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Federalism Revisited: The Supreme Court Resurrects the Notion of Enumerated Powers by Limiting Congress's Attempt to Federalize Crime Comment.

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COMMENTS

FEDERALISM REVISITED: THE SUPREME COURT RESURRECTS THE NOTION OF ENUMERATED POWERS BY LIMITING CONGRESS'S ATTEMPT TO FEDERALIZE CRIME

LARRY E. GEE

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent . . . the greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding.[1]

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1. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

I. INTRODUCTION

"Bronx Kindergartner Found with a Loaded .25-Cal. Pistol;"[2] "Four Wounded in Gunfire at Wilson High; Spray of Bullets Aimed at Students Gathered Outdoors After Class;"[3] "Teachers, Pupils Edgy; Weapons Invade the Classroom."[4] Increasingly, Americans confront stories of school children wielding handguns, whether for protection or because of involvement in gang- and drug-related activities, or both.[5] The media real-

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2. Elaine Rivera & Nick Chiles, *Bronx Kindergartner Found with a Loaded .25-Cal. Pistol*, NEWSDAY, Jan. 12, 1989, at A3. The child initially told teachers and police that the gun belonged to his father. *Id.* He later changed his story, stating that a stranger had placed the gun in his pocket. *Id.* While the story of an armed five-year-old may seem incredible, children apparently learn by example. The Justice Department has estimated that individuals armed with handguns are committing a record number of crimes. *See* Bill McAllister, *Handgun Crime Soaring in U.S., Report Says*, L.A. TIMES, May 16, 1994, at A1 (chronicling Justice Department's study of handgun crime). In 1994, the Justice Department released a report stating that individuals using handguns "committed a record 930,700 violent crimes in 1992 and also set a record of 917,500 nonfatal crimes" in which offenders were armed with guns. *Id.* This is a leap of almost 50% over figures from the previous five years. *Id.*

3. Rene Sanchez & Sari Horowitz, *Four Wounded in Gunfire at Wilson High; Spray of Bullets Aimed at Students Gathered Outdoors After Class*, WASH. POST, Jan. 27, 1989, at A1. Increasingly, minors are the perpetrators of crimes in which handguns are used. *See Children Carrying Weapons: Why the Recent Increase: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. 23 (1992) (expounding on problem of availability of handguns to children). In enacting the Gun-Free School Zones Act of 1990, Congress found that an estimated 135,000 male students carry handguns to school each day. *Gun-Free School Zones Act of 1990: Hearings on H.R. 3757 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 2 (1990). The Center to Prevent Handgun Violence, a nonprofit organization based in Washington, D.C., estimated that 8.7 million children in the United States have access to handguns. *See* Michele Weldon, *Got a Gun? Lock It Up—Or Else*, CHI. TRIB., Apr. 12, 1992, at CN11 (urging parents to exercise greater gun responsibility). A recent study of the Seattle public school system found that 34% of high-school students reported "easy access" to guns. Charles M. Callahan & Frederick P. Rivara, *Urban High School Youth and Handguns: A School-Based Survey*, 267 JAMA 3038, 3040 (1992). The study indicated that 6.4% of the Seattle students actually owned guns. *Id.* The study also related that in 1988, handguns were responsible for 20% of all deaths among 15- to 20-year-olds in the United States. *Id.* at 3038. The accessibility of handguns to children could be significantly reduced if legitimate gun owners took the time to secure their weapons. Michele Weldon, *Got a Gun? Lock It Up—or Else*, CHI. TRIB., Apr. 12, 1992, at CN11. *See generally* Ben Winton, *C'mon, Get Real, Folks: Save Our Kids; Ad Campaign Targets Parents on Gun Safety*, PHOENIX GAZETTE, Aug. 26, 1994, at B1 (reporting efforts of Phoenix community leaders to encourage parents to teach gun safety to children).

4. Elaine Woo & Charisse Jones, *Teachers, Pupils Edgy; Weapons Invade the Classroom*, L.A. TIMES, Mar. 11, 1989, at 1.

5. *See* Peter Applebone, *Houston Aims at Weapons in School*, N.Y. TIMES, May 25, 1986, at 18 (explaining program established by Houston School District to deal with "increasing problem" of school children carrying guns). Noting the increased presence of

izes that stories of guns in schools make for captivating news coverage.[6] Indeed, violent crime in general has evolved into a form of entertainment, with regular television programs dedicated exclusively to covering leading criminal trials.[7]

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handguns in schools, a popular television show even devoted a portion of its program to this problem. *See Primetime Live* (ABC television broadcast, Nov. 19, 1992) (reporting increased presence of handguns in schools), *available in* LEXIS, News Library, SCRIPT File. The exposé on guns in schools was touted as "something every parent needs to know about the growing threat in America's schools." *Id.* The broadcast went on to show footage, obtained by hidden camera, of 14- and 15-year-old gang members in Denver gathering together before school. *Id.* The children smoked, caught up on news, and then armed themselves with pistols before heading off to school. *Id.* Students interviewed by correspondent Diane Sawyer reported that it was much easier to obtain a handgun than a driver's license. *Id.*

6. *See* Art Harris, *Reliving the Murders in Atlanta; A City's Anger Unleashed Anew*, WASH. POST, Feb. 10, 1985, at H1 (indicating that Atlanta school children carried guns and knives to school for protection). The enactment of the Gun-Free School Zones Act heightened media coverage of the presence of guns in schools. *See* Jim Casey, *Boy, 9, Arrested for Bringing Gun to School*, CHI. SUN-TIMES, Jan. 11, 1994, News, at 3 (reporting that Chicago grammar school student was arrested for bringing unloaded .25-caliber semiautomatic pistol to class); Tom Demoretcky, *9th-Grader Shot In School Hallway*, NEWSDAY, Nov. 18, 1994, at A8 (describing fight over girl that erupted into gunfire in high school); Mark D. Karlin, *Shooting Spree Targets Kids*, CHI. SUN-TIMES, Mar. 28, 1992, at 18 (commenting that firearm violence is out of control); Jounice L. Nealy, *Boy Shoots Himself At School*, PALM BEACH POST, Jan. 11, 1995, at B2 (relating story of high-school student who shot himself between classes after argument with girlfriend); *see also Bill Moyers' Specials* (PBS television broadcast, Jan. 9, 1995) (exploring sociological roots of violent crime), *available in* LEXIS, News Library, SCRIPT File; *Frontline: Does T.V. Kill?* (PBS television broadcast, Jan. 10, 1995) (studying behavior of children exposed to excessively violent television programming), *available in* LEXIS, News Library, SCRIPT File.

7. *See* Dan Collins, *"Most Dramatic Story Ever": The Fascination with Murder*, U.S. NEWS & WORLD REP., June 24, 1985, at 64 (noting public thirst for news of leading trials, especially those involving homicide). The public's obsession with news and fictional portrayals of violent crime has inspired excessive coverage of the O.J. Simpson murder trial. *See Entertainment Tonight* (CBS television broadcast, Jan. 12, 1995) (leading broadcast with story of O.J. Simpson murder trial, complete with "analysis" of legal arguments presented that day in court), *available in* LEXIS, News Library, SCRIPT File. *Entertainment Tonight*, though centered around coverage of movies, television, and other forms of popular entertainment, usually leads with daily reports from correspondents covering the Simpson murder trial. *Id.* The media's glamorization of violent crime was recently parodied in Oliver Stone's motion picture *Natural Born Killers*, a film described by critics as "the 'Bonnie and Clyde' story of the 1990's." *See* Steve Pearsall, *Look Away, If You Can*, ST. PETERSBURG TIMES, Aug. 26, 1994, at 6 (critiquing *Natural Born Killers* and speculating that Stone's motive for making film was to "indict" Americans for their "obsession with telegenic bloodlust"). The film tells the story of two gun-carrying serial killers who enjoy a meteoric rise in popularity brought on by extensive media coverage and a seemingly bloodthirsty public. NATURAL BORN KILLERS (Warner Bros. 1994).

This constant barrage of stories about handgun violence involving children has understandably led to voter concern.[8] Sensing the growing fear of violent crime, political candidates have promised to "get tough" on crime in general and juvenile offenders in particular.[9] Additionally, state legislatures have passed laws criminalizing possession of weapons within the vicinity of schools.[10] Despite the states' traditional role in regulating

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8. *See* David E. Rosenbaum, *Emotional Issues Are the 1988 Battleground*, N.Y. TIMES, Nov. 4, 1988, at A1 (reporting voter concern with juvenile crime during 1988 presidential election); Courtney R. Sheldon, *Congress Gets the Word on What Voters Want*, U.S. NEWS & WORLD REP., Jan. 30, 1984, at 26 (evaluating voter concern over crime). Voters continue to demand, and politicians continue to promise, tougher crime laws. *See* Bob Cohn & Bill Turque, *Reinventing the President*, NEWSWEEK, Jan. 9, 1995, at 42 (describing voters' continuing concern over crime). President Bill Clinton's aides explained the sweeping Republican victories in November 1994 as a partial voter response to perceived delays in reforming criminal laws by Washington politicians. *Id.* Voters chose from candidates of all political persuasions promising to toughen criminal laws. *Id.* President Clinton's signing of the Federal Education Bill was an attempt to publicly illustrate his position on violence in schools. Paul Richter, *Clinton to Sign School Gun Curb in California*, L.A. TIMES, Oct. 22, 1994, at 18. The Education Bill, which President Clinton signed shortly before the November elections, mandates that federal aid be withheld from school districts that fail to expel students caught carrying guns into school. *Id.*

9. *See* Alfredo Azula, *Crime On Minds of Candidates*, PHOENIX GAZETTE, Nov. 2, 1994, at 16 (describing race for Phoenix House of Representatives in which all candidates promised to crack down on juvenile crime). During the 1994 Texas gubernatorial campaign, George W. Bush, Jr. promised to push legislation designed to crack down on crime, especially crimes committed by juvenile offenders. Ken Herman & Marty Graham, *Richards Focusing on Bush's Inexperience*, HOUS. POST, Oct. 30, 1994, at A39. Voters were ultimately attracted to Bush's call for stiffer penalties for juvenile crime, as he won the election. *Id.*

10. *E.g.*, N.D. CENT. CODE § 62.1-02-05 (1985); 18 PA CONS. STAT. ANN. § 912 (1983). After the Gun-Free School Zones Act was passed in 1990, many states either amended existing laws or enacted similar bans on guns in schools. *E.g.*, ALASKA STAT. § 11.61.195(a)(2)(A) (Supp. 1993); ARIZ. REV. STAT. ANN. § 13-3102(A)(12) (Supp. 1993); ARK. CODE ANN. § 5-73-119(a)(2)(A) (Michie 1993); CAL. PENAL CODE § 626.9 (Deering Supp. 1994); COLO. REV. STAT. ANN. § 18-12-105.5 (West Supp. 1993); CONN. GEN. STAT. ANN. § 53a-217(b) (West Supp. 1993); FLA. STAT. ANN. § 810.095 (West 1994); GA. CODE ANN. § 16-11-127.1 (1994); IDAHO CODE § 18-3302C(1) (Supp. 1994); ILL. ANN. STAT. ch. 720, para. 5/24-1 (a)(11)(c)(1) (Smith-Hurd 1994); LA. REV. STAT. ANN. §§ 14:95(A)(5), 14:95.2, 14:95.6 (West Supp. 1994); ME. REV. STAT. ANN. tit. 20-A, § 6552 (West 1994); MD. ANN. CODE art. 27, § 36A (1992); MINN. STAT. ANN. § 609.66(6)(b)(1) (West Supp. 1994); MISS. CODE ANN. § 97-37-17 (1993); MO. ANN. STAT. § 571.030.1(8) (Vernon Supp. 1994); MONT. CODE ANN. § 45-8-334 (1993); NEV. REV. STAT. § 202.265.1(e) (1993); N.J. STAT. ANN. § 2C:39-5.e(1) (West Supp. 1994); N.M. STAT. ANN. § 30-7-2 (Michie Supp. 1993); N.Y. PENAL LAW § 265.01(3) (McKinney 1989); N.C. GEN. STAT. § 14-269.2(b) (1993); OHIO REV. CODE ANN. § 2923.122 (Anderson 1993); OKLA. STAT. ANN. tit. 21, § 1280.1 (West Supp. 1994); OR. REV. STAT. § 166.370 (1993); R.I. GEN. LAWS § 11-47-60 (1993); S.C. CODE ANN. § 16-23-420 (Law. Co-op. Supp. 1993); S.D. CODIFIED LAWS ANN. § 13-32-7 (Supp. 1994); TENN. CODE ANN. § 39-17-1309 (1991); TEX. PENAL CODE ANN. § 46.03(a)(1) (Vernon Supp. 1994); UTAH CODE ANN. § 76-3-203.2 (Supp. 1993); VT. STAT.

local crime and education, Congress jumped on the political bandwagon and passed the Gun-Free School Zones Act of 1990.[11] The Gun-Free School Zones Act, which passed in the House of Representatives by a 313-to-1 margin, made it a federal crime to possess a gun within 1,000 feet of any school.[12]

The United States Supreme Court recently considered the constitutionality of this politically popular statute in *United States v. Lopez*.[13] Because the Act made mere possession of handguns near schools a crime, challengers argued that no rational basis existed for congressional findings of a nexus between such a crime and interstate commerce.[14] The United States Court of Appeals for the Fifth Circuit had already declared the Act unconstitutional,[15] contrary to the conclusion of the Ninth Circuit in *United States v. Edwards*,[16] which also involved prosecution under the

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ANN. tit. 13, § 4004 (Supp. 1993); VA. CODE ANN. § 18.2-308.1 (Michie Supp. 1994); WASH. REV. CODE ANN. § 9.41.280 (West Supp. 1994); WIS. STAT. ANN. § 948.605 (West Supp. 1993). At least eight states, including Texas, require schools to suspend or expel students found possessing firearms on campus. *See* Brief for Respondent at App. B, United States v. Lopez, 115 S. Ct. 1624 (1995) (No. 93-1260) (listing states imposing suspension requirement). Notably, when President Bush signed the Crime Control Act of 1990, which contained the Gun-Free School Zones Act, he declared that 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 on the states by the Congress." President's Statement upon Signing S. 3266, 26 WEEKLY COMP. PRES. DOC. 1944 (Dec. 3, 1990).

11. *See* Gun-Free School Zones Act of 1990, Pub L. No. 101-647, 104 Stat. 4923 (current version at 18 U.S.C. § 922(q) (Supp. V 1993)) (designating knowing possession of firearm within school zone as federal crime); *see also* James M. Maloney, Note, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 FORDHAM L. REV. 1795, 1798 (1994) (analyzing Gun-Free School Zones Act in context of Fifth Circuit's holding that Act is unconstitutional).

12. 18 U.S.C. § 921(a)(25) (Supp. V 1993). The Act defines a school zone as an area "in, or on the grounds of, a public, parochial or private school . . . or within a distance of 1,000 feet from the grounds of a public, parochial or private school." *Id.* Violations of the Gun-Free School Zones Act are punishable by a fine not to exceed $5,000, or a maximum of five years in prison, or both. *Id.* § 924(a)(1)(b). Senator Herbert Kohl championed the Gun-Free School Zones Act in the Senate, while Representative Edward Feighan introduced a similar version in the House of Representatives. United States v. Lopez, 2 F.3d 1342, 1359 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995).

13. 115 S. Ct. 1624 (1995).

14. *See Lopez*, 2 F.3d at 1346–47 (recounting Lopez's contention that Section 922(g) of Gun-Free School Zones Act "intrudes upon a domain traditionally left to the states").

15. *Id.* at 1367–68. Judge Garwood refused to find the Act constitutional in the absence of congressional findings establishing a nexus between carrying handguns in schools and interstate commerce. *Id.; see* discussion *infra* part III.

16. 13 F.3d 291, 295 (9th Cir. 1993).

Act.[17] The Supreme Court ultimately struck down the Gun-Free School Zones Act of 1990 as an impermissible extension of congressional power under the Commerce Clause.[18] Some commentators were delighted with the United States Supreme Court's reversal of its sixty-year trend of construing the Commerce Clause expansively.[19] The Court's nearly uniform tendency to uphold federal regulation under the Commerce Clause began

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17. *See Edwards*, 13 F.3d at 291 (explaining Edwards's conviction for violating Gun-Free School Zones Act). Ray Harold Edwards, III was found in possession of a .22-caliber rifle and a sawed-off, bolt-action rifle while on the campus of Grant Union High School in Sacramento, California. *Id.* at 292. Many of the arguments advanced by Edwards were the same as the arguments of the respondent in *Lopez*, but the Ninth Circuit found it unnecessary for Congress to include findings of a nexus between interstate commerce and guns in schools in order to justify the law under the Commerce Clause power. *Id.* at 292–93. Accordingly, the Ninth Circuit deemed the Gun-Free School Zones Act constitutional and affirmed Edwards's conviction. *Id.* at 296.

18. *See Lopez*, 115 S. Ct. at 1634 (invalidating Gun-Free School Zones Act). In passing the Gun-Free School Zones Act, Congress failed to include findings of how the possession of handguns in schools affects interstate commerce; such findings legitimate Congress's exercise of the Commerce Clause power. *Id.* at 1631; *see* James M. Maloney, Note, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 FORDHAM L. REV. 1795, 1798 (1994) (stating that point of debate over constitutionality of Act is that Congress never included formal findings of connection between guns in schools and interstate commerce). Traditionally, issues such as education and crime have been regulated by the individual states. *See* Rizzo v. Goode, 423 U.S. 362, 379–80 (1975) (refusing to allow "unwarranted federal intrusion" into state and local government's discretionary authority to exercise police power).

The *Lopez* case came about after Alfonso Lopez, Jr., a 12th-grader, was caught in possession of a .38-caliber handgun while attending classes at Edison High School in San Antonio, Texas. *Lopez*, 115 S. Ct. at 1626. The gun was unloaded, but Lopez carried five bullets with him. *Lopez*, 2 F.3d at 1345. Lopez explained that a friend gave him the gun to deliver to another child who would use the weapon in a gang war. *Id.* Texas officials originally charged Lopez under the Texas law prohibiting handguns in schools, but these charges were dropped so that the United States could prosecute Lopez under the Gun-Free School Zones Act. *Id.* at 1345 n.1. Lopez was convicted under the federal law after a bench trial, and he was sentenced to six months in prison, followed by two years of supervised release. *Id.* at 1345.

19. *See* Paul D. Kamenar, *A Welcome Check on Voracious Government*, TEX. LAW., May 15, 1995, at 17 (declaring that *Lopez* decision will give members of Congress "a principled reason to oppose legislation by their colleagues who grandstand before their constituents by rushing to federalize all of society's ills"); William Murchison, *The Court Puts Federalism in Focus*, TEX. LAW., June 5, 1995, at 22 (stating that Congress was using argument that right to regulate interstate commerce included ability to regulate guns near schools as "legal figleaf"). *But see* Stuart Taylor, Jr., *The Court Is Not a Right-Wing Nut*, LEGAL TIMES, May 1, 1995, at 26 (deciding that *Lopez* decision was gift to "states-righters and . . . gun lovers").

in the aftermath of the Constitutional Revolution of 1937 and allowed Congress to regulate almost any matter plausibly "affecting commerce."[20]

This Comment argues that the federal system must be preserved and, consequently, that the Court should build upon the interpretation of the Commerce Clause used in *Lopez* to reinstate the Framers' vision of federalism. Part II of this Comment traces the background of Commerce Clause jurisprudence, paying careful attention to the social justifications for the Court's traditional rubber stamping of Congress's broad exercises of power. Part III reviews the Fifth Circuit's reasoning in deeming the Gun-Free School Zones Act an unconstitutional extension of congressional Commerce Clause power. Part IV summarizes the United States Supreme Court's majority, concurring, and dissenting opinions in *Lopez*. Part V analyzes federal gun control efforts in the context of current Commerce Clause jurisprudence and argues that the Court was justified in holding Congress exceeded its powers under the Constitution when it passed the Gun-Free School Zones Act. Finally, Part VI concludes that the Court, building upon *Lopez*, should analyze congressional findings of fact more discriminately in deciding what constitutes interstate commerce and should generally allow the states to freely exercise their traditional regulatory powers without the threat of federal preemption.

II. THE HISTORY OF COMMERCE CLAUSE JURISPRUDENCE

Controversy over the delicate balance between state and federal powers surfaced early in the history of the United States.[21] Traditionally, individual colonies dealt with social and economic problems on a local scale, under the disinterested eye of the British monarch.[22] The Antifed-

20. *See, e.g.*, United States v. Darby, 312 U.S. 100, 125 (1940) (allowing Congress to impose minimum wage standards); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41 (1937) (reversing trend of previous decades by upholding national legislation, enacted under the Commerce Clause, designed to promote collective bargaining in labor disputes); *see also* Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 669 (1994) (explaining Court's veritable transformation in outlook).

21. *See* THE FEDERALIST No. 84 (Alexander Hamilton) (answering Antifederalist critics by suggesting that federal system of enumerated powers would act as check on national government to advantage of individual states); THE FEDERALIST Nos. 45, 46 (James Madison) (arguing in favor of dual government system where some activities would be regulated by states and others by national government). Many Antifederalists called for a bill of rights to be included in the original Constitution to guarantee that the newly created national government would not infringe on the sovereignty of the states. *See* FRED W. FRIENDLY & MARTHA J.H. ELLIOT, THE CONSTITUTION: THAT DELICATE BALANCE 250–51 (1984) (describing pre-ratification fears of Antifederalists that national government would be too powerful).

22. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 76–93 (2d ed. 1985) (chronicling social and economic institutions of colonial life); KERMIT L. HALL, THE

eralists, who opposed a strong central government, sharply criticized the Framers of the Constitution for granting broad powers to the newly formed national government.[23] The Federalists ultimately persuaded the states to ratify the Constitution, thus establishing a federal system in which powers were apportioned between the national government and the individual states.[24]

MAGIC MIRROR: LAW IN AMERICAN HISTORY 28–48 (1989) (describing efforts of colonies to exert social and economic control).

23. *See* KERMIT L. HALL, MAGIC MIRROR: LAW IN AMERICAN HISTORY 69-70 (1989) (tracing factionalism that arose among delegates to Constitutional Convention regarding preservation of state sovereignty). Delegates concerned with the usurpation of state authority were largely haled from inland areas where agriculture outweighed interstate trade in importance. *Id.* The Antifederalists only trusted localized grants of authority, for they felt that a federal system could only exist in a geographically small nation. *Id.*; *see* CATHERINE D. BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787, at 299–300 (1966) (chronicling Antifederalists' fears during drafting of Constitution regarding strength of national government).

24. *See* U.S. CONST. amend. X (stating that "the 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"). In construing Congress's power under the Commerce Clause, the Supreme Court has almost completely ignored the argument that certain powers are reserved to the states under the Tenth Amendment. *See* United States v. Darby, 312 U.S. 100, 111 (1940) (upholding sections of Fair Labor Standards Act as within scope of regulation of interstate commerce). Justice Stone, delivering the opinion of the Court in *Darby*, wrote:

> Our conclusion is unaffected by the Tenth Amendment. . . . The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

Id. at 123–24; *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549–55 (1985) (finding that Tenth Amendment does not impose internal limit on Congress's power under Commerce Clause); RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 5 (1987) (arguing that notion of states' rights represented by Tenth Amendment has for too long been associated with "southern condonation of lynchings, . . . official oppression of blacks, and . . . demagogues who duped their constituents"); Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 IOWA L. REV. 891, 910–11 (1990) (reviewing states' rights debate between Antifederalists, who believed in classical republican tradition, and Federalists, who wanted newly drafted Constitution to be ratified); Deborah Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1566 (1994) (concluding that language of Tenth Amendment is simply too weak to rely upon in striking down national regulation of local activities that would normally be governed by states).

One of the greatest constitutional grants of power to the federal government came with the Commerce Clause.[25] Article I, Section 8, Clause 3 gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[26] The Framers of the Constitution could not have realized in 1789 how broadly courts would eventually interpret the Commerce Clause as a justification for actions of the federal government.[27] This broad interpretation evolved over time in response to the changing needs of a rapidly growing nation in the nineteenth and twentieth centuries.[28]

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25. *See* Fry v. United States, 421 U.S. 542, 543–44 (1975) (applying expansive interpretation of Commerce Clause power to regulation of arguably local activity and upholding congressional legislation designed to stabilize wages and salaries through use of Pay Board). Although the Framers may not have expected it, Congress subsequently interpreted the Commerce Clause to allow regulation in most aspects of American life, regardless of state prerogatives. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5-5 to 5-8, at 236-44 (1978) (describing vast reaches of Commerce Clause); *see also Darby*, 312 U.S. at 121 (allowing Congress to prohibit interstate shipment of goods produced by workers not protected by minimum wage and maximum hour regulations). *See generally* Earl Maltz, *Some New Thoughts on an Old Problem: The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U. L. REV. 811, 812–19 (1983) (suggesting methods for reconciling Framers' vision of Commerce Clause power with contemporary social and economic problems).

26. U.S. CONST. art. I, § 8, cl. 3. The national government's power to regulate interstate commerce was a direct result of infighting among the states prior to the establishment of the federal system. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 3 (2d ed. 1991) (alluding to interstate jealousies which arose under Articles of Confederation and retaliatory trade measures). Thus, the Commerce Clause was designed to provide centralized regulations for interstate commerce in order to "level the playing field" for trade among the states. *Id.*

27. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 3 (2d ed. 1991); *see* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 273–74, 283 (1981) (upholding congressional regulation of local strip mining operations); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5–8, at 242 (1978) (stating that "[c]ontemporary commerce clause doctrine grants Congress such broad power that judicial review of the affirmative authorization for congressional action is largely a formality"). The Court's extreme deference to Congress's regulation of local activities is exemplified by Justice Marshall's statement: "[W]hen Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational." *Hodel*, 452 U.S. at 277. The statute at issue in *Hodel* included findings that strip mining operations affect commerce by causing erosion and impairing natural beauty. *Id.* Even prior to *Hodel*, it was clear that the Court would defer to congressional regulation of local activities. *See Fry*, 421 U.S. at 547 (reiterating position that Court would not overturn congressional regulation of any activity remotely affecting international or interstate commerce); *Darby*, 312 U.S. at 109 (finding constitutional those portions of Fair Labor Standards Act of 1938 that prohibited shipment of goods manufactured by laborers paid less than set minimum wage and working more than prescribed maximum hours).

28. *See* Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from* Swift *to* Jones & Laughlin, 61 FORDHAM L. REV. 105, 108–60 (1992)

A. *Early Interpretations of Congress's Power Under the Commerce Clause*

Interpretation of the scope of Congress's power under the Commerce Clause began with the Supreme Court's famous 1824 decision in *Gibbons v. Ogden*.[29] Following a careful, textualist approach to constitutional interpretation,[30] Chief Justice Marshall concluded in *Gibbons* that the Commerce Clause allows Congress to impose economic regulations on individual states if Congress promulgates the regulations to protect interstate commerce.[31] Marshall's definition of interstate commerce reflected a common sense interpretation of actual commercial practices—interstate commerce was deemed to be "intercourse," or trade, between the

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(describing Court's Commerce Clause jurisprudence as response to changing views of federalism rather than political pressure); Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 41–49 (1987) (tracing Court's efforts to invoke textualist approach in construing Commerce Clause); *see also* Katzenbach v. McClung, 379 U.S. 294, 300 (1964) (announcing that congressional findings were sufficient to hold that prohibition on racial discrimination in private restaurants is within Commerce Clause power); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249 (1964) (validating Title II of Civil Rights Act of 1964 under Commerce Clause). The Court announced the *Heart of Atlanta Motel* and *Katzenbach* decisions on the same day in 1964. Commentators saw the decisions as a nod in favor of legislation designed to end racial discrimination, regardless of whether Congress was motivated by a desire to protect interstate commerce. *See, e.g.*, JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 157 (3d ed. 1986) (relating that lack of congressional findings on connection between discriminatory practices by private businesses and interstate commerce was not important to Court's decision in *Heart of Atlanta Motel*); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 195–96 (1986) (2d ed. 1991) (suggesting that perhaps Congress could have relied solely upon Fourteenth Amendment to justify civil rights legislation under judicial review); LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 104 (1985) (stating that Court no longer inquires into congressional motivations when evaluating legitimacy of legislation, but rather examines enactment "based on the actual legitimacy of its means and ends pursuant to the totality of the grant of, and limits on, legislative power").

29. 22 U.S. (9 Wheat.) 1 (1824); *see* United States v. Lopez, 115 S. Ct. 1624, 1626–27 (1995) (finding that Court first defined limits of Commerce Clause power in landmark decision of *Gibbons v. Ogden*).

30. *See Gibbons*, 22 U.S. (9 Wheat.) at 189 (interpreting each word of Commerce Clause literally in determining Congress's power to regulate interstate trade); *see also* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 943 (1985) (describing tendency of Court during 19th century to resist straying from Framers' words); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989) (lauding Marshall Court for confining analysis to strict textualism).

31. *See Gibbons*, 22 U.S. (9 Wheat.) at 189–90 (noting Congress's power to regulate commercial activity among states); *see also* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1402 (1987) (suggesting that Marshall's interpretation of Commerce Clause was especially broad in light of prevailing belief in state sovereignty at time of *Gibbons*).

states.[32] *Gibbons* represents the classic approach to Commerce Clause interpretation.[33] Significant controversy over the Commerce Clause power did not arise again until the late nineteenth century, when Congress began to exercise its powers more vigorously in response to prolonged economic growth and post-Civil War social developments.[34]

B. *Industrialism and the Commerce Clause Power*

With the exception of the southern states, post-Civil War America experienced a rapid transformation from a collection of localized, agrarian economies to an economy of widespread industrial growth.[35] Social

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32. *See Gibbons*, 22 U.S. (9 Wheat.) at 189–90 (defining interstate commerce as commercial activity conducted between states). Marshall's interpretation was hardly novel, but reflected the Court's tendency to interpret the meaning of the Constitution in a common sense fashion. *See* Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 414–16 (1829) (Johnson, J., concurring) (urging literal reading of Ex Post Facto Clause to determine Framers' true intent); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816) (confining analysis to actual wording of Constitution). Fearful that Congress might attempt to regulate human servitude, slaveholders monitored the Court's interpretation of what constituted interstate commerce. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 252–53 (2d ed. 1991) (tracing debate over issue of slavery during antebellum period). Southerners were uneasy with an increasingly active Congress and the westward migration of settlers, which was perceived as a shift in the balance of power between slaveholders and nonslaveholders. *Id.*

33. *See* Stafford v. Wallace, 258 U.S. 495, 528 (1922) (applying definition of interstate commerce first articulated in *Gibbons* to allow Secretary of Commerce to regulate rates and set standards for operation of stockyards because such activities have direct effect on interstate commerce); United States v. E.C. Knight Co., 156 U.S. 1, 13 (1895) (citing *Gibbons* for proposition that Congress may only act under Commerce Clause when "interstate or international commerce may be ultimately affected"); The Passenger Cases, 48 U.S. (7 How.) 283, 436 (1849) (relying on *Gibbons* decision as basis for upholding Congress's right to regulate passengers as form of interstate commerce).

34. *See* KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 189–90 (1989) (describing transformation of economy between Civil War and World War I). The United States of America was experiencing rapid change in every respect. *Id.* at 189. An exponential rise in immigration during this period changed the ethnic makeup of the nation, which in turn changed cultural values. *Id.* The most dramatic symbol of this change was the urban metropolis. *Id.* Urban growth tracked the transformation of the economy from agrarian to industrial. *Id.* American law kept pace with the rapid changes in cultural values and the revolutionary transformation of the economy. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 337–42 (2d ed. 1985).

35. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 151–52 (2d ed. 1991) (explaining congressional efforts to regulate economy in face of overwhelming industrial advancements). The success of the post-Civil War economy caused societal problems that were no longer local in nature. *Id.* The role of the northern economy in helping to win the Civil War illustrated the effectiveness of national power in promoting social progress. *Id.*; *see* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 337 (2d ed. 1985) (stating that Civil War required enormous effort from national government). Legislation, such as the Interstate Commerce Act of 1887 and the Sherman Antitrust Act of 1890, demonstrated the changing role of the national government in effecting positive change. *See* Ste-

problems that the Framers never contemplated began to take on immediate significance as the national economy became increasingly interconnected among the states.[36] The Civil War, and the Reconstruction Era in particular, diluted faith in the power of the individual states to regulate their own economic and social problems.[37] In response, the idea of federalism naturally evolved during the Reconstruction Era to justify instances of national intervention in areas traditionally reserved for state regulation.[38]

The rise of the Progressive Movement during the first two decades of the twentieth century bolstered congressional attempts to alleviate the social costs of unbridled industrialism.[39] However, a reactionary

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phen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 795 (1994) (tracing beginnings of congressional preemption of state efforts to regulate economy). Indeed, Congress was largely responsible for the growth of the railroad industry, which created modern interstate trade. KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 191 (1989).

36. *See* KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 189 (1989) (describing economic transformation that occurred between 1860 and 1920). An explosion of growth in the economy catalyzed congressional efforts at regulation. *Id.* During the post-Civil War era, the gross national product, which represents the value of all services and goods produced annually, jumped from $7 billion to over $35 billion. *Id.* Production of iron, steel, and textiles skyrocketed. *Id.* By the end of the 19th century, the United States was one of the wealthiest nations on the planet. *Id.*

37. *See* Harry N. Scheiber, *Federalism, the Southern Regional Economy, and Public Policy Since 1865* (describing increasingly centralized federal system, despite reservation of some powers in states), *in* AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 83–86 (David J. Bodenhamer & James W. Ely, Jr. eds., 1984). In particular, southern state and local governments took advantage of the federal system of government to exploit former slaves and the white underclass after the Civil War. *Id.* Congress's first attempt at federal criminal law came with the passage of the Ku Klux Act of 1871. *See* Ku Klux Act of 1871, ch. 22, § 2, 17 Stat. 13, 14 (forbidding private actors from denying equal protection under law to any citizen); Joseph Guzinski, *Federalism and Federal Questions: Protecting Civil Rights Under the Regime of* Swift v. Tyson, 70 VA. L. REV. 267, 269 (1984) (discussing impact of Ku Klux Act on balance of power between national and state governments); *see also* LAWRENCE H. FRIEDMAN, A HISTORY OF AMERICAN LAW 337 (2d ed. 1985) (finding that Civil War led to period of martial law and great domestic turmoil in South, which contributed to rise in power of national government).

38. *See, e.g.*, United States v. Darby, 312 U.S. 100, 111–16 (1940) (finding Fair Labor Standards Act of 1938 constitutional); Houston, E. & W. Texas Ry. Co. v. United States [The Shreveport Rate Cases], 234 U.S. 342, 360 (1914) (upholding Interstate Commerce Commission's imposition of price limits for shipment of goods across state lines to prevent interstate "discrimination"); Swift & Co. v. United States, 196 U.S. 375, 396 (1905) (allowing Congress to regulate shipment of meat across state lines). *But see* United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) (refusing to allow Congress, through Sherman Antitrust Act, to break up sugar refining monopoly because Commerce Clause did not allow national regulation of manufacturing).

39. *See* KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 196–97 (1989) (analyzing Progressive Movement and efforts of Congress to confront excesses of

Supreme Court seemed to draw a line in the sand to mark how far Congress could legislate under the Commerce Clause's grant of power.[40] For example, in *Hammer v. Dagenhart*,[41] the Court refused to allow Congress to regulate child labor, stating that the manner in which goods were manufactured did not fall within the ambit of interstate commerce.[42]

The Court was not unanimous in its distaste for Congress's newly found social activism. Justice Holmes, in his now famous dissent in *Hammer*, argued that Congress has the right to regulate, in any way, products crossing state lines.[43] Justice Holmes asserted that because such products become a part of interstate commerce, Congress may regulate their origins regardless of the effect on the social policies or efforts of the states.[44] Although Justice Holmes noted the seriousness of the child labor prob-

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industrialism). The Progressive Movement placed credence in scientific and rational solutions to the social problems that resulted from rapid industrial growth. *Id.* Child labor and other social problems caused by industrialism spurred legislation designed to ensure the continued growth of the economy. *Id.* at 201; *see* Sherman Antitrust Act of 1890, Pub. L. No. 101-588, § 4, 104 Stat. 2721 (codified as amended in scattered sections of 15 U.S.C.) (addressing threat that monopolies posed to price competition); Clayton Act, ch. 323, § 7, 38 Stat. 730, 731–32 (1914) (current version at 15 U.S.C. § 18 (1988)) (limiting use of judicially enforced injunctions against labor). *See generally* Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from* Swift *to* Jones & Laughlin, 61 FORDHAM L. REV. 105, 139–43 (1992) (chronicling Court's early reactions to Progressive Era legislation such as Wagner Act, which encouraged use of collective bargaining in labor disputes); Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 COLUM. L. REV. 1931, 1973 (1991) (explaining Progressive Era legislation as response to closing of frontier, end of cheap labor, and realization that market could not always regulate itself); Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 1002–09 (1990) (describing origins of law and economics philosophy in Progressive Movement).

40. *See* Carter v. Carter Coal Co., 298 U.S. 238, 310–12 (1936) (invalidating national legislation that established minimum wage provisions for coal miners); Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330, 362 (1935) (finding legislation that regulated pension system for railroad employees unconstitutional); Adkins v. Children's Hosp., 261 U.S. 525, 561–62 (1923) (striking down legislation that enacted minimum working conditions); *see also* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 4.7, at 146 (3d ed. 1986) (finding that decisions such as *Carter* exemplified Court's determination to uphold Tenth Amendment as impediment to congressional attempts at economic regulation).

41. 247 U.S. 251 (1918). In *Hammer*, a father wishing to enjoin enforcement of the Child Labor Act on behalf of his two minor sons challenged the law as outside the boundaries of Congress's power under the Commerce Clause. *Hammer*, 247 U.S. at 269. The Child Labor Act prohibited the shipment of any good produced by child labor across state lines. Child Labor Act, ch. 18, §§ 1200–07, 40 Stat. 1138 (1919) (current version at 29 U.S.C. § 212 (1988)).

42. *Hammer*, 247 U.S. at 277. Justice Day distinguished activities strictly local in nature from those that are national. *See id.* at 275–76 (discussing local and national activities).

43. *Id.* at 277–78 (Holmes, J., dissenting).

44. *Id.* at 281.

lem,[45] he concluded that the correctness or incorrectness of social legislation is not for the Court to decide.[46] He decided that the only relevant issue is whether Congress acted within constitutional parameters.[47]

C. *The New Deal: A Revolution in Commerce Clause Interpretation*

The Supreme Court's stubborn approach toward national legislation designed to foster social progress led to one of the greatest political challenges to the Court's power since *Marbury v. Madison*[48] was decided in 1803.[49] Industrial decadence and laissez-faire economic policies during the 1920s prompted a massive economic crash, culminating in the Great Depression.[50] Newly elected President Franklin Delano Roosevelt pro-

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45. *Id.* at 280. Holmes wrote, "[I]f there is any matter upon which civilized countries have agreed—far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused—it is the evil of premature and excessive child labor." *Id.*; *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 560–61 (2d ed. 1985) (chronicling organized labor's attempts to abolish child labor in an effort to ensure jobs and wages for adult laborers).

46. *Hammer*, 247 U.S. at 280. A laissez-faire economic policy during the first three decades of the 20th century meant the infliction of harsh conditions on those without political power. Charles H. Clarke, *The Owl and the Takings Clause*, 25 ST. MARY'S L.J. 693, 708 (1994). Before the passage of New Deal legislation in the 1930s, the Court was primarily concerned with freedom of contract and the constitutional right to use property, which presumably included labor resources. *Id.* Cases such as *Hammer* forced the Court to choose between the constitutional right to engage in entrepreneurial activity and the need to improve living conditions for the poor. *Id.* at 708–09. Such controversies dealt with child labor, a minimum wage, a shorter work week, and provisions for retirement income. *Id.* at 709.

47. *Hammer*, 247 U.S. at 280–81.

48. 5 U.S. (1 Cranch) 137 (1803).

49. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 685 (2d ed. 1985) (writing that Court began 20th century with "huge pretensions, often exercised in conservative direction" about what role of law in society should be). *Marbury v. Madison* represented the Court's first assertion of the power of judicial review. *See Marbury*, 5 U.S. (1 Cranch) at 177–78 (explaining that Constitution reserves power of review to judicial branch). The Court's tendency to strike down Commerce Clause legislation during the first 30 years of the 20th century paralleled the Court's use of substantive due process to overturn other social legislation. *See* Adair v. United States, 208 U.S. 161, 180 (1908) (striking down state law designed to prevent "yellow dog" contracts), *overruled in part by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Lochner v. New York, 198 U.S. 45, 64 (1905) (invalidating state law limiting number of hours per week that bakery employees could work); *see also* BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 23 (1980) (condemning *Lochner* and its progeny as examples of "judicial dereliction and abuse"). *But see* Muller v. Oregon, 208 U.S. 412, 421 (1908) (allowing law fixing maximum working hours for women because woman's "physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence").

50. *See* Stephen L. Smith, Comment, *State Autonomy After* Garcia*: Will the Political Process Protect States' Interests?*, 71 IOWA L. REV. 1527, 1530 (1986) (describing laissez-

posed a package of legislative reforms constituting a "New Deal" to lift the nation out of the Depression.[51] As never before, Congress regulated varied facets of everyday life under the guise of the Commerce Clause to provide much needed economic assistance to the American people.[52]

At first, the Court balked at New Deal social legislation.[53] In the 1935 case of *A.L.A. Schechter Poultry Corp. v. United States*,[54] the Court overturned portions of the National Industrial Recovery Act (NIRA).[55] As a centerpiece of New Deal economic reforms, the NIRA established, among other things, the forty-hour work week and the first minimum

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faire review of economic legislation practiced by Court that resulted in New Deal crisis of 1930s); *see also* LAWRENCE H. FRIEDMAN, A HISTORY OF AMERICAN LAW 440 (2d ed. 1985) (maintaining that during period prior to Great Depression, economic Social Darwinism was prevailing theory of regulation).

51. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 658–59 (2d ed. 1985) (explaining social significance of New Deal legislation); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 150 (4th ed. 1991) (stating that 1932 election acted as public mandate for government intervention to end economic depression); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 155 (1986) (2d ed. 1991) (describing economic crisis that Franklin D. Roosevelt faced when he took office in 1933). *See generally* Michael E. Parrish, *The Great Depression, the New Deal, and the American Legal Order*, 59 WASH. L. REV. 723, 726 (1984) (tracing effect of New Deal legislation on role of judiciary).

52. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 150 (4th ed. 1991) (expounding on congressional efforts to alter economic conditions to provide relief for citizens). The New Deal was simply a response to the American public's desire for a better way of life. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 658–59 (2d ed. 1985). New Deal programs were extremely popular. *Id.* Americans' reliance on the federal government to cure all of society's ills contributed to a decline in state and local governments. *Id.*

53. *See* Carter v. Carter Coal Co., 298 U.S. 238, 297 (1936) (invalidating Guffey Bituminous Coal Act); United States v. Butler, 297 U.S. 1, 74 (1936) (striking down Agricultural Adjustment Act); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601–02 (1935) (holding unconstitutional Frazier-Lemke Farm Mortgage Act); *see also* EDWARD KEYNES & RANDALL K. MILLER, THE COURT VS. CONGRESS 163–64 (1989) (explaining that major realignment of forces between 1928 and 1936 meant that Hughes Court was politically out of touch with national government's duty to promote social and economic welfare).

54. 295 U.S. 495 (1935).

55. *Schechter*, 295 U.S. at 542. Under the National Industrial Recovery Act, the federal government enacted a live poultry code which set certain standards of operation for the poultry industry. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933) (codified as amended in scattered sections of 15 U.S.C. and 40 U.S.C.). Perhaps sensing the political implications of the Court's invalidation of the National Industrial Recovery Act, Chief Justice Hughes wrote: "Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power." *Schechter*, 295 U.S. at 528.

wage.[56] Writing for the majority, Chief Justice Hughes declared that "the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the Commerce Clause itself establishes, between commerce 'among the several states' and the internal concerns of a state."[57] The Court continued its opposition to New Deal legislation with its decision in *Carter v. Carter Coal Co.*,[58] which struck down the Bituminous Coal Conservation Act of 1935 as beyond Congress's power to regulate interstate commerce.[59]

The Court's position rapidly changed, however, after President Roosevelt threatened to enact the infamous Court-packing plan.[60] In 1937, a new majority of the Court retreated from previous decisions and applied a much more liberal construction of the Commerce Clause in *NLRB v. Jones & Laughlin Steel Corp.*,[61] which upheld congressional legislation regulating labor-management relations.[62] With regard to modern Commerce Clause jurisprudence, the die had been cast.

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56. *See* National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933) (codified as amended in scattered sections of 15 U.S.C. and 40 U.S.C.) (imposing regulatory provisions on employers); *see also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 156 (1986) (2d ed. 1991) (characterizing National Industrial Recovery Act as product of regulatory boards from various industries that desired "codes of fair competition").

57. *Schechter*, 295 U.S. at 550.

58. 298 U.S. 238 (1936).

59. *See Carter*, 298 U.S. at 289 (applying logic of Court's decision in *Schechter* to Bituminous Coal Conservation Act of 1935); *see also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 180 (2d ed. 1991) (questioning persuasiveness of Justice Sutherland's opinion in *Carter* as it concerned costs of coordinating state and federal responses to social and economic problems).

60. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 153 (4th ed. 1991) (explaining significance of Court-packing plan to later Supreme Court decisions). Specifically, Roosevelt asked Congress for permission to reorganize the judiciary by appointing one federal judge to the bench for each sitting judge over the age of 70 who had served for at least a decade. *Id.* After much political jockeying, Roosevelt's plan failed. *Id.* at 154; *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 686 (2d ed. 1985) (finding that Roosevelt had last laugh by being re-elected four times and changing face of Court by traditional method of appointment); WILLIAM J. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 215–34 (1987) (delineating political players who worked for and against Roosevelt's plan); ROBERT J. STEAMER, THE SUPREME COURT IN CRISIS: A HISTORY OF CONFLICT 209–13 (1971) (relating strategy that Roosevelt used in attempt to convince Congress to allow him to restructure Court). Roosevelt enjoyed tremendous popularity at the time of his Court-packing plan, which bolstered efforts to overcome the Court's decisions striking down important parts of the New Deal legislative scheme. Michael Comiskey, *Can a President Pack—or Draft—the Supreme Court? F.D.R. and the Court in the Great Depression and World War II*, 57 ALB. L. REV. 1043, 1045–48 (1994).

61. 301 U.S. 1 (1937).

62. *Jones & Laughlin Steel Corp.*, 301 U.S. at 41. *Compare Carter*, 298 U.S. at 310–11 (refusing to allow Congress to regulate hours and wages through Bituminous Coal Conser-

D. *Modern Approaches to Commerce Clause Jurisprudence*

Since 1937, the Supreme Court has, with rare exceptions,[63] allowed Congress to regulate all aspects of American economic life, regardless of whether the regulated activity falls within the traditional province of the states.[64] This "realist approach"[65] is illustrated in the case of *Wickard v.*

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vation Act) *and Schechter*, 295 U.S. at 548 (overturning legislative hub of New Deal recovery programs) *with* United States v. Darby, 312 U.S. 100, 125 (1940) (upholding enactment of penalties for failing to comply with minimum wage standards) *and Jones & Laughlin Steel Corp.*, 301 U.S. at 40, 49 (abandoning previous tests for constitutionality and upholding National Labor Relations Act). *Jones & Laughlin Steel Corp.* involved the constitutionality of the National Labor Relations Act, which provided for collective bargaining for unions in all industries where interstate commerce might be affected. *Jones & Laughlin Steel Corp.*, 301 U.S. at 22–24. In addition to new appointments to the Court, the economic depression of the 1930s and the growing belief that government should exercise more regulatory control over economic matters resulted in a relatively rapid change in the Court's philosophy. *See* NELSON L. DAWSON, LOUIS D. BRANDEIS, FELIX FRANKFURTER AND THE NEW DEAL 12 (1980) (examining social philosophy of Brandeis and Frankfurter, which advocated increased governmental regulation); *see also* Social Security Act of 1935, 42 U.S.C. § 301 (1988) (promoting "health and well-being" of public); Thomas R. Powell, *The Judiciality of Minimum-Wage Legislation*, 37 HARV. L. REV. 545, 565 (1924) (pointing out need of workers to live "in health" in order to provide most efficient labor force). Legal scholars differ over the reasons for the Court's sudden switch toward upholding New Deal legislation enacted under the Commerce Clause. *See* Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 669 (1994) (describing historical revisionism engaged in by commentators seeking to explain Court's "switch in time"); Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from* Swift *to* Jones & Laughlin, 61 FORDHAM L. REV. 105, 156 (1992) (explaining Court's switch as merely change in conceptualization of what constitutes interstate commerce, rather than response to any dramatic political showdown); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1487 (1994) (speculating that New Deal Court must have assumed that deference to congressional impositions of power would not unduly harm states because states' interests would be protected through political process); Michael E. Parrish, *The Great Depression, the New Deal, and the American Legal Order*, 59 WASH. L. REV. 723, 732 (1984) (arguing that Court's reversal was not politically motivated, but rather was result of "scrupulous line drawing" between what constituted permissible exercise of Commerce Clause power and what did not).

63. New York v. United States, 112 S. Ct. 2408, 2423 (1992) (placing limit on Congress's ability under Commerce Clause to mandate actions of state legislatures); National League of Cities v. Usery, 426 U.S. 833, 852 (1976) (holding unconstitutional certain portions of Fair Labor Standards Act), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 530 (1985).

64. *See, e.g.*, Perez v. United States, 402 U.S. 146, 154–57 (1971) (upholding Title II of Consumer Credit Protection Act, which outlaws loan-sharking practices, as valid exercise of congressional power under Commerce Clause); United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942) (stating that commerce power extends to any activity that has effect on interstate commerce); United States v. Darby, 312 U.S. 100, 120–21 (1940) (allowing Congress to establish minimum wage and maximum hours for workers).

65. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 189–90 (2d ed. 1991) (characterizing Court's change in interpretation of Commerce Clause as pragmatic re-

Filburn.[66] In *Wickard*, the Court found that even though an activity is "local" in nature, Congress may regulate the activity if the activity exerts a "substantial economic effect" on interstate commerce.[67] Other cases following this approach have similarly found congressional regulations of local activities within the Commerce Clause power.[68]

During the past four decades, the Commerce Clause evolved into a conduit for national efforts to reform social problems that had not been adequately addressed by the states.[69] Cases such as *Katzenbach v. McClung*[70] and *Heart of Atlanta Motel, Inc. v. United States*,[71] which upheld congressional civil rights legislation enacted under the Commerce Clause, affirmed the Court's policy of rubber stamping congressional regulations when some remote connection to interstate commerce could be found.[72]

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sponse to economic hardships facing nation). The liberal interpretation of Congress's power under the Commerce Clause has not escaped criticism. *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1451 (1987) (suggesting that Court naïvely took congressional fact findings at face value in upholding virtually all New Deal economic legislation after 1937).

66. 317 U.S. 111 (1942); *see id.* at 128 (finding that power to regulate interstate commerce extends to regulation of commodities prices); Daniel J. Hulsebosch, Note, *The New Deal Court: Emergence of a New Reason*, 90 COLUM. L. REV. 1973, 2014–15 n.253 (1990) (finding that Court's decision in *Wickard* represented emergence of "rational relation" analysis of legislation enacted under Commerce Clause, and that this constituted new, realistic approach). In *Wickard*, the Secretary of Agriculture fined the plaintiff for growing crops in excess of allotments set by the Agricultural Adjustment Act of 1938. *Wickard*, 317 U.S. at 113. The plaintiff argued that parts of the Act were unconstitutional, but the Court found that interstate commerce was sufficiently affected to uphold the law. *Id.* at 118, 128.

67. *Wickard*, 317 U.S. at 128.

68. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 276 (1981) (approving congressional regulation of local strip mining operations); *Wrightwood Dairy Co.*, 315 U.S. at 119 (1942) (allowing Congress to regulate purely local activity).

69. *See* Katzenbach v. McClung, 379 U.S. 294, 300 (1964) (justifying congressional intervention under Commerce Clause with evidence that racial discrimination obstructs interstate commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249 (1964) (holding that congressional findings concerning effect on interstate commerce were sufficient to allow enforcement of Civil Rights Act of 1964); *see also* Dave Frohnmayer, *A New Look at Federalism: The Theory and Implications of "Dual Sovereignty,"* 12 ENVTL. L. 903, 908 (1982) (suggesting that when Court allows Congress to regulate localized, everyday matters, federal government is elevated above states).

70. 379 U.S. 294 (1964).

71. 379 U.S. 241 (1964).

72. *See Heart of Atlanta Motel*, 379 U.S. at 262 (affirming constitutionality of Civil Rights Act of 1964); *Katzenbach*, 379 U.S. at 300 (upholding Civil Rights Acts of 1964 based on testimony showing that racial discrimination substantially affects interstate commerce). In *Heart of Atlanta Motel*, the Court reiterated a policy of deferring to congressional fact finding and declared that impositions of power under the Commerce Clause would be upheld as long as the means are reasonably adapted to the constitutionally permissible end. *Heart of Atlanta Motel*, 379 U.S. at 262; *see also* Fry v. United States, 421

To avoid the appearance of buckling under to congressional pressure, the Court could point to the fact that the southern state legislatures simply refused to take action to fight the problem of de jure racial inequality.[73] That is, in the absence of legitimate state efforts to fight a problem of serious social and cultural magnitude, the Court could hardly find the efforts of Congress unconstitutional.[74]

In recent years, cracks have appeared in the Court's liberal reading of the Commerce Clause. In *National League of Cities v. Usery*,[75] the Court employed a balancing test for certain minimum-wage and overtime provisions of the Fair Labor Standards Act and concluded that the provisions exceeded Congress's power under the Commerce Clause.[76] The construction of a balancing test in *National League of Cities* suggested a rec-

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U.S. 542, 547 (1975) (declaring that Congress may even regulate purely intrastate activity if activity, considered in aggregate, has effect on interstate commerce); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-8, at 242 (1978) (declaring that even though Court may subject legislation enacted under Commerce Clause to close scrutiny, such examination is largely formality).

73. *See* Brown v. Board of Educ., 347 U.S. 483, 493-96 (1953) (finding that "separate but equal" doctrine caused detrimental effects to school children; thus, states could no longer sponsor segregation of public schools); *see also* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 114-16 (1978) (classifying Warren Court as activist in areas where state legislatures failed to enact corrective social legislation); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 668 (2d ed. 1985) (speculating that Civil Rights Movement would have failed without intervention of federal courts); ARTHUR S. MILLER, POLITICS, DEMOCRACY AND THE SUPREME COURT 221 (1985) (finding that Warren Court sought to raise status of African-Americans to achieve moral and community concerns); R. Tim Hay, Comment, *Blind Salamanders, Minority Representation, and the Edwards Aquifer: Reconciling Use-Based Management of Natural Resources with the Voting Rights Act of 1965*, 25 ST. MARY'S L.J. 1449, 1471 (1994) (finding that even after *Brown* decision, racial unrest continued in South, prompting Congress to enact further measures to protect civil rights of minorities).

74. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 672 (2d ed. 1985) (describing Warren Court's response to South's stubborn insistence on segregation). Beginning with the decision in *Brown*, the Court refused to tolerate any form of segregation and used any possible constitutional justification to eradicate the practice. *Id.* Massive resistance to decisions such as *Katzenbach* and *Heart of Atlanta Motel* made the Court even more determined to uphold legislation designed to end racial discrimination. *Id.*

75. 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

76. *National League of Cities*, 426 U.S. at 852; *see also* Bernard Schwartz, National League of Cities v. Usery *Revisited: Is the Quondam Constitutional Mountain Turning out to Be Only a Judicial Molehill?*, 52 FORDHAM L. REV. 329, 330-32 (1983) (examining Court's reasoning in *National League of Cities* and finding that decision has been ignored in battle to reestablish traditional balance of power between federal and state governments); Lee E. Berner, Note, *The Repudiation of* National League of Cities*: The Supreme Court Abandons the State Sovereignty Doctrine*, 69 CORNELL L. REV. 1048, 1053 (1984) (commenting that *National League of Cities* prompted much criticism and uncertainty concerning future congressional legislation).

ognition by the Court that many previous decisions upholding congressional action were premised on hazy articulations of supposed limits on Congress's power to regulate local activities.[77]

The hiatus was temporary, however. *National League of Cities* was overturned nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*.[78] The 1985 *Garcia* decision reflected the return of at least five members of the Court to the tradition of upholding congressional regulations under the Commerce Clause absent "compelling" constitutional reasons to strike such regulations.[79] Justice Blackmun, writing for the Court in *Garcia*, relied on commentary suggesting that the states possessed enough political influence to render the *National League of Cities* decision unnecessary.[80]

One subsequent decision resuscitated the idea of state sovereignty in the face of Congress's overwhelming power under the Commerce Clause. In *New York v. United States*,[81] the Court held that Congress may not

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77. *See* Alex Sears, Note, 8 TEX. TECH L. REV. 403, 416–18 (1976) (finding that balancing test was majority's attempt to overcome lack of articulable guidelines in determining whether federal statute unlawfully infringed on state sovereignty). *But see* Bernard Schwartz, National League of Cities v. Usery—*The Commerce Power and State Sovereignty Redivivus*, 46 FORDHAM L. REV. 1115, 1133 (1978) (expressing doubt that Court made any progress in resolving, or even clarifying, states' rights debate).

78. 469 U.S. 528, 557 (1985). In *Garcia*, Justice Blackmun wrote that "[r]eliance on history as an organizing principle [for Commerce Clause jurisprudence] results in line-drawing of the most arbitrary sort." *Garcia*, 469 U.S. at 544. Accordingly, the Court overruled *National League of Cities*, in which the Court had focused on whether a state traditionally regulated the activity in question. *Id.* at 557.

79. *See Garcia*, 469 U.S. at 557 (overruling *National League of Cities v. Usery* and upholding portions of Fair Labor Standards Act). The issue in *Garcia* was whether Congress could, through the Fair Labor Standards Act, impose minimum wage and overtime restrictions on the San Antonio Metropolitan Transit Authority, a local, public mass-transit system. *Id.* at 533.

80. *Id.* at 549–51; *see* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 176–84 (1980) (recounting various means by which states retain political influence); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954) (concluding that states' interests are already well protected and, thus, not in need of judicial preservation).

81. 112 S. Ct. 2408 (1992). In another recent case, which involved the Age Discrimination in Employment Act, the Court recognized the states' ability to regulate their own affairs. *See* Gregory v. Ashcroft, 501 U.S. 452, 473 (1991) (refusing to elevate Age Discrimination in Employment Act over Missouri law requiring state court judges to retire at age 70). *See generally* Donald A. Dripps, *Don't Make a Federal Case out of It*, TRIAL, Jan. 1995, at 90 (maintaining that cases such as *Gregory* stand for proposition that federal legislation will not always trump state laws, absent some connection to interstate commerce); Jerome L. Wilson, *Courts Continue to Puzzle over the Adjustments Between States' Autonomy and Federal Primacy*, RECORDER, Apr. 26, 1994, at 6 (depicting Court's decision in *Gregory* as precursor to holding in *New York v. United States*).

compel state legislatures to enact regulations, but must confine its regulations to individual citizens.[82] With the Supreme Court's recent decision in *United States v. Lopez*, a revolution in Commerce Clause interpretation based on the Framers' vision of federalism may be beginning.[83]

III. The Reasoning of the Fifth Circuit in *United States v. Lopez*

When Alfonso Lopez, Jr. arrived at his San Antonio high school on March 10, 1992 carrying a concealed .38-caliber handgun, he could not have foreseen that he would spark a constitutional debate about the scope of Congress's power under the Commerce Clause.[84] Lopez was

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82. *New York*, 112 S. Ct. at 2423; *see also* Scott Gardner, Recent Development, 31 Duq. L. Rev. 877, 900 (1993) (stating that holding in *New York* is limited to instances in which Congress attempts to direct state legislatures to take some action); John M. Linglebach, Note, *The Tenth Amendment and the Federal Power to Direct Low-Level Radioactive Waste Disposal:* New York v. United States, 26 Creighton L. Rev. 557, 578 (1993) (finding that *New York* decision represented departure from Court's usual policy of disregarding state sovereignty as to disposal of radioactive waste). The *New York* case involved the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which required the states to provide for the disposal of low-level radioactive waste within their respective borders. *New York*, 112 S. Ct. at 2415. The Act also provided monetary and legal incentives for the states to comply with the law. *Id.* at 2415–16; *see* Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b-2021i (1988) (providing incentives and suggesting method by which individual state legislatures could provide for storing of low-level radioactive wastes).

83. *See* Donald A. Dripps, *Don't Make a Federal Case out of It*, Trial, Jan. 1995, at 90–92 (commenting on persuasiveness of Judge Garwood's Fifth Circuit opinion in *Lopez*); *see also* Tony Mauro, *"Sleeper" Case Tests Reach of Congress*, Legal Times, Oct. 31, 1994, at 12 (linking dissatisfaction with congressional overreaching to debate surrounding *Lopez*).

84. *See* United States v. Lopez, 115 S. Ct. 1624, 1626 (1995) (describing circumstances leading up to Lopez's challenge of Gun-Free School Zones Act of 1990 that sparked debate about value of state sovereignty). Lopez was delivering the gun to a friend who was to pass the gun on to another boy for use in gang-related activities. United States v. Lopez, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995). Communities across the United States, including San Antonio, are experiencing a sharp rise in juvenile gangs and juvenile crime in general. *See, e.g.*, David A. Avila, *Juvenile Crime Rising Sharply; Youth: Experts Blame Gangs, Readily Available Guns and a Population Surge Among Teenagers, Thanks to Immigration*, L.A. Times, Aug. 25, 1992, at B1 (reporting epidemic of gang and juvenile handgun violence); Earnest L. Perry, *Gang Fears Spur Police to Force Black Teens on Buses*, Hous. Chron., May 14, 1992, at A1 (describing busing program in Houston implemented to diffuse fighting among alleged gang members); Lillie Rodulfo, *Gang Murder Reveals San Antonio Quandary*, Nat. Cath. Rep., Jan. 8, 1993, at 6 (characterizing San Antonio city leaders as divided over whether gang members are society's victims or violent offenders in need of deterrence); Tom Squitieri, *Gang Problem Spreads: "Magnitude is Startling,"* USA Today, Oct. 24, 1991, at A6 (relating interview with victim of gang-related violence at hands of "little boys" carrying guns).

convicted for violating the Gun-Free School Zones Act of 1990 after Edison High School officials confiscated a loaded handgun in his possession,[85] despite his contention that the Act was unconstitutional.[86]

The United States Court of Appeals for the Fifth Circuit agreed with Lopez's contention that Congress exceeded its constitutional authority in passing the Act.[87] Judge Garwood, delivering the opinion of the court, found that the states have traditionally regulated local activities such as crime and education by virtue of their police powers.[88] He conceded that

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85. *Lopez*, 2 F.3d at 1345.

86. *See id.* (reporting Lopez's assertion that Gun-Free School Zones Act "does not appear to have been enacted in furtherance of any . . . enumerated powers"). After pleading not guilty, Lopez moved to dismiss the case on the grounds that the Gun-Free School Zones Act was unconstitutional as beyond Congress's power to exercise control over public schools. *Id.* Lopez was found guilty after a bench trial and was sentenced to six months in prison with two years of supervised release. *Id.* Section 922(q)(1)(B) of the Act, under which Lopez was convicted, had several limited exceptions:

> (B) Subparagraph (A) shall not apply to the possession of a firearm—
>
> (i) on private property not part of school grounds;
>
> (ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located . . .
>
> (iii) which is—
>
> (I) not loaded; and
>
> (II) in a locked container, or a locked firearms rack which is on a motor vehicle;
>
> (iv) by an individual for use in a program approved by a school in the school zone;
>
> (v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;
>
> (vi) by a law enforcement officer acting in his or her official capacity. . . .

Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(B) (Supp. II 1990).

87. *See Lopez*, 2 F.3d at 1367–68 (declaring that conviction must be supported by finding of nexus between alleged offense and interstate commerce to sustain assertion of power under Commerce Clause); *see also* Jerome L. Wilson, *Courts Continue to Puzzle Over the Adjustments Between States' Autonomy and Federal Primacy*, RECORDER, April 26, 1994, at 6 (noting that Fifth Circuit opinion in *Lopez* spurred several decisions on constitutionality of Gun-Free School Zones Act). The Fifth Circuit expressed doubt that the Gun-Free School Zones Act should be upheld under the "substantial effect" test, and declined to so hold in the absence of congressional findings of fact. *Lopez*, 2 F.3d at 1366–67. Judge Garwood, mocking the Act, wrote:

> The Gun-Free School Zones Act extends to criminalize any person's carrying of any unloaded shotgun, in an unlocked pickup truck gun rack, while driving on a county road that at one turn happens to come within 950 feet of a one-room church kindergarten located on the other side of a river, even during the summer when the kindergarten is not in session.

Id. at 1366.

88. *Lopez*, 2 F.3d at 1346 (quoting Gregory v. Ashcroft, 501 U.S. 452, 457 (1991)). The Supreme Court has recognized the states' authority to perform regulatory functions, especially in the areas of education and crime. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362,

Congress can constitutionally regulate in the area of education, despite the traditional separation of powers between the states and the federal government, provided that some connection exists between the regulated activity and interstate commerce.[89] However, he found an additional guide to state police powers in the Tenth Amendment, which despite its checkered history in Commerce Clause jurisprudence, still safely stands for the proposition that congressional power is not unlimited.[90]

Relying on past Commerce Clause decisions, the Fifth Circuit concluded that when Congress includes legislative findings of fact, including the "fact" that the regulated activity substantially affects interstate commerce, the courts must necessarily defer to such findings.[91] Conversely,

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379–80 (1976) (recognizing traditional power of states to exercise police power); O'Shea v. Littleton, 414 U.S. 488, 500 (1974) (refusing to interfere with state's exercise of police power); Stefanelli v. Minard, 342 U.S. 117, 120 (1951) (warning federal courts faced with challenge of states' authority to be mindful of "special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law"); *see also* THE FEDERALIST No. 45 (James Madison) (stating that powers reserved to states are "numerous and indefinite").

89. *Lopez*, 2 F.3d at 1360–61. Judge Garwood noted in *Lopez* that the Supreme Court has never held that Congress's powers under the Commerce Clause are unlimited. *Id.* at 1361. In fact, in *Maryland v. Wirtz*, the Court recognized that cognizable limits exist on Congress's ability to regulate intrastate activities. 392 U.S. 183, 196, *overruled in part by* National League of Cities v. Usery, 426 U.S. 833 (1976).

90. *Lopez*, 2 F.3d at 1347; *see* U.S. CONST. amend. X (providing that those powers not expressly delegated to national government are reserved to states). In *Lopez*, Judge Garwood pointed out that the Tenth Amendment cannot be construed as any kind of limit on the power of Congress to regulate interstate commerce, but rather stands for the proposition that Congress is not, in fact, omnipotent. *Lopez*, 2 F.3d at 1347. In years past, the Supreme Court placed little faith in the notion that the national government may not interfere with certain regulatory schemes simply because the states traditionally governed the area. *See* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (holding that Congress may regulate in areas traditionally governed by states so long as regulation is promulgated under powers provided to Congress under Constitution); City of Rome v. United States, 446 U.S. 156, 179–80 (1980) (distinguishing holding in *National League of Cities* and stating that federalism places no limits on Congress's ability to act under cover of Constitution). *But see, e.g.*, *Rizzo*, 423 U.S. at 379–80 (suggesting that states, rather than federal government, traditionally regulate local activities such as crime); *O'Shea*, 414 U.S. at 500 (reinforcing states' traditional exercise of police power); *Stefanelli*, 342 U.S. at 120 (recognizing ability of states to regulate intrastate activities). The Tenth Amendment establishes that the national government is one of enumerated powers. *See* JOHN H. ELY, DEMOCRACY AND DISTRUST 34–36 (1980) (stating that language of Tenth Amendment clearly limits powers of national government to those expressly delegated in text of Constitution); Vincent D. Palumbo, Note, National League of Cities v. Usery *to* EEOC v. Wyoming*: Evolution of a Balancing Approach to Tenth Amendment Analysis*, 1984 DUKE L.J. 601, 602 (maintaining that Tenth Amendment was not simply historical relic, but was legitimate constraint on federal primacy over state actions).

91. *Lopez*, 2 F.3d at 1347; *see* United States v. Wallace, 889 F.2d 580, 583 (5th Cir. 1989) (relying on legislative history to determine whether Firearm Owners' Protection Act

the court noted that a complete lack of congressional findings concerning the connection between the regulated activity and interstate commerce leaves courts wondering whether Congress intended to invoke the Commerce Clause as a justification for its assertion of power.[92] Applying this logic to the Gun-Free School Zones Act, the Fifth Circuit found that Congress had abused the deference that courts grant to congressional assertions of power under the Commerce Clause.[93] The court decided that a connection between the mere possession of a handgun and interstate

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was constitutional), *cert. denied*, 497 U.S. 1006 (1990). *But see* Saul M. Pilchen, *Politics v. the Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337, 339–40 (1984) (maintaining that Court need not always defer to congressional fact finding). *See generally* Peggy S. McClard, Comment, *The Freedom of Choice Act: Will the Constitution Allow It?*, 30 HOUS. L. REV. 2041, 2067–68 (1994) (analyzing judicial deference to legislative fact findings in relation to Commerce Clause questions).

92. *Lopez*, 2 F.3d at 1347. Judge Garwood drew support for the proposition from Supreme Court holdings that refused to allow Congress to intrude into the realm of state regulation absent findings of fact to justify legislation under Congress's enumerated powers. *Id.* at 1365; *see* Pennsylvania v. Union Gas Co., 491 U.S. 1, 23 (1989) (upholding portions of Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) based upon Congress's "unmistakably clear" intent to invoke commerce power). In *Union Gas Co.*, Justice Brennan wrote that congressional intent to invoke power under the Commerce Clause must be clear on the face of the statute before the Court would uphold CERCLA. *Union Gas Co.*, 491 U.S. at 7; *accord* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (requiring clear expression of congressional intent before upholding legislation under Commerce Clause); *cf.* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993) (providing method for government and private parties to recover costs of cleaning up pollution). The determination of whether a regulated activity substantially affects interstate commerce involves hearing testimony and analyzing economic data. Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 225 (1971). Courts have delegated to Congress the responsibility of maintaining the delicate balance between state and federal regulation. *Id.*; *see* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 560 (1954) (characterizing Court as subordinate to Congress in determining whether legislation will be allowed under Constitution).

93. *See Lopez*, 2 F.3d at 1365, 1367–68 (referring to previous Supreme Court decisions holding that Congress's ability to invoke Commerce Clause is inherently related to legislative expression of intent to do so); *see also Gregory*, 501 U.S. at 460–61 (noting decided advantage that national government maintains over state government, and requiring Congress to express intent to interfere with state powers before regulating under Commerce Clause); United States v. Bass, 404 U.S. 336, 349 (1941) (requiring Congress to plainly state its intent to alter balance between state and federal powers in furthering protection of interstate commerce). *See generally* Deborah J. Merritt, *The Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1572 (1994) (asserting that "state autonomy" model explains Court's decision in New York v. United States, 112 S. Ct. 2408 (1992)).

commerce hardly jumps from the pages of the politically popular statute.[94] Consequently, the Fifth Circuit concluded that the Act exceeded congressional power under the Commerce Clause[95] and reversed Lopez's conviction.[96]

Shortly after the Fifth Circuit's decision in *Lopez*, the United States Court of Appeals for the Ninth Circuit upheld the Act in the face of a similar challenge.[97] In *United States v. Edwards*, the Ninth Circuit declared that the Fifth Circuit had "misinterpreted, or refused to follow," binding precedent that would uphold any conviction under the Gun-Free School Zones Act of 1990.[98] With the circuit courts disagreeing on a matter of such widespread significance, the challenge fell to the Supreme

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94. *See Lopez*, 2 F.3d at 1347 (pointing to previous cases holding that various types of firearm legislation must be connected to interstate commerce to justify enforcement under Commerce Clause); *see also Wallace*, 889 F.2d at 583 (concluding that legislation such as Omnibus Crime Control and Safe Streets Act of 1968 included findings of commerce nexus); Saul M. Pilchen, *Politics v. the Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337, 340–41 (1984) (noting importance of findings of fact showing connection between regulated activity and interstate commerce).

95. *Lopez*, 2 F.3d at 1367–68. The Fifth Circuit was justified in prompting the Supreme Court to impose narrower limits on Congress's power under the Commerce Clause. *See* OLIVER P. FIELD, THE EFFECT OF AN UNCONSTITUTIONAL STATUTE 306 (1971) (explaining that judiciary has duty to resolve disputes arising because of separation of powers). To formulate the best approach to the division of power between state and national governments, the judiciary must look at how federalism has evolved over time in relation to politics. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1561 (1994). The nature of federalism in the 1990s is merely a reflection of the social and economic forces that have shaped all aspects of jurisprudence. *Id.*

96. *Lopez*, 2 F.3d at 1368. Commenting on the Gun-Free School Zones Act and speculating about the significance of the Fifth Circuit's opinion in *Lopez*, one commentator wrote:

> Backward, turn backward, O Time, in thy flight! If only the lousy, accommodative jurisprudence of the New Deal era, and since, could be expunged! That's expecting more than we have a right to expect. But that Congress should be restricted to the exercise of those powers that rightly belong to it—five-year-olds operate under no greater or lesser restriction. What has made Congress a special case is its own arrogance and our own—that includes the judiciary's—complaisance.

William Murchison, *Separating Powers and Roles*, TEX. LAW., Oct. 24, 1994, at 22; *see also Texas Case to Help Find Limit of Federal Anti-Crime Powers*, HOUS. CHRON., Apr. 19, 1994, at A2 (reporting Court's decision to hear *Lopez* and stating that affirmance of Fifth Circuit decision would affect future anti-crime legislation).

97. *See* United States v. Edwards, 13 F.3d 291, 291–92 (9th Cir. 1993) (upholding constitutionality of Gun-Free School Zones Act).

98. *Edwards*, 13 F.3d at 294–95.

Court to establish some limit to Congress's power under the Commerce Clause.[99]

IV. THE DECISION OF THE SUPREME COURT IN *UNITED STATES V. LOPEZ*

Facing this split among the circuits regarding the constitutionality of the Gun-Free School Zones Act of 1990,[100] the Supreme Court granted certiorari to hear arguments in *United States v. Lopez*.[101] The ultimate question in *Lopez* was whether the Court would place any real limit on Congress's reach under the Commerce Clause.[102]

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99. The Gun-Free School Zones Act faced challenges in courts across the nation. *See, e.g.*, United States v. Knowles, 29 F.3d 947, 948 (5th Cir. 1994) (involving arrest and conviction under Gun-Free School Zones Act of man carrying fully loaded handgun on campus of Fort Worth high school); United States v. Campbell, 12 F.3d 147, 148 (8th Cir. 1994) (affirming conviction of defendant under Gun-Free School Zones Act for firing gun at school because defendant stood on private property, not school grounds, during commission of crime); United States v. Morrow, 834 F. Supp. 364, 365–66 (N.D. Ala. 1993) (following opinion of Fifth Circuit in *Lopez* by overturning conviction of defendant under Gun-Free School Zones Act). In *United States v. Morrow*, Judge Acker wrote:

> [T]his court joins the Fifth Circuit in expecting Congress at least to share with the public, and with the overworked federal courts upon which Congress thrusts the enforcement of an accelerating volume of federal crime fighting statutes, some articulated, rational, constitutional basis for the federal government's assumption of jurisdiction over the perceived problem, particularly over an area historically governed by states or municipalities under local laws. Although the Congress has systematically whittled away at the old idea of the superiority inherent in the local solution of problems, the principle of federalism still has enough vitality to demand an explanation from Congress when Congress finds that the states' various means of handling a particular societal problem are so ineffectual as to be moribund and in need of replacement by an overarching new federal remedy.

834 F. Supp. at 365.

100. The Ninth Circuit flatly disagreed with the Fifth Circuit's opinion in *Lopez*, stating that the Fifth Circuit "misinterpreted, or refused to follow, the decisions of the United States Supreme Court that are binding on all courts inferior to our nation's highest court." United States v. Edwards, 13 F.3d 291, 294 (9th Cir. 1993).

101. 114 S. Ct. 1536 (1994).

102. *See* United States v. Lopez, 115 S. Ct. 1624, 1626 (1995) (characterizing issue in case). The Court has often upheld congressional regulations under the Commerce Clause that police individual activities. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 277–78 (1981) (approving congressional regulation of strip mining operations which were local in nature); Perez v. United States, 402 U.S. 146, 154–57 (1971) (upholding legislation designed to outlaw criminal loan-sharking); Wickard v. Filburn, 317 U.S. 111, 128 (1942) (allowing Congress to police farmers' production of wheat in order to establish prices); *see also* Naftali Bendavid, *How Much More Can Courts, Prisons Take?: It's Tempting to Federalize Crimes, but Opponents Are Gathering Momentum*, LEGAL TIMES, June 7, 1993, at 22–25 (relating critics' comments characterizing national legislation designed to combat crime as politically profitable); Lyle Denniston, *Going Overboard for a Federal Gun Law*, AM. LAW., Jan.-Feb. 1995, at 94 (maintaining that Congress has at-

Both parties submitted briefs focusing on whether congressional findings of a nexus between guns in schools and interstate commerce were necessary to sustain the Act.[103] Oral arguments, however, turned more on the scope of Congress's ability to regulate non-commercial activity in general.[104] The United States argued that the Fifth Circuit erred in finding that Congress must include within the statute some indication of a link between the regulated activity and interstate commerce.[105] According to the United States, the Court previously required a mere rational basis for finding a link, rather than dictating the procedure by which Congress can pass laws.[106] In response to the Court's question as to whether the possession of a gun could be considered interstate commerce,[107] the United States contended that the Act was justified because of the *impact* guns in schools have on interstate commerce.[108]

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tempted to federalize local crime problems for political gain); Donald A. Dripps, *Don't Make a Federal Case out of It*, TRIAL, Jan. 1995, at 90 (depicting Commerce Clause as "functional equivalent of a federal police power").

103. *See* Brief for Petitioner at II, United States v. Lopez, 115 S. Ct. 1624 (1994) (No. 93-1260) (declaring that Congress could reasonably have concluded that guns in vicinity of schools substantially affect interstate commerce and that such findings need not be stated on face of statute); Brief for Respondent at I, United States v. Lopez, 115 S. Ct. 1624 (1994) (No. 93-1260) (arguing that Congress has grown careless in enacting legislation without including requisite findings concerning effect of regulated activity on interstate commerce).

104. *See* United States v. Lopez, 56 CRIM. L. REP. (BNA) No. 8, at 3089 (Nov. 23, 1994) (providing detailed account of oral arguments in *Lopez*).

105. *Id.* United States Solicitor General Drew S. Days, III maintained that the Fifth Circuit ignored precedent in holding that Congress must include legislative findings of a link to interstate commerce to justify the legislation. *Id. But see Lopez*, 2 F.3d at 1365 (citing Supreme Court decisions from past decade requiring that congressional findings of fact be included in order to allow invocation of Commerce Clause power by Congress).

106. *See* United States v. Lopez, 56 CRIM. L. REP. (BNA) No. 8, at 3089 (Nov. 23, 1994) (chronicling arguments made by Solicitor General in *Lopez*). The United States argued that the Fifth Circuit's holding imposed undue procedural requirements on Congress regarding the enactment of legislation. *Id.* When pressed, the Solicitor General conceded that the Court previously required Congress to follow certain procedural guidelines. *Id.* at 3090; *see* New York v. United States, 112 S. Ct. 2408, 2425–35 (1992) (finding guidelines for congressional regulation of low-level radioactive waste constitutional, but striking down procedures used to implement such guidelines).

107. *See* Lyle Denniston, *Going Overboard for a Federal Gun Law*, AM. LAW., Jan.-Feb. 1995, at 94 (relating Justice Kennedy's question and characterizing Solicitor General Days's oral argument for United States as reckless). During oral argument, Justice O'Connor displayed skepticism when she asked how mere possession of a gun in the vicinity of a school could substantially affect interstate commerce. *Id.* When Days argued that the mere possession of a gun did affect interstate commerce, O'Connor disagreed, citing the Constitution's enumeration of powers between the state and federal governments. *Id.*

108. *See* United States v. Lopez, 56 CRIM L. REP. (BNA) No. 8, at 3089 (Nov. 23, 1994) (relating exchange between Justice O'Connor and Solicitor General Days regarding

Lopez asked the Court to return to its previous constitutional stance that required some substantial impact on interstate commerce to justify congressional regulations under the Commerce Clause.[109] Lopez argued that Congress, in failing to include findings of a link to interstate commerce, violated the trust that courts have placed in the ability of the legislative branch to responsibly enact laws under the Commerce Clause.[110] Shifting away from the "findings requirement" argument, Justice Ginsburg suggested during oral arguments that the case be remanded for a determination of whether mere possession of a firearm within 1,000 feet of a school has a substantial impact on interstate commerce.[111]

The Court ultimately affirmed the Fifth Circuit's decision.[112] Delivering the opinion of the Court, Chief Justice Rehnquist maintained that,

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types of activity that constitute commerce for purposes of judicial review). The United States stressed that Congress may regulate activities having a substantial effect on interstate commerce and relied on numerous prior holdings of the Court in support of this proposition. *See, e.g.*, Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 17 (1990) (stating that Court will defer to findings of substantial effect if any "rational basis" exists to do so); *Hodel*, 452 U.S. at 276 (employing "substantial effect" test while evaluating legislation under Commerce Clause); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (deferring to congressional findings of substantial effect of regulated activity on interstate commerce).

109. *See* United States v. Lopez, 56 CRIM. L. REP. (BNA) No. 8, at 3089 (Nov. 23, 1994) (reporting that *Lopez* invited Court to return to more fact-based review of congressional enactments under Commerce Clause).

110. *Id.* at 3090–91; *see Lopez*, 2 F.3d at 1363 (noting Court's expansive Commerce Clause jurisprudence). Judge Garwood concluded that the Court's current scheme for evaluating legislation enacted under the Commerce Clause almost always results in deference to Congress. *Lopez*, 2 F.3d at 1363. Because of the judiciary's extreme deference, the only "check" on Congress's power is the wisdom of the representatives themselves to "fairly and consciously fix, rather than to simply disregard, the Constitution's boundary line between 'the completely internal commerce of a state . . . reserved for the state itself' and the power to regulate 'Commerce with foreign nations, and among the several states.' " *Id.*

111. *See* United States v. Lopez, 56 CRIM L. REP. (BNA) No. 8, at 3091 (1994) (recording Justice Ginsburg's assertion during oral arguments that if Court refuses to find need for congressional findings of fact, *Lopez* could be remanded for determination of whether presence of guns in schools has substantial effect on interstate commerce). The Fifth Circuit declined to consider the question of whether the Gun-Free School Zones Act would be constitutional if adequate factual findings were included in the Act. *Lopez*, 2 F.3d at 1368. Judge Garwood expressed doubt that Congress retains sufficient power under the Commerce Clause to allow federal criminalization of firearm possession in "school zones." *Id.* at 1367. Judge Garwood wrote, "If Congress can thus bar firearms possession because of such a nexus to the grounds of *any* public or private school, and can do so without supportive findings or legislative history, on the theory that education affects commerce, then it could also similarly ban lead pencils, 'sneakers,' Game Boys, or slide rules." *Id.*

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

despite the Court's previous willingness to uphold congressional regulations arguably disconnected from interstate commerce, mere possession of guns near schools fails to justify passage of the Gun-Free School Zones Act of 1990 under the Commerce Clause.[113] According to Chief Justice Rehnquist, the Court would have to "pile inference upon inference" to find the substantial effect that guns near schools have on interstate commerce.[114]

The majority stated that Congress can regulate three broad categories of activities under the Commerce Clause: those involving the use of interstate commerce channels,[115] the actual instrumentalities of interstate commerce,[116] and those activities having a substantial relationship to interstate commerce.[117] According to the majority, the Gun-Free School Zones Act did not fall within any of these three categories.[118] With regard to the third category, the majority conceded that prior case law failed to articulate a bright-line rule for what constitutes a "substantial effect" on interstate commerce to justify congressional regulation.[119] However, Chief Justice Rehnquist stated that criminalizing the mere possession of handguns in the vicinity of schools is so far removed from the regulation of an economic activity that the Gun-Free School Zones Act could not possibly be upheld under the substantial effects test.[120]

Further, the majority agreed with the Fifth Circuit's assertion that Congress should have included findings of fact to demonstrate that the presence of guns near schools substantially affects interstate commerce.[121] According to the majority, absent some finding of a connection to interstate commerce, no real limit on Congress's ability to regulate local activi-

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113. *Id.*

114. *Id.*

115. *Id.* at 1629; *see also Heart of Atlanta Motel, Inc.*, 379 U.S. at 256 (maintaining that transportation of passengers across state lines is activity well within Congress's reach under Commerce Clause); United States v. Darby, 312 U.S. 110, 114 (1940) (declaring, "It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.").

116. *Lopez*, 115 S. Ct. at 1629; *see also* Houston & Tex. Ry. v. United States [The Shreveport Rate Cases], 234 U.S. 342, 360 (1914) (allowing congressional regulation of interstate carriers).

117. *Lopez*, 115 S. Ct. at 1629–30; *see also Perez*, 402 U.S. at 146 (designating permissible categories of activities subject to congressional regulation); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (promulgating "substantial effect" requirement for congressional regulations of interstate commerce).

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

119. *Id.* at 1630.

120. *Id.* at 1630–31.

121. *Id.* at 1631.

ties exists.[122] Chief Justice Rehnquist asserted that a lack of articulable confines to Congress's power would dictate the conclusion that Congress enjoys federal police powers.[123]

Justice Kennedy concurred in the judgment.[124] Although Justice Kennedy cautioned the Court against ignoring existing Commerce Clause precedent,[125] he noted that the history of Commerce Clause jurisprudence illustrates that content-based limitations on Congress's power to regulate interstate commerce are especially imprecise.[126] Justice Kennedy also pointed out that the federal system of government acts as a check on the accumulation of excessive power in the national government.[127] He concluded that the circumstances surrounding the Gun-Free School Zones Act require the Court's intervention to preserve the balance of powers protected by the federal system, despite the Court's prior leniency in Commerce Clause cases.[128]

Justice Thomas, also concurring, asserted that the Court should return to the principles upon which the Commerce Clause was originally based.[129] Justice Thomas specifically questioned the validity of the substantial effects test, stating that the Court must fashion a principle more respecting of the balance of power between the states and the national government.[130] According to Justice Thomas, the substantial effects test essentially allows the federal government to enjoy a federal police power.[131]

Justice Breyer dissented, joined by Justices Stevens, Souter, and Ginsburg.[132] Justice Breyer began by pointing out that the Commerce Clause power allows Congress to regulate purely local activities, provided that such activities "significantly affect" interstate commerce.[133] He stated that, in analyzing the significant effect that gun possession near schools has on interstate commerce, the Court should consider the "cumulative effect" of such activities.[134] Justice Breyer also asserted that the Court should give Congress sufficient leeway to determine the existence of a

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122. *Lopez* , 115 S. Ct. at 1632.
123. *Id.* at 1634.
124. *Id.* (Kennedy, J., concurring).
125. *Id.* at 1637.
126. *Lopez*, 115 St. Ct. at 1637.
127. *Id.* at 1638.
128. *Id.* at 1640.
129. *Id.* at 1642 (Thomas, J., concurring).
130. *Lopez*, 115 S. Ct. at 1642.
131. *Id.* at 1650–51.
132. *Id.* at 1657 (Breyer, J., dissenting).
133. *Id.*
134. *Lopez,* 115 S. Ct. at 1658.

factual connection between interstate commerce and the activity regulated.[135]

Justice Breyer concluded that the Gun-Free School Zones Act should survive because Congress could rationally find that the presence of firearms near schools substantially affects interstate commerce.[136] In support of this conclusion, Justice Breyer pointed to findings which showed that the quality of education is significantly undermined by the possession of guns in schools.[137] Because the quality of education is vitally important to the nation's economy, Justice Breyer determined that Congress should be allowed to regulate the possession of guns near schools.[138] Justice Breyer also pointed out that the Court has previously upheld regulations of local activities with a more tenuous link to interstate commerce.[139] He thus concluded that the Court should adhere to the principles of stare decisis and uphold the Gun-Free School Zones Act.[140]

V. ANALYSIS

Whether the Court's decision in *United States v. Lopez* is viewed as merely establishing a requirement of congressional findings in Commerce Clause legislation, or as an indictment of congressional reach under Article I of the Constitution,[141] the Gun-Free School Zones Act of 1990 rested on very shaky constitutional ground.[142] Finding that the mere pos-

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135. *Id.*

136. *Id.* at 1659.

137. *Id.*

138. *Lopez,* 115 S. Ct. at 1659.

139. *See id.* at 1664–65 (referring to *United States v. Darby* as example of Court's hesitancy to interfere with congressional regulation).

140. *Id.* at 1665.

141. The Court declined to impose a blanket requirement of findings as to whether a regulated activity substantially affects interstate commerce. *Id.* at 1631–32. Rather, the Court held that Congress may preserve its right to regulate purely local activities by including findings of fact. *Id.*

142. *See, e.g.*, New York v. United States, 112 S. Ct. 2408, 2431 (1992) (noting importance of maintaining delicate balance between state and federal powers); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (stating that federalism serves as buffer between power of national government and individual liberties); Maryland v. Wirtz, 392 U.S. 183, 196 (1968) (concluding that Congress may not base assertions of power under Commerce Clause on trivialities); *see also* United States v. Edwards, 13 F.3d 291, 295 (9th Cir. 1993) (upholding Gun-Free School Zones Act as wholly within Congress's power to regulate interstate commerce); United States v. Lopez, 2 F.3d 1342, 1367–68 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995) (finding Gun-Free School Zones Act to be impermissible extension of congressional power under Commerce Clause); United States v. Holland, 841 F. Supp. 143, 145 (E.D. Pa. 1993) (speculating that Congress made sufficient findings to support enactment of Gun-Free School Zones Act); James M. Maloney, Note, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 FORDHAM

session of a handgun within 1,000 feet of a school has a "substantial impact" on interstate commerce is a difficult proposition at best.[143]

A. *Potential Links Between Handgun Possession Near Schools and Interstate Commerce*

One possible connection between interstate commerce and possession of handguns in schools is the negative impact that gun possession in schools has on the relocation of residents, for employment purposes, into areas where schools are experiencing handgun-related violence.[144] This argument implicates restrictions on the right to travel, especially among families with children who are required to move into violent neighborhoods to seek or sustain employment.[145] Handguns in schools have been linked to a sharp rise in post-traumatic stress syndrome among students who are both literally and figuratively "caught in the cross-fire"—something all parents would want to avoid subjecting their children to.[146] Fur-

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L. REV. 1795, 1822 (1994) (criticizing Ninth Circuit's refusal to follow decision of Fifth Circuit in *Lopez*).

143. National legislation enacted under the Commerce Clause may not be based on some fictitious effect that an activity may have on interstate commerce. *See, e.g.*, *Wirtz*, 392 U.S. at 196 (recognizing limit to Congress's power to regulate commerce); Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453, 466 (1938) (reasoning that power of Congress is still limited by definition of commerce, despite Court's then recent turnaround in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194–95 (1824) (establishing classic test that some sort of interstate commerce must be involved to justify congressional interference in state regulation); *see also* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1395 (1987) (asserting that Chief Justice Marshall's interpretation of commerce as "trade" is congruent with usage of term "commerce" in Constitution).

144. *See* New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) (declaring that disorder and violence in schools have become "major social problems"). Urban areas wishing to attract new businesses often focus on the quality of available schools. *See* Peter Behr, *The Selling of Washington: P.R. Blitz Designed to Target Area's Strengths, Play Down Bureaucracy and Crime*, WASH. POST, Jan. 23, 1995, at F1 (describing Washington D.C.'s efforts to attract new industry by focusing on schools and cultural attractions).

145. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (declaring that right to migrate from state to state deserves protection); Edwards v. California, 314 U.S. 160, 176–77 (1941) (striking down state law infringing on citizens' right to bring indigent nonresidents into state); Crandall v. Nevada, 73 U.S. 35, 49 (1867) (invalidating state tax on persons transporting passengers across state lines); *see also* Thomas R. McCoy, *Recent Equal Protection Decisions—Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 VAND. L. REV. 987, 998–99 (1975) (analyzing Court's holding in *Shapiro*, which declared that right to travel is fundamental right); Note, *Durational Residence Requirements from* Shapiro *Through* Sosna*: The Right to Travel Takes a New Turn*, 50 N.Y.U. L. REV. 622, 633–34 (1975) (tracing implications of *Shapiro* decision).

146. *See* Betsy M. Groves et al., *Silent Victims: Children Who Witness Violence*, 269 JAMA 262, 263 (1993) (reporting that exposure to violence causes deep emotional scarring); John C. Kuehner & Patrick O'Donnell, *Terror Enters Middle School: 'The Sound's*

ther, the economy in violent neighborhoods suffers not only because families want to avoid these areas, but because school districts and administrators are increasingly required to devote time and money to policing students suspected of carrying handguns.[147] Some schools have even installed metal detectors.[148]

Such an argument is problematic, however, because it rests on a "House that Jack Built" premise: guns in schools lead to post-traumatized children, which leads to scared parents, which means families and businesses do not want to relocate into areas affected by gun violence in schools, which in turn causes the economy in these areas to collapse.[149] While the emotional well-being of students should not be overlooked, it is difficult to make the leap from such a problem to the collapse of urban economies across the nation.[150] Significantly, when Congress debated the Gun-Free School Zones Act of 1990, not one witness testified specifically about the effect that firearm possession on or near school property has on

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Never Going to Go Away,' for Pupils, Staffers Who Faced Ordeal, PLAIN DEALER, Nov. 13, 1994, at A1 (interviewing students caught in crossfire of shooter armed with single-barrel, 12-gauge shotgun).

147. *See* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 480 (5th Cir. 1982) (placing duty on society to take steps to protect students from anti-social activities in schools), *cert. denied*, 463 U.S. 1207 (1983); *In re* William G., 709 P.2d 1287, 1295 (Cal. 1985) (stating that students have unquestionable right to school environment fit for learning); *see also* John C. Kuehner & Michael Sangiacomo, *Shooting Leaves School Officials, Parents Stunned*, PLAIN DEALER, Nov. 8, 1994, at A7 (chronicling reaction of officials to shooting of school's assistant principal); Norimitsu Onishi, *Girl, 15, Shot Near School; Doctors Try to Save Her Eye*, N.Y. TIMES, May 25, 1994, at B1 (reporting story about student who was shot in head just before she walked through school's metal detector).

148. *See* Robert S. Johnson, *Metal Detector Use in Public Schools: Is It Legal?*, TEX. B.J., June 1995, at 552 (debating public policy implications of metal detector use in public schools).

149. *See* Maryland v. Wirtz, 392 U.S. 183, 196 (1968) (recognizing that Commerce Clause power, though broad, cannot be based on mere speculation about substantial effect on interstate commerce). When confronted with concrete legislative findings, as opposed to speculation, the Court will uphold Commerce Clause enactments if there is a rational basis for doing so. *See, e.g.*, Preseault v. International Commerce Comm'n, 494 U.S. 1, 17 (1990) (commenting that findings of fact are necessary to invoke power under Commerce Clause); Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 275–77 (1981) (recognizing that Congress engages in fact finding before enacting legislation that might upset balance between state and national powers); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (requiring rational basis to uphold congressional regulation of local activities).

150. *Cf.* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1451 (1987) (arguing that Court previously "[stood] a clause of the Constitution upon its head" in engaging in speculation regarding substantial effect on interstate commerce).

interstate commerce.[151] During the hearings, one official from the Bureau of Alcohol, Tobacco and Firearms (BATF) even expressed concern that the bill contained no Commerce Clause justification.[152] Apparently, Congress was not overly concerned.

An even more fantastic link between guns in schools and interstate commerce parallels the reasoning of the previous argument: guns in schools require more school tax dollars to pay for metal detectors and security officers, which results in fewer tax dollars spent on those items necessary to the educational process.[153] Thus, the entire educational process suffers, causing children to be less prepared to enter the world, effecting a national decline in the quality of the work force, and leading to the collapse of the economy.[154] This argument is attractive because it incorporates public fears about the quality of education in general and

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151. *See* United States v. Lopez, 2 F.3d 1342, 1360 (5th Cir. 1993) (noting statute's failure to explain how mere possession of handguns near schools has substantial effect on interstate commerce), *aff'd*, 115 S. Ct. 1624 (1995); *see also* Peggy S. McClard, *The Freedom of Choice Act: Will the Constitution Allow It?*, 30 HOUS. L. REV. 2041, 2067–69 (1994) (relating importance of congressional findings of fact to past decisions of Court upholding congressional regulations under Commerce Clause).

152. *See Lopez*, 2 F.3d at 1359–60 (relating BATF agent's concern at hearings that no explanation of any nexus between possession of guns near schools and interstate commerce was included in Gun-Free School Zones Act). Specifically, the BATF agent stated:

> Finally, we would note that the source of constitutional authority to enact the legislation is not manifest on the face of the bill. By contrast, when Congress first enacted the prohibitions against possession of firearms by felons, mental incompetents and others, the legislation contained specific findings relating to the Commerce Clause and other constitutional bases, and the unlawful acts specifically included a commerce element.

Gun-Free School Zones Act of 1990: Hearings on H.R. 3757 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 10 (1990) (statement of Richard Cook).

153. *See* Brief of Center to Prevent Handgun Violence at 126, Unites States v. Lopez, 115 S. Ct. 1624 (1994) (No. 93-1260) (arguing that Congress could rationally have concluded that guns in schools led to overall decline in education and that this decline substantially affects interstate commerce); Robert S. Johnson, *Metal Detector Use in Public Schools: Is It Legal?*, TEX. B.J., June 1995, at 552 (speculating about great cost of metal detection systems in schools).

154. *See* Brief of Center to Prevent Handgun Violence at 126, United States v. Lopez, 115 S. Ct. 1624 (1994) (No. 93-1260) (noting that students taught in unsafe environment often lack skills needed to compete in national and global economy). Alarmed at the increased presence of guns in schools, teachers are leaving the profession for fear of being injured or killed in the classroom. *Id.*; *see* Nancy H. McLaughlin, *More Teachers Needed: Report Urges Scholarships for Special Education Teachers*, NEWS & RECORD, Aug. 31, 1994, at B1 (describing scholarship programs established in response to shortage of teachers in public schools).

stresses the importance of the old-fashioned ideal of "reading, writing, and arithmetic."[155]

The quality of education *is* one of the most important issues facing the United States as it enters the twenty-first century.[156] However, arguments based on a fear of mediocrity and depressing stories of five-year-olds with guns cannot justify Congress's total disregard of constitutional limits on congressional power.[157] Congress should have addressed the direct causes of a perceived decline in the quality of education before it bypassed the states' right to regulate handgun violence in schools.[158]

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155. *See* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 37 (1990) (tracing common belief among American voters that quality of American public education has suffered in last decade and that decline in education will have negative implications for American economic competitiveness on global scale); *see also* Seth Mydans, *Upset with Quality of Schools, Californians Will Vote on Voucher*, N.Y. TIMES, Nov. 1, 1993, at B9 (describing proposition in California designed to provide state-financed vouchers to concerned parents who wish to enroll children in private schools). *But see* Mark Genrich, *Decline and Fall? Whoa, Let's Not Bury U.S. Education*, PHOENIX GAZETTE, Apr. 14, 1993, at A13 (refuting studies showing decline in overall intelligence of students).

156. *See T.L.O.*, 469 U.S. at 350 (Powell, J., concurring) (recognizing that individual states have compelling interest in ensuring quality of public education); Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (stating that maintaining quality of schools is among most important functions of government); Missy Bankhead, Note, New Jersey v. T.L.O.: *The Supreme Court Severely Limits Schoolchildren's Fourth Amendment Rights When Being Searched by Public School Officials*, 13 PEPP. L. REV. 87, 107 (1985) (agreeing with Court's decision in *New Jersey v. T.L.O* that upholding quality of public education was important duty).

157. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 528 (1935) (declaring that "[e]xtraordinary conditions do not create or enlarge constitutional power"); *see also* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 158 (1990) (arguing that Congress has been allowed to function omnipotently with Commerce Clause power). *See generally* THE FEDERALIST No. 51 (James Madison) (theorizing that federal system exists to act as check on legislative branch out of control); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 17 (2d ed. 1991) (explaining that federal system establishes framework of checks and balances to ensure that no governmental branch acts in disregard of Constitution); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 434 (1987) (maintaining that one goal of federal system is to allow each branch to block legal transgressions of other).

158. *See Lopez*, 2 F.3d at 1360 (finding that Gun-Free School Zones Act duplicates existing state efforts to combat school violence on local level); *Gun-Free School Zones Act of 1990: Hearings On H.R. 3757 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 14 (1990) (statement of Rep. Hughes) (admitting that federal courts would have original jurisdiction over criminal possession of handguns near schools if Act was passed, and that this would represent "major departure" from traditional notions of federalism); *see also* James M. Maloney, Note, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 FORDHAM L. REV. 1795, 1801 (1994) (commenting that Gun-Free School Zones Act inappropriately overrides existing state efforts to prevent handgun violence in schools).

The Framers of the Constitution established a system in which powers are divided between the national and state governments.[159] Although the Framers did not realize the extent to which the economy of the United States would interconnect,[160] and the role that technology would play in linking citizens across a vast nation,[161] there are several reasons to respect state autonomy in the federal system of government.[162]

B. *The Advantages of the Federal System*

1. Protection of Individual Autonomy

Americans value personal autonomy, and the federal system fosters this desire by creating a framework of dual sovereignty in which the police power remains largely with state governments.[163] Under the federal

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159. *See* U.S. CONST. amend. X (designating that those powers not expressly delegated to national government are reserved to states); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 132 (2d ed. 1991) (finding that enumeration of powers in Constitution acts as safeguard against out-of-control national government).

160. *See* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 137 (3d ed. 1986) (theorizing that Supreme Court was forced to adapt Commerce Clause interpretation to changing needs of economy); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 151–67 (2d ed. 1991) (expounding on doctrinal devices used by Supreme Court to deal with expanding national economy and federalism-based arguments against national action).

161. *See* Jonathan D. Blake & Lee J. Tiedrich, *The National Information Infrastructure Initiative and the Emergence of the Electronic Superhighway*, 46 FED. COMM. L.J. 397, 399 (1994) (tracing legal implications of convergence of industry, technology, and services into electronic superhighway).

162. *See* National League of Cities v. Usery, 426 U.S. 833, 845 (1976) (recognizing that Congress must respect federal system by not attempting to exercise power outside limits of Constitution), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 134–38 (2d ed. 1991) (stating that federal system of government is justified because it promotes efficiency, democracy, and personal autonomy).

163. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 135–36 (2d ed. 1991) (asserting that federal system allows maximum freedom to citizens to choose where and how they will be regulated). State police power includes the right to enact all legislation necessary and proper to protect public health, order, security, and justice. *See* Sharon N. Humble, Comment, *The Federal Government's Machiavellian Impediment of the States' Collection of Property Taxes Through the FDIC's Regulation of Failed Financial Institutions: Does the End Justify the Liens?*, 25 ST. MARY'S L.J. 493, 500–01 (1993) (finding that Constitution vests police power in individual states rather than national government). Congress may not deprive states of the police power in contravention of the Constitution. *Id.* Nonetheless, federal criminal jurisdiction has increased steadily during the past three decades. *See, e.g.*, Russell v. United States, 471 U.S. 858, 862 (1985) (allowing Congress to designate arson as federal crime under Commerce Clause power); Elkins v. United States, 364 U.S. 206, 211 (1960) (noting expansion of federal criminal law); United States v. LeFaivre, 507 F.2d 1288, 1296 (4th Cir. 1974) (discussing expansion of federal criminal jurisdiction); *see also* Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L. J. 1029, 1031 (1995) (noting increased presence of federal government in crime control).

system, citizens who do not support the policies of a particular state have the option of moving to another state.[164] A decentralized government allows a maximum number of citizens to retain the ability to live under the control of regulatory policies they support.[165] For example, corporations are generally governed by the laws of the particular state in which they are incorporated.[166] For this reason, citizens wanting to form a corporation often choose to incorporate in one state rather than another, exercising their freedom of choice.[167]

2. Encouragement of Legislative Experimentation

United States v. Lopez illustrates a second advantage of a decentralized form of government—the federal system encourages state governments to experiment with various solutions to social problems.[168] As for legisla-

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164. *See, e.g.*, DENNIS C. MUELLER, PUBLIC CHOICE 125–31 (1979) (discussing possibility of relocation for voters who are unhappy with state's regulatory scheme); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 135–36 (2d ed. 1991) (listing element of individual choice as advantage of federal system of government); Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959, 960 (1991) (debating theory of voters as consumers who exercise democratic impulse on state and local level).

165. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 135–36 (2d ed. 1991) (finding that federalism distributes power at several levels so that citizens unhappy with regulatory scheme of state government have option of moving to another state); *see also* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 917–20 (1994) (noting "citizen choice" advantage of federalism).

166. *See* ROBERT W. HAMILTON, CASES AND MATERIALS ON CORPORATIONS, INCLUDING PARTNERSHIPS AND LIMITED PARTNERSHIPS 175 (5th ed. 1994) (describing enactment of corporation statutes by numerous states during 19th century industrialization to attract business); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 668 (1974) (finding that Delaware has become most popular state in which to incorporate because of state regulatory scheme).

167. *See* Bayless Manning, *State Competition: Panel Response*, 8 CARDOZO L. REV. 779, 785 (1987) (explaining reasons why many choose to incorporate in Delaware instead of other states); *see also* William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 668 (1974) (explaining liberalism of Delaware corporate law as attempt to raise revenue for state). *See generally* Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709, 709 (1987) (expounding on relationship of federal system to corporate law).

168. *See* Brief for Respondent at App. B, United States v. Lopez, 115 S. Ct. 1624 (1994) (No. 93-1260) (chronicling legislative experimentation that occurred among states regarding elimination of handgun violence in schools); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 923–26 (1994) (discussing notion that federal system encourages experimentation among state legislatures in finding solutions to social problems); *see also* New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (arguing that experimentation is vitally important to social and economic well-being of nation). Justice Brandeis wrote, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens

tion designed to combat the presence of handguns in schools, different states have chosen different approaches.[169] State legislatures often monitor each other's progress, and the state regulatory systems that produce the best results are, in theory, emulated throughout the nation.[170]

3. Respect for State Sovereignty

Finally, a federal system recognizes that Congress cannot always foresee the best remedy for a social problem in a particular area of the United States.[171] Different solutions to social problems may be needed in different geographic areas, and the federal system allows a more tailored approach to government. Voters apparently favor a more tailored ap-

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choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.*, 285 U.S. at 311; *see also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 123 (2d ed. 1991) (describing innovative policies originating at state level, including sunset legislation, equal housing, auto pollution standards, and limited-access highways).

169. *See* Brief for Respondent at App. B, United States v. Lopez, 115 S. Ct. 1624 (1994) (No. 93-1260) (describing different approaches taken by individual states to maintain safety in schools). Some states require that students found possessing firearms on campus be immediately suspended or expelled. ALA. CODE § 16-1-24.1 (Michie 1993); ARK. CODE ANN. § 6-21-608 (Michie 1993); CAL. EDUC. CODE § 48900(b) (Deering 1987); DEL. CODE ANN. tit. 14, § 4112(c) (Supp. 1993); IND. CODE ANN. § 20-8.1-5-4(b)(1) (Burns Supp. 1994); KY. REV. STAT. ANN. § 158.150(1)(a) (Michie/Bobbs-Merrill 1992); TEX. EDUC. CODE ANN. § 21.3011(b)(4) (Vernon 1994); WASH. REV. CODE ANN. § 9.41.280 (West Supp. 1994). Other states take a more novel approach, holding third persons liable for the actions of minors in possession of firearms. *See, e.g.*, ILL. ANN. STAT. ch. 720, para. 5/24-3.3 (Smith-Hurd 1993) (criminalizing delivery of firearms to minors at school); MASS. GEN. L. ch. 269, § 10(j) (1992) (punishing school officials for failing to report students in possession of weapons); MISS. CODE ANN. § 97-37-17 (1973) (punishing complaisant teachers with misdemeanor for allowing students to possess guns); N.C. GEN. STAT. § 14-269.2(b) (1993) (defining act of aiding minor carrying firearm to school as felony); OKLA. STAT. ANN. tit. 21, § 858 (West Supp. 1994) (fining parents for allowing children to take guns to school); TENN. CODE ANN. § 39-17-1312 (Supp. 1993) (punishing parents with misdemeanor for allowing their issue to possess firearms in school). Thus, different states put different "spins" on solving the problem of handguns in schools.

170. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 134–35 (2d ed. 1991) (commenting on Justice Brandeis's assertion that state legislatures are social laboratories of nation). *But see* Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594 (1980) (criticizing Justice Brandeis's position and asserting that state and local governments are not prone to risk-taking).

171. *See* New York v. United States, 112 S. Ct. 2408, 2424 (1992) (declining to allow Congress to decide best method for individual state legislatures to address disposal of radioactive waste); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 658–59 (2d ed. 1985) (maintaining that federal government has undertaken responsibility of regulating all aspects of American life ever since New Deal, which has resulted in paternalism, rather than federalism); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 135 (2d ed. 1991) (describing efficiency gained by allowing states in different geographic areas to tailor social policies to their own needs).

proach, as evidenced by the outcome of the 1994 congressional elections which was at least partly attributable to voter dissatisfaction with federal regulation of everyday, local matters.[172] Indeed, successful congressional candidates ran on a platform of *less* government.[173]

In sum, the Gun-Free School Zones Act of 1990 subjugated all of the above precepts of our federal system—individual autonomy, legislative experimentation, and state sovereignty. Congress, acting to gain political advantage, completely disregarded the states' efforts to combat the serious problem of handgun violence in schools.[174] In the past, the Supreme Court necessarily allowed Congress to regulate activities arguably disconnected from interstate commerce because of the states' tendencies to either ignore or aggravate a particular social problem.[175] However, with regard to legislation designed to crack down on the presence of firearms in schools, individual state legislatures are not idle.[176]

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172. *See, e.g.*, Harvey Berkman, *Congress' Reach May Be Nipped*, NAT'L L.J., Nov. 21, 1994, at A6 (construing arguments in *Lopez* in terms of voters' disapproval with omnipotent Congress); Tony Mauro, *Anti-Gun Case Tests Congress' Power to Combat State Crime*, RECORDER, Oct. 31, 1994, at 1 (declaring that voters were tired of "out of control" Congress); *Yet Another Power Grab*, ROCKY MTN. NEWS, Nov. 13, 1994, at A96 (describing electorate's dissatisfaction with Congress).

173. *See Budget Blaster*, U.S. NEWS & WORLD REPORT, Feb. 20, 1995, at 33 (presenting question, "You Say You Want Less Government?" on cover and then inviting readers to take part in game where fictitious reductions are made in federal spending).

174. *See* United States v. Lopez, 2 F.3d 1342, 1345 n.1 (5th Cir. 1993) (pointing out that Texas legislature had already taken steps to prevent possession of handguns in schools), *aff'd*, 115 S. Ct. 1624 (1995); William Murchison, *Separating Powers and Roles*, TEX. LAW., Oct. 24, 1994, at 22 (characterizing Gun-Free School Zones Act as mockery of system of enumerated powers).

175. *See* Katzenbach v. McClung, 379 U.S. 294, 300 (1964) (allowing Congress to regulate purely local activity by liberally construing meaning of interstate commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249 (1964) (trusting congressional findings of effect on interstate commerce to allow prohibition of racial discrimination by private businesses); *see also* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1451 (1987) (recognizing that Court previously construed Commerce Clause liberally to further substantive social policies).

176. *See* Tex. H.B. 658, 74th Leg., R.S. (1995) (proposing alternative education program for juvenile offenders in schools). The bill, known as the "Safe Schools Act," would give school officials in Texas the power to immediately place violent students into "alternative education programs" if there is a reasonable belief that other students or teachers are in danger. *See* Diana R. Fuentes, *Bill Aimed Against School Violence: 'One Strike—You're Out' Plan Has Alternative Academy for Offenders*, SAN ANTONIO EXPRESS-NEWS, Feb. 8, 1995, at A14 (reporting introduction of bill to Texas legislature that would establish comprehensive program to deal with problems of violence and drugs in schools). Specifically, the plan would establish a one-strike-and-you're-out system, where students caught with drugs or weapons could be sent after a hearing to an alternative school staffed with teachers trained to deal with problem students. *Id.* Texas governor George W. Bush, while delivering his state-of-the-state address, said, "School districts must be encouraged,

Faced with the Gun-Free School Zones Act, the Supreme Court cautioned Congress to include findings of a substantial impact on interstate commerce.[177] Accordingly, the lower federal courts have already begun to strike down legislation that lacks the findings suggested by *Lopez*.[178] However, once findings of fact are included in future legislation, the Court should stand behind its decision in *Lopez* and weigh such assurances against a reality-based conception of what actually constitutes commerce.[179] Only then will Congress be limited in its attempts to disregard the states' legitimate efforts to combat social problems.[180]

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not mandated, to start 'Tough Love Academies.' These alternative schools would be staffed by a different type of teacher, perhaps retired Marine drill sergeants, who understand that discipline and love go hand in hand." *Id.* Texas, a leader among states enacting tougher crime legislation, would pay for the program entirely with state funds, at an estimated cost of $50 million per year. *Id.*

177. *See* United States v. Lopez, 115 S. Ct. 1624, 1631 (1995) (suggesting findings requirement); *see also* Pennsylvania v. Union Gas, 491 U.S. 1, 23 (1989) (employing congressional findings of fact to uphold legislation); United States v. Bass, 404 U.S. 336, 350 (1971) (holding that Congress should include findings of substantial effect on interstate commerce in order to justify regulations under Commerce Clause).

178. *See* United States v. Mussari, No. CR 95-009 PHX PGR, 1995 WL 447266, at *9 (D. Ariz. July 26, 1995) (concluding that portions of 1992 Child Support Recovery Act exceeded Congress's power under Commerce Clause given Court's decision in *Lopez*); *see also* Frank J. Murray, *Commerce Ruling Increases Appeals; Court Undercuts Some Federal Laws*, WASH. TIMES, Sept. 25, 1995, at A4 (noting increase in constitutional challenges to federal criminal laws in light of Court's decision in *Lopez*). *But see* United States v. Gonzalez, No. CR 95-0337-R, 1995 WL 44727, at *2 (S.D. Cal. July 24, 1995) (rejecting *Lopez* challenge to federal drug statute containing no statement of nexus to interstate commerce).

179. *Cf.* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189–90 (1824) (applying common sense definition of commerce among states, which reflected actual business practices). The Court's adoption of an originalist view, at least in the area of the Commerce Clause, would comport with changing views of the role of the federal government in light of overwhelming federal deficits and Congress's apparent inability to affect the positive changes demanded by the electorate. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 853–54 (1989) (describing shortcomings of Court's attempt to second-guess Framers of Constitution).

180. *See* New York v. O'Neill, 359 U.S. 1, 11 (1959) (urging cooperation among states and national government in dividing powers). In *O'Neill*, Justice Frankfurter wrote:

> The Constitution of the United States does not preclude resourcefulness of relationships between states on matters as to which there is no grant of power to Congress and as to which the range of authority restricted within an individual state is inadequate. By reciprocal, voluntary legislation the states have invented methods to accomplish fruitful and unprohibited ends.

Id.; *see also* JOHN H. ELY, DEMOCRACY AND DISTRUST 80 (1980) (finding that specific aim of Constitution was to break up government's decision and enforcement authority between national and state governments and among legislative, judicial, and executive branches); THE FEDERALIST No. 51 (James Madison) (noting importance of separation of powers to guard against government oppression). The Constitution's system of separated powers may not be discarded simply out of convenience. *See* A.E. Dick Howard, Garcia *and the*

VI. CONCLUSION

The social justifications for the Supreme Court's expansive construction of the Commerce Clause during the past sixty years simply no longer existed to justify the Gun-Free School Zones Act of 1990. The presence of guns in schools did not give rise to an economic emergency. Additionally, the states were neither ignoring nor aggravating the social problem being addressed, as was the case during the Civil Rights Era. On the contrary, state legislatures took a cue from voters and enacted more tailored solutions to the problem of handgun violence in schools.

The Supreme Court sent a clear message with its decision in *United States v. Lopez*: Congress should restrain its recent penchant for federalizing crime to pacify alarmed voters. When five-year-olds carry guns to school for protection and violent crime becomes a source of popular entertainment, prescriptive action is in order. Given the opportunity, however, state legislatures will tackle violent crime head on, if only for the political rewards inherent in such legislation.

The most realistic framework for Commerce Clause jurisprudence is one based in fact. Congressional findings must be present and must show that some substantial impact on interstate commerce *actually exists* to allow Congress to regulate a local activity. Such a test would allow the Framers' vision of federalism to operate as originally intended. Most importantly, however, individual state legislatures could once again serve as the proving grounds for the substantive social policies that will guide our nation into the twenty-first century. The Court's decision in *Lopez* is only the first step.

Values of Federalism: On the Need for a Recurrence to Fundamental Principles, 19 GA. L. REV. 789, 795 (1985) ("The individual American—as the heir to those who brought the Constitution into being and agreed to its adoption—has a fundamental entitlement to living under the form of government spelled out in the Constitution.").