
Charles B. Schweitzer

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Street Crime, Interstate Commerce, and the Federal Docket: The Impact of *United States v. Lopez*

**INTRODUCTION**

In *United States v. Lopez*, the United States Supreme Court invalidated the Gun-Free School Zones Act of 1990 because it exceeded the constitutional power given to Congress to regulate the commercial activities of private parties. Undoubtedly the most important decision of the Court's October 1994 Term, *Lopez* is significant because it invalidated a federal law under the Commerce Clause for the first time since 1936. The legal implications of the decision are uncertain and potentially far-reaching. The holding in *Lopez* will either be limited to the area of federal criminal law, with a message to Congress to exercise restraint, or it will be used to call into question entire areas of federal regulation. With *Lopez*, the Court's tradition of defer-

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2. 18 U.S.C. § 922(q)(1)(A) (1988 & Supp. V 1993). The law made it a federal offense "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." *Id.*
4. There was general agreement across the political spectrum on the scope of the commerce power. For example, in 1987 during his confirmation hearing, Judge Bork stated that the Commerce Clause "has been expanded so much it cannot be cut back." *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Committee on the Judiciary, 100th Cong., 1st Sess. 664* (1987). This statement may no longer be true.
ring to congressional determinations of the limits of the commerce power may have come to an end.

*Lopez* illustrates the tensions and dilemmas that have always dominated and informed the Court's jurisprudence. Throughout its history, the Court has settled and then revisited the meanings, principles, and myths of the American Republic. In the most fundamental sense, the Framers and Ratifiers of the Constitution, by no stretch a unified group,\(^6\) intended to create a lasting national government.\(^6\) That this goal was achieved by an expanded commerce power is testament to a flexible document enlivened by a constitutional interpretation that had continued until *Lopez*.\(^7\) There are two divergent views of the process that led to an expanded conception of the federal commerce power. For originalists, the process is illegitimate because it did not adhere to the original, narrow conception of commerce.\(^8\) The

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6. Just prior to the signing of the Constitution, Benjamin Franklin delivered, through James Wilson, these words:

I doubt . . . whether any other convention we can obtain may be able to make a better constitution. For, when you assemble a number of men to have the advantage of their wisdom, you inevitably assemble with those men all their prejudices, their passions, their errors of opinion, their local interest, and their selfish views. From such an assembly can a perfect production be expected? It therefore astonishes me, sir, to find this system approaching so near to perfection as it does . . . . Thus I consent, sir, to this Constitution, because I expect no better, and because I am not sure that it is not the best.

*The Living U.S. Constitution* 14 (Saul K. Padover, ed. 1968) (quoting Benjamin Franklin). Mr. Franklin would probably be "astonished" that the Republic has endured for so long.

7. The relationship between historical developments and constitutional interpretation has long been recognized. Justice Holmes wrote that:

[H]istory is the means by which we measure the power which the past has had to govern the present in spite of ourselves, so to speak, by imposing traditions which no longer meet their original end. History sets us free and enables us to make up our minds dispassionately whether the survival which we are enforcing answers any new purpose when it has ceased to answer the old.

Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 *Harv. L. Rev.* 443, 452 (1899). Justice Frankfurter, writing prior to his appointment to the Court, stated that:

The Constitution of the United States is most significantly not a document but a stream of history. And the Supreme Court has directed the stream. Constitutional law, then, is history. But equally true is it that American history is constitutional law.


8. See, e.g., *Raoul Berger, Federalism: The Founders' Design* 120 (1987);
originalists argue that changes in economic development and sophistication do not excuse an unconstitutional expansion of federal power. The opposing view accepts the expansion of federal power as a practical development reflecting national economic needs as the nation grew following the Civil War. This "practical" argument has the advantage of responding to the growing irrelevance of state boundaries within a national and international economic setting. Both arguments have inadequacies and shortcomings. Questions about the difficulty of determining "intent" aside, originalism does not answer the question of why each successive generation must adhere to definitions that do not admit to modern circumstances. The "practical" argument, on the other hand, does not posit any limitations on federal commerce power and belittles the notion of limited government.

This comment argues that United States v. Lopez may have a limited impact on the current state of federalism and the broad commerce power and merely represents an attempt by the Rehnquist Court to address the "crisis" facing the federal courts as Congress has continued to expand the reach of federal criminal law. With Lopez, the federal judiciary has attempted to influence the size and nature of its docket by leaving petty criminal activity to state court adjudication.


9. See BERGER, supra note 8, at 150 ("Economic developments do not confer power that was withheld."). Professor Epstein argued that "[t]here has been no basic transformation of the economy that requires, or allows, a parallel transformation in the scope of the commerce clause. International trade is driven by the principle of comparative advantage and the costs of reaching distant markets. It did not begin with either the steamship or the railroad." Epstein, supra note 8, at 1397.

10. See, e.g., E. PARMALEE PRENTICE & JOHN G. EGAN, THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION 35 (1898):

The construction of the commerce clause cannot be limited to the accomplishment of the particular objects which the framers of the Constitution sought, but must broaden with the extending needs of commerce, so as to accomplish wider purposes. The words of the Constitution still remain, and the purpose to protect national and international commerce from burdensome, conflicting or discriminating State legislation still remains; but the application of the clause to particular conditions is changed. In the course of time, and in greater or lesser degree, such must be the result of the interpretation of any written Constitution.

Id.


12. But see Judith S. Kaye, Federalism Gone Wild, N.Y. TIMES, Dec. 13, 1994, at A29 (calling for an understanding of how criminal cases were burdening state courts and noting that an invigorated federalism was "no solution at all").
The decision of the Justices and the concurring opinions indicates that the Justices do not wish to return, as a practical matter, to the original conception of commerce adhered to by the Framers, a notion the dissenting opinions reinforce. Section I discusses the various opinions of *Lopez*. Section II provides an overview of the commerce clause jurisprudence and examines the competing interpretations of this long line of cases. Section III explores some of the concepts that define the relationship between the states and the federal government, with emphasis on how *Lopez* may contribute to recent attempts to reform the business of the federal courts.

**SECTION I. THE LÓPEZ OPINION**

Alfonso López, Jr. was convicted under the Gun-Free School Zones Act of 1990 (the "Act") for carrying a handgun and ammunition while attending Edison High School in San Antonio, Texas.¹³ The conviction was overturned on appeal to the United States Court of Appeals for the Fifth Circuit, which found that the Act was beyond congressional commerce power.¹⁴

The Supreme Court's analysis began with a discussion of several fundamental principles of American Government. The Court noted that the Constitution created a federal government of enumerated powers, a system which balances power between the national government and the states."¹⁵ The Court cited *Gibbons v. Ogden*¹⁶ as the first case to define the scope of federal power under the Commerce Clause. The Court asserted that for most of the nineteenth century, its decisions concerned limits on the power of states to burden interstate commerce.¹⁷ The Court traced the beginning of federal regulatory activity to the passage

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¹³. *López*, 115 S. Ct. at 1626. López was also charged under a Texas law prohibiting firearm possession on school grounds, but that charge was dismissed when federal agents intervened. See Tex. Penal Code Ann. § 46.03(a)(1) (Supp. 1994).


¹⁵. *López*, 115 S. Ct. at 1626 (citing THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)). The FEDERALIST No. 45 states:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)


of the Interstate Commerce Act of 1887 and the Sherman Antitrust Act of 1890, laws which quickly and decisively affected Supreme Court jurisprudence. In the decisions that followed, the Court identified two divergent strands, one prohibiting federal regulation of local matters such as manufacturing and the other allowing federal regulation of intrastate matters that were intermingled with interstate matters.

The Court argued that, beginning with NLRB v. Jones & Laughlin Steel Corp., formal distinctions among economic activities were abandoned and that a “substantial economic effects” test was developed. The result was a greatly expanded power to regulate commerce. However, the Court maintained that the New Deal decisions nonetheless recognized limits to the federal commerce power by requiring a showing of substantial economic effect.

In an attempt to reconcile its holding with precedent, the Court identified three types of activities that Congress was authorized to regulate. First, the Court noted that Congress could regulate the channels of interstate commerce. Second, the Court asserted that Congress could regulate the instrumen-

20. Lopez, 115 S. Ct. at 1627.
22. 301 U.S. 1 (1937).
23. Lopez, 115 S. Ct. at 1628 (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)).
24. The Court rationalized this expanded congressional authority: In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce. Lopez, 115 S. Ct. at 1628.
25. Lopez, 115 S. Ct. at 1628-29 (citing Wickard v. Filburn, 317 U.S. 111 (1942), United States v. Darby, 312 U.S. 100 (1941) and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)). The Court noted that its standard of review in determining the scope of the commerce power was “whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.” Id. at 1629.
26. Id. at 1629.
27. Id. (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)).
taliies of interstate commerce and the persons and things involved in interstate commerce.\textsuperscript{28} Third, the Court maintained that the commerce power extended to those activities with a substantial relation to interstate commerce or that substantially affect interstate commerce.\textsuperscript{29} The Court concluded that the third category was unclear because it ascribed no limits to the commerce power, and therefore Congress must demonstrate that a regulated activity "substantially affected" interstate commerce.\textsuperscript{30}

The Court found that the Gun-Free School Zones Act was distinguishable from the other cases within the third category because the activity was not part of a commercial transaction.\textsuperscript{31} In addition, the Court found that the Act lacked a jurisdictional element limiting its application to those instances of gun possession affecting interstate commerce.\textsuperscript{32} After noting that the record contained no legislative findings establishing a link between gun possession in schools and interstate commerce,\textsuperscript{33} the Court rejected the Government's attempt to show that gun possession actually burdened interstate commerce.\textsuperscript{34} The Court found that the argument admitted no limits to the commerce power.\textsuperscript{35} The Court characterized the Act as an unconstitutional expansion of the commerce power that obliterated the distinction between national matters and local matters.\textsuperscript{36}

Justice Kennedy wrote a concurring opinion to emphasize his

\begin{itemize}
\item \textsuperscript{28} Id. (citing The Shreveport Rate Cases, 234 U.S. 243 (1914)).
\item \textsuperscript{29} Id at 1629-30 (citing Jones \& Laughlin, 301 U.S. at 37 and Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968)).
\item \textsuperscript{30} Lopez, 115 S. Ct. at 1630. The Court held: "We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." Id.
\item \textsuperscript{32} Id. at 1631. The Court asserted that a "jurisdictional element would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." Id.
\item \textsuperscript{33} The Court noted that under rational basis review, specific legislative findings were not necessary: "We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." Lopez, 115 S. Ct. at 1631.
\item \textsuperscript{34} Lopez, 115 S. Ct. at 1631-32.
\item \textsuperscript{35} Id. at 1632. The Court stated that "it [was] difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign." Id.
\item \textsuperscript{36} Id. at 1633-34. The Court concluded: "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." Id. at 1634.
\end{itemize}
view that the majority opinion was limited and did not affect the Court's previous interpretations of the scope of the federal commerce power.\textsuperscript{37} Justice Kennedy's analysis noted that the Court's jurisprudence was molded in response to nineteenth century industrialization, initially distinguishing manufacturing from commerce before abandoning such formal distinctions.\textsuperscript{38} Justice Kennedy argued that while these formal distinctions were initially resuscitated in response to New Deal legislation,\textsuperscript{39} a more practical view of the commerce power prevailed.\textsuperscript{40} Justice Kennedy maintained that the New Deal cases and subsequent decisions, in which deference was given to Congress to enact legislation regulating a broad range of commercial activity, were not being questioned by the majority opinion.\textsuperscript{41} For Justice Kennedy, the concept of \textit{stare decisis} counseled restraint.\textsuperscript{42} Yet, Justice Kennedy believed that not all congres-

\textsuperscript{37} Id. at 1634 (Kennedy, J., concurring). Justice O'Connor joined. \textit{Id.} Justice Kennedy began with a note of caution: The history of the judicial struggle to interpret the Commerce Clause during the transformation from the economic system the Founders knew to the single, national market still emergent in our own era counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power. \textit{Id.}

\textsuperscript{38} \textit{Id.} at 1635. For cases using such formalistic dichotomies, see Adair v. United States, 208 U.S. 161 (1908), The Employers' Liability Cases, 207 U.S. 463 (1908) and United States v. E.C. Knight Co., 156 U.S. 1 (1895). For cases disavowing the earlier approach, see Texas & N.O. R.R. v. Brotherhood of Railway & Steamship Clerks, 281 U.S. 548 (1930) and Standard Oil Co. v. United States, 221 U.S. 1 (1911).


\textsuperscript{40} Lopez, 115 S. Ct. at 1636 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)). Justice Kennedy remarked that Jones & Laughlin "seem[ed] to mark the Court's definitive commitment to the practical conception of the commerce power." \textit{Id.}

\textsuperscript{41} \textit{Id.} at 1637 (citing Perez v. United States, 402 U.S. 146 (1971), Katzenbach v. McClung, 379 U.S. 294 (1964), Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), Wickard v. Filburn, 317 U.S. 111 (1942) and United States v. Darby, 312 U.S. 100 (1941)). For Justice Kennedy, these decisions were "within the fair ambit of the Court's practical conception of commercial regulation and are not called in question by our decision today." \textit{Id.}

\textsuperscript{42} \textit{Id.} Justice Kennedy wrote: [The Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. \textit{Stare decisis} operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature. That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy, dependent then upon production and trading practices that had changed little over
sional actions were beyond review, especially if such actions upset the federal balance.43

After noting that federalism was the Founders' unique contribution to political science, Justice Kennedy emphasized the difficulties inherent in a judicial determination of the federal balance.44 Justice Kennedy admitted that while one could conclude that the nature of the balance between state and national power was best left to political processes, the inexactness of this balance required judicial intervention.45 Justice Kennedy agreed with the majority opinion that the Act expanded the commerce power and went beyond the principles of federalism because it regulated an activity unrelated to interstate commerce and usually considered to be within the powers of the states.46

In a confident concurring opinion peppered with jabs at his colleagues, Justice Thomas called for the repudiation of much of the Court's commerce clause jurisprudence, arguing that it had strayed from the original understanding of the Clause.47 Justice Thomas examined the text, structure, and history of the Clause and concluded that the Ratifiers of the Constitution would not recognize the current understanding. Justice Thomas stressed the limited definition of "commerce," which included buying, selling and transporting goods and did not refer to productive activities such as manufacturing and agriculture.48 Justice Thomas argued that the "substantial effects" test ignored the text of the Clause, which did not grant Congress the power to regulate everything that "affected" interstate commerce; to the contrary, the power to regulate was limited to actual interstate commerce.49

the preceding centuries; it also mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system. Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.

Id.
43. Id.
44. Id. at 1639.
45. Lopez, 115 S. Ct. at 1639. Justice Kennedy maintained that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." Id.
46. Id. at 1641.
47. Id. at 1642 (Thomas, J., concurring). Justice Thomas' argument echoes the interpretations of Professors Berger and Epstein, but he did not cite the scholarship of either. See Berger, supra note 8; Epstein, supra note 8.
48. Lopez, 115 S. Ct. at 1643 (Thomas, J., concurring).
49. Id. at 1644.
Justice Thomas asserted that constitutional structure indicated that the Ratifiers had a limited view of the commerce power because the other enumerated powers in Section 8 of Article I of the Constitution were stated separately even though these powers deal with activities that certainly "substantially affect" commerce. Justice Thomas argued that the current broad reading of the commerce power rendered the other enumerated powers superfluous, a view which he considered to be illogical and incorrect.

Justice Thomas included an overview of the historical proceedings that supported his interpretation of the proper scope of the commerce power. For Justice Thomas, those who participated in the ratification process had an understanding of commerce that limited federal power to a narrow range of activities while preserving everything else for "exclusive control" by the states. Justice Thomas maintained that the original understanding did not grant the central government power to regulate all that substantially affected commerce. In his review of case law, Justice Thomas characterized the New Deal cases as a "wrong turn" that had led the Court to implicitly grant plenary police powers to the federal government. Calling for the reformulation of the "substantial effects" test, Justice Thomas concluded that the Court had wrongly interpreted the Constitution.

The dissenting opinions of Justices Stevens, Souter, and Breyer all characterized the majority opinion as a departure from the Court's long-standing interpretation of the commerce power. The dissenters were united in their view that the majori-

50. *Id.* For example, Justice Thomas noted that the power to enact bankruptcy laws could also be inferred from the expanded Commerce Clause. *Id.* (citing U.S. CONST. art. I, § 8, cl. 4).

51. *Id.*

52. *Id.* at 1645.


54. *Id.* at 1646.

55. *Id.* at 1649.

56. *Id.* at 1650. In the end, even Justice Thomas understood that his iconoclastic analysis did not befit contemporary commercial relationships: Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of stare decisis and reliance interests may convince us that we cannot wipe the slate clean. *Id.*

57. *Id.* at 1651 (Stevens, J., dissenting).

58. *Lopez,* 115 S. Ct. at 1651 (Souter, J., dissenting).

59. *Id.* at 1657 (Breyer, J., dissenting). Justice Breyer was joined by Justices Stevens, Souter, and Ginsburg. *Id.*
ty had engaged in an unwarranted type of judicial activism while in the process of altering the standard of review in cases involving congressional regulation of commerce.60

Justice Souter argued that in resurrecting the commercial/non-commercial dichotomy, the majority opinion had disposed of the Court's traditional rationality review, first by asking whether the law at issue infringed on traditional state subjects and then by requiring that the law at issue be supported by explicit legislative findings.61 Justice Souter believed that such an inquiry was incompatible with rational basis review, indicating a willingness on the part of the majority to return to the intrusive judicial review that characterized the Court's jurisprudence prior to 1937.62 Justice Souter maintained that inquiry concerning areas of traditional state regulation untenably im-

60. Justice Souter stated:
The modern respect for the competence and primacy of Congress in matters affecting commerce developed only after one of this Court's most chastening experiences, when it perforce repudiated an earlier and untenably expansive conception of judicial review in derogation of congressional commerce power . . . . [T]oday's decision tugs the Court off course, leading it to suggest opportunities for further developments that would be at odds with the rule of restraint to which the Court still wisely states adherence.

_Id._ at 1652 (Souter, J., dissenting). Given the tone of Justice Thomas' concurring opinion, Justice Souter's dissent seems aimed at circumscribing the possible impact of the majority opinion. As Justice Frankfurter had earlier observed, "[t]he scope of a Supreme Court decision is not infrequently revealed by the candor of the dissent. . . . [I]n constitutional law, a particular decision, howsoever limited to its immediate facts, is not an isolated instance but is apt to serve as the beginning of a doctrinal process." _FRANKFURTER_, _supra_ note 7, at 107.

61. _Lopez_, 115 S. Ct. at 1653-54.

62. _Id._ Justice Souter cited _West Coast Hotel Co. v. Parrish_, 300 U.S. 379 (1937) and _NLRB v. Jones & Laughlin Steel Corp._, 301 U.S. 1 (1937), as inaugurating "sea changes" in Supreme Court jurisprudence that repudiated prior judicial intrusions into legislative power at both the state and federal levels. For cases invalidating state regulatory laws, see _Louis K. Liggett Co. v. Baldridge_, 278 U.S. 105 (1928), _Coppage v. Kansas_, 236 U.S. 1 (1915) and _Lochner v. New York_, 198 U.S. 45 (1905). For cases invalidating federal regulatory laws, see _Carter v. Carter Coal Co._, 298 U.S. 238 (1936), _A.L.A. Schechter Poultry Corp. v. United States_, 295 U.S. 495 (1935), _Hammer v. Dagenhart_, 247 U.S. 251 (1918), _overruled by United States v. Darby_, 312 U.S. 100 (1941) and _Adair v. United States_, 206 U.S. 161 (1908). Justice Souter argued that these cases hinged on an impractical, overly formalistic view of the nature of commerce, a view long discredited:

Thus, under commerce, as under due process, adoption of rational basis review expressed the recognition that the Court had no sustainable basis for subjecting economic regulation as such to judicial policy judgments, and for the past half-century the Court has no more turned back in the direction of formalistic Commerce Clause review (as in deciding whether regulation of commerce was sufficiently direct) than it has inclined toward reasserting the substantive authority of Lochner due process (as in the inflated protection of contractual autonomy).

_Lopez_, 115 S. Ct. at 1653.
plied a weaker commerce power, while the requirement of legislative findings implied that the Court would again examine legislative policy judgments.63

In his dissenting opinion, Justice Breyer found three basic principles underlying the Commerce Clause: first, the commerce power reached local activities with significant effects on interstate commerce; second, the effect of individual actions must be viewed in the aggregate; and third, the Court's inquiry must defer to legislative judgments on the connection between the regulated activity and interstate commerce.64 Justice Breyer was satisfied that these principles required the validation of the Gun-Free School Zones Act because Congress could rationally find that even though gun possession could have been an inherently local activity with no commercial aspect, violence in school zones affected the quality of education and negatively impacted interstate commerce.65 Thus, while the majority viewed the Act as outside the commerce power, Justice Breyer argued that holding that the Act was constitutional was not an expansion of the commerce power, but merely an application of precedent.66

Even with its isolated holding, Lopez may radically alter the practice of federal criminal law. Prosecutors and defense attorneys will again debate the nexus between federal criminal law and interstate commerce. But Congress is still able to regulate local activities as long as they are sufficiently "economic." Nonetheless, Lopez could represent great possibilities for reordering the relationship between the states and the federal government, especially given the tone of Justice Thomas' concurrence. The elections of 1996 could usher in a "constitutional moment" negating the New Deal's administrative state.67

The Chief Justice was correct in noting that "legal uncertainties" are central to the constitutional inquiry, but he failed to

63. Lopez, 115 S. Ct. at 1654-57. Justice Souter argued that the majority had used a "hard" case to change the standard of review: "While the ease of review may vary from case to case, it does not follow that the standard of review should vary, much less that explicit findings of fact would even directly address the standard." Id. at 1656.

64. Id. at 1657-58 (Breyer, J., dissenting).

65. Id. at 1659. Justice Breyer recounted the evidence of mounting school violence and its impact on educational quality and included an extensive appendix of materials on the subject. See id. at 1665.

66. Id. at 1662. Justice Breyer wrote: "In sum, a holding that the particular statute before us falls within the commerce power would not expand the scope of that Clause. Rather, it simply would apply preexisting law to changing circumstances." Id.

67. See Bruce A. Ackerman, We The People: Foundations (1991) (arguing that there were three "constitutional moments" in American history: the founding, the outcome of the Civil War, and the New Deal).
provide any guidance to judges who will be forced to decipher the difference between substantial and insubstantial effects.\textsuperscript{66} There can be no doubt that litigation based on federalism claims will increase. More specifically, Chief Justice Rehnquist did not adequately explain why education was not an economic activity or why gun possession lacked a commercial element. It is quite easy to envision an interstate network trafficking in weapons that could have a significant effect on commerce, though demonstrating that effect might be impossible. By failing to acknowledge the impact that education has on interstate commerce, the Chief Justice's critique of the dissent remains unconvincing. Upholding the law at issue here certainly does not expand the commerce power. The Court avoided overruling precedent but did not apply it. It stated that the rational basis test applied to the law at issue but proceeded to heighten the standard.

The tone of Justice Thomas' concurrence indicates what is at stake. Though no other Justice joined him, Justice Thomas was willing to radically reorder long-settled practices. The raw judicial power advocated in \textit{Lopez} could be used to invalidate the enactments of Congress, ostensibly expressions of the will of the people, in a wide range of areas. Justice Thomas showed little regard for the possibilities for social upheaval that would result if his vision swayed the Court. The following section details the line of cases and types of issues that led the Court to its holding in \textit{Lopez}.

\textbf{SECTION II. A HISTORY OF COMMERCE CLAUSE JURISPRUDENCE}

A response to one of the main shortcomings of the Articles of Confederation, the Commerce Clause prevented the states from enacting discriminatory legislation that hobbled trade between citizens of different states.\textsuperscript{69} The rather limited early conception\textsuperscript{70} has been expanded, granting the federal government a

\textsuperscript{66} The Rehnquist Court has been unwilling to forward explicit judicial tests. \textit{See} Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (providing an inexact judicial test for determining when regulatory takings require compensation). \textit{See also} Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1993) (noting that takings cases involved "essentially ad hoc, factual inquiries").

\textsuperscript{69} \textit{See} \textbf{THE FEDERALIST,} No. 22 (Alexander Hamilton):

\textit{[T]here are other[ ][defects] of not less importance which concur in rendering [the present federal system] altogether unfit for the administration of the affairs of the Union. The want of a power to regulate commerce is by all parties allowed to be of the number. . . . It is indeed evident . . . that there is no object, either as it respects the interest of trade or finance, that more strongly demands a federal superintendence.}


\textsuperscript{70} Any discussion of this early conception cannot disregard the impact slavery
greater role in regulating and prohibiting commercial activity. On the grandest constitutional scale, what is being disputed today is the meaning of *Gibbons v. Ogden* and the impact and efficacy of federal economic regulation, questions which ultimately focus on the New Deal jurisprudence that approved of congressional enactments regulating virtually every area of human endeavor.

**Chief Justice Marshall and the Commerce Power**

As every student of constitutional law knows, John Marshall, the fourth Chief Justice, helped shape the fundamental interpretation of the Constitution with such seminal decisions as *Marbury v. Madison*, *Martin v. Hunter's Lessee*, and *McCulloch v. Maryland*. More central to our present purposes are the decisions in *Gibbons v. Ogden* and *Willson v. Black Bird Creek Marsh Co.*, which established the framework for interpreting the scope of the commerce power. What these Commerce Clause decisions share with the earlier cases is an emphasis on national power and the supremacy of federal law over state law.

had on commerce clause jurisprudence prior to the Civil War. One activity that southern states did not want the federal government interfering with was slavery. In addition, early American jurisprudence retreated into positivistic interpretations, thereby avoiding the moral implications of decisions upholding the legality of slavery. See Bernard Schwartz, *Main Currents in American Legal Thought* 81-82, 159-60 (1993).

71. 22 U.S. (9 Wheat.) 1 (1824).
73. 5 U.S. (1 Cranch) 137 (1803) (establishing the concept of judicial review of Acts of Congress). It was here that the Chief Justice stated: “It is emphatically the province and duty of the judicial department to say what the law is. . . .” *Marbury*, 5 U.S. (1 Cranch) at 177.
75. 17 U.S. (4 Wheat.) 316 (1819) (giving a broad reading to the Necessary and Proper Clause). The Necessary and Proper Clause authorizes Congress “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. Const. art. I, § 8, cl. 19.
76. 27 U.S. (2 Pet.) 245 (1829).
77. Consider G. Edward White, *The Marshall Court and Cultural Change*, 1815-1833 486 (1991) (“The ‘nationalism’ inherent in those decisions was not a nationalism in the modern sense of support for affirmative plenary federal reg-
The language of the Commerce Clause includes three concepts: the scope of activity (i.e., what is “commerce”?), the type of power (i.e., what does “regulate” mean?), and the location of the activity (i.e., what does “among the States” imply?). The scope of activity within the commerce power hinges on the definition of commerce, which originally referred to the buying, selling, and shipping of goods and did not include such distinct activities as manufacturing and agriculture. Whether persons engaged in or using the instrumentalities of interstate commerce fell under the commerce power was an open question with implications for the slave trade. The type of power hinges on whether it is limited to mere “regulation,” or includes “prohibition,” which implicates the concept of police powers. The location of the activity implies that there are commercial activities that occur completely within a state which the commerce power cannot reach. This concept is, of course, dependent on the definition of commerce, which in its most limited sense, places many economic activities beyond the reach of federal interference. Chief Justice Marshall initially defined these terms in Gibbons. While Gibbons and the other early decisions focused on what the states could and could not do vis a vis commerce and not specifically on the nature of federal legislative power to regulate interstate commerce, the early discussions had lasting implications for the post-Civil War expansion of social and economic regulation.

In Gibbons, the Court settled the question of whether the regulation of navigation between two states was contemplated to be within the commerce power.\(^{78}\) After establishing that commerce included trade and the traffic necessary to accomplish the buying and selling of goods, the Court held that the federal government was limited to regulating those transactions that occurred between states and had no power to reach into the internal affairs of the states.\(^{79}\) Likewise, the Court recognized that

\(^{78}\) Gibbons, 22 U.S. (9 Wheat.) at 189-90. The Court held: “Commerce, undoubtedly, is traffic, but is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.” Id. At issue was a state law granting a monopoly to a steamship company to operate between two states. Id. at 3-6. A second steamship company, which had a federal coasting license, wished to operate between the same two points. Id. After holding that the federal license was impaired by state law, the Court hesitated to limit state action in the absence of federal action, what is now referred to as the “dormant” commerce power, but it did conclude that state authority was limited when it contradicted federal law. Id. at 209-10.

\(^{79}\) Id. at 194. The Court held that the commerce power “is the power to
states were also limited in regulating interstate commerce. However, the Court was equivocal on the issue of whether the federal commerce power was exclusive, thereby constraining states from acting even in the absence of federal law on a particular subject. Chief Justice Marshall's opinion embodied an appreciation for the federal relationship between the national government and the states, while recognizing the need for national authority to foster economic growth and interdependence.

The Court seemed to take a step back from Gibbons' exclusivity dictum in Willson v. Black Bird Creek Marsh Co., in which it upheld a state law authorizing the construction of a dam across a navigable waterway, thus impairing a federal coasting license, the same type of license at issue in Gibbons. However, the Court implied that the state law was within the state's police power to regulate health and safety and did not impinge on the federal commerce power.

The Marshall Court set the tone of commerce clause jurisprudence by characterizing the commerce power as a negative federal power to prevent state interference with interstate commerce. Chief Justice Roger Taney, Marshall's successor, focused the

regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than prescribed in the constitution." *Id.* at 196. The Court described these limitations:

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

*Id.* at 194.

80. *Id.* at 195. The Court held that the regulatory activity of the states was restricted to those concerns "which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." *Id.*

81. Counsel had argued that the power to regulate commerce implied "full power over the thing to be regulated [and] exclude[d], necessarily, the action of all others that would perform the same operation on the same thing." *Gibbons*, 22 U.S. at 209. While the Court stated that this argument had not been refuted, it did not commit itself to the position. *Id.*

82. Chief Justice Marshall also believed that the judiciary should defer to the will of the people, as expressed in the enactments of Congress: "The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse." *Gibbons*, 22 U.S. (9 Wheat.) at 197.

83. 27 U.S. (2 Pet.) 245 (1829).


85. *Id.* at 252. The Court found that the state law was not "repugnant to the power to regulate commerce in its dormant state or . . . in conflict with any law passed on the subject." *Id.*
Court's understanding of the commerce power as a check against discriminatory assertions of state power. For example, in Cooley v. Board of Wardens, the Court clarified the exclusivity doctrine by establishing that some subjects were of such a local nature that the states could exercise a concurrent power over interstate commerce. Coupled with Willson's police power limitation, Chief Justice Marshall's exclusivity dictum had thus been refined.

These early pronouncements established the limits of state power in areas affecting interstate commerce. In addition, by defining "commerce" and making distinctions between national and local matters, whether "interstate" or not, the early cases affected how the Court analyzed assertions of affirmative federal power to regulate interstate commerce. A change in the Court's approach to the commerce power did not come until the last decade of the nineteenth century, as the Court responded to congressional enactments such as the Interstate Commerce Act and the Sherman Antitrust Act.

86. Chief Justice Taney served from 1835 to 1864. See Veazie v. Moor, 55 U.S. (14 How.) 568 (1852) (upholding exclusive state regulation of internal commerce); The Passenger Cases, 48 U.S. (7 How.) 283 (1849) (voiding state laws imposing a head tax on passengers arriving in state ports, but also holding that people were objects of commerce); The License Cases, 46 U.S. (5 How.) 504 (1847) (sustaining state laws requiring licenses to distribute intoxicating beverages as within states' police powers).

87. 53 U.S. (12 How.) 299 (1851).


89. Implicit in all the discussions of exclusivity was the issue of slavery. See Geoffrey R. Stone et al., Constitutional Law 269 (2d ed. 1991). Southern states did not want slaves to be considered objects of interstate commerce because they would be within the exclusive domain of the federal commerce power. Id. Then the states could not regulate the buying and selling of human beings. Id. This strategy became more important as the mid-century mark approached. Id. Early in the century, southern states were able to control how the issue of slavery was raised in national politics due to their relatively large numbers. Id. Later, as their power was diluted by the admission of free states, southern states came to rely on the notion of local control to keep slavery from national encroachment. Id. The strategy of the abolitionists was a mirror image of the slave state approach. Id. Initially, abolitionists favored a state-by-state approach, which guaranteed that some states would be free to outlaw slavery. Id. As more free states were admitted to the union, abolitionists began to seek national solutions to slavery. Id. This approach was, of course, cut off in Chief Justice Taney's most notorious decision, Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
The Authority of Congress to Regulate Commerce and the Rise of Laissez Faire Jurisprudence

The end of slavery and the passage of the Fourteenth Amendment greatly impacted the concept of the federal commerce power. In the period between the end of the Civil War and the turn of the century, the economy of the United States was transformed by industrialization and technological innovation. The progressive politics of the era, with its suspicion of trusts and monopolies, led Congress to enact legislation insuring that competition was not waylaid by the monopolistic practices used in some industries. These enactments clashed with the Court's laissez-faire jurisprudence, which viewed economic regulation as an impairment of contract rights. During the period leading up to the sea change of 1937, the Court followed contradictory impulses, invalidating federal laws in some cases by making distinctions between commerce and manufacturing and upholding federal laws in other cases by intimating that a "stream of commerce" existed that brought into the federal regulatory domain areas previously thought to have been under exclusive state control.

After few contributions during the Chief Justiceships of Samuel Chase and Morrison Waite, the Court gave new meaning to its commerce clause jurisprudence. After 1890, the Court considered congressional actions that attempted to influence economic policy, such as the Interstate Commerce Act of 1887 and the Sherman Antitrust Act of 1890.

90. See Stone et al., supra note 89, at 151.
91. The judicial activism of this era is epitomized by Lochner v. New York, 198 U.S. 45 (1905), which invalidated a state law limiting the weekly hours of bakery workers. Judicial restraint, on the other hand, is characterized by a deference to legislative judgment of constitutionality, a refusal to deprive legislatures of a choice of policy, and a belief that the economic aspects of legislative policy is a function of fact. See Frankfurter, supra note 7, at 81-82. But see Richard Epstein, Self-Interest and the Constitution, 37 J. LEGAL EDUC. 153, 157 (1987) (arguing that Lochner was correctly decided because it invalidated special interest legislation).
92. Chief Justice Chase served from 1864 to 1873. See The License Tax Cases, 72 U.S. (5 Wall.) 462 (1867) (holding that Congress cannot regulate purely intrastate activities); United States v. De Witt, 76 U.S. (9 Wall.) 41 (1870) (invalidating, for the first time, a federal law regulating petroleum products as exceeding the commerce power because the law impinged on the police power reserved to the states).
93. Chief Justice Waite served from 1874 to 1887. See Munn v. Illinois, 94 U.S. 113 (1877) (upholding state regulation of railroad rates because railroads are private property devoted to public purposes). According to Professor Frankfurter, this case "laid the foundation of Congressional entry into fields of comprehensive regulation of economic enterprise." Frankfurter, supra note 7, at 83. See, e.g., The Shreveport Rate Cases, 234 U.S. 342 (1914).
94. These initial regulatory laws, broad and vague in scope, were designed to
The first consideration of the Sherman Antitrust Act was in *United States v. E.C. Knight Co.* In *E.C. Knight*, a New Jersey corporation had acquired four Pennsylvania corporations that owned sugar refineries, effectively monopolizing the manufacture of sugar in the United States. While the Court made it abundantly clear that manufacturing was a sphere of industry not contemplated to be within the commerce power, it failed to explain how the purchase of the stock of the companies owning the refineries was not "commerce."

The Court limited federal attempts to prohibit the interstate shipment of goods manufactured by companies using child labor in *Hammer v. Dagenhart.* The Court held that, as a jurisdictional matter, labor regulation was the province of the states, pursuant to their police powers. The Court thus limited the scope of the congressional power to legislate in the name of morality.

Initially, the Court adhered to a limited definition of commerce which exempted wide areas of economic activity from federal regulation. In addition, the Court maintained its traditional approach to areas within the police powers of the states. However, the Court eventually recognized a greater scope for congressional action under the commerce power in other contexts.

address the excesses of capitalism by promoting competitive practices. See Epstein, *supra* note 8, at 1413; *James Q. Wilson, The Politics of Regulation* 366-70 (1980). Professor Epstein accepts such regulation because it aims to bolster competition. His complaint generally concerns laws that distort markets without, in even the slightest way, actually achieving the stated intention of bestowing a benefit on a narrow class of interests, while extracting costs from a narrow range of parties. See, e.g., Richard Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 Brook. L. Rev. 741 (1988). What Professor Epstein does not explain is the tension in conservative constitutionalism between the principle of majoritarianism and the conservative judicial activism embodied in policy pronouncements on the constitutionality of legislative acts.

95. 156 U.S. 1 (1895).
96. *E.C. Knight*, 156 U.S. at 17. After purchasing the four Pennsylvania companies, the American Sugar Refining Company refined 98 percent of the sugar in the United States. *Id.* at 18 (Harlan, J., dissenting).
97. *Id.* at 12. The Court held: "Commerce succeeds to manufacture, and is not part of it." *Id.*
Pre-New Deal Expansions of Commerce Power

During the period leading up to the New Deal, the Court also indicated a willingness to allow certain broad interpretations of the federal commerce power, especially when the instrumentalities of commerce were involved. The Court upheld the federal regulation of activities that were not purely "commercial" and not purely "interstate" while expanding the notion of "regulation" to include "prohibition." Thus, the initial constructs offered in Gibbons were manipulated, usually under the guise of addressing the interconnectedness of the national economy, and the groundwork for the New Deal legislation was laid. The Court sought to reconcile decisions seemingly in conflict with E.C. Knight by emphasizing that the practices at issue were aimed at "sales," and not manufacturing. Nonetheless, subsequent Courts drew on these decisions to justify further expansions of the commerce power. The Court soon disposed of the difficulties inherent in making artificial distinctions and delineating purely intrastate matters.

100. The Shreveport Rate Cases, 234 U.S. 342 (1914) (upholding federal regulation of railroad rates on intrastate routes of interstate carriers). The Court held that Congress had the power "to control . . . all matters having such a close and substantial relation to interstate traffic." The Shreveport Rate Cases, 234 U.S. at 351. Later, in Railroad Comm’n v. Chicago, B. & Q. R.R., 257 U.S. 563 (1922), the Court allowed the federal regulation of all railroads, even purely intrastate carriers.

101. See Champion v. Ames, 188 U.S. 321 (1903) (upholding a federal law prohibiting the shipment of lottery tickets across state lines). "Although the statute in question operated on articles of interstate commerce, its purpose surely was not to protect or to facilitate interstate commerce. Quite the opposite—it was designed to influence the primary conduct of individuals. . . ." Epstein, supra note 8, at 1422. By seeking to prohibit an activity in the name of morality, Congress infringed on the essentially local police power. See also Hoke v. United States, 227 U.S. 308 (1913) (upholding the Mann Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (1988)), prohibiting the interstate transportation of women for immoral purposes).

102. See Chicago Bd. of Trade v. Olsen, 262 U.S. 1 (1923) (upholding regulation of futures markets as instrumentalities of interstate commerce); Stafford v. Wallace, 258 U.S. 495 (1922) (upholding the regulation of the sales and shipment of beef at stockyards); Swift & Co. v. United States, 196 U.S. 375 (1905). In Swift, the Court applied the Sherman Antitrust Act to attempts by meat dealers to create a cartel. Swift, 196 U.S. at 398. Justice Holmes, writing for a unanimous Court, held that interstate commerce was "not a technical legal conception, but a practical one, drawn from the course of business." Id. For other cases expanding the commerce power in the antitrust context, see United States v. American Tobacco Co., 221 U.S. 106 (1908) (holding that monopolization of the tobacco industry was within the Sherman Antitrust Act) and Standard Oil Co. v. United States, 221 U.S. 1 (1911) (holding that monopolization of the petroleum industry was within the Sherman Antitrust Act).
The New Deal

During the first years of the Roosevelt administration, the Court invalidated many of the legislative initiatives aimed at alleviating the effects of the economic crisis. However, in the watershed year of 1937, the Court's new majority upheld both state and federal regulatory laws under the Due Process and Commerce Clauses. For some commentators, it was the culmination of a trend toward the recognition of a national economy, while other commentators have viewed this period as the beginning of the end of federalism.

The "substantial economic effects" test was later expanded in Wickard v. Filburn, in which the Court upheld a federal law reaching trivial, "non-commercial" activities. Using a "cumulative effects" theory, the Wickard Court announced that Congress was able to regulate even those local activities that lacked a direct effect on interstate commerce as long as such activities substantially affected commerce. The Court reasoned that such activities, when aggregated with the impact of all those engaging in such activity, had a substantial impact on interstate commerce. Wickard represented an unprecedented expansion

104. The Court's membership had not changed, but Justice Roberts switched sides and joined the Carter dissenters, Chief Justice Hughes, and Justices Brandeis, Stone, and Cardozo.
105. See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding state minimum wage law). The Due Process Clause provides: "No state shall... deprive any person of life, liberty, or property, without due process of law...." U.S. CONST. amend. XIV.
107. See Stern, supra note 103, at 545-47.
108. See Epstein, supra note 8, at 1443. "The old barriers were stripped away; in their place has emerged the vast and unwarranted concentration of power in Congress that remains the hallmark of the modern regulatory state." Id.
111. Id. at 127-28. The Court stated that an individual's effect on interstate commerce may be trivial, but that fact was not "enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." Id.
of the commerce power.

While the transformation of the Commerce Clause was complete, there were Justices who continued to recognize that federalism limited the powers of Congress. Justices Cardozo and Frankfurter were frequent critics of the Court's blurring of the limits of federalism. In his concurrence in *Schechter*, Justice Cardozo argued that there were intrastate activities that remained beyond the commerce power. In addition, Justice Frankfurter, an advisor to President Roosevelt prior to his appointment to the Court, was a proponent of judicial restraint and federalism. For Justice Frankfurter, federal criminal laws that intruded on traditional state authority were invalid. Thus, the seeming *carte blanche* of *Wickard* continued to have its limitations.

The Court had signalled its deference to congressional actions that greatly enhanced federal regulatory power, and as a result, Congress was virtually free to enact whatever initiatives it defined as constitutional. The result has been concomitant strains

112. In 1928, Professor Frankfurter warned that increasing the number of federal courts would "result[] in a depreciation of the judicial currency and the consequent impairment of the prestige of the federal courts." Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L. Q. 499, 506 (1928).


115. See *Screws v. United States*, 325 U.S. 91, 138 (1945) (Roberts, Frankfurter, and Jackson, J.J., dissenting) (arguing that the law at issue was a needless extension of federal criminal authority into a traditional state area); United States v. Five Gambling Devices, 346 U.S. 441 (1953) (plurality opinion) (invalidating federal reporting requirements on the grounds of reaching purely intrastate transactions).

Justice Frankfurter also dissented in two landmark cases extending federal jurisdiction. See *Monroe v. Pape*, 365 U.S. 167, 202 (1961) (Frankfurter, J., dissenting) (the Court allowed federal civil rights suits under 42 U.S.C. § 1983 without exhaustion of state remedies); Baker v. Carr, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting) (disposing of the political question doctrine, the Court held that the issue of the legality of a legislative apportionment scheme was justiciable).

116. Justice Frankfurter was on the bench when a unanimous Court issued its opinion in *Wickard*, authored by Justice Jackson. In addition, Justice Jackson joined the *Five Gambling Devices* plurality opinion dismissing the federal indictment, even though the same "cumulative effects" theory could have been applied to uphold the reporting requirements for the sales of gambling devices. Without intrastate reports, it was impossible to trace devices that later traveled in interstate commerce. See Robert L. Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271, 274-75 (1973).
on the judicial workload and the relationship between states and the federal government. While the Wickard Court argued that it was merely applying Chief Justice Marshall's original conception of "commerce," it was obvious that something entirely new had occurred. That the commerce clause jurisprudence remained settled until Lopez is testament to how far federal power could reach. But Lopez is not so inexplicable if one considers the ascendency of conservative jurisprudence, as exemplified by the unwavering opinions of Chief Justice Rehnquist.

The Rehnquist Era

Prior to Justice Rehnquist's appointment, the Court rendered opinions in two cases touching on issues that would later help define the Rehnquist era. In Maryland v. Wirtz, the Warren Court held that the Federal Fair Labor Standards Act could be applied to regulate the wages and hours of employees at state institutions. Then, the Burger Court obliterated the distinction between intrastate and interstate crime in United States v. Perez. In Perez, the Court relied on the "class of activities" test used in the public accommodations cases to uphold a federal criminal law that required no demonstration of an interstate nexus. The Perez Court held that it was sufficient that

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117. Justice Jackson, writing for the Court, stated: "At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded." Wickard, 317 U.S. at 120.
120. Wirtz, 392 U.S. at 198-99. In dissent, Justice Douglas argued: The Court's opinion skillfully brings employees of state-owned enterprises within the reach of the Commerce Clause; and as an exercise in semantics it is unexceptionable if congressional federalism is the standard. But what is done here is nonetheless such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism. Id. at 201 (Douglas, J., dissenting).
121. 402 U.S. 146 (1971). In dissent, Justice Stewart maintained that: [T]he Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws. . . . But it is not enough to say that loan sharking is a national problem, for all crime is a national problem. Perez, 402 U.S. at 157 (Stewart, J., dissenting).
123. To establish federal criminal jurisdiction, prosecutors no longer had to demonstrate that each specific criminal act affected interstate commerce. See Stern,
Congress had made extensive findings establishing the interstate effect of extortionate credit transactions.\textsuperscript{124} The Court did not require that the Government establish that the particular actions of the defendant in\textit{Perez} affected interstate commerce, but only that the defendant had engaged in the class of activities contemplated to have been within the federal criminal statute.\textsuperscript{125}

The themes of state sovereignty and federalism expressed in the dissenting opinions in\textit{Wirtz} and\textit{Perez} were subsequently picked up by Justice Rehnquist, who authored the Court's opinion overruling\textit{Wirtz} in part in\textit{National League of Cities v. Usery}.\textsuperscript{126} A decision animated by the notion of state sovereignty,\textsuperscript{127} \textit{National League of Cities} invalidated the 1974 amendments to the Fair Labor Standards Act\textsuperscript{128} that extended the wage and hour provisions to state and municipal employees because they impaired "essentially and peculiarly state powers."\textsuperscript{129} While noting that the statute was within the scope of the commerce power, the Court marked off an area that was exclusively the province of the states, without precluding congressional regulation of wages and hours of other types of employees.\textsuperscript{130}

In his concurrence in\textit{Hodel v. Virginia Surface Mining \& Reclamation Ass'n},\textsuperscript{131} Justice Rehnquist expressed discomfort with the practice of deferring to congressional judgment on a law's connection to interstate commerce.\textsuperscript{132} The Justice's nar-

\textsuperscript{supra} note 116, at 273.

\textsuperscript{124} \textit{Perez}, 402 U.S. at 154. The interstate element was alleged in congressional findings, cited by the Court in a footnote. \textit{Id.} at 147 n.1. It was not alleged that the defendant was associated with "organized crime."

\textsuperscript{125} \textit{Id.} at 154.


\textsuperscript{127} The Court reasoned:

One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.\textit{National League of Cities}, 426 U.S. at 845.


\textsuperscript{129} \textit{National League of Cities}, 426 U.S. at 845 (quoting Coyle v. Oklahoma, 221 U.S. 559, 565 (1911)).

\textsuperscript{130} See Laurence H. Tribe, \textit{American Constitutional Law} § 5-22 (2d ed. 1988): "Rather than narrowing the stream of commerce, the Court instead chose to create islands in that stream—islands where the states alone could regulate, islands off-limits to the once seemingly omnipresent federal government." \textit{Id.}


\textsuperscript{132} Justice Rehnquist stated that "simply because Congress may conclude that
row view of the commerce power required a demonstration of a substantial effect on interstate commerce.\(^\text{133}\)

In 1985, *National League of Cities* was overruled by *Garcia v. San Antonio Metropolitan Transit Authority*,\(^\text{134}\) with Justice Blackmun joining the *National League of Cities* dissenters.\(^\text{135}\) In *Garcia*, the Court disposed of the "traditional function" test as unworkable and argued that the states' sovereign authority was not impaired.\(^\text{136}\) In his dissenting opinion, Justice Rehnquist predicted that the Court would eventually return to the principles of *National League of Cities*.\(^\text{137}\)

The most recent exposition of the limits of federalism occurred in *New York v. United States*,\(^\text{138}\) in which the Court invalidated the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985\(^\text{139}\) as a violation of the Tenth Amendment.\(^\text{140}\) Writing for the Court, Justice O'Connor held that state sovereignty prevented Congress from forcing states to participate in federal policy directives.\(^\text{141}\)

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\(^{133}\) Id. at 311.

\(^{134}\) 469 U.S. 528 (1985).

\(^{135}\) Garcia, 469 U.S. at 531. The Court held:

\[\text{The attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which National League of Cities purported to rest. That case, accordingly, is overruled.}\]

\(^{136}\) Id. at 549.


\(^{140}\) New York v. United States, 505 U.S. at 179-80. The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively; or to the people." U.S. CONST. amend. X.

Chief Justice Rehnquist has patiently adhered to a vision of federalism that was once out of fashion but now commands a majority of the Court. But the Court remains divided on these crucial issues. The ideological commitment of the Chief Justice countenances no opposition. Though he compromised in *Lopez* in order to attract the votes of Justices Kennedy and O'Connor, Chief Justice Rehnquist has little use for *stare decisis* when it clashes with his vision of constitutional jurisprudence. In the end, a principled constitutionalism may be impossible in light of the ongoing politicization of the judicial decision making process.

**SECTION III. AT THE CROSSROADS: COMPROMISE, PRINCIPLE, AND JUDICIAL ACTIVISM**

In the October 1994 term, the Rehnquist Court, employing a judicial activism traditionally eschewed by judicial conservatives, was able to forward its agenda of conservative constitutionalism to a degree only hinted at in previous terms. On several fronts, usually with 5-4 majorities, the Court limited federal power, sending strong messages to all three branches of the federal government. In *Lopez*, the Court enunciated a potentially sweeping limitation on the power of Congress to regulate commerce. Chief Justice Rehnquist, along with allies Justices Scalia and Thomas, saw long-held beliefs command a majority of the votes of the Court. But in order to get the fourth and fifth votes, the Chief Justice was forced to temper his most extreme policy views. To garner the votes of Justices O'Connor and Kennedy, Chief Justice Rehnquist grudgingly accepted the continued vitality of the New Deal cases as well as the public accommodations cases, but was able to change the "rational basis" test by requiring a demon-

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142. See Robin West, *Progressive and Conservative Constitutionalism*, 88 Mich. L. Rev. 641 (1990) (arguing that conservative activism has displaced the liberal-legal paradigm). Professor West maintained that conservative and progressive theories of jurisprudence are in agreement "that liberal neutrality in judging is illusory, and that constitutional adjudication is consequently necessarily political." *Id.* at 644. Today, the dispute "is over the value of the visions of the good defined by the various hierarchies that make up our private and social life." *Id.*

stration by Congress of some relationship between the regulated activity and interstate commerce. While the 104th Congress has shown signs of reinvigorating the powers of the states, the Court has acted to nudge the process along. Advocates of federalism have reason to feel emboldened by the new atmosphere, especially in the areas of gun control\(^{144}\) and environmental regulation.\(^{145}\) But the disregard for precedent, with implications for the Court's legitimacy and the potential for social upheaval, reveals a dilemma for conservative constitutionalists. In the end, though, *Lopez* may merely be an expression by the federal judiciary of its special role in the adjudicatory process.

**Federalism and the Tenth Amendment**

*Lopez* was one of several decisions made during the October 1994 Term that were favorable to the states.\(^{146}\) In the context of the commerce power, *Lopez* is an extension of the Court's limitation on federal power announced in *New York v. United States*. The values of federalism underlying *New York v. United States* are reflected in *Lopez*, with its emphasis on exclusive spheres of state control. *Lopez* is on its strongest footing when viewed as a restatement of the principle of limited government, with powers reserved to local entities attuned to local problems.

In *Lopez*, the Rehnquist Court tried to reassert the notions of state sovereignty and limited federal powers. During his tenure, Chief Justice Rehnquist has been willing to expand his conception of federalism at every opportunity.\(^{147}\) But his assumption

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In the Court's October 1993 Term, environmentalists successfully used the federalism strategy to prevent the construction of a dam. See *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 114 S. Ct. 1900 (1994) (holding that state regulations were not pre-empted in the absence of conflicting federal regulations).


that states, being closer to the people, are the guardians of freedom is historically inaccurate and ignores the changes in the federal relationship brought by the passage of the Fourteenth Amendment.

In addition, any redistribution of power within a federal system should occur through the legislative process, in which elected officials reflect the will of the people and are accountable to the electorate. *Lopez* invalidated a duly passed law, which indicates that the Court is willing to substitute its judgment about the role of the federal government for that of the legislature.

**Stare Decisis and Judicial Activism**

The dangers of disregarding precedent include a loss of legitimacy for the Court and a disruption of the balance of powers within the federal framework.\(^{148}\) In ending the *Lochner* era’s activism, the New Deal Court adopted a “rational basis” test for evaluating congressional enactments under the Commerce Clause. The test deferred to the intentions of Congress, which was charged with defining the scope of its power under the Clause. The Court’s decisions in this area thus did not proscribe action but allowed a broad scope for fashioning legislative responses. The responsibility of decision making thus rests solely on elected officials. *Lopez*, on the other hand, gingerly accepted New Deal precedents but employed a more stringent evaluation of whether the regulated activity “substantially affected” interstate commerce. Such a change in the test reflects Chief Justice Rehnquist’s impatience with congressional determinations of constitutionality. In light of the fact that the Court has traditionally left that determination to Congress, the Chief Justice was forced to address questions concerning *stare decisis*. Chief Justice Rehnquist has never hesitated to advocate overturning

precedent that he considers to have been wrongly decided, even though in doing so he denigrates the principle of majoritarianism, an ideal usually embraced by conservative jurists.

The Court’s most recent exposition of the doctrine of stare decisis came in Planned Parenthood v. Casey. In Casey, the Court adhered to the doctrine for the sake of the Court’s legitimacy and to avoid social dislocation. In his dissenting opinion, Chief Justice Rehnquist ridiculed the majority’s conception of stare decisis as a distortion of the doctrine’s role. While stare decisis once offered many institutional benefits, it is clear that, from the position of the Chief Justice, the doctrine has little application when a Justice believes that a constitutional case has been wrongly decided.

While no cases were explicitly overruled in Lopez, the Court failed to distinguish several important precedents, especially the line of cases starting with Wickard v. Filburn that was based on the aggregation theory. For example, the Court distinguished United States v. Perez because loansharking affects the channels of interstate commerce, as Congress made clear in its specific findings. But the Perez holding, which allowed federal prosecution of purely local actions, will have to be overruled if the Rehnquist Court wishes to revolutionize federal criminal law.

In addition, the concurrence of Justice Thomas indicates that a strictly originalist position requires a return to eighteenth century interpretations of the commerce power. Whatever the inefficiencies of a federal regulatory scheme may be, an originalist approach cannot explain the value in dismantling modern Amer-

149. 112 S. Ct. 2791 (1992) (invalidating a state law restricting abortion).
150. The Court held that ignoring precedent would do “profound and unnecessary damage to the Court’s legitimacy.” Casey, 112 S. Ct. at 2816. In addition, the Court noted that people had come to rely on prior law and had “organized intimate relationships and made choices that define their views of themselves and their places in society.” Id. at 2809. The Court found that its “power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.” Id. at 2814.
151. Casey, 112 S. Ct. at 2856 (Rehnquist, C.J., dissenting). The Chief Justice argued that under the majority’s characterization of stare decisis, “when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was incorrect, unless opposition to the original decision has died away.” Id. at 2863.
152. See, e.g., Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 COLUM. L. REV. 723, 724 (1988) (arguing that the doctrine “maintain[s] political stability and continuity in society.”).
ican Government.

Federal Criminal Law and the Federal Docket

While it is easy to speculate on some of the broader implications of Lopez, its most immediate impact will be felt in the area of federal criminal law. The Lopez decision addresses concerns that the proliferation of federal criminal statutes has diluted the special stature of the federal courts, inundating them with mundane criminal proceedings more appropriately adjudicated in state courts. Various reports by federal judicial agencies as well as articles published by Chief Justice Rehnquist indicate that Lopez was aimed directly at effecting immediate change in the makeup of the federal judiciary’s docket. But this seemingly innocuous goal requires the undoing of the entrenched and oftentimes spasmodic development of federal criminal law. The electoral process was supposed to safeguard the limits of federal power. However, today few members of Congress would oppose a crime bill for fear of appearing “soft” on the issue. Therefore, the Lopez Court acted to limit the power of the legislative branch because Congress has never been able to


158. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) (Chief Justice Marshall argued that elections would restrain Congress from abuse of the commerce power).
exercise self-restraint in this area.159

Criticisms of the development of federal criminal law are not new.160 And as Congress has continued to enact new criminal laws, additional calls for reform have been issued.161 Today, the voices are virtually united in the denunciation of the federalization of intrastate crime.162 These critics reinforce the perceptions of members of the federal judiciary that a crisis is engulfing the courts, and nothing short of radical re-evaluation of federal criminal law will suffice. *Lopez* is thus the first step.

Crime has traditionally been viewed as a local matter within the police powers of the states. Prior to the Civil War, federal criminal offenses were few and limited to those activities that resulted in injury to the federal government or its programs.163 During the nineteenth century, clashes between state courts and the federal government over jurisdictional questions were resolved in favor of enlarging the scope of federal jurisdiction.164 After the Civil War, federal criminal laws were enacted that

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160. In 1925, legal historian Charles Warren wrote: The present congested condition of the dockets of the Federal Courts and the small prospect of any relief to the heavily burdened Federal Judiciary, so long as Congress continues, every year, to expand the scope of the body of Federal crimes, renders it desirable that consideration be given to the possibility of a return to the practice which was in vogue in the early days of the Federal judicial system.


161. Robert Stern, who had earlier helped usher in the New Deal as an official in the Justice Department, remarked in 1973: "Recent developments in the federalization of intrastate crime which appear to extend the commerce power beyond previous limits raise important constitutional questions under the commerce clause." *Stern*, supra note 116, at 274.


163. See Beale, supra note 157, at 775-79.

164. See Warren, supra note 160, at 583-98. Professor Warren described three phases of this process. First, the Court held that states could not be compelled to enforce federal criminal law in *Prigg v. Pennsylvania*, 41 U.S. (10 Pet.) 539, 615 (1842). Second, Congress enacted criminal laws that took jurisdiction away from state courts. Third, the Court allowed for removal to federal courts of state criminal proceedings in *Tennessee v. Davis*, 100 U.S. 257 (1880).

Ironically, it was the holding in *Prigg* that led to the development of a federal police force to enforce the Fugitive Slave Act of 1850. See *Schwartz*, supra note 70, at 175-76.
protected private citizens from injury. In *Champion v. Ames*, the Court held that Congress could regulate in the name of morality, thus creating a federal police power over activity that had been considered to be exclusively within the states’ police powers. The passage of the Eighteenth Amendment in 1918 resulted in a flood of federal prosecutions until the Amendment was repealed in 1933. During the New Deal, Congress provided for criminal and civil penalties in a wide range of social and economic initiatives.

The next major expansion in federal criminal jurisdiction came in 1971 when the Court upheld the federal regulation of an overinclusive class of activities. In *United States v. Perez*, the Court upheld a conviction in federal court without an establishment of a nexus between the criminal activity and interstate commerce. Congress was free to determine the scope of federal jurisdiction.

Other enactments, such as the Comprehensive Drug Abuse Prevention and Control Act of 1970, the Speedy Trial Act of 1974, and the Sentencing Reform Act of 1984, radically changed the nature of the federal docket and placed great strains on federal judicial resources. Commentators have

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165. 188 U.S. 321 (1903).
166. The Court upheld federal laws under the commerce power in a variety of areas. See, e.g., *Brooks v. United States*, 267 U.S. 432 (1925) (upholding a prohibition on the interstate transportation of stolen vehicles); *Caminetti v. United States*, 242 U.S. 470 (1917) (upholding a prohibition on the interstate transportation of women for immoral purposes).
168. Judge Miner observed that the New Deal decisions initiated "the most expansive intervention of the federal government in crime control since the beginning of the Republic." Miner, *supra* note 154, at 123.
169. *United States v. Perez*, 402 U.S. 146, 154 (1971). Stern noted that "[t]he key to the *Perez* decision may be found in the difficulty of proving in each individual case that the loan shark had an interstate connection even when it existed." Stern, *supra* note 116, at 278.
noted the increase in the federal workload,\textsuperscript{174} while federal judges have decried the change in the status of federal courts.\textsuperscript{175} Published studies by the Federal Judicial Center also advocate a re-evaluation of the role of the federal courts.\textsuperscript{176} These studies imply that prosecutions for street crimes involving petty drug transactions do not belong in the federal courts.\textsuperscript{177} \textit{Lopez} will allow the courts to invalidate those enactments under the commerce power that do not relate to the channels or the instrumentalities of interstate commerce. Without this connection, federal criminal laws that reach purely intrastate conduct will not be able to pass the "substantial effects" test.

\textit{Lopez} is the culmination of these trends and represents a frustration with a Congress unwilling or unable to exercise self-restraint. Yet, \textit{Lopez} can also be seen as an unprincipled usurpation of the legislative process that does nothing to address the
crisis that engulfs both state and federal court systems.\textsuperscript{178} Systemic reform is certainly required to address the "crisis" currently inundating the federal courts. Lopez may serve as merely a reminder to Congress that its commerce power has "outer limits," but the decision may have broader, more sweeping impact.\textsuperscript{179} Indeed, the continued vitality of the New Deal legislation may hinge on the outcome of the 1996 elections.

\textit{Charles B. Schweitzer}

\textsuperscript{178} The author of this comment concurs with Professor Little, who wrote: Federal legislative or enforcement polices based on an expansive concept of the 'dignity' of federal courts are unprincipled, founded on unarticulated and disputable premises, and ignore too large a portion of our existing criminal justice system: talented and struggling state courts. There is an implied elitist and self-protectionist component of this message that seems entirely illegitimate. Rory K. Little, \textit{Myths and Principles of Federalization}, 46 HASTINGS L.J. 1029, 1060-61 (1995).
