Court made clear that motive was wholly unimportant. Arguments focusing on the economic motive of the enterprise “overlook[ed] the fact that predicate acts, such as the alleged extortion, may not benefit the protestors financially but still may drain money from the economy by harming businesses such as the clinics.”<sup>55</sup>

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(2d Cir. 1983) (stating that the enterprise must have a financial purpose—political terrorists who promote their cause through assassinations, arson, bombings and other violent crimes do not have the necessary mercenary motive); *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980) (stating that the enterprise must be directed toward an economic goal), *cert. denied*, 450 U.S. 912 (1981).

51. *NOW*, 114 S. Ct. at 801.

52. *Id.* at 803-04.

53. *Id.* at 804 (quoting Webster’s Third New International Dictionary 35 (1969)) (internal quotations omitted). On the Court’s selective use of dictionaries, see Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1590-91, 1614-16 (1994) (noting differences between Webster’s Third New International Dictionary, the Oxford English Dictionary (Second Edition), and Webster’s Second Edition in the search for the ordinary meaning of the word “enterprise”). See also A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 71 (1994); Aaron J. Rynd, *Dictionaries and the Interpretation of Words: A Summary of Difficulties*, 29 ALBERTA L. REV. 712 (1991); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994). For an example of the classic battle of the dictionaries, compare *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1170 (1993) (Blackmun, J.) (relying on Webster’s Third New International Dictionary) with *id.* at 1174 (Souter, J., dissenting) (relying on the Oxford English Dictionary for a competing view).

54. *NOW*, 114 S. Ct. at 804.

55. *Id.* at 805.

In contrast with the statutory construction concern in *NOW*, the Court in *Lopez* was concerned that the activities governed by the Gun-Free School Zones Act did not "arise out of" and were not "connected with" a commercial transaction.<sup>56</sup> But do abortion protesters who engage in a pattern of intimidation engage in activities *arising out of* a commercial transaction? A common-sense understanding of what commercial transactions are would suggest not. The protesters were promoting a personal, religious, or political cause. Thus, the question must be framed in terms of whether the protesters' activities were *connected with* a commercial or economic enterprise or whether, as in *Lopez*, their activities had "nothing to do with . . . any sort of economic enterprise."<sup>57</sup>

In *NOW*, the coalition of anti-abortion groups presumably had no economic purpose.<sup>58</sup> Thus, the only "economic enterprise" with which the protesters had any conceivable connection was the clinics themselves. But they were connected with the clinics only in the sense that they objected to medical procedures the clinics performed. They were noncommercial actors whose activities disrupted commercial enterprises engaged in or affecting interstate commerce.<sup>59</sup> Is that the kind of commercial nexus the *Lopez* majority had in mind?

Suppose that instead of targeting clinics nationwide, the protesters adopted the more limited goal of killing doctors who perform abortions in Florida. Their obvious purpose would be to halt Florida abortions.<sup>60</sup> If the assassination strategy were to succeed, it

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

57. *Id.* at 1630-31.

58. See *NOW*, 114 S. Ct. at 802 (noting the District Court's finding that the activities were politically, not commercially, motivated).

59. Cf. *United States v. Dinwiddie*, 76 F.3d 913, 919-20 (8th Cir. 1996) (holding that the Freedom of Access to Clinic Entrances Act is a valid exercise of the commerce power); *United States v. Wilson*, 73 F.3d 675, 681-84 (7th Cir. 1995) (holding that the provision of reproductive health services is commercial activity and that the Freedom of Access to Clinic Entrances Act, which regulates private conduct that affects commercial entities or activities, is a valid exercise of the commerce power); *Cheffer v. Reno*, 55 F.3d 1517, 1519-21 (11th Cir. 1995) (finding that the Freedom of Access to Clinic Entrances Act regulates commercial activity—but even if the provision of reproductive health services were not commercial activity, congressional findings support the legislative judgment that the regulated activity substantially affects commerce); *American Life League, Inc. v. Reno*, 47 F.3d 642, 647 (4th Cir.) (finding that the Access Act is a valid exercise of the commerce power), *cert. denied*, 116 S. Ct. 55 (1995). Jurisdiction based upon conduct "in or affecting" commerce is discussed below. See *infra* text accompanying notes 177-86.

60. It must be conceded that since the protesters' purpose would be to dissuade physicians from performing abortions, a corollary objective would be to deprive physicians who

too could drain money from the economy by inflicting the same financial harm envisioned in *NOW*.<sup>61</sup> Thus, the protest enterprise would be engaged in activities that adversely "affect" commerce and would pass muster under *NOW*. But where is the commercial activity or economic enterprise that *Lopez* demands?<sup>62</sup>

The majority in *Lopez* maintained that its decision was consistent with modern Commerce Clause precedent. Indeed, the Court succeeded in invalidating the Act as an unconstitutional exercise of the commerce power without overruling a single case. Instead, the opinion observes that, while some prior Commerce Clause cases have suggested the possibility of additional expansion of commerce-based jurisdiction, the Court now declines to proceed any further down that road.<sup>63</sup> Thus, the majority at least creates the impression that it is simply maintaining the status quo.

If that is the case, one can only conclude that even though the majority insisted that intrastate activity must be commercial or economic, noncommercial activity that adversely affects an economic enterprise engaged in commerce is subject to Commerce Clause jurisdiction.<sup>64</sup>

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perform the procedure of their livelihood.

61. See *supra* text accompanying notes 45-55 (discussing *NOW* in greater depth).

62. One might be tempted to attribute this semantic puzzle to stylistic differences among members of the Court were it not for the irony that Justice Rehnquist wrote both the majority opinion in *Lopez* and the unanimous opinion in *NOW*.

From Justice Souter's perspective, perhaps these questions illustrate the "hopeless porosity" of the commercial/noncommercial distinction the majority draws. See *Lopez*, 115 S. Ct. at 1654 (Souter, J., dissenting). In Justice Souter's view, this distinction looks for all the world like the direct/indirect dichotomy embedded in the "untenable jurisprudence" that the Court abandoned in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). *Lopez*, 115 S. Ct. at 1654. Similarly, Justice Breyer objects that in our complex national economy, it is "almost impossible" to distinguish commercial from noncommercial activities. *Id.* at 1664 (Breyer, J. dissenting).

63. 115 S. Ct. at 1634.

64. See, e.g., *United States v. Bishop*, 66 F.3d 569, 580-81 (3d Cir. 1995) (finding that *Lopez* did not create a "bright line" rule requiring that regulated activity be commercial or economic); *United States v. Edwards*, 894 F. Supp. 340, 342 (E.D. Wis. 1995) (noting that the regulated activity itself need not be commercial). But see *Bishop*, 66 F.3d at 602 (Becker, J., concurring in part and dissenting in part) ("While it is far from clear what *Lopez* meant by a 'commercial transaction,' the preferable definition of commercial transaction requires an activity involving a voluntary economic exchange."); Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1817 (1995) (stating that *Lopez* "removed noneconomic local activity—whatever its effect on interstate commerce—from the scope of federal regulatory power"). Compare *United States v. Sage*, 906 F. Supp. 84, 89-90 (D. Conn. 1995) (Nonpayment of child support payments is an economic activity in that each payment withheld economically benefits the noncustodial parent and economically harms the unsupported child; because interstate cases account for an

## CURING JURISDICTIONAL FLAWS

The *Lopez* Court recognized that the process of determining whether intrastate activity is commercial or noncommercial is neither precise nor formulaic.<sup>65</sup> The extent to which Congress can regulate a specified activity under the commerce power is necessarily a matter of degree.<sup>66</sup>

In support of its conclusion that gun possession in a school zone was not an economic activity, the Court made the following observations: (1) *Lopez* was a local student at a San Antonio school; (2) there was no evidence that he had recently traveled in interstate commerce; and (3) the Act did not require a showing of any concrete tie between his gun possession and commerce.<sup>67</sup>

These observations suggest several ways in which the jurisdictional flaws in the Act might be cured. One would focus on the movement of persons or things in interstate commerce. Thus, for example, Congress could have prohibited crossing state lines with intent to possess a firearm in a school zone. This is a common technique for asserting federal criminal jurisdiction.<sup>68</sup> Congress has invoked the Commerce Clause to prohibit the interstate transportation of everyone from fugitive felons<sup>69</sup> to kidnapping victims,<sup>70</sup>

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estimated \$14 billion in uncollected child support judgments, the Act regulates activity that substantially affects commerce and hence is a constitutional exercise of the commerce power.) *with* *United States v. Mussari*, 894 F. Supp. 1360, 1363-64 (D. Ariz. 1995) (concluding that collection of delinquent child custody payments from the noncustodial parent who lives in another state does not involve commercial intercourse—the Child Support Recovery Act of 1992 is an unconstitutional exercise of the commerce power).

Thus, perhaps Justice Breyer's concern that the majority would apparently distinguish two local activities that had identical effects on commerce if one were commercial and the other were not is premature, if not misplaced. *See Lopez*, 115 S. Ct. at 1663-64 (Breyer, J., dissenting).

The question whether noncommercial activity directed at noncommercial entities can substantially affect commerce is considered below. *See infra* text accompanying notes 199-213.

65. *Lopez*, 115 S. Ct. at 1633-34.

66. *Id.* at 1633.

67. *Id.* at 1634.

68. The Supreme Court had validated this species of criminal jurisdiction by the turn of the century. *See Hoke v. United States*, 227 U.S. 308, 323 (1913) (upholding the constitutionality of the Mann Act); *Hipolite Egg Co. v. United States*, 220 U.S. 45, 57-58 (1911) (upholding a statute punishing interstate transportation of adulterated articles); *Champion v. Ames*, 188 U.S. 321, 363-64 (1903) (upholding the constitutionality of a statute suppressing interstate transportation of lottery tickets).

69. 18 U.S.C. § 1073 (1994) (fleeing across state lines to avoid prosecution).

70. 18 U.S.C. § 1201 (1994) (transporting a kidnapping victim across state lines).

prostitutes,<sup>71</sup> sexually exploited children,<sup>72</sup> spouse abusers,<sup>73</sup> and animal enterprise terrorists.<sup>74</sup>

Admittedly, many statutes employing this approach are directed at what are normally considered local concerns, and they often amount to an exercise of concurrent jurisdiction over state crimes.<sup>75</sup> The Gun-Free School Zones Act is the quintessential example. More than forty states, including Texas,<sup>76</sup> have statutes that make possession of a firearm on school grounds a crime.<sup>77</sup> If Congress were to correct the jurisdictional flaw in the Gun-Free

71. 18 U.S.C. §§ 2421-2423 (1994) (transporting an individual across state lines to engage in prostitution or other criminal sexual activity).

72. 18 U.S.C. § 2251 (1994) (transporting a minor across state lines for the purpose of engaging in sexually explicit conduct for visual depiction).

73. 18 U.S.C. § 2261 (1994) (travelling interstate with intent to harass, intimidate, or injure one's spouse or intimate partner).

74. 18 U.S.C. § 43 (1994) (travelling across state lines for the purpose of disrupting the function of an animal enterprise).

75. The federal government can effectively exercise concurrent jurisdiction by adding the element of interstate travel to what are otherwise state crimes. Thus, for example, the Violence Against Women Act asserts federal jurisdiction over domestic violence that results in bodily injury to a spouse or domestic partner if the assaulter traveled interstate with the intent to harass, intimidate, or injure the spouse or partner. 18 U.S.C. § 2261 (1994). Thus, assuming the requisite intent and resulting injury, a spouse abuser may be federally prosecuted for committing crimes like assault, battery, rape, and homicide if he traveled interstate.

Similarly, the Travel Act federalizes prostitution, extortion, bribery, and arson that is punishable under state law if the offender traveled interstate with intent to promote or commit such crimes. 18 U.S.C. § 1952 (1994). The federal carjacking statute, 18 U.S.C. § 2119 (1994), *see infra* notes 84-86 and accompanying text, is another recent enactment in which the primary concern is conduct that constitutes a state crime.

Congress sometimes expressly recognizes that it is regulating matters of state concern by indicating its intent neither to occupy the field nor invalidate state law. *See, e.g.*, 18 U.S.C. § 659 (1994) (theft from common carrier); 18 U.S.C. § 43(e) (1994) (animal enterprise terrorism); 18 U.S.C. § 224(b) (1994) (bribery in sporting contests); 18 U.S.C. § 233 (1994) (civil disorders); 18 U.S.C. § 248(a) (1994) (freedom of access to clinic entrances); 18 U.S.C. § 848 (1994) (importation, manufacture, distribution, and storage of explosive materials); 18 U.S.C. § 896 (1994) (extortionate credit transactions); 18 U.S.C. § 922(q)(4) (1994) (gun-free school zones); 18 U.S.C. § 927 (1994) (firearms offenses); 18 U.S.C. § 1074(b) (1994) (flight to avoid prosecution for damaging or destroying property); 18 U.S.C. § 1468(c) (1994) (distributing obscene material by cable or subscription television); 18 U.S.C. § 2345 (1994) (contraband cigarettes).

The Civil Rights Acts of 1866, 1870, and 1871 are historical antecedents of modern statutes that create concurrent federal jurisdiction over state crimes. *See Brickey, Criminal Mischief, supra* note 14, at 1139-40 & nn.26-30.

76. TEX. PENAL CODE ANN. § 46.03(a) (West 1994). The Texas statute is discussed *supra* in note 22.

77. Respondent's Brief, *supra* note 24, at 24 n.20. A compendium of the statutes appears as Appendix B to the brief. *See id.* at 3a.

School Zones Act by requiring that the gun possessor travel in interstate commerce, the underlying social concern would be precisely the same as before—the adverse impact of violent crime on the educational process. But because the Court has recognized that “[t]ransportation alone across state lines is commerce,”<sup>78</sup> it would be unnecessary to address the question whether gun possession in school zones *affects* commerce. As Justice Kennedy’s concurrence observed, “[e]ven the most confined interpretation of ‘commerce’ would embrace transportation between the States.”<sup>79</sup>

Alternatively, Congress could prohibit possessing a firearm in a school zone if the weapon itself had been transported in commerce, regardless of whether its possessor had crossed state lines. This is another common approach to federalizing local crime.<sup>80</sup> The early statutes that used this approach required a discernible connection between the underlying crime and movement in commerce.<sup>81</sup> The Dyer Act,<sup>82</sup> for example, prohibits transporting stolen motor vehicles in interstate commerce.<sup>83</sup> In Dyer Act prosecutions, the government must prove the vehicle was moved in commerce after it was stolen. Thus, whether the thief transports a stolen vehicle or its parts for sale in another state—or simply uses it for interstate flight—the transportation is factually linked to the theft.

This is in marked contrast with many modern commerce-based federal crimes in which the link between commerce and the prohibited activity may be tenuous at best. The federal carjacking statute, for example, prohibits the forcible taking of any motor vehicle that

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78. *NLRB v. Fainblatt*, 306 U.S. 601, 606 (1939) (emphasis added) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) and *Champion v. Ames*, 188 U.S. 321 (1903)). That is true whether or not the transportation itself is “commercial.” See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964).

79. *Lopez*, 115 S. Ct. at 1636 (Kennedy, J., concurring).

80. See, e.g., 18 U.S.C. § 46 (1994) (water hyacinths); 18 U.S.C. § 844(d) (1994) (explosives); 18 U.S.C. § 924(b) (1994) (firearms); 18 U.S.C. § 1301 (1994) (lottery tickets); 18 U.S.C. § 1465 (1994) (obscene materials); 18 U.S.C. §§ 2311-2313 (1994) (stolen motor vehicles); 18 U.S.C. §§ 2314-2315 (1994) (stolen goods and wares); 18 U.S.C. § 2318 (1994) (counterfeit phonograph records).

81. For a chronicle of the evolving role of the Commerce Clause in federalized crime, see Kathleen F. Brickey, *The Commerce Clause and Federalized Crime: A Tale of Two Thieves*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 27 (1996).

82. 18 U.S.C. §§ 2311-2313 (1994).

83. *Id.* § 2312. The Act also prohibits receiving, concealing, or disposing of stolen vehicles that have been transported across state lines. *Id.* § 2313.

has been transported, shipped, or received in interstate commerce.<sup>84</sup> Since virtually all automobiles are transported from one state to another before they are sold,<sup>85</sup> this statute federalizes essentially all armed robberies in which the object of the theft is a car.<sup>86</sup> That is true even though the out-of-state manufacturer's shipment of the car to the in-state dealer is remote in time and place and wholly unrelated to the crime.

Congress could have used this approach in the Gun-Free School Zones Act by prohibiting possession in school zones of guns that have been "shipped, transported, or received" in interstate commerce. Suppose the Act had included such language. What if the gun was manufactured in Massachusetts, shipped to Texas, and sold to Lopez's father by a San Antonio dealer ten years before young Lopez was arrested. Does the interstate transportation of the

84. *Id.* § 2119.

85. *But see* *United States v. Johnson*, 56 F.3d 947 (8th Cir. 1995). In *Johnson*, the court held that an automobile that had been assembled in one state from components manufactured in another had not been "transported, shipped, or received" in interstate commerce. While it "would require no great leap in logic and likely would not offend the Commerce Clause" to make theft of such cars a federal crime, Congress did not draft the statute that broadly. *Id.* at 957.

86. *See* *United States v. Johnson*, 22 F.3d 106, 107 (6th Cir. 1994) (holding interstate commerce nexus is satisfied when a car that was manufactured in Smyrna, Tennessee and shipped to a Chattanooga, Tennessee dealer passed through Georgia en route).

Anecdotal evidence derived from the facts of reported cases suggests that the overwhelming majority of federal carjacking prosecutions involve purely intrastate robberies. *See, e.g.*, *United States v. Bishop*, 66 F.3d 569 (3d Cir. 1995); *United States v. Robinson*, 62 F.3d 234 (8th Cir. 1995); *United States v. Oliver*, 60 F.3d 547 (9th Cir. 1995); *United States v. Murray*, No. 94-10124, 1995 U.S. App. LEXIS 11610 (9th Cir. May 11, 1995) (reported in case table format at 56 F.3d 74), *cert. denied*, 116 S. Ct. 261 (1995); *United States v. Hudson*, 53 F.3d 744 (6th Cir.), *cert. denied*, 116 S. Ct. 235, and *cert. denied*, 116 S. Ct. 400 (1995); *United States v. Woosley*, No. 94-6137, 1995 U.S. App. LEXIS 14931 (6th Cir. June 14, 1995) (reported in case table format at 57 F.3d 1072), *cert. denied*, 116 S. Ct. 349 (1995); *United States v. Johnson*, 56 F.3d 947 (8th Cir. 1995); *United States v. Perez-Garcia*, 56 F.3d 1 (1st Cir.), *cert. denied*, 116 S. Ct. 400 (1995); *United States v. T.F.F., A Juvenile Male*, 55 F.3d 1118 (6th Cir. 1995); *United States v. Fuentes-Vazquez*, 52 F.3d 394 (1st Cir. 1995); *United States v. Brown*, 49 F.3d 135 (5th Cir. 1995); *United States v. Singleton*, 49 F.3d 129 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 324 (1995); *United States v. Bell*, 46 F.3d 442 (5th Cir. 1995); *United States v. Clark*, 45 F.3d 1247 (8th Cir. 1995); *United States v. Overstreet*, 40 F.3d 1090 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1970 (1995); *United States v. A.R., A Male Juvenile*, 38 F.3d 699 (3d Cir. 1994); *United States v. Harris*, 25 F.3d 1275 (5th Cir.), *cert. denied*, 115 S. Ct. 458 (1994); *United States v. Mohammed* 27 F.3d 815 (2d Cir.), *cert. denied*, 115 S. Ct. 451 (1994); *United States v. Robertson*, 21 F.3d 1030 (10th Cir.), *cert. denied*, 115 S. Ct. 238 (1994) and *cert. denied*, 116 S. Ct. 197 (1995). *But see* *United States v. Johnson*, 32 F.3d 82 (4th Cir.) (interstate crime), *cert. denied*, 115 S. Ct. 650 (1994).



gun a decade before he possessed it in school fulfill the jurisdictional requirements imposed by the Court? Does it supply a concrete connection between his possession and commerce?

Although one could argue that because the possession is so remote from the transportation the connection is too tenuous,<sup>87</sup> under settled case law the jurisdictional element is satisfied if the gun had previously traveled interstate<sup>88</sup> or was manufactured out of state.<sup>89</sup> The government is not required to prove that the possession itself was "part of the interstate movement."<sup>90</sup> The jurisdictional language denotes a completed act.<sup>91</sup> Thus, "[i]t is the movement of the firearm" that affects commerce, "not the activity of the person in whose possession it is later found."<sup>92</sup>

Because the statute may be applied "with little concern for *when* the nexus with commerce occurred,"<sup>93</sup> the gun may come to

87. See *Lopez*, 115 S. Ct. at 1634 (noting that there was no evidence that Lopez had "recently" traveled in interstate commerce).

88. *United States v. Bass*, 404 U.S. 336, 350 (1971); see also *United States v. Johnson*, 22 F.3d 106, 109 (6th Cir. 1994); *United States v. Horton*, 503 F.2d 810, 813 (7th Cir. 1974); *United States v. Haley*, 500 F.2d 302, 304 (8th Cir. 1974); *United States v. Bush*, 500 F.2d 19, 21 (6th Cir. 1974); *United States v. Rollings*, 494 F.2d 344, 345 (8th Cir. 1974); *United States v. Lupino*, 480 F.2d 720, 723-24 (8th Cir.), *cert. denied*, 414 U.S. 924 (1973); *United States v. Mullins*, 476 F.2d 664, 664 (4th Cir.), *cert. denied*, 414 U.S. 839 (1973); *United States v. Brown*, 472 F.2d 1181, 1182 (6th Cir. 1973).

89. *United States v. Cole*, CRIM. No. 89-322, CIV.A. No. 95-3190, 1995 WL 375833 at \*2 (E.D. Pa. 1995) (noting that the burden can be met by showing that the firearm was manufactured in another state); *United States v. Johnson*, 722 F.2d 407, 410 (8th Cir. 1983) (noting that proof of manufacture in another state is sufficient); see also *United States v. Robertson*, 115 S. Ct. 1732, 1733 (1995) (*per curiam*) (holding that the operation of a gold mine in Alaska constituted production, distribution, or acquisition of goods in interstate commerce); *Daniel v. Paul*, 395 U.S. 298, 308 (1969) (holding that the paddle boats, jukebox, and records at an Arkansas amusement park moved in interstate commerce).

90. *Barrett v. United States*, 423 U.S. 212, 216 (1976). Stated differently, the defendant need not travel interstate while possessing the gun.

91.

Thus, there is no warping or stretching of language when the statute is applied to a firearm that already has completed its interstate journey and has come to rest in the dealer's showcase at the time of its purchase and receipt by the felon.

*Id.* at 217.

92. *United States v. Bumphus*, 508 F.2d 1405, 1407 (10th Cir. 1975); *cf.* *United States v. Walker*, 489 F.2d 1353, 1357-58 (7th Cir. 1973) (finding that the possession of a firearm that has previously moved in commerce satisfies the jurisdictional element even though the possession is unrelated to the prior movement in commerce), *cert. denied*, 415 U.S. 982 (1974).

93. *Scarborough v. United States*, 431 U.S. 563, 577 (1977) (*emphasis added*); *cf.* *United States v. Thomas*, 485 F.2d 557, 558 (5th Cir. 1973) (holding that the jurisdiction-

rest in the dealer's display case<sup>94</sup>—or in the Lopez household for that matter—and still supply the requisite link to commerce.<sup>95</sup> The jurisdictional element would be satisfied by “the minimal nexus that the firearm [has] been, at *some* time, in interstate commerce,”<sup>96</sup> regardless of when the movement occurred.<sup>97</sup> If the mere movement of the gun in interstate commerce confers jurisdiction, and if the possession need not be related to the movement, it would seem that Congress can regulate gun possession wherever it occurs—including school zones—provided that it employs the right jurisdictional hook.<sup>98</sup>

#### A PATH LESS CERTAIN

The Court in *Lopez* briefly addressed the extent to which regulated activity must affect commerce. Noting that its past Commerce Clause jurisprudence had left unclear whether the activity must “affect” or “substantially affect” commerce, the Court found that the weight of authority supported the “substantially affects”

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al element is satisfied if the firearm has previously moved in commerce, and there is no limit on the amount of time that can elapse between the interstate transportation and the possession).

94. Barrett, 423 U.S. at 217; cf. *Walker*, 489 F.2d at 1354 (finding that a gun that was shipped from Florida to Illinois, sold six months later by an Illinois retailer to a pawnbroker, and resold to a third party provided a sufficient nexus with commerce); *Thomas*, 485 F.2d at 557 (finding a sufficient link with commerce where a Florida importer who sold a gun manufactured in Germany to a Florida gun distributor, who sold it to a pawn shop, which sold it to a third party, who then sold it back to the pawn shop, which then sold it to the defendant); *United States v. Lupino*, 480 F.2d 720, 723 (8th Cir.) (finding a sufficient link with commerce where a gun manufactured in Germany that was shipped to New York and ultimately entered customs in Minnesota where the defendant acquired it), *cert. denied*, 414 U.S. 924 (1973).

95. See *United States v. Johnson*, 22 F.3d 106, 109 (6th Cir. 1994) (finding that the carjacking statute does not require a car to be in commerce when it is stolen if the car has previously moved in commerce).

96. *Scarborough*, 431 U.S. at 575 (emphasis added).

97. *Id.* at 577.

98. Cf. *Lopez*, 115 S. Ct. at 1651 (Stevens, J., dissenting) (“Congress’ power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use.”).

Legislation to resuscitate the Gun-Free School Zones Act is presently pending. The Gun-Free School Zones Act of 1995 would make the possession of a firearm in or near a school a federal crime if the gun had previously moved in commerce or otherwise affected commerce. H.R. 1608, 104th Cong., 1st Sess. (1995); S. 890, 104th Cong., 1st Sess. (1995).

standard.<sup>99</sup> While the Court has indeed used the substantially affects standard in some of its past Commerce Clause decisions,<sup>100</sup> the Court has never explained just what it means. In view of the *Lopez* Court's disdain for the speculative interstate connections posited by the government<sup>101</sup> and Justice Breyer's dissent, at minimum, a substantial relation to commerce must be a real connection, not an imagined one. But beyond that, it is difficult to gauge, particularly in light of language the Court has used in past decisions.

While the term "substantial" could connote that the activity must have a significant or important effect on commerce,<sup>102</sup> language in some of the Court's earlier decisions connotes a contrasting view. In *National Labor Relations Board v. Fainblatt*,<sup>103</sup> for example, the Court confronted a challenge to the National Labor Relations Act, which, as applied to the facts, regulated the working conditions of employees engaged in purely intrastate activity.<sup>104</sup>

The Court observed that when Congress acts under the commerce power, it can choose to regulate activities that affect either a large or small volume of commerce. In *Fainblatt*, the volume of commerce affected, "though substantial," was "relatively small."<sup>105</sup> But the Act does not require that the regulated activity affect a particular volume of commerce beyond the threshold level of a

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99. *Lopez*, 115 S. Ct. at 1630. The Court cited only *Jones & Laughlin Steel* and *Wirtz* in support of its conclusion. *Id.* at 1629-30.

100. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 296-97 (1964) (finding that racial discrimination by a restaurant that buys meat produced out of state substantially affects interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255, 258 (1964) (finding that racial discrimination in public accommodations substantially affects interstate commerce); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118, 119 (1942) (finding that milk produced intrastate that competes with milk produced out of state substantially affects interstate commerce); *United States v. Darby*, 312 U.S. 100, 106, 119-20 (1941) (finding that the intrastate production of lumber and the employment of workmen in production substantially affect interstate commerce).

101. See *infra* text accompanying notes 156-64.

102. Ironically, Justice Breyer, who believed that the Gun-Free School Zones Act was a constitutional exercise of commerce power, would adopt a "significant effect" test. *Lopez*, 115 S. Ct. at 1657 (Breyer, J., dissenting).

103. 306 U.S. 601 (1939).

104. *Id.* at 602.

105. *Id.* at 606. Similarly, the Court in *Darby* declared that Congress can regulate intrastate activities having a substantial effect on commerce, but that no particular volume or amount of commerce need be involved. *United States v. Darby*, 312 U.S. 100, 119-20, 123 (1941).

“de minimis” effect.<sup>106</sup> Stated differently, as long as an activity’s effect on commerce is more than trifling (or, in *Wickard*’s terms, trivial),<sup>107</sup> Congress has power to regulate it. In *Fainblatt*, the regular interstate shipment of products produced by a small manufacturing company satisfied that threshold.<sup>108</sup>

Later in *Scarborough v. United States*,<sup>109</sup> the Court upheld a statute prohibiting convicted felons from possessing guns “in commerce or affecting commerce.”<sup>110</sup> The defendant claimed that, because there was no commerce connection contemporaneous with his possession, there was no jurisdictional ground for his conviction. The Court disagreed. By regulating possession “in” and “affecting” commerce, Congress clearly intended to bar more than possession in commerce or in interstate facilities.<sup>111</sup> “Congress sought to reach possessions broadly,” regardless of when the commerce connection occurred.<sup>112</sup> The Court could find “no indication that Congress intended to require any more than the *minimal* nexus that the firearm have been, at some time, in interstate commerce.”<sup>113</sup>

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106. *Fainblatt*, 306 U.S. at 607.

107. In *Wickard*, the Court declared that while *Wickard*’s individual “contribution to the demand for wheat may be trivial by itself,” his production of wheat for home consumption was nonetheless subject to federal regulation if “his contribution, taken together with that of many others similarly situated, is far from trivial.” *Wickard*, 317 U.S. at 127-28 (citing *Fainblatt*, 306 U.S. at 606, et seq. and *Darby*, 312 U.S. at 123).

The Court echoed these sentiments in *Wirtz*. “The contention that in Commerce Clause cases the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest.” *Maryland v. Wirtz*, 392 U.S. 183, 192-93 (1968) (citing *Wickard*, 317 U.S. at 127-28, *Polish Nat’l Alliance v. NLRB*, 322 U.S. 643, 648 (1944), and *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964)), *overruled by National League of Cities v. Usery*, 426 U.S. 833 (1976).

*Lopez* revived this theme when it stated that the Court has “never declared that ‘Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.’” *Lopez*, 115 S. Ct. at 1630 (quoting *Wirtz*, 392 U.S. at 196 n.27).

108. *Fainblatt*, 306 U.S. at 606. In view of the Court’s post-*Lopez* decision in *United States v. Robertson*, 115 S. Ct. 1732 (1995) (per curiam), *Fainblatt* would likely be recast as a case in which the company was “engaged in commerce,” thus obviating any need to determine what effect its activities had on commerce. See *infra* text accompanying notes 187-96 (discussing *Robertson*).

109. 431 U.S. 563 (1977).

110. *Id.* at 564. The Tenth Circuit reaffirmed the validity of the statute after *Lopez* in *United States v. Bolton*, 68 F.3d 396, 400 (10th Cir. 1995).

111. *Scarborough*, 431 U.S. at 572. The legislative history supported this conclusion. *Id.* at 572-75.

112. *Id.* at 577.

113. *Id.* at 575 (emphasis added).

Another of the Court's decisions has led to rampant use of the terms "minimal" and "de minimis" to describe the requisite connection with commerce.<sup>114</sup> That is not so much because of the breadth of the Court's language as it is the breadth of the statute it upheld. *Stirone v. United States*<sup>115</sup> involved a challenge to the Hobbs Act, which prohibits obstructing, delaying, or affecting commerce in "any way or degree" through the commission of robbery, extortion, or acts of violence.<sup>116</sup> Stirone was convicted of obstructing commerce by threatening labor disputes that could have prevented a maker of ready-mixed concrete from fulfilling a contract to supply concrete for a construction project. Although the construction project was in-state, the concrete maker obtained his sand from out of state. The Court found that his dependence on out-of-state sand supplied a sufficient nexus with interstate commerce to confer Hobbs Act jurisdiction. If the extortion had harmed or destroyed his business, shipments of sand to him would have diminished or ceased, and that is precisely the kind of commercial harm the Hobbs Act was intended to curb.<sup>117</sup>

Courts considering the breadth of the Hobbs Act after *Stirone* have variously described the requisite impact on commerce as "de minimis,"<sup>118</sup> "minimal,"<sup>119</sup> "slight,"<sup>120</sup> or "small."<sup>121</sup> Hobbs

114. See *infra* notes 118-31 and accompanying text.

115. 361 U.S. 212 (1960).

116. 18 U.S.C. § 1951(a) (1994). The "affecting commerce" language ordinarily manifests congressional intent to use full Commerce Clause power. *Allied-Bruce Terminix Co. v. Dobson*, 115 S. Ct. 834, 839 (1995) (citing *Russell v. United States*, 471 U.S. 858, 859 (1985)).

117. *Stirone*, 361 U.S. at 215.

118. See, e.g., *United States v. Stillo*, 57 F.3d 553, 558 (7th Cir.) (post-*Lopez*), *cert. denied*, 116 S. Ct. 383 (1995); *United States v. Woodruff*, 50 F.3d 673, 676 (9th Cir. 1995); *United States v. Collins*, 40 F.3d 95, 99 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1986 (1995); *United States v. Davis*, 30 F.3d 613, 615 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 769 (1995); *United States v. Zeigler*, 19 F.3d 486, 489 (10th Cir.), *cert. denied*, 115 S. Ct. 517 (1994); *United States v. Shields*, 999 F.2d 1090, 1098 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 877 (1994); *United States v. McKenna*, 889 F.2d 1168, 1171-72 (1st Cir. 1989); *United States v. Rivera-Medina*, 845 F.2d 12, 15 (1st Cir.), *cert. denied*, 488 U.S. 862 (1988); see also *United States v. Shively*, 927 F.2d 804, 808 (5th Cir.) (stating that the arson statute should be read broadly to reach activities having even a de minimis effect on commerce), *cert. denied*, 501 U.S. 1209 (1991); *United States v. Voss*, 787 F.2d 393, 397 (8th Cir.) (stating that under the federal arson statute, Congress intended to reach arson of any property used in an activity having a de minimis relation to commerce), *cert. denied*, 479 U.S. 888 (1986); *United States v. Sage*, 906 F. Supp. 84, 89 (D. Conn. 1995) (stating that the de minimis character of an individual instance of withholding child support is irrelevant under the Child Support Recovery Act if the regulated activity, when considered in the aggregate, substantially affects commerce); *United*

Act decisions handed down after *Lopez* reflect continued semantic confusion. Citing intra-circuit precedent (but not *Lopez*), one opinion states that under the Hobbs Act, the effect on commerce may be "de minimis" or "minimal."<sup>122</sup> Another, also relying exclusively on intra-circuit precedent, states that the Hobbs Act applies when there is an impact on commerce, "however small," or where the connection with commerce is even "slight."<sup>123</sup> Yet another states that *Lopez* did not change the "minimal potential effect" standard under the Hobbs Act.<sup>124</sup>

Construing an identical jurisdictional element in a different context,<sup>125</sup> another post-*Lopez* opinion stated that a minimal effect is sufficient to establish jurisdiction.<sup>126</sup> Citing *Lopez* for the premise that the effect cannot be too indirect and remote,<sup>127</sup> the court

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*States v. Payne*, 841 F. Supp. 810, 811 (S.D. Ohio 1994) (stating that the carjacking need only have a de minimis effect on interstate commerce to give Congress authority to regulate it), *aff'd*, 59 F.3d 171 (6th Cir.), *cert. denied*, 116 S. Ct. 347 (1995).

119. *See, e.g.*, *United States v. Jones*, 30 F.3d 276, 285 (2d Cir.), *cert. denied*, 115 S. Ct. 602 (1994); *United States v. Davis*, 967 F.2d 516, 522 (11th Cir. 1992); *see also* *United States v. Hanna*, 55 F.3d 1456, 1462 (9th Cir. 1995) (citing *Scarborough v. United States*, 431 U.S. 563, 575 (1977) (the firearms possession statute requires only the minimal nexus that the firearm was in commerce at some time)).

120. *See, e.g.*, *Stillo*, 57 F.3d at 558; *United States v. Box*, 50 F.3d 345, 352 (5th Cir.), *cert. denied*, 116 S. Ct. 309 (1995); *United States v. Tomblin*, 46 F.3d 1369, 1382 (5th Cir. 1995); *United States v. Coyne*, 4 F.3d 100, 111 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 929 (1994); *United States v. Inigo*, 925 F.2d 641, 648 (3d Cir. 1991); *see also* *United States v. Evans*, 928 F.2d 858, 862 (9th Cir. 1991) (finding that the machine gun possession statute's requirement of a "tenuous nexus" is sufficient).

121. *See, e.g.*, *United States v. Bailey*, 990 F.2d 119, 125 (4th Cir. 1993) (citing *United States v. Brentley*, 777 F.2d 159, 162 (4th Cir. 1985), *cert. denied*, 479 U.S. 822 (1986)); *United States v. Taylor*, 966 F.2d 830, 836 (4th Cir. 1992), *cert. denied*, 114 S. Ct. 249 (1993).

122. *United States v. Frost*, 61 F.3d 1518, 1524 (11th Cir. 1995) (per curiam) (stating that extorting a city council member to resign his seat affected interstate commerce in at least a minimal degree); *see also* *United States v. Bolton*, 68 F.3d 396, 399-400 (10th Cir. 1995) (noting that evidence that money the defendant obtained in robberies would have been used to purchase items in interstate commerce was sufficient to establish a de minimis effect on commerce).

123. *United States v. Huynh*, 60 F.3d 1386, 1389 (9th Cir. 1995) (per curiam) (finding that threats to prevent the mailing of Social Security checks across state lines affected interstate commerce).

124. *United States v. Stillo*, 57 F.3d 553, 558 n.2 (7th Cir.) (stating that the Hobbs Act's express jurisdictional requirement distinguishes it from the Gun-Free School Zones Act), *cert. denied*, 116 S. Ct. 383 (1995); *see also* *United States v. Arena*, 894 F. Supp. 580, 584-85 (N.D.N.Y. 1995) (stating that *Lopez* does not affect the Hobbs Act).

125. *See* 18 U.S.C. § 1956(c)(4) (1994) (money laundering).

126. *United States v. Grey*, 56 F.3d 1219, 1224 (10th Cir. 1995).

127. *Id.* at 1225-26 n.3. Justices Souter and Breyer expressed concern that the Court's emphasis on commercial versus noncommercial activity signaled a return to the long-dis-

emphasized that the minimal impact standard still requires the government to prove the manner or degree in which the activity affects commerce.<sup>128</sup>

*Lopez* leaves us in a semantic quagmire. If *Stirone* is still good law, Congress has power to regulate activity that affects commerce in *any* way or degree. But "any" is not the same as "substantial." The "affecting commerce" language signals congressional intent to exercise full power under the Commerce Clause.<sup>129</sup> By invoking the full extent of its power in the Hobbs Act, Congress did not say—as it could have said—that the Act only outlaws extortion that obstructs commerce to a great (i.e., substantial) extent.<sup>130</sup> It said the Hobbs Act forbids extortion that obstructs commerce in any way or degree, no matter how great or small.

But the force of this analysis is undercut by courts' uncritical use of terms like "substantial," "de minimis," "minimal" and "small." Courts indiscriminately use these words "to express different and sometimes contradictory ideas,"<sup>131</sup> thus robbing them of any true significance. Hence, the "substantially affects commerce" test—though clothed in the garb of substantive rule—may be little more than linguistic formality.

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carded direct/indirect distinction. *Lopez*, 115 S. Ct. at 1654 (Souter, J., dissenting); *id.* at 1663 (Breyer, J., dissenting). The court in *Grey* contributed to the revival of that test. *See Grey*, 56 F.3d at 1225; *see also* *United States v. Pappadopoulos*, 64 F.3d 522, 526 (9th Cir. 1995) (noting that *Lopez* clearly requires that the regulated activity's effect on commerce must not be too indirect and remote).

128. "'Minimal' is defined as 'of, being, or having the character of a minimum.' 'Minimum' means 'the least quantity assignable, admissible, or possible in a given case.' . . . Without delving into metaphysics, we can suggest at least that something is more than nothing." *Grey*, 56 F.3d at 1225 (quoting Webster's Third New International Dictionary, Unabridged (1968) and concluding that the government had failed to prove even a minimal effect on commerce); *cf.* *United State v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996) ("Nothing in *Lopez* suggests that the 'minimal nexus' test should be changed.").

129. *Stirone v. United States*, 361 U.S. 212, 215 (1960).

130. *See, e.g.*, 18 U.S.C. § 245 (1994) (federal civil rights act protecting against injuring or intimidating anyone engaged in a business that sells a substantial portion of its articles or services to interstate travelers or that moves a substantial portion of its articles in interstate commerce).

131. *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring).

## LEGISLATIVE FACT-FINDING

To cure the jurisdictional flaw in the Gun-Free School Zones Act, Congress could have made formal findings that provided an explicit link between gun possession in school zones and interstate commerce. Congress often employs this legislative technique when enacting legislation that regulates activity previously considered to be purely intrastate.<sup>132</sup> A finding that links large-scale gambling enterprises<sup>133</sup> or loan sharking<sup>134</sup> to interstate commerce, for example, speaks to the effect of these undertakings on commerce as a class of activities. If the class of activities as a whole affects commerce, then an individual instance of the activity need not be shown to do so.<sup>135</sup> In consequence, the finding serves as a proxy for an express jurisdictional element.

Thus, for example, congressional findings that illegal gambling operations extensively affect interstate commerce<sup>136</sup> can be substituted for a jurisdictional element that would require the government to prove an interstate nexus on a case-by-case basis. Hence, substitution of legislative findings for an express jurisdictional element serves to rescue prosecutions that would have foundered on the government's inability to prove that a particular defendant transmitted wagering information interstate, or that specific gambling proceeds or paraphernalia had moved interstate.<sup>137</sup> And because findings relieve the government of having to prove even a minimal connection between the gambling activity and commerce, they increase the likelihood of federal prosecutions based on wholly intrastate activity.<sup>138</sup>

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132. Legislative findings can appear in the United States Code either in the form of a statute, *see, e.g.*, 21 U.S.C. § 801 (1994) (controlled substances), or as a separate declaration printed in explanatory material following a statute. *See, e.g., id.* § 891 (extortionate credit transactions); *id.* § 921 (gun possession); *id.* § 1961 (RICO). Findings may also be incorporated in committee reports explaining proposed legislation. *See, e.g.*, SENATE COMM. ON THE JUDICIARY, ORGANIZED CRIME CONTROL ACT OF 1969, S. REP. NO. 617, 91st Cong., 1st Sess. 73 (1969).

133. *See* S. REP. NO. 617, *supra* note 132, at 73.

134. *See* 18 U.S.C. § 891 (1994) (Congressional Findings and Declaration of Purpose).

135. *Perez v. United States*, 402 U.S. 146, 152 (1971); *cf. United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949) ("If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.").

136. *See* S. REP. NO. 617, *supra* note 132, at 73 (noting that illegal gambling operations depend on the facilities of interstate commerce, and that illegal gambling proceeds and paraphernalia often move in interstate commerce).

137. *Id.* at 72.

138. *Cf. Perez*, 402 U.S. at 157 (Stewart, J., dissenting).



When Congress enacted the Gun-Free School Zones Act, it did not adopt any formal findings. Under the rational basis analysis applicable to Commerce Clause cases,<sup>139</sup> however, the Court has never required Congress to "articulate its reasons for enacting a statute."<sup>140</sup> When Congress adopts findings, courts give them substantial deference, thus simplifying the judicial task of assessing the reasonableness of the legislative judgment that the class of regulated activities affects commerce.<sup>141</sup>

As a general rule, the absence of "'legislative facts on the record'" does not render a statute constitutionally suspect.<sup>142</sup> In the ordinary course of events, judicial inquiry into the rationality of a statute is limited to "the issue whether any state of facts either known or which could reasonably be assumed affords support for it."<sup>143</sup> Although the Court in *Lopez* reaffirmed that Congress is not usually required to make formal findings on the relationship between the regulated activity and interstate commerce,<sup>144</sup> it also observed that when the relationship is not obvious—as it was not

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

*Id.*

139. The Court customarily defers to Congress under the Commerce Clause if the Court finds that there was a rational basis for concluding that the regulated activity affects commerce and that the regulatory means are reasonably suited to the stated ends. *See, e.g.*, *Preseault v. ICC*, 494 U.S. 1, 17 (1990); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981); *Maryland v. Wirtz*, 392 U.S. 183, 190 (1968), *overruled by* *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-59 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964).

140. *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2102 (1993); *cf.* *EEOC v. Wyoming*, 460 U.S. 226, 243-44 n.18 (1983) (noting that Congress need not expressly state what power it is exercising); *Katzenbach*, 379 U.S. at 299 (noting that "no formal findings were made, which of course are not necessary"); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) ("The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.").

By articulating its reasons for acting via formal legislative findings, Congress states its basis for concluding that the regulated activity is an appropriate subject of federal jurisdiction.

141. *See* *United States v. Edwards*, 13 F.3d 291, 295 (9th Cir. 1993), *vacated on other grounds*, 115 S. Ct. 1819 (1995).

142. *See* *Beach Communications, Inc.*, 113 S. Ct. at 2102.

143. *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938).

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

to the *Lopez* majority—legislative findings can assist the Court in evaluating the congressional judgment that a substantial relationship exists.<sup>145</sup>

The government urged that, because Congress had, on many prior occasions, included specific findings in firearms legislation,<sup>146</sup> its “accumulated institutional expertise” obviated the need for new findings.<sup>147</sup> But the Court viewed reliance on findings in predecessor statutes as inappropriate in the context of the Gun-Free School Zones Act because neither the findings nor the laws they support address gun possession in school zones or the relationship between that activity and commerce.<sup>148</sup> Instead, the Act “‘plows thoroughly new ground and represents a sharp break with the long-standing pattern of federal firearms legislation.’”<sup>149</sup>

While most of the earlier firearms laws included a commerce-based jurisdictional element or findings that articulated a nexus between the regulated activity and commerce,<sup>150</sup> their findings and legislative history strongly suggest that firearms move freely in commerce, and that the ease with which juveniles can obtain firearms contributes to the prevalence of violent crime in general, and of juvenile crime in particular.<sup>151</sup> Assuming *arguendo* these findings provide a rational basis for concluding that possession of firearms affects commerce and that Congress has the power to

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145. *Id.* at 1632.

146. See *Lopez*, 2 F.3d at 1348-60 (surveying the substance and legislative histories of the National Firearms Act of 1934, the Federal Firearms Act of 1938, the Omnibus Crime Control and Safe Streets Act of 1968, The Gun Control Act of 1968, the Firearms Owners Protection Act of 1986, the Undetectable Firearms Act of 1988, the Anti-Drug Abuse Amendments Act of 1988, the Crime Control Act of 1990, and the Gun-Free School Zones Act of 1990).

147. *Lopez*, 115 S. Ct. at 1632. As Justice Powell once observed, when Congress has “legislated repeatedly in an area of national concern,” its familiarity with the field may diminish the need for “fresh hearings or prolonged debate” when Congress revisits the issue. *Fullilove v. Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring).

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

149. *Id.* at 1632 (quoting *Lopez*, 2 F.3d at 1366).

150. But see 18 U.S.C. § 922(o) (1994) (banning transfer or possession of machine guns). This section, which forbids mere possession, was enacted with scant legislative history and no committee report. See *Farmer v. Higgins*, 907 F.2d 1041, 1044-45 (11th Cir. 1990), *cert. denied*, 498 U.S. 1047 (1991). The Eighth and Ninth Circuits upheld the constitutionality of § 922 in the pre-*Lopez* decisions of *United States v. Hale*, 978 F.2d 1016, 1018 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1614 (1993), and *United States v. Evans*, 928 F.2d 858, 862 (9th Cir. 1991). The Fifth Circuit upheld the statute in a post-*Lopez* decision. See *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995) *reh'g en banc granted*, 78 F.3d 160 (1996).

151. *Lopez*, 2 F.3d at 1350 & n. 17 (citing Pub. L. No. 90-351 § 901(a)).

regulate possession,<sup>152</sup> would it be logical to conclude that gun possession "ceases to affect commerce" when it occurs in a school zone?<sup>153</sup> Or would it be more logical to conclude that Congress has determined that gun possession in school zones creates more serious risks than it does in other places, and thus punished it more harshly?<sup>154</sup> If so, does the statute incorporate a reasonable way of decreasing the availability of guns to children and reducing the incidence of school violence?<sup>155</sup> Or is this even a permissible congressional goal?

### THE GOVERNMENT'S CASE

The government reasoned that gun possession in school zones may lead to violent crime, which in turn adversely affects the economy in two principal ways. The substantial economic consequences of crime are spread throughout society through the cost of insurance, and violent crime influences whether and where people are willing to travel. Moreover, the argument ran, school violence threatens to disrupt the educational process. And because poorly

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152. The extent to which Congress has power to regulate possession is considered below. See *infra* text accompanying notes 174-86.

153. Cf. *United States v. McDougherty*, 920 F.2d 569, 572 (9th Cir. 1990) (rejecting a constitutional challenge to the Drug-Free School Zones Act, which prohibits the sale of drugs within 1,000 feet of a school), *cert. denied*, 499 U.S. 911 (1991); *United States v. Thornton*, 901 F.2d 738, 741 (9th Cir. 1990) (confirming the congressional finding that drug trafficking, wherever it occurs, is a national concern that affects interstate commerce).

154. See *McDougherty*, 920 F.2d at 572 ("There is no legal reason why Congress cannot choose to punish some behavior affecting commerce more harshly than other behavior, based upon its detriment to society.").

155. See *Thornton*, 901 F.2d at 741 (finding that a federal statute mandating an enhanced penalty for drug sales near schools is a rational means of reducing the availability of drugs to school children).

The Gun-Free School Zones Act was obviously designed to reach gun possession by young school children. Ironically, it could not have been routinely applied to children under the age of 18 because Congress did not amend the statute governing the criminal prosecution of juveniles. See 18 U.S.C. § 5032 (1994). Thus, although the Act could have been invoked against high school seniors who, like Lopez, had reached their eighteenth birthday, the vast majority of school children would not be subject to its sanctions.

Although the government conceded this point, it nonetheless argued that the Act would increase the likelihood that children who were caught possessing firearms would be subject to sanctions because the government could institute delinquency proceedings in federal court if the state courts either lacked jurisdiction or refused to exercise it. Reply Brief for the United States at 12-14, *Lopez* (No. 93-1260); see also 18 U.S.C. § 5032(1) (1994).

educated children will become less productive members of the national work force,<sup>156</sup> the "Nation's economic well-being" is at risk.<sup>157</sup>

The majority found that these arguments would lead to virtually limitless federal power. The "costs of crime" argument, for example, could result in the federal regulation of everything that could conceivably lead to violent crime, even though the regulated activity had only a tenuous link to interstate commerce.<sup>158</sup> "[D]epending on the level of generality," the Court wrote, "any activity can be looked upon as commercial."<sup>159</sup> The "national productivity" argument, moreover, would empower Congress to regulate anything that relates to economic productivity, including matters that have traditionally been the states' prerogative to address.<sup>160</sup>

In the field of education, for example, Congress could find that the curriculum has a substantial effect on classroom learning. That being true, Congress could impose curricular requirements on local schools because the quality of the educational process substantially affects commerce.<sup>161</sup> Noting endless possibilities, the majority found the government's broad reading of congressional power under the Commerce Clause an untenable piling of inference upon inference that would enable Congress to exercise "a general police power of the sort retained by the States."<sup>162</sup> Thus, while language in some of its prior decisions suggested the Court might be receptive to additional expansion of Commerce Clause jurisdic-

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156. See RESEARCH AND POLICY COMMITTEE, COMMITTEE FOR ECONOMIC DEVELOPMENT, *CHILDREN IN NEED: INVESTMENT STRATEGIES FOR THE EDUCATIONALLY DISADVANTAGED* 4 (1987) (predicting that if current trends continue, the work force will be so poorly educated and ill-equipped that the nation will face a severe employment crisis).

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

158. *Id.*

159. *Id.* at 1633.

160. *Id.* at 1632 (listing marriage, divorce, and child custody as examples).

161. *Id.* at 1633. Congress does, of course, exert enormous influence on local decision-making through the power of the purse strings. The Gun-Free Schools Act of 1994, for example, conditions a state's continued eligibility for federal education money on the enactment of a law requiring a mandatory one-year expulsion for any student who is caught with a gun on school grounds. 20 U.S.C. § 8921(b) (1994); cf. Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995) (arguing that the Court should interpret the Spending Clause consistently with the Commerce Clause to restrict the use of conditional federal funding to regulate the states).

162. *Lopez*, 115 S. Ct. at 1634; cf. Dailey, *supra* note 64, at 1818 (stating that "without some substantive limitation on congressional power, federalism becomes nothing more than an unenforceable promise of congressional self-restraint").

tion,<sup>163</sup> the Court in *Lopez* "decline[d] . . . to proceed any further" down that road.<sup>164</sup>

#### CONGRESSIONAL FINDINGS REDUX

After the Fifth Circuit called the constitutionality of the Gun-Free School Zones Act into question in *Lopez*,<sup>165</sup> Congress amended the Act by adopting formal findings that articulate commerce-based concerns. They include the following: that crime, especially crime involving guns and drugs, is a nationwide problem; that interstate movement of drugs, guns, and gangs aggravates the crime problem; that guns and ammunition move easily in interstate commerce and are becoming commonplace around schools; that raw materials and components used to make guns and ammunition move interstate; that travelers may refrain from visiting crime-ridden parts of the country and parents may keep their children out of school because of concerns regarding violent crime; that violent crime in school zones has diminished the quality of education, which in turn adversely affects interstate commerce; that school systems and state and local governments cannot control gun-related crime by themselves; and that Congress has power to act under the Commerce Clause to safeguard the nation's schools.<sup>166</sup>

While the *Lopez* Court observed in passing that Congress had belatedly adopted formal findings, the government did not rely on them.<sup>167</sup> Hence, the Court did not take them into account. But what if Congress had adopted these findings at the outset? Would that have saved the statute? The answer is not entirely free from doubt. The majority would likely have dismissed the findings relating to the quality of education, keeping children out of school, and the frequency with which guns are possessed in and around schools. Those concerns were at the heart of the government's argument, and the Court had little regard for them.

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

164. *Id.*

165. *Lopez*, 2 F.3d at 1367-68.

166. 18 U.S.C. § 922(q)(1) (1994) (as amended by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320904 (1994)). Similar findings are contained in the Senate version of the Gun-Free School Zones Act of 1995, which is currently pending in Congress. See S. 890, 104th Cong., 1st Sess. § 2 (1995).

167. *Lopez*, 115 S. Ct. at 1632 n.4. In Justice Souter's view, the findings Congress enacted merely stated what was implicit in the statute and "at such a conclusory level of generality" that the government wisely declined to rely on them. *Id.* at 1656 n.2 (Souter, J., dissenting).

The identification of crime as a national problem would likely have been insufficient to assuage the Court as well.<sup>168</sup> Even dysfunctional families could rationally be found to constitute a national problem. Marriage, divorce, and child custody matters may profoundly affect an individual's productivity. But the Court made clear its position that, contrary to the implications of the government's argument, Congress cannot regulate all activity that is related to productivity. The government's position would leave the Court "hard-pressed to posit any activity by an individual that Congress is without power to regulate."<sup>169</sup>

The finding concerning the movement of weapons, their components, and ammunition in interstate commerce comes closer to the mark, but the Court's antipathy toward the general premise that gun possession in school zones is an appropriate subject of federal regulation could have led it to conclude that the regulated activity is insufficiently related to commerce.<sup>170</sup> On the other hand, the court of appeals suggested that the outcome might have been different had Congress adopted a finding that gun possession in schools substantially affects commerce,<sup>171</sup> and the Supreme Court left that prospect dangling.<sup>172</sup> While the court of appeals acknowledged its responsibility to invalidate legislation extending Commerce Clause jurisdiction beyond its legitimate bounds, it could

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168. Cf. *Perez*, 402 U.S. at 157-58 (Stewart, J., dissenting).

[I]t is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.

*Id.*

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

170. The problem is compounded because the regulated activity is gun possession in school zones rather than possession of guns "in or affecting" commerce. See *infra* text accompanying notes 174-86.

171. *United States v. Lopez*, 2 F.3d 1342, 1368 (5th Cir. 1993).

172. The Court's silence on this point led Justice Souter to believe that such findings might have saved the statute. *Lopez*, 115 S. Ct. at 1655-57 (Souter, J., dissenting). But, Justice Souter thought the Court's reliance on the absence of findings misplaced. Findings merely reveal the factual predicate that prompted Congress to act. The enactment of the Gun-Free School Zones Act itself implies a finding that gun possession in school zones affects commerce. That being true, the only question for the Court is not whether the finding was correct, but is, instead, "whether the legislative judgment is within the realm of reason." *Id.* at 1656.

find no decision in the last fifty years in which the Supreme Court ruled that a congressional finding lacked a rational basis.<sup>173</sup>

### REGULATING POSSESSION

Apart from the unresolved conundrums discussed above, the Court interjected yet another uncertainty into the equation. The Court faulted the Act because it did not contain a jurisdictional element that "would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."<sup>174</sup> At first blush, this statement does not ring true.<sup>175</sup> Suppose, for example, the statute contained a jurisdictional element requiring the gun to have previously moved in interstate commerce. Absent proof that the gun was manufactured out of state or was otherwise transported from one state to another, there would be no crime. But that is merely a factual inquiry. Once the jurisdictional fact is proven, the relevant inquiry is not whether this particular gun possession affects commerce, but is whether such gun possessions, considered in the aggregate, substantially affect commerce.<sup>176</sup>

Other contextual concerns must be taken into account, however. The Court's reference to a case-by-case inquiry came at the beginning of a brief discussion of *United States v. Bass*.<sup>177</sup> In *Bass*, the Court construed a statute forbidding convicted felons to receive, possess, or transport a firearm in or affecting commerce.<sup>178</sup> Finding the statute ambiguous on the question whether the "in or affecting commerce" language applied to receipt and possession as well as transportation, the Court held that the phrase modified all three antecedents.<sup>179</sup> Absent a clearer manifestation of congressional intent to alter traditional federal-state relations, the

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173. *Lopez*, 2 F.3d at 1363 n.43. *But cf.* *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring in the judgment) (stating that "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so"). The same would have been true, of course, had the court searched for a decision in the last 50 years in which the Supreme Court struck down a statute as an unconstitutional exercise of the commerce power.

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

175. *See United States v. Bishop*, 66 F.3d 569, 587-88 (3d Cir.) (rejecting the argument that *Lopez* requires a case-by-case analysis of whether the particular act in question affects commerce), *cert. denied*, 116 S. Ct. 681 (1995).

176. *Perez v. United States*, 402 U.S. 146 (1971); *see also supra* note 107.

177. 404 U.S. 336 (1971).

178. *Id.* at 337.

179. *Id.* at 347.

Court felt obliged to adopt the narrower construction.<sup>180</sup> Thus, it was incumbent on the government to prove a connection between the defendant's possession and commerce, a task it did not undertake in *Bass*.<sup>181</sup> The government proved that the defendant possessed a firearm, but it did not establish any nexus with interstate commerce.<sup>182</sup>

Because it was decided on statutory construction grounds, the *Lopez* Court observed, *Bass* "interpreted the statute to reserve the constitutional question whether Congress could regulate, without more, the 'mere possession' of firearms."<sup>183</sup> This passage can best be understood in the context of a footnote in *Bass* from which the "mere possession" theme emerged.

In light of our disposition of the case, we do not reach the question whether, upon appropriate findings, Congress can constitutionally punish the "mere possession" of firearms; thus, we need not consider the relevance, in that connection, of our recent decision in *Perez v. United States*, 402 U.S. 146 (1971).<sup>184</sup>

All told, then, the *Lopez* Court's reference to a case-by-case inquiry into the nexus between gun possession and commerce, and its subsequent allusion to the unresolved question whether Congress can regulate "mere possession," boils down to this: as a class of activities, gun possession—standing alone—may not bear a sufficient nexus to commerce to warrant federal regulation.

Thus, if Congress had declared that gun possession plus attendant circumstances (e.g., possession by a felon or possession in a school zone) substantially affects commerce, that finding, standing alone, might have been insufficient to support commerce-based criminal jurisdiction. But if, in addition, Congress had added a jurisdictional element to the statute, the outlook would have significantly improved. Indeed, the Court's holding in *Bass* makes clear that Congress can regulate possession of firearms in or affecting

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180. *Id.* at 349-50.

181. *Id.* at 339.

182. *Id.* at 337-38.

183. *Lopez*, 115 S. Ct. at 1631 (quoting *United States v. Bass*, 404 U.S. 336, 339 n.4 (1971) and citing *United States v. Five Gambling Devices*, 346 U.S. 441, 448 (1953) (plurality opinion)); *cf. id.* at 1642 (Thomas, J., concurring) (stating that any interpretation of the commerce power that suggests that Congress can regulate mere gun possession needs to be reexamined).

184. *Bass*, 404 U.S. at 339 n.4.



commerce, and its holding in *Scarborough*<sup>185</sup> plainly confirms that the possession need not have a contemporaneous connection with commerce.<sup>186</sup>

Hence, the lesson of *Lopez*, *Bass*, and *Scarborough* is that *Lopez*'s hypothetical possession of the gun ten years after it was shipped in interstate commerce can be reached under the Commerce Clause because his possession plus the jurisdictional fact of movement in commerce equals more than "mere possession."

#### LIFE AFTER *LOPEZ*

*Lopez* was only the first of two closely watched Commerce Clause cases the Court decided in its 1994-95 term. The second, *United States v. Robertson*,<sup>187</sup> was decided barely a week later. In *Robertson*, the defendant, an Arizona resident, acquired an Alaskan gold mine with the proceeds of drug crimes. He purchased mining equipment and supplies in Los Angeles and shipped them to the mine. He also hired a number of out-of-state employees to travel to Alaska and work in the mine. Although most of the gold produced by the mine was sold to Alaskan refiners, Robertson personally took about \$30,000 worth of gold out of the state.<sup>188</sup>

Robertson was convicted of violating RICO by using racketeering proceeds to acquire and operate an enterprise engaged in or affecting interstate commerce.<sup>189</sup> On appeal, he argued that the activities of the mine did not affect commerce. In a stunning departure from settled Commerce Clause precedent, the Ninth Circuit agreed.<sup>190</sup> Rejecting the government's argument that the interstate movement of supplies, employees, and Robertson himself supplied a sufficient link to commerce, the court noted that the mine was a relatively small and entirely local operation and that Robertson kept only "a few nuggets" of gold for himself.<sup>191</sup> To hold otherwise,

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185. See *supra* text accompanying notes 109-13.

186. *Accord* *Barrett v. United States*, 423 U.S. 212 (1976) (construing a provision that prohibits convicted felons from receiving a firearm that has been transported in interstate commerce). The nexus between the receipt or possession of the firearm and its transportation interstate is considered *supra* in notes 87-97 and accompanying text.

187. 115 S. Ct. 1732 (1995) (*per curiam*).

188. *Id.* at 1732-33.

189. *United States v. Robertson*, 15 F.3d 862, 867-68 (9th Cir. 1994), *rev'd*, 115 S. Ct. 1732 (1995).

190. *Id.* at 866.

191. *Id.* at 868-69 (citing *Musick v. Burke*, 913 F.2d 1390 (9th Cir. 1990)). Although the court of appeals recognized that activity having only a minimal effect on commerce

the court posited, would be tantamount to finding that all local Alaskan businesses affect commerce because Alaska is geographically isolated and its businesses acquire most of their equipment and supplies from out of state.<sup>192</sup>

In a brief per curiam opinion, the Supreme Court reversed.<sup>193</sup> While the parties had framed the issue as one of whether the gold mine's operations "affected" commerce, the high Court found it unnecessary to resolve that point because the evidence clearly established that the mine was "engaged in" commerce. Robertson's purchase of out-of-state equipment and supplies, hiring out-of-state employees, and taking fifteen percent of the mine's production out of Alaska all demonstrated that the mine was engaged in commerce.<sup>194</sup> "[A] corporation is generally engaged in commerce when it is itself directly engaged in the production, distribution, or acquisition of goods and services in interstate commerce."<sup>195</sup> The "affecting commerce" standard, considered at length in *Lopez*, applies only when it is necessary to assess the relationship between purely intrastate activity and commerce.<sup>196</sup>

*Robertson* was, as it should have been, an easy case.<sup>197</sup> The question is whether it sheds any light on *Lopez*. Standing alone, it seems doubtful that it does. But when considered with the Court's contemporaneous denial of certiorari in two arson cases and with Justice Kennedy's concurrence in *Lopez*, it portends more stability in Commerce Clause jurisprudence than some Court watchers initially predicted.<sup>198</sup>

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would suffice, it espoused the view that drawing supplies from the general stream of commerce is insufficient. The activities upon which the government relied had, at most, an incidental effect on commerce, according to the court. *Id.*

192. *Id.* at 869.

193. *United States v. Robertson*, 115 S. Ct. 1732, 1733 (1995) (per curiam).

194. *Id.*

195. *Id.* (quoting *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271, 283 (1975)) (internal quotations omitted).

The Court also cited *American Building Maintenance* for the premise that a business's local purchases of supplies manufactured out of state would not establish that the business was engaged in commerce. Instead, the relevant question would be whether the purchase of supplies manufactured out of state substantially affects commerce. *Id.*

196. *Id.*

197. In reaching a conclusion that flatly contradicted a substantial body of Commerce Clause precedent, the Ninth Circuit dispatched the issue in five paragraphs that relied exclusively on three intra-circuit RICO decisions. See *United States v. Robertson*, 15 F.3d 862, 868-69 (9th Cir. 1994), *rev'd*, 115 S. Ct. 1732 (1995).

198. See Stuart Taylor, Jr., *The Court Is Not a Right Wing Nut*, *LEGAL TIMES*, May 1, 1995, at 26 (observing that some Court watchers' initial reaction to *Lopez* was anticipa-

The arson cases the Court declined to review were both Fourth Circuit decisions—*United States v. Ramey*<sup>199</sup> and *United States v. Moore*.<sup>200</sup> The defendants in *Ramey* were convicted of burning a building used in an activity affecting commerce.<sup>201</sup> The building at issue was a trailer occupied by an interracial couple. The defendants contended on appeal that their crime was beyond the reach of the commerce power because the trailer was a private residence and hence did not affect commerce.<sup>202</sup>

The Supreme Court had previously affirmed that the arson statute is a valid exercise of full congressional power under the Commerce Clause in *Russell v. United States*.<sup>203</sup> In *Russell*, a unanimous Court ruled that an apartment building the defendant rented out and treated as a business was engaged in an activity affecting commerce.

The rental of real estate is unquestionably such an activity. We need not rely on the connection between the market for residential units and the "interstate movement of people" to recognize that the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties. The congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class.<sup>204</sup>

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tion of a coming constitutional law revolution). Compare *Lopez*, 115 S. Ct. at 1657 (Souter, J., dissenting) (stating that *Lopez* is a "misstep," not an epochal case—but beware that "[n]ot every epochal case comes in epochal trappings") and *United States v. Bishop*, 66 F.3d 569, 590 (3d Cir.) ("despite protestations to the contrary, the winds have not shifted that much"), *cert. denied*, 116 S. Ct. 681 (1995) and *United States v. Martin*, 63 F.3d 1422, 1427 (7th Cir. 1995) ("*Lopez* . . . suggests that the winds of interstate commerce jurisprudence may have shifted, albeit slightly, against . . . expansive understandings" of commerce-based jurisdiction.) with *Bishop*, 66 F.3d at 603 (Becker, J., concurring in part and dissenting in part) ("*Lopez* is not just another Supreme Court case, but a watershed.").

199. 24 F.3d 602 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1838 (1995).

200. No. 93-5273, 1994 U.S. App. LEXIS 14314 (4th Cir. June 10, 1994) (per curiam) (reported in case table format at 25 F.3d 1042), *cert. denied*, 115 S. Ct. 1838 (1995). Justice Scalia went on record in *Ramey* and *Moore* as favoring the granting of the petitions, vacating the judgments, and remanding the cases for reconsideration in light of *Lopez*. See *Ramey*, 115 S. Ct. at 1839; *Moore*, 115 S. Ct. at 1838.

201. *Ramey*, 24 F.3d at 602. The defendants were convicted for the arson under 18 U.S.C. § 844(i) (1994).

202. *Ramey*, 24 F.3d at 606-07.

203. 471 U.S. 858 (1985).

204. *Id.* at 862 (footnotes omitted).

Although *Russell* left unresolved the question raised in *Ramey*, the *Russell* Court observed that Congress intended to protect a broad spectrum of properties, including all business property.<sup>205</sup> The extent to which the statute protected private homes, on the other hand, was less clear according to the Court.<sup>206</sup> Although few cases of arson involving a private residence seem to have been prosecuted, several courts have found a sufficient nexus between private homes and commerce to support federal arson convictions.<sup>207</sup> The court in *Ramey* followed suit on the ground that the trailer received its electricity from an interstate power grid.<sup>208</sup>

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205. *Id.* at 860.

206. *Id.* at 861-62 (noting that the legislative history also suggested that Congress might not have the power to reach the arson of a private home). Whatever limitations the arson statute may have in a given factual context, it often works in tandem with other federal crimes. See John Panneton, *Federalizing Fires: The Evolving Federal Response to Arson Related Crimes*, 23 AM. CRIM. L. REV. 151, 161-92 (1985) (stating that some arsons lend themselves to prosecution under the mail and wire fraud statutes, RICO, the Gun Control Act of 1968, and the Travel Act).

207. See, e.g., *United States v. Stillwell*, 900 F.2d 1104, 1110 (7th Cir.) (finding that receipt of natural gas that traveled in interstate commerce is a sufficient link with commerce), *cert. denied*, 498 U.S. 838 (1990); *United States v. Zabic*, 745 F.2d 464, 470-71 (7th Cir. 1984) (finding that a rental apartment building was used for commercial activity, but receipt of natural gas originating from out of state could provide an independent basis for finding that its use affected commerce); *United States v. Barton*, 647 F.2d 224, 231-32 (2d Cir.) (finding that a university building that sold food that had moved in interstate commerce or that operated on fuel that originated from out of state has the requisite effect on commerce), *cert. denied*, 454 U.S. 857 (1981).

In other reported cases involving arsons committed against residences, the courts found a more direct commercial connection. See, e.g., *United States v. Parsons*, 993 F.2d 38, 40 (4th Cir.) (finding that a single family house used as rental property is engaged in an activity affecting commerce), *cert. denied*, 114 S. Ct. 266 (1993); *United States v. Shively*, 927 F.2d 804, 808 (5th Cir.) (finding "some relationship" between defendant's house and automobile and his trucking business), *cert. denied*, 501 U.S. 1209 (1991). But see *United States v. Pappadopoulos*, 64 F.3d 522, 527-28 (9th Cir. 1995) (holding (post-*Lopez*) that a private residence that receives natural gas from out-of-state sources is neither engaged in nor used in commerce and does not have a substantial effect on commerce).

208. *United States v. Ramey*, 24 F.3d 602, 607 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1838 (1995). Relying on *Ramey*, the court in *Moore* likewise held that a private home was used in an activity affecting commerce. *United States v. Moore*, No. 93-5273, 1994 U.S. App. LEXIS 14314, at \*19-\*20 (4th Cir. June 10, 1994) (per curiam) (reported in case table format at 25 F.3d 1042), *cert. denied*, 115 S. Ct. 1838 (1995). Although the *Moore* court began its recitation of commerce-related evidence with the home's connection with interstate gas and telephone lines, the court enumerated other facts, including the interstate marketing of the home for sale, that supported the conclusion that the home was used in an activity affecting commerce. *Id.* at \*11-\*12. Justice Scalia's vote to remand *Moore* and *Ramey* for reconsideration in light of *Lopez*, see *supra* note 200, raises the issue of whether he views *Lopez* as an invitation to revisit *Russell*, which equated partici-

Read in light of *Lopez*, *Ramey* looks like business as usual. The *Ramey* defendants were not commercial or economic actors. They committed a racially motivated crime. Like gang members who burn down a rival gang's headquarters, a skinhead who bombs a synagogue, or a paramilitary member who blows up a government agent's car, the *Ramey* defendants violated the arson statute even though they were non-commercial actors who lacked an economic motive.<sup>209</sup>

*Ramey* is a step removed from *NOW*, moreover.<sup>210</sup> The abortion protesters in *NOW* at least directed their protests against commercial enterprises. In *Ramey*, the defendants directed their violence against non-commercial private individuals.<sup>211</sup> Their crime was not connected with and did not arise out of a commercial transaction. But like the abortion protesters in *NOW*, the *Ramey* defendants' arson could drain money from the economy by disrupting the flow of electricity to the trailer. While the amount of electricity consumed by the trailer's occupants would amount to only a "pittance of energy" from the grid, when all buildings receiving energy from the grid are considered in the aggregate, it becomes clear that their consumption affects commerce. Indeed, not only does this class of activities affect commerce, it is "the *raison d'être* of an interstate business."<sup>212</sup> Thus, in contrast with the gun possession in *Lopez*, *Ramey's* arson was in one sense an economic activity that could, "through repetition elsewhere, substantially affect . . . interstate commerce."<sup>213</sup>

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pation in the real estate market with engaging in an activity affecting commerce.

209. The petitioners in *Moore* conceded that bombing a police station or a state university laboratory where military research is conducted would fit within the confines of the arson statute, notwithstanding that the buildings might not technically qualify as businesses. Petition for a Writ of Certiorari to the Supreme Court at 9, *Moore v. United States*, (No. 94-642) (Oct. 6, 1994), *cert. denied*, 115 S. Ct. 1838 (1995). But the activities conducted from those buildings affect commerce just as surely as activities conducted from reproductive health clinics. See *supra* text accompanying notes 45-59.

A recent Sixth Circuit decision reaffirmed the constitutionality of the arson statute. In *United States v. Sherlin*, 67 F.3d 1208 (6th Cir. 1995), the court found that, because the arson statute requires proof of a jurisdictional element linking the regulated activity to commerce, it is distinguishable from the statute in *Lopez*. *Id.* at 1213-14. The building at issue in *Sherlin* was a residential dormitory on a college campus. The court concluded without hesitation that "the educational business of Lee College was an activity affecting interstate commerce, and Ellis Hall was a building used in that activity." *Id.* at 1213.

210. See *supra* text accompanying notes 45-64.

211. See *supra* text accompanying notes 199-202.

212. *Ramey*, 24 F.3d at 607.

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

The Court's denial of certiorari in *Ramey*,<sup>214</sup> viewed in light of the Kennedy concurrence in *Lopez*, suggests that *Lopez* may not have dealt a serious blow to commerce-based criminal jurisdiction after all.<sup>215</sup>

Justice Kennedy, joined by Justice O'Connor, sounded a note of caution. The history of the Court's Commerce Clause jurisprudence during the transition to a national economy "counsels great

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214. Two subsequent denials of certiorari are also worthy of note. First, the Court denied certiorari in a carjacking case in which the defendant challenged the statute as an impermissible exercise of Commerce Clause jurisdiction. See *United States v. Williams*, 51 F.3d 1004 (11th Cir.), cert. denied, 116 S. Ct. 258 (1995). The Eleventh Circuit joined the four other courts of appeal that had upheld the statute as a valid exercise of the commerce power. *Id.* at 1008-09. The Court's refusal to hear the case drew no dissent. The carjacking statute and its implications for commerce-based jurisdiction are discussed *supra* in text accompanying notes 84-98.

More recently (and, perhaps, more notably), the Court denied certiorari in *Cargill, Inc. v. United States*, 116 S. Ct. 407 (1995), a suit challenging the Army Corps of Engineers' jurisdiction under the Clean Water Act over private property containing two seasonal rainwater ponds that attracted migratory waterfowl.

The Clean Water Act extends to waters used or susceptible of use in interstate or foreign commerce and to intrastate waters that may affect interstate or foreign commerce. *Id.* at 408 (citing 33 C.F.R. § 328.3(a) (1995)). A preamble to regulations promulgated by the Corps suggests that waters used as habitat by birds protected by Migratory Bird Treaties or that are used by other migratory birds that cross state lines are also within the ambit of the Act. *Id.* (citing 51 Fed. Reg. 41,217 (1986)).

The district court held, and the Ninth Circuit affirmed, that the seasonal presence of migratory birds at the ponds provided a sufficient connection with interstate commerce to sustain the Corps of Engineers' jurisdiction. *Id.*

The Supreme Court's denial of certiorari prompted a dissent from Justice Thomas, who argued that to base jurisdiction on the comings and goings of self-propelled airborne interstate travelers "likely stretches Congress' Commerce Clause powers beyond the breaking point." *Id.* at 409. He thought the case raised compelling constitutional questions about the outer limits of jurisdiction to regulate land use under the Clean Water Act, *id.*, but he was the lone dissenter from the Court's refusal to hear the case.

215. Another development worth noting is an unheralded pre-*Lopez* decision from the Court's 1994-95 term. In *Allied-Bruce Terminix Co. v. Dobson*, 115 S. Ct. 834, 836 (1995), the Court construed a provision in the Federal Arbitration Act that applies to every contract "evidencing a transaction involving commerce." 9 U.S.C. § 2 (emphasis added). Equating the phrase "involving commerce" with "affecting commerce," the Court, citing *Russell*, found that these terms signaled an intent to exercise full congressional power under the Commerce Clause. Also finding that a broad interpretation of these terms was consistent with the purposes of the Act, the Court held that the terms "evidencing" and "involving" commerce do not restrict the Act's application. Thus, even though there was no evidence that the parties contemplated that the transaction at issue would be in interstate commerce, the Act applied if the transaction in fact turned out to have involved interstate commerce. *Id.* at 839-43.

Judge Frank Easterbrook, who views *Lopez* as a "dud," calls *Terminix* the most significant Commerce Clause case decided in the 1994 term. *Constitutional Law Conference Probes Impact of Supreme Court's 1994-95 Term*, 64 U.S.L.W. 2240, 2253-54 (1995).

restraint" in considering whether to strike down an exercise of the commerce power.<sup>216</sup> That history teaches at least two lessons: first, the use of content-based boundaries to define the limits of the commerce power has proved to be inexact; and second, both the Court and the legal system "have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point."<sup>217</sup> Thus, Justice Kennedy made clear that in his view, *Lopez* in no way calls into question the validity of *Heart of Atlanta*, *Katzenbach*, *Perez*, and other linchpins of modern Commerce Clause jurisprudence.<sup>218</sup>

Although the history of Commerce Clause jurisprudence gave Justice Kennedy "some pause" about the holding in *Lopez*,<sup>219</sup> he was unable to find any evident commercial purpose in the Gun-Free School Zones Act or its legislative history.<sup>220</sup> By intruding into two areas—education and crime—that are traditionally matters of state concern, the Act disturbs the proper balance between federal and state power.<sup>221</sup> Thus, he joined what he believed to be the Court's "necessary though limited holding."<sup>222</sup>

*Lopez* was a 5-4 decision. With Justices Kennedy and O'Connor hewing to the Court's past precedents and characterizing the holding as "limited," it seems unlikely that a call to revisit the last sixty years of Commerce Clause jurisprudence would command a majority of the Court today.<sup>223</sup>

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216. *Lopez*, 115 S. Ct. at 1634 (Kennedy, J., concurring).

217. *Id.* at 1637. Justice Kennedy's opinion includes a homily on the importance of stare decisis, which forecloses the Court "from reverting to an understanding of commerce that would serve only an 18th-century economy." *Id.* This is presumably addressed to Justice Thomas, whose separate concurrence discusses 18th-century definitions of commerce in a favorable light, *Lopez*, 115 S. Ct. at 1643-46 (Thomas, J., concurring), disapproves of the substantial effects test, *id.* at 1649-50, advocates a reexamination of commerce-based jurisdiction, *id.* at 1650-51, and suggests that he might be willing to revert "to the original understanding" of commerce-based jurisdiction, but recognizes that reliance interests and stare decisis might convince his colleagues that the Court "cannot wipe the slate clean." *Id.* at 1650 n.8.

218. *See id.* at 1637 (stating that "these and like authorities are within the fair ambit of the Court's practical conception of commercial regulation").

219. *Id.* at 1634.

220. *Id.* at 1640.

221. *Id.*

222. *Id.* at 1634.

223. In view of Justice Thomas's concurrence in *Lopez*, *see supra* note 217, Justice Scalia's vote to grant certiorari in *Ramey* and *Moore*, *see supra* note 200, and Justice Thomas's dissent from the denial of certiorari in *Cargill, Inc. v. United States*, 116 S. Ct. 407 (1995), *see supra* note 214, a reconstituted Court's direction in future years may be another matter.

THE *LOPEZ* LEGACY

If, as Justice Kennedy posits, the holding in *Lopez* is limited to exceptional cases, and if, as Justice Souter suggests, appropriate legislative findings might have saved the Act,<sup>224</sup> what would the significance of *Lopez* be?

One possible scenario is that Congress could (and perhaps should) view *Lopez* as a warning shot across the bow. For despite the measured tone of the majority opinion, the dissenters viewed the decision as a radical misstep that injects considerable uncertainty into Commerce Clause jurisprudence.<sup>225</sup> Thus, Congress could respond by becoming politically more cautious in deciding what it will criminalize. But Congress is an institution that is all too eager to look tough on crime, so the politics of crime control make it highly unlikely that Congress will become a model of restraint.<sup>226</sup> An alternative scenario is that *Lopez* will have a practical (if nominal) impact on Congress. To satisfy *Lopez*, Congress can either dutifully engage in legislative fact-finding or, as it normally does, include an express jurisdictional element in laws defining crimes under the commerce power.<sup>227</sup>

But the real significance of *Lopez* may be its symbolic value. The Gun-Free School Zones Act federalized a local crime. It was part of a burgeoning body of federal criminal law, much of which overlaps with or merely duplicates state crimes.<sup>228</sup> Notably, the unrestrained expansion of this body of law has occurred without

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

225. See *id.* at 1654, 1657 (Souter, J., dissenting) (stating that the commercial/noncommercial distinction suffers from "hopeless porosity" and constitutes a "misstep"); *id.* at 1662, 1664 (Breyer, J., dissenting) (stating that the majority's decision "creates three serious legal problems"—among them is that it "threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled").

Indeed, Justice Rehnquist's majority opinion concedes that requiring case-by-case determinations about whether particular activity is commercial or noncommercial could "result in legal uncertainty." *Id.* at 1633.

226. Cf. William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 27, 71 (1994) (noting that "there are few interest groups to derail feel-good, do-something federal crime bills").

227. Indeed, that is precisely how Congress proposes to revitalize the Gun-Free School Zones Act. See *supra* note 98; cf. Eskridge & Frickey, *supra* note 226, at 71 ("Although ordinarily the Court might be expected to assist the current Congress by not requiring that it return to a statutory area and fix small mistakes, in this area the Court is an active opponent of Congress and seems to be throwing up what roadblocks it can.").

228. See *supra* notes 75-77, 84-86 and accompanying text; *infra* text accompanying notes 233-40.



regard for its effect on the federal courts. Chief Justice Rehnquist, who wrote for the majority in *Lopez*, has been sounding the alarm for several years. In his year-end reports to the judiciary, he has warned that the federal courts are limited resources and that unchecked growth of federal criminal law threatens to create a crisis in the federal justice system.<sup>229</sup> These concerns have been echoed by the Federal Courts Study Committee,<sup>230</sup> the Judicial Conference,<sup>231</sup> and the Judicial Conference's Committee on Long Range Planning.<sup>232</sup>

Not only have the judiciary's concerns gone unheeded by Congress—they have been openly ignored. The 1994 crime bill,<sup>233</sup> for example, federalized drug-related drive-by shootings<sup>234</sup> and participation in local street gangs.<sup>235</sup> And despite criticisms that it federalized divorce law<sup>236</sup> and would seriously encumber the federal courts,<sup>237</sup> Title IV of the bill, the Violence Against Women Act, invokes Commerce Clause jurisdiction to federalize domestic abuse crimes and violation of state protective orders.<sup>238</sup> Worse still, a

229. See William H. Rehnquist, *1993 Year-End Report on the Judiciary* 4-5, reprinted in 26 THE THIRD BRANCH 1, 3 (Jan. 1994); William H. Rehnquist, *1992 Year-End Report on the Judiciary* 1, 3-4, reprinted in 25 THE THIRD BRANCH 1, 1-3 (Jan. 1993); William H. Rehnquist, *1991 Year-End Report on the Federal Judiciary* 5, reprinted in 24 THE THIRD BRANCH 1, 3 (Jan. 1992).

230. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, April 2, 1990, at 35-36 (stating that "[t]he federal courts' most pressing problems . . . stem from unprecedented numbers of federal narcotics prosecutions" and that the courts' caseload crisis can only be resolved by "returning the federal courts to their proper, limited role in dealing with crime").

231. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 57-58 (March 12, 1991) [hereinafter JUDICIAL CONFERENCE REPORT]; see also 140 Cong. Rec. S6090 (daily ed. May 19, 1994) (Federalization of State Prosecutions: Position of the Judicial Conference of the United States, enclosed in Letter from Chief Justice Rehnquist, Presiding Officer of the Judicial Conference, to Rep. Jack Brooks, Chairman of the House Comm. on the Judiciary).

232. A draft report of the Long Range Planning Committee recommends, *inter alia*, the repeal of existing criminal provisions that do not serve an essential federal purpose. COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS, DRAFT FOR PUBLIC COMMENT 22 (Nov. 1994); see also J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1178 (1994).

233. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (codified as amended in scattered sections of 18 U.S.C.).

234. *Id.* § 6008 (codified at 18 U.S.C. § 36).

235. *Id.* § 150001 (codified at 18 U.S.C. § 521).

236. W. John Moore, *The High Price of Good Intentions*, 25 NAT'L. J. 1140, 1140 (1993).

237. William H. Rehnquist, *1992 Year-End Report on the Judiciary* 3-4, reprinted in 25 THE THIRD BRANCH, 1, 2-3 (Jan. 1993).

238. Violent Crime Control and Law Enforcement Act of 1994, § 40221 (codified as

defeated amendment to the 1994 bill would have federalized virtually every state crime committed with a gun. The provision had been overwhelmingly passed in a 1993 Senate crime bill,<sup>239</sup> notwithstanding estimates that the provision would have swamped the federal courts with more than 600,000 new prosecutions a year.<sup>240</sup>

But it is not just the federal judiciary that is concerned. The National Association of Attorneys General,<sup>241</sup> the National Conference of State Legislatures,<sup>242</sup> and the National Conference of State Chief Justices<sup>243</sup> have all expressed serious concerns about

amended at 18 U.S.C. § 2261) (prohibiting crossing state lines to injure a spouse or intimate partner).

239. H.R. 3355 incorporated Senate amendments and was passed by the Senate (Engrossed Amendments), November 19, 1993, Item 340: Sec. 2405, by a vote of 95-4. See Status report on H.R. 3355 on November 19, 1993, available in Legi-Slate, Inc., an electronic data base; see also 139 CONG. REC. S17095, S17148 (daily ed. Nov. 24, 1993).

240. Naftali Bendavid, *Reading Crime Bill's Fine Print; Overlooked Amendments Draw Fire as Unconstitutional, Overly Harsh*, LEGAL TIMES, March 7, 1994, at 1, 19.

In the words of the bill's inimitable sponsor, Senator Alphonse D'Amato, "I could care a hoot about the fact that it may create a burden for the courts, . . . [t]he predators have taken over." Michael Isikoff, *Crime Bill's Costs Worry U.S. Judges; Senate Plan Seen as Adding Inmates*, WASH. POST, July 22, 1991, at A1, A8 (acknowledging, however, it would take "billions" to pay for the necessary additional judges and prosecutors).

As Professors Eskridge and Frickey have observed, it is not surprising that the Court is hostile to ill-conceived enactments that further clog the federal courts with cases that lack national significance. While Congress has the power to federalize these crimes of primarily local concern, "the Court may interpret the congressional command grudgingly, giving it only the scope compelled by a narrow parsing of its four corners." Eskridge & Frickey, *supra* note 226, at 71 (offering this observation in the context of considering two (inexplicably) narrow Supreme Court decisions in *United States v. Ratzlaff* and *Staples v. United States*).

241. See HEARINGS BEFORE THE SUBCOMM. ON CRIMINAL JUSTICE OF THE COMM. ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, 97th Cong. 1st & 2d Sess. on H.R. 1647, H.R. 4492, H.R. 4711, H.R. 5679, and H.R. 5703, on *Federal Criminal Law Revision* 423, 424 (1981) (statement of Dennis Roberts, Attorney General of Rhode Island, on behalf of the National Association of Attorneys General, urging Congress to operate with a presumption that favors state enforcement of criminal law).

242. See *id.* at 448-49 (statement of Chuck Hardwick, Vice Chairman of the Law and Justice Committee of the National Conference of State Legislatures, advocating state retention of primary responsibility for and jurisdiction over criminal activity); see also William Claiborne, *States Wary of Anti-Crime Bill; Legislators Balk at Measure's Costs, Requirements*, WASH. POST, July 29, 1994, at A11 (indicating some states may opt out of the bill's anti-crime grants due to other costs passed on to the states).

243. See JUDICIAL CONFERENCE REPORT, *supra* note 231, at 57-58 (March 12, 1991); see also Mark Curriden, *State Court Chiefs Flex New Muscle*, NAT'L L.J., Oct. 17, 1994, at A1, A26 (reporting that the Conference of Chief Justices, through the National Center for State Courts, briefed key congressional committee members on their concerns about the crime bill and that the federal government is trying to exercise too much control and influence over state criminal justice administration); Bill Rankin, *State Justices Pan Federal Crime Bill*, ATLANTA J. & CONST., Feb. 11, 1994, at C2 (reporting that state chief

the rampant centralization of power, particularly police power, in the federal government.<sup>244</sup> And in 1993, an unusual coalition of thirty national criminal justice organizations adopted a policy statement decrying the continued federalization of state crimes.<sup>245</sup> Simply put, despite widespread criticism of the race to federalize everything in sight, Congress continues undaunted down the road to federalized crime.<sup>246</sup>

*Lopez* is a counterpoint to that trend.<sup>247</sup> Sounding strong federalism themes, it is a reminder that, contrary to contemporary

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justices adopted a formal resolution condemning the federal crime bill on the ground, inter alia, that its "indiscriminate federalization of crimes" invalidates state law principles).

244. The National Governors' Association also proposed adoption of a policy that "expresses governors' concern that attempts to expand federal criminal law could undermine state and local crime-fighting efforts." George Embrey, *Governors Want More Help, Fewer Restraints from Washington*, COLUMBUS DISPATCH, July 17, 1994, at 3B; see also George Allen, *A Federalist Perspective on the Crime Problem*, 4 CORNELL J.L. & PUB. POL'Y 535, 535 (1995) (noting that Governor Allen of Virginia posited that state governments are best equipped to develop and implement effective solutions to the crime problem, and that efforts to federalize crime are more politically motivated than based on principle).

Indeed, the National Governors' Association, the National Conference of State Legislatures, the National League of Cities, and the National Association of Counties were among seven amici who joined together in a brief supporting *Lopez* and his effort to have the Gun-Free School Zones Act stricken as an invalid exercise of federal commerce power. See Brief for National Conference of State Legislatures, National Governors' Association, National League of Cities, National Association of Counties, International City/County Management Association, and National Institute of Municipal Law Officers, Joined by the National School Boards Association, as Amici Curiae in Support of Respondent, *United States v. Lopez*, 115 S. Ct. 1624 (1995) (No. 93-1260).

245. See *30 Organizations Call for Shift in Criminal Justice Policy*, CRIM. JUST. NEWSL., July 15, 1993, at 3, 3-4. The policy statement urges a halt to further expansion of federalization into areas of traditional state authority absent agreement among state, local, and federal officials that the need for an increased federal presence is clear and compelling. *Id.* at 4. Included among the organizations that joined the coalition are the American Correctional Association, the American Jail Association, the National Association of Counties, the National Association of Pretrial Service Agencies, the American Probation and Parole Association, and the U.S. Conference of Mayors. *Id.*

246. The rampant federalization of crime dominated the panel discussion of Federal Enforcement Priorities at the American Bar Association's 1995 annual meeting. See *ABA Annual Meeting Features Programs on Death Penalty Litigation, DOJ priorities*, 57 CRIM. L. REP. 1483, 1485-87 (August 23, 1995).

247. The Court has deferred to federalism concerns on several other recent occasions as well. See, e.g., *Wilton v. Seven Falls Co.*, 115 S. Ct. 2137, 2140-41 (1995) (holding that federal district courts have discretion to stay actions for declaratory judgments during pendency of parallel proceedings in state court—pursuit of federal declaratory action might result in "[g]ratuitous interference" with state proceeding (quoting *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 495 (1942))); *Grove v. Emison*, 113 S. Ct. 1075, 1082 (1993) (holding that a federal district court must defer consideration of disputes over redistricting when state has begun to address the issue legislatively or judicially—"elementary principles of federalism and comity" require recognition of state court's redistricting plan).

thought, congressional power under the Commerce Clause is not unlimited, that states have primary authority to define and enforce criminal laws, and that much of what Congress has enacted needlessly alters the balance between federal and state jurisdiction.<sup>248</sup> It is also a reminder that the Court's policy of deferring to congressional judgments is not a presumption of congressional infallibility.<sup>249</sup> Admittedly, the Court's role remains limited to determining whether Congress acted within the "bounds of legal power," regardless of whether Congress acted wisely or not.<sup>250</sup> But *Lopez* reminds us that in defining the outer bounds of power, the Court also delineates the boundaries of reasonable legislative action.<sup>251</sup> And under a rational basis analysis, power and wisdom are inextricably intertwined.

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248. *Lopez*, 115 S. Ct. at 1631 n.3.

249. Cf. Eskridge & Frickey, *supra* note 226, at 71 (noting that in this context, "the Court may feel that it must communicate its concern to Congress clearly, come what may").

250. *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 650 (1944).

251. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 148 (1893).

