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The Lautenberg Amendment: Congress Hit the Mark by Banning Firearms from Domestic Violence Offenders Comment.

Polly McCann Pruneda

COMMENTS

THE LAUTENBERG AMENDMENT: CONGRESS HIT THE MARK BY BANNING FIREARMS FROM DOMESTIC VIOLENCE OFFENDERS

POLLY MCCANN PRUNEDA

"All too often, the difference between a battered woman and a dead woman is a gun."[1]

I. INTRODUCTION

On the evening of March 11, 1999, the parishioners of New St. John Fellowship Baptist Church in Gonzales, Louisiana, were listening to Reverend Wilbert Holmes read from the third chapter of *John*.[2] Suddenly, a gunman kicked open the doors to the vestibule, fired into the air, and ordered everyone to the floor.[3] A little boy turned and said, "Daddy."[4] According to witnesses, the gunman then fired a semiautomatic handgun until the weapon was emptied, killing the little boy and his mother.[5] After an hour-long standoff, the police arrested the gunman and identified him as Shon Miller, the father of the little boy, Shon Miller, Jr., and estranged husband of the woman killed, Carla Miller.[6]

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1. Elizabeth Shogren, *Senate Votes to Extend Gun Curbs—Congress: Bill to Widen Ban to Those Guilty of Misdemeanor Domestic Violence Passes, 97-2*, L.A. TIMES, Sept. 13, 1996, at A22 (quoting Sen. Paul Wellstone), *available in* 1996 WL 11643613.

2. *See* Larry Copeland, *4 Killed in La. Shooting Rampage: Estranged Husband Held After Standoff*, USA TODAY, Mar. 12, 1999, at 3A (describing the tragic shooting death of a woman and her son by her estranged husband), *available in* 1999 WL 6836656.

3. *See id.*

4. *See id.*

5. *See id.* According to one witness, "The little boy turned around and said, 'Daddy,' and that's when he shot .... He shot the Momma first and then he shot the little boy." *Id.*

6. *See id.* Shon Miller was reportedly unemployed and recently had been released from jail after violating his wife's restraining order obtained against him. *See id.* Furthermore, Miller allegedly shot and killed his mother-in-law before going to the church. *See id.* Police also said that during the standoff Shon Miller had threatened to kill himself. *See id.* Apparently, Miller was only arrested after he was shot in the back, leaving him paralyzed from the waist down. *See id.*

In an unrelated incident, Melanie Edwards and her daughter Carli suffered the same fate as Shon, Jr. and Carla only three months earlier.[7] On December 9, 1998, aircraft mechanic Carlton Edwards was waiting outside the agency that had arranged his court-ordered visitation time with Carli, his two-year old daughter.[8] Carlton, who had just finished playing with Carli, was waiting for his estranged wife Melanie, to exit the building.[9] When Melanie finally emerged from the agency, Carlton leaped from his car and shot Melanie four times, and with one lethal bullet, he killed Carli as well.[10]

Deplorably, incidents of gun-related domestic violence such as these are not uncommon in the United States[11] and span all economic and racial boundaries.[12] In fact, statistics reveal that in some states domestic

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7. *See* Editorial, *License to Kill Women: Are Restraining Orders Sending Abusive Husbands over the Edge?*, GLAMOUR, Apr. 1999, at 214 (discussing the shooting deaths of a woman and child by the estranged husband and father).

8. *See id.* Four weeks previously, Melanie had argued in court against granting Carlton visitation rights. *See id.* Evidently, Carlton had "repeatedly threatened to kill her and had already tried to strangle her." *Id.* The court, however, held that Melanie "had to allow Carlton to visit their child." *Id.*

9. *See id.*

10. *See id.* The article reporting this incident also asks an important and fundamental policy question, "How many more Melanies must be terrorized and murdered before lawmakers and law enforcers realize that these [restraining] orders are fatally flawed?" *Id.*

11. *See, e.g.*, Patricia S. Castillo, *Violence in the Home a Community Concern*, SAN ANTONIO-EXPRESS NEWS, Jan. 29, 1999, at 5B (stating that a woman was shot and killed by her husband); *Rally Protects Domestic Abuse, Death of Girl, 14*, SAN ANTONIO EXPRESS-NEWS, Oct. 11, 1996, at 6B (illustrating the realities of domestic violence by pointing out that a 14-year-old girl was shot and killed by her domestic partner/boyfriend); *see also* William G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources?*, 48 RUTGERS L. REV. 1139, 1141 (1996) (stressing that "domestic violence accounts for more injuries to women than auto accidents, rapes, and muggings combined"); Edward Cohn & Jason Zengerle, *Draw, Domestic Pardner*, AM. PROSPECT, Nov. 1, 1997, at 14 (reporting that twenty-six percent of murdered women are killed by intimate partners), *available in* 1997 WL 21293195; *cf.* Margo L. Ely, *Domestic Violence Law Draws Split Decisions*, CHI. DAILY L. BULL., Sept. 9, 1996, at 1 (stating that "[a]pproximately 4 million women are battered by their husbands or partners in America each year"), *available in* WESTLAW, Chidlb Database.

12. *See* Judy Keen, *Comment on Domestic Abuse Draws Criticism*, USA TODAY, May 31, 1996, at 4A (quoting Bob Dole as stating that domestic violence is a problem that affects "people of all races and incomes"), *available in* 1996 WL 2057109; Joe Urschel, *Yes, There's Spouse Abuse, but . . .*, USA TODAY, June 30, 1994, at 11A (explaining that domestic violence is not directly related to race), *available in* 1994 WL 11105543; *see also* Idaho Council on Domestic Violence, *Statistics on Domestic Violence* (visited Jan. 27, 1999) <http://www2.state.id.us/crimevictim/Statistics/domesticviolence.html> (declaring that all women are equally susceptible to violence by a domestic partner); Victims Services, *Facts About Domestic Violence: Domestic Violence and Race* (visited Jan. 27, 1999) <http://www.dvsheltertour.org/fact.html> (confirming that domestic violence is an indiscriminate problem among all races).

violence takes one life every three days.[13] Likewise, what typically turns these domestic disputes deadly is the fact that when firearms are involved, death is almost unavoidable.[14] Fortunately, these drastic consequences have caught the attention of legislators throughout the country, including the members of the United States Congress.[15]

In 1996, Congress attempted to curtail the tragic effects of domestic violence by enacting the Lautenberg Amendment to the Gun Control Act of 1968.[16] The Lautenberg Amendment, enacted pursuant to Con-

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13. *See* Sergio R. Bustos, *Domestic Abuse Stays at Forefront: Simpson Case Brings Awareness, Action*, SUN-SENTINEL (Ft. Lauderdale, Fla.), July 5, 1995, at 1B (providing information that Florida experiences a domestic violence-related death every three days), *available in* 1995 WL 8819009; John H. Manor, *Pistons Women's Association Stand Against Domestic Violence*, MICH. CHRON., Mar. 21, 1995, at 1D (commenting that every eight days a woman dies from domestic violence in Michigan), *available in* 1995 WL 15428610; *see also* Family Violence Prevention Fund, *New Crime Statistics* (last modified Jan. 1997) <http://www.igc.apc.org> (stating that Maine reported that three in five murders were caused by domestic violence during the 1990s).

14. *See* 142 CONG. REC. S10,379-01 (daily ed. Sept. 12, 1996) (statement of Sen. Murray) (introducing a California study that "showed when a domestic violence incident is fatal, 68 percent of the time the homicide was done with a firearm"); *Guns, Domestic Violence and the Law*, WASH. POST, Apr. 29, 1997, at A72 (illustrating the correlation between guns and violence through the statistics indicating that sixty-two percent of deaths caused by a domestic partner involved a shooting), *available in* 1997 WL 10690550; *see also* U.S. Dep't of Justice, Bureau of Justice Statistics, *Women Usually Victimized by Offenders They Know* (Aug. 16, 1995) <http://www.ojp.usdoj.gov> (asserting that eighteen percent of domestic violence attacks involved weapons, and fifty-two percent of those incidents resulted in injury for women compared to a twenty percent injury rate for women attacked by strangers with weapons).

15. *See, e.g.*, Gun Control Act of 1968, 18 U.S.C. § 922 (1994), *amended by* 18 U.S.C. § 922(g)(9) (Supp. III 1997) (prohibiting persons convicted of a misdemeanor domestic violence offense from possessing, transferring, or receiving a firearm); IDAHO CODE § 18-3315 (1997) (stating that residents of Idaho who desire to purchase a firearm are subject to the domestic violence provisions of the Gun Control Act of 1968); 750 ILL. COMP. STAT. ANN. 60/102(1) (West 1993) (noting the purpose of the Illinois Domestic Violence Act of 1986 is to recognize the serious nature of the crime of domestic violence against the person and society).

16. *See generally* Gun Control Act of 1968, 18 U.S.C. § 922 (1994), *amended by* 18 U.S.C. § 922(g)(9) (Supp. III 1997) (including domestic violence misdemeanor offenders in the class of persons prohibited from possessing, receiving, or transferring firearms). The text of the Lautenberg Amendment to the Gun Control Act reads:

> [I]t shall be unlawful for any person . . . (9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Id. The stated purpose of the amendment was to protect women from spousal abuse. *See Urge Your Senators to Oppose "Spanker" Gun Ban* (last modified Aug. 14, 1996) <http://www.gunowners.org/alt96089.htm> (arguing that Senator Frank Lautenberg included lan-

gress' Commerce Clause power, seeks to protect individuals from gun-related injury or death occurring within domestic relationships.[17] Specifically, the Amendment is designed to prohibit the transfer, possession, or receipt of both firearms and ammunition by individuals who have been convicted of misdemeanor crimes of domestic violence.[18]

Lamentably, and despite its noble goals, the Amendment has been unable to evade criticism and attack.[19] In particular, critics have argued that the Amendment's application will be complicated by inconsistencies among the states as to what constitutes a misdemeanor offense of domestic violence.[20] In addition, several commentators have questioned the

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guage in the amendment to aid in the removal of guns from homes involving persons convicted of domestic violence offenses).

17. *See* Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811, 814 (S.D. Ind. 1998) (stating that Congress passed the Lautenberg Amendment in order to create a firearm disability for persons convicted of misdemeanor crimes of domestic violence); 142 CONG. REC. S10,377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Frank Lautenberg) (confirming that the underlying policy of the Lautenberg Amendment is a congressional attempt to address the seriousness of the deaths and recurring injuries caused by domestic violence), *available in* 1996 WL 517928; Frank R. Lautenberg, *No Guns for Wife Beaters*, WASH. POST, Apr. 3, 1997, at A21 (explaining that the underlying principle of the Lautenberg Amendment is to keep guns away from wife-beaters and child abusers"), *available in* 1997 WL 10010533. The Lautenberg Amendment "was signed into law on September 30, 1996, as Section 658 of the Treasury-Postal portion of the omnibus appropriations bill." *The Lautenberg Domestic Confiscation Law* (visited Mar. 1, 1999) <http://www.gunowners.org>.

18. *See* Gun Control Act of 1968, 18 U.S.C. § 922 (1994), *amended by* 18 U.S.C. § 922(g)(9) (Supp. III 1997) (describing how the Lautenberg Amendment operates to prevent domestic violence offenders from committing subsequent offenses by prohibiting gun possession).

19. *See* Eric Andrew Pullen, Comment, *Guns, Domestic Violence, Interstate Commerce, and the Lautenberg Amendment: "[S]imply Because Congress May Conclude That a Particular Activity Substantially Affects Interstate Commerce Does Not Necessarily Make It So."*, 39 S. TEX. L. REV. 1029, 1038 (1998) (arguing that the Lautenberg Amendment completely lacks a connection to interstate commerce); Robert Breckenridge-Kelly, Editorial, *Chenoweth Is Right: Repeal the Lautenberg Amendment*, IDAHO STATESMAN, Mar. 30, 1997 (arguing that the Lautenberg Amendment should be repealed because it is applied retroactively), *available in* 1997 WL 10197159; Guy Gugliotta, *Gun Ban Exemption Ricochets in the Struggle*, WASH. POST, June 10, 1997, at A15 (opposing the Lautenberg Amendment based on its retroactive application), *available in* 1997 WL 11160279; Fred Romero, *Hair-Trigger Rationale: An Obscure Gun-Control Measure Sailed Through Congress Late Last Year, Taking Guns Away from Men and Women with Any Domestic Violence Record*, L.A. DAILY NEWS, Apr. 13, 1997, at V1 (attacking the Lautenberg Amendment as an infringement upon the right to bear arms under the Second Amendment), *available in* 1997 WL 4039222.

20. *See* Nancy McCarthy, *Numbers Are in: Crime Stabilizes*, PORTLAND OREGONIAN, Apr. 25, 1996, at 1 (suggesting that defining what precisely constitutes domestic violence is impossible), *available in* 1996 WL 4133015; *see also* Bruce T. Smith, *Disarming the Soldier*, 44 FED. LAW. 16, 16 (1997) (proposing that a misdemeanor domestic violence offense is

constitutional soundness of the Amendment itself.[21] In fact, during Congress' 105th legislative session, a number of bills were proposed that favored at least a partial repeal of the Amendment.[22] Notably, one bill, H.R. 1009, demanded that the Amendment be repealed entirely.[23] That

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determined in the jurisdiction where the proceedings are held). Specifically, under Section 922 of Title 18:

> [T]he term "misdemeanor crime of domestic violence" means an offense that—
> (i) is a misdemeanor under Federal or State law; and
> (ii) has, an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim . . . .

18 U.S.C. § 922(a)(33)(A) (Supp. III 1997).

21. *See* Eric Andrew Pullen, Comment, *Guns, Domestic Violence, Interstate Commerce, and the Lautenberg Amendment: "[S]imply Because Congress May Conclude That a Particular Activity Substantially Affects Interstate Commerce Does Not Necessarily Make It So.*", 39 S. TEX. L. REV. 1029, 1038 (1998) (discussing the unconstitutionality of the Lautenberg Amendment under the Commerce Clause); Carla Crowder, *Police Fight Strict Gun Law: Many Cops Don't Like Law That Bars Abusers from Carrying Firearms Whether on or Off Duty*, ROCKY MTN. NEWS, Oct. 29, 1998, at 5A (challenging that constitutionality of the Lautenberg Amendment because misdemeanor domestic violence offenses deprive police officers convicted of an offense of jobs, whereas a felony misdemeanor domestic violence conviction has an "official duty" exception), *available in* 1998 WL 21797237; Chad Hyslop, *Press Conference Scheduled on Effort to Repeal Anti-Gun Law* (visited Nov. 1, 1998) <http://www.gov/chenoweth/71197.htm> (reviewing the Lautenberg Amendment's many constitutional flaws and discussing why it should be repealed); *Political Ad Watch*, IDAHO STATESMAN, Apr. 9, 1998, at 1B (referring to the Lautenberg Amendment as radical anti-gun legislation), *available in* 1998 WL 11223287.

22. *See* States' Rights and Second and Tenth Amendment Restoration Act of 1997, H.R. 1009, 105th Cong. (1997) (proposing a full repeal of the Lautenberg Amendment); H.R. 26, 105th Cong. (1997) (proposing that the Lautenberg Amendment only apply to persons with a misdemeanor conviction of domestic violence after the date the prohibitions became law); H.R. 445, 105th Cong. (1997) (proposing to delete Section 922(g)(9) and prevent retroactivity of the Lautenberg Amendment); *see also* Claire Antonelli, *Law Banning Domestic Abusers from Owning Guns in Jeopardy* (visited Oct. 19, 1998) <http://www.feminist.org/police/dvgunlink.html> (alleging that the Lautenberg Amendment is in jeopardy of repeal or amendment by several bills introduced in Congress, such as a proposed bill by Representative Bart Stupak, H.R. 445, which advocates exempting police officers and military personnel from the scope of the Lautenberg Amendment); *Barr and Fraternal Order of Police Slam Lautenberg Gun Ban*, U.S. NEWSWIRE, Sept. 30, 1997 (quoting Representative Bob Barr of Georgia regarding H.R. 26, a proposed partial repeal to the Lautenberg Amendment, that "would stop the administration from enforcing the Lautenberg Amendment retroactively" in violation of the ex post facto provision of the Constitution, "Article 1, Section 9, Clause 5"), *available in* 1997 WL 13913238.

23. *See* States' Rights and Second and Tenth Amendment Restoration Act of 1997, H.R. 1009, 105th Cong. (1997) (advocating a full repeal of the Lautenberg Amendment); *Lautenberg Gun Ban Repeal Update: Get Pro-Gun Compromisers on Board the Full Re-*

bill, which was entitled "States' Rights and Second and Tenth Amendment Restoration Act of 1997," argued that the Amendment violated the Commerce Clause, which is contained in Article 1, Section 8, of the United States Constitution.[24]

Under the Commerce Clause, Congress has the power to regulate commerce among the several states.[25] In the past, Congress has typically used this power to justify extensive economic regulation.[26] Recently, however, the Supreme Court of the United States has placed limitations on the scope of Congress' Commerce Clause power.[27] Specifically, in *United States v. Lopez*,[28] the Court defined the contemporary parameters within which Congress may constitutionally regulate commerce.[29] According to that decision, Congress may regulate an activity if it falls within one of three categories: channels of interstate commerce, instrumentalities of interstate commerce, or local activities with a substantial relation to interstate commerce.[30] Subsequently, in *Printz v. United States*,[31] the Court

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peal! (last modified Oct. 15, 1997) <http://www.gunowners.org/a101597.htm> (explaining that a bill was introduced in Congress in an effort to repeal the Lautenberg Amendment); *see also Political Ad Watch*, IDAHO STATESMAN, Apr. 9, 1998, at 1B (claiming that Rep. Chenoweth views the Lautenberg Amendment as unconstitutional in its entirety), *available in* 1998 WL 11223287; *States' Rights and Second and Tenth Amendment Restoration Act of 1997* (last modified Mar. 1997) <http://www.gunowners.org/gthr1009.htm> (proposing the States' Rights and Second and Tenth Amendment Restoration Act of 1997 in the 105th Congress to repeal the Lautenberg Amendment).

24. *See* States' Rights and Second and Tenth Amendment Restoration Act of 1997, H.R. 1009, 105th Cong. (1997) (arguing that the Lautenberg Amendment extends beyond the reach of federal Commerce Clause authority).

25. *See* U.S. CONST. art. I, § 8, cl. 3 (providing that "Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

26. *See* Charles B. Schweitzer, *Street Crime, Interstate Commerce, and the Federal Docket: The Impact of* United States v. Lopez, 34 DUQ. L. REV. 71, 77 (1995) (confirming that the Court provided deference to Congress to promulgate legislation regulating an expansive range of commercial activity during the New Deal era); *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 129 (4th ed. 1991) (explaining that a broad interpretation of Congress' Commerce Clause power may be construed as the equivalent of a generalized "police power" because of the wide range of state issues involving economic problems).

27. *See* Printz v. United States, 117 S. Ct. 2365, 2378-79 (1997) (stating that under the Commerce Clause, Congress is authorized to regulate interstate commerce directly, but may not do so indirectly by regulating state governments and their interstate commerce regulations); United States v. Lopez, 514 U.S. 549, 558-59 (1995) (discussing the three categories of activity Congress is limited to regulating under its commerce power).

28. 514 U.S. 549 (1995).

29. *See Lopez*, 514 U.S. at 551-52 (holding that the Gun-Free School Zones Act of 1990 exceeded the authority of Congress by regulating the local aspects of schools).

30. *See id.* at 558-59 (defining the three categories of activity that Congress may regulate).

determined that even if federal legislation satisfies the *Lopez* standard, such legislation may not "commandeer" the states to enforce it.[32] According to the Court, any such congressional action unconstitutionally impinges on the notion of state sovereignty, which is protected by the Tenth Amendment.[33]

The *Lopez* and *Printz* decisions represent the Supreme Court's current interpretation of Congress' power to act under the Commerce Clause as well as the Court's emphasis on the importance of federalism.[34] More importantly, the Court's interpretations of the Commerce Clause and the Tenth Amendment are useful in understanding whether the Lautenberg Amendment represents a valid exercise of congressional power. Such a determination is important, as the Amendment has been criticized as illegitimately attempting to regulate a noncommercial activity and as impermissibly requiring state law enforcement authorities to enforce a federal regulatory scheme.[35]

This Comment addresses the arguments questioning the constitutionality of the Lautenberg Amendment. In particular, this Comment exam-

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31. 117 S. Ct. 2365 (1997).

32. *See Printz*, 117 S. Ct. at 2384 (holding that the Brady Handgun Violence Prevention Act is unconstitutional because it commandeered the states to execute a federal regulatory scheme).

33. *See id.* (prohibiting Congress from compelling states to enact or enforce federal regulations); *see also* U.S. CONST. amend. X (leaving all powers of government not designated to Congress to the states).

34. *See* Lynn A. Baker, *The Revival of States' Rights: A Progress Report and Proposal*, 22 HARV. J.L. & PUB. POL'Y 95, 95 (1998) (stating that the Court's decisions in *Lopez* and *Printz* signal a willingness to enforce constitutional protections for state autonomy); William Funk, *The* Lopez *Report*, 23 ADMIN. & REG. L. NEWS 1, 15 (1998) (acknowledging that a combined reading of *Lopez* and *Printz* reflect a heightened sense of concern over federal power, which has the potential to greatly affect federal regulatory activity); Robert Laurence & Robert A. Leflar, *Lawyers, Guns and Money: Some Practical Advice About Taking Security Interests in Firearms*, 1998 ARK. L. NOTES 55, 56 (asserting that *Lopez* and *Printz* represent the Supreme Court's manipulation of modern federalism).

35. *See, e.g.*, Editorial, *Congress' Mock War on Crime*, CHI. TRIB., Feb. 20, 1999, at 22 (asserting that domestic violence is not an area to be regulated by Congress), *available in* 1999 WL 2845489; Benjamin Wittes, *When Chopping Someone Up with an Ax Isn't Murder,* WASH. POST, Mar. 22, 1999, at A19 (proposing that domestic violence is not an interstate activity by its nature), *available in* 1999 WL 2206740. *But see* Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811, 821 (S.D. Ind. 1998) (holding that Section 922 (g)(9) of the Lautenberg Amendment regulates private individuals, not states, and does not contain a federal mandate for states to enforce the regulation). One commentator has stated that permitting Congress to regulate domestic violence would be equivalent to admitting that there is no distinction between activities that state and federal governments may regulate. *See* Jennifer C. Philpot, Note, *Violence Against Women and the Commerce Clause: Can This Marriage Survive?*, 85 KY. L.J. 767, 801 (1997) (citing United States v. Lopez, 514 U.S. 549, 568 (1995)).

ines the Lautenberg Amendment in light of Supreme Court jurisprudence and argues that the Amendment is not only a constitutional exercise of Congress' Commerce Clause power, but that the Amendment is also not violative of the principle of state sovereignty. Additionally, this Comment proposes the enactment of additional legislation to strengthen the Amendment against constitutional attack. Part II, therefore, discusses the historical background of the Supreme Court's Commerce Clause jurisprudence and what currently constitutes a valid regulation of commerce. Part III explores modern Commerce Clause cases that have dealt with the issue of domestic violence. Part IV then examines the Gun Control Act of 1968 and the underlying policies of the Lautenberg Amendment. Part V next analyzes the constitutionality of the Lautenberg Amendment under the principles established by the Supreme Court in *Lopez* and *Printz*. Finally, Part VI offers two proposals to ensure the Amendment's continued ability to prevent the tragic and fatal consequences that frequently arise with gun-related domestic violence.

II. EVOLUTION OF COMMERCE CLAUSE JURISPRUDENCE

The Commerce Clause, contained in Article 1, Section 8, Clause 3 of the United States Constitution, permits Congress to regulate foreign commerce, interstate commerce, and commerce with Indian tribes.[36] From its inception, the Commerce Clause has been the subject of controversy.[37] This controversy stems from the fundamental problem of defining the phrase "commerce among the several states" and properly dividing federal and state authority to regulate activities that bear a rela-

36. *See* U.S. CONST. art. I, § 8, cl. 3 (stating that Congress shall have the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

37. *See, e.g.*, Lord v. Steamship Co., 102 U.S. 541, 544 (1880) (interpreting congressional Commerce Clause power as outside of the "purely internal commerce of the States"); Woodruff v. Parham, 75 U.S. (8 Wall.) 123, 140 (1868) (clarifying Congress' Commerce Clause authority over states to intervene in state matters that interfere with or are oppressive to interstate commerce); Smith v. Turner, 48 U.S. (7 How.) 283, 415 (1849) (arguing that Congress' power to regulate commerce does not include the power to regulate the internal trade of states); *see also* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS & CONSTRAINTS 360 (3d ed. 1998) (noting that disputes regarding the interpretation of the Commerce Clause arose very soon after the Constitution's adoption); Larry E. Gee, Comment, *Federalism Revisited: The Supreme Court Resurrects the Notion of Enumerated Powers by Limiting Congress's Attempt to Federalize Crime*, 27 ST. MARY'S L.J. 151, 157 (1995) (indicating that the controversy surrounding the balance of "state and federal powers surfaced early in the history of the United States").

tionship to commerce.[38] During the latter part of this century, the decisions of the Supreme Court of the United States, which have determined the confines of federal commerce power, have generally expanded Congress' ability to regulate apparently local activities.[39] Despite this expansion, the Court has struggled to define limitations on the federal government's ability to regulate commerce without upsetting the division of state and federal power.[40]

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38. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 298 (1936) (referring to the definition of commerce in the United States Constitution as "intercourse for the purpose of trade," including the transportation, purchase, sale, or exchange of a commodity between citizens of different states); Veazie v. Moor, 55 U.S. (14 How.) 568, 573 (1852) (interpreting commerce to embrace the means and vehicles that cause traffic among the states and signifying transactions that are extraterritorial); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824) (defining the term, "commerce" to mean the power to regulate); *see also* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS & CONSTRAINTS 360 (3d ed. 1998) (suggesting that Commerce Clause history is replete with conflicts over definitions).

39. *See* United States v. Lopez, 514 U.S. 549, 556 (1995) (indicating that cases expanding the authority of congressional commerce power recognized great changes in local businesses that later became national in scope); New York v. United States, 505 U.S. 144, 158 (1992) (emphasizing that the range and quantity of accepted objects of government regulation have expanded over the last 200 years along with Congress' regulatory authority); *see also* Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 685-86 (1995) (arguing that prior to *United States v. Lopez*, scholars and judges speculated that Congress' ability to regulate was unlimited under the Commerce Clause); Larry E. Gee, Comment, *Federalism Revisited: The Supreme Court Resurrects the Notion of Enumerated Powers by Limiting Congress's Attempt to Federalize Crime*, 27 ST. MARY'S L.J. 151, 167 (1995) (stressing that the Court has "allowed Congress to regulate all aspects of American economic life, regardless of whether the regulated activity falls within the traditional province of the states").

40. The foundation of Commerce Clause jurisprudence was initially defined by the Court's interpretation of "commerce." *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824) (defining commerce as the power to regulate). During the New Deal Era, the Court gave great deference to Congress to regulate activities under the Commerce Clause. *See* Charles B. Schweitzer, *Street Crime, Interstate Commerce, and the Federal Docket: The Impact of* United States v. Lopez, 34 DUQ. L. REV. 71, 77 (1995) (explaining that Congress received deference from the Court in regulating activities under the Commerce Clause during the New Deal). The post-New Deal era was exemplified by deference to Congress in its commercial regulations. *See* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1271 (1986) (emphasizing that, although the post-New Deal era was marked by deference, it should not be confused with disregard). Finally, the modern limitations on Congress' Commerce Clause authority were earmarked in *United States v. Lopez* as ending Congress' pattern of unrestricted regulation of activities. *See Lopez*, 514 U.S. at 558-59 (requiring that Congress regulate activities that fit within one of three permissible categories of regulation).

A. *The Foundation of the Court's Commerce Clause Jurisprudence*

Congress' power to enact legislation that regulates commercial activities—as well activities related to commerce—originates in Article I of the United States Constitution, which authorizes Congress, in part, "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[41] In defining the exact scope of this grant of authority, the Supreme Court focused initially on the interpretation of the term "commerce."[42] In *Gibbons v. Ogden*,[43] Chief Justice Marshall laid the foundation for future Commerce Clause jurisprudence with a broad interpretation of that term.[44]

The conflict in *Gibbons* involved a clash between state and federal laws governing the right to use the navigable waters between New York and New Jersey.[45] One party, Gibbons, held a federal license to operate his steamboat on the Hudson River, running between locations in New York and New Jersey, while at the same time, another party, Ogden, held exclusive state-granted rights to operate steamboats in the New York waters.[46] In deciding the case, Chief Justice Marshall scrutinized the Commerce Clause and interpreted the term "commerce" to encompass all forms of commercial intercourse including that which reached into the

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41. U.S. CONST. art. I, § 8, cl. 3; *see, e.g.*, Wickard v. Filburn, 317 U.S. 111, 118 (1942) (regulating production of wheat for personal consumption under the Commerce Clause); *Gibbons*, 22 U.S. at 193-94 (explaining that the Commerce Clause is universally interpreted to pertain to all aspects of commercial interaction among the United States and other nations).

42. *Cf.* Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 290 (1922) (stating that commerce "comprehends all commercial intercourse between different states and all the component parts of that intercourse"); Railroad Co. v. Fuller, 84 U.S. (17 Wall.) 560, 568 (1873) (defining commerce as more than mere traffic but all the means necessarily employed in facilitating it); *Gibbons*, 22 U.S. at 196 (defining commerce as the power to regulate).

43. 22 U.S. (9 Wheat.) 1 (1824).

44. According to the Supreme Court in *Gibbons v. Ogden*, "Commerce undoubtedly is traffic, but it is something more: it is intercourse . . . [i]t describes commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *Gibbons*, 22 U.S. at 189-90; *see* Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 170 (1996) (noting that the effect of *Gibbons* was the creation of a broad scope of federal commerce power).

45. *See Gibbons*, 22 U.S. at 1-2 (describing the nature of the conflict).

46. *See id.* (noting that the original assignment of rights to the navigable waters between New York and New Jersey were granted to Robert Livingston and Robert Fulton by the state of New York).

interior of a state.[47] Under such an interpretation, Marshall concluded that Congress could regulate the navigation of waters into New York.[48] Marshall further held that the federal licensing law was a constitutional exercise of Congress' Commerce Clause authority, and that the state monopoly, which conflicted with the federal law, was in violation of the Supremacy Clause.[49]

In *Cooley v. Board of Wardens*,[50] the Supreme Court again faced a collision between state and federal regulations, this time regarding the regulation of pilots on the Delaware River.[51] In this instance, both state and federal regulations governed aspects of the coasting trade, but they were not in direct conflict.[52] As such, the Court concluded that the state regulation was valid and not an interference with any act by Congress.[53] Although *Cooley* appeared to be a victory for the states, the decision actually created the problematic determination of whether an activity was national or local in nature.[54]

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47. *See id.* at 193-94 (explaining that the Commerce Clause is universally interpreted to pertain to all species of commercial interaction among the United States and other nations, and as such, it does not end at the boundary of each state).

48. *See id.* at 190 (stating that "America understands . . . the word 'commerce' to comprehend navigation").

49. *See id.* at 196 (concluding that commerce power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than those prescribed in the constitution"). The *Gibbons* decision also revealed the Court's view that federal commerce power should be unrestricted by the judiciary. *See id.* (discussing the fact that federal commerce power is generally viewed as unrestricted by the judicial branch). Further, under the Supremacy Clause of the United States Constitution, the Commerce Clause binds all state judges to follow its mandate. *See* U.S. CONST. art. VI, § 2 (setting out that all federal laws drafted pursuant to constitutional authority are "the supreme Law of the Land").

50. 53 U.S. (12 How.) 299 (1851).

51. *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 300 (1851) (inquiring into whether Congress or the states may regulate an activity that is national or local in scope).

52. *See id.* at 313-14 (concluding that the Pennsylvania law and the federal law regulating varying aspects of the coasting trade were not in direct conflict). The Pennsylvania act limited vessels to seventy-five tons and required a fee for entering the Delaware River. *See id.* at 304. In contrast, the act of Congress, dated February 18, 1793, required tax collectors to grant a license for participation in the coasting trade. *See id.*

53. *See id.* at 321.

54. *See id.* (holding that the activity was local and validly promulgated under state law, which was not in conflict with existing federal law). In that regard, the Court concluded that both the states and Congress possess the authority to regulate certain commercial activities. *See id.* at 302, 320 (proclaiming that, despite Congress' grant of the power to regulate commerce, states are neither deprived of the power to regulate pilots nor is federal commerce power so exclusive so as to prevent states from regulating in the absences of federal legislation). Moreover, states are free to regulate a local activity in the absence of federal regulation. *See id.* at 320 (stating that "the mere grant to Congress of the power to regulate commerce, did not deprive the States of power to regulate pilots, and that

Ultimately, *Gibbons* represents a broad interpretation of the power that Congress has over commerce,[55] whereas *Cooley* exhibits the Court's sensitivity to the necessity of allowing state regulation of commerce with interstate effects.[56] Nonetheless, *Gibbons* and *Cooley* illustrate that in determining whether a valid exercise of federal commerce power exists, the reviewing court must examine the regulated activity contained in the federal legislation.[57] Although these cases required consideration of whether the activity was local or national in scope,[58] the Court actually exercised great deference in how Congress regulated activities affecting commerce.[59] This deference subsequently permitted Congress to attempt further expansion of its Commerce Clause power during the New Deal era.[60]

B. *The New Deal Era: A Narrow View of Commerce*

In 1932, President Franklin D. Roosevelt proposed far-reaching New Deal programs to combat the economic hardships created by the Great

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although Congress had legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but leave its regulation to the several States").

55. *See* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 331 (1997) (explaining the significance of *Gibbons* and *Cooley* in establishing a broad Commerce Clause power).

56. *See Cooley*, 53 U.S. at 320 (explaining that Congress' Commerce Clause power does not deprive the states of the ability to regulate in the absence of federal legislation).

57. *See id.* at 319 (suggesting that the proper exercise of congressional commerce power can be ascertained by looking to the nature or scope of the subject matter being regulated); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 198-99 (1824) (looking at the nature of the activity regulated by federal and state legislation to determine whether the federal regulation is a proper exercise of federal commerce power).

58. *See Cooley*, 53 U.S. at 319 (determining a valid exercise of federal commerce authority by considering whether the regulated subject is one that is national and must be legislated by Congress exclusively to render uniformity, or local in nature); *Gibbons*, 22 U.S. at 189, 193-94 (applying the Commerce Clause to the area of navigation involving more than one state because such an activity does not end at an individual state's boundaries).

59. *See Gibbons*, 22 U.S. at 198-99 (looking at the nature of the activity regulated by federal and state legislation broadly to determine whether the federal regulation is a proper exercise of federal commerce power).

60. *See* WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 184 (10th ed. 1997) (noting that the quantity of federal commerce regulation increased sharply during the New Deal era and has continued to increase at high levels); Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 167 (1996) (recognizing the expansion of federal commerce power during the New Deal as a prime example of unfounded constitutional faith). *But cf.* Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 690 (1995) (conceding that Congress' expansion of federal commerce power has been great, but not unlimited).

Depression.[61] To fulfill his plan, Congress used its Commerce Clause power to regulate a broad range of activities, including transportation systems and industrial production.[62] In response, businesses challenged these regulations as unconstitutional, asserting that Congress lacked any legitimate authority to implement such commercial regulations.[63] Despite the Supreme Court's early expansive interpretation of the commerce power, the Court held in *Carter v. Carter Coal Co.*[64] that Congress must demonstrate that the regulated activity had a "direct" effect on interstate commerce.[65]

The *Carter* case involved the Bituminous Coal Conservation Act, which Congress enacted in 1935 in order to stabilize the coal mining industry and promote interstate commerce through the regulation of the hours and wages of coal workers.[66] The shareholders of the Carter Coal Company brought suit, requesting an injunction against the enforcement of the Act.[67] In reaching a decision, the Court examined the nexus between the local activity being regulated—the working conditions of intrastate[68]

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61. *See* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 373-74 (3d ed. 1998) (explaining that federal legislation was implemented as part of the New Deal in an attempt to boost the economy); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 658-59 (2d ed. 1985) (explaining the importance of the New Deal legislation); Larry E. Gee, Comment, *Federalism Revisited: The Supreme Court Resurrects the Notion of Enumerated Powers by Limiting Congress's Attempt to Federalize Crime*, 27 ST. MARY'S L.J. 151, 164-65 (1995) (stating that President Franklin D. Roosevelt proposed legislative reforms, referred to as the "New Deal," to alleviate the effects of the Great Depression).

62. *See* WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 184-85 (10th ed. 1997) (claiming that during the New Deal, Congress regulated transportation systems and industrial production through various programs); Stephen M. McJohn, *The Impact of* United States v. Lopez*: The New Hybrid Commerce Clause*, 34 DUQ. L. REV. 1, 6-7 (1995) (stating that the Court upheld federal statutes that prohibited the interstate transportation of stolen cars, lottery tickets, and impure food).

63. *See* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 375 (3d ed. 1998) (discussing the challenges by businesses to the constitutionality of the legislative programs of the New Deal).

64. 298 U.S. 238 (1936).

65. *See* Carter v. Carter Coal Co., 298 U.S. 238, 307 (1936) (recognizing that the direct effects of an intrastate activity upon interstate commerce are essential to maintaining our constitutional system). The Court defined a direct effect on interstate commerce in *Carter* as an activity that operates proximately to produce a result on interstate commerce. *See id.*

66. *See id.* at 278 (listing the purposes of the Bituminous Coal Conservation Act).

67. *See id.*

68. The term "intrastate" relates to matters or activities that are local to a state, such as the working conditions of employees. *See id.* at 308 (delineating the distinction between local activities and interstate commerce). For instance, an employee of a mining company is not engaged in commerce, per se, but merely the production of a commodity. *See id.*

mining companies—and interstate commerce.[69] The Court distinguished "commerce" from "production," explaining that Congress must show a *direct* relation between the production of coal by workers and interstate commerce.[70] The Court then described the effects of the employer-employee relationship on interstate commerce as secondary and indirect.[71] Therefore, because the regulated activity in *Carter* did not have a direct effect upon interstate commerce, the Court struck down the Act as invasive of the "local" realm of employer-employee relations and outside the scope of Congress' Commerce Clause authority.[72]

Although Congress had exercised its Commerce Clause power during the New Deal era to combat the drastic results of the Great Depression, *Carter* reveals a narrowing of this power. Although a federal regulation of an intrastate activity was required to affect interstate commerce directly, the Congressional power under the Commerce Clause was not limitless.[73] As such, the New Deal era is noteworthy for emphasizing a "direct" versus "indirect" constitutional distinction in regard to federally regulated activities.[74] However, this narrow interpretation of the Commerce Clause did not endure for long.[75]

(distinguishing interstate commerce from the production of coal and discussing how Congress must link the two together).

69. *See id.* at 308-09 (clarifying that federal commerce power is invalid unless a direct nexus exists with interstate commerce, which can be demonstrated by showing that the local activity reaches into interstate commerce). The Court recognized that Congress did not have the authority to regulate intrastate mining, and it therefore struck down the Bituminous Coal Conservation Act. *See id.* (concluding that the effects of intrastate labor conditions in the coal mining industry are indirect and secondary, thus, out of the scope of Congress' power to regulate under the Commerce Clause).

70. *See id.* (describing interstate commerce and the production of coal in order to explain how Congress must show a relation between the two).

71. *See id.* (providing the Court's viewpoint regarding the distinction between an employer-employee relationship and interstate commerce). The Court explained that the increase in the degree of an effect increases its importance. *See id.* (implying that local work does not increase the degree of the effect of commerce so as to rise to a direct effect).

72. *See id.* (concluding that the hours and wages of employees are not related directly to interstate commerce and that the federal commerce power does not include the authority to regulate production of a commodity that is local in nature). According to the Court, "Working conditions are obviously local conditions . . . [and] employees are not engaged in or about commerce, but exclusively in producing a commodity." *Id.* at 308.

73. *See id.* (alleging that if the Court allowed Congress to regulate activities with only an indirect effect on interstate commerce, then Congress could regulate any activity).

74. *See* WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 188 (10th ed. 1997) (noting that "[i]n addressing New Deal legislation the Court resuscitated the abandoned abstract distinction between direct and indirect effects on interstate commerce").

75. *See* Wickard v. Filburn, 317 U.S. 111, 124-25 (1942) (declaring that Congress may regulate an activity regardless of whether it has direct or indirect effects on interstate com-

C. *The Post-New Deal Era and the Winds of Change*

The period following the New Deal marked a change in the "relationship between the government and the economy."[76] Because of this change, as well as the impact of the Great Depression and President Roosevelt's "court-packing plan,"[77] the Court returned to a broader interpretation of commerce, allowing Congress to regulate areas outside the typical commercial sphere.[78] Thus, in the years following the New Deal, the Court rejected its prior differentiation between "direct" and "indirect" effects on interstate commerce.[79] The Court instead adopted an approach that focused on whether the regulated activity had a practical economic effect on interstate commerce.[80]

For example, in *NLRB v. Jones & Laughlin Steel Corp.*,[81] the Court upheld the constitutionality of the National Labor Relations Act, which

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merce); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41 (1937) (emphasizing that the effects of a regulated activity must be viewed on a cumulative basis and not in an "intellectual vacuum").

76. LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 388 (3d ed. 1998). The decisions in *NLRB v. Jones & Laughlin Steel Corp.* and *Wickard v. Filburn* demonstrate a new era of interpretation by the Court. *See* United States v. Lopez, 514 U.S. 549, 556 (1995) (recognizing that the holdings of *NLRB v. Jones & Laughlin Steel Corp.* and *Wickard v. Filburn* greatly expanded the authority of Congress under the Commerce Clause).

77. *See* RICHARD B. MORRIS, ENCYCLOPEDIA OF AMERICAN HISTORY 356 (1961) (reporting that the Court's continued invalidation of social and economic legislation led to Roosevelt's "court-packing plan"). On February 5, 1937, Roosevelt submitted a plan to reorganize the federal judiciary. *See id.* The proposal included: (1) increasing the number of judges on the Court from nine to fifteen if judges declined to retire upon reaching age seventy; (2) adding a total of no more than fifty judges to all levels of federal courts; (3) sending appeals of constitutional issues from lower courts directly to the Supreme Court; (4) implementing a requirement that government attorneys be allowed to argue the case prior to a lower court issuing any injunction against an act of Congress if a question of constitutionality was involved; and (5) assigning district judges to more congested areas to expedite court business. *See id.* The plan sparked bitter controversy and debate and drew criticism that Roosevelt was attempting to corrupt the Constitution and "pack" the Supreme Court. *See id.*

78. *See* Carlo D'Angelo, Note & Comment, *The Impact of* United States v. Lopez *upon Selected Firearms Provisions of Title 18 U.S.C. § 922*, 8 ST. THOMAS L. REV. 571, 574 (1996) (expressing that commerce was interpreted broadly following the Depression, which allowed Congress to regulate civil rights and criminal legislation).

79. *See Jones*, 301 U.S. at 41 (viewing the effects of a regulated activity on a cumulative basis); LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 400 (3d ed. 1998) (noting the Court's rejection of the direct or indirect effects argument on interstate commerce).

80. *See* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 400 (3d ed. 1998) (drawing attention to the change in the Court's perception of local activities).

81. 301 U.S. 1 (1937).

was designed to protect the rights of workers through collective bargaining.[82] In *Jones*, the question before the Court was whether labor-management relations affected interstate commerce.[83] In upholding the federal regulation, the Court reasoned that measuring an intrastate activity's impact on interstate commerce cannot be done in an "intellectual vacuum."[84] Accordingly, the Court examined the activity's cumulative ef-

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82. *See Jones*, 301 U.S. at 22-23 (describing how the National Labor Relations Act pertained to the denial of the employees' right to organize and to employers who refused to accept the concept of collective bargaining, which resulted in injury to commerce). This Act created the National Labor Relations Board to resolve workers' complaints and impose corrective solutions for employer-employee problems. *See* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 388 (3d ed. 1998) (stating the purpose of the National Labor Relations Board under the National Labor Relations Act). *See generally* 29 U.S.C. § 153 (1994) (providing for the National Labor Relations Board and prescribing its various duties).

83. *See Jones*, 301 U.S. at 40 (posing the question to be decided as the effects of labor practices upon interstate commerce). In *Jones*, the NLRB charged the Jones & Laughlin Steel Corporation with unfair labor practices ascribable to discharging employees for their union membership and coercion by intimidating employees from obtaining union membership. *See id.* at 22 (describing the charge against the corporation as discrimination against union members in employment and intimidation of its own employees to join a union); *see also* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 392 (3d ed. 1998) (explaining the Board's charges against the Jones & Laughlin Steel Corporation in violation of the National Labor Relations Act). The corporation did not present evidence to refute accusations of discrimination and coercion. *See Jones*, 301 U.S. at 29 (noting that the respondent did not attempt to refute petitioner's offered evidence to disprove coercion). The NLRB subsequently ordered the corporation to cease and desist from such discrimination and coercion. *See id.* at 22. Contesting the NLRB order, Jones & Laughlin Steel argued:

> (1) that the Act is in reality a regulation of labor relations and not of interstate commerce;
> (2) that the Act can have no application to the respondent's relations with its production employees because they are not subject to regulation by the federal government; and
> (3) that the provisions of the Act violate § 2 of Article III and the Fifth and Seventh Amendments of the Constitution of the United States.

Id. at 25.

84. *See Jones*, 301 U.S. at 41-42 (reasoning "that interstate commerce itself is a practical conception . . . [and] that interferences with that commerce must be appraised by a judgment that does not ignore actual experience"). The Court found that the local steel company was a "self-contained, highly integrated body" transforming raw materials and distributing them through national channels to all parts of the country. *See id.* at 27 (discussing the operations and effects of the Jones & Laughlin Steel Corporation on interstate commerce).

fect on the national economy[85] and held that the local activity was within the reach of Congress' Commerce Clause power.[86]

The Court's broad interpretation of the Commerce Clause and the power to regulate local activities reached an extreme in *Wickard v. Filburn*,[87] where the Court determined that Congress could constitutionally regulate farmers' wheat production for their home consumption.[88] In *Wickard*, a dispute arose when Congress amended the Agricultural Adjustment Act of 1938 to impose penalties for farmers who produced crops in excess of established quotas.[89] The Act had been designed to aid in the stabilization of the national price of wheat by limiting the volume grown.[90] Although the statute was intended to regulate the commercial production of wheat, Congress also included a provision governing the farmers' *personal* consumption of wheat.[91] Filburn, a farmer in Ohio, challenged the Act, contending that it exceeded Congress' Commerce Clause authority because the wheat grown for his personal use did not have a sufficient effect on commerce.[92]

In addressing Filburn's arguments, the Court noted that Congress could not control wheat production unless it did so without regard to the avowed use of the wheat.[93] In addition, the Court held that whether a

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85. *See id.* (reiterating that the local activity's overall effect on the national economy must be analyzed because of the activity's close relationship to interstate commerce).

86. *See id.* at 49 (permitting Congress to regulate intrastate activities); *see also* Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 172 (1996) (explaining that the *Lopez* Court interpreted *Jones & Laughlin* as eradicating the distinction between the direct and indirect effects upon commerce and effectively giving Congress the discretion to determine whether local labor markets needed federal regulation).

87. 317 U.S. 111 (1942). In *United States v. Lopez*, the court noted that "*Wickard* is perhaps the most far reaching example of Commerce Clause authority over intrastate activity." United States v. Lopez, 514 U.S. 549, 560 (1995); *see* WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 191 (10th ed. 1997) (noting that *Wickard* confirmed a sweeping deferential approach to federal commerce power).

88. *See* Wickard v. Filburn, 317 U.S. 111, 113-14, 118 (1942) (considering whether Congress exceeded its commerce authority in federally regulating the production of wheat for personal use).

89. *See id.* at 113-15, 128 (describing the goal and the implications of the amendment to the Agricultural Adjustment Act of 1938).

90. *See id.* at 128-29 (emphasizing that without the Act, the market would be economically hindered).

91. *See id.* at 118-19 (explaining that wheat quotas set in the Agricultural Adjustment Act of 1938 included wheat used for personal consumption and for feeding livestock).

92. *See id.* at 113-14 (indicating that the plaintiff sought to avoid the consequences of the Act by declaring it unconstitutional).

93. *See id.* at 119 (explaining that Congress set a quota under the Agricultural Adjustment Act, which includes "all that the farmer may harvest for sale or for his own farm

local activity "substantially affects" commerce should be determined in accordance with the activity's aggregate effect with respect to all farmers growing wheat for home consumption.[94] Applying this reasoning to the case at hand, the Court determined that the Act was constitutionally permissible.[95] Perhaps more significantly, the Court also espoused the view that "[t]he power of Congress over interstate commerce is plenary."[96]

Ultimately, the post-New Deal era was marked by the Court's refusal to insist on a direct connection between intrastate activity and interstate commerce.[97] Due to the Court's decisions in *Jones* and *Wickard*, the validity of a federally regulated local activity was no longer dependent upon its direct or indirect effects on interstate commerce.[98] Instead, demonstrating *any* effect on interstate commerce seemed sufficient to bring a local activity legitimately within the scope of Congress' Commerce Clause power.[99]

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needs," and any amount exceeding that quota is subject to penalty regardless of whether the amount was completely for personal consumption).

94. *See id.* at 125 (asserting that even if an intrastate activity is "non-commercial," Congress may regulate that activity under its commerce power if, in the aggregate, the activity "exerts a substantial economic effect on interstate commerce").

95. *See id.* at 129.

96. *Id.* at 124. This power includes the ability to regulate intrastate activities substantially affecting interstate commerce irrespective of whether the effect is considered direct or indirect. *See id.* at 124-25 (stating that a direct or indirect effect of an activity on commerce has no bearing on whether it may be reached by Congress); *see also* United States v. Lopez, 514 U.S. 549, 556 (1995) (noting that *Wickard* "rejected earlier distinctions between direct and indirect effects on interstate commerce").

97. *See* Carlo D'Angelo, Note & Comment, *The Impact of* United States v. Lopez *upon Selected Firearms Provisions of Title 18 U.S.C. § 922*, 8 ST. THOMAS L. REV. 571, 574 (1996) (noting that following the Great Depression, Congress attempted to regulate local areas of economic and state concern). *Compare Wickard*, 317 U.S. at 124-25 (permitting Congress to exercise its Commerce Clause power regardless of whether the activity regulated by Congress has a direct or indirect effect on commerce), *with* Carter v. Carter Coal Co., 298 U.S. 238, 307 (1936) (restricting Congress from regulating intrastate activities under its commerce power unless the regulated activity directly affected interstate commerce).

98. *See Wickard*, 317 U.S. at 125 (permitting Congress to regulate intrastate activities if, in the aggregate, the activity has a substantial economic impact on interstate commerce irrespective of any earlier direct versus indirect distinction by the Court).

99. *See, e.g.*, Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186, 195 (1974) (stating that the Court has previously held that, regardless of the locality of a regulated object, if it adversely affects interstate commerce, then it may be regulated by Congress); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 231 (1948) (indicating that determining where interstate commerce begins and ends was no longer necessary for the Court, but that determining the effects of a regulated activity on interstate commerce was essential); United States v. Rybar, 103 F.3d 273, 283 (3d Cir. 1996) (recognizing that the Court has sustained Congress' authority to regulate intrastate activity if the cumulative effect of similar events ultimately has a substantial effect on interstate commerce). *But see*

D. *Modern Limitations on Congress' Commerce Clause Power*

Recently, the Supreme Court has taken a narrow stance regarding its Commerce Clause jurisprudence, signaling a return to a stronger view of federalism.[100] *United States v. Lopez*[101] and *Printz v. United States*,[102] decided in 1995 and 1997 respectively, outline the criteria required to establish a valid exercise of Commerce Clause power. Notably, these cases illustrate that the modern Court has retreated from its previous deference to Congress.[103] In particular, the Court's modern approach to the Commerce Clause, unlike that espoused during the post-New Deal era, partially revives the requirement that Congress demonstrate a clear nexus between the regulated intrastate activity and interstate commerce.[104]

Maryland v. Wirtz, 392 U.S. 183, 196 (1968) (recognizing that while the power to regulate commerce is broad, it has limitations enforceable by the Court); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (asserting that the evaluation of Congress' commerce power must consider our system of dual federalism so that the distinctions of national and local activities are not erased, thereby creating a completely centralized government).

100. *See* Kevin Todd Butler, Printz v. United States*: Tenth Amendment Limitations on Federal Access to the Mechanisms of State Government*, 49 MERCER L. REV. 595, 602 (1998) (presenting the argument that *Printz* represents a shift in the Supreme Court's interpretation of federalism). The Court's interpretation of federalism shifted gradually over a thirty-year period, beginning with centralized power during the New Deal, then to recognizing principles of state sovereignty under the Tenth Amendment, and ending with the current concept of federalism established in *Printz*, which is adverse to centralized power. *See id.* at 602 (detailing the evolution of the Court's interpretation of federalism).

101. 514 U.S. 549 (1995).

102. 117 S. Ct. 2365 (1997).

103. *See* Nina Smith, Comment, *Constitutional Law: The Reach of the Commerce Power over Non-commercial Acts*, 8 U. FLA. J.L. & PUB. POL'Y 139, 143 (1996) (arguing that *Lopez* serves as a limitation on acts that were previously within the reach of federal commerce power as substantially affecting commerce). The *Lopez* decision signals a change in Commerce Clause jurisprudence. *See* Jennifer C. Philpot, Note, *Violence Against Women and the Commerce Clause: Can This Marriage Survive?*, 85 KY. L.J. 767, 769 (1997) (recognizing that *Lopez* signifies a change in the Court's interpretation of congressional commerce power). *Lopez* was the first case since 1936 to nullify a federal law under the Commerce Clause and limit congressional authority. *See* Charles B. Schweitzer, Comment, *Street Crime, Interstate Commerce, and the Federal Docket: The Impact of* United States v. Lopez, 34 DUQ. L. REV. 71, 71 (1995) (noting that *Lopez* was the first case to invalidate Commerce Clause legislation since 1936).

104. *See* Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 695 (1995) (speculating that the distinction in commercial versus noncommercial activities will be important in Commerce Clause challenges under *Lopez*); Nina Smith, Comment, *Constitutional Law: The Reach of the Commerce Power over Non-commercial Acts*, 8 U. FLA. J.L. & PUB. POL'Y 139, 146 (1996) (alleging that the substantial relation category in *Lopez* restored the direct and indirect distinction of a regulated activity). *Compare* United States v. Lopez, 514 U.S. 549, 558-59 (1995) (requiring Congress to draft federal Commerce Clause legislation within three distinct categories that affect interstate commerce), *and* Carter v. Carter Coal Co., 298 U.S. 238, 307 (1936) (restricting Congress from regulating intrastate activities

1. *United States v. Lopez*

The Supreme Court's fairly consistent deference to Congress regarding its Commerce Clause power was upset in 1995 when the Court in *United States v. Lopez* struck down Congress' attempt to regulate guns in local schools.[105] In *Lopez*, the Court faced the issue of whether Congress had exceeded its authority in criminalizing the possession of a firearm in or near a school under the Gun-Free School Zones Act.[106] In its argument to the Court, the government asserted that the Act should be sustained as

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under its commerce power unless the regulated activity directly affected interstate commerce), *with* Wickard v. Filburn, 317 U.S. 111, 125 (1942) (allowing Congress to regulating intrastate activities if in the aggregate, that activity has a substantial impact on interstate commerce).

105. *See* Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 168 (1996) (asserting that *Lopez* signifies the departure from the "accepted doctrine of unyielding deference to Congress"); Thomas Lundmark, *Guns and Commerce in Dialectical Perspective*, 11 BYU J. PUB. L. 183, 198 (1997) (stating that until *Lopez*, the Commerce Clause did not restrict Congress' legislative prerogative because Commerce Clause legislation was held unconstitutional based on jurisprudence since the 1930s). In 1995, the Court in *Lopez* departed from the previous broad judicial interpretation of commerce, striking down the Gun-Free School Zones Act. *See* 18 U.S.C. § 922(q)(2)(a) (Supp. III 1997) (making unlawful "for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone"); *Lopez*, 514 U.S. at 567 (declining to expand the language of prior Commerce Clause opinions or expand congressional commerce power in order uphold the Gun-Free School Zones Act). Breyer's dissent in *Lopez* criticized the majority's departure from the traditional rational basis standard of review. *See id.* at 628 (Breyer, J., dissenting) (stating that the majority's test is inconsistent and recharacterizes Commerce Clause case law previously decided by the substantial effect that the activity had on interstate commerce, not its commerciality). Traditionally, the standard of review for federal legislation required that the regulation have a rational basis or purpose and that the means to achieve that purpose were reasonably adapted to reach that end under the Constitution. *See id.* at 603 (Souter, J., dissenting) (noting the traditional standard of review for federal legislation). Justice Souter in his dissent claimed that the majority grants deference to a regulation based on the commercial or noncommercial nature of the regulated activity. *See id.* at 603 (Souter, J., dissenting) (detailing how the majority's opinion modifies the traditional rational basis standard in *Lopez*).

106. *See Lopez*, 514 U.S. at 552 (examining whether Congress overstepped its commerce power by enacting the Gun-Free School Zones Act). In 1992, Alfonso Lopez, Jr. went to high school armed with a .38 caliber handgun and ammunition. *See id.* at 551. An anonymous tip prompted school authorities to confront Lopez, who admitted to the possession of the firearm. *See id.* Lopez was arrested by state agents under Texas law; the following day, state charges were dismissed and federal agents charged Lopez in violation of the federal Gun-Free School Zones Act. *See id.* Lopez was convicted in federal district court, and subsequently, he appealed. *See id.* at 552. On appeal, Lopez argued that Congress' legislation of public schools exceeded commerce power. *See id.* at 552. The United States Court of Appeals for the Fifth Circuit reversed the judgment of the trial court, declaring that the Act was an unconstitutional exercise of commerce power. *See id.* The

constitutional because gun-related violence in schools had an effect, albeit indirectly, on interstate commerce.[107] The Court, however, found this argument unpersuasive, responding that the connection between guns in schools and interstate commerce was attenuated at best, particularly in light of the noncommercial nature of the local activity.[108] In addition, the Court noted that the regulation of both education and crime has traditionally been reserved for the individual states.[109] In accordance with this line of reasoning, the Court held that Congress exceeded the limits of the Commerce Clause by enacting the Gun-Free School Zones Act.[110]

Undeniably, the *Lopez* decision reversed the Court's trend of "rubber-stamping" issues regarding Congress' Commerce Clause authority over local activities.[111] However, the precise effect of *Lopez* has proved difficult to determine, as evidenced by the divisiveness among critics and scholars.[112] Some commentators have interpreted *Lopez* as suggesting a

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Supreme Court then granted certiorari. *See* United States v. Lopez, 511 U.S. 1029, 1029 (1994).

107. *See Lopez*, 514 U.S. at 554-55 (discussing the government's argument that any effect on interstate commerce, whether direct or indirect, justifies regulation by Congress under the Commerce Clause).

108. *See id.* at 564-65 (rejecting the assertion that the indirect effects of guns on education justify federal regulation and allow Congress to regulate many other areas reserved to the States); *see also* Larry E. Gee, Comment, *Federalism Revisited: The Supreme Court Resurrects the Notion of Enumerated Powers by Limiting Congress's Attempt to Federalize Crime*, 27 ST. MARY'S L.J. 151, 182-83 (1995) (concluding that the possession of a gun near a school as substantially impacting interstate commerce is a weak link with which to invoke Congress' authority).

109. *See Lopez*, 514 U.S. at 564 (declining to accept the government's argument that education substantially affects interstate commerce on the grounds that criminal law and education have been historically regulated by the states).

110. *See id.* at 567 (declining to expand Congress' power to include the Gun-Free School Zones Act, regardless of the broad language of the Commerce Clause precedents).

111. *Compare* Larry E. Gee, Comment, *Federalism Revisited: The Supreme Court Resurrects the Notion of Enumerated Powers by Limiting Congress's Attempt to Federalize Crime*, 27 ST. MARY'S L.J. 151, 168 (1995) (explaining that "civil rights legislation enacted under the Commerce Clause" and the subsequent case law, such as *Katzenbach v. McClung* and *Heart of Atlanta Motel, Inc. v. United States*, illustrate the "Court's policy of rubber stamping congressional regulations when some remote connection to interstate commerce could be found"), *with* Jennifer C. Philpot, Note, *Violence Against Women and the Commerce Clause: Can This Marriage Survive?*, 85 KY. L.J. 767, 767-68 (1997) (stating that *Lopez* was the first case in over sixty years to hold that Congress overstepped its Commerce Clause authority and adopted a restrictive construction of federal commerce power).

112. *See, e.g.*, LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 408 (3d ed. 1998) (asserting that *Lopez* is interpreted as removing deference to federal commerce power); Carlo D'Angelo, Note & Comment, *The Impact of* United States v. Lopez *upon Selected*

strict interpretation of the Commerce Clause that preserves the role of the states in our federal system and reinforces the notion that the Constitution grants Congress limited powers.[113] Conversely, other commentators have interpreted *Lopez* as "simpl[y] [a] warning to Congress that it must justify its legislation by showing the relationship between the activities regulated and interstate commerce."[114] Despite the confusion regarding the decision's exact implications, *Lopez* signals that Congress cannot assume power over local activities that are noncommercial in nature unless the activity bears a relation to interstate commerce.[115]

Significantly, the *Lopez* decision also recognized three categories of activity that Congress may regulate permissibly under the Commerce Clause: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) activities with a substantial relation to interstate commerce.[116] Essentially, as long as the federally regulated activity

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Firearms Provisions of Title 18 U.S.C. § 922, 8 ST. THOMAS L. REV. 571, 572 (1996) (suggesting that the *Lopez* decision raises doubts as to the extent that the Commerce Clause authorizes Congress to regulate local criminal activities); Larry E. Gee, Comment, *Federalism Revisited: The Supreme Court Resurrects the Notion of Enumerated Powers by Limiting Congress's Attempt to Federalize Crime*, 27 ST. MARY'S L.J. 151, 191 (1995) (suggesting that the *Lopez* Court prevented Congress from enforcing a regulation based solely on social policy); Yvette J. Mabbun, Comment, *Title III of the Violence Against Women Act: The Answer to Domestic Violence or a Constitutional Time-Bomb?*, 29 ST. MARY'S L.J. 207, 238 (1997) (interpreting *Lopez* to conclude that federal regulations, which are noncommercial in nature, "lack a jurisdictional element, and fail to demonstrate a nexus with interstate commerce will likewise be found unconstitutional"); Jennifer C. Philpot, Note, *Violence Against Women and the Commerce Clause: Can This Marriage Survive?*, 85 KY. L.J. 767, 768 (1997) (explaining that legislative fact-finding is required by *Lopez* to uphold a federal regulation).

113. *See* Larry E. Gee, Comment, *Federalism Revisited: The Supreme Court Resurrects the Notion of Enumerated Powers by Limiting Congress's Attempt to Federalize Crime*, 27 ST. MARY'S L.J. 151, 157 (1995) (advocating that the Supreme Court take notice of the preservation of federalism in the interpretation of future Commerce Clause cases); Jennifer C. Philpot, Note, *Violence Against Women and the Commerce Clause: Can This Marriage Survive?*, 85 KY. L.J. 767, 768 (1997) (stating that *Lopez* narrowed the interpretation of commerce and implied that regulation of criminal law should be reserved to the states).

114. LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 406 (3d ed. 1998); *see* Jennifer C. Philpot, Note, *Violence Against Women and the Commerce Clause: Can This Marriage Survive?*, 85 KY. L.J. 767, 768 (1997) (explaining that legislative fact-finding is required under *Lopez* in order to uphold a federal regulation).

115. *See Lopez*, 514 U.S. at 567-68 (refusing to uphold the Gun-Free School Zones Act as a valid exercise of federal commerce power because education is a noncommercial area traditionally reserved to the states, not Congress).

116. *See id.* at 558-59 (concluding that Congress may legitimately regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and activities with a "substantial relation to interstate commerce"); United States v. Wilson, 159 F.3d

falls within one of these three categories, the regulation is considered a proper exercise of Congress' Commerce Clause authority.[117]

a. Channels of Interstate Commerce

In *Lopez*, the Court determined that Congress may regulate the channels of interstate commerce.[118] Channels of interstate commerce generally include tangible items that facilitate commerce, such as motels and highways.[119] Without these items, people would have difficulty traveling across state lines or contributing to interstate commerce.[120] Moreover, because Congress has the constitutional authority to maintain "open" channels of interstate commerce, activities that may interfere with the promotion of interstate travel logically fall within this category of regulation.[121]

In determining that channels of interstate commerce could be regulated by Congress, the *Lopez* Court relied upon its earlier decision in *Katzenbach v. McClung*.[122] In *Katzenbach*, the Court held the Civil Rights Act of 1964 to be constitutional as applied to the regulation of restaurants that served a substantial quantity of food that had "moved in commerce."[123] The Civil Rights Act mandated that public accommodations, which affect commerce, shall not discriminate against persons based

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280, 285 (7th Cir. 1998) (recognizing that the Supreme Court articulated three categories of activity that Congress may regulate in *Lopez*).

117. *See Lopez*, 514 U.S. at 558-59 (implying that legislation will not pass constitutional scrutiny unless the regulation fits into one of the permissible categories of activity that Congress may regulate under the Commerce Clause).

118. *See id.* at 558 (proclaiming that the first category of activity that Congress may permissibly regulate involves channels of interstate commerce).

119. *See id.* (presenting examples of the channels of interstate commerce that Congress may regulate); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253 (1964) (stating that racial discrimination by hotels and motels impedes interstate travel by discouraging individuals because they lack the assurance of a place to rest during their travels).

120. *Cf. Heart of Atlanta Motel*, 379 U.S. at 300 (stating that discrimination in restaurants affects interstate commerce and travel because people cannot travel without eating, and if individuals cannot eat, then they are less likely to travel).

121. *See id.* at 258 (stating that Congress was permitted to regulate motels as a channel of interstate commerce). The assumption that the transportation of passengers in interstate commerce falls within the scope of Congress' commerce power has been viewed as a settled and undisputed issue. *See id.* at 256 (commenting on the movement of persons in interstate commerce (citing Caminetti v. United States, 242 U.S. 470, 491 (1917))).

122. 379 U.S. 294 (1964).

123. *See Lopez*, 514 U.S. at 558 (stating that channels of interstate commerce are a permissible area for federal regulation); Katzenbach v. McClung, 379 U.S. 294, 297 (1964) (upholding the Civil Rights Act of 1964 as constitutional). In *Katzenbach*, the lower court held that because there was no "demonstrable connection" in the case, there was no indication that discrimination would affect commerce. *See id.* at 297 (presenting the district

on "race, color, religion, or national origin."[124] The *Katzenbach* Court upheld the Act on Commerce Clause grounds, reasoning that the refusal to serve individuals based on discriminatory beliefs "discourages travel and obstructs interstate commerce."[125] Comparatively, according to the Court in *Lopez*, the Gun-Free School Zones Act did not regulate a channel of interstate commerce nor did it prohibit transportation of guns in interstate commerce.[126]

b. Instrumentalities of Interstate Commerce

The Supreme Court also concluded in *Lopez* that Congress may "regulate and protect the instrumentalities of interstate commerce, or [the] persons or things in interstate commerce."[127] In other words, the Court interpreted Congress' Commerce Clause power as including the ability to regulate the means used to carry out interstate commerce.[128] Previously, the Court had held that Congress can constitutionally regulate the "movement of persons" because they contribute to interstate commerce when they travel across state lines.[129] However, in *Lopez*, the Court held that the Gun-Free School Zones Act was not an attempt by Congress to protect an instrumentality or thing in interstate commerce.[130] Notably, in addressing this category, the Court did not discuss its previous rulings recognizing that persons are instrumentalities of interstate commerce.[131]

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court's rejection in this case of the notion that restaurants serving a substantial quantity of food that has "moved in commerce" affects commerce).

124. *See Katzenbach*, 379 U.S. at 298 (discussing the Civil Rights Act of 1964). *See generally* Civil Rights Act of 1964, Pub. L. No. 105-220, 42 U.S.C. §§ 2000a1-6 (1994) (prohibiting discrimination in public accommodations on the basis of "race, color, religion, or national origin").

125. *Katzenbach*, 379 U.S. at 300. In *Katzenbach*, the Court concluded that the restaurant discriminated by selling less food and directly obstructing interstate travel. *See id.* (describing the effect of discrimination between persons and interstate commerce).

126. *See Lopez*, 514 U.S. at 559 (explaining that the Gun-Free School Zones Act does not involve a channel of interstate commerce).

127. *Id.* at 558.

128. *See id.* at 558-59 (explaining that regulating the instrumentalities of interstate commerce includes regulating "persons or things in interstate commerce even though the threat may come only from intrastate activities").

129. *See Katzenbach*, 379 U.S. at 297 (noting that the regulation of persons is a valid exercise of federal Commerce Clause authority).

130. *See Lopez*, 514 U.S. at 559 (striking down the Gun-Free School Zones Act because the Act did not apply to an instrumentality of interstate commerce).

131. *See id.* (disposing quickly of the second category, instrumentalities of commerce).

c. Activities with a Substantial Relationship to Interstate Commerce

The third category that the Court determined Congress could legitimately regulate included "those activities having a *substantial relation* to interstate commerce."[132] According to the Court in *Lopez*, whether an activity falls within this category depends upon "whether the regulated activity 'substantially affects' interstate commerce."[133] This third category of permissible regulation has created the most difficulty in interpreting the exact scope of Congress' Commerce Clause authority; moreover, the Court's construction of this category has created challenges in predicting the constitutionality of federally regulated activities.[134]

In determining whether an activity has a substantial relation to interstate commerce, the *Lopez* Court stated that a number of factors may be considered. First, a court may consider congressional findings to determine the actual legislative intent behind the regulation.[135] However, these legislative findings are not required to be considered as a conclusive determination that a sufficient relationship to commerce exists.[136]

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132. *Id.* at 558-59 (emphasis added).

133. *Id.* at 559. The "substantially affecting commerce" test is the key provision to determine whether Congress can regulate an activity under the Commerce Clause. *See id.* (proposing the test to measure the effect that an activity has on interstate commerce). Legislation regarding an economic activity that is determined to substantially affect interstate commerce will be upheld. *See id.* at 560 (describing the validity of legislation if the economic activity is deemed to substantially affect interstate commerce); Jennifer C. Philpot, Note, *Violence Against Women and the Commerce Clause: Can This Marriage Survive?*, 85 KY. L.J. 767, 800 (1997) (arguing that "[t]he pivotal element of the *Lopez* analysis is whether the activity regulated is commercial or economic in nature").

134. *See* Carlo D'Angelo, Note & Comment, *The Impact of* United States v. Lopez *upon Selected Firearms Provisions of Title 18 U.S.C. § 922*, 8 ST. THOMAS L. REV. 571, 576 (1996) (arguing that the *Lopez* Court made the third category of activity that Congress may regulate under its commerce power the broadest area of regulation); Stephen M. McJohn, *The Impact of* United States v. Lopez*: The New Hybrid Commerce Clause*, 34 DUQ. L. REV. 1, 11 (1995) (noting that the "activities affecting commerce" category provides a wide scope for federal regulation under the Commerce Clause).

135. *See Lopez*, 514 U.S. at 562 (stating that Congress may consider legislative findings regarding the substantial affects of an activity upon interstate commerce, but noting that Congress is not required to consider these findings); United States v. Wilson, 159 F.3d 280, 286 (7th Cir. 1998) (stating that the Court may examine legislative findings to determine the constitutionality of a statute).

136. *See Lopez*, 514 U.S. at 562 (recognizing that formal findings were not required to determine an activity's impact on interstate commerce); Perez v. United States, 402 U.S. 146, 156 (1971) (confirming that Congress does not need to make particularized findings prior to legislating); Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (stating that the absence of congressional findings is not fatal to the constitutionality of a regulation (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938))); Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 177 (1996) (indi-

Another factor a court may consider is whether the legislation contains a jurisdictional element linking the activity to commerce.[137] A jurisdictional element is a term or phrase within the language of the legislation that limits the scope of a federal regulation by requiring the element to be proven in each case.[138] For example, Congress included the jurisdictional language "in or affecting commerce" in its felon-in-possession statute,[139] so that only the possession by a felon of firearm that has moved in interstate commerce would be a crime.[140] Specifically, such a jurisdictional element limits federal legislation because a federal prosecutor must show that the gun illegally possessed in each case has, in fact, moved in interstate commerce. As a result, an otherwise noncommercial statute is transformed into one that may be regulated by Congress.[141]

In *Lopez*, the Court demonstrated the importance of including a jurisdictional element in legislation by declaring that one of the deficiencies of the Gun-Free School Zones Act leading to its unconstitutionality was the

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cating that Chief Justice Rehnquist noted that legislative findings may be considered by the Court, however, they are not binding).

137. *See Lopez,* 514 U.S. at 562 (stating that the jurisdictional element serves to require an additional nexus to interstate commerce); *cf.* United States v. Bass, 404 U.S. 336, 337 (1971) (acknowledging the use of the jurisdictional language, "in commerce or affecting commerce," to prohibit felons from possessing, receiving, or transferring firearms and bring the activity of felons within the scope of federal commerce power). Congress often incorporates the phrase "in and affecting commerce" into legislation to bring the subject of the statute within the scope of its Commerce Clause power. *See id.* (explaining that the jurisdictional element "in and affecting commerce" indicates congressional intent to include a regulated activity within the scope of federal Commerce Clause authority).

138. *See Wallace*, 889 F.2d at 583 (stating that "the words 'affecting commerce' are jurisdictional words of art, typically signaling a congressional intent to exercise [Congress'] Commerce Clause power broadly").

139. *See* 18 U.S.C. § 922(g) (1994 & Supp. III 1997) (restricting felons from the possession, transfer, or receipt of a firearm "in or affecting commerce").

140. *See* Belflower v. United States, 129 F.3d 1459, 1461 (11th Cir. 1997) (stating that the United States Court of Appeals for the Eleventh Circuit upheld the constitutionality of the felon-in-possession statute under the Commerce Clause, even after the *Lopez* decision), *cert. denied*, 118 S. Ct. 2308 (1998); United States v. Lewis, 100 F.3d 49, 50 (7th Cir. 1996) (asserting that the "in commerce or affecting commerce" language in the felon-in-possession statute requires that the firearm possessed by the felon must have traveled in commerce at some point in time to fall within the Commerce Clause); United States v. McAllister, 77 F.3d 387, 390 (11th Cir. 1996) (upholding 18 U.S.C. § 922(g)(1) by stating that the statutory jurisdictional element defeats any facial challenge under the Commerce Clause by requiring a minimal nexus between the firearm and interstate commerce).

141. *See* Carlo D'Angelo, Note & Comment, *The Impact of* United States v. Lopez *upon Selected Firearms Provisions of Title 18 U.S.C. § 922*, 8 ST. THOMAS L. REV. 571, 575 (1996) (explaining that the key to Commerce Clause legislation is a link to commerce, otherwise Congress lacks the authority to enact legislation to regulate an intrastate activity).

absence of an express jurisdictional element.[142] The Court explained that if the Gun-Free School Zones Act had incorporated an express jurisdictional element, the statute's scope would have included firearm possessions with an explicit connection to interstate commerce.[143] In other words, had the Gun-Free School Zones Act included a statutory jurisdictional element, Congress could have legitimately regulated the possession of guns that moved in commerce at or near a school.[144]

2. *Printz v. United States*

In 1997, the Supreme Court took another step that further limited Congress' Commerce Clause power. In *Printz v. United States*,[145] the Court concluded that even a federal regulation permissible under *Lopez* may be unconstitutional if it violates the principles of state sovereignty otherwise protected by the Tenth Amendment.[146] In other words, a federal regulation properly enacted under Congress' Commerce Clause authority would be unconstitutional to the extent that it "commandeers" the states to implement that regulation.[147] In essence, the Court in *Printz* mandated that a constitutional balance between state and federal power must be maintained, even under the Commerce Clause.[148]

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142. *See Lopez*, 514 U.S. at 562 (concluding that Section 922(q) does not contain an express jurisdictional element to limit the statute's scope to a particular set of firearm possessions with an explicit link to or effect on interstate commerce); *see also* Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A) (Supp. III 1997) (forbidding "any individual knowingly to possess a firearm that has moved or that otherwise affects interstate or foreign commerce at a place that [she] knows . . . is a school zone").

143. *See Lopez,* 514 U.S. at 562 (predicting the practical effect of the inclusion of a jurisdictional element in the Gun-Free School Zones Act).

144. *See* Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 696-97 (1995) (confirming that the omission of an express jurisdictional element was a key factor in the statute's invalidation as described in *Lopez*).

145. 117 S. Ct. 2365 (1997).

146. *See* U.S. CONST. amend. X (stating that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"); Printz v. United States, 117 S. Ct. 2365, 2379 (1997) (explaining that even if a regulation is a valid exercise of federal commerce power, such a regulation is not the appropriate means of regulation if it interferes with state sovereignty under the Tenth Amendment).

147. *See Printz*, 117 S. Ct. at 2384 (concluding that Congress "may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program"); *see also* New York v. United States, 505 U.S. 144, 188 (1992) (holding that the "Federal Government may not compel the States to enact or administer a federal regulatory program").

148. *See Printz*, 117 S. Ct. at 2383-84 (holding that Congress cannot ignore the Court's prohibition in *New York v. United States* by issuing federal directives to states to carry out a federal regulation and implying that the "constitutional system of dual sovereignty" must

The particular question presented to the Court in *Printz* was whether Congress could order state law enforcement officials to enforce the Brady Handgun Violence Prevention Act ("Brady Act").[149] The Brady Act, enacted by Congress in 1993 as an amendment to the Gun Control Act of 1968, required state law enforcement officials to check the background of a gun purchaser prior to the sale of any firearm.[150] This check by state officials was designed only to be conducted as an interim measure until a national background check system was fully implemented.[151]

Despite the temporary nature of the federal mandate, the Court held such commandeering of the states by Congress, whether temporary or permanent, was unconstitutional.[152] Explaining that compelling states to enforce a federal regulatory scheme is "fundamentally incompatible with our Constitutional system of dual sovereignty," the Court held that the Brady Act, as an unfunded mandate, violated the Tenth Amendment.[153] Furthermore, the Court substantiated its decision based on "two centuries of apparent congressional avoidance" of issuing federal directives to

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be maintained regardless of whether the federal directives are burdensome on States or involve policy-making).

149. *See id.* at 2368 (presenting the issue as being whether Congress may direct state officials to carry out federal regulatory schemes).

150. *See id.* (requiring state law enforcement officers to perform criminal background checks prior to the sale of a firearm).

151. *See id.* (describing how state law enforcement officials were to oversee federally mandated background checks until the national instant background check became operative). In particular, the Brady Act required state officials to provide written statements upon request once a transaction for the sale of a firearm was denied. *See id.* at 2369 (describing the procedure for state law enforcement officials to follow regarding denied applications for the sale of a firearm). Conversely, any information obtained regarding the approval of a transaction for the sale of a firearm had to be destroyed by the state official. *See id.* at 2369 (explaining the procedure for state officials on approved applications for the sale of a firearm). On November 30, 1998, the National Instant Check System became effective to aid in background checks prior to the sale of firearms. *See* Gary Fields & Richard Willing, *Administration Takes Aim at Brady Law's Private Sales Loophole*, USA TODAY, Feb. 5, 1999, at 6A, *available in* 1999 WL 6833675. According to one report, as of February 3, 1999, "the FBI had conducted 815,730 checks and blocked 17,144 of those sales;" likewise, states that conducting their own checks ran "744,751 checks during the same period." *Id.*

152. *See Printz*, 117 S. Ct. at 2384 (stating that the policy underlying a federal command to states and the burden of the command on states are both irrelevant, because any such commands are contrary to our system of dual sovereignty).

153. *See id.* The Supreme Court reversed the appellate court's decision as an unconstitutional imposition on the states and inconsistent with the concept of federalism. *See id.* at 2377 (stating that the Framers believed that utilizing the States as instruments in federal governance under the Articles of Confederation was ineffectual and provocative of state-federal conflict (citing THE FEDERALIST No. 15 (Alexander Hamilton))).

states.[154] In this regard, the Court emphasized the need to maintain a proper balance between state and federal power as well as to prevent Congress from governing state matters.[155]

Although policy considerations were significant in the *Printz* opinion, Congress' failure to incorporate a system of cooperative federalism was the ultimate reason for the Court's invalidation of the Brady Act.[156] Cooperative federalism occurs when the federal government induces a state to implement federal regulations either by "encourag[ing] a State [to] regulate in a particular way, or hold[ing] out incentives to the States as a method of influencing a State's policy choices."[157] This concept circum-

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154. *See Printz*, 117 S. Ct. at 2376; *see also* Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) (advancing as undeniable the proposition that the Constitution created a system of dual sovereignty); Barry Latzer, *Whose Federalism? Or, Why "Conservative" States Should Develop Their State Constitutional Law*, 61 ALB. L. REV. 1399, 1400 (1998) (concluding that the commandeering in the Brady Act constitutionally runs "afoul of the Tenth Amendment"). In fact, the Framers rejected the notion of a federal government acting upon and through the states. *See Printz*, 117 S. Ct. at 2377 (noting that the Framers rejected the concept of operating a federal government through state directives (citing THE FEDERALIST No. 15, (Alexander Hamilton))). *But see* Vicki C. Jackson, *Federalism and the Uses and Limits of the Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2195 (1998) (stressing that the majority in *Printz* interprets dual sovereignty contrary to the belief "that it was the 'people,' and not the 'states,' that formed the Union").

155. *See Printz*, 117 S. Ct. at 2377 (stating that "the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere" (quoting THE FEDERALIST No. 39 (James Madison))). Furthermore, "[a]lthough the States surrendered many of their powers to the new federal Government, they retained 'a residuary and inviolable sovereignty.'" *Id.* at 2377 (citing THE FEDERALIST No. 39 (James Madison)). Our government was thus designed so that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *Id.* at 2376 (citing U.S. Term Limits, Inc. v. Thorton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). Accordingly, unfunded federal directives to states are unconstitutional because the states are in effect serving the federal government's constituents rather than their own. *See id.* (arguing that federal directives to states would interfere with the constitutional notion that "a State's government will represent and remain accountable to its own citizens"). In fact, the Court has recognized that states would not be truly sovereign if federal legislation were allowed to negate its constitutional limitations, thereby upsetting the balance of state and federal power. *See id.* at 2378 (noting that "the separation of two spheres [of government] is one of the Constitution's structural protections of liberty"); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2192 (1998) (arguing that "allowing federal laws to commandeer state executive forces would disturb the federal separation of powers by undermining the authority of the unitary President"). Simply stated, *Printz* concludes that "Congress cannot circumvent . . . [constitutional] prohibition by conscripting the State's directly." *Printz*, 117 S. Ct. at 2384.

156. *See Printz*, 117 S. Ct. at 2384 (addressing the issue of power between the states and the federal government).

157. New York v. United States, 505 U.S. 144, 166 (1992).

vents challenges that the legislation is merely an unfunded mandate upon states.[158] Moreover, under a cooperative federalism scheme, states retain the prerogative to volunteer their compliance with a federal regulation, but aiding the federal government in achieving the goals of the legislation is not required for those states that lack an adequate budget to cover the expense of implementing federal law.[159]

The Supreme Court addressed this notion of cooperative federalism in *New York v. United States*.[160] In *New York*, the Court identified several methods that Congress may use to encourage a state to adopt a legislative program that is consistent with federal interests.[161] For example, under its "power of the purse," Congress may condition the receipt of federal funds on some action taken by the state, as long as the condition relates to the purpose of the federal spending.[162] In order to induce a state to adopt a federal regulation, Congress may also offer the state a "choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."[163] Under either of these methods, the citizens of a particular state have the ultimate decision as to whether the state will cooperate.[164] As the Court stated in *New York*, "[w]here Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; [therefore,] state officials remain accountable to the people."[165]

In addressing cooperative federalism and the reasoning for not commandeering states, the Court in *Printz* noted that the Framers rejected a system with a centralized government that acts upon and through the

158. *See id.* at 167-68 (avoiding unconstitutional federal directives to states to enforce federal regulatory schemes through the incorporation of cooperative federalism to preserve state discretion to refuse).

159. *See* Philip J. Weiser, Chevron, *Cooperative Federalism, and Telecommunications*, 52 VAND. L. REV. 1, 1 (1999) (explaining that the underlying purpose of cooperative federalism statutes is to encourage states to implement regulatory schemes to meet local needs); Katheryn Kim Frierson, Comment, Arkansas v. Oklahoma*: Restoring the Notion of Partnership Under the Clean Water Act*, 1997 U. CHI. LEGAL F. 459 (emphasizing that the purpose of cooperative federalism is to preserve state autonomy, while assuring some uniformity via nationally mandated standards), *available in* WESTLAW, UCHILF database; Pierre Thomas, *Little Effect Predicted on Gun Checks*, WASH. POST, June 28, 1997, at A12 (stating that the decision in *Printz* does not preclude police officers who want to make background checks from doing so), *available in* 1997 WL 11971241.

160. 505 U.S. 144 (1992).

161. *New York*, 505 U.S. at 167 (suggesting ways that Congress can constitutionally use states to enact or enforce a federal regulatory scheme).

162. *See id.* (quoting South Dakota v. Dole, 483 U.S. 203, 206 (1987)).

163. *See id.*

164. *See id.* at 168 (assuring that under either method, the residents of a state ultimately decide whether a state will comply with a federal regulation).

165. *Id.*

states, drafting instead a system that intended both federal and state governments to exercise concurrent power over the people.[166] Following this line of reasoning, the *Printz* Court supported its holding that a provision of the Brady Act was unconstitutional by citing *New York*, wherein the Court held that funded federal mandates were constitutionally permissible.[167] Thus, in *Printz*, the lack of cooperative federalism embodied in the Brady Act was a pivotal factor in striking down the legislation because the Act violated principles of state sovereignty by compelling states to implement federal legislation.[168]

The Supreme Court's decisions in *Lopez* and *Printz* represent contemporary constitutional parameters within which Congress may regulate local activities permissibly. Accordingly, federal courts must now review whether federal legislation that is purportedly enacted pursuant to Congress' Commerce Clause power actually fits within the *Lopez-Printz* framework.

III. The Commerce Clause and Domestic Violence

In recent years, lower courts have examined Congress' varied attempts to address the rise of domestic violence.[169] In particular, courts have addressed the constitutionality of the Violence Against Women Act ("VAWA") and Section (g)(8) of the Gun Control Act of 1968.[170]

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166. *See* Printz v. United States, 117 S. Ct. 2365, 2377 (1997) (relying on the Framers' intended roles for federal and state governments to support noncommandeering of states by the federal government).

167. *See id.* at 2380-81 (distinguishing the Brady Act from the regulation at issue in *New York v. United States* and reiterating that regardless of the significance of the command, any command by Congress upon states to implement federal regulations is unconstitutional and an intrusion upon state sovereignty).

168. *See id.* at 2384 (holding that Congress may not force states to implement federal regulatory schemes and circumvent the holding in *New York v. United States*).

169. *See, e.g.*, United States v. Wright, 128 F.3d 1274, 1274-75 (8th Cir. 1997) (using *Lopez* to inquire into the constitutionality of the Violence Against Women Act), *cert. denied*, 118 S. Ct. 1376 (1998); United States v. Bailey, 112 F.3d 758, 765-66 (4th Cir.) (applying *Lopez* to address a Commerce Clause challenge to Section 2261(a), a provision of the Violence Against Women Act), *cert. denied*, 118 S. Ct. 240 (1997).

170. *See* United States v. Wilson, 159 F.3d 280, 285 (7th Cir. 1998) (applying *Lopez* in the constitutional inquiry of Section 922(g)(8)); United States v. Pierson, 139 F.3d 501, 502-04 (5th Cir.) (applying *Lopez* in a Commerce Clause challenge to Section 922(g)(8)), *cert. denied*, 119 S. Ct. 220 (1998); *Wright*, 128 F.3d at 1274-75 (using *Lopez* to inquire into the constitutionality of a provision of the Violence Against Women Act); *Bailey*, 112 F.3d at 765-66 (applying *Lopez* to address a Commerce Clause challenge to Section 2261(a), a provision of the Violence Against Women Act).

Although both acts have been challenged on Commerce Clause grounds,[171] the lower courts have upheld their constitutionality.[172]

A. *Violence Against Women Act*

One of the reasons that Congress enacted VAWA was to regulate the interstate movement of domestic violence offenders who were subject to a protective order.[173] However, despite its facial relationship to interstate commerce, this provision of VAWA was subsequently challenged as being an unconstitutional exercise of congressional power.[174] Both the Fourth and Eighth Circuits have addressed these Commerce Clause challenges to VAWA.

1. *United States v. Wright*

The notion that a person may be regarded as a commercial instrumentality was reaffirmed recently in *United States v. Wright*,[175] in which the

171. *See Wilson*, 159 F.3d at 285 (challenging Section 922(g)(8) as a violation of Congress' Commerce Clause authority); *Pierson*, 139 F.3d at 502-03 (questioning the constitutionality of Section 922(g)(8) as a valid exercise of federal commerce authority); *Wright*, 128 F.3d at 1274 (arguing that 18 U.S.C. § 2262(a)(1) is unconstitutional under the Commerce Clause); *Bailey*, 112 F.3d at 765 (claiming that 19 U.S.C. § 2261(a) exceeds Congress' Commerce Clause authority).

172. *See Wilson*, 159 F.3d at 286 (holding Section 922(g)(8) as a constitutional exercise of Congress' Commerce Clause power); *Pierson*, 139 F.3d at 503 (determining that Section 922(g)(8) is constitutional under the Commerce Clause); *Wright*, 128 F.3d at 1276 (concluding that Section 2262(a)(1) of VAWA is constitutional under the Commerce Clause); *Bailey*, 112 F.3d at 766 (deciding that Section 2262(a)(1) of VAWA is a constitutional exercise of Congress' commerce power).

173. *See* Violence Against Women Act, 18 U.S.C. § 2262(a)(1) (1994 & Supp. II 1996) (defining interstate violations of protective orders).

174. *See Wright*, 128 F.3d at 1276 (addressing the challenge to Section 2262(a)(1) of the Violence Against Women Act, which federalizes interstate domestic violence, and holding that the Act is constitutional); *Bailey*, 112 F.3d at 766 (upholding a provision of the Violence Against Women Act that regulates interstate domestic violence). *But see* Brzonkala v. Virginia Polytechnic Instit. State Univ., Nos. 96-2316, 96-1814, 1999 WL 111891, at *1, *2 (4th Cir. 1999) (holding unconstitutional subtitle C of the Violence Against Women Act, 42 U.S.C. § 13981, because it punishes noncommercial intrastate violence as a federal crime). This provision of VAWA, before declared unconstitutional, established a federal substantive right for all individuals in the United States to be free from gender-motivated crimes of violence. *See id.* at *3 (setting out the effect of Section 13981). In reaching this conclusion, the court addressed whether Section 13981 was a constitutional exercise of congressional Commerce Clause authority. *See id.* at *6 (presenting the issue before the court). The court invalidated Section 13981 under the Commerce Clause because the legislation failed to regulate an economic activity and did not contain a jurisdictional element. *See id.* at *9 (discussing the reasoning for holding Section 13981 unconstitutional).

175. 128 F.3d 1274 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1376 (1998).

United States Court of Appeals for the Eighth Circuit upheld Section 2262(a)(1) of VAWA as a valid exercise of Congress' Commerce Clause authority.[176] In *Wright*, the district court held that Section 2262(a)(1) of VAWA was not a valid exercise of federal Commerce Clause power and dismissed the indictment against Wright for violating his protective order.[177] The Eighth Circuit reversed the district court because the appellate court determined that this provision did fit within one of the *Lopez* categories.[178] In reaching its conclusion, the court relied on the Supreme Court's ruling that persons crossing state lines, regardless of whether an economic activity is involved, constitutes interstate commerce.[179]

2. *United States v. Bailey*

Similarly, the United States Court of Appeals for the Fourth Circuit, in *United States v. Bailey*,[180] upheld VAWA's regulation of interstate domestic violence as a valid exercise of Commerce Clause authority.[181] The issue presented in *Bailey* was whether Section 2261(a)(2) of VAWA, which regulates interstate domestic violence and prohibits an individual from forcing his spouse or intimate partner to cross state lines,[182] was constitutional under the Commerce Clause.[183] Bailey argued that this provision was unconstitutional because the provision did not fit within the first two *Lopez* categories and that it failed to satisfy the third category because the regulated local activity did not directly affect com-

176. *See Wright*, 128 F.3d at 1276 (upholding Section 2262(a)(1) of the Violence Against Women Act as a valid exercise of federal Commerce Clause authority). The court approved of the effect of the federal statute, which was to punish domestic violence offenders who were subject to a protective order and who crossed state lines with an intent to violate that protective order. *See id.*

177. *See id.*

178. *See id.* at 1274-75 (reversing the decision of the district court that held Section 2262(a) of VAWA unconstitutional and not within one of the *Lopez* categories).

179. *See id.* at 1276 (upholding Section 2262(a)(1) of the Violence Against Women Act as a valid exercise of federal Commerce Clause authority and relying on the proposition that when individuals cross state lines they constitute interstate commerce).

180. 112 F.3d 758, (4th Cir.), *cert. denied*, 118 S. Ct. 240 (1997).

181. *See* United States v. Bailey, 112 F.3d 758, 766 (4th Cir.) (upholding the validity of regulating interstate domestic violence offenders—who intend to injure their spouses or domestic partners—as a constitutional exercise of congressional authority under the Commerce Clause), *cert. denied*, 118 S. Ct. 240 (1997).

182. *See* Violence Against Women Act, 18 U.S.C. § 2262(a)(2) (1994 & Supp. II 1996) (prohibiting interstate domestic violence); *see also Bailey*, 112 F.3d at 765 (providing the language of the statute).

183. *See Bailey*, 112 F.3d at 765 (questioning the constitutionality of 18 U.S.C. § 2262(a)(2)).

merce.[184] In upholding the statute, the court declared that the federal power "over the instrumentalities of interstate commerce is plenary" and that "it may be used to defeat what are deemed to be immoral practices."[185] As such, the court plainly stated that the requirement in the statute that the defendant cross state lines placed the transaction squarely into interstate commerce.[186]

The courts' responses in *Wright* and *Bailey* may be interpreted as actually broadening the power that Congress enjoys under the Commerce Clause. Essentially, these cases suggest that Congress may regulate intrastate activities and persons if the regulated activity impedes the ability of other individuals to travel, thereby hindering their contributions to interstate commerce.

B. *Section (g)(8) of the Gun Control Act*

The presence of a jurisdictional element has also been a dispositive factor in recent Commerce Clause cases.[187] For that matter, federal courts have consistently held that a jurisdictional element linking a regulated activity to interstate commerce is a valid exercise of Congress' Commerce Clause authority.[188] In particular, two courts have relied upon the exist-

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184. *See id.* at 766 (presenting defendant's arguments that Congress exceeded its Commerce Clause authority in promulgation of the Section 2261(a) of VAWA under the holding in *Lopez*).

185. *Id.* (citing Cleveland v. United States, 329 U.S. 14 (1946)).

186. *See id.*

187. *See* United States v. Robinson, 119 F.3d 1205, 1211-12 (5th Cir. 1997) (explaining that the *Lopez* standard, which requires that an activity substantially affect interstate commerce, is almost always met with the incorporation of a statutory jurisdictional element that requires proof of the regulated activity's connection to interstate commerce), *cert. denied*, 118 S. Ct. 1104 (1998).

188. *See* Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811, 822 (S.D. Ind. 1998) (holding that the jurisdictional nexus in Section 922(g)(9) is constitutional because every federal circuit court has upheld the jurisdictional element in Section 922(g) as a valid exercise of Commerce Clause power); *see also* United States v. Wilson, 159 F.3d 280, 286 (7th Cir. 1998) (confirming that the jurisdictional element in Section 922(g) brings the statute within Congress' Commerce Clause power by establishing the "requisite nexus with interstate commerce"); United States v. Pierson, 139 F.3d 501, 503 (5th Cir.) (upholding Section 922(g)(8) because the jurisdictional element expressly requires a "nexus between [an] illegal firearm and interstate commerce" under *Lopez*), *cert. denied*, 119 S. Ct. 220 (1998); United States v. Wells, 98 F.3d 808, 811 (4th Cir. 1996) (determining that the jurisdictional element in Section 922(g) satisfied "the minimal nexus required for the Commerce Clause"); United States v. Barry, 98 F.3d 373, 378 (8th Cir. 1996) (relying on precedent to determine that the implementation of 922(g)(1) was constitutional because the shotgun used by the accused had traveled in interstate commerce); United States v. Garcia, 94 F.3d 57, 65 (2d Cir. 1996) (reiterating that the government need only show that the firearm "traveled in interstate commerce" in order to uphold a conviction under Section 922(g)); United States v. Nguyen, 88 F.3d 812, 820-21 (9th Cir. 1996) (relying on its previous deci-

ence of a jurisdictional element in upholding Section (g)(8) of the Gun Control Act.[189]

1. *United States v. Pierson*

In *United States v. Pierson*,[190] the United States Court of Appeals for the Fifth Circuit upheld the constitutionality of a provision of the Gun Control Act of 1968 that prohibited domestic violence offenders subject to a protective order from possessing firearms that traveled in interstate commerce.[191] Pierson argued that Section 922(g)(8) violated the principles set forth in *Lopez*, and therefore, was beyond the scope of Congress' Commerce Clause authority.[192] Specifically, Pierson claimed that the purpose of this Act was to regulate the actions of domestic violence offenders who were subject to a protective order and in possession of a firearm.[193] These local activities, he contended, failed to substantially affect interstate commerce.[194] The Fifth Circuit, however, rejected this argument, determining that Section 922(g)(8) requires a prosecutor to prove that the firearm at issue has traveled in interstate commerce and not merely that the offender possessed a firearm.[195] According to the court, this requirement brought the provision within Congress' Com-

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sion that upheld the constitutionality of 922(g) based on the jurisdictional requirement); United States v. Gateward, 84 F.3d 670, 672 (3d Cir. 1996) (agreeing with other courts that 922(g)(1) is constitutional and within Congress' Commerce Clause authority); United States v. Turner, 77 F.3d 887, 889 (6th Cir. 1996) (concluding that the inclusion of the "in or affecting commerce" language in Section 922(g)(1) ensured the constitutionality of the "felon-in-possession" statutes); United States v. McAllister, 77 F.3d 387, 389-90 (11th Cir. 1996) (determining that the jurisdictional element in 922(g)(1) defeats the claim that 922 (g)(1) does not "substantially affect" interstate commerce); United States v. Bolton, 68 F.3d 396, 400 (10th Cir. 1995) (holding that the jurisdictional element included in Section 922(g) was sufficient to establish the statute's constitutionality under the commerce clause); United States v. Wallace, 889 F.2d 580, 583 (5th Cir. 1989) (stating that "[t]he words 'affecting commerce' are jurisdictional words of art, typically signaling a congressional intent to exercise its Commerce Clause power broadly").

189. *See Wilson*, 159 F.3d at 286 (finding that Section 922(g)(8) is constitutional); *Pierson*, 139 F.3d at 503-04 (holding that Section 922(g)(8) is a valid exercise of federal commerce power based on the inclusion of a jurisdictional element linking the regulated activity to interstate commerce); *see also* United States v. Cunningham, 161 F.3d 1343, 1346 (11th Cir. 1998) (defeating a Commerce Clause challenge through the use of a jurisdictional element).

190. 139 F.3d 501 (5th Cir.), *cert. denied*, 119 S. Ct. 220 (1998).

191. *See Pierson*, 139 F.3d at 504 (upholding the constitutionality of Section 922(g)(8) of the Gun Control Act).

192. *See id.* at 502-03.

193. *See id.* at 503.

194. *See id.*

195. *See id.* (explaining that Section 922(g)(8) expressly links firearms with interstate commerce through the statute's jurisdictional language).

merce Clause authority.[196] Although Pierson appealed this decision to the Supreme Court, the Court denied his petition for writ of certiorari.[197] This denial suggests that this provision of the Gun Control Act is within Congress' Commerce Clause authority; moreover, the denial can be read as reflecting the Court's deference to federal regulations containing a jurisdictional element.[198]

2. *United States v. Wilson*

The United States Court of Appeals for the Seventh Circuit likewise upheld Section 922(g)(8) in *United States v. Wilson*.[199] In *Wilson*, the court read the Commerce Clause broadly and ruled that Section 922(g)(8) fell within the scope of federal commerce authority because Congress used a statutory jurisdictional element to link the possession of a firearm to commerce.[200] Additionally, the court determined that the "substantially affects commerce" category set forth in *Lopez* was the proper category under which to analyze that provision; in so doing, the court rejected the proposition that the "statute must *specify* a 'substantial affect' on interstate commerce . . . ."[201]

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196. *See id.* (recognizing that Section 922(g)(1) of the Gun Control Act, which regulates convicted felons in possession of firearms, has previously been upheld with the same jurisdictional language as Section 922(g)(8)); *see also* 18 U.S.C. § 922(g) (Supp. III 1997) (containing the exact jurisdictional element as Section 922(g)(8), which requires that the gun possessed is "in or affecting commerce"); Belflower v. United States, 129 F.3d 1459, 1461 (11th Cir. 1997) (arguing that the felon-in-possession statute has been upheld as a valid exercise of Commerce Clause authority), *cert. denied*, 118 S. Ct. 2308 (1998).

197. *See* Pierson v. United States, 119 S. Ct. 220 (1998) (denying the petition for writ of certiorari).

198. *See Pierson*, 139 F.3d at 503 (upholding Section 922(g)(8) of the Gun Control Act as constitutional because it uses the same jurisdictional language as Section 922(g)(1)); *Belflower*, 129 F.3d at 1461 (arguing that the felon-in-possession statute has been upheld as a valid exercise of Commerce Clause authority). The Supreme Court also denied certiorari in *Belflower*. *See* Belflower v. United States, 118 S. Ct. 2308, 2308 (1998).

199. 159 F.3d 280 (7th Cir. 1998).

200. *See* United States v. Wilson, 159 F.3d 280, 286 (7th Cir. 1998) (finding that Section 922(g)(8) passes constitutional muster under the "substantially affects interstate commerce" category set forth in *Lopez*). The Seventh Circuit also reiterated the deferential nature of its Commerce Clause analysis by stating that the power under the Commerce Clause is "complete in itself, may be exercised to its utmost extent and is susceptible to no limits except for those prescribed in the Constitution." *Id.* at 285.

201. *See id.* (emphasis added) (asserting that the third prong in *Lopez* is the proper means of examination for Section 922(g)(8) of the Gun Control Act). The *Wilson* court explained that the statute need not specify such a "substantial affect," but that it must merely reflect a "minimal nexus" with interstate commerce. *See id.* The government, then, needed to show only that the firearm in question moved in interstate commerce. *See id.* at 286-87.

Hence, recent appellate decisions confirm that congressional action in the area of interstate domestic violence may be regulated under the Commerce Clause. Of importance is the fact that these decisions were reached by using the Commerce Clause principles set forth in *Lopez*. Moreover, although the *Lopez* holding does not require that Congress employ a statutory jurisdictional element, these cases illustrate that federal legislation can sustain a constitutional attack when the legislation includes a proper jurisdictional element.[202]

IV. The Lautenberg Amendment to the Gun Control Act of 1968

Before attempting to regulate domestic violence in particular, Congress used its Commerce Clause authority to regulate another type of interstate commerce that affects local activities: the possession of firearms. Congress chose to regulate this activity through the Gun Control Act of 1968 (GCA).[203] The GCA was enacted directly in response to the assassinations of Dr. Martin Luther King, Jr. and Robert F. Kennedy as well as the increase in the 1960s of crime and violence generally.[204] Today, the GCA stands as our nation's primary gun control law.

Originally, the "GCA disqualified certain categories of people from receiving firearms or ammunition that had traveled in interstate commerce and imposed criminal liability for the sale or transfer of firearms to disqualified people."[205] As a result, the GCA allowed states to enforce their

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202. *See, e.g.*, United States v. Cunningham, 161 F.3d 1343, 1346-47 (11th Cir. 1998) (defeating challenges to Section 922(g)(8) based on the inclusion of a jurisdictional element); *Wilson*, 159 F.3d at 286 (finding that Section 922(g)(8) passes constitutional muster under the "substantially affects commerce" category set forth in *Lopez*); *Pierson*, 139 F.3d at 503 (noting that Section 922(g)(8) expressly links firearms with interstate commerce through the jurisdictional language in the statute).

203. *See* 18 U.S.C. § 922 (1994) (explaining that the purpose of the Gun Control Act of 1968 is to provide "support to Federal, State, and local law enforcement officials in their fight against crime and violence").

204. *See* Brenden J. Healey, *Plugging the Bullet Holes in U.S. Gun Law: An Ammunition-Based Proposal for Tightening Gun Control*, 32 J. Marshall L. Rev. 1, 9 (1998) (indicating that the Gun Control Act of 1968 was "passed in the wake of the assassinations of Martin Luther, King, Jr. and Robert F. Kennedy"); Eva H. Shine, Note & Comment, *The Junk Gun Predicament: Answers Do Exist*, 30 Ariz. St. L.J. 1183, 1206 (1998) (stating that after Robert Kennedy's assassination, Congress tightened gun control laws by enacting the Gun Control Act of 1968); *Guns in America: History of U.S. Gun Laws*, Hous. Chron., Oct. 22, 1997, at A21 (explaining that the Gun Control Act of 1968 was promulgated in response to the assassinations of Martin Luther King, Jr. and Robert Kennedy, in addition to an increasing crime rate), *available in* 1997 WL 13068874.

205. Major Einwechter & Captain Christiansen, *Abuse Your Spouse and Lose Your Job: Federal Law Now Prohibits Some Soldiers from Possessing Military Weapons*, Army Law., Aug. 1997, at 26.

own laws regarding firearms, although permitting federal monitoring of any interstate activity involving firearms.[206] As time passed, however, the inadequacy of the original language contained in the GCA became evident, particularly in regard to domestic violence.[207] In addition, the increase in *gun-related* domestic violence incidents suggested that Congress needed to supplement the GCA.[208] In response to these incidents, Congress enacted the Lautenberg Amendment in 1996 to halt the growing number of domestic violence deaths.[209]

The Lautenberg Amendment expands the list of persons subject to a firearm prohibition; the Amendment also makes the receipt or possession of a firearm that has moved in interstate commerce a felony if the person possessing the weapon was previously convicted of a misdemeanor crime of domestic violence[210] and makes the receipt or possession of a firearm

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206. *See* H.R. REP. No. 90-1577 (1968) (detailing the manner in which the Gun Control Act of 1968 would assist states), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4412-13.

207. *See* Melanie L. Mecka, Note, *Seizing the Ammunition from Domestic Violence: Prohibiting the Ownership of Firearms by Abusers*, 29 RUTGERS L.J. 607, 607-08 (1998) (expressing understanding, in light of the overwhelming statistics of domestic violence, at why governments at all levels have imposed restrictions on the rights of domestic violence offenders to possess firearms); *cf.* Naomi Cahn & Joan Meier, *Domestic Violence and Feminist Jurisprudence: Towards a New Agenda*, 4 B.U. PUB. INT. L.J. 339, 339 (1995) (responding to the explosion of domestic violence cases, over twenty law schools have devoted law clinics to representing women in domestic violence cases); Karen A. Geraghty, Note, *Bruising the Legal Profession: Attorney Discipline for Acts of Domestic Violence*, 28 RUTGERS L.J. 451, 453 (1997) (reporting a twenty-two percent increase in domestic violence offenses reported to police from 1994 to 1996 in New Jersey).

208. *See* Alana Bassin, *Why Packing a Pistol Perpetuates Patriarchy*, 8 HASTINGS WOMEN'S L.J. 351, 356 (1997) (estimating that out of the 2-4 million domestic violence occurrences annually, 150,000 are gun-related); *see also* Family Violence Prevention Fund, *New Crime Statistics* (last modified Jan. 1997) <http://www.igc.apc.org> (stating that Maine reported that three in five murders were caused by domestic violence during the 1990s).

209. *See* Eric Andrew Pullen, Comment, *Guns, Domestic Violence, Interstate, Commerce, and the Lautenberg Amendment: "[S]imply Because Congress May Conclude That a Particular Activity Substantially Affects Interstate Commerce Does Not Necessarily Make It So."*, 39 S. TEX. L. REV. 1029, 1032-33 & n.22 (1998) (reporting that the Amendment seeks to reduce the occurrences of domestic violence in the United States); Frank R. Lautenberg, *No Guns for Wife-Beaters*, WASH. POST, Apr. 3, 1997, at A21 (explaining that the underlying principle of the Lautenberg Amendment is to keep guns away from "wife-beaters and child abusers"), *available in* 1997 WL 10010533; *see also* Richard J. Gelles, *Domestic Violence Factoids* (last modified Oct. 17, 1996) <http://www.mincava.umn.edu/papers/factoid.htm> (providing facts on the impact of deaths caused by domestic violence). For example, deaths caused by domestic violence during the past five years equal the total number of fatalities in the Vietnam War. *See id.*

210. *See* Gun Control Act of 1968, 18 U.S.C. § 922 (1994), *amended by* 18 U.S.C. § 922(g)(9) (Supp. III 1997) (criminalizing the receipt or possession of a firearm by an individual convicted of a misdemeanor nor offense or domestic violence); *see also* Major Einwechter & Captain Christiansen, *Abuse Your Spouse and Lose Your Job: Federal Law*

that has moved in interstate commerce a felony if the person possessing the weapon was previously convicted of a misdemeanor crime of domestic violence. The Amendment applies to *all* persons convicted of misdemeanor crimes of domestic violence, regardless of the date of the offense.[211] Moreover, any violence, whether actual, attempted, or threatened, against a spouse or child—and prosecuted successfully as a misdemeanor—triggers application of the Amendment and prohibits the domestic violence offender from possessing, transferring, and purchasing firearms or ammunition.[212] A person who is subject to the Amendment and fails to relinquish all firearms and ammunition can be fined up to $250,000 and receive a ten-year prison sentence.[213]

Now Prohibits Some Soldiers from Possessing Military Weapons, ARMY LAW., Aug. 1997, at 26 (explaining that the Lautenberg Amendment merely expanded the list of disqualified people under the Gun Control Act of 1968 and that violation of the Lautenberg Amendment by a disqualified person constitutes a felony offense).

211. *See* Gun Control Act of 1968, 18 U.S.C. § 922 (1994), *amended by* 18 U.S.C. § 922(g)(9) (Supp. III 1997) (banning firearms from any person convicted of a misdemeanor crime of domestic violence); Major Einwechter & Captain Christiansen, *Abuse Your Spouse and Lose Your Job: Federal Law Now Prohibits Some Soldiers from Possessing Military* Weapons, ARMY LAW., Aug. 1997, at 26-27 (pointing out that the Lautenberg Amendment applies to any person convicted of a misdemeanor crime of domestic violence); *see also* Ann Carnahan, *Senator Vows to Disarm Cop: Abuser of Girlfriend Should Not Be Exempt, Sponsor of Law Says*, ROCKY MTN. NEWS, Dec. 2, 1997, at 5A (defining domestic violence under the Lautenberg Amendment as "physical force or the threatened use of a deadly weapon against a spouse or 'a person similarly situated to a spouse'"), *available in* 1997 WL 14979335. Furthermore, the Lautenberg Amendment is unlimited in its retroactive application and applies to all persons, including police officers and members of the armed services. *See* Gun Control Act of 1968, 18 U.S.C. § 922 (1994), *amended by* 18 U.S.C. § 922(g)(9) (Supp. III 1997) (detailing to whom the Amendment applies); Ann Carnahan, *Senator Vows to Disarm Cop: Abuser of Girlfriend Should Not Be Exempt, Sponsor of Law Says*, ROCKY MTN. NEWS, Dec. 2, 1997, at 5A (explaining how and to whom the Lautenberg Amendment applies). In fact, a misdemeanor conviction under a state or federal law that "contained as an element the use or attempted use of force, by a person upon a person in a domestic relationship" qualifies as a "misdemeanor crime of domestic abuse." Bruce T. Smith, *Disarming the Soldier*, 44 FED. LAW. 16, 16 (1997).

212. *See* Bruce T. Smith, *Disarming the Soldier*, 44 FED. LAW. 16, 16 (1997) (arguing that any attempted violence by an individual convicted of a misdemeanor crime of domestic violence against an intimate partner or child brings the offender within the scope of the Lautenberg Amendment); *see also* Gun Control Act of 1968, 18 U.S.C. § 921 (1994 & Supp. III 1997) (describing acts of violence that, if convicted, may constitute a domestic violence offense to trigger application of the Amendment).

213. *See* Gun Control Act of 1968, 18 U.S.C. § 922 (1994), *amended by* 18 U.S.C. § 922(g)(9) (Supp. III 1997) (describing the penalties for violation of the Lautenberg Amendment); Major Einwechter & Captain Christiansen, *Abuse Your Spouse and Lose Your Job: Federal Law Now Prohibits Some Soldiers from Possessing Military Weapons*, ARMY LAW., Aug. 1997, at 26 (describing the liability for violating the Lautenberg Amendment). A disqualified person receiving or possessing a firearm is liable "only if the following elements are proven: (1) that the accused was convicted of a misdemeanor crime of

Notably, in an attempt to evade any Commerce Clause problems, Congress limited the scope of the Lautenberg Amendment with a statutory jurisdictional element; this element requires that the possession, transfer, or receipt of firearms be "in and affecting commerce."[214] However, despite the inclusion of this jurisdictional element, critics have attacked the Lautenberg Amendment as outside the scope of Congress' Commerce Clause power.[215] One critic has even argued that the Lautenberg Amendment lacks any necessary link to interstate commerce.[216]

Critics have attacked the Amendment on several other constitutional grounds as well.[217] First, critics have argued that the Lautenberg Amendment violates the Second Amendment of the United States Constitution by depriving domestic violence misdemeanor offenders of the right to bear arms.[218] Critics argue further that the Lautenberg Amendment violates the Tenth Amendment by regulating an area reserved for the states.[219] Furthermore, critics have attacked the application of the

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domestic violence; (2) that the accused thereafter knowingly received or possessed a firearm or ammunition; and (3) that the firearm or ammunition had been transported in interstate or foreign commerce." *Id.* at 27; *see* Gun Control Act of 1968, 18 U.S.C. § 922 (1994), *amended by* 18 U.S.C. § 922(g)(9) (Supp. III 1997) (explaining the elements that must be met to hold a person liable for violation of the Lautenberg Amendment).

214. *See* National Ass'n of Gov't Employees, Inc. v. Barrett, 968 F. Supp. 1564, 1572 (N.D. Ga. 1997) (proposing that a facial constitutional challenge to Section 922(g)(9) would be fatal by differentiating the language of Section 922(g)(9) from the statute in *Lopez* that requires the government to show the "firearm was possessed 'in or affecting commerce' or received after having 'been shipped or transported in interstate or foreign commerce'"), *aff'd sub. nom.* Hiley v. Barrett, 155 F.3d 1276 (11th Cir. 1998); *cf.* United States v. Turner, 77 F.3d 887, 889 (6th Cir. 1996) (claiming that the jurisdictional element of the felon-in-possession statute, Section 922(g), provides the required nexus to interstate commerce that the statute reviewed in *Lopez* lacked).

215. *See* Eric Andrew Pullen, Comment, *Guns, Domestic Violence, Interstate Commerce, and the Lautenberg Amendment: "[S]imply Because Congress May Conclude That a Particular Activity Substantially Affects Interstate Commerce Does Not Necessarily Make It So."*, 39 S. TEX. L. REV. 1029, 1038 (1998) (asserting that the Lautenberg Amendment fails to support its link to interstate commerce as an economic activity through legislative history connecting the possession of guns by domestic violence misdemeanor offenders to interstate commerce).

216. *See id.* (arguing that the Lautenberg Amendment completely lacks a connection to interstate commerce).

217. *Cf.* Fraternal Order of Police v. United States, 152 F.3d 998, 1004 (D.C. Cir.) (holding unconstitutional the firearm disability for persons convicted of domestic violence misdemeanors and the lack of an explicit ban for more serious domestic violence felony offenses), *reh'g granted*, 159 F.3d 1362 (D.C. Cir. Nov. 12, 1998).

218. *See id.* at 1002 (noting the plaintiff's argument that the Lautenberg Amendment impinges on the fundamental right to bear arms).

219. *See* Editorial, *Congress' Mock War on Crime*, CHI. TRIB., Feb. 20, 1999, at 22 (asserting that domestic violence is not an area that should be federalized by Congress), *available in* 1999 WL 2845489.

Amendment on Equal Protection grounds; at least one critic has alleged that it discriminates against persons convicted of misdemeanor crimes of domestic violence but not all misdemeanor offenders.[220]

In addition to these constitutionally based assertions, critics claim that, rather than depriving the abusers of guns, the Amendment removes guns from victims who often obtain firearms to protect themselves.[221] Critics explain that domestic violence prosecutions are frequently against *women* who defend themselves against aggression. Thus, these women would, following a conviction, be prohibited from possessing firearms under the Lautenberg Amendment.[222] Furthermore, critics point out that some jurisdictions routinely charge both the aggressor and the victim in misdemeanor domestic violence cases, and in such an instance, the Amendment leaves the victim without the option of possessing a firearm.[223]

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220. *See Guns and Domestic Violence Change to Ownership Ban: Hearings Before the Subcomm. on Crime of the House Comm. on Judiciary*, 105th Cong. (1997) (statement of Kenneth T. Lyons, National President International Brotherhood of Police Officers) (stating that the International Brotherhood of Police Officers filed suit based on the Lautenberg Amendment in that it violates the Due Process Clause, the Equal Protection Clause, the Ex Post Facto Clause, and the Commerce Clause), *available in* 1997 WL 101020.

221. *See id.* (statement of Kenneth T. Lyons, National President International Brotherhood of Police Officers) (describing the possible effects of the Lautenberg Amendment on victims); Mike Madden, *Chenoweth Blasts Lautenberg Gun Law, Seeks Support to Repeal It,* GANNETT NEWS SERV., July 14, 1997, at 1 (quoting Representative Helen Chenoweth as stating, "the Lautenberg Amendment will take guns out of the wrong people's hands"), *available in* 1997 WL 8831866; *see also* Editorial, *Domestic Violence Is a Serious Issue, but Amendment Is Not the Solution*, IDAHO STATESMAN, Aug. 11, 1997, at 6A (criticizing the effects of the Lautenberg Amendment), *available in* 1997 WL 12711236. The Lautenberg Amendment has been criticized because it applies retroactively for periods of up to twenty years. *See id.* (describing the application of the Lautenberg Amendment). Additionally, critics argue the Lautenberg Amendment exclusively targets misdemeanor offenders and consequently operates unfairly against law enforcement officers with misdemeanor convictions. *See id.* (arguing that the Lautenberg Amendment deprives law enforcement officers with a misdemeanor domestic violence conviction from possessing firearms, which is an integral aspect of their occupation). Another view criticizes the Lautenberg Amendment as a "uniform punishment for wildly divergent [domestic violence] crimes." *Repeal the Lautenberg Act, Demands Libertarian Party* (last modified Apr. 21, 1997) <http://www.lp.org/rel/970421-lautenberg.html>. This view points out that the Lautenberg Amendment "treats all domestic violence convictions the same—whether for actual violence, or verbal threats, or trespassing, or even spanking your children." *Id.*

222. *See* Mike Madden, *Chenoweth Blasts Lautenberg Gun Law, Seeks Support to Repeal It,* GANNETT NEWS SERV., July 14, 1997, at 1 (asserting that the result of the Lautenberg Amendment may be depriving guns from the victims of domestic violence), *available in* 1997 WL 8831866.

223. *See* Editorial, *Domestic Violence Is a Serious Issue, but Amendment Is Not the Solution*, IDAHO STATESMAN, Aug. 11, 1997, at 6A (stating that some police departments do not distinguish the domestic violence abuser from the victim during arrests for incidents

Even in the face of these attacks, the policy reasons supporting the passage and continued enforcement of the Amendment are quite persuasive.[224] However, benevolent policy reasons alone do not make a statute constitutional. The Amendment, therefore, must be able to withstand constitutional scrutiny, particularly under Commerce Clause jurisprudence.

V. A Two-Step Analysis for Determining the Lautenberg Amendment's Constitutional Validity

The constitutionality of the Lautenberg Amendment under present Commerce Clause jurisprudence must be determined by using a two-step analysis. First, a court must ascertain whether the Lautenberg Amendment satisfies one of the three categories established in *Lopez* which Congress may constitutionally regulate.[225] Assuming that the Lautenberg Amendment satisfies one of these three categories, a court must then determine whether the regulation is compatible with the state sovereignty principles discussed in *Printz*.[226]

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of domestic violence), *available* in 1997 WL 12711236. Assuming that the dispute is resolved, and the victim pleads "no contest" to avoid a lengthy court proceeding, the victim will be unable to carry a firearm for protection due to the previous incident. *See id.* (explaining the repercussions for a victim charged with a misdemeanor domestic violence offense).

224. *See* Frank R. Lautenberg, *No Guns for Wife-Beaters*, WASH. POST, Apr. 3, 1997, at A21 (explaining that the underlying principle of the Lautenberg Amendment is to keep guns away from "wife-beaters and child abusers"), *available in* 1997 WL 10010533. Additionally, "[t]he stated purpose of the [Lautenberg] [A]mendment is to protect women from spousal abuse." *Urge Your Senators to Oppose "Spanker" Gun Ban* (last modified Aug. 14, 1996) <http://www.gunowners.org/alt96089.htm>.

225. *See* United States v. Lopez, 514 U.S. 549, 558-59 (1995) (discussing the three categories of activities that Congress may regulate under the Commerce Clause).

226. *See* Printz v. United States, 117 S. Ct. 2365, 2383 (1997) (holding that Congress may not commandeer states to act in the implementation of a federal regulatory scheme). Recently, a district court addressed the constitutionality of the Lautenberg Amendment. *See* Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811, 828 (S.D. Ind. 1988) (holding that the Lautenberg Amendment is a proper exercise of congressional commerce power and determining that the Lautenberg Amendment lacks a federal mandate for state enforcement). In *Gillespie v. City of Indianapolis*, the court held that the Lautenberg Amendment is a valid regulation under the Commerce Clause and does not contain a federal mandate for states to enforce that regulation. *See id.* In *Gillespie*, the court examined the Amendment under *Lopez* and distinguished the regulation from the Gun-Free School Zones Act because the Lautenberg Amendment contains an express jurisdictional element, which brought the regulated activity within the scope of federal commerce authority. *See id.* at 822 (distinguishing the construction of the Lautenberg Amendment from the Gun-Free School Zones Act in *Lopez*).

In addition, the court examined a Tenth Amendment challenge to the Lautenberg Amendment as invasive of principles of state sovereignty by compelling states to serve as

A. *Step One: Passing the* Lopez *Standard*

In *Lopez*, the Supreme Court of the United States specified three categories of activity that affect interstate commerce.[227] Accordingly, if a regulated activity falls within one of the three categories, that regulation constitutes a valid exercise of Congress' commerce power.[228] In the event that the constitutionality of federal legislation is questioned, the burden is on the challenger to establish that the law is unconstitutional because it fails to fit within one of the categories set forth in *Lopez*.[229]

1. Commercial Activity

Whether gun-related domestic violence is a commercial or noncommercial activity is not determinative as to whether Congress may regulate an activity under the Commerce Clause.[230] Congress is not restricted to

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implementers of this regulation and usurping a state's legislative authority in the area of criminal law. *See id.* at 819 (reviewing the argument that the Lautenberg Amendment intrudes upon state sovereignty in several regards). In addressing this challenge of whether the Amendment violated principles of state sovereignty, the court relied on *Printz*. *See id.* (relying on *Printz* as controlling case law). Utilizing *Printz*, the *Gillespie* court held that the Lautenberg Amendment merely provided a new federal law in regard to domestic violence offenders that did not contravene any state domestic violence regulation. *See id.* at 819-20 (noting the effect of the Lautenberg Amendment upon states). In general, the court found Gillespie's challenges unpersuasive and upheld the Lautenberg Amendment as a valid exercise of Commerce Clause authority and non-invasive of state sovereignty. *See id.* at 820 (upholding the constitutionality of the Lautenberg Amendment).

227. *See Lopez*, 514 U.S. at 558-59 (stating that Congress may legitimately regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and activities with a "substantial relation to interstate commerce"); United States v. Wilson, 159 F.3d 280, 285 (7th Cir. 1998) (listing the three areas that Congress may regulate under the Commerce Clause). Although the Court has given deference to Congress in addressing social issues under the Commerce Clause, Congress cannot ignore the Court's plainly stated constitutional requirements for Congress to regulate an activity. *See* Nicole Huberfeld, Note, *The Commerce Clause Post-*Lopez*: It's Not Dead Yet*, 28 SETON HALL L. REV. 182, 207 (1997) (pointing out that the Court typically gives deference to Congress in addressing social-policy issues under the Commerce Clause).

228. *See Lopez*, 514 U.S. at 560 (declaring that the Court does not have the discretion to invalidate Commerce Clause legislation if the regulated activity substantially affects interstate commerce).

229. *See id.* at 559 (implying that a challenger must prove that the regulated activity does not fit into a *Lopez* category to invalidate a federal regulation). For example in *Gillespie v. City of Indianapolis*, the defendant argued that the Lautenberg Amendment did not fit within any of the *Lopez* categories and therefore, exceeded Congress' Commerce Clause power. *See Gillespie*, 13 F. Supp. 2d 811, 822 (S.D. Ind. 1998) (relying on *Lopez* to invalidate the constitutionality of the Lautenberg Amendment). However, the court in *Gillespie* rejected the defendant's argument under *Lopez* as an attempt to invalidate the Lautenberg Amendment. *See id.* (upholding the Lautenberg Amendment).

230. *See* Carlo D'Angelo, Note & Comment, *The Impact of* United States v. Lopez *upon Selected Firearms Provisions of Title 18 U.S.C. § 922*, 8 ST. THOMAS L. REV. 571, 577

regulating only "commercial" activities; rather, the fact that an activity being regulated is commercial in nature functions merely as a plausible link to Congress' ability to regulate it.[231] As *Lopez* demonstrates, the actual critical factor in determining whether a valid exercise of commerce power exists is a local activity's relationship to interstate commerce.

Thus, in regard to the Lautenberg Amendment, the commerciality of the activity regulated—gun-related domestic violence—is not critical to determining the Amendment's constitutional validity. Arguably, the activity being regulated by the Amendment is not commercial in nature.[232] However, other methods exist to bring domestic violence offenders within the purview of federal Commerce Clause power. As *Lopez* reveals, if the activity falls within any of the three categories, thereby indicating a relationship to interstate commerce, then Congress' regulation is constitutionally permissible.

2. Three Categories of Permissible Regulation

a. Channels of Interstate Commerce

As discussed earlier, the first category of activity that Congress may regulate includes those activities that impede or interfere with the channels of interstate commerce.[233] A channel of commerce concerns tangible items, such as a motel or highway, that facilitates interstate commerce.[234] In *Katzenbach v. McClung*,[235] the Court held that a restaurant that served a substantial quantity of food could not impede travel by

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(1996) (declaring that a central element of Commerce Clause legislation is a link to commerce, and not necessarily commercial activities, and explaining that without this link to interstate commerce, "Congress lacks the power to enact legislation regulating any intrastate activity").

231. See Russell I. Pannier, Lopez *and Federalism*, 22 WM. MITCHELL L. REV. 71, 103-04 (1996) (recognizing that Congress enjoys the broad power to regulate nonfederal activities so long as Congress believes that the activity will have at least a minimal effect on commerce). *See generally supra* Part III.

232. *See* Yvette J. Mabbun, Comment, *Title III of the Violence Against Women Act: The Answer to Domestic Violence or a Constitutional Time-Bomb?*, 29 ST. MARY'S L.J. 207, 238 (1997) (arguing that the activity of domestic abuse is criminal in nature and not a valid exercise of federal commerce power).

233. *See Lopez*, 514 U.S. at 558 (listing "channels of interstate commerce" as the first broad category that Congress may constitutionally regulate under the Commerce Clause); *cf.* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253 (1964) (concluding that motels and hotels that discriminate on the basis of race against potential guests interfere with the use of the channels of interstate commerce, thereby impeding racial minority travelers).

234. *See* Heart of Atlanta Motel v. United States, 379 U.S. at 253 (stating that racial discrimination by hotels and motels impedes interstate travel by discouraging individuals because they lack the assurance of a place to rest during their travels).

235. 379 U.S. 294 (1964).

discriminating against interstate travelers.[236] In reaching this decision, the Court explained that discrimination in the "channels" of interstate commerce "discourages travel and obstructs interstate commerce for one can hardly travel without eating."[237]

Unfortunately, the Lautenberg Amendment does not involve a channel of interstate commerce, such as a road, hotel, or restaurant.[238] Rather, the Amendment regulates the private activities of certain individuals, particularly in regards to criminal behavior. By regulating anticipated violence, the Amendment does not involve a tangible thing upon which travel is dependent. Furthermore, the Court in *Lopez* rejected the argument that Congress may regulate *any* activity that is likely to lead to violent crime.[239] In fact, the regulation of crime has traditionally been left to the states.[240] Thus, the likelihood that a domestic violence offender in possession of a firearm may induce violence is not a sufficient justification for satisfying this first *Lopez* category.[241]

b. Instrumentalities of Interstate Commerce

The second category set forth in *Lopez* permits Congress to regulate and protect persons and instrumentalities of interstate commerce.[242] Under this category, Congress may legitimately regulate the movement of persons across state lines because a person constitutes an instrumentality of interstate commerce.[243] The Court permits the regulation of persons under the Commerce Clause because they contribute and promote interstate commerce through travel.

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236. *See* Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (holding that discrimination by restaurants against interstate travelers adversely impacts interstate commerce and is therefore unconstitutional).

237. *Id.* at 300.

238. *Cf. Heart of Atlanta Motel*, 379 U.S. at 253 (inferring that the activity of domestic violence offenders does not impede travel in the way that discrimination by hotels does).

239. *See Lopez*, 514 U.S. at 564 (rejecting the argument that federal commerce power entails regulating activities involving any aspect of violent crime).

240. *See id.* at 561 n.3 (citing Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)); *cf. id.* at 564 (stressing that the "[s]tates have historically been sovereign" regarding the regulation of education and law enforcement).

241. *See id.* at 561 (explaining that the regulation of an activity that may potentially lead to violence is not a valid exercise of Commerce Clause authority).

242. *See id.* at 558 (describing the second category of activities that Congress may regulate as "persons or things in interstate commerce," otherwise known as instrumentalities); *Katzenbach*, 379 U.S. at 304 (stating that Congress' express grant of Commerce Clause authority to regulate interstate commerce includes the regulation of the movement of persons); *Heart of Atlanta Motel*, 379 U.S. at 255-56 (asserting the "intercourse" of interstate commerce includes the movement of individuals across states).

243. *See Katzenbach*, 379 U.S. at 304; *Heart of Atlanta Motel*, 379 U.S. at 255-56.

The Lautenberg Amendment apparently satisfies this second category in its effort to protect victims of domestic violence by regulating domestic violence offenders in possession of a firearm that has "moved" in interstate commerce.[244] Furthermore, Congress is justified in regulating domestic violence offenders as instrumentalities because the offender's possession of a gun adversely affects the victim's ability to contribute to interstate commerce—the victim would otherwise be able to purchase goods, seek employment, or travel.[245] Although the majority in *Lopez* rejected this justification, Justice Breyer explained in his dissent that violence associated with gun sales can disrupt interstate commerce.[246] Thus, because a victim of domestic violence is less likely to be a productive member of society and the domestic violence offender may disrupt interstate commerce by contributing to gun-related violence, the regulation of this activity should be justified. However, unless the Supreme Court alters the view that it espoused in *Lopez*, the Court is not likely to view the Lautenberg Amendment as a valid exercise of Congress' commerce authority because the Court will likely reject the argument that domestic violence offenders may impede victims from travel and decrease benefits to interstate commerce.[247]

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244. *See* Gun Control Act of 1968, 18 U.S.C. § 922 (1994), *amended by* 18 U.S.C. § 922(g)(9) (Supp. III 1997) (prohibiting persons convicted of domestic violence misdemeanor offenses from transferring, possessing, or receiving a firearm or ammunition that has moved in interstate commerce and detailing that such a violation is a felony); Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811, 824 (S.D. Ind. 1998) (upholding the constitutionality of the gun ban for domestic violence misdemeanants that protects domestic violence victims from murder).

245. *Cf. Lopez*, 514 U.S. at 620, 623 (Breyer, J., dissenting) (suggesting that guns near schools undermine the quality of our nation's education, which directly impacts the national economy by producing under-educated workers subject to low paying jobs and otherwise preventing a well-educated workforce); *Heart of Atlanta Motel*, 379 U.S. at 253 (concluding that motels and hotels that racially discriminate against potential guests impede interstate travelers from positively contributing to interstate commerce). *But see Lopez*, 514 U.S. at 563-64 (concluding that the acceptance of the dissent's rationale would enable Congress to regulate any activity affecting the "national productivity" of individual citizens).

246. *See Lopez*, 514 U.S. at 624 (Breyer, J., dissenting) (explaining that violence involving firearms adversely affects interstate commerce).

247. *Cf. id.* at 623 (Breyer, J., dissenting) (suggesting that firearms near schools undermine the quality of our nation's education, which directly impacts the national economy by producing under-educated workers subject to low paying jobs and otherwise preventing a well-educated workforce); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 698 (1995) (pointing out that the government's best argument to uphold the Gun-Free School Zones Act in *Lopez* was that firearms hinder education and that an educated citizenry promotes a healthy economy). Notably, the district court in *Gillespie v. City of Indianapolis* examined the constitutionality of the Lautenberg Amendment under the Commerce Clause and held that it permissibly regulated the movement of individuals with firearms in

c. Activities Substantially Affecting Commerce

The third *Lopez* category permits Congress to regulate any activity with a "substantial relation" to interstate commerce.[248] Thus, any legislation that Congress enacts will pass constitutional muster if it successfully links the regulated activity to interstate commerce.[249] Yet, to do so, the activity must be one that "*substantially* affects interstate commerce."[250]

To satisfy this third category and to bring an activity within the scope of the Commerce Clause, courts have held that when Congress includes a jurisdictional element, such as "in or affecting commerce," the legislation is upheld.[251] Although the jurisdictional element is not required to create a permissible federal regulation under *Lopez*, the lack of such an element ensures further scrutiny by a court.[252] More importantly, the presence of a jurisdictional element allows a court to consider the surrounding circumstances in making the final determination of a regulation's constitutionality.[253] Congress, thus, has used a jurisdictional element to enact

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interstate commerce. *See Gillespie*, 13 F. Supp. 2d at 821 (suggesting that the Lautenberg Amendment, which regulates the behavior of private individuals or instrumentalities in interstate commerce, is a valid exercise of Commerce Clause authority).

248. *See Lopez*, 514 U.S. at 558-59 (outlining the third category of activity that Congress may regulate under the Commerce Clause as any activity that has a substantial relation to interstate commerce).

249. *See* Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 174 (1996) (arguing that the *Lopez* decision turned on the third category of activities because the first two categories were easily dismissed by the Court).

250. *See Lopez*, 514 U.S. at 559 (concluding that "substantially affects" commerce is the proper test).

251. *See id.* at 630 (Breyer, J., dissenting) (stating that Congress has enacted "more than 100 sections of the United States Code" using the words "affecting commerce" to define the scope of their regulation). *But see* Jennifer C. Philpot, Note, *Violence Against Women and the Commerce Clause: Can This Marriage Survive?*, 85 KY. L.J. 767, 794 (1997) (criticizing the fact that the sole mention of activities "affecting interstate commerce" in the Violence Against Women Act is sufficient to supply the jurisdictional element).

252. *See Lopez*, 514 U.S. at 561 (stating that a statute with a jurisdictional element must still undergo an inquiry regarding its relation to interstate commerce).

253. *See* United States v. Pierson, 139 F.3d 501, 502-03 (5th Cir.) (upholding as constitutional 18 U.S.C. § 922(g)(8), which prohibits persons subject to a protective order relating to domestic violence from possessing or transferring guns or ammunition that have moved in interstate commerce through the use of a jurisdictional element), *cert. denied*, 119 S. Ct. 220 (1998). The court in *Pierson* concluded that the jurisdictional element should be sufficient because it has been upheld in the felon-in-possession statute. *See id.* at 503 (stating that the jurisdictional element, "affecting commerce," creates an express nexus between guns and interstate commerce). *But see Lopez*, 514 U.S. at 559 (arguing that the "substantially affects commerce" test is the proper method to measure an activity's relation to interstate commerce, not the existence of a jurisdictional element in the statute); Rebecca E. Hatch, Note, *The Violence Against Women Act: Surviving the Substantial Effects*

laws preventing domestic violence by showing a relationship between the regulated activity to interstate commerce.[254]

The language of the Lautenberg Amendment literally links domestic violence offenders to interstate commerce by incorporating the term "in and affecting commerce" into the statute.[255] However, application of the Lautenberg Amendment is not triggered merely when domestic violence offenders come in contact with firearms; the Amendment also requires that the weapon in the offender's possession be one that has traveled in commerce.[256] In *Scarborough v. United States*,[257] the Court indicated

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of United States v. Lopez, 31 SUFFOLK U. L. REV. 423, 450 (1997) (suggesting that the inclusion of a jurisdictional element will act to confuse Congress and the courts).

Technically, a firearm manufactured out-of-state could satisfy the jurisdictional element of the statute; such a scenario may even constitute a "substantial effect" that fulfills the required nexus to interstate commerce. *See Lopez*, 514 U.S. at 560 (stressing that "where [an] economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained"); *Pierson*, 139 F.3d at 503-04 (indicating that weapons manufactured in another state, that later travel in interstate commerce, and that are later possessed by a domestic violence offender, satisfy the element of "affecting commerce"); Nina Smith, Comment, *Constitutional Law: The Reach of the Commerce Power over Noncommercial Acts*, 8 U. FLA. J.L. & PUB. POL'Y 139, 147 (1996) (suggesting that a jurisdictional element may be regarded as a safeguard by courts required to criminalize noncommercial acts).

254. *Cf.* United States v. Wallace, 889 F.2d 580, 583 (5th Cir. 1989) (explaining that Congress incorporates jurisdictional language within a statute when it intends to exercise its commerce power broadly).

255. *See* Gun Control Act of 1968, 18 U.S.C. § 922 (1994), *amended by* 18 U.S.C. § 922(g)(9) (Supp. III 1997) (using the language "in and affecting commerce" to tie domestic violence offenders to interstate commerce); Carlo D'Angelo, Note & Comment, *The Impact of* United States v. Lopez *upon Selected Firearms Provisions of Title 18 U.S.C. § 922*, 8 ST. THOMAS L. REV. 571, 584 (1996) (alleging that Congress inserted the term "commerce" into various portions in 18 U.S.C. § 922 merely to satisfy the nexus between regulated activities and federal commerce power).

256. *See* 18 U.S.C. § 922(g)(9); *see also* United States v. Bass, 404 U.S. 336, 337 (1971) (using jurisdictional language to "prohibit felons from possessing firearms" that have moved in commerce); United States v. Cunningham, 161 F.3d 1343, 1346-47 (11th Cir. 1998) (defeating challenges to Section 922(g)(8) that were based on the statute's inclusion of a jurisdictional element); United States v. Wilson, 159 F.3d 280, 286 (7th Cir. 1998) (finding that Section 922(g)(8) passes constitutional muster under the "substantially affects commerce" category set forth in *Lopez*); *Pierson*, 139 F.3d at 503 (noting that Section 922(g)(8) expressly links firearms with interstate commerce through the jurisdictional language in the statute). *But see* Yvette J. Mabbun, Comment, *Title III of the Violence Against Women Act: The Answer to Domestic Violence or a Constitutional Time-Bomb?*, 29 ST. MARY'S L.J. 207, 239-40 (1997) (presuming that after *Lopez*, "the Court . . . requires more than a chain of causation to bring an activity within the scope of Congress' commerce power"). Recall that in *Lopez*, the Court refused to regulate an activity that was likely to lead to crime merely because it was linked to education because education is an area of regulation for the states. *See Lopez*, 514 U.S. at 566 (arguing that the broad authority of Congress under the Commerce Clause does not include regulating education).

257. 431 U.S. 563 (1977).

that a regulation under the Commerce Clause would be upheld as long as a minimal nexus to interstate commerce was shown.[258] Thus, the Court has articulated a minimal burden of proof required to show "a prior movement of the firearm across state lines to satisfy the jurisdictional element and the Commerce Clause."[259]

The Lautenberg Amendment is also distinguishable from the Gun-Free School Zones Act addressed in *Lopez* in that the Amendment does not merely regulate the possession of a firearm.[260] The Lautenberg Amendment instead regulates the possession of a firearm with the requirement that the weapon be one that has "moved in commerce" prior to its possession, receipt, or transfer.[261] Thus, unlike the regulation in *Lopez*, the Lautenberg Amendment contains a jurisdictional element that explicitly requires the demonstration of a nexus between the gun and interstate commerce.[262] In other words, the "in or affecting commerce" language in the Lautenberg Amendment is satisfied once the firearm or ammunition possessed by a domestic violence misdemeanor offender has actually traveled from one state to another at some point in time.[263] Consequently, if the firearm or ammunition at issue was manufactured in one state and purchased by an individual residing in another state, either will be considered to have affected commerce.

Notably, the Supreme Court has upheld the validity of regulating persons in commerce under the felon-in-possession statute,[264] which contains

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258. *See* Scarborough v. United States, 431 U.S. 563, 577-78 (1977) (noting that the conviction of the petitioner would be affirmed because Congress intended at least a "minimal nexus" to interstate commerce).

259. *Wilson*, 159 F.3d at 286-87 (citing United States v. Lewis, 100 F.3d 49, 51-52 (7th Cir. 1996)); *see Scarborough*, 431 U.S. at 577 (upholding Commerce Clause legislation if the government demonstrated a "minimal nexus" to interstate commerce).

260. *See Lopez*, 514 U.S. at 562 (stating that because the Gun-Free School Zones Act did not have an explicit tie to commerce, such as a jurisdictional element, it merely regulates the possession of a gun).

261. *See* National Ass'n of Gov't Employees, Inc. v. Barrett, 968 F. Supp. 1564, 1572 (N.D. Ga. 1997) (distinguishing Section 922(g)(9) from the Gun-Free School Zones Act because the Lautenberg Amendment requires that the government prove the firearm was possessed or received after it has moved in commerce), *aff'd sub. nom.* Hiley v. Barrett, 155 F.3d 1276 (11th Cir. 1998).

262. *See id.* (requiring the government, in order to prevail, to prove the nexus between the domestic violence offender in possession of a firearm, and that the gun has affected or moved in commerce at some point in time).

263. *See* United States v. Pierson, 139 F.3d 501, 503-04 (5th Cir.) (explaining that the jurisdictional element of a statute is satisfied if the weapon has previously traveled in commerce), *cert. denied*, 119 S. Ct. 220 (1998).

264. *See Scarborough*, 431 U.S. at 566-67 (upholding a conviction based on the felon-in-possession statute); Belflower v. United States, 129 F.3d 1459, 1461 (11th Cir. 1997) (stating that the United States Court of Appeals for the Eleventh Circuit upheld the consti-

the same jurisdictional element as the Lautenberg Amendment.[265] Also, as previously mentioned, a number of courts of appeals have upheld other GCA provisions similar to the Lautenberg Amendment, such as Section 922(g)(8) that prohibits a domestic violence offender subject to a protective order from possessing firearms.[266] Considering the similarities in the language of other GCA provisions and the felon-in-possession statute, as well as the courts' unwillingness to invalidate their constitutionality, the Lautenberg Amendment is unlikely to be struck down.[267] Essentially, irrespective of the Amendment's viability under the first two *Lopez* categories, the inclusion of a jurisdictional element assures that the Lautenberg Amendment will pass constitutional muster.[268] In addition, the Lautenberg Amendment is a part of the GCA, our country's primary gun control legislation, and the Court is unlikely to invalidate this provision because to do so would effectively undermine the force of the GCA.[269] This assertion is evidenced by the substantial impact of the GCA on interstate commerce through the regulation of firearms and the

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tutionality of the felon-in-possession statute under the Commerce Clause even after the *Lopez* decision), *cert. denied*, 118 S. Ct. 2308 (1998); United States v. Lewis, 100 F.3d 49, 50 (7th Cir. 1996) (asserting that the "in commerce or affecting commerce" language in the felon-in-possession statute requires that the firearm possessed by the felon must have traveled in interstate commerce at some point in time); United States v. McAllister, 77 F.3d 387, 389-90 (11th Cir. 1996) (upholding 18 U.S.C. § 922(g)(1), stating that the statutory jurisdictional element defeats any facial challenge under the Commerce Clause by requiring a minimal nexus between the firearm and interstate commerce).

265. *See* United States v. Wilson, 159 F.3d 280, 286 (7th Cir. 1998) (stating that the United States Court of Appeals for the Fifth Circuit has upheld the constitutionality of the felon-in-possession statute, which shares the same jurisdictional element as that found in the Gun Control Act); United States v. Rawls, 85 F.3d 240, 242 (5th Cir. 1996) (finding § 922(g)(1) constitutional). *Compare* 18 U.S.C. § 922(g)(1) (1994) (using "in or affecting commerce" to link firearms possession by felons to interstate commerce), *with* 18 U.S.C. § 922(g)(9) (Supp. III 1997) (incorporating "in or affecting commerce" to connect convicted misdemeanor domestic violence offenders in possession of a firearm to interstate commerce).

266. *See supra* Part III.B.

267. *See* Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 718 (1995) (arguing that narrowing the possession of guns by convicted felons or striking down the entire Gun Control Act based on *Lopez* would require the Court to overrule its own precedent, an action that was disfavored by the majority in *Lopez*).

268. *See* United States v. Lopez, 514 U.S. 549, 561 (1995) (implying that the presence of a jurisdictional element in a federal regulation establishes the constitutionality of a statute); *see also* Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 696-97 (1995) (reiterating that "[t]he Clinton administration and numerous legislators have concluded that the lack of a jurisdictional element was the dispositive defect in the Gun-Free School Zones Act").

269. *Cf. Lopez*, 514 U.S. at 561 (implying that the Gun-Free School Zone Act might have been saved had the Act been a part of a larger regulation of economic activity that substantially affects interstate commerce).

Court's corresponding unwillingness to strike down other provisions of the GCA.[270]

Assuming that the jurisdictional element is sufficient to pass constitutional muster, the Lautenberg Amendment may also remain within the reach of federal commerce power as long as domestic violence offenders' possession of guns is linked to interstate commerce through other means.[271] For example, Congress could link the regulated activity to interstate commerce by demonstrating that the firearm has moved through the stream of commerce.[272] In *United States v. Pierson*, the Fifth Circuit upheld the constitutionality of a similar provision of the GCA[273] that prohibits a domestic violence offender subject to a protective order "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."[274] The court explained that Pierson's rifle was manufactured in Connecticut and traveled across state lines to his possession in Texas.[275] This stream of commerce argument, thus, linked the weapon to

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270. *Cf.* Pierson v. United States, 119 S. Ct. 220 (1998) (denying the petition for writ of certiorari in a case upholding the constitutionality of Section 922(g)(8) of the Gun Control Act of 1968); *Lopez*, 514 U.S. at 561 (indicating that when a regulation is part of a larger economic regulatory scheme the Court would rather uphold that regulation than undermine the force of the entire scheme).

271. *See Lopez*, 514 U.S. at 561 (indicating that the removal of a jurisdictional element without any other relation to commerce makes a federal regulation unconstitutional under the Commerce Clause). *But see* United States v. Bass, 404 U.S. 336, 337, 349 (1971) (interpreting as ambiguous 18 U.S.C. § 1202(a), which criminalizes a felon's "recei[pt], posse[ssion], or transpor[tation] in commerce or affecting commerce . . . [of] any firearm" and requiring the proof of an additional nexus to the activity). The *Bass* Court explained that when the congressional intent of a statute is unclear, requiring an additional nexus to interstate commerce will not be perceived as upsetting the balance of state and federal powers. *See Bass,* 404 U.S. at 349 (explaining the Court's interpretation of Section 1202(a)).

272. *Cf.* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 106 (1987) (illustrating that an item placed into the stream of commerce affects interstate commerce if the item is manufactured in one state and sold in another state); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 306 (1980) (Brennan, J., dissenting) (demonstrating that the sale of an automobile moves in the stream of commerce when it is purchased in New York and then crosses into Oklahoma); United States v. Pierson, 139 F.3d 501, 504 (5th Cir.) (showing that the movement of a firearm across state lines constitutes interstate commerce), *cert. denied*, 119 S. Ct. 220 (1998).

273. *See Pierson*, 139 F.3d at 503 (upholding 18 U.S.C. § 922(g)(8) as a constitutional exercise of Congress' Commerce Clause authority).

274. 18 U.S.C. § 922(g)(8) (Supp. III 1997).

275. *See Pierson*, 139 F.3d at 504 (advancing the proposition that a gun manufactured out-of-state, such as Pierson's, and later possessed in a different state, adequately establishes a link between the gun and interstate commerce).

interstate commerce with evidence that "a gun was manufactured in one state and possessed in another state."[276]

Similarly, the Lautenberg Amendment prohibits a person "convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."[277] Because of the similarities between the provision in *Pierson* and that contained in the Lautenberg Amendment, the regulation of domestic violence offenders satisfies the "substantially affects commerce" category in *Lopez*. To this end, one district court in particular has upheld the Lautenberg Amendment as non-violative of the Commerce Clause.[278] Thus, Congress may permissibly regulate the possession of guns by domestic violence misdemeanor offenders under the substantially affecting commerce category set forth in *Lopez*.

The ease of fitting the Lautenberg Amendment into one, and possibly two, of the three permissible categories indicates that the Commerce Clause provides Congress with sufficient authority to regulate misdemeanor domestic violence offenders' possession of firearms that have moved in interstate commerce.[279] The Lautenberg Amendment regulates a noncommercial activity and falls within at least one category under *Lopez*: the Amendment substantially affects commerce and arguably regulates an instrumentality of commerce. Therefore, the Amendment can be said to be a valid exercise of Congress' Commerce Clause power. The constitutional inquiry is not complete, however, until the principles of state sovereignty and federalism are addressed.

B. *Step Two: Applying* Printz *to the Lautenberg Amendment*

Assuming that the Lautenberg Amendment survives a constitutional attack under *Lopez*, the bright-line rule established in *Printz* that prevents Congress from "commandeering" states to enforce federal regulation must not be violated.[280] Comparatively, the constitutional dilemma

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276. *Id.*

277. Gun Control Act of 1968, 18 U.S.C. § 922 (1994), *amended by* 18 U.S.C. § 922(g)(9) (Supp. III 1997).

278. *See* Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811, 822 (S.D. Ind. 1998) (finding that the Lautenberg Amendment was a proper exercise of Commerce Clause power).

279. *See* United States v. Lopez, 514 U.S. 549, 558-59 (1995) (implying that a federal regulation outside the parameters established in *Lopez* is an unconstitutional exercise of federal commerce power).

280. *See* Printz v. United States, 117 S. Ct. 2365, 2384 (1997) (concluding that Congress cannot force the states to carry out a federal regulation).

regarding the implementation of the Lautenberg Amendment parallels the problem addressed in *Printz*.[281] As such, step two of this analysis requires a court to determine whether the implementation of the Lautenberg Amendment indirectly requires state officials to carry out federal law.

Unfortunately, the Lautenberg Amendment is *not* self-enacting, and therefore, indirectly forces state officials to aid in its enforcement.[282] In fact, confiscating weapons and determining who is in violation of the Lautenberg Amendment will require state law enforcement officials to aid in the process, even with the use of the National Instant Check System.[283] Although the system acts as a central depository of information, thus allowing firearm dealers to safeguard against illegal sales, it depends upon state and local employees to update the records.[284] Accordingly, by requiring state efforts to aid in its enforcement, the Lautenberg Amendment, as an unfunded mandate, may very well be unconstitutional under the Supreme Court's decision in *Printz*.[285]

Although the Lautenberg Amendment may indirectly mandate states to act, the language of the Amendment does not explicitly require the states to cooperate. In *Gillespie v. City of Indianapolis*,[286] for example, a federal district court held that the Lautenberg Amendment regulates persons, not states, and does not contain an express federal mandate for

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281. *See id.* at 2368 (asking whether the Brady Handgun Violence Prevention Act, which "command[s] state and local law enforcement officials to conduct background checks on prospective handgun purchasers and to perform certain related tasks, violate[s] the Constitution").

282. *Cf. id.* at 2383 (finding that Congress may not command states to administer federal regulatory programs).

283. *See National Background-Check System Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 105th Cong. (1998) (statement of James E. Kessler, Jr., Section Chief, Criminal Justice Information Services Division, FBI) (projecting that states must input information regarding new arrests and convictions), *available in* 1998 WL 307146; Bruce Reed & Jose Cerda, *The White House: Press Briefing*, M2 PRESSWIRE, Aug. 10, 1998 (stating that the National Instant Check System will replace the Brady background check, allowing gun dealers to perform a background inquiry without the aid of state officials), *available in* 1998 WL 16516848.

284. *See National Background-Check System Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 105th Cong. (1998) (statement of James E. Kessler, Jr., Section Chief, Criminal Justice Information Services Division, FBI) (explaining that states will be required to input information regarding arrests and convictions due to the lag time between the state and the federal level). This system will require human intervention in up to twenty-five percent of the checks. *See id.* (stating the statistics for possible human intervention at the state level).

285. *See Printz*, 117 S. Ct. at 2384 (reiterating that Congress cannot order states to implement federal legislation without compensation).

286. 13 F. Supp. 2d 811 (S.D. Ind. 1998).

states to enforce the regulation.[287] The *Gillespie* court therefore held that the Amendment did not violate the *Printz* bright-line rule.[288] Despite the holding in *Gillespie*, the Lautenberg Amendment nonetheless *requires*, albeit indirectly, participation of state officials in its enforcement.[289] Thus, whether the Lautenberg Amendment is compatible with *Printz* becomes uncertain and dependent upon the interpretation of the language of the Amendment.[290] By failing to defeat a challenge under step two of the Commerce Clause analysis, the Lautenberg Amendment may nevertheless be constitutionally invalid.

VI. PRESERVING THE LAUTENBERG AMENDMENT

Legislation enacted to prevent gun-related domestic violence must be tailored to fit within the "constitutional box." Because the constitutionality of the Lautenberg Amendment is debatable, action must be taken to ensure that domestic violence victims can be protected from inevitable death when a gun is involved. This Comment, therefore, proposes two solutions: the first solution addresses the possibility of strengthening the Amendment, and the second suggests the creation of state laws that ban firearms from domestic violence offenders. Although either solution will yield a constitutional result, thus assuring victims of domestic violence that the epidemic of gun-related domestic violence is taken seriously, enactment of both solutions is most desirable.[291]

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287. *See* Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811, 821 (S.D. Ind. 1998) (holding that Section 922 (g)(9) regulates private individuals' behavior, not states, nor does it mandate that states enforce the regulation).

288. *See id.* at 819 (holding that the Lautenberg Amendment does not violate principles set forth in *Printz*).

289. *See id.* at 819-20 (indicating that state and local law enforcement agencies would have to determine if their employees are misdemeanor domestic violence offenders).

290. *See, e.g.*, *Printz*, 117 S. Ct. at 2384 (proclaiming that Congress cannot force states to carry out federal legislation); New York v. United States, 505 U.S. 144, 161 (1992) (questioning the "circumstances under which Congress may use the states as implements of regulation" and not Congress' commerce authority); Coyle v. Smith, 221 U.S. 559, 565 (1911) (stating that the Constitution has not been interpreted to give Congress the ability to command states to govern according to Congress' instructions). *But cf.* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 758-59 (1982) (upholding legislation that did not command states to develop programs regarding the national energy crisis under the Public Utility Regulatory Policies Act of 1978); Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981) (upholding the Surface Mining Control and Reclamation Act of 1977 because the regulation did not command the states to assist in its implementation).

291. Two solutions are necessary because although the Lautenberg Amendment is desirable, it may not endure; therefore, uniform state legislation is needed in the event that the Amendment is defeated. This situation is analogous to the problem that federal and state governments faced in respect to child custody disputes. *Cf.* Parental Kidnaping Pre-

A. *Proposed Federal Solution*

Although, the Lautenberg Amendment will likely succeed in satisfying the third *Lopez* category of permissible regulation because it incorporates a jurisdictional element that the federal courts have consistently upheld as valid, this alone does not remove the possibility that the Supreme Court may strike down the Lautenberg Amendment if the implementation intrudes upon principles of state sovereignty set forth in *Printz*.[292] Moreover, although the court in *Gillespie* held that the Lautenberg Amendment did not violate the principles set forth in *Printz*,[293] Congress can preclude a future *Printz* challenge by including the concept of cooperative federalism within the statute.[294] As previously discussed, cooper-

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vention Act of 1980, 42 U.S.C. § 663 (1994 & Supp. II 1996) (providing for various methods in which the federal government is to aid states in locating any noncustodial parents or children); UNIFORM CHILD CUSTODY JURISDICTION ACT §§ 1-405 (1998) (providing model legislation adopted by all fifty states to ensure uniformity application of standard with respect to resolving child custody disputes). The PKPA functions as the federal legislation; however, because states have a large role in reducing child custody disputes, the UCCJA was necessary to ensure seamless application to parents involved in child custody disputes. *See* UNIFORM CHILD CUSTODY JURISDICTION ACT § 1 (1998) (explaining the purposes of the Act as furthering the resolution of child custody disputes and promoting cooperation among state courts).

292. *See Printz*, 117 S. Ct. at 2379 (asserting that the Commerce Clause is not the proper means to carry a law into execution and must be struck down if the legislation violates principles of state sovereignty); Stephen Lofted, *Poverty, Democracy and Constitutional Law,* 141 U. PA. L. REV. 1277, 1296 n.75 (indicating that although an "exceedingly wide berth" exists within which Congress defines its powers, the Court has, at times, been mindful of the importance in preserving state sovereignty).

293. *See Gillespie*, 13 F. Supp. 2d at 819 (confirming that the Lautenberg Amendment does not require states to implement it and that states retain the prerogative to enact state domestic violence laws).

294. *See* New York v. United States, 505 U.S. 144, 166-68 (1992) (advancing the concept of cooperative federalism as a permissible method to avoid commandeering states). The Clean Water Act, the Occupational Health and Safety Act of 1970, the Resource Conservation and Recovery Act 1976, and the Alaska National Interest Lands Conservation Act are all examples of "cooperative federalism." *See id.* at 167-68 (explaining that cooperative federalism involves Congress giving states the choice of regulating private activity using federal standards or having federal regulations pre-empt state law); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1174 (1995) (explaining that federal environmental statutes commonly follow the "cooperative federalism" model, which "make[s] federal agencies responsible for establishing national environmental standards that state authorities then may qualify to administer and enforce"). *See generally* Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205 (1997) (tracing the history of cooperative federalism statutes, explaining their rationale, and highlighting the salient features of contemporary cooperative federalism statutes). Because the strongest threat to the Lautenberg Amendment is a Tenth Amendment challenge, Congress may preclude these challenges under the Supremacy Clause contained in Article VI, Section 2

ative federalism is a compromise between state and federal governments to implement funded federal mandates.[295] Further, cooperative federalism was held constitutional in *New York v. United States* because it does not intrude upon state sovereignty.[296]

Accordingly, the Lautenberg Amendment should read:

> It is unlawful for an individual convicted of a domestic violence misdemeanor crime "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce"[297] or otherwise has moved in or affects interstate commerce.[298] States implementing this statute through background checks are eligible to negotiate their efforts for federal funding.[299]

This revised version of the statute varies slightly from the current Lautenberg Amendment by including a cooperative federalism clause to avoid violating the principles of state sovereignty set forth in *Printz*. By including the cooperative federalism clause, this otherwise valid exercise of Commerce Clause authority is therefore guaranteed not to be undermined by intruding upon state sovereignty. As illustrated, real threats to

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of the United States Constitution. *See* U.S. CONST. art. 6, § 2 (stating that the federal Constitution is "the Supreme Law of the Land"). In this regard, one would assert that the Lautenberg Amendment is part of a larger regulatory scheme, the GCA, which Congress has properly enacted. *Cf.* United States v. Lopez, 514 U.S. 549, 561 (1995) (implying that the Gun-Free School Zones Act may have been upheld as constitutional under the Commerce Clause had the regulation been an essential part of a larger regulation of economic activity). Essentially, the argument would be that invalidating the Amendment undermines the force of the entire GCA and its constitutional grant of authority.

295. *See* Kena I. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97, 226 (1996) (detailing that cooperative federalism's success hinges upon proper funding at all levels of government to permit each governmental actor "to assume its appropriate role"); *cf. New York*, 505 U.S. at 188 (stating that the Constitution permits Congress to offer financial incentives to states as a means of encouraging states to implement federal regulations).

296. Alternatively, Congress may preclude challenges to the statute, reasoning that under the Supremacy Clause, Congress has the power to enact legislation, such as the GCA and its amendments, if in the furtherance of that legislation it does not intrude upon state sovereignty. *See* U.S. CONST. art. 6, § 2 (stating that the United States Constitution is the "supreme Law of the Land").

297. Gun Control Act of 1968, 18 U.S.C. § 922 (1994), *amended by* 18 U.S.C. § 922(g)(9) (Supp. III 1997).

298. *Cf.* H.R. 1082, § 2, 106th Cong. (1999) (finding that hate-crime violence "affects interstate commerce in many ways"). This bill provides one example of the language used to clarify that the legislation is a proper exercise of congressional authority.

299. In addition, the legislation could explain that one of the goals of the Amendment is to function as part of national firearm policy, namely, the Gun Control Act of 1968.

the longevity of the Lautenberg Amendment are challenges under *Printz*, not *Lopez*. Thus, the Lautenberg Amendment can be preserved as a valid exercise of Congress' Commerce Clause authority by incorporating this proposed federal solution.

B. *Proposed State Solution*

Regardless of the constitutional strength that the Lautenberg Amendment enjoys, the stream of commerce argument may be ineffective in linking the possession of guns by domestic violence offenders to interstate commerce;[300] this ineffective link would place the Amendment in jeopardy. Furthermore, the Lautenberg Amendment is loosely constructed and provides a loophole for domestic violence offenders. Domestic violence offenders who possess firearms not passing through interstate commerce are not considered to have violated the Lautenberg Amendment because they have neither contributed to, nor hindered, commerce.[301] Although this loophole is remote, it demonstrates an additional weakness in terms of reaching the Lautenberg Amendment's goal of preventing future gun-related domestic violence incidents.[302]

Regulation by states therefore would not only strengthen the force behind the Lautenberg Amendment, but would also avoid violating modern commerce principles; such regulation would also reinforce the states' sovereignty.[303] Currently, several states have taken an initiative by enacting

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300. *See* United States v. Lopez, 514 U.S. 549, 602 (1995) (Stevens, J., dissenting) (disagreeing with the majority's assertion that guns are articles to promote commerce and possession of a firearm is usually the product of commercial activity).

301. *See* Gun Control Act of 1968, 18 U.S.C. § 922 (1994), *amended by* 18 U.S.C. § 922(g)(9) (Supp. III 1997) (requiring that a firearm "move" through interstate commerce to qualify as a violation of the Lautenberg Amendment). To demonstrate this point, visualize a person convicted of a misdemeanor crime of domestic violence living in State A, who purchases a gun manufactured and sold in State A. The firearm is not "moving" in commerce by transfer or receipt. Additionally, the possession of the firearm has not "moved" in commerce under this hypothetical because the gun remains in State A with no indication of future "movement."

302. *See Lopez*, 514 U.S. at 561 (suggesting that the presence of a jurisdictional element in the Gun-Free School Zones Act would not have affected the Court's inquiry); United States v. Wilson, 159 F.3d 280, 286-87 (7th Cir. 1998) (concluding that the criminal statute in *Lopez* did not regulate an economic activity affecting interstate commerce).

303. *See* John Attanasio, *Foreword: Stages of Federalism?*, 42 ST. LOUIS U. L.J. 485, 492 (1998) (discussing the limitation on Congress' ability to order states to administer federal programs as a critical attribute of state sovereignty); *see also* Michelle W. Easterling, *For Better or Worse: The Federalization of Domestic Violence*, 98 W. VA. L. REV. 933, 953 (1996) (criticizing the federalization of domestic violence as an inadequate device to punish all domestic violence offenders and, instead, advocating strong domestic violence laws at the state level that are supported by federal funding).

some type of legislation regarding domestic violence and guns.[304] For example, Idaho has recently codified provisions that incorporate the GCA by reference.[305] However, to ensure that victims of domestic violence are protected nationally, all states should enact some form of the proposed legislation. Doing so is clearly within a state's power and in the best interests of its citizens.

The power to enact such legislation is derived from the Tenth Amendment of the United States Constitution, which expressly provides that all powers not delegated by the Constitution of the United States are reserved to the individual states.[306] In this regard, a state's police powers implicit in the Tenth Amendment permit a state to regulate the health, safety, welfare, and morals of its citizens.[307] Because regulating domestic violence offenders relates directly to the health, safety, and welfare of domestic violence victims and is well within a state's police powers, a state should model its legislation after the Lautenberg Amendment, although redacting the unnecessary jurisdictional element. A proposed state firearm ban against domestic violence offenders, therefore, could read:

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304. *See* Melanie L. Mecka, Note, *Seizing the Ammunition from Domestic Violence: Prohibiting the Ownership of Firearms by Abusers*, 29 RUTGERS L. REV. 607, 609 (1998) (stating that "there are over twenty-five state domestic violence statutes across the county fighting to keep weapons out of the hands of abusers"); *see also* Eric Andrew Pullen, Comment, *Guns, Domestic Violence, Interstate Commerce, and the Lautenberg Amendment: "[S]imply Because Congress May Conclude That a Particular Activity Substantially Affects Interstate Commerce Does Not Necessarily Make It So."*, 39 S. TEX. L. REV. 1029, 1035 (1998) (reviewing the large-scale response by state governments and legal systems to the crisis of domestic violence).

305. *See* IDAHO CODE § 18-3315 (1997) (stating that residents of Idaho who desire to purchase a firearm are subject to the provisions of the Gun Control Act of 1968).

306. *See* U.S. CONST. amend. X (leaving all powers of government not assigned to the federal government to the states); Thomas B. McAffee, *The Federal System As Bill of Rights: Original Understandings, Modern Misreadings*, 43 VA. L. REV. 17, 32 (1998) (asserting that the powers reserved to the states refer to the rights of individuals that actually serve as a limitation upon the scope of federal power).

307. *See, e.g.*, Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (outlining the requirements for a valid local ordinance, which is an exercise of the municipality's police power); Lochner v. New York, 198 U.S. 45, 53 (1905) (implying that a state's police power is a power to regulate upon which Congress may not intrude); *see also* Anthony S. McCaskey, Comment, *Thesis and Antithesis of Liberty of Contract: Excess in* Lochner *and* Johnson Controls, 3 SETON HALL CONST. L.J. 409, 436 (1993) (reflecting on the "aftermath" of *Lochner*, which regarded legislation as invalid if it did not fall inside the state's police power). The *Ambler Realty* Court indicated that the regulation must bear a "substantial relation to the public health, safety, morals, or general welfare." *Ambler Realty*, 272 U.S. at 395.

> It is a felony for a person convicted of a misdemeanor crime of domestic violence to possess, transfer, or receive firearms or ammunition.[308]

At the very least, this state solution furthers the policy behind the Lautenberg Amendment of stopping deaths caused by gun-related domestic violence. This proposal can achieve that goal by serving as a safety net to the Lautenberg Amendment should the Amendment ever be defeated. In addition, the state proposal functions in concert with the Lautenberg Amendment with the least chance of preemption. Finally, the state legislation would continue to close the gap on domestic violence offenders and their accessibility to firearms.[309]

VII. CONCLUSION

The effects of domestic violence reach far beyond the lives of its victims. Statistics conclusively establish that the combination of guns and domestic violence cause more deaths than incidents that are not associated with guns. Ostensibly, prevention of unnecessary deaths by gun-related domestic violence was the most compelling reason for passing the Lautenberg Amendment and keeping guns out of the hands of abusers. Despite the Amendment's laudable purpose, legislation has been introduced to repeal the Lautenberg Amendment based on various legal principles, including a challenge that the Amendment is an unconstitutional exercise of Congress' Commerce Clause authority. To avoid this possibility, the federal regulation proposed in this Comment assures that the Amendment constitutes a valid exercise of Congress' Commerce Clause authority. This solution seeks to incorporate various safeguards to satisfy

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308. This proposal is not based on any existing statute because states have failed to adopt any state legislation similar to the Lautenberg Amendment. Although states such as Texas have domestic violence legislation in effect, such legislation is not enough to prevent offenders who possess firearms from committing further acts of violence or death against their intimate partners, spouses, or children. *Cf.* TEX. FAM. CODE ANN. § 153.004 (Vernon 1996) (utilizing a party's history of domestic violence for the purpose of determining whether to award custody of a child to the party). As discussed earlier, Idaho specifically incorporates the GCA by reference into its statute; however, if the Lautenberg Amendment fails, the Idaho statute, which is dependent upon the federal legislation, will be ineffective. Therefore, incorporating the Lautenberg Amendment into state legislation by reference is not sufficient to ensure that effective domestic violence legislation is in force. Thus, states would need to take their own affirmative action that parallels the Lautenberg Amendment, should it fail at the national level. If the Lautenberg Amendment is declared constitutionally infirm, model legislation such as in this state proposal would serve as a continued deterrent to convicted misdemeanor domestic violence offenders.

309. *Cf.* Frank R. Lautenberg, *No Guns for Wife-Beaters*, WASH. POST, Apr. 3, 1997, at A21 (explaining that the underlying principle of the Lautenberg Amendment is to keep guns away from "wife-beaters and child abusers"), *available in* 1997 WL 10010533.

the principles set forth in the recent Supreme Court decisions, *Lopez* and *Printz*. The proposed solutions empower the states to protect victims of gun-related domestic violence as well.

Whether the solution to prevent future deaths caused by gun-related domestic violence is created by Congress or the states, immediate action is critical to preserve the goals of the Lautenberg Amendment. To do so will ultimately protect the victims of domestic violence from future abuse. More importantly, a solution that embodies the aims of the Lautenberg Amendment may likely save their lives as well. [310]

310. *See id.*