

Volume 46 | Issue 3

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1996

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## Recommended Citation

Melvyn R. Durchslag, *Will the Real Alfonso Lopez Please Stand Up: A Reply to Professor Nagel*, 46 Case W. Res. L. Rev. 671 (1996)  
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# WILL THE REAL ALFONZO LOPEZ PLEASE STAND UP: A REPLY TO PROFESSOR NAGEL

*Melvyn R. Durchslag\**

Professor Nagel concludes that *United States v. Lopez*<sup>1</sup> will have little impact on the constitutional distribution of authority between the federal government and the states. While the belief that “we may be on the verge of important alterations in the federal system . . . is entirely understandable,”<sup>2</sup> coming as it does during a term when not one but three important federalism cases were decided, Nagel argues that *Lopez* is little more than “an aspect of normal, predictable doctrinal gyrations.”<sup>3</sup> His reasons are clearly stated and certainly provocative. The *Lopez* Court, he states, is engaged in an adjudicative technique he denominates “successive validation,” a technique that subordinates one of two mutually exclusive principles *in a particular case*, but holding the possibility that the subordinated principle *in another case* could become dominant.<sup>4</sup> In declaring 18 U.S.C. § 922(q) unconstitutional, the Court was simply “redeem[ing] its pile of pledges,”<sup>5</sup> waiting for the day when it could hold, rather than simply repeat, that Congress’s commerce powers are indeed limited, and that in order to assert them the matter regulated must be “substantially related” to interstate commerce. Consequently, *Lopez* was not so much a ground-breaker as it was a “quasi-random event.”<sup>6</sup>

Nagel admits that he could be wrong if a majority of the Court heartily believed in a decentralized political system, but he

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1. 115 S. Ct. 1624 (1995).

2. Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 645 (1996) [hereinafter *The Future of Federalism*].

3. *Id.* at 648.

4. *Id.* at 650-52.

5. *Id.* at 654.

6. *Id.* at 655.

finds the evidence of that mixed at best.<sup>7</sup> Moreover (and here he is more tentative), while *Lopez* could be seen as part of a wider political movement toward greater decentralization, Nagel sees no consistency in that movement either, being animated as it is by a strange grouping of true believers, issue-specific partisans who are very selective about when they advocate decentralization and those who oppose all government at whatever level, but find the federal government the easiest target at the moment.<sup>8</sup> In any event, opines Nagel, “[a]gainst this backdrop of complex, imponderable political and cultural forces, the *Lopez* decision—and indeed, the Justices themselves—recede into relative insignificance.”<sup>9</sup>

On a number of scores I agree with Professor Nagel. I believe, as does he, that when all is said and done the Court is repackaging a test that it has recited in virtually every Commerce Clause case decided since 1937. However, as I will argue below, the evidence of that is far more opaque and its significance far greater than Professor Nagel suggests. I also agree that the Court’s federalism-labeled crystal ball is quite clouded and will most likely be this way for the near future. On the other hand, my sense is that Chief Justice Rehnquist has bigger fish to fry than 18 U.S.C. § 922(q). I think (with no way of verifying my beliefs) that *Lopez* was written the way it was (not applying its own test of validity) in order to lay the foundation for a time when the Court has the numbers to mount a stronger attack on political centralization.<sup>10</sup> Finally, I agree that the Court is not the institution that will lead the next social or political revolution; it has never been in the vanguard of social change. Indeed, as Nagel states, “sooner or later the Supreme Court goes along with the dominant trends of the time.”<sup>11</sup> Consequently, in the cosmic sense that Professor Nagel

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7. *Id.* at 658. On March 27, however, the Court struck one more blow against centralization by holding that Congress has no power under the Commerce Clause to waive a state’s Eleventh Amendment sovereign immunity even with respect to Indian Tribes, an area over which the Congress may exercise exclusive legislative authority. *Seminole Tribe of Florida v. Florida*, 64 U.S.L.W. 41 (1996). *Seminole Tribe* does not of course limit Congress’s power to regulate Indian tribes; it only limits its ability to permit individuals to sue states in federal courts. Its scope is thus limited to private rights of action in federal court. But the Court’s language is unmistakably focused on increasing the states’ independence from the federal government.

8. *Future of Federalism*, *supra* note 2, at 658-59.

9. *Id.* at 661.

10. See Sara Sun Beale, Speech at the *Case Western Reserve Law Review* Symposium: The New Federalism after *United States v. Lopez* (Nov. 11, 1996).

11. *Future of Federalism*, *supra* note 2, at 659. There are numerous examples of in-

speaks, *Lopez* and its deciding Justices (indeed all Justices *qua* Justices) are now and probably always have been “relatively insignificant” *except* (and this is a big exception) as an institution that can lend moral and legal sanction to a political movement.<sup>12</sup> The Court can, in other words, move partisan political rhetoric to a higher ground.<sup>13</sup>

I have little faith in my distinctive abilities as a political or social commentator, therefore my remarks will be limited to the first point, the Court is simply re-packaging its time honored “substantial effects” doctrine—engaging in “successive validation” (as Nagel puts it) and the significance that this has. First, while I believe that the *Lopez* Court has not pronounced a new substantive doctrine, I am not quite as certain of this point as is Professor Nagel. I believe that some argument can be made that the Court is, to use Nagel’s words, engaged in the adjudicative devices of “denial,”<sup>14</sup> “legalistic devaluation,”<sup>15</sup> or even “substitution.”<sup>16</sup> And second, the impact of “successive validation” is potentially far more significant than Nagel asserts. I will discuss each of these two points in order.

## I.

Notwithstanding Justice O’Connor’s contrary statement in *New York v. United States*,<sup>17</sup> it matters whether *Lopez* holds (1) that despite an activity’s relationship to commerce, the Tenth Amendment prevents Congress from regulating it if the activity is “too local,” or (2) that the record demonstrates an insufficient relation-

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stances in which the Court appeared to buck political trends and put its own stamp on the polity: *Lochner v. New York*, 198 U.S. 45 (1905); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Roe v. Wade*, 410 U.S. 113 (1973) and as it would seem in hindsight from this past term, *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995). Most infamous, of course, was the misbegotten attempt by the Supreme Court in *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), to placate the South and thus attempt to avoid a civil war.

12. *Future of Federalism*, *supra* note 2, at 650-51.

13. Cf. James M. O’Fallon, *Marbury*, 44 STAN. L. REV. 219, 260 (1992) (arguing that *Marbury v. Madison* legitimized the ideology of “nationalist politicians”).

14. *The Future of Federalism*, *supra* note 2, at 652.

15. *Id.* at 651.

16. *Id.* at 653.

17. 505 U.S. 144, 155-56 (1992) (stating that the issue of whether a congressional action is authorized by Article I of the Constitution and the issue of whether a congressional action unconstitutionally crosses the line into those powers reserved to the States by the Tenth Amendment are “mirror images” of one another—much like the question whether the glass is half full or half empty).

ship between the subject matter of the regulation (such as the possession of a firearm within 1,000 feet of a school as is the case in *Lopez*) and interstate commerce. The first is an attempt to determine the perimeters of federal power. The second only determines how well the federal government supported its assertion of authority. In the second instance, Congress has the ability to cure an apparent break in the chain from the claimed source of power to its exercise. It cannot, in the first instance, overcome the more normative judgment that its regulation of a particular transaction was improper because the issue *should* be governed by a different level of government.

My best guess, like that of Professor Nagel, is that *Lopez* has more to do with the second statement than the first. It is, in other words, a *source* of powers rather than a *limitation* on powers case. Unlike *National League of Cities v Usery*<sup>18</sup> and *New York v. United States*,<sup>19</sup> neither the majority nor Justice Kennedy's concurring opinion speaks about the Tenth Amendment in any substantive way. Chief Justice Rehnquist's opinion is mostly devoted to re-establishing that the "proper test requires an analysis of whether the regulated activity '*substantially effects*' interstate commerce."<sup>20</sup> What distinguished *Lopez* from cases such as *Perez v. United States*<sup>21</sup> or *Champion v. Ames*<sup>22</sup> was that the activity being regulated was neither itself commerce nor was its relationship to commerce "visible to the naked eye."<sup>23</sup>

If the Court had simply stopped with those observations, Professor Nagel's judgment that the Court was simply engaging in a strategy of successive validation would be more certain. However, it did not. Both the majority and Justice Kennedy muddied the waters by talking about "areas . . . where States historically have been sovereign"<sup>24</sup> and "areas of traditional state concern."<sup>25</sup> Similar language appeared most prominently in *National League of*

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18. 426 U.S. 833 (1976).

19. 505 U.S. 144.

20. 115 S. Ct. at 1630 (emphasis added).

21. 402 U.S. 146 (1971) (holding that Congress has the power to regulate loan sharking activities).

22. 188 U.S. 321 (1903) (upholding the constitutionality of congressional regulation of lottery ticket trafficking).

23. 115 S. Ct. at 1632; *see also id.* at 1640, 1642 (Kennedy, J., concurring) (stating that there was a lack of an "evident commercial nexus").

24. *Id.* at 1632 (Rehnquist, C.J.).

25. *Id.* at 1638 (Kennedy, J., concurring).

*Cities* to describe a Tenth Amendment limit on the use of Congress's power to regulate the states' abilities to conduct their own internal business.<sup>26</sup> The phrase later found its way into the analysis in *Gregory v. Ashcroft*,<sup>27</sup> in which the Court considered whether Congress, contrary to Missouri's constitutional policy regarding mandatory retirement, intended to apply the Age Discrimination in Employment Act to state judges.<sup>28</sup> *National League of Cities* and *Ashcroft* both involved attempted assertions of federal authority over the employment terms and working conditions of state employees in ways that Professor Nagel has argued might shift the allegiance of state employees from the state to the federal government, thus violating one of the underlying protections of a divided government.<sup>29</sup> The statute in *Lopez*, however, regulated purely private activity, a difference that the Court in *New York v. United States* said was significant, indeed determinative.<sup>30</sup> Moreover, it did so in a way that state authority and the policy judgments underlying that authority were not displaced, except in the most abstract of ways.<sup>31</sup> Does the Court now mean to conflate *New York v. United States* with regulation of private conduct in a way which would overrule *Hodel v. Virginia Surface Mining & Reclamation Association*<sup>32</sup> where the application of a "traditional state functions" standard for evaluating federal regulation of private conduct was rejected?<sup>33</sup> If so, a significant redistribution of constitutional authority has occurred.

In addition to using the language of traditional state functions, there is other evidence that the Court may be either talking generally about a Tenth Amendment, affirmative limitation on congressional authority or attempting to define a category of activities that do not fit within Congress's commerce powers. The *Lopez* majority

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26. 426 U.S. at 851-52 (using language such as "impermissibly interfere with the [States'] integral governmental functions" and "displac[e] the States' freedom").

27. 501 U.S. 452 (1991).

28. *Id.* at 456-57.

29. Robert F. Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81, 106-07 (1982) [hereinafter *Federalism as a Fundamental Value*].

30. 505 U.S. at 160 (stating that "this is not a case in which Congress has subjected a State to the same legislation applicable to private parties").

31. Alfonso Lopez was initially charged under Texas law for the felony of possessing a firearm in a school. The state then *voluntarily* dismissed the state charges on the next day when Lopez was charged with the federal offense. *Lopez*, 115 S. Ct. at 1626.

32. 452 U.S. 264 (1981).

33. *Id.* at 292-93.

apparently places congressional commerce power into three distinct categories.<sup>34</sup> The first two categories are obvious and unexceptional examples of appropriate congressional commerce regulations.<sup>35</sup> But it is the third classification that is troublesome because it is far more narrow than what the Court has previously held to be within Congress's authority. This category begins inauspiciously enough: "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially effect interstate commerce."<sup>36</sup> But the statement does not end there: "Where *economic activity* substantially effects interstate commerce, legislation regulating that activity will be sustained."<sup>37</sup> Is "non-commercial" activity now beyond Congress's power to regulate, even if it can be demonstrated that it has a substantial effect on interstate commerce? Despite Professor Nagel's correct observation that such a standard would be difficult to administer and would produce indefensible results and thus could not possibly form the core of future Commerce Clause decisions,<sup>38</sup> I am not so sanguine. Evidently, these objections would not sway Justice Thomas.<sup>39</sup> And Justice Rehnquist's pithy, formalist dissent in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>40</sup> and his statement in *Hodel* that some activities may be too "local" to be considered "*in commerce*"<sup>41</sup> might indicate that he too would not object to a categorical, subject matter limit on Congress's commerce powers.<sup>42</sup> Whether a commercial/non-commercial or local/national distinction can hold on any longer or with any greater success than the direct/indirect test of yesteryear, or whether it will join the Court's many "discarded doctrine[s]"<sup>43</sup> is

34. See 115 S. Ct. at 1629-30.

35. *Id.* at 1629 (labeling the first category as "use of the channels of interstate commerce," and the second category as regulating threats to interstate commerce from intrastate activities).

36. *Id.* at 1629-30 (citations omitted).

37. *Id.* at 1630 (emphasis added); see also *id.* at 1640, 1642 (Kennedy, J., concurring) (stating that a nexus is needed between the activity being regulated and interstate commerce for Congress to have the power to regulate at all).

38. *The Future of Federalism*, *supra* note 2, at 646-48. But see Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 694-95 (1995).

39. 115 S. Ct. at 1642-51 (Thomas, J., concurring).

40. 469 U.S. 528, 579-80 (1985) (Rehnquist, J., dissenting).

41. 452 U.S. at 310 (Rehnquist, J., concurring).

42. At least one commentator has read *Lopez* to limit Congress's commerce authority to commercial activities. Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1789, 1816-18 (1995).

43. *The Future of Federalism*, *supra* note 2, at 654.

not important. What is important is that some Justices are willing to give it a valiant try and some lower federal courts have already started.<sup>44</sup>

The counter evidence is Justice Kennedy's concurrence, which seems to apply a brake on reading *Lopez* as an affirmative limitation on the exercise of federal power. Unfortunately, that opinion can also be read in a far less limiting way. Kennedy uses the same federalism rationales for limiting federal regulatory assertions against private individuals that Justice O'Connor used in *New York v. United States* to limit federal regulatory assertions against the "states qua states."<sup>45</sup> As well he should. Both the tyranny and the experimentation rationales are at least as, if not more, congenial to federal regulation of private conduct than they are to federal regulation of public conduct. Indeed, his somewhat off-handed remark that "[t]his is not a case where the *etiquette* of federalism has been violated by a formal command from the National Government,"<sup>46</sup>

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44. See, e.g., *United States v. Pappadopoulos*, 64 F.3d 522, 527-28 (9th Cir. 1995) (deciding that federal prohibition of arson against property used in commerce or in an activity affecting commerce could not be applied to a private residence in part because a "house has a particularly local rather than interstate character"); *United States v. Mussari*, 894 F. Supp. 1360, 1364, 1367 (D. Ariz. 1995) (finding the Child Recovery Support Act unconstitutional *inter alia* because criminal law and child custody are areas of traditional state concern); *United States v. Bailey*, Crim. No. SA-95-CR-138, 1995 WL 563284 (W.D. Tex., Sept. 7, 1995) (same); *United States v. Parker*, 64 U.S.L.W. 2313 (E.D. Pa., Oct. 30, 1995) (same but decision based on Act not being regulation of commercial activity). For a republican argument that states ought to be free of federal control in areas of family law, see Dailey, *supra* note 42, at 1860. Professor Dailey candidly admits she advocates a return to dual federalism, albeit for reasons unlike those of other commentators who have urged the same thing. See, e.g., James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251 (1994) (arguing that the Tenth Amendment should protect specific areas of state concern from federal control); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987) (stating that Congress's power should be limited in a way which protects autonomous spheres of state legislative authority). Dual Federalism is certainly the road Justice Thomas walks in *Lopez*. See 115 S. Ct. at 1642-51 (Thomas, J., concurring).

In a subsequent conversation about the Symposium with my colleague Ron Coffey, I was reminded that a resurrection of dual federalism would not only alter the doctrinal approach to Congress's commerce powers, but also the Court's approach to state powers under the so-called dormant side of that clause. It is hard to imagine the Court holding, on the one hand, that a particular activity falls outside Congress's power but that state regulation of that activity imposes an undue burden on interstate commerce. Indeed, Professor Epstein has argued, on the other side, that Congress's powers to regulate commerce ought to be limited to matters the dormant Commerce Clause insulates from state regulation. Epstein, *supra*, at 1454.

45. 115 S. Ct. at 1638-39 (Kennedy, J., concurring) (citing *New York v. United States*, 505 U.S. at 181).

46. *Id.* at 1642 (emphasis added).

can be read to elevate the infringement of state prerogatives in *Lopez* to a higher plane than that in *New York v. United States*.

## II.

Despite the arguments that *Lopez* marks off distinct boundaries separating state from federal control, on balance I agree with Professor Nagel that the case does not go that far. While it is true that Justices Kennedy and O'Connor, who hold the balance of power in *Lopez*, speak about traditional state concerns, they also disavow the use of "content-based boundaries . . . to define the limits of the Commerce Clause."<sup>47</sup> It would appear, then, that Justices Kennedy and O'Connor are less troubled by federal invasion of some subject-defined state turf than they are by the apparent lack of any *distinct* federal interest in regulating the possession of guns around local schools. If I am correct, congressional findings that establish a link between the activity regulated and Congress's distinct commerce-related interest in the national economy may be more persuasive to Justices Kennedy and O'Connor than to Chief Justice Rehnquist and Justices Scalia and Thomas, regardless of how one characterizes the economic nature of the regulated activity.

This, however, tells us little about the impact of *Lopez* except that it is less than what it could be. Nor does it necessarily lead to Professor Nagel's conclusions regarding either the Court's adjudicative technique or that *Lopez* does not effect, or potentially effect, a redistribution of decisionmaking authority between the states and the federal government. It is equally plausible that the Court is engaging in (again using Nagel's terminology) a covert form of substitution. While articulating the time-honored (if rarely enforced) principle of "substantial effect," the Court is, in reality, substituting the following "rule" (principle may be a stretch):

*Where the federal government uses its commerce power to regulate an activity we "ordinarily" think ought to be a matter of state prerogative, and there exists no evident federal interest except that which otherwise animates the state's concern, the federal regulation is presumptively unconstitutional.*

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47. *Id.* at 1637 (Kennedy, J., concurring).

This rule, of course, is not a rule of decision. It does not determine the eventual outcome of a specific case. It is different, therefore, than the outcome-determinative nature of the traditional state functions test of *National League of Cities*. Instead, the rule determines the scope of judicial review. It tells us how the Court is likely to react to the stimuli of particular cases. Consequently, despite its obvious deficiencies, it is an easier rule to live with than the rule of decision in *National League of Cities*. Because it is essentially a process rule, people with differing views on the merits of decentralized decisionmaking might agree that Congress should demonstrate in some way that it is not merely “strong-arming” the Commerce Clause (which I have no doubt Congress was doing when it enacted § 922(q)).<sup>48</sup> Unfortunately, because it is a process rule, it raises serious questions of judicially manageable standards.<sup>49</sup>

The analytical key, both to the rule and to the judicial review problems posed by the rule, is the strength of the presumption of invalidity. One could argue that there is no presumption, but that ignores the one obvious point of the majority opinion—the rational basis test of the Due Process and Equal Protection Clauses will not suffice to sustain federal regulation that is, *a priori*, disconnected from Congress’s interstate commercial authority. Were this not true, Justice Breyer’s dissent would have been the majority opinion.<sup>50</sup> Thus, some “plausible” connection between the activity regulated and commerce will no longer suffice. Whatever might be said about the pliability of the “substantial relation to commerce” test, the Court seems adamant that it will not speculate about the existence of such a substantial connection.<sup>51</sup> When a case falls within the “rule”, Congress must supply the missing link.

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48. The legislative history of § 922(q) is painstakingly chronicled in the Fifth Circuit Court of Appeals decision. See *United States v. Lopez*, 2 F.3d 1342, 1359-60 (5th Cir. 1993).

49. Justice Souter’s dissent demonstrates particular sensitivity to the problems of judicially manageable standards. See 115 S. Ct. at 1651-57 (Souter, J., dissenting). The most significant scholarly discussion of this problem is JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980). But see *Federalism as a Fundamental Value*, *supra* note 29, at 89-97 (disputing Choper’s distinction between the judicial role in federalism cases and that in individual liberties cases).

50. See *Lopez*, 115 S. Ct. at 1657-65 (Breyer, J., dissenting) (analyzing judicial levels of scrutiny for various congressional exercises of power in arguing for deference to Congress’s finding of a connection between guns near schools and interstate commerce).

51. *Id.* at 1634 (Rehnquist, C.J.).

It is possible that *Lopez* only requires a technical compliance by Congress. All that is required is facts somewhere in the "record" that reasonably support a substantial nexus and a "clear statement" of Congress's intent to push the commerce envelope to its limits. That certainly would have satisfied the Fifth Circuit.<sup>52</sup> It would also satisfy the *Gregory v. Ashford* concern that Congress consciously weigh the disruptive effect of its legislation on the federal system against the necessity of regulation.<sup>53</sup> If the *Lopez* Court's concerns could be satisfied by a "clear statement" from Congress, it is an unexceptional ruling<sup>54</sup> and Professor Nagel's conclusion that *Lopez* will have little impact on the constitutional division of legislative authority is correct.<sup>55</sup> This is not to say that *Lopez* is insignificant. It will remain as a symbol of Congress's limited power and, as Professor Nagel has previously argued, that symbolism is a powerful source of the states' legitimacy.<sup>56</sup>

Reading *Lopez* to require only some finding by Congress, while not implausible, is, however, unlikely. Not surprisingly, the *Lopez* opinion reads like (then) Justice Rehnquist's concurring opinion in *Hodel*<sup>57</sup> in which he stated that "simply because Congress may conclude that a particular activity substantially effects commerce does not necessarily make it so. Congress's findings must be supported by a rational basis *and* are reviewable by the courts."<sup>58</sup> Indeed, he went further, putting the burden on Congress to "show that the activity it seeks to regulate has a substantial effect on interstate commerce."<sup>59</sup> If Chief Justice Rehnquist's opinion in *Lopez* is to be read to track his opinion in *Hodel* then the impact of *Lopez* is arguably far more significant, not because of the results it will necessarily produce, but because the Court will play a far greater role in determining the federal balance. The Court would determine whether the evidence marshaled by Con-

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52. See *Lopez*, 2 F.3d at 1365-66.

53. 501 U.S. at 461 (1991) (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)).

54. The standard of judicial review would then likely be close to the "rational basis with bite" review proposed by Professor Gerald Gunther for the Equal Protection Clause. See Gerald Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-24 (1972); Merritt, *supra* note 38, at 684.

55. *Future of Federalism*, *supra* note 2, at 659-60.

56. *Federalism as a Fundamental Value*, *supra* note 29, at 101-02.

57. 452 U.S. at 307-13 (1981) (Rehnquist, J., concurring).

58. *Id.* at 311 (emphasis added).

59. *Id.* at 313.

gress is probative of a "substantial" nexus between the activity regulated and the national economic market. Because substantiality is a qualitative, and not a quantitative question, Professor Nagel's conclusion becomes somewhat problematic.

Most lower courts interpreting *Lopez* have been reluctant to second guess Congress's explicit determinations of an interstate connection.<sup>60</sup> But there is no doubt that the leeway given the judiciary is far greater after *Lopez* than it was before. Moreover, the question is arguably different after *Lopez*. Rather than asking whether there is *any* logically defensible federal interest, the substantial effects question, seriously posed, queries whether there is a *sufficient* federal interest. Thus, we need not necessarily accept Professor Choper's broad argument that there is no principled way of answering *any* federalism question<sup>61</sup> in order to understand the judicial review problem posed by *Lopez*. As Professor Nagel demonstrates,<sup>62</sup> the question of when centralized authority has gone "too far," cannot be answered, one way or the other, by reference to the Constitution. The best one can do is what Professor Nagel has done—illustrate the two horns of the adjudicative dilemma and pick a result, holding out the possibility that another case may be decided differently. Finally, it does no good to argue that the substantial effects question is one of fact since there is no standard by which a court can assess the sufficiency of any factual assertion other than according to a partisan view of the relative regulatory roles of the federal and state governments. This leaves the federal judiciary with enormous authority to impose their own views on the federal/state balance. Such potential should concern liberals and conservatives alike: liberals because of the (current) expected outcome and conservatives because of the increased authority assumed by the federal courts.

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60. See, e.g., *United States v. Bishop*, 66 F.3d 569 (3d Cir., 1995) (upholding a federal carjacking statute); *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995) (upholding Freedom of Access to Clinic Entrances Act under Commerce Clause). When Congress has included a jurisdictional element in the statute, the case is that much easier because the government must then prove, beyond a reasonable doubt in a criminal case, that the prohibited act had a substantial interstate nexus. See, e.g., *United States v. Stillo*, 57 F.3d 553 (7th Cir. 1995) (dealing with the Hobbs Act). The jurisdictional element, while satisfying the *Lopez* Court's concern for substantial effect, does not necessarily help in concluding that the prohibited activity possesses the requisite commercial characteristics. See *supra* notes 31-38 and accompanying text.

61. CHOPER, *supra* note 49, at 201-03.

62. *The Future of Federalism*, *supra* note 2, at 649.

Of those in the majority, only Justice Thomas seeks a theory that might limit federal power while at the same time avoiding the pitfalls of judging the qualitative link between interstate commerce and the activity regulated.<sup>63</sup> Unfortunately, as Justice Kennedy points out<sup>64</sup> and Professor Nagel confirms, Justice Thomas's particular solution—limiting federal regulation to the movement of goods across state lines—did not work in the past nor will it work any better now.

What did the Court say about the problem of judicially manageable standards? Nothing actually. It simply recited the hegemonous watchword of our judicial faith, "it [is] the judiciary's duty 'to say what the law is.'"<sup>65</sup> Another principle, however, may have been more appropriately cited. To paraphrase Justice White, the Court undoubtedly has the "raw judicial power" to review whether there exists a sufficiently substantial relationship between an activity and our national economic welfare to justify federal

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63. This is not to suggest that I subscribe to Justices Thomas's analysis; I do not. Nor do I subscribe generally to the notion that "framer's intent" is some objective fact that can be discovered by turning to the correct page of the book, thus cabining judicial "law making". But even if I did, it is certainly not clear that Justice Thomas's view of what the framers intended is accurate. It is certainly at odds with Chief Justice John Marshall's understanding of the time. Among other things, Justice Thomas simply writes off the Necessary and Proper Clause with the observation that the Clause would render "many of Congress' other enumerated powers . . . wholly superfluous." 115 S. Ct. at 1644 (Thomas, J., concurring). How he decides that it is more appropriate to render the Necessary and Proper Clause superfluous than, for example, the bankruptcy power is not explained. More than likely it is because of Justice Thomas's personal beliefs about the appropriate distribution of authority between the federal and the state governments. *But see generally* Epstein, *supra* note 44, (arguing for a limitation on congressional power to protect state law-making authority).

64. 115 S. Ct. at 1637 (Kennedy, J., concurring).

65. *Id.* at 1633 (Rehnquist, C.J.) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The pejorative comment regarding the citation of *Marbury* to justify judicial intervention comes from Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. REV. 30, 33 (1974).

Justices Kennedy and O'Connor, while clearly more troubled by judicial intervention in "the ordinary" commerce clause case than are the other three Justices who constitute the majority, are equally short on discussing the problems of judicially manageable standards. About all the concurrence can muster is the conclusion (hardly an argument) that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." 115 S. Ct. at 1639 (Kennedy, J., concurring). Maybe this proves Professor Nagel's conclusion that our preferences for judicial review are too strong to sustain judicial abstinence. *The Future of Federalism*, *supra* note 2, at 653.

regulation. But the wisdom of undertaking that review is quite something else.<sup>66</sup>

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66. *Roe v. Wade*, 410 U.S. at 222 (White, J., dissenting). For the record, I believe that Justice White was incorrect when he applied that principle in *Roe* for many of the same reasons articulated by Professor Choper as distinguishing the Court's role in federalism cases from its role in individual rights cases. *See* CHOPER, *supra* note 49, at 195-205.

