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FEDERAL POWER AND FEDERALISM: 
A THEORY OF COMMERCE-CLAUSE BASED REGULATION OF 
TRADITIONALLY STATE CRIMES†

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Perhaps no legal topic has generated more scholarly discussion in the last two years than the meaning of the Supreme Court's decision in United States v. Lopez.1 To many legal thinkers, the decision—the first since the New Deal to reject an attempted exercise of the commerce power—appeared to undermine long-held assumptions about the commerce power, along with the validity of a wide range of criminal, social, and environmental statutes that rest on that power.2 Some commentators, grouping Lopez with the

† This Article is adapted from an address presented at the Symposium, The New Federalism After United States v. Lopez, Case Western Reserve School of Law (Nov. 10-11, 1995).
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2. Professor William Banks, for example, wrote immediately after the Lopez decision that "a whole body of federal criminal law, federal environmental law, [and] social policies of an enormous range are in question." Joan Biskupic, Court Signals Sharp Shift on Congressional Powers, WASH. POST, Apr. 28, 1995, at A3. Speaking at a roundtable of professors on National Public Radio, Professor Bruce Ackerman dramatically speculated that the decision "could well be one of the opening cannonades in the coming constitutional revolution." Morning Edition (National Public Radio broadcast, Apr. 27, 1995), available in WESTLAW, 1995 WL 2958158 (pages unavailable). See United States v. Parker, 108 F.3d 28, 29 (3rd. Cir. 1997) (Supreme Court's "apparent change in course has resulted in reexamination of the Commerce Clause in a variety of contexts, as lit-
Court’s decisions the same term in *U.S. Term Limits, Inc. v. Thornton*\(^3\) and *Missouri v. Jenkins*,\(^4\) offered the even more dramatic assessment that the decision signalled a turning point in the Court’s basic approach to federalism.\(^5\)

The speculation about *Lopez* intensified in the wake of the Court’s decision the following term in *Seminole Tribe v. Florida*.\(^6\) Commentators now saw confirmation of the view that *Lopez* had been not only a watershed in Commerce Clause jurisprudence, but also the beginning of an upheaval in the Court’s approach to federalism. In a front-page story the day after the Court issued its opinion in *Seminole Tribe*, the *New York Times* reported that it had become “evident now that the *Lopez* decision was a signal that the current majority is in the process of revisiting some long-settled assumptions about the structure of the Federal Government and the constitutional allocation of authority between Washington and the states.”\(^7\)

Others, reacting to these sightings of a revolution, have advanced more tempered assessments of *Lopez*’s significance.\(^8\) A

\(^{3}\) 115 S. Ct. 1842 (1995) (holding that the states were not reserved the power under the Tenth Amendment to impose qualifications for the offices of United States Representatives and Senators in addition to those set forth by the Constitution).

\(^{4}\) 115 S. Ct. 2038 (1995) (holding that district court’s orders had exceeded scope of federal power to remedy effects of past discrimination in state school system).

\(^{5}\) See, e.g., Vicki C. Jackson, *Cautioning Congress to Pull Back*, LEGAL TIMES, July 31, 1995, at S31. (“Any doubt that federalism lives on as an important issue in constitutional law is put to rest” by *Lopez* and the Term Limits case); see also R. Cordray, *Courts Rein in Congress’s Authority*, COLUMBUS DISPATCH, Aug. 6, 1995, at A11 (“For judges and legal scholars who had grown accustomed to thinking in terms of congressional omnipotence, the decision was seen as revolutionary. And it raised a host of new questions about precisely when Congress can be restrained from imposing supreme federal law in areas traditionally governed by state law.”).

\(^{6}\) 116 S. Ct. 1416 (1996) (holding that Congress lacked authority under the Indian Commerce Clause to abrogate the states’ Eleventh Amendment immunity from suit in federal court).


\(^{8}\) See, e.g., Larry Kramer, *What’s a Constitution For Anyway? Of History and Theory, Bruce Ackerman and the New Deal*, 46 CASE W. RES. L. REV. 885, 885 (1996) ("In-
number of scholars, for example, explain the decision as merely a ‘sort of ‘signalling device’—a reminder to Congress that the Court is still out there, willing (however reluctantly) to intervene if federal legislators become too complacent about extending their authority.’ Somewhat differently, Robert Nagel suggests that Lopez did not even apply the test it announced, and predicts that the decision will be only an isolated gesture because neither the political culture nor the Justices are devoted to ‘decentralized decision making.’ And Deborah Merritt thinks Lopez ‘will have very little practical effect’ because Congress can still regulate any conduct that is ‘a little more like commerce than the acts depicted by the government in that case.”

Notwithstanding the basic divide between these two groups of commentators on the ultimate impact of Lopez, the second wave of commentators has tended to share the view that Lopez was driven by federalism values. Professors Suzanna Sherry and Robert Nagel are representative in so portraying the decision, even as they disclaim its lasting impact. The title of Nagel’s essay on Lopez, The Future of Federalism, 46 CASE W. RES. L. REV. 643, 660 (1996), sets the tone for his thoughts about devolution of power to the States, while Sherry explicitly links the decision in Lopez to the Court’s Eleventh Amendment jurisprudence. See Suzanna Sherry, The Barking Dog, 46 CASE W. RES. L. REV. 877, 882 (1996) (citing Seminole Tribe); see also Kathleen F. Brickey, Crime Control and the Commerce Clause: Life After Lopez, 46 CASE W. RES. L. REV. 801, 842-43 (1996) (hereinafter Brickey, Crime Control) (“Sounding strong federalism themes, [Lopez] is a reminder that, contrary to contemporary 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.”); infra Part III.B.

9. Guns in Schools, 1995: Hearings on S. 890 Before the Subcomm. on Youth Violence of the Senate Judiciary Comm., (1995) [hereinafter Hearings] (statement of Professor Larry Kramer), available in WESTLAW, 1995 WL 435712, (F.D.C.H.U.), at 26. Professor Brickey similarly suggests that “Congress could (and perhaps should) view Lopez as a warning shot across the bow” the real significance of which may be “its symbolic value” in indicating the judiciary’s frustration with “the unchecked growth of federal criminal law.” Brickey, Crime Control, supra note 8, at 839, 840. See also Sherry, supra note 8, at 877 (explaining Lopez on the theory that in order to have its warnings about the limits of federal power taken seriously the Court “has to bite someone occasionally—and it does not much matter whom”).

10. Nagel, supra note 8, at 660.

A recent and little-noticed legislative action has now prepared the way for the Court to elaborate on its decision in *Lopez*. On September 30, 1996, a revised version of the Gun-Free School Zones Act, the statute the Court invalidated in *Lopez*, was signed into law. The revised act—which was slipped into an omnibus spending provision and has therefore escaped notice almost entirely—has the same purpose and effect as its predecessor. Moreover, it achieves its purpose through statutory terms that are strikingly similar to the terms of the disapproved statute.

Consideration of the constitutionality of the revised act provides an occasion to address exactly what the decision in *Lopez* means. For if the Court were truly in the process of rethinking the commerce power along the lines posited by many of the commentators, the minor surgery Congress has performed should be insufficient to save the revised act. Indeed, at the time the revision was first proposed, critics suggested that the Court would consider Congress’s tinkering to have been not only fruitless, but brazen for ignoring the essential federalism message of the *Lopez* decision.

More broadly, the revised act presents an opportunity to consider the theoretical underpinnings of the commerce power, which Congress has controversially employed in recent years to establish concurrent federal jurisdiction over crimes traditionally regulated by the states. The revised act can be used to frame two questions of central doctrinal and theoretical importance to Commerce Clause jurisprudence: (1) Can Congress use the commerce power to reach any activity involving an item that has crossed state lines, however remote or tenuous the connection between the interstate passage and the regulated activity? (2) Does Congress’s authority to regulate an activity under the Commerce Clause depend in part on its purposes? In response to these questions, we develop and defend in this Article a theory of the commerce power under which Con-

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13. See, e.g., Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez*, 46 CASE W. RES. L. REV. 757, 799 (1996). Professor Friedman made a similar point in his testimony before the Senate, urging it not to pass the revised act because “[t]his does our constitutional system no good to challenge the Supreme Court unnecessarily in its interpretation of the Constitution.” See *Hearings supra* note 9, at 15 (statement of Professor Barry Friedman).
gress, without regard to its purposes, may regulate a harmful activity involving an item that has moved in interstate commerce so long as the movement is a cause of the harm.

More broadly still, Congress's persistence in bringing the possession of guns in school within the federal criminal law—as represented by the revised act—provokes basic questions of allocation of power, both between federal and state governments and within the federal government. To characterize Lopez, as many scholars have, as a decision about federalism is to suggest that the point of the decision is that legislation such as the Gun-Free School Zones Act is an inappropriate encroachment on state authority. Properly understood, however, Lopez does not address the core federalism issue of what matters are properly committed to state control, at the level of either constitutional law or wise policy. Rather the decision determines merely that the act does not fall within the scope of Congress's power, not because it interferes with state functions but because the regulated activity happens not to have a sufficient effect on interstate commerce. Many recent federal criminal laws have been similarly attacked as improper encroachments on state authority. The charge typically rests on a misunderstanding of the nature of concurrent state and federal jurisdiction in the criminal law. In fact, much of the recent federal criminal legislation, including the legislation struck down in Lopez, does not threaten, and may well promote federalism values. With respect to the ongoing "federalization debate"¹⁴ the revised act prompts observations about the appropriate roles of each branch of the federal government, both in identifying and enforcing national priorities and in attending to federalism values.

Each of these questions—about the meaning of Lopez, the foundations of the commerce power, and the implications of the federalization of crime—is illuminated by consideration of the revised Gun-Free School Zones Act. Part I of the Article describes the new legislation and explains why, in light of Lopez, the revised statute is constitutional and will be upheld. Analysis of the legislative fix helps to clarify the contours of Commerce Clause doctrine, as set out in Lopez. A close reading of the Lopez opinion reveals that the decision neither articulated a new Commerce Clause theory

nor narrowed the boundaries of the commerce power. Rather, the Court applied standard, if somewhat reconceptualized, doctrine, striking down the Gun-Free School Zones Act because the act as written did not regulate an activity either in or having a substantial effect on interstate commerce; the revised act, by contrast, will be upheld because the fix limits the statute to guns in interstate commerce, thereby making inapplicable the requirement that the activity regulated substantially affect interstate commerce. We thus endorse the view that *Lopez* is not a revolutionary opinion, and that it will prove far less consequential than some commentators have surmised, although we do so for substantively different reasons from those that others have advanced. If the Court is in the process of revisiting basic assumptions about state and federal power (and cases such as *Seminole Tribe*—in contrast to *Lopez*—may so suggest), *Lopez* did little to advance that process, and its overall impact is likely to be modest, even within Commerce Clause jurisprudence.

Part II uses the revised act to explore the theoretical and doctrinal underpinnings of the commerce power. To spell out our view, we proceed by considering a series of objections to the revised act from a hypothetical critic who doubts whether the revised act should or will be upheld. The theme of the objections is that the differences between the revised act and the act struck down in *Lopez* are too inconsequential to demarcate a constitutional line. At the heart of the objections is the idea that the fix is empty and formalistic. In order to respond to the objections, we explore the relation between congressional purposes and congressional power. We argue that regardless of its purposes, Congress may under the Commerce Clause regulate threats to health and safety that are caused by interstate commerce. More generally, we argue that Congress's purposes are irrelevant to the validity of its exercise of the commerce power. Further, even were Commerce Clause doctrine to be reconceptualized to limit Congress to certain purposes, preventing interstate commerce from being a vehicle of injury to health and safety would be an entirely appropriate purpose. We go on to rebut the objection that the theory of the Commerce Clause needed to uphold the new act would leave no room for principled limits on the commerce power, and would, for example, permit Congress to make it a federal offense to commit any state crime while wearing an article of clothing that had crossed state lines. The view that Congress can, under the commerce power, regulate
harm caused by interstate commerce does not legitimate such all-embracing exercises of the power; rather, since interstate commerce
is not a cause of all harms, only certain problems may be addressed with commerce power.

Finally, Part III considers the idea, prominent in much of the scholarship on *Lopez*, that the decision reflects the Supreme Court's frustration with inappropriate and unwise congressional enactments in traditionally state areas. We criticize the related claims that federal statutes such as the Gun-Free School Zones Act and the Child Support Recovery Act are inappropriate and unwise uses of federal power, that such statutes are responsible for overwhelming the federal courts and preventing them from fulfilling important functions, and that the political branches should defer to the federal judiciary's views about how best to use the federal courts.

I. THE REVISED GUN-FREE SCHOOL ZONES ACT

The decision in *Lopez* prompted Congress and the Executive Branch to consider whether the policy goals of the invalidated act could be served by a statute that was within the commerce power as articulated by the Court. The Attorney General advised the President that the defect the court had identified could be corrected by a slight modification in the statutory language. On June 7, 1995, Senator Kohl (D-Wisconsin) introduced S.890, the slightly modified version of the Gun-Free School Zones Act that eventually became law. The Subcommittee on Youth Violence of the Senate Judiciary Committee held hearings on S.890 in July 1995. The bill languished in committee thereafter, and did not come up for a vote until 14 months later, as one of dozens of amendments to an omnibus appropriations bill. Late in the day on September 30, 1996, the eve of the new fiscal year, Congress hurriedly passed and President Clinton signed into law the omnibus bill, including the revised Gun-Free School Zones Act.

15. The authors helped draft the modification to the Gun-Free School Zones Act and to prepare the Department of Justice's analysis in support of the revised act's constitutionality, as well as the subsequent testimony before the Subcommittee on Youth Violence of the Senate Judiciary Committee by Walter Dellinger, then the Assistant Attorney General for the Office of Legal Counsel.

The revised act changes the original act only by the addition of twelve words. The original act stated: “It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.” The revised act amends this language so that it applies to such a knowing possession only in the case of a firearm “that has moved in or that otherwise affects interstate or foreign commerce.”

A careful consideration of the Court’s opinion in *Lopez* reveals the idea behind this seemingly modest change. In *Lopez*, the Court identified “three broad categories of activity that Congress may regulate under its commerce power.” Congress has the power (1) to “regulate the use of the channels of interstate commerce,” including keeping those channels “free from immoral and injurious uses;” (2) to “regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce;” and (3) to regulate “those activities that substantially affect interstate commerce.” Thus, Congress can regulate or protect activities or things that are in interstate commerce, and prevent injurious uses of the channels of interstate commerce; however, it can regulate *intrastate* activities only if they substantially affect interstate commerce.

With respect to the original statute, the Court was able to “quickly dispose[]” of the first two categories of authority, concluding that the statute could potentially be sustained only “under the third category as a regulation of an activity that substantially affects interstate commerce.” The Court’s analysis is therefore devoted to the question of whether the intrastate possession of guns in school substantially affects interstate commerce within the meaning of the Court’s decisions.

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18. 18 U.S.C. § 922(q) (1994 & Supp. 1996). The new sentence reads in full: “It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.” *Id.*
19. 115 S. Ct. at 1629. The Court later in the opinion refers to the three categories as “categories of authority,” rather than of activities subject to congressional regulation. *Id.* at 1630.
20. *Id.* at 1629.
21. *Id.* at 1630.
The Court added one important wrinkle to the substantial effects doctrine by indicating that the effects of individual instances of the regulated activity may be aggregated only if the activity is commercial. The Court concluded that because the statute neither regulated economic enterprise nor was "an essential part of a larger regulation of economic activity," it could not be "sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." This conclusion was pivotal in the Court's analysis because it meant that in gauging the effect of the intrastate activity, the Court would consider the activity in isolation rather than in the aggregate. In other words, the Court required that the particular possession of a gun in school (as opposed to the possession of guns in school in the aggregate) have a substantial effect on interstate commerce. Since an isolated instance of possessing a gun in school would not have a substantial effect on interstate commerce, it followed from the Court's refusal to aggregate that the statute failed the substantial effects test and that it could not be upheld under category III of Commerce Clause authority.

In sum, the Court treated the original statute as sustainable, if at all, only under category III of Congress's Commerce Clause authority—the authority to regulate wholly intrastate matters—with the consequence that the statute's constitutionality depended on the application of the substantial effects test.

The purpose of the key phrase of the revised act—"that has moved in ... interstate ... commerce"—is now apparent. The revision is designed to place the new statute within categories I and II, rather than category III, thus basing the statute on a different category of Congress's Commerce Clause authority from the only category that the Court believed could plausibly support

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22. Id. at 1631. The gloss on the doctrine thus permitted the Court to distinguish the landmark decision in Wickard v. Filburn, 317 U.S. 111 (1942), which the Court portrayed as a case upholding "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," 115 S. Ct. at 1630, on the ground that the private, intrastate activity of growing wheat "involved economic activity in a way that the possession of a gun in a school zone [does] not." Id.; see also United States v. Robertson, 115 S. Ct. 1732, 1733 (1995) (per curiam) ("The 'affecting commerce' test was developed in our jurisprudence to define the extent of Congress's power over purely intrastate commercial activities that nonetheless have substantial interstate effects.") (citing Wickard) (emphasis on "commercial" added).
the original act. As explained more fully below, the restriction of the statute to the possession of guns that have "moved in" interstate commerce serves to make the statute an exercise of Congress's power to regulate things in interstate commerce and also of Congress's power to regulate the channels of interstate commerce. As a statute based on those categories that authorize the regulation of interstate, rather than intrastate, matters, the revised Gun-Free School Zones Act will not have to pass the substantial effects test in order to be within the commerce power.

Moreover, because of this difference in the source of authority, the question of whether the regulated activity is commercial has no bearing on the constitutionality of the revised act. The revised statute is no more a regulation of commercial activity than the original statute, but the issue should not be relevant because the statute, as a regulation of interstate matters, would not need to be sustained as a regulation of intrastate activities substantially affecting interstate commerce. Because it seeks to regulate only things in interstate commerce, the revised act draws on a different source of Commerce Clause authority from its predecessor. It is, as a consequence, unnecessary for the revised act to pass the substantial effects test, and therefore also unnecessary for the Court to consider whether the regulated activity is commercial or noncommercial. In sum, the revision, while modest in wording, is fundamental.

23. See 115 S. Ct. at 1630 ("The first two categories of authority may be quickly disposed of . . . . Thus, if [the act] is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.").

24. In addition to adding the phrase "that has moved in" interstate commerce, the revised act adds the phrase "or that otherwise affects" interstate commerce. This Article focuses on the principal element of the fix, the requirement that the firearm have moved in interstate commerce. It is worth pausing, however, to set aside a possible source of confusion by distinguishing the "otherwise affects" language from the substantial effects test. The phrase "or that otherwise affects" interstate commerce is designed to serve as a catch-all provision encompassing any possession of a firearm in a school zone not already captured by the statute that Congress could constitutionally regulate under the commerce power. The "otherwise affects" language is well suited to perform this function because a series of cases have interpreted it or similar words to express congressional intent to reach to the limit of the commerce power. See, e.g., Scarborough v. United States, 431 U.S. 563, 571-72 (1977) (interpreting "in commerce or affecting commerce" in this manner). There are a variety of kinds of cases in which the catch-all provision could come into play. For example, even if a firearm had never moved in interstate commerce, Congress might still be able to prohibit its possession in a school zone if the ammunition had moved in interstate commerce or if the possessor had crossed state lines en route to the school zone. In either of these cases, Congress would be regulating a person or thing in interstate commerce or the use of the channels of interstate commerce. To take a dif-
II. THE THEORY OF COMMERCE POWER UNDERLYING THE NEW GUN-FREE SCHOOL ZONES ACT

The revised Gun-Free School Zones Act is premised on the supposition that the movement of a gun in interstate commerce is itself a constitutionally adequate basis for Congress to regulate the gun’s subsequent possession in a school. Although this premise emerges from a straightforward reading of the Court’s opinion in *Lopez*, the fix will be objectionable to many, on a number of grounds. Those objections, and the responses to them, illuminate the contours of the commerce power.

A. Doctrinal Objection

It first might be objected that the legislative fix fails in its goal of bringing the act within the doctrinal boundaries delineated in *Lopez*. According to this objection, the new statute would not come within category I or II because it would regulate the local possession of guns that have previously moved in interstate commerce rather than regulating the actual transportation of guns across state lines. As a doctrinal matter, this objection is weak because the Court has made clear—in a series of cases that *Lopez* leaves undisturbed,25 that the power to regulate objects under the Com-

25. See 115 S. Ct. at 1627-28 (approvingly reviewing precedents on Commerce Clause based regulation of intrastate activities). See also United States v. Murphy, 107 F.3d 1199, 1211 (6th Cir. 1997) (noting that *Lopez* did not disturb *Scarborough* and other Supreme Court precedents authorizing Congress to regulate the possession of any firearm that has travelled in interstate commerce).
merce Clause may be based on the fact that they have been or will be transported across state lines.

In United States v. Darby,\(^26\) for example, the Court determined that federal minimum wage and maximum hour standards with respect to employees engaged in production of goods for interstate commerce could be sustained independently of statutory provisions prohibiting the interstate shipment of articles produced in violation of the standards.\(^27\) As to things that have previously moved across state lines, the Court in United States v. Sullivan\(^28\) had little difficulty upholding under the commerce power a statutory provision that prohibited certain acts, such as misbranding, with respect to drugs that had previously been shipped in interstate commerce.

Most relevant for present purposes, the Court in Scarborough v. United States\(^29\) necessarily, if implicitly, held that Congress has the power to regulate guns that have traveled in interstate commerce. The case required that the Court interpret a statutory requirement that possession of a firearm be "in commerce or affecting commerce." The Court resolved the statutory interpretation question by deciding that the statute was coextensive with Congress's power under the Commerce Clause to regulate the possession of firearms. The federal felon-in-possession statute makes it a crime for a felon to "possess in or affecting commerce, any firearm."\(^30\) The specific issue in Scarborough was whether a firearm's having previously traveled in interstate commerce was sufficient to satisfy the statutorily required link to interstate commerce. The Court interpreted the broad "in or affecting commerce" language of the statute to reach to the limits of Congress's power under the Commerce Clause.\(^31\) The Court went on to hold that the requirement of a connection between possession of a gun and interstate commerce was satisfied by the gun's having previously traveled in interstate commerce.\(^32\) Because the Court's interpretation of the statute depended on its finding that the statute

\(^{26}\) 312 U.S. 100 (1941).
\(^{27}\) Id. at 122.
\(^{28}\) 332 U.S. 689, 697 (1948).
\(^{31}\) 431 U.S. at 571-72.
\(^{32}\) See id. at 572-73.
had the same reach as the commerce power, the decision necessarily establishes that the commerce power reaches to the possession of any gun that has traveled in interstate commerce. Thus, the Court’s Commerce Clause decisions—in particular Scarborough—clearly reach far enough to secure the constitutionality of the revised act; how much further they may reach we will develop below.33

B. Objection that the Fix is Formalistic

Although the fix is effective at the doctrinal level, it still strikes many commentators as objectionable at a deeper level. This objection is based on the notion that the legislative fix is formalistic: the fix adds a contrived connection to interstate commerce, but at bottom the revised statute would accomplish the same thing as the original act.

Careful scrutiny reveals that the objection is less compelling than it may at first appear. We begin with a rough version of the objection and progressively refine it in order to bring it onto the strongest possible footing.

In general terms, the objection might be put as follows:

The original act criminalized the possession of guns in school. *Lopez* decided that Congress lacked the power to pass such legislation. Since almost every gun has moved in interstate commerce, the revised act would ban the same conduct as the original act. If Congress lacks the power explicitly to prohibit guns in school, it must lack the power to pass legislation that would have the effect of prohibiting guns in school. It would be formalistic to allow that adding a few words that would have almost no effect on the scope of the statute could enable Congress to accomplish something that would otherwise be beyond its constitutional powers.

The objection, in other words, is that the revised act would do exactly the same thing as the original act. Therefore, if Congress does not have the power to enact the original act, it should not have the power to enact the revised act.34

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33. See infra Part II.C.
34. A related argument might be that the Court’s decision in *Lopez* has already established that Congress lacks the power to regulate guns in schools under category I or II of
One obvious response is that the revised act does not do exactly the same thing as the original act; it applies to only a subset, though admittedly a very large subset, of the gun possessions to which the original act applies. At least a few guns will never have moved in interstate commerce before being possessed in a school.

Such a response actually brings out the crux of the objection. The objector thinks that it would be formalistic for fundamental questions about Congress’s power to depend on such a trivial matter as whether a statute covers a few more cases; the revised statute would still accomplish what Congress tried unsuccessfully to accomplish in the first place. Thus, the objection can be restated:

Even if the revised act would have a slightly different scope from the original act, Congress’s purpose is the same—to prevent guns in school. Whether Congress has the power to accomplish this purpose should depend on something more fundamental than the difference between the scope of the original and revised acts.

So refined, the objection at its core involves Congress’s purpose. The thrust of the objection is that whether Congress has the power to accomplish something should depend on what its purpose is, not on the specific details of how it goes about translating that purpose into statutory language. Purpose in this objection could be either of two different notions. First, it could be Congress’s moti-
vation—in the sense of the psychological explanation for why members of Congress voted for the legislation. Second, purpose could be the statute’s aim—what the words of the statute, in the circumstances, are well-suited to achieve.

If the objection is understood in terms of motivation, it is easily parried. There are important reasons why the nature of Congress’s motivation—assuming that the motivation is not independently illegitimate (such as a racially discriminatory motivation)—is not relevant to Congress’s power to enact a statute that would otherwise be within the commerce power. Not only is it difficult to ascertain the motivation of a member of Congress, but each member may simultaneously have several motivations. (And of course, since different members who vote for a statute would differ in their motivations, it is not clear what it would mean for there to be a single joint motivation for Congress’s action.) More importantly, it is difficult to see why the actual psychological processes of members of Congress should have any bearing on whether a statute is within the commerce power.35

In contrast, understanding the objection’s reliance on Congress’s purpose in the second sense—in terms of aim rather than motivation—does not accord any relevance to the psychological processes of members of Congress. The aim of a statute is the goal or effect the statute as written is best understood as trying to accomplish. (Note that a statute can have more than one aim since the statutory language can be well calculated to accomplish different things.) Purpose in this sense is the ordinary notion of legislative intent that courts and lawyers routinely rely on in statutory interpretation. Essentially, they ask what the words of the statute mean (as opposed to what the legislators who used them actually had in mind), i.e., what purpose the words of the statute are well calculated to accomplish.36

In this relevant sense of purpose, then, a purpose, or aim, of the original Gun-Free School Zones Act is to combat the possession of guns in school. Restated, the objection is then that the new

35. Cf. Sonzinsky v. United States, 300 U.S. 506, 556 (1937) (noting that “the Supreme Court is not free to speculate as to motives”).

36. ANTONIN SCALIA, A MATTER OF INTERPRETATION 17, 144 (1997) (arguing that the objective of statutory interpretation is to discern “the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris”).
act has basically the same aim as the original act. Like its unconstitutional predecessor, the revised act has the purpose of combating the possession of guns in school. Having the same purpose, the statute should have the same constitutional infirmity.

This objection is effective only if the constitutional defect in the original act was in its aim. The objector needs to maintain that Congress lacked power to enact the original statute because its purpose was not one that is sanctioned by the commerce power. Under this view, the problem with the original act was that its purpose was to combat guns in school, and not to regulate interstate commerce. And whatever tenuous connections to interstate commerce lawyers can contrive, the revised act would still be trying to address guns in school, not interstate commerce.  

This formulation of the objection finds some apparent support in the *Lopez* decision. The tone of the majority opinion suggests a basic problem with what Congress is trying to do, not a minor defect in the drafting of the statute that could be corrected by slightly contracting the statute’s coverage. For example, when the Court asserts that “[the act] is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms,” the Court backs up the assertion with a footnote suggesting that what Congress is trying to accomplish is outside its proper realm:

> Under our federal system, the “‘States possess primary authority for defining and enforcing the criminal law.’”

> When Congress criminalizes conduct already denounced as criminal by the States, it effects a “‘change in the sensitive relation between federal and state criminal jurisdiction.’”

And the opinion buttresses this suggestion by quoting a criticism of the act by then President Bush:

> Most egregiously, [the act] inappropriately overrides legitimate state firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed upon the States by Congress.

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37. See *Hearings*, supra note 9, at 6 (statement of Professor Barry Friedman) (“From a purely formal look at the Constitution, it is hard to see how gun possession in school qualifies as ‘Commerce with foreign Nations and among the several States . . . .’

38. 115 S. Ct. at 1631 n.3 (citations omitted).

39. *Id.* (quoting *Statement of President George Bush on Signing the Crime Control Act*).
Notwithstanding these few signs of encouragement in the *Lopez* opinion, the objection runs into the problem that it relies on a view of the way in which the Commerce Clause allocates power to Congress that was long ago rejected by the Supreme Court. This view, which might be called a "purpose-based view," would hold that Congress's powers—or at least its powers under the Commerce Clause—are defined in terms of purposes rather than in terms of subject matters. Whether Congress has the power to enact a particular statute would thus depend on what Congress is trying to achieve in enacting the statute. According to a purpose-based view, then, the commerce power is the power to regulate for certain purposes—"interstate-commerce purposes"—and an important part of the Supreme Court's task in interpreting the Commerce Clause is essentially to identify and elaborate those purposes.\(^{40}\)

The contrary view holds that the Constitution gives Congress the power to regulate particular subjects or areas, regardless of its aims. On this view, Congress may regulate any aspect of interstate commerce without regard to its purpose in doing so. For example, Congress could use the interstate commerce power to address noncommercial problems, for example racial discrimination. But at least judging from criticisms of certain federal criminal legislation, the full implications of that position for Commerce Clause theory, and in particular for a purpose-based view of the clause, are not fully appreciated.

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40. Different versions of the purpose-based view could take different positions on the question whether purpose is the only restricting factor or whether Congress’s power is also to some extent restricted by subject matter. The possible positions lie on a spectrum from the extreme position that, so long as Congress’s purpose is authorized by a constitutional grant of power, the statute is within the grant of power regardless of what subject matter it regulates, to the opposite extreme position that Congress may only regulate certain authorized subject matters for certain authorized purposes.

41. This view says that the Commerce Clause does not require that Congress have interstate commerce purposes in order to regulate under the commerce power; of course it is a separate question if a statute is unconstitutional because Congress has an independently illegitimate purpose, such as a racially discriminatory purpose.
The purpose-based view was decisive in the Supreme Court's decision in the Child Labor case, *Hammer v. Dagenhart.*\(^{42}\) The issue in the case was whether Congress has power under the Commerce Clause to prohibit the interstate transportation within thirty days of manufacture of goods produced by child labor. The Court concluded that the prohibition was unconstitutional. Justice Day, writing for the Court, reasoned:

The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect *does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States.*\(^{43}\)

Thus, the Court found that Congress could not regulate an activity that was undeniably interstate commerce—the transportation of certain goods across state lines—because the act's purpose was not to control interstate transportation but to control the age at which children may be employed.

Justice Holmes's dissent (which set out the position the Court was later to adopt in *Darby*) responded that whether a statute is within Congress's power does not depend on Congress's purpose. As a general matter, in deciding whether a statute is within Congress's constitutional powers, the court is not called on to determine whether the statute's purpose is one that the Constitution authorizes.\(^ {44}\) Holmes relied upon cases interpreting Congress's taxing power:

Congress levied a tax upon [oleomargarine] when colored so as to resemble butter that was so great as obviously to prohibit the manufacture and sale. In a very elaborate discussion the present Chief Justice excluded any inquiry into the purpose of an act which apart from that purpose was within the power of Congress. . . . Fifty years ago a tax on state banks, the obvious purpose and actual effect of which was to drive them, or at least their circulation, out

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42. 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).
43. 247 U.S. at 271-72 (emphasis added).
44. 247 U.S. at 277-78 (Holmes, J., dissenting).
of existence, was sustained, although the result was one that Congress had no constitutional power to require. The Court made short work of the argument as to the purpose of the act. "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers."45

The Court in Darby made the point even more plainly:

[Regulation excluding from commerce articles that Congress conceives to be injurious] is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the state of destination; and is not prohibited unless by other Constitutional provisions. . . . The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. . . . Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. . . . In the more than a century which has elapsed since the decision of Gibbons v. Ogden, these principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the Commerce Clause, that there would be little occasion for repeating them now were it not for the decision of this Court twenty-two years ago in Hammer v. Dagenhart.46

Since Darby, the Court has consistently rejected the purpose-based view, holding that a congressional purpose to control or affect matters other than interstate commerce does not undermine a statute's constitutionality under the Commerce Clause. Most fa-

45. Id. (quoting Veazie Bank v. Fenno, 8 Wall. 533 (1868)). In commenting on the Child Labor case in a letter to Learned Hand, Holmes explained: "In my opinion Congress may have whatever ulterior motives they please if the act passed in the immediate aspect is within their powers—though personally, were I a legislator I might think it dishonest to use powers in that way." Letter from Holmes to Learned Hand, quoted in Gerald Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine, 27 Stan. L. Rev. 719, 760 (1975).
46. 312 U.S. at 114-15.
mously, in *Heart of Atlanta Motel v. United States*, the Court held that the Commerce Clause authorized the enactment of Title II of the Civil Rights Act of 1964, which outlawed discrimination and segregation in the use of public accommodation on the basis of race, color, religion, or national origin. It was undisputed that the "fundamental object of [the act] was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" However, the Court deemed that purpose irrelevant to the question of the act's constitutionality. The Court reasoned that Congress could regulate those effects of racial discrimination that were within the subject matter of interstate commerce even if its purpose in doing so was to address a moral and social problem rather than a commercial one.

Under reigning Supreme Court doctrine, then, the purpose-based view has lost out to the subject-based view of congressional power. Thus, the purpose of the new Gun-Free School Zones Act is irrelevant to whether the act is within the commerce power. Consequently, the objection that Congress's purpose in enacting the revised act is the same as its purpose in enacting the original act does not get off the ground. Since it was not Congress's purpose that constituted the defect in the original act, the same purpose would no more be a defect in the revised act.

Appraised under the governing subject-based view, the revised act is plainly constitutional. The revised act regulates only guns that have moved in or otherwise affect interstate commerce. The Court has long accepted that the commerce power extends to the regulation of objects that have moved in interstate commerce. And the "otherwise affects" statutory language cannot impair the act's constitutionality because the Court has construed that language simply to track the boundary of Congress's Commerce Clause power.

At this point, the objector might concede that the subject-based view of congressional power is firmly established but argue that

47. 379 U.S. 241 (1964).
48. See id. at 247.
49. Id. at 250; see id. at 291 (Goldberg, J., concurring) (emphasizing that the purpose of the Civil Rights Act of 1964 was the vindication of human dignity and not mere economics).
50. See id. at 256 (holding that as long as the conduct sufficiently affects interstate commerce, Congress may legislate against moral wrongs).
51. See supra note 24.
the purpose-based view would provide a better interpretation of the Constitution. The argument would now run as follows:

The Commerce Power was given to Congress so that it could accomplish specific purposes, such as to provide for uniform standards and to protect the channels of interstate commerce from parochial interference. Why should Congress be able to accomplish purposes other than those for which the power was included in the Constitution?

Indeed, despite the Court's express rejection of the purpose-based view in its Commerce Clause cases, the argument would continue, the overall pattern of results in those cases might be understood in terms of that view. Rather than attempting to find a way of characterizing the scope of Congress's commerce power in terms of subject matters, the Court might better rationalize the pattern of its decisions as embodying a principle that the commerce power gives Congress the power to enact regulations that are rationally related to achieving the purposes for which the commerce power was created, such as protecting and regulating interstate commerce and preventing it from causing injury and undermining state policies.

There is no general reason that the Constitution could not be understood to allocate power in this way. The copyright power, for example, expressly grants Congress power to achieve specified ends. And the Court has interpreted the taxing and spending powers to be limited to certain, albeit very extensive, purposes.

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52. Professor Regan adopts something like this position in an article on Lopez in the University of Michigan Symposium on the case. See Donald H. Regan, How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez, 94 Mich. L. Rev. 554, 555-557 (1995) (arguing, for example, that "there is all the difference in the world between Congress's legislating against lotteries just because it disapproves of them and Congress's legislating against lotteries to help the states give effect to their own judgments of disapproval").

53. "Congress shall have Power to . . . promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8.

54. The courts have decided that it is beyond the scope of Congress's power to lay punitive taxes. And whether a tax is punitive depends, under the prevailing doctrine, on whether there are revenue-raising purposes for the tax, regardless of whether or not the tax imposes a burden or deters activity. See United States v. Kahriger, 345 U.S. 22 (1953); Zwak v. United States, 848 F.2d 1179 (11th Cir. 1988). Similarly, Congress has wide latitude in using the spending power as an inducement to encourage states to undertake certain actions, but Congress may not use the spending power for a coercive purpose. See S. Dakota v. Dole, 483 U.S. 203, 209 (1987).
Even if the purpose-based view were the best interpretation of the Constitution (i.e., even if the Interstate Commerce Clause were best understood as allocating power to Congress to accomplish certain purposes rather than to regulate certain subject matters) the revised act would still be a valid exercise of the commerce power. As the next section details, the revised act has a purpose that would be sanctioned by any reasonable purpose-based view of the Commerce Clause. This purpose, which is overlooked or slighted by many critics, is to prevent interstate commerce from contributing to the problem of guns in school.

1. The Commerce Purpose of the Revised Act

The revised act makes it a federal crime to possess within one thousand feet of a school a firearm that "has moved in or otherwise affects interstate commerce."55 Opponents of the act justifiably point out the strain in trying to discern in the act a direct commercial purpose (i.e., a purpose to regulate or advance the national economy or the commercial relations between the States).56 The broad problem at which the statute is directed is, rather, one of public safety—the possession of guns in school. And it is elementary that the Constitution does not provide a general federal police power to promote health and safety. Thus, the purpose of the act, an advocate of a purpose-based view might argue, is one that is not encompassed by the Constitution.

The flaw in this argument is its unjustified move from the absence under the commerce power of a general power to promote health and safety to the conclusion that Congress may never act under the commerce power to promote health and safety. This conclusion does not follow as a matter of logic. And as a matter of fact, under any plausible purpose-based view of the Commerce Clause, the commerce power would not be restricted to commercial purposes. A purpose-based view of the Commerce Clause would not of course sanction a general purpose of promoting health or

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56. See Hearings, supra note 9, at 4 (statement of Professor Barry Friedman). The federal government nevertheless attempted to defend the Gun-Free School Zones Act in the Supreme Court in part by describing a chain of effects starting from the possession of guns in schools and culminating in a reduction in the nation's economic competitiveness. See United States v. Lopez, 115 S. Ct. 1624, 1632 (1995).
safety, but it would sanction certain specific, noncommercial health and safety purposes.

A purpose-based view would, for example, have to sanction a congressional purpose of preventing interstate commerce from carrying injurious articles. A restriction to commercial purposes would not even allow Congress to ban the shipment of bombs across state lines, since the purpose of such a prohibition would not be commercial. The problems caused by interstate transport of injurious articles (which are largely problems of local health and safety) can be adequately addressed only at the national level. States cannot regulate the shipment of harmful objects from other states, and prohibiting the possession of the objects within the state may be ineffective if the objects are readily shipped to many different locations within the state.

Indeed, the courts have long recognized the importance of Congress’s having the ability to use to commerce power to prevent interstate commerce from contributing to local harms. Thus, in the Lottery Case, Champion v. Ames, the Court approved Congress’s use of the commerce power to suppress state lotteries:

[Congress] said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end.

Moreover, in the period when the Court was applying a purpose-based view, the Court recognized that the purpose of preventing interstate commerce from being the vehicle of injury to public

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57. 188 U.S. 321 (1903).
58. Id. at 357-358; see also Hearings, supra note 9, at 5 (statement of David Strauss) ("The principle that Congress may seek to prevent interstate commerce from being used as a means of bringing about an evil within the states has been reaffirmed repeatedly by the Supreme Court."); see also Hammer v. Dagenhart, 247 U.S. 251, 279 (1918) (Holmes, J., dissenting) ("It does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil."); Hoke v. United States, 227 U.S. 308, 321-23 (1913) (upholding White Slavery Act of 1910); Hipolite Egg Co. v. United States, 220 U.S. 45, 50 (1911) (recognizing Congress's power to regulate the shipping of adulterated eggs even before shipment).
health and safety was appropriate. In *McDermott v. Wisconsin*, for example, the Court noted that "Congress may determine for itself the character of the means necessary to make its purpose effectual in preventing the shipment in interstate commerce of articles of a harmful character." Thus, any tenable purpose-based view should allow that Congress may use the commerce power to prevent interstate commerce from being the vehicle for injury to health and safety in the receiving state.

The revised act would therefore be valid even under a purpose-based view. Since guns are manufactured in only a few states, nearly all guns in school have had to travel in interstate commerce to arrive where they are. An aim of the revised act—an effect that the statute is well-calculated to achieve—is to prevent interstate commerce from contributing to the problem of guns in school. The revised act is reasonably calculated to help prevent interstate commerce from contributing to this problem because it bans the very aspect of the problem that results from interstate commerce—the possession in schools of guns that have moved in interstate commerce. The act therefore accomplishes a purpose that on a purpose-based view should be considered within the commerce power.

2. Primary v. Secondary Purposes

The objector might make two further objections to this argument. First, the objector may insist that even if preventing interstate commerce from contributing to guns in schools is a purpose of the revised act, it is a secondary purpose; the real or primary purpose is simply to combat guns in schools. (This argument is related to the claim that any Commerce Clause purpose to the revised act is "purely pretextual." ) Second, even if the purpose of preventing interstate commerce from contributing to the problem of guns in schools is a purpose of the revised act that is appropriately advanced within the commerce power, the prohibition in schools of guns that have ever moved in interstate commerce is too tenuously linked to that purpose.

The idea that a statute should be within the commerce power only if its primary purpose is a commerce purpose is easily countered. So long as a statute is reasonably calculated to achieve a

59. 228 U.S. 115 (1913).
60. Id. at 135.
61. *Hearings, supra* note 9, at 4 (statement of Professor Barry Friedman).
Commerce Clause purpose, it should not matter that Congress had other purposes, even more prominent purposes, having nothing to do with interstate commerce. First, there may often be no fact of the matter as to which of Congress's purposes are primary or principal. A statute may be well calculated to accomplish several aims at different levels of generality, and there may be no reason to hold that one of those aims is more genuinely or dominantly the statute's purpose. Second, partly as a result of this first point, the inquiry into what is the principal or primary effect of a statute is inherently subject to manipulation. Third, since whether a purpose, in the relevant sense, is primary or secondary depends on how well calculated the statute is to achieve that purpose as opposed to other purposes, a doctrine that a statute with a perfectly acceptable commerce purpose was not within the commerce power because of other purposes that the statute was more precisely tailored to accomplish would impose something like the narrowly tailored requirement of strict scrutiny on Commerce Clause enactments. Such a doctrine would greatly restrict legislative decision making, effectively empowering the courts to review legislative decisions for their effectiveness in promoting commerce power goals.

62. The discussion above suggests a potential reinterpretation of Supreme Court doctrine in a way that would incorporate some consideration of congressional purpose. As reformulated, the doctrine would be that the statute must have at least some ancillary purpose that is within the purposes for which the commerce power was granted. This interpretation would modify, but would not fundamentally change, the current doctrine, that the Court will not inquire into whether the statute's purpose is within the purposes for which the commerce power was granted in deciding whether a statute is within the commerce power. The modification would be that, while the primary purpose of the statute (assuming it is not independently illegitimate) has no bearing on whether the statute is a legitimate exercise of the commerce power, the statute must still have some purpose that is within the purposes for which the power was granted. This interpretation would both maintain the appeal of the purpose-based doctrine that Congress should not be able, under the Commerce Clause, to enact statutes that do not have a purpose for which the commerce power was granted, and avoid the problems with the doctrine that a statute's primary purpose must be a commerce purpose. The interpretation would make sense of the Court's insistence that the fact that a statute has a purpose that Congress is not authorized to pursue is irrelevant to whether the statute is valid under the commerce power. This insistence could be premised on an assumption that the statute has some other, authorized purpose. And this interpretation would make sense of Holmes's notion of a statute's being "apart from that purpose... within the power of Congress." *Hammer*, 247 U.S. at 277-78. Thus, the doctrine as reformulated would be not that Congress's purpose does not matter if Congress has power, determined independently of purpose, but that Congress's other purposes do not matter if Congress is trying to accomplish some purpose that is within the commerce power.
Moreover, even leaving aside the theoretical problems with the primary purpose objection, its application to the revised act seems strained. As noted above, a purpose-based view would have to sanction the use of the commerce power to prevent interstate commerce from being a cause of a health and safety problem. Thus, if the primary purpose that the objector identifies—to combat the problem of guns in school—is an acceptable purpose, because interstate commerce is a cause of the problem. So even if in general a statute is within the commerce power only if its primary purpose is an appropriate interstate commerce purpose, the revised act is on firm ground.

There is likewise a straightforward answer to the second potential objection—that the link is too tenuous between the purpose (preventing interstate commerce from contributing to the health and safety problems caused by guns in school) and the statutory means of serving that purpose (making it a federal crime to possess guns in school). On the contrary, given the legislative options, preventing the possession of guns at the end of the interstate commerce stream is a fairly direct way to effectuate the statutory purpose. It would not be feasible or effective to police interstate borders in an attempt to seize the guns at the point of passage. In addition, since there is no way to know which guns are destined to wind up in schools, any such attempt to restrict guns from crossing borders would be exceedingly overbroad; it would be far more tenuously connected to the purpose than is the regulation of possession of guns in school (as well as incidentally sweeping in the guns whose subsequent possession is fully lawful). The most sensible focus of regulation is where the problem is actuated, at the point of possession in schools, rather than at the point of actual crossing.

Thus, objections premised on Congress’s purpose in enacting the revised act should not prevail. We may demur to the sense of critics that the statute, in the main, is “really” about preventing the possession of guns in school, not regulating commerce as such. As a doctrinal matter, what the statute is intended to accomplish is irrelevant to the inquiry of whether it is a valid exercise of the

63. See Hearings, supra note 9, at 6 (statement of Professor David Strauss).
64. Thus, the revised act is a fairly narrowly tailored attack on the problem of interstate commerce’s contribution to the presence guns in schools, although as noted, see supra note 60, there is no requirement of narrow tailoring to address a health and safety problem caused by interstate commerce.
commerce power. But even if an exercise of the commerce power required an acceptable Commerce Clause purpose, the purpose of combatting guns in school would satisfy that requirement.

C. The Criticism that the Fix Would Authorize a Limitless Commerce Power

A final important objection to the Gun-Free School Zones Act is that if the act is constitutional there remains no effective limit on Congress's commerce power. The revised act bases the use of the commerce power to regulate guns in school on the fact that the guns have crossed state lines. Almost every transaction involves some person or thing that has crossed state lines. Consequently, the objection goes, if Congress can, under the commerce power, regulate an activity merely because a person or thing involved in the activity has once crossed state lines, the commerce power is effectively transformed into a general police power.

The opinion in *Lopez* manifests that the Court felt the force of this objection.65 The concluding paragraph of the opinion begins, "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." 66

Critics of both the old and new acts argue that if Congress can, in the name of interstate commerce, regulate guns in school, then, given the interconnectedness of the modern national economy, there is nothing it cannot regulate under the Commerce Clause. As Professor Friedman urged in his Senate testimony in opposition to the legislative fix: "Just because something travels in interstate commerce should not, standing alone, justify congressional regulation... for almost everything travels in interstate commerce today." 67

Opponents illustrate the point with hypothetical statutes based on the movement of goods across state lines in which the goods

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66. 115 S. Ct. 1624, 1634 (1995). Similarly, the Court criticized Justice Breyer's dissent on the ground that his acceptance of the Government's rationale would place no limitations on Congress's commerce power: "Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate." Id. at 1632.
67. *Hearings, supra* note 9, at 5 (statement of Professor Barry Friedman).
are only trivially or incidentally related to the activity being regulated. At the Senate subcommittee hearing on S.890, for example, Senator Thompson posed the hypothetical of a statute that made it a crime to possess a gun any part of which, including the paint, had ever passed in interstate commerce. Such a statute likely would cover virtually every gun in the nation because some part or component of the gun would have originated in another state. Even more broadly, Professor Beale raises the specter that Congress could federalize any crime by passing a statute making it a federal offense to violate under any state law while wearing clothing that had ever passed in interstate commerce. If validated, the approach of basing Commerce Clause authority on interstate movement of an item that is only incidentally related to the regulated activity would permit commerce-power based regulation of nearly all behavior.

Another kind of example involves cases in which federal jurisdiction is premised on a movement of goods in interstate commerce that is vanishingly remote in time from the commission of the criminal offense. Typical is a hypothetical case in which a prosecution is brought under a federal firearms statute requiring that a gun have moved in interstate commerce, and the gun in question last crossed state lines decades before the alleged criminal violation. Although even opponents do not suggest there is a clean line, at some point the connection of the regulated activity to interstate commerce may seem too attenuated to ground Commerce Clause authority.


69. Contrary to what some commentators seem to assume, the mere fact that a Commerce Clause theory results in an extremely broad commerce power does not show that the theory is wrong. As the country changes, the scope of the commerce power changes, and nothing in the Clause appears to support a limit on what areas may be regulated if they become appropriately involved with interstate commerce. See Gibbons v. Ogden, 22 U.S. 1, 196 (1824) (Marshall, C.J.) (noting that the commerce power is "complete in itself . . . and acknowled[es] no limitations other than are prescribed in the Constitution"); infra. Part III.A. It is conceivable that the country may eventually become so economically interdependent that the commerce power would extend to all areas of activity (subject of course to other constitutional restrictions). In other words, what is wrong with the hypothetical paint and clothing statutes is not that they regulate activities that are necessarily outside the reach of the commerce power, but that they lack an appropriate basis to regulate those activities.
The objection is less an analytical attack on the act than an expression of queasiness about the prospect of an unlimited commerce power. The notion behind the objection is that the act can be validated only on a theory of Commerce Clause authority that leaves no room for a principled stopping place short of a general federal police power. The act could thus be defended on its own merits, as in Part II.A., by showing that the Court’s precedents make clear that the movement of a firearm in interstate commerce (at least if not too remote in time) is a sufficient basis for federal regulation of the firearm’s possession. Thus, since the act rests on a well-established source of Commerce Clause authority, the act could be upheld while leaving the problem of delineating the outer limits of the commerce power for another day. Even if the paint or clothing hypothetical would cross some as-yet undefined boundary because the connection between interstate commerce and the regulated activity is too attenuated, the act’s regulation of the possession of firearms that have crossed state lines is on the safe side of the line.

Although the act can be defended in this way, without providing an account of precisely how far the commerce power reaches, the theory of the commerce power on which the revised act relies does not imply an unbounded commerce power. The rest of this section clarifies the contours of the commerce power under this theory, in the process providing a fuller response to the objection.

The objection presupposes that the revised act depends on a theory of the commerce power according to which an item’s mere passage in interstate commerce provides a sufficient basis for regulating any transaction in which that item later makes an appearance. In other words, such regulation is valid no matter how attenuated or incidental the connection between the passage in interstate commerce and the regulated transaction.

Since the revision of the act simply adds a requirement of a passage in interstate commerce,70 it is understandable that the revised act might be taken to rest on such a theory. In fact, however, the theory behind the act is far more narrow and distinguishes the revised act from the objector’s hypothetical statutes. As developed below, the revised act is valid not because it regulates transactions involving items that once moved in interstate commerce

70. See supra note 18.
commerce but because it addresses a harm of which the movement of items across state lines is a cause. Whatever the outer limits on the commerce power, the use of the power to regulate harms of which interstate commerce is a cause is straightforward.71

The objector might here interject that in the case of the hypothetical statutes as well, the interstate movement is no less a cause of the harm because the harm would not have occurred but for the interstate movement. In the case of the paint statute, for example, the passage of the paint in interstate commerce might also be considered a cause of the gun's possession: had the paint never crossed state lines, the gun in question would not have been possessed, at least not in the form in which it was possessed, paint and all.72 On this view, the hypothetical statutes would in principle be indistinguishable from the revised act.

Such a position, however, relies on a special and exceedingly expansive notion of cause. Every occurrence has an indefinite number of necessary or "but-for" causes—events but for which the occurrence would not have taken place. For example, the but-for causes of a car accident might include the rain that made the road slick, the incident at work that delayed the driver, the telephone call a year before that brought the driver to the city, the birth of the driver's great grandparents, and so on. But-for causes not only reach back into the past, but include the unbounded number of conditions at the time of the occurrence without which it would not have taken place: for example, the absence of an immensely strong net that would have caught the car before it left the road.

Because but-for causation is so undiscriminating, it is typically not the most serviceable notion of causation. In ordinary contexts, for example, answering a question about the causes of a car accident with facts about the birth of the driver's great grandparents would be bizarre. It would be equally inappropriate in most instances to say that the availability of gasoline caused a car accident, or even that it was a cause of an accident, though no car

71. Putting this point within the terms of Lopez, a statute should be understood to regulate a person or thing in interstate commerce or the channels of interstate commerce—and thus to come within the categories of authority identified in the decision—whenever the interstate movement of the thing or use of the channels is a cause of the harm addressed by the statute.

72. Actually it is highly questionable whether the movements in interstate commerce of paint and clothing are "but-for" causes of the relevant harms within the best understanding of the notion of but-for causation. See infra note 77.
accident would happen without gasoline. As these examples illustrate, the ordinary, common sense notion of the cause of an occurrence is more discriminating than but-for causation. It is this familiar notion, and not mere but-for causation, that is employed by laypersons and lawyers in most contexts; it is what we normally mean by “cause.” Thus, the initial concern misses the mark by assuming a nonordinary notion of causation.

Although the ordinary notion of causation—the notion that the theory behind the revised act employs—is familiar and easily applied in most cases, it is notoriously difficult to articulate with complete precision the implicit standards according to which we apply that notion. There is in fact an extensive philosophical literature on the question, which largely concludes that it may not be possible to specify these standards fully. One reason for this difficulty, as the literature outlines, is that what counts as an ordinary cause, as opposed to a mere but-for cause, depends on the purposes and context of the inquiry. For example, when a forest fire breaks out, the appropriate answer (for most ordinary purposes and in most contexts) to the question of what caused the fire is the carelessly tossed cigarette rather than the presence of oxygen, despite the fact that the presence of oxygen is no less a but-for cause of the fire.

Since the ordinary notion of causation is purpose- and context-dependent, application of the notion will inevitably turn on judgment and experience; there is no formula that can be used to mechanically generate answers to questions about causes. Relatedly, it is inevitable that there will be borderline cases in which the determination of causation will be open to debate. No one suggests, however, that the notion is consequently useless or empty. In fact, we request and provide causal explanations all the time, in legal, academic, and policy discussions as well as in everyday life. Moreover, the law in particular regularly employs notions—for example, voluntariness, or prejudice, or negligence—that are plainly meaningful and readily applied in most cases even though they are difficult to apply in borderline cases. The absence of a mechanical formula for determining whether an event is a cause of another occurrence is no great problem because we share a sufficiently

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clear understanding of the ordinary notion to apply it determinately in a wide range of cases and to know what kinds of considerations cut for and against its application in other cases. That is, we must implicitly grasp fairly determinate, though difficult to specify, standards for applying the notion. If we did not, there would not be general agreement in most circumstances on what is or is not a satisfactory causal explanation, and the ordinary notion of causation would not be as useful as it is in so many contexts.

Returning to the question of the use of the commerce power to regulate transactions involving items that have moved in interstate commerce, the paint and clothing statutes are premised on movements in interstate commerce that are not generally causes of the relevant harms. In fact, it is likely that the hypothetical statutes seem so glaringly inappropriate precisely because the movement of paint or clothing in interstate commerce is not a cause of the prohibited conduct. It is questionable, in the first place, whether the movement of the paint or clothing can even properly be characterized as a but-for cause of the harm. In any event, regardless of the outcome of the but-for analysis, the movement in interstate commerce of the paint and clothing are not causes of the regulated conduct. In the case of the paint statute, it is scarcely plausible to maintain that the movement of paint in interstate commerce is a cause of the possession of guns. The objection thus relies on a false analogy: the infirmity of the paint

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75. It would be possible to frame crimes for which the movement of the clothing was a cause in the ordinary sense of the term—for example the theft and transport of the clothing itself or, perhaps, the use in an armed robbery of special bulletproof clothing manufactured only in one state. Similarly, there would be some crimes—for example, the defacement of public property with spray paint—for which the interstate transport of the paint could well be a cause of the conduct. Such hypothetical applications only serve, however, to illustrate the important distinction between an interstate movement of goods that is a cause of the relevant harm, as opposed to one that is only incidentally related to it.

76. Even if congress used its Commerce Clause authority to ban the interstate passage of paint, for example, the very same guns could end up in school without paint or with paint produced within the state. In contrast, but for their passage across state lines, guns manufactured in other states could not be brought to school.

The determination of whether an event is a but-for cause is not always straightforward. The question a but-for standard poses is basically: would the event still have happened if everything had happened just as it did except that the putative but-for cause did not occur. The difficulty is that in answering that question it may matter greatly why the putative but-for cause did not occur. There are innumerable possible explanations, and since there are no clear standards for choosing which explanation is the pertinent one, the but-for analysis can present a vexing intellectual puzzle.
and clothing statutes does not imply a similar infirmity in the revised act. The interstate commerce in guns is certainly a but-for cause of the harm—the possession of guns in school—that Congress seeks to address because guns that originated in other states would not be where they are if it were not for the interstate movement of guns. Most guns are manufactured in one of two states and are then shipped to other states. More to the point, few would deny that the interstate traffic in guns is a cause in the ordinary sense of the problem of guns in schools. None of the objectors, in fact, contest that point. Rather, they assume that the basis of the revised act is the mere fact of an item’s movement in interstate commerce and thus do not even address the critical causation distinction between the revised act and the hypothetical statutes.

Thus, the hypothetical paint and clothing statutes are distinguished from the revised act because, unlike the interstate commerce in guns, the interstate commerce in paint and clothing are not causes of the possession of guns in schools. The case of the gun that last moved in interstate commerce a century ago is more difficult. The movement of a gun across state lines that long ago is, no less than its movement last month, a but-for cause of its possession in the receiving state today: the possession would not have come about but for the passage into the receiving state. But where the passage is so removed from the regulated behavior, the responsibility of interstate commerce for the harm is tenuous, in part because of the expanse of intervening but-for causes. At some point, the connection between interstate commerce and the harm might become too attenuated for interstate commerce to be considered a cause of the harm, and, at that point, the passage in interstate commerce would not support congressional authority to regulate under the Commerce Clause. As a doctrinal matter, the recognition of such a limitation would, of course, entail revisiting the conclusion of Scarbourough that the commerce power permits regulation of a gun that has passed, however distantly, in interstate commerce. More important for present purposes, the limitation would not threaten federal regulation of guns in schools because it would cover only the odd case in which the gun last crossed state lines a particularly long time before the possession in school. It therefore would not call into question the facial validity of a provision such as the revised act; rather, it would at most threaten the application of the statute in a very few extreme cases.
An analogy to common law principles of liability is useful. A punctilious reliance on but-for causation would identify for any injury an indefinite number of actual causes.\textsuperscript{77} Tort law excludes overly remote but-for causes from legal responsibility for injury through the notion of proximate cause. Thus, tort law requires as a condition for recovery in negligence that the negligent act be not only the but-for cause of the plaintiff's injury but also the proximate cause.\textsuperscript{78} Attempts to give a precise definition or mechanical formula for the notion of proximate cause have been unsuccessful\textsuperscript{79} in part because the notion draws on ordinary notions of causal responsibility. The notion is nevertheless readily applied in the run of cases, and few would contend that it was meaningless.\textsuperscript{80}

In sum, the legislative fix does not rest on a theory of the commerce power that would render it boundless. The outlandish exercises of federal power that critics contend would be authorized were the fix to be upheld are readily distinguished because, in contrast to the legislative fix, they are based on movements in interstate commerce that are not causes of the relevant harm. Even if the new act potentially could be applied to some cases in which the interstate commerce connection is too attenuated for interstate commerce to be a cause of the harm, that possibility does not call into question either the overall constitutionality of the new act or the soundness of the theory of commerce power on which it rests.

\textbf{III. Lopez, Federalism, and the Federalization Debate}

Many commentators have sounded a broader theme in assessing the meaning and impact of \textit{Lopez}, discerning beneath the surface of the Court's opinion a growing frustration with congressional en-

\textsuperscript{78} See \textsc{Restatement (Second) of Torts} § 432 (1986).
\textsuperscript{79} "Proximate" is defined in the tort law as a major or substantial cause, the cause that "stands next in causation to the effect, not necessarily in time or space but in causal relation." \textsc{Black's Law Dictionary} 1225 (6th ed. 1990); \textit{see also Restatement (Second) of Torts} § 432 (citing cases that require cause be a "substantial factor" in producing the injury rather than contributing "only slightly" to the result).
\textsuperscript{80} In fact, the lack of a precise formulation and the existence of difficult cases are less problematic in Commerce Clause jurisprudence than in tort law. The notion of proximate cause in tort law, though it plainly draws heavily on the ordinary notion of causal responsibility, is a technical legal notion and thus allows greater scope for argument that it should take into account policy theories about what causes should be held responsible for particular injuries.
croachments on traditionally state areas. They view the decision as only superficially about the commerce power, and more profoundly about basic values of federalism. We first argue that *Lopez* cannot be understood as a decision about federalism. Then, leaving aside the question of how best to understand the Court’s decision, we consider some of the more prominent arguments that the act and similar federal criminal legislation in traditionally state areas are unwise and inappropriate uses of congressional power. We focus, in particular, on recent expressions of concern from the federal judiciary that federal criminal legislation is swamping the federal courts with inappropriate cases and preventing the federal courts from carrying out their important traditional functions.

**A. Lopez as a Decision about Federalism.**

A number of commentators have suggested that the chief significance of *Lopez* lies not in what it holds for the commerce power, but in what it augurs for Court’s approach to federalism. Professor Brickey, for example, drawing on a footnote in the Court’s opinion, asserts that “[s]ounding strong federalism themes, [Lopez] is a reminder that, contrary to contemporary thought . . . states have primary authority to define and enforce criminal laws, and that much of what Congress has prioritized needlessly alters the balance between federal and state jurisdiction.”81 Similarly, Professor Kramer argues that the reason the Court rendered the *Lopez* decision is that “the Court worried that Congress had been neglecting its responsibility to safeguard federalism. [Lopez] is] a plea to take federalism seriously.”82 Even those commentators who do not see *Lopez* as primarily a case about federalism still tend to see federalism as an important theme in the case.

81. Brickey, supra note 8, at 842-43 & n.258.
82. See *Hearings*, supra note 9, at 11 (statement of Professor Larry Kramer); see also Frickey, supra note 10, at 729 (noting that *Lopez* “could promote a meaningful dialogue . . . concerning important constitutional values of . . . federalism”); *Hearings*, supra note 9, at 1 (statement of Professor Barry Friedman) (noting that the Commerce Clause would not reach even the new act “because the regulation of guns in and around schools is a job properly allocated to state and local governments, and thus is beyond the power of the national Congress”) (emphasis added); Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 802-05, 810-13 (1995). Professor Calabresi hails *Lopez* as a rare example of the Court’s determination that an activity falls outside the reach of the commerce power because of the “historical and normative case that suggests that education and local law enforcement are functions that we do well to leave to the states.” Id. at 803.
Commentators who portray the *Lopez* decision in federalism terms can find some support for their view in the various opinions in the case. Most notably, the concurrence of Justice Kennedy, appears to argue that the act is beyond the commerce power in part because it interferes with a traditionally state concern:

The [act] forecloses the States from experimenting and 'exercising their own judgment . . . and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term . . . [Therefore] [w]hile the intrusion on state sovereignty may not be as severe in this instance as in some of our recent Tenth Amendment cases, the intrusion is nonetheless significant. Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed.⁸³

In addition, Chief Justice Rehnquist's opinion for the Court itself included a notable aside about federalism, appending to the statement that the act "by its terms has nothing to do with 'commerce'" a footnote stressing the states' "primary authority for defining and enforcing the criminal law."⁸⁴ The footnote, moreover, appears at the pivotal point in the opinion, where the Court declares that the act "by its terms has nothing to do with 'commerce.'"⁸⁵

Notwithstanding these passages, the commentators' interpretation cannot be accurate: although the opinions contain bromides on the subject of federalism, as a matter of doctrine *Lopez* cannot be about federalism values in the sense in which the commentators are suggesting. A closer examination of what it might mean for a decision to be about federalism reveals the problem with the commentators' interpretation.

In a broad, weak sense of federalism, a decision holding that the commerce power does not authorize a particular statute is a federalism decision. To say that such a decision is a federalism decision in this broad sense, however, is merely to say that it is a

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84. Id. at 1631 & n.3 (quoting Brecht v. Abrahamson, 113 S. Ct. 1717, 1720 (1992)); see supra Part II.B.
85. 115 S. Ct. at 1631.
decision about the reach of federal power; every decision construing an enumerated federal power is equally "about federalism." Thus, any decision interpreting the Commerce Clause—or any other grant of power to the federal government—is, in this broad sense, a federalism decision. To characterize the decision as about federalism in this sense, therefore, is simply to restate the straightforward fact that the decision construes an enumerated federal power. That does not necessarily make the description inaccurate, but it does make it uninteresting since it says nothing in particular about the actual decision or federalism doctrine. Commentators claiming that *Lopez* rests on federalism grounds must be understood as saying more than that the decision concerns the reach of federal power.

In a more pointed and useful sense, federalism concerns the entrustment of certain matters to state and local government. A classic federalism decision—*City of New York* is a good example—would be one that declared certain matters to be constitutionally entrusted exclusively to the states. Such a decision is typically based on federalism values, such as the benefits of state and local control over certain areas and the correlative benefits of

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86. Tangential references to federalism in the broad sense can be found in several of the Court's Commerce Clause decisions. For example, in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court admonished that the commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." See *Lopez*, 115 S. Ct. at 1628-29 (quoting this language). And *Lopez* itself concludes with the statement that to uphold the Gun-Free School Zones Act "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local." *Id.* at 1634 (citation omitted). Read in their contexts, these comments are merely restatements of the fundamental but uncontroversial principles that the federal government is a government of enumerated powers, that it would be inconsistent with the system of enumerated powers if the federal government were able to exercise powers other than those enumerated, and that an underlying presupposition of the system is that some powers remain with the states. See *Gibbons v. Ogden*, (9 Wheat.) 1, 194-95 (1824) (Marshall, C.J.) (noting that the enumeration of certain powers presupposes the reservation of some powers to the states). These principles are not in tension with Marshall's famous characterization of the commerce power in *Gibbons* as "complete in itself . . . and acknowledging no limitations other than are prescribed in the Constitution." *Id.* at 196.

restricting the federal government to its proper limited realm. It is clear from their discussions that many commentators do indeed see Lopez as a federalism decision in this narrow sense.  

The flaw in characterizing Lopez as a federalism decision in the narrow sense is that the decision rested exclusively on Commerce Clause grounds, and the Commerce Clause is plainly not a limitation on federal power or a source of state power at all. For one thing, that a congressional enactment is not within the commerce power does not establish that it is not within some congressional power. So the determination whether something is not within the commerce power is different from the determination of whether something is outside the reach of federal power; the fact that the commerce power is limited should not be confused with the idea that the Commerce Clause limits Congress’s power.

More fundamentally, the Commerce Clause test on which the decision in Lopez turned—whether the regulated activity has a substantial effect on interstate commerce—does not appeal to federalism values. The issue is not, for example, whether the activity is integral to state and local government function or whether local experimentation in the area would be effective. This is plain from the Court’s decisions sanctioning the expansion of the scope of the commerce power, as the national economy has expanded, into areas that were previously within exclusively local control. These decisions have approved the swelling commerce power, without regard to the benefits of state and local control, on the basis that previously local activities have become more integrated in the national economy. Indeed, nothing in the Court’s Commerce Clause precedents or the clause itself prevents Congress’s power from extending to any activities that interstate commerce comes to encompass.

88. According to Professor Friedman’s interpretation of Lopez, for example, even the revised act would be outside the scope of congressional authority “because the regulation of guns in and around schools is a job properly allocated to state and local governments, and thus is beyond the power of the national congress.” Hearings, supra note 9, at 1 (statement of Professor Barry Friedman); see also id. at 3. Professor Brickey sees the “real significance” of Lopez as a message that the act, like many other recent federal criminal laws, “federalized a local crime” without regard to the importance of decentralized solutions to crime problems and without regard to the effect on the federal courts. Brickey, supra note 8, at 839 (emphasis added). Moreover, Brickey, like other commentators, groups Lopez with genuine federalism decisions from the Court that delineated limits on the power of federal courts vis-a-vis state courts. See id. at 842 n.247 (citing Wilton v. Seven Falls Co., 115 S.Ct. 2137 (1995) and Growe v. Emison, 113 S. Ct. 1075 (1993)).
Of course, the Commerce Clause’s grant of power to Congress may have to be reconciled with any constitutional provision, most significantly the Tenth Amendment, that is interpreted to limit federal power by providing an exclusive grant of power to the states. But that possibility, which is true of any federal legislative power, is far from the proposition that the Commerce Clause itself establishes or incorporates an exclusive grant of power to the states. A decision that the Commerce Clause states a limitation on federal power—that is, places an area beyond the reach of the federal government, even under, for example, the Spending Clause—would be a startling and unprecedented reading of a clause that is plainly an affirmative grant of power.89

But even if Lopez should not be characterized as a federalism decision, the decision does mark a milestone in an ongoing debate

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89. There is a possible third, intermediate sense in which a decision could be about federalism. According to this sense, even if a decision does not involve entrustment of an area to the states, a decision would still be a federalism decision if it takes into account federalism values, such as the benefits of local control, in interpreting the reach of a federal power. For example, in the area of habeas corpus, the Court has taken account of federalism interests in comity and finality in interpreting the general congressional commands to entertain applications on behalf of persons held “in custody in violation of the Constitution” and to dispose of the writ “as law and justice require.” 28 U.S.C. § 2254, 2243 (1994); see, e.g., Stone v. Powell, 428 U.S. 465, 493-94 (1976) (holding, in part on ground of comity, that habeas relief may not be granted based on a Fourth Amendment claim as to which the state has provided a full and fair hearing). Interestingly, the footnote in Lopez that expressly invoked federalism concerns quoted a habeas corpus case, Brecht v. Abrahamson, 113 S. Ct. 1710 (1993), in which the Court announced a different harmless-error standard on habeas than applies on direct appeal. Thus, even if the Commerce Clause itself does not foreclose federal power’s extending to any particular activity (were the activity to become sufficiently integrated with the national economy), a decision interpreting the clause could still be interpreted as a federalism decision if federalism values are factors relevant to the determination whether an activity is within the commerce power. This idea provides a possible way of understanding Justice Kennedy’s suggestion in his concurring opinion in Lopez that the act is invalid because the intrusion on state sovereignty was too significant “[a]bsent a stronger connection or identification with commercial concerns.” 115 S. Ct. at 1642.

The problem with interpreting Lopez as a federalism decision in this third sense is twofold. First, the Court makes clear that the case turns on the substantial effects test, and nothing in the Court’s Commerce Clause precedents supports the idea that an effect on interstate commerce that would otherwise count as substantial would not if the activity regulated is within a traditional state area. Second, and relatedly, there is no apparent connection between the question whether a regulated activity is interstate commerce or substantially affects interstate commerce and the question whether the regulation frustrates state experimentation or otherwise impinges on federalism values. If the revised Gun-Free School Zones Act is valid so long as it regulates interstate commerce, it is difficult to see what work federalism values might be doing.
about the proper reach of the federal criminal law, and that debate
certainly turns in part on federalism values. Thus, in addition to
the writers who read the Lopez decision in federalism terms, many
others criticize the original and revised acts on federalism
grounds. Thus, the result (if not the reasoning) in Lopez, read in
the context of the ongoing federalization debate, does present an
occasion for renewed reflection on the proper reach of the federal
criminal law. In the context of this broader debate, the decision in
Lopez struck many commentators as salutary for helping to effect a
more appropriate allocation of law enforcement responsibility be-
tween the federal and state governments. For those commentators,
the Gun-Free School Zones Act was an inappropriate exercise of
federal power in an area best left to the states. These criticisms are
representative of those launched generally against federal criminal
legislation in traditionally local areas. Given the apparently contin-
ing trend in Congress to expand the reach of the federal criminal
law, it is important to consider exactly why commentators think
legislation such as the Gun-Free School Zones Act offends fed-
eralism values. The next section appraises several of the arguments
that have gained wide currency in the federalization debate.

B. Federalism Criticisms of Act

The Gun-Free School Zones Act is often grouped with other
federal criminal legislation passed in recent years regulating con-
duct in traditionally state areas. Like the act, statutes such as the
Child Support Recovery Act of 1992, the Violence Against
Women Act of 1994, and the federal carjacking statute establish concurrent federal criminal jurisdiction over conduct historically regulated exclusively by the states. The federalization of

90. See infra notes 101-04 and accompanying text. Some such critics, while
recognizing explicitly that federalism grounds cannot serve to invalidate the Gun-Free
School Zones Act, rely on those grounds to argue that the act and similar legislation are
unwise uses of federal power. See, e.g., Hearings, supra note 9, at 1, 8 (statement of
Professor Larry Kramer); Sanford H. Kadish, Comment: The Folly of Overfederalization,
46 HASTINGS L.J. 1247, 1248-49 (1995) (arguing that federalizing local crimes subverts federalism values and wastes resources).
94. For reasons discussed below, see infra text accompanying notes 108-110, it is best
to address federal drug legislation separately from other recent statutes establishing concur-
crime has generated considerable debate in both the political and scholarly arenas. Most of the arguments on both sides of the federalization debate have been well-canvased in the literature.

We focus here on three claims that figure prominently in the debate, but that have been the subject of relatively little critical evaluation.

First, critics argue that the act will be utterly ineffective because enacting federal criminal legislation is a futile way to address local “street” crime. Professor Friedman emphasizes this point:

What is most troubling about this legislation is that it offers little hope at all for helping with the terrible gun problem in our schools. . . . The act offers no federal resources to help keep guns out of schools or detect them when they are there. There have been very few prosecutions under the federal act.

Professor Kramer makes a similar argument in support of his claim that the usual justifications for federal action are not present: “[T]he FBI is not about to start posting its agents around the more than 100,000 schools in this country,” so “adopting [this law] won’t help.” Relatedly, critics suggest that the Gun-Free School Zones Act and other recent federal criminal laws were enacted merely for short-term political gain and are not seriously intended to address local crime problems.

rent federal jurisdiction over traditionally state crimes.

95. See, e.g., George Allen, A Federalist Perspective on the Crime Problem, 4 CORNELL J.L. & PUB. POL’Y 535, 535 (1995) (arguing that state governments are best situated to develop crime control mechanisms).

96. The authors have been active participants in the debate, laying out and defending a theory of concurrent federal criminal jurisdiction according to which Congress may appropriately create a new federal crime when the federal government has a comparative advantage in handling some specific aspect of a crime problem that the states are not fully able to address. See Gorelick & Litman, supra note 14; Harry Litman & Mark D. Greenberg, Dual Prosecutions: A Model for Concurrent Federal Jurisdiction, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72 (1996).


98. Hearings, supra note 9, at 6 (statement of Professor Barry Friedman).

99. Hearings, supra note 9, at 10 (statement of Professor Larry Kramer); see also Kadish, supra note 90, at 1249 (“[F]ederalizing street-type crimes . . . requires the kind of on-site policing that the federal criminal system has never been any good at.”).

100. See Hearings, supra note 9, at 7 (statement of Professor Barry Friedman); Allen,
Second, critics of the act argue that it, as well as other recent federal criminal legislation, impinges on core federalism values. They assert that the act invades core state functions;\textsuperscript{101} interferes with state efforts to address the problem of guns in school by thwarting state and local experimentation;\textsuperscript{102} and harms democracy by transferring responsibility to the less responsive and accountable federal government.\textsuperscript{103}

Third, commentators charge that the recent legislation is swamping the federal courts with local criminal matters. According to Professor Brickey, for example, "[t]his trend [of federalizing local crime] has had profound implications for the federal justice system. The federal courts are overwhelmed with criminal cases."\textsuperscript{104} This claim of swamping the federal courts is the most widely heard and strenuously made objection to the new federal criminal legislation.\textsuperscript{105} The federal judiciary has itself been one of the most prominent proponents of this objection.\textsuperscript{106} And the many critics who echo the judges' objection tend to rely heavily on the pronouncements of judges and judicial bodies.\textsuperscript{107}

\textsuperscript{101} See, e.g., Frickey, supra note 11, at 721.

\textsuperscript{102} See, e.g., Hearings, supra note 9, at 7 (statement of Professor Barry Friedman); \textit{id.} at 10-11 (statement of Professor Larry Kramer) (citing \textit{Lopez}, 115 S. Ct. at 1624, 1641 (1995) (Kennedy, J., concurring)).

\textsuperscript{103} See Hearings, supra note 9, at 9-10 (statement of Professor Larry Kramer); Calabresi, supra note 82, at 803; \textit{cf.} Hearings, supra note 9, at 7 (statement of Professor Barry Friedman) (stating that the consequence of statutes such as Gun-Free School Zones Act is that citizens are led to believe this is a problem that can and should be solved in Washington).


\textsuperscript{106} See William H. Rehnquist, 1993 Year-End Report on the Judiciary, reprinted in \textit{26 THE THIRD BRANCH} 1, 3 (1994); COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS, 22 (Mar. 1995) [hereinafter COMMITTEE ON LONG RANGE PLANNING]. See generally, Brickey, supra note 8, at 839-42 (citing reports by prominent judicial groups).

\textsuperscript{107} See Kadish, supra note 90, at 1230-51 (quoting judicial commentary).
C. Responses to Federalism Objections

There is a fundamental flaw in the federalism criticisms of the act and of other recent federal criminal legislation in traditionally state areas. The flaw stems from a failure to take account of how the federal criminal legislation is designed to address local crime. Contrary to the implicit assumption of these criticisms, the act and other recent legislation in traditionally state areas do not supplant state criminal legislation and bring vast numbers of local crimes into federal court. Rather, the legislation merely creates concurrent federal jurisdiction, making federal prosecutions possible in select cases where the need for a federal response is difficult to deny. Both by design and in practice, federal prosecutions occur in only a tiny fraction of the cases covered by the federal criminal legislation.

At the outset, it is important in assessing federalism objections to recent legislation to address drug laws separately from other statutes establishing concurrent federal jurisdiction in traditionally state areas. There are strong reasons why drug legislation is a singular case from which no general conclusions about the wisdom of federalization can be drawn. The discussion in this subsection addresses objections to the federalization of crime in general (i.e. as these objections relate to legislation other than the federal drug laws). First, drug cases constitute a substantial portion of the criminal cases in the federal courts; the number of prosecutions for violations of federal drug laws dwarfs the number of prosecutions under the other statutes at issue in the federalization debate. For that reason, to base general claims about federalization on the impact of drug laws would severely misrepresent the effects of the other legislation.\(^{108}\) The point is not that federal drug legislation

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\(^{108}\) For example, one claim often voiced by critics of federalization is that the federal statutes creating concurrent federal jurisdiction over traditionally state crimes are swamping the federal courts, impeding them from fulfilling their important other functions. See infra text accompanying notes 140-41. Since drug cases constitute such a large proportion of the federal docket, the effect of federalization in general cannot be properly evaluated unless the effects of non-drug legislation are separately analyzed. Even if the federal courts were swamped, it would tell us little about the effect of federalization in general if the drug laws were themselves almost solely responsible for the swamping. To assert that the recent federal legislation, including the drug laws, is swamping the federal courts without segregating the particular effects of the federal drug laws is something like asserting that heart disease, lightning, and snakebites kill hundreds of thousands of people every year.
is wise or effective but that the criticisms of it need to be separat-
ed from criticisms of the other federal criminal legislation. Otherwise, the effects of federalization will be judged simply by the effects of the federal drugs laws. Second, and relatedly, drug laws present a special case because of the national focus on drugs and the exceptionally strong political consensus to attack drugs at the national level. Thus, federalism-based arguments against national drug laws are not only assailable but largely academic, since there is no reasonable prospect of significant opposition to those laws in Congress.

As we have elaborated elsewhere, federal criminal legislation is appropriate when the distinctive attributes of the federal government—for example, its interjurisdictional reach and its specialized investigative resources—put it in a qualitatively better position than the states to handle a specific aspect of a problem of national dimension that the states are not fully able to address. For example, a particular criminal enterprise may spread across numerous states in a way that makes it difficult for any one state to investigate and prosecute, or a particular crime may raise issues that are so sensitive locally that effective prosecution requires the independence of the federal courts. It is often impossible to draft a statute in a way that includes only those crimes that are sophisticated, interjurisdictional, or sensitive enough to require a federal solution. In order to allow sufficient flexibility

109. Nevertheless, although we set aside drug legislation for the reasons given in the text, the responses to the federalism objections apply in large part to the criticisms of federal drug laws.

110. Indeed, some strong proponents of federalism insist on an even more expansive role for the federal government in the area of drug interdiction. The 1996 Presidential election provides a case in point. During the campaign, Senator Dole in a number of speeches combined tributes to the Tenth Amendment and federalism with calls for an expanded federal role in the war on drugs, featuring the domestic use of the U.S. armed forces. See, e.g., Bob Sipchen, Dole Assails Clinton’s Record in War on Drugs, L.A. TIMES, Aug. 26, 1996, at A10. See also, Peter Slevin, Clinton, Dole Differ Sharply on Strategy to Battle Drug Abuse, RALEIGH NEWS & OBSERVER, Aug. 31, 1996, at A4 (describing Dole’s “appeal for a wider Pentagon role” in the war on drugs).


112. The federal government’s position is qualitatively (as opposed to merely quantita-
tively) better than a state’s position when the federal government’s investment of a certain amount of resources would be more effective than a state’s investment of the same amount of resources.
to bring a federal prosecution when an aspect of a law enforcement problem requires it, federal criminal legislation inevitably will have to be overinclusive. It will have to be drafted in a way that includes criminal activities that state and local criminal justice systems can adequately address, as well as activities that they cannot. Federal prosecutors and other law enforcement agencies, in cooperation with state law enforcement, can then select from the many cases covered by both federal and state criminal legislation the cases in which federal prosecution would be most appropriate. This is the regime for nearly all legislation establishing concurrent federal criminal jurisdiction, including legislation to which few would raise federalism objections.\footnote{113}

Not only is it very difficult to frame federal legislation so that it reaches only crimes that are uncontroversially appropriate for federal prosecution, it also is unnecessary to do so in order to safeguard federalism values. Principles governing the exercise of prosecutorial discretion—implemented in cooperation with state and local authorities—can both protect federalism values and selectively target federal efforts where they can best complement the efforts of local authorities.\footnote{114} Federal prosecutors—who are better situated than Congress to evaluate the circumstances of particular cases—can and should exercise discretion with an eye towards ensuring that cases remain in the state system unless they present exceptional circumstances that rebut the general presumption in favor of

\footnote{113. A good example is federal civil rights legislation. See 18 U.S.C. §§ 241, 242, 245 (1994). The state often will have concurrent jurisdiction in civil rights cases, either under traditional statutes criminalizing battery, harassment, etc., or, more typically in recent years, under the state's own civil rights laws. See, e.g., CAL. PENAL CODE § 422.6 (West 1988 & Supp. 1997).}

\footnote{114. For a discussion of specific principles to govern the exercise of state-federal concurrent criminal jurisdiction, see Litman & Greenberg, Reporters' Draft, supra note 111, at 1328-38. Note that the selection for prosecution of a small fraction of potential cases is not inconsistent with congressional intent; given the potential breadth of much if not most federal criminal legislation, see, e.g., infra note 125, Congress must be considered to legislate with the expectation of highly selective exercise of discretion. See Gorelick & Litman, supra note 14, at 973. C\textsuperscript{f}. Dan M. Kahan, Is Chevron Relevant to Federal Criminal Law? 110 HARV. L. REV. 469, 479-81 (1996) (arguing, and decrying, that Congress, by routinely underspecifying elements of criminal legislation, implicitly delegates lawmaking authority that is exercised by prosecutors as well as courts).}
state prosecution. They should do so, moreover, in cooperation with state and local authorities.

It is a fact, rarely recognized much less confronted by critics of federalization, that state and local authorities frequently have welcomed a cooperative federal presence in the few cases in which they are unable to provide a fully effective response. (Indeed, Department of Justice policy specifies that if a local prosecutor objects to a federal prosecution, the prosecution cannot go forward unless the United States Attorney's office takes the extraordinary step of obtaining the approval of the appropriate Assistant Attorney General.) Thus, the federal contribution to local crime problems consists of broad legislation supplementing state legislation in certain traditionally state areas and highly discriminating prosecutorial discretion. This combination can reinforce state law enforcement efforts without sacrificing state and local control over most local crime and without overwhelming the federal courts with local criminal matters.

115. In theory, and laying aside separation of powers concerns, Congress could pass legislation prescribing standards to govern the exercise of prosecutorial discretion specifying which kinds of cases should be brought in federal court. There are institutional reasons, however, why the executive branch is far better suited to the task. See Litman & Greenberg, supra note 96, at 83 n.29 (citing, for example, Congress's relative lack of expertise in determining prosecutorial standards). The important point for present purposes, however, is that our response to federalism objections to the creation of new federal crimes does not imply that only federal prosecutors can appropriately attend to federalism values.

116. The Reporters' Draft for the Working Group on Federal-State Cooperation notes the perception of state and local prosecutors that cooperation with federal law enforcement is valuable and describes the mechanisms that have given rise to the strongest and most constructive working relationships. See Litman & Greenberg, Reporter's Draft, supra note 111, at 1319-27. The testimony before the Senate subcommittee included more personal accounts of the value to state and local officials of legislation such as the revised act. A high school principal in Milwaukee, for example, testified, "I do not care whether someone who brings a gun into school is prosecuted under a state law or a federal law. I just want them prosecuted. . . . Having it said by the federal government makes a difference. When I tell kids it is a federal crime, it gets through to them. . . . You should not underestimate the importance of your role." Hearings, supra note 9, at 4 (statement of Robert Nelson). Similarly, the national legislative chair of the Fraternal Order of Police, noting the rise in violent crime in some schools testified, "[O]n a more practical level and speaking solely from a law enforcement perspective, both state and federal laws making it a crime to bring guns into the schools will help. State prosecutors will presumably use these statutes more often than their federal counterparts—but local district attorneys can refer some prosecutions to U.S. Attorneys when doing so makes sense." Id. at 3 (statement of Don Cahill).


118. For more detailed development of this idea, see Gorelick & Litman, supra note 14,
The facts behind the decision to bring a federal prosecution in the Lopez case provide an instructive case study. A number of critics of the Gun-Free School Zones Act hold up the prosecution in Lopez as a paradigm of intrusive and capricious federal prosecution of a pedestrian local crime. The actual background to the prosecution, however, illustrates precisely the opposite: a selective federal response welcomed by local authorities and designed to exploit a federal comparative advantage in a very small number of relatively serious cases.

The prosecution of Alfonso Lopez has its genesis in a federal-state program set up to prosecute Gun-Free School Zones Act cases. The local police welcomed the idea of a state-federal partnership because the possession of guns had caused a number of serious disruptions in schools, and because long delays in the state system had impeded the effectiveness of state prosecutions. The program took the form of a task force comprising members of the San Antonio Independent School District “SAISD” Police Department, the ATF, and the United States Attorney’s Office for the Western District of Texas. The task force decided to prosecute selected cases as part of the “Triggerlock” initiative, a national program of federal-state cooperation that targets certain violent offenders for prosecution under federal firearms laws.

The Lopez case itself was referred by state authorities for federal prosecution at the instigation of state authorities because of the special

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at 972-78. It is possible of course that the federal presence may genuinely chafe in particular cases, either because it is inappropriately high-handed or because the federal government seeks to assert a stronger interest in prosecution. See Brickey, supra note 8, at 841-42. These instances do not, however, frame an argument against the institutional capacity of the federal government to attend to federalism values.

119. See, e.g., Deborah Jones Merrit, Commerce!, 94 Mich. L. Rev. 674, 694 (1995) (“There was no evidence . . . that Lopez was a sophisticated criminal who might evade the clutches of local law enforcement officers. . . . The Government never explained why the Assistant U.S. Attorney in Lopez’s district decided to initiate federal charges in this purely local case.”); Brickey, supra note 8, at 805 n.24. Brickey suggests that the decision to bring the Lopez case federally was “curious” on the ground that Texas law provided for a harsher sentence than federal law. This suggestion both overlooks factors other than length of sentence that can militate in favor of a federal prosecution, see, e.g., infra text accompanying note 118, and fails to take into account considerations—such as the abolition of parole in the federal system—that in practice determine the length of time offenders actually serve.

120. For a description of the Triggerlock program see Litman & Greenberg, supra note 111, at 1325.
feature of the involvement of gangs: Lopez had brought the gun to school in order to deliver it to a participant in a gang war.

The work of the task force, and in particular the strategy of selective prosecution of a few offenders, was strongly supported by local law enforcement. The SAISD police felt that federal prosecution had been salutary in the few cases in which it had been used and, more broadly, that the threat of federal prosecution was a valuable tool for local law enforcement. When, in reaction to the Fifth Circuit decision invalidating the act, the United States Attorney's Office stopped bringing prosecutions, the SAISD police protested vehemently. The police thereafter continued to work with federal authorities to bring selected firearms cases under other federal statutes providing concurrent jurisdiction.

1. Effectiveness

The Lopez case thus itself illustrates an approach to a federal role in combatting local crime that entails targeting for federal prosecution a small number of cases that exploit a comparative advantage of the federal government. In light of this approach, it is misguided to argue that the Gun-Free School Zones Act will not solve the problem of guns in school because the federal government will not commit the resources necessary to prosecute every crime covered by the statute. The facts that there have been very few prosecutions under the act and that "the FBI is not about to start posting its agents around the more than 100,000 schools in this country" constitute no criticism of legislation that is intended not to result in federal prosecution of every gun possession in a school zone, but to make federal intervention available where it is needed. (Also, the posting of FBI agents in schools is not a prerequisite for federal prosecution; indeed, the far more common pattern, as exemplified by the San Antonio task force, is a federal-state partnership in which state law enforcement agents work with federal prosecutors.) Brickey makes a similar critique of a provision passed overwhelmingly by the Senate that would have made it a federal offense to use a gun that had passed in interstate commerce in any crime of violence. Brickey is right that the provision would have been an inappropriate use of federal criminal

121. See Hearings, supra note 9, at 6 (statement of Professor Barry Friedman).
122. Id. at 11 (statement of Professor Larry Kramer).
jurisdiction, but the reason it is inappropriate is not, as she asserts, that the provision "would have swamped the federal courts with more than 600,000 new prosecutions a year."\textsuperscript{123} Since federal prosecutors and law enforcement agencies would not—and could not—have brought prosecutions in more than a few of the hundreds of thousands of possible cases, Brickey's worry is unwarranted.\textsuperscript{124} Rather, the provision would have been an inappropriate use of federal criminal jurisdiction because the case for the federal government's comparative advantage over the states had not been made.\textsuperscript{125} In sum, a valid critique of the act's effectiveness either would have to evaluate whether the few cases in which federal prosecutions are brought are cases in which federal intervention is appropriate or would have to demonstrate that there are no such appropriate cases.

As the events that led to the federal prosecution of the \textit{Lopez} case illustrate, selective use of the act to bring cases federally that the states could not prosecute as effectively can promote both local and national interests.\textsuperscript{126} Local law enforcement in West Texas welcomed the participation of the federal government because it ensured expeditious and substantial punishment in a narrow category of cases and raised the threat of federal prosecution in other cases. In addition, the federal government may be positioned to make prosecution possible in a few otherwise intractable cases.

\begin{footnotesize}
\textsuperscript{123} Brickey, \textit{Crime Control}, supra note 8, at 841.

\textsuperscript{124} The criticism, if it were valid, would similarly discredit any number of federal criminal statutes that in theory could reach thousands of cases for every one in which a prosecution is actually brought. For example, the Hobbs Act, 18 U.S.C. § 1951 (1994), by its terms authorizes federal prosecution of virtually any convenience store holdup in the country. As a matter of formal Department of Justice policy, however, the act is used extremely selectively and only when consistent with formal guidelines that ensure the case implicates important national interests. See \textit{U.S. Dept. of Justice}, supra note 117, § 9-131.040 ("The robbery provision of the [Hobbs Act] is to be utilized only in instances involving organized crime, gang activity, or wide-ranging schemes.").

\textsuperscript{125} See Gorelick & Litman, supra note 14, at 974.

\textsuperscript{126} Indeed, it may well be that in the area of criminal law, local and national interests overlap more than in other substantive areas. In the area of the criminal law, both state and federal officials will frequently endorse the basic goal of the criminal law of preventing and punishing criminal conduct, and with certain important exceptions will agree on what conduct should be singled out for criminal sanction. There remains of course potential for sharp conflict over issues such as what kinds of punishments are appropriate or what level of police presence is desirable. These issues are important, but given the relative consensus over ultimate policy goals, it is not surprising that state and local officials frequently support at least limited federal involvement in local law enforcement. See, e.g., \textit{supra} note 114.
\end{footnotesize}
Some cases, for example, may involve gangs that are interstate in reach, or witness intimidation beyond the power of the state to control. The criticisms of the effectiveness of concurrent federal jurisdiction thus presume an inaccurate model of federal involvement. The correct model—the model for the exercise of jurisdiction under the Gun-Free School Zones Act and similar recent legislation—provides for a federal role that is neither indiscriminate nor merely symbolic. Moreover, since only a few cases are targeted for federal involvement (and those are selected in cooperation with state authorities), there is little risk of swamping the courts or usurping state prerogatives.

2. Federalism Values

Contrary to the assertions of critics, statutes like the Gun-Free School Zones Act do not preempt state legislation and generate relatively few prosecutions (and those mostly in cooperation with state authorities). Such statutes therefore do not strongly implicate concerns about frustrating state experimentation and local preferences, excluding states from traditionally state provinces, or harming democracy.

The vast majority of criminal justice system resources are and will continue to be state and local. Compared with the dramatic growth in federal criminal jurisdiction, federal prosecutorial resources remain relatively constant, limiting the federal government’s actual prosecutions to approximately 35,000 per year, well less than five percent of all prosecutions nationally. Thus, bare practicalities, as well as the exercise of prosecutorial discretion according to established guidelines, ensure that “federalization” will continue to be a misnomer for the institution of a federal presence in a traditionally state criminal law area.

127. See, e.g., id. at 970-71 (describing successful federal prosecution of gang member who had ordered the murder of three witnesses and intimidated jurors at state trial, which ended in a hung jury).

128. There is an element of inconsistency in the criticisms of federalization. At the same time that critics worry that federal criminal legislation will be ineffective because few prosecutions will be brought and because federal resources will not be made available on a large scale, they also maintain that the very same legislation will “federalize” the area, removing state control, supplanting state efforts, and thwarting state experimentation.

129. To take the example of the Gun-Free School Zones Act, in the five years that the act was operative there were fewer than 100 prosecutions brought under it, and a large percentage of those were in the Western District of Texas, where the local authorities explicitly invited a federal presence. This infrequent exercise of prosecutorial power in areas
Since prosecutions under the Gun-Free School Zones Act are limited to a small fraction of possible prosecutions selected in cooperation with state and local authorities, it is difficult to see how the act interferes with state experimentation and with satisfaction of local preferences. Consider Justice Kennedy's examples of creative state efforts to deal with the problem of guns in school.\textsuperscript{130} The mere enactment of the Gun-Free School Zones Act and the institution of a small number of prosecutions under it would not prevent states from providing inducements to inform on violators, from imposing penalties on parents for failure to supervise children, or from enacting laws providing for the suspension or expulsion of students carrying guns.\textsuperscript{131} Similarly, if the local preference is for harsher, more lenient, or otherwise different treatment of persons taking guns into schools, that preference will be very little disturbed by a few federal prosecutions. Indeed, it may be that the state's interests are best served by a regime of concurrent jurisdiction under which the policy choices embodied in state of concurrent state and federal jurisdiction is not an anomaly. Indeed, it is a product of design. Not only do limited federal resources foreclose widespread federal involvement, the Department of Justice's prosecutorial criteria institutionalize the limitation of federal prosecutions in traditional state areas to those few cases in which a comparative federal advantage militates strongly in favor of federal prosecution. The criteria also are designed to ensure cooperation with state and local counterparts in law enforcement to produce a consensus about which rare cases are appropriate for federal prosecution. Department guidelines thus incorporate federalism values at both a substantive and a procedural level. Under the Child Support Recovery Act, 18 U.S.C. § 228 (1994), for example, which potentially covers many thousands of cases, the Department's prosecutorial criteria are designed to target the few cases that states are unable to handle because of interstate barriers. \textit{See Mary Jo White, Collecting Child Support Is a Federal Matter, N.Y. Times, Aug. 14, 1995}, at A19. The Department filed charges under the Child Support Recovery Act against only 28 persons last year. Thus, although the federal government theoretically could prosecute thousands of cases of guns in schools—interfering thoroughly with state control—any such worry is chimerical.

\textsuperscript{130} See Lopez, 115 S. Ct. at 1641 (listing the creation of inducements to inform on offenders, the institution of programs encouraging the voluntary surrender of guns, the imposition of penalties on parents, and the expulsion or assignment to special facilities of students who bring guns to school).

\textsuperscript{131} The only one of Justice Kennedy's examples of experiments that even arguably would be stymied is the institution of programs, including some provision for amnesty, to encourage students to voluntarily turn in guns. Conceivably, students would be deterred from turning in guns because the state amnesty would not cover the unlikely possibility of federal prosecution. However, such programs could be saved by obtaining the cooperation of the United States Attorney's Office. In general, commentators frequently do not stop to consider how exactly the Gun-Free School Zones Act is supposed to interfere with experimentation. \textit{See Hearings, supra} note 9, at 7 (statement of Professor Barry Friedman) (claiming federal laws interfere with state experiments without saying how).
legislation apply in the run of cases but a federal response, including a harsher penalty, is available in a few otherwise intractable cases. This leaves the charge that federalization of crime is bad for democracy because it puts the less accountable federal government in charge. This argument is stronger than the arguments that federalization prevents experimentation and frustrates local preferences, but it too fades in light of a fuller understanding of the way in which federal criminal jurisdiction is exercised. The mere enactment of federal criminal legislation in a traditionally state area can be understood to impair state sovereignty since conduct within the area is now subject to federal as well as state standards. (Of course, it could be said that such state sovereignty is already impaired as a matter of constitutional design by the mere existence of congressional power that reaches into traditionally state areas.) However, such impairment seems more symbolic than substantive, and it is not clear why it should provoke particular concern, especially when balanced against the need to address aspects of pressing national problems that states are unable or unwilling to solve. The state maintains real control over nearly all the conduct in the federalized area and has a strong say in the selection and treatment of those few cases that will be prosecuted federally. Similarly, the enactment of concurrent federal legislation leaves local decision making power largely intact.

132. Moreover, even from the standpoint of federalism, states' interests are not the only value to consider. Some cases may implicate especially strong interests of the federal government in prosecution. A particularly good illustration of the point is dual prosecutions, such as the federal prosecutions in the Rodney King and Crown Heights cases. Under the Petite Policy, the federal government, on rare occasions, will prosecute a defendant following a state criminal trial based on the same conduct, even when the trial has ended in a conviction. (It is well established that such prosecutions do not violate the Double Jeopardy Clause. See Abbate v. United States, 359 U.S. 187 (1959).) The Petite Policy incorporates federalism concerns in a number of ways, including by establishing a strong presumption against reprosecution, but it nevertheless permits reprosecution where necessary to vindicate compelling federal interests. See Litman & Greenberg, supra note 96, at 75-77. It is not illegitimate, or inconsistent with federalism, for the federal government occasionally to assert a national interest prescribed by Congress in traditionally state areas. A strong commitment to federalism does not require a complete ceding of the field in such areas; it may be satisfied by an overall approach to prosecution that gives strong weight to states' interests and that makes federal prosecution the exception to the rule of state regulation.

133. Cf. Calabresi, supra note 82, at 802 ("Similarly it would be easy to run this analysis in reverse and show that all congressional exercises of the interstate commerce power were invalid because they significantly affect the exclusive power of the states over education or tort law or family law or local law enforcement.").
Moreover, the enactment of such legislation does not prevent citizens from holding state and local decision makers responsible for their legislative and enforcement programs, which will remain the nearly exclusive means of dealing with local crime.\textsuperscript{134} Particularly since it is questionable whether citizens generally draw a sharp distinction between federal and state law enforcement, it is implausible that the passage and selective exercise of federal legislation will impair the accountability of local government for combating crime.

\textbf{3. Workload of the Federal Courts}

A third widely voiced objection to federalization of crime is that it overwhelms the federal courts with a flood of local criminal matters, thereby preventing those courts from fulfilling their traditional functions. In considering this objection, it is important to distinguish between the question of what cases belong in the federal courts and the separate question of who should decide which cases belong in federal court.

The principal source of alarm over the impact on the federal courts of the new federal criminal legislation has been the federal judiciary itself. As noted above, individual judges, judicial conferences and committees, and the Chief Justice himself have been vocal in expressing their dismay over the increase in size and the change in make-up of the workload of the federal courts. Further, their complaints have identified Congress's enactment of legislation addressing local street crime, especially drug violations, as the source of the evil.\textsuperscript{135} Other non-judicial critics who have echoed these complaints have based their objections on the dire pronouncements of the judiciary.\textsuperscript{136}


\textsuperscript{135} See, e.g., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 4-10, 35-38 (1990); COMMITTEE ON LONG RANGE PLANNING, supra note 106, at 12 (drug cases have gone from 18\% to 40\% of the federal court's criminal caseload in the past 25 years). The Committee on Long Range Planning notes that the criminal caseload of the federal courts has actually decreased in the last 25 years but that "the nature and complexity of the caseload has changed dramatically." Id. at 10-11.

\textsuperscript{136} Professor Friedman, for example, asserts that "Lopez cannot be fully understood . . . without taking into account that [members] of the judiciary have joined lately in expressing concern about the increasing federalization of criminal offenses and the impact of that federalization on the dockets of federal courts." Barry Friedman, Legislative Findings
On closer examination, however, there is reason to discount, or at least not to adopt automatically, the judiciary's views. Of course, federal judges and courts are valuable sources of information bearing on the appropriate role and workload of the federal courts. But the courts are not well suited to making decisions about the allocation of resources, and they are obviously self-interested in the issue of their own jurisdiction.

The undemocratic, life-appointed status of the federal judiciary well qualifies it to make disinterested decisions in concrete cases; however, that status does not provide any special vantage point for decisions about the wise use of national resources. The federal courts have justifiably emphasized that the federal courts are a scarce and valuable resource. But how to allocate scarce and valuable resources is fundamentally a political decision, best suited to the political branches of government. Such decisions should be made in a way that generally maximizes the satisfaction of people's preferences or welfare, and made by decision-makers who are positioned to investigate and respond to popular preferences and needs.

The federal courts, in contrast to the political branches, lack the institutional resources and expertise to determine which national problems are most pressing and how best to go about addressing them. The very factors that make the federal courts disinterested in particular cases make them unresponsive to the public and inappropriate for deciding how to resolve the competing claims of different interest groups. In fact, with respect to decisions about how the federal courts should be used, the federal courts are one of the interest groups that are most directly affected by the outcome. Thus, quite apart from the reasons for doubting that the federal courts are the right kind of institution to make those decisions and for believing that they lack much of the information that should go into the decisions, the federal judiciary's ultimate conclusions on its appropriate role are fairly evaluated in light of the judiciary's own institutional self-interest. Indeed, one may question whether it is a coincidence that the cases that the federal courts insist should be their main staple are precisely those that are most interesting, complex, and prestigious.\(^{137}\)


137. See, e.g., COMMITTEE ON LONG RANGE PLANNING, supra note 106, at 23-24 (urg-
Of course, the fact that the judicial warnings cannot be taken as authoritative does not itself rebut the claim that recent federal criminal legislation is swamping the federal courts with inappropriate cases. Similarly, the fact that Congress and the President—the appropriate decision-makers—have enacted the legislation does not itself imply that the legislation uses the federal courts appropriately. We have above and elsewhere elaborated a view about the appropriate role of concurrent federal criminal jurisdiction, and it is implicit in that view that the federal courts are properly used to adjudicate the cases that, under the view, would be brought in federal court. Specifically, the federal courts should be available to adjudicate cases in which the federal criminal justice system can make a qualitative difference to an aspect of a national problem that the states cannot adequately address. Thus, the jurisdiction of the federal courts should be defined (and historically has been defined), not in terms of a special, historical subject matter, but in terms of their function as a limited and valuable forum for vindicating federal interests.

As to the claim that recent federal criminal legislation attacking violent street crime threatens to overwhelm the federal courts with inappropriate cases, it is first not clear that the federal courts are overwhelmed at all. Many of the dire assessments appear to be based on the mistaken assumption that the enactment of federal criminal legislation implies that all cases covered by the legislation will be prosecuted in federal court. (Only that assumption could explain, for example, Professor Brickey’s claim that the bill extending federal jurisdiction to almost every violent crime committed with guns would have added 600,000 cases to the federal docket.) Indeed, although federal prosecutions undoubtedly have be-

138. See supra notes 111-114 and accompanying text.
come more complex, the overall number of federal prosecutions is now about the same as what it was twenty-five years ago.\footnote{141}{See Committee on Long Range Planning, supra note 106, at 10. The number of federal prosecutions has not held steady during that entire period. After a drop between 1972 and 1980, it increased from 38,033 in 1980 to over 67,632 in 1992. See Beale, supra note 105, at 984.}

Although criminal matters have undoubtedly come to occupy a larger portion of the federal court’s workload, much of the difference in the criminal workload comes from the dramatic rise in drug cases.\footnote{142}{See Committee on Long Range Planning, supra note 106, at 11; Kadish, supra note 90, at 1251.} Thus, as Professor Beale documents, between 1980 and 1992, there was a fourfold increase in drug prosecutions.\footnote{143}{Sarah Sun Beale, Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction, 46 Hastings L.J. 979, 984-86 (1995).} Moreover, the percentage of federal defendants charged with drug crimes increased between 1972 and 1992 from 18 to 41 percent, and the complexity of the drug cases increased significantly.\footnote{144}{See id. at 985.} Also, according to Beale’s analysis, other factors, such as the Federal Sentencing Guidelines and a higher conviction rate, are major contributors to the swelling of the criminal part of the docket.\footnote{145}{See id. at 986-87.} Thus, the increase in the criminal docket is not largely attributable to statutes like the Gun-Free School Zones Act that create concurrent federal jurisdiction over nondrug crimes.

Finally, whatever the source of the increased criminal workload, it is not clear that the best response to it would be simply to eliminate that source. We should hesitate before abandoning federal legislation that targets unmet national needs that the federal government is better positioned than the states to address. It is a serious problem if, as some claim, the increased criminal workload is preventing the federal courts from fulfilling their important functions in civil cases.\footnote{146}{See Federal Courts Study Committee, supra note 135, at 36 (claiming courts in districts with particularly heavy caseloads of drug crimes are “virtually unable to try civil cases”); Brickey, supra note 104, at 38 (“The federal courts are overwhelmed with criminal cases.”). But see Committee on Long Range Planning, supra note 106, at 39 (“The federal courts function effectively under their present structures, but major problems loom on the horizon if judicial workloads continue to grow.”); id., at 10 (noting delays in civil cases caused by heavy burdens of criminal cases but identifying administrative techniques courts have developed to decrease the burdens, including increased use of alternative dispute resolution procedures and increased reliance on magistrate judges).}

Of course, if that were the only problem
and the criminal cases were appropriately in federal court, at least part of the solution might be to increase the size of the federal judiciary. No doubt there are important advantages to the small size of the judiciary, but whether, at its current dimensions, the loss from some increase in size would be outweighed by the national interests served by providing a federal forum is an open question, though one that is outside the scope of this Article. For immediate purposes, the important point is that there is little reason to believe that recent federal legislation such as the Gun-Free School Zones Act that creates concurrent federal jurisdiction over traditionally state crimes threatens to overwhelm the federal courts with a flood of cases that would be better handled in state courts.

CONCLUSION

The revised Gun-Free School Zones Act provides a vantage point on several important issues of doctrine and theory relating to the scope of the federal criminal law. Perhaps the least interesting of these issues is also of the most immediate practical importance: Can Congress remedy the defect identified in *Lopez* by the simple expedient of adding a provision ensuring that the statute reach only to guns that have passed in interstate commerce at some point. The revised act will serve as a vehicle for the courts to make clear that Congress can. The validation of the act will largely settle the extensive debate over the meaning and impact of *Lopez*, which will prove to have no more than a modest impact on the interpretation of the Commerce Clause and a negligible one on federalism jurisprudence.

The approval of the revised act will be an unwelcome development to many commentators who see little practical or theoretical difference between federal regulation of possession in school of guns generally and federal regulation of possession in school of the great majority of guns that have passed in interstate commerce. The constitutionality of the revised act, however, is not a triumph of formalism, but the consequence of a reasonable understanding of the commerce power. According to that understanding, Congress may criminalize the possession in school of guns that have moved in interstate commerce. This recognition does not result in a general police power because though interstate commerce is a cause of the possession of guns in schools, it is not a cause of every threat to health and safety. As for the objection that the revised act has the same purpose as the act the Court struck down in *Lopez*, Con-
gress's purpose is irrelevant to the constitutionality of an exercise of the commerce power; and even if purpose were relevant, the purpose of the revised act would be an appropriate one.

Others might concede that the commerce power reaches the possession in school of guns that have crossed state lines, but see in that result a tension with federalism values, which many view as the true driving force behind the opinion in *Lopez*. But the common federalism-based criticisms of the act, in both its original and revised versions, and of similar recent federal legislation, are not well founded. Although we have not attempted to examine in depth in this Article whether Congress and the Executive are in fact making wise choices in their deployment of federal criminal jurisdiction, we have sketched a view of the appropriate role of federal criminal jurisdiction, and have critiqued three of the most widely expressed reasons for thinking it is not being wisely used. In contrast to the debate about the meaning of *Lopez*, this debate will not be settled soon. Still, since the choices about the reach of the federal criminal law have been made by the branches of government that, in contrast with the federal judiciary, are institutionally best suited to make them, it is at least arguable that the burden of showing that the choices have been misguided lies with the critics of the recent federal criminal legislation.