Fordham Law Review

Volume 62 | Issue 6 Article 8

1994

Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession

James M. Maloney

Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession

Cover Page Footnote

*I would like to thank Professor George C. Cochran of the University of Mississippi Law Center for having challenged me, during the summer fo 1993, to write the mock dissent to Wickard v. Filburn that marked the beginning of my efforts in this area. Additionally, I am grateful for the input of the following members of the Fordham Law faculty: Martin S. Flaherty, Michael M. Martin, William M. Treanor, and, especially, Sean P. Walsh. Finally, many thanks are due to all those who assisted me in the preparation of this Note for publication, including Christopher W. Atkinson, Gian Brown, Kieran Doyle, William J. Geller, Cristopher Greer, Nina Keilin, Robert S. Mayer, John M. Mawe, Kathy L. McFarland, Thomas A. McGratch, David E. Roth, Jonathan S. Shapiro, and Paul F. Washington.

SHOOTING FOR AN OMNIPOTENT CONGRESS: THE CONSTITUTIONALITY OF FEDERAL REGULATION OF INTRASTATE FIREARMS POSSESSION

*JAMES M. MALONEY**

INTRODUCTION

As 1993 drew to a close, two federal prosecutions for possession of firearms on or near school grounds, pursuant to the Gun-Free School Zones Act of 1990 (the "Act"),[1] resulted in a split between the Fifth and Ninth Circuits on the question of the Act's constitutionality. On September 15, in *United States v. Lopez*,[2] the United States Court of Appeals for the Fifth Circuit held the Act, in the full reach of its terms, invalid as beyond the powers granted to Congress under the Commerce Clause.[3] On December 21, in *United States v. Edwards*,[4] the Ninth Circuit reached the opposite conclusion, rejecting the *Lopez* reasoning[5] and explicitly recognizing that an intercircuit conflict would be created.[6] In addition, there have been five recent district court rulings on motions to dismiss indictments under the Act, based on its putative unconstitutionality, with varied results.[7] On April 18, 1994, the Supreme Court decided to review the *Lopez* decision.[8]

---

* I would like to thank Professor George C. Cochran of the University of Mississippi Law Center for having challenged me, during the summer of 1993, to write the mock dissent to *Wickard v. Filburn* that marked the beginning of my efforts in this area. Additionally, I am grateful for the input of the following members of the Fordham Law faculty: Martin S. Flaherty, Michael M. Martin, William M. Treanor, and, especially, Sean P. Walsh. Finally, many thanks are due to all those who assisted me in the preparation of this Note for publication, including Christopher W. Atkinson, Gian Brown, Kieran Doyle, William J. Geller, Cristopher Greer, Nina Keilin, Robert S. Mayer, John M. Mawe, Kathy L. McFarland, Thomas A. McGrath, David E. Roth, Jonathan S. Shapiro, and Paul F. Washington.

1. Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4844-45 (1990) (codified at 18 U.S.C. § 922(q) (Supp. IV 1992)).

2. 2 F.3d 1342 (5th Cir. 1993), *cert. granted*, 62 U.S.L.W. 3690 (U.S. Apr. 18, 1994) (No. 93-1260).

3. *See id.* at 1367-68. The court noted that "[n]o other basis for section 922(q) ha[d] been suggested." *Id.* at 1368 n.52.

4. 13 F.3d 291 (9th Cir. 1993), *petition for cert. filed* Mar. 25, 1994 (No. 93-8487).

5. *See id.* at 294. The Ninth Circuit observed: "With respect, we believe the Fifth Circuit has misinterpreted, or refused to follow, the decisions of the United States Supreme Court that are binding on all courts inferior to our nation's highest court." *Id.* The Ninth Circuit is here referring to the *Lopez* court's treatment of Congress's failure to have made formal or informal findings in enacting the Gun-Free School Zones Act. For a detailed discussion of this aspect of the *Lopez-Edwards* split, see *infra* part III.

6. *See Edwards*, 13 F.3d at 294.

7. *See* United States v. Ornelas, 841 F. Supp. 1087 (D. Colo. 1994) (constitutional); United States v. Glover, 842 F. Supp. 1327 (D. Kan. 1994) (constitutional); United States v. Trigg, 842 F. Supp. 450 (D. Kan. 1994) (unconstitutional); United States v. Holland, 841 F. Supp. 143 (E.D. Pa. 1993) (constitutional); United States v. Morrow, 834 F. Supp. 364 (N.D. Ala. 1993) (unconstitutional).

8. 62 U.S.L.W. 3690 (U.S. Apr. 18, 1994) (No. 93-1260).

It is generally agreed that the modern scope of the commerce power, as a source of legislative authority for Congress, is quite broad, even virtually unlimited.[9] Thus, not surprisingly, the Commerce Clause[10] has become, in recent years, the foundation for an expanding federal criminal jurisdiction over intrastate activities,[11] on the theory that such activities "affect interstate commerce."[12] Although the Supreme Court has stated that there are limits to the breadth of the commerce power,[13] the absence of any clearly articulated doctrine defining these limits[14] has left the resolution of the *Lopez-Edwards* split an open question.[15]

---

9. *See, e.g.*, Robert H. Bork, The Tempting of America: The Political Seduction of the Law 158 (1990) ("[T]he expansion of Congress's commerce, taxing, and spending powers has reached a point where it is not possible to state that, as a matter of articulated doctrine, there are any limits left."); Rogers M. Smith, Liberalism and American Constitutional Law 162 (1990) ("The Court's affirmation of the Civil Rights Act [of 1964] confirmed the disappearance of any real limits on the commerce power . . . ."). For a critical analysis of the modern scope of the commerce power, see Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387 (1987).

10. U.S. Const. art. I, § 8, cl. 3.

11. *See* Elkins v. United States, 364 U.S. 206, 211 (1960) (recognizing "an era of expanding federal criminal jurisdiction"); United States v. LeFaivre, 507 F.2d 1288, 1296 (4th Cir. 1974) (recognizing "the problem of expanding federal criminal jurisdiction"); United States v. Glover, 842 F. Supp. 1327, 1332 (D. Kan. 1994) ("Congress generally relies upon the Commerce Clause to enact federal criminal laws."); Gerald Gunther, Constitutional Law 137 (12th ed. 1991) (recognizing that "risks persist in the mounting modern resort to the commerce power as the basis for new federal criminal laws"); Robert L. Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 Ariz. L. Rev. 271, 274 (1973) ("[R]ecent developments in the federalization of intrastate crime which appear to extend the commerce power beyond previous limits raise important constitutional questions under the commerce clause."); Tracy W. Resch, Comment, *The Scope of the Federal Criminal Jurisdiction Under the Commerce Clause*, 1972 U. Ill. L.F. 805, 805 (1972) ("The expansive reading given [the Commerce Clause] by the judiciary has allowed the federal government, in relatively recent times, to inject itself deep into the field of crime control.").

12. Modern applications include federal prosecutions for arson involving apartment buildings, *see* Russell v. United States, 471 U.S. 858, 862 (1985) (relying on the theory that the rental of "apartment unit[s]" is an activity that affects commerce), as well as for "loan sharking," *see* Perez v. United States, 402 U.S. 146 (1971). Under current Commerce Clause jurisprudence, Congress may regulate not only "activities affecting commerce" but also "the use of channels of interstate or foreign commerce" and the "protection of the instrumentalities of interstate commerce." *Id.* at 150. *See also* Fry v. United States, 421 U.S. 542, 547 (1975) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.").

13. *See, e.g.*, Maryland v. Wirtz, 392 U.S. 183, 198 (1968) ("This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the states.").

14. *See, e.g.*, Bork, *supra* note 9, at 158 (describing the commerce power as without articulated limits); *cf.* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 307 (1981) (Rehnquist, J., concurring) (describing the principle of a federal government of limited powers as a "fiction" and the manner in which the Court has construed the Commerce Clause as an illustration thereof); United States v. Cortner, 834 F. Supp. 242, 244 (M.D. Tenn. 1993) (stating that the courts have "stretched the Commerce Clause . . . beyond the wildest imagination of the Framers and beyond any rational interpretation of the language itself").

15. This Note argues that the scope of the commerce power, even as it is currently

This disagreement between the Fifth and Ninth Circuits represents a major divergence of judicial opinion on the essential question of the breadth of Congress's power. Accordingly, the outcome of the debate will have far-reaching consequences, not only on the development of Commerce Clause jurisprudence, but also, as a practical matter, on the future of the growing trend toward federalizing intrastate crimes.[16] The Court now has the opportunity to delineate more precisely the contours of the modern commerce power, and, in so doing, to shape the future extension of the federal criminal jurisdiction into intrastate activities.[17] Even more significantly, the Court, in reviewing *Lopez*, may take a consequential step toward deciding whether federalism remains a viable concept as we enter the twenty-first century.

This Note argues that *Lopez* must be affirmed, that the modern scope of the commerce power, although undeniably broader than that contemplated by the Framers, is nonetheless still not expansive enough to justify upholding the Act, and that arguments for allowing the continued expansion of the commerce power are flawed. Part I of this Note discusses the Gun-Free School Zones Act in the context of the Commerce Clause and

---

understood, is not broad enough to support federal intrusion into such purely intrastate activities as simple firearms possession. As noted in *Lopez*, 2 F.3d at 1364 n.46, some applications of the Gun-Free School Zones Act may raise Second Amendment concerns, although these issues were not raised in that case and will not be explored in this Note. For an argument that the Second Amendment should be taken seriously, see Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989). For a thought-provoking proposal for solving the problem of handgun-related violence in America, see James Q. Wilson, *Just Take Away Their Guns*, The New York Times Magazine, Mar. 20, 1994, at 46.

16. *See supra* note 11 and accompanying text (discussing the expansion of the federal criminal jurisdiction under the Commerce Clause).

17. It stands to reason that a greatly expanded federal criminal jurisdiction over intrastate activities would, at least to some extent, usurp the states' own penal laws. To the extent that this were to occur, federal prosecutions for a broad array of intrastate crimes would tend to circumvent criminal procedural protections based on the states' constitutions, since the prosecutions for the federal crimes would be subject only to federal procedural protections. *Cf.* Robert F. Utter (Justice, Supreme Court of Washington), *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 499 (1984) ("Washington is one of many states that . . . have interpreted their state constitutions to provide greater protection for individual rights than does the United States Constitution.") (footnotes omitted); *compare* California v. Greenwood, 486 U.S. 35 (1988) (holding that the Fourth Amendment does not prohibit the warrantless search or seizure of garbage left for collection beyond the curtilage of a private dwelling) *with* State v. Hempele, 576 A.2d 793 (N.J. 1990) (holding that, under the New Jersey Constitution, such garbage may not be subjected to a warrantless search); *compare* Smith v. Maryland, 442 U.S. 735 (1979) (holding that the installation of a pen register on a private telephone line is not a "search" under the Fourth Amendment) *with* State v. Gunwall, 720 P.2d 808 (Wash. 1986) (en banc) (holding that the Washington Constitution prohibits the warrantless installation of pen registers). Perhaps the awareness that federal criminal prosecutions are not "burdened" by state constitutional protections has contributed to popular support for measures such as the Gun-Free School Zones Act. Certainly, the support for such measures must derive from a belief that federal criminal sanctions will be effective where state penal laws have not.

Tenth Amendment issues it raises. Part II traces the historical antecedents to the present-day commerce power, with particular emphasis on those decisions that have provided the foundation for the modern federal criminal jurisdiction over intrastate activities. Part III digresses to focus on the question of what weight should be accorded Congress's failure to have made formal or informal findings of a nexus to interstate commerce, an important point of divergence between the *Lopez* and *Edwards* opinions.[18] Part III concludes by suggesting that, where Congress wishes to use the Commerce Clause as the basis for regulation of intrastate activity that lacks a well established or obvious relationship to interstate commerce, congressional establishment of a nexus to commerce should be a minimal prerequisite to a presumption of constitutionality. Part IV, drawing from the historical perspective introduced in Part II, raises broader issues not definitively addressed in the *Lopez* and *Edwards* opinions, and argues for a halt to the expansion of the commerce power that has occurred since the New Deal. This Note concludes by questioning whether the current breadth of the commerce power was indeed contemplated by the New Deal decisions, and by reiterating the principles that the expansion of the commerce power must be checked and that the legislature should be encouraged to identify the constitutional source of power for legislation that is not clearly based on any of Congress's enumerated powers.

I. THE GUN-FREE SCHOOL ZONES ACT, THE COMMERCE CLAUSE, AND THE TENTH AMENDMENT

The Gun-Free School Zones Act of 1990, codified at 18 U.S.C. § 922(q),[19] makes it "unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[20] The Act provides for certain exceptions[21] and includes a disclaimer to the effect that "[n]othing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun-free school zones as pro-

18. *Compare Lopez*, 2 F.3d at 1363-65 (arguing that findings are necessary) *with Edwards*, 13 F.3d at 293-95 (contra). As the *Lopez* court noted, "findings [ ] can be inferred from committee reports, testimony before Congress, or statutory terms expressly providing for some nexus to interstate commerce." *Lopez*, 2 F.3d at 1362. Thus, while the term "findings" often refers to formal legislative (i.e., explicit) findings, it may, in a broader sense, refer to informal (i.e., implicit) findings such as a legislative history.

19. Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4844-45 (1990) (codified at 18 U.S.C. § 922(q) (Supp. IV 1992)).

20. 18 U.S.C. § 922(q)(1)(A). The term "school zone," for the purposes of the Act, is defined as: "(A) in, or on the grounds of, a public, parochial or private school; or (B) within a distance of 1,000 feet from the grounds of a public, parochial or private school." "School," in turn, is defined as "a school which provides elementary or secondary education under State law." *See id.* at § 921(a)(26).

21. *See id.* at § 922(q)(1)(B). As noted in *Lopez*, 2 F.3d at 1346, none of the exceptions were applicable in that case. The same is true of the other cases ruling on the Act's constitutionality. *See* cases cited *infra* note 34.

vided in this subsection."[22] Violations are punishable by up to five years' imprisonment and a fine not to exceed $5,000.[23] Significantly, the Act contains no formal findings of a nexus between interstate commerce and the activity (gun possession on or near school grounds) sought to be regulated.[24]

The bills that resulted in the enactment of § 922(q) were introduced in the Senate by Senator Herbert Kohl of Wisconsin as S. 2070[25] and in the House by Representative Edward Feighan of Ohio as H.R. 3757.[26] The *Lopez*[27] opinion noted that the Senate bill has no known formal legislative history,[28] but that a House Judiciary Subcommittee hearing was held on H.R. 3757.[29] According to the Fifth Circuit, "Witnesses told this subcommittee of tragic instances of gun violence in our schools, but there was no testimony concerning the effect of such violence upon interstate commerce."[30] A court in the District of Colorado, however, has identified one statement from the subcommittee hearing that may reveal a connection to interstate commerce: a police chief from Cleveland testified that gang members from Los Angeles, Chicago, and Detroit were coming into the Cleveland area to organize local gangs, possibly supplying them with weapons.[31] Thus, the legislative history is not entirely devoid of evidence that the Commerce Clause may have been considered by Congress in its deliberations concerning the constitutionality of the proposed enactment, but neither is it clear that such considerations were by any means substantial.[32] Nevertheless, the Commerce Clause, by default,

22. 18 U.S.C. § 922(q)(3).

23. *See id.* at § 924(a)(4).

24. *See Lopez*, 2 F.3d at 1364. But formal findings have subsequently been proposed as an amendment to the Gun-Free School Zones Act, perhaps in response to the *Lopez* decision. *See infra* part III.B. It is also important to note at the outset that § 922(q) contains no commerce "element," i.e., statutory language linking the crime of gun possession in schools to interstate commerce. *See Edwards*, 13 F.3d at 292-93 ("The Gun-Free School Zones Act . . . does not expressly require the Government to establish a nexus between the possession of a firearm in a school zone and interstate commerce."); *cf. infra* note 36 and accompanying text (defining the term "element").

25. *See* 136 Cong. Rec. S766-67 (1990) ("To ensure that our school grounds do not become battlegrounds, I am introducing the Gun-Free School Zones Act of 1990.") (statement of Sen. Kohl).

26. *See* 136 Cong. Rec. E3988 (1989) ("I am today introducing legislation to create gun-free school Zones.") (statement of Rep. Feighan).

27. United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993), *cert. granted*, 62 U.S.L.W. 3690 (U.S. Apr. 18, 1994) (No. 93-1260).

28. *See id.* at 1359.

29. *See id.* at 1359-60 (citing *Gun-Free School Zones Act of 1990: Hearings on H.R. 3757 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990) [hereinafter *Hearings*]).

30. *See Lopez*, 2 F.3d at 1359.

31. *See* United States v. Ornelas, 841 F. Supp. 1087, 1092 (1994) (citing *Hearings*, *supra* note 29 (statement of Edward Kovacic)).

32. Congress's apparent lack of debate concerning the constitutional basis for the Gun-Free School Zones Act is in sharp contrast to the exhaustive debates that preceded the enactment of the Civil Rights Act of 1964. *See infra* part II.C.

seems the only possible basis for the Act,[33] and, indeed, has been the constitutional basis cited by the government in all cases heard so far in which the Act's constitutionality has been challenged.[34]

The *Lopez* opinion also noted that officials from the Treasury Department's Bureau of Alcohol, Tobacco and Firearms testified that "the source of constitutional authority to enact the legislation is not manifest on the face of the bill."[35] The BATF officials further noted that "when Congress first enacted the prohibitions against possession of firearms by felons . . . and others, the legislation contained specific findings relating to the Commerce Clause and other constitutional bases, and the unlawful acts specifically included a commerce element."[36]

This testimony was not specifically discussed in the Ninth Circuit's opinion in *United States v. Edwards*,[37] with the court instead taking the position that the hearings and formal findings accompanying earlier legislation obviated the need for further findings relating the area of gun control to interstate commerce.[38] While this argument seems at first blush to be a reasonable one (indeed, it would seem ridiculous, by contrast, to require that Congress rediscover a commerce nexus with each new enactment in a given, well established area of legislation), it is open to some criticism on the basis that the Gun-Free School Zones Act is qualitatively different from most, if not all, federal firearms legislation that has preceded it. Earlier legislation focused on the interstate transport of, or commercial transactions involving, firearms, whereas the Gun-Free School Zones Act criminalizes simple intrastate possession.[39]

---

33. *See supra* note 3 and accompanying text; *see also infra* note 63 (discussing arguments that the Necessary and Proper Clause could be interpreted as an independent grant of legislative power).

34. *See* United States v. Edwards, 13 F.3d 291, 292 (9th Cir. 1993); United States v. Lopez, 2 F.3d 1342, 1346 (5th Cir. 1993); United States v. Ornelas, 841 F. Supp. 1087, 1089 (D. Colo. 1994); United States v. Glover, 842 F. Supp. 1327, 1328 (D. Kan. 1994); United States v. Trigg, 842 F. Supp. 450, 450 (D. Kan. 1994); United States v. Holland, 841 F. Supp. 143, 144 (E.D. Pa. 1993); United States v. Morrow, 834 F. Supp. 364, 365 (N.D. Ala. 1993).

35. *Lopez*, 2 F.3d at 1359-60 (citing *Hearings*, *supra* note 29 (statements of Richard Cook and Bradley Buckles)).

36. *Lopez*, 2 F.3d at 1360 (citing *Hearings*, *supra* note 29 (statements of Richard Cook and Bradley Buckles)). An "element," as the term is used in this context, is a phrase in the statute, such as "in commerce" or "affecting commerce," that establishes a nexus between the activity regulated and interstate commerce. When a commerce element is present in a statute, it must be alleged and proved by the government in order to obtain a conviction. *See* United States v. Bass, 404 U.S. 336, 339 (1971); *cf. supra* note 24 (discussing the lack of a commerce element in the Gun-Free School Zones Act).

37. 13 F.3d 291 (9th Cir. 1993), *petition for cert. filed* Mar. 25, 1994 (No. 93-8487).

38. *See id.* at 295 ("Where, as here, however, Congress in adopting earlier legislation has found that the activity sought to be regulated affects interstate commerce, additional hearings and findings on this question are unnecessary.").

39. *See Lopez*, 2 F.3d at 1348-59 (providing a history of federal firearms laws). That the Gun-Free School Zones Act differs significantly from prior federal firearms legislation was precisely the position taken by the *Lopez* court. *See id.* at 1364. For a discussion of this position, and of the related question of whether Congress need establish a nexus to interstate commerce, see *infra* part III.

As a final consideration concerning the enactment of the Gun-Free School Zones Act, it is noteworthy that President Bush, on signing the Crime Control Act of 1990, commented that the Gun-Free School Zones Act "inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed on the States by the Congress."[40] Although this presidential commentary has no binding authority in a judicial assessment of the Act's constitutionality, it is nonetheless worthy of attention in light of the notion that each of the three branches of the federal government has a duty to examine the constitutionality of legislation.[41]

The substance of the President's comment reflects a concern that Congress, by imposing a federal remedy that may conflict with the states' statutory schemes, is upsetting the balance of power envisaged by our federal system.[42] If the Act is indeed an exercise of legislative power beyond that delegated to Congress, it may also be described as a violation of the Tenth Amendment,[43] for it is widely recognized that both issues are interrelated:

> In a case . . . involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the

40. Statement by President George Bush upon signing S. 3266, 1990 U.S.C.C.A.N. 6696-1 (Dec. 3, 1990).

41. *See, e.g.*, Gunther, *supra* note 11, at 21-22 (raising the question of the exclusivity of the judiciary's role in evaluating the constitutionality of statutes); John W. Brewer & Leonard A. Leo, *Foreword* to Who Speaks for the Constitution? The Debate Over Interpretive Authority (The Federalist Society, Occasional Paper No. 3), at v-xii (1992) [hereinafter Federalist Society] (discussing the role of the President in constitutional interpretation); *see also* Bruce Ackerman, We the People: Foundations 68-69 (discussing early veto messages that interpreted the Constitution and looked "rather similar to judicial opinions"); *cf.* United States v. LeFaivre, 507 F.2d 1288, 1296 (4th Cir. 1974) ("We think the solution to the problem of expanding federal criminal jurisdiction is not for the courts to deny that the jurisdiction exists and that Congress may implement it but instead for the executive branch to exercise wisely the discretion vested in it by the Congress.") (footnote omitted).

42. It has been proposed that the original meaning of federalism—that the national government would be one of limited and enumerated powers—has been largely (and legitimately) replaced by a recognition that the federal government "would operate as a truly national government, speaking for the People on all matters that sufficiently attracted the interest of lawmakers in Washington, D.C." *See* Ackerman, *supra* note 41, at 105. Professor Ackerman proposes that the New Deal was a period of "constitutional politics" during which the popular will gave "constitutional legitimacy to a new vision of activist national government that did not have deep popular roots in our previous constitutional experience." *See id.* at 104. *But see infra* text accompanying notes 251-53 (distinguishing popular support for a federal government of expanded economic powers from that for one of expanded police powers).

43. U.S. Const. amend. X. The text reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

> Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.[44]

Similarly, the *Lopez* court recognized that, "[i]n actuality, the Tenth Amendment and Commerce Clause issues in this case are but two sides of the same coin."[45] Whichever metaphor one chooses, it is important to recognize that the two issues are interrelated because the Tenth Amendment, as an articulation of the principle of a federal government of limited, enumerated powers, is dependent on the assumption that the Commerce Clause is not (or will not become) a grant of unlimited power.[46] Indeed, if the commerce power is truly without limits, then there are no "powers not delegated to the United States [that must be] reserved to the States[,]"[47] and the Tenth Amendment is without meaning. Chief Justice (then Justice) Rehnquist recognized in 1981 that the expansion of the commerce power represents a threat to these principles of federalism:

> It is illuminating for purposes of reflection, if not for argument, to note that one of the greatest "fictions" of our federal system is that the Congress exercises only those powers delegated to it, while the remainder are reserved to the States or to the people. The manner in which this Court has construed the Commerce Clause amply illustrates the extent of this fiction.[48]

If the commerce power has expanded, it follows that the powers reserved to the states have contracted. Therefore, although much of the ensuing historical discussion focuses on what may be interpreted as an expansion of the commerce power, the same phenomenon may be as readily conceptualized as the progressive erosion of the Tenth Amendment, and of the principles of federalism expressed by its inclusion in the Bill of Rights.

II. HISTORICAL OVERVIEW OF COMMERCE CLAUSE JURISPRUDENCE

The modern scope of the commerce power, it has been said, is one that "grants the federal government jurisdiction so long as it can show (as it always can) that the regulated activity burdens, obstructs, or affects interstate commerce, however indirectly."[49] If this statement is accurate, it would seem that the Commerce Clause has effectively become (or is

---

44. New York v. United States, 112 S. Ct. 2408, 2417 (1992).

45. *Lopez*, 2 F.3d at 1346.

46. *See id.* at 1347; *cf.* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 36 (1980) (stating, in the context of a discussion about the Ninth Amendment, that the Tenth Amendment "clearly expresses" an intention "to forestall . . . the implication of unexpressed powers").

47. U.S. Const. amend. X.

48. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 307 (1981) (Rehnquist, J., concurring).

49. Epstein, *supra* note 9, at 1387.

about to become, should *Lopez*[50] be reversed) a grant to Congress of legislative power over any subject,[51] which would arguably render the Tenth Amendment, and the principle of a federal government of limited, enumerated powers, void.[52] An alternative view holds that the commerce power has not expanded but instead has been understood to be a comprehensive grant of federal power since the earliest days of the Republic.

A. Gibbons v. Ogden: *Basis for the Modern Commerce Power?*

The well-known 1824 case of *Gibbons v. Ogden*[53] held that a 1793 federal statute licensing ships in coastwise trade preempted a New York statute that would have granted a monopoly on interstate (New York-New Jersey) steamboat trade.[54] *Gibbons* was the opinion by Chief Justice Marshall that, at least according to some scholars and judges, gave the commerce power the broad scope that it enjoys today.[55] Even in *Lopez*, itself an opinion that would limit the scope of the commerce power, the court reiterates the notion that the modern breadth of the Commerce Clause had its roots in *Gibbons*:

> We are, of course, fully cognizant and respectful of the great scope of the commerce power. It is generally agreed that in a series of decisions culminating in *Wickard v. Filburn* . . . the Supreme Court fixed the modern definition of the commerce power, *returning it to the breadth of* Gibbons v. Ogden . . . .[56]

But the idea that the modern cases have "returned" the breadth of the commerce power to that which existed immediately after *Gibbons* is far

---

50. United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993), *cert. granted*, 62 U.S.L.W. 3690 (U.S. Apr. 18, 1994) (No. 93-1260).

51. The power of Congress would, of course, be limited by other constraints (e.g., those expressed in the Bill of Rights). *See, e.g.*, Ely, *supra* note 46, at 36. But the principle that the federal government is one of limited, delegated powers would be negated by the Commerce Clause's becoming a grant of authority to Congress to legislate in any area it chooses. In deciding *Lopez*, the Court now has an opportunity to choose between a federal government of limited powers (albeit greatly expanded since the Founding) and one apparently without affirmative limits. *Cf.* Epstein, *supra* note 9, at 1397 (noting that an expansive interpretation of the Commerce Clause has done away with the protections afforded by the design of a federal government of limited powers, and that the "necessary effect is that greater burdens are placed upon substantive limitations, such as the Bill of Rights").

52. *See supra* notes 43-48 and accompanying text.

53. 22 U.S. (9 Wheat.) 1 (1824).

54. *See id.* at 1-2, 190-91, 213-17. For a criticism of Chief Justice Marshall's proposition that the federal law was of sufficient scope to preempt the state enactment, see Bork, *supra* note 9, at 27.

55. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 120 (1942) ("At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded."); *see also infra* note 84 (citing other sources that develop this viewpoint). *But see* Gunther, *supra* note 11, at 97 (questioning this broad interpretation of *Gibbons*); Epstein, *supra* note 9, at 1401-08 (arguing that the scope of the commerce power under *Gibbons* is considerably narrower than has been suggested subsequently).

56. *Lopez*, 2 F.3d at 1360 (emphasis added) (citations omitted).

from universally accepted.[57] As Professor Richard Epstein points out, the case merely decided that navigation between the states is interstate commerce[58] and that regulation of navigation (and, therefore, of interstate commerce) must be able to take place not only as a ship crosses from the waters of one state into those of another, but also at any and all points along the interstate voyage.[59] In rebutting the argument that interstate commerce (and, hence, its regulation) can only occur at the infinitesimally narrow border between states, Chief Justice Marshall wrote:

> Commerce among the States[ ] cannot stop at the external boundary line of each State, but may be introduced into the interior.
>
> It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.
>
> Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and *the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description.*[60]

In thus describing the limitations on the commerce power, this passage would seem to weaken the position that the more recent cases "returned"

---

57. *See, e.g.*, Epstein, *supra* note 9, at 1399-1400 ("The New Deal was not a reformation, but a sharp departure from previous case law, and one that moved federal power far beyond anything Chief Justice Marshall had in mind."); Smith, *supra* note 9, at 154 ("It was long conventional for constitutional scholars to disregard the question of the substantive novelty of New Deal thought and to declare that its constitutional theory was simply a reversion to Marshall's broad view of national powers, and especially [of] the commerce clause. . . . However, the New Deal's constitutional ideas were fundamental, if moderate, innovations within liberalism.") (footnote omitted); *cf.* Paul L. Murphy, The Constitution in Crisis Times, 1918-1969, at 168 (1972) (describing the insistence of "New Deal leaders both on and off the bench" that they were "returning the nation to the bedrock principles of the Founding Fathers" and stating that "Marshall had given great breadth to the commerce clause for totally different reasons than had the New Dealers").

58. *See* Epstein, *supra* note 9, at 1401 (explaining *Gibbons*); *see also Gibbons*, 22 U.S. (9 Wheat.) at 190 ("If commerce does not include navigation, the government of the Union has no direct power over that subject . . . . All America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation.").

59. *See Gibbons*, 22 U.S. (9 Wheat.) at 194 ("Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior."); *see also* Epstein, *supra* note 9 at 1403 (explaining *Gibbons*).

60. *Gibbons*, 22 U.S. (9 Wheat.) at 194-95 (emphasis added). The analysis of the word "among" refers to that word as used in the Commerce Clause ("To regulate Commerce with foreign Nations, and *among* the several States, and with the Indian Tribes;"). U.S. Const. art. I, § 8, cl. 3 (emphasis added). The reference to "the enumeration of the particular classes of commerce," *Gibbons*, 22 U.S. (9 Wheat.) at 194, refers to the three classes mentioned in the constitutional text: foreign, interstate, and that with "the Indian Tribes." *See* U.S. Const. art. I, § 8, cl. 3.

the breadth of the commerce power to that which existed in 1824. To say that "[a]t the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded"[61] not only ignores the clear import of the language quoted above, but also rather disingenuously filters the *Gibbons* opinion from its historical setting. Indeed, it is unlikely that Chief Justice Marshall, when using relatively sweeping language to describe the commerce power,[62] would have contemplated its becoming the basis for a federal "police power" over intrastate activities.[63]

Given the broad expansion of the commerce power that has, at least according to one interpretation of history, occurred between then and now,[64] one might argue that the scope of the commerce power immediately after *Gibbons* is of no importance. More recent precedent, after all,

---

61. Wickard v. Filburn, 317 U.S. 111, 120 (1942) (citing *Gibbons*). Professor Epstein's succinct response to this characterization of *Gibbons* is, "No way." Epstein, *supra* note 9, at 1408.

62. *See, e.g., Gibbons*, 22 U.S. (9 Wheat.) at 196 ("This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution.").

63. The commerce power was "still not used heavily" as a basis for federal legislation during the fifty years following *Gibbons*. *See* Smith, *supra* note 9, at 149. That the first case ever to strike down legislation as beyond Congress's power under the Commerce Clause did not occur until 1869, *see id.* at 151, is probably itself ample evidence that the legislative milieu in which *Gibbons* was written was such that invasive federal regulation was not yet even contemplated. The 1869 case struck down a statute making it a misdemeanor to sell substandard lamp oil (for safety reasons), which early attempt to create a federal "police power" was summarily thwarted. *See* United States v. Dewitt, 76 U.S. (9 Wall.) 41 (1869). Thus, it is unlikely that Chief Justice Marshall, in writing *Gibbons*, was considering the possibility of the extension of the commerce power into the realm of a federal police power over intrastate matters. Indeed, the language of *Dewitt* is decidedly at odds with any interpretation of the post-*Gibbons* view of the commerce power as akin to the modern one:

> That Congress has the power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the States *has always been understood as limited by its terms*; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution *some other power expressly granted or vested*. . . .
>
> . . . .
>
> As a *police regulation*, relating exclusively to the internal trade of the State, [the statute] can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as for example, in the District of Columbia. Within State limits, it can have no constitutional operation. This has been so frequently declared by this court, *results so obviously from the terms of the Constitution*, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion.

Dewitt, 76 U.S. (9 Wall.) at 43-45 (emphasis added) (footnote omitted). The reference to the Necessary and Proper Clause also clearly indicates that this clause could not be used to magnify the Commerce Clause into a limitless grant of power, as some have suggested, but only to carry into execution some other power expressly granted or vested. *Cf.* Epstein, *supra* note 9, at 1397-99 (arguing that the Necessary and Proper Clause does not "provide for an unlimited grant of federal power").

64. *But see supra* note 55 and accompanying text (presenting the alternative view-

has intervened, so that no matter what the "original understanding" (as would have been reflected in *Gibbons* by virtue of its temporal proximity to the ratification of the Constitution), the Commerce Clause now is understood to confer upon Congress broad regulatory powers in diverse subject areas. Yet this argument that precedent overrides text ignores the principle that "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."[65] And while it may be true that the precedent that has evolved over the past fifty years has created enormous reliance interests in a modern federal government that cannot readily be dismantled,[66] it is nonetheless not inevitable that the trend to expand the commerce power must continue into new subject areas.[67] Arguably, the Gun-Free School Zones Act represents a new incursion into previously untrodden areas of federal criminal legislation,[68] but before turning to that issue it would be worthwhile to examine the period of greatest expansion of the commerce power, which undoubtedly set the stage for the Malthusian growth of Title 18 that has since occurred.

B. *The New Deal and the "Death of Federalism"*[69]

By the time President Franklin Delano Roosevelt took office in 1933, the Court had two lines of Commerce Clause precedent upon which to draw.[70] On the one hand, federal regulation of monopoly in manufacture,[71] and of the interstate movement of the products of child labor,[72]

---

point that the New Deal decisions returned the commerce power to the breadth contemplated during the days of John Marshall).

65. Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring); *cf.* Tyler Pipe Indus. v. Washington Dep't of Revenue, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part) (describing established precedent that conflicts with the Constitution as "a sort of intellectual adverse possession").

66. *See* Epstein, *supra* note 9, at 1455.

67. *See, e.g.*, Bork, *supra* note 9, at 158 ("[T]he expansion of Congress's *commerce*, taxing, and spending powers has reached a point where it is not possible to state that, as a matter of articulated doctrine, there are any limits left. *That does not mean, however, that the Court must necessarily repeat its mistake as congressional legislation attempts to reach new subject areas.*") (emphasis added); *cf.* Resch, *supra* note 11, at 823 ("In an earlier series of decisions, the Court virtually eliminated the commerce clause as an obstacle to the extension of federal power in respect to economic regulation. It may be that the same course of events is not likely to be repeated in the criminal area.").

68. *See Lopez*, 2 F.3d at 1366.

69. The reference to the "death of federalism" is borrowed from the following passage:

> It was shortly after [Chief Justice Charles Evans] Hughes's retirement that *Wickard v. Filburn* permitted Congress to limit the wheat a farmer grew for his own consumption on the ground that what he could not grow he might buy from another state. But that was only to write the epitaph; constitutional *federalism had died* in 1937.

David P. Currie, The Constitution in the Supreme Court: The Second Century, 1888-1986, at 238 (emphasis added) (footnote omitted).

70. *See* Smith, *supra* note 9, at 153.

71. *See* United States v. E.C. Knight Co., 156 U.S. 1 (1895). In this "Sugar Trust Case," the Court affirmed the dismissal of a government civil action to set aside, under

had been held to be beyond the commerce power. On the other hand, the Court had upheld federal legislation prohibiting the interstate transport of "contraband" such as lottery tickets,[73] impure foods,[74] and stolen automobiles.[75] Notably, these early uses of the "federal police power" (a phrase that would have been alien, no doubt, in John Marshall's day)[76] required that the prohibited goods first move in interstate commerce.[77] Squaring the "Child Labor Case"[78] with the "Lottery Case"[79] was not easily accomplished (since both statutes would take effect only upon the interstate movement of the prohibited products), but Justice Day's opinion in the former distinguished the line of cases exemplified by the latter on the ground that the "evil" of child labor was confined to the original locality and had ended by the time the items entered interstate commerce.[80]

Into this delicate apportionment of the states' versus the federal government's legislative powers[81] came the wave of legislation known as the

---

the Sherman Antitrust Act, the acquisition by the American Sugar Refining Company of the stock of four other sugar refineries, creating a monopoly. The Court held that such a "monopoly in manufacture" could not be "directly suppressed" and distinguished "manufacture" from "commerce." *See id.* at 11-18.

72. *See* Hammer v. Dagenhart, 247 U.S. 251 (1918) ("The Child Labor Case").

73. *See* Champion v. Ames, 188 U.S. 321 (1903) ("The Lottery Case").

74. *See* Hipolite Egg Co. v. United States, 220 U.S. 45 (1911).

75. *See* Brooks v. United States, 267 U.S. 432 (1925).

76. *See supra* note 63 (supporting the premise that a federal "police power" was not yet contemplated at the time of Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).

77. *See* Champion v. Ames, 188 U.S. 321, 326-27 (1908); *Hipolite Egg*, 220 U.S. at 51; *Brooks*, 267 U.S. at 439-40.

78. Hammer v. Dagenhart, 247 U.S. 251 (1918).

79. Champion v. Ames, 188 U.S. 321 (1903).

80. *See Hammer*, 247 U.S. at 270-72.

81. Some of the results derived from the distinction between the "Child Labor Case" and the line of cases that upheld legislation prohibiting interstate movement of a continuing "evil" were criticized severely. For example, in an essay accompanying a letter to President Roosevelt, written in 1939 during the controversy over the court-packing plan and not long before his appointment to the Supreme Court, Felix Frankfurter commented:

> The Congress has very properly been allowed to use the Commerce Clause to protect the children of the rich from kidnappers, but the Congress has been denied the right to use the same power to protect the children of the poor from the terrible exploitation of child labor.
>
> These decisions, and many more that I could cite, cannot be justified by anything in the Constitution. They are explained by the fact that some of the Justices have identified the Constitution with their private social philosophy.

Letter from Felix Frankfurter to Franklin Delano Roosevelt (1939), *in* Roosevelt and Frankfurter: Their Correspondence, 1928-1945, at 383 (Freedman ed., 1967), *reprinted in* Federalist Society, *supra* note 41, at 79, 83. The extent and rapidity of the change that occurred shortly thereafter is amply illustrated by the comments of Senator Robert Taft in a speech delivered at Kenyon College seven years later:

> Government action which twenty-five years ago would have excited a sense of outrage in thousands is . . . disapproved with a shrug of the shoulders and a hopeless feeling that nothing can be done about it.
>
> To a large extent this feeling has been promoted by the attack on the Supreme Court, and the effort to make the courts instruments of executive policy. The

New Deal. The Court's initial resistance to much New Deal legislation, followed by the President's unsuccessful "court-packing" plan, and, ultimately, by the death or retirement of seven of the nine justices by 1941,[82] is too familiar a story to be retold here, except to note the occurrence of these events as historical background to the decisions that emerged.[83] Although the prevailing rhetoric was that the cases of this era "returned" the breadth of the commerce power to that of John Marshall's day,[84] it has come to be recognized, at least by some, that the New Deal decisions, and not those they overturned, represented the true departure from the *Gibbons* view.[85] Three principal and pivotal decisions marked this transition: *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[86] *United States v. Darby*,[87] and *Wickard v. Filburn*.[88]

In 1937, in *Jones & Laughlin Steel*, the Court upheld the constitutionality of the National Labor Relations Act of 1935 and abandoned the distinction between "manufacturing" and "commerce" that had been articulated in *United States v. E.C. Knight*.[89] The Court in *Jones & Laughlin Steel* instead focused on the *effects* on commerce of the respondent corporation's operations and of potentially "commerce-threatening" la-

---

> old Court may have been too conservative, but the judges believed they were interpreting the laws and Constitution as they were written, and most of the country believed that they were honestly impartial. Today the Court regards itself as the maker of policy—no maker of policy can command respect for impartial dispensation of justice.

Senator Robert A. Taft, Address at Kenyon College (October 5, 1946), *in* Lend Me Your Ears: Great Speeches in History 597, 600 (William Safire ed., 1992).

82. By 1941, President Roosevelt had appointed: Black (1937), replacing Van Devanter (retired); Reed (1938), replacing Sutherland (retired); Frankfurter (1939), replacing Cardozo (died); Douglas (1939), replacing Brandeis (retired); Murphy (1940), replacing Butler (died); Byrnes (1941), replacing McReynolds (retired); and Jackson (1941), filling the vacancy created by the promotion of Harlan Fiske Stone to Chief Justice following the retirement of Charles Evans Hughes. *See* Gunther, *supra* note 11, app. B at B-5.

83. For a discussion of this period in American history, in the context of the constitutional changes then taking place, see Currie, *supra* note 69, at 208-44; Murphy, *supra* note 57, at 128-69. For a treatment of the same era that focuses on popular perceptions of constitutional issues, see Michael Kammen, A Machine That Would Go of Itself: The Constitution in American Culture 269-81 (1986).

84. *See supra* notes 55-63 and accompanying text. The notion that the Court had strayed from the original "broad construction" of the Commerce Clause (and, therefore, of the federal government's powers) was extensively developed by Edward Corwin of Princeton University. *See* Edward S. Corwin, The Commerce Power versus States Rights: Back to the Constitution (1936); *see also* Kammen, *supra* note 83, at 275 (discussing the book in its historical context). But Professor Corwin would later question whether the pendulum had swung too far in favor of a powerful central government. *See* Corwin, *The Passing of Dual Federalism*, 36 Va. L. Rev. 1 (1950); Kammen, *supra* note 83, at 317 (discussing same).

85. *See supra* part II.A.

86. 301 U.S. 1 (1937).

87. 312 U.S. 100 (1941).

88. 317 U.S. 111 (1942).

89. *Compare Jones & Laughlin Steel*, 301 U.S. at 34, 39 (abandoning the distinction between manufacture and commerce) *with E.C. Knight*, 156 U.S. at 12-13 (articulating that distinction); *see also supra* note 71 and accompanying text (discussing same).

bor disputes that could occur if federal labor regulation were not permitted.[90] Despite creating the basis for an "affecting commerce" rationale[91] that would soon develop a life of its own,[92] *Jones & Laughlin Steel* explicitly limited its approval of congressional intrusion into intrastate matters:

> Undoubtedly the scope of this power must be considered in light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.[93]

The next principal case, *United States v. Darby*,[94] expressly overruled *Hammer v. Dagenhart*,[95] the "Child Labor Case," in upholding the Fair Labor Standards Act of 1938.[96] *Darby* noted that the distinction on which *Hammer* had rested[97]—that the "[c]ongressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property"[98]—had "long since been abandoned[,]"[99] and proceeded to overrule *Hammer*.[100] *Darby* thus successfully applied federal wage and hour regulations to intrastate labor where the products of that labor were bound for interstate commerce, on the combined bases that the payment of low wages adversely affected commerce[101] and, more significantly, that, because Congress could prohibit

---

90. *See Jones & Laughlin Steel*, 301 U.S. at 41-43.

91. *See id.* at 43.

92. *See infra* part II.C-D.

93. 301 U.S. at 37 (citations omitted). One wonders, accordingly, whether the effect of firearms possession on school grounds upon interstate commerce is "indirect" enough to qualify under this caveat, and whether the federal criminalization of such intrastate possession does indeed begin to obliterate the distinction between what is national and what is local.

94. 312 U.S. 100 (1941).

95. 247 U.S. 251 (1918).

96. *See Darby*, 312 U.S. at 108, 116 (overruling *Hammer*); *id.* at 125 (upholding statute). Again, the Court recognized, as it had in *Jones & Laughlin Steel*, that, while manufacturing is not commerce, there were means by which Congress might regulate manufacturing because of its relationship to commerce. *See Darby*, 312 U.S. at 113.

97. *See supra* note 81 and text accompanying notes 78-80 (discussing Justice Day's distinction between *Hammer* and the line of cases that upheld prohibition of the interstate transport of items such as lottery tickets, stolen cars, and impure foods).

98. *Darby*, 312 U.S. at 116.

99. *Id.*

100. *See id. Hammer*, however, had struck down a statute that would have regulated only the interstate transport of the products of child labor, and not the intrastate work conditions themselves. *See supra* text accompanying notes 72-80.

101. *See Darby*, 312 U.S. at 119-20. The Court's sole support for this premise was *Jones & Laughlin Steel*, decided only four years before, and cases that followed it. *See Darby*, 312 U.S at 119 (citing *Jones & Laughlin Steel* and its companion case, National Labor Relations Board v. Fainblatt, 301 U.S. 601 (1937)). The Court, in a footnote, did attempt to show more time-honored support for the power of Congress to regulate "activities intrastate which have a substantial effect on . . . commerce," but all the cases cited were those in which the regulations upheld had been directed at instrumentalities of com-

the interstate shipment of goods manufactured under "substandard" conditions of employment, the legislature could therefore "choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities."[102] In other words, under *Darby*, Congress could regulate intrastate work conditions as a means of enforcing its "permitted end" of prohibiting the interstate transport of the products of such work conditions.[103]

Like *Darby*, the 1942 case of *Wickard v. Filburn*[104] was a unanimous decision.[105] If *Darby* broke new ground by declaring that Congress could reach intrastate activities as a means of enforcing its prohibition of the interstate transport of the products of those activities, *Wickard* plowed an entire new field[106] when it held that wheat grown for home consumption was constitutionally within the reach of Congress to regulate.[107] The *Wickard* Court found that "[h]ome-grown wheat . . . competes with wheat in commerce"[108] by allowing a farmer to "forestall resort to the market by producing to meet his own needs."[109] At issue in the case was the Agricultural Adjustment Act of 1938, as amended, which established quotas limiting the acreage of wheat for each farm, and which acreage allotment for his own farm the appellee had exceeded by some 11.9 acres.[110] The Court decided that, although the "appellee's own contribution to the demand for wheat may be trivial by itself[, it] is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."[111] Of course, the contribution to the nationwide de-

merce (e.g., railroads). *See Darby*, 312 U.S. at 119-20 & n.3. The "affecting commerce" rationale was, after all, a brand new discovery.

102. *Darby*, 312 U.S. at 121.

103. *See id.* This approach has been criticized as "superbootstrapping," whereby Congress could, if it desired, reach virtually any intrastate activity by prohibiting the interstate transport of the product of that activity and then prohibiting the intrastate activity itself as a "means reasonably adapted" to the legislative goal. *See* Gunther, *supra* note 11, at 135-36; *see also* Currie, *supra* note 69, at 238 n.177 (discussing the "superbootstrapping" criticism).

104. 317 U.S. 111 (1942).

105. Professor Currie succinctly summed up the explanation for the unanimous decisions in *Wickard* and *Darby*: "There was no one left to dissent." Currie, *supra* note 69, at 238 n.178; *cf. supra* note 82 and accompanying text (listing President Roosevelt's appointments to the Supreme Court).

106. It is submitted that the *Wickard* rationale, at least as it has been interpreted, *see infra* notes 111-12 and accompanying text, was more significant because, unlike *Darby*'s "superbootstrapping" approach, *see supra* note 103, the modified "affecting commerce" rationale of *Wickard* has enjoyed wide use as a means for permitting congressional reach into intrastate activities not directly connected to interstate commerce. *Cf.* Stern, *supra* note 11, at 275 n.29 ("Many have regarded *Wickard* as perhaps the most extreme application of the commerce clause to intrastate transactions.").

107. *See Wickard*, 317 U.S. at 128-29.

108. *Id.* at 128.

109. *Id.* at 127.

110. *See id.* at 114.

111. *Id.* at 127-28. For a brief but thought-provoking commentary on the scope of the *Wickard* rationale, see Gunther, *supra* note 11, at 131.

mand for wheat of *any* given defendant growing the crop for home consumption would be quite minimal. Therefore, according to one interpretation of the *Wickard* rationale, even legislation enacted primarily to prohibit such "trivial" intrastate activity is sustainable under the Commerce Clause, provided the aggregate effect on interstate commerce is substantial.[112]

The statute at issue in *Wickard* was genuinely aimed at achieving economic, commerce-related benefits (i.e., the stabilization of wheat prices). Yet the *Wickard* rationale (or one interpretation of it) has had far-reaching consequences in the area of federal criminal legislation, where the aims may fairly be said to be social rather than economic. Nevertheless, the principle that the federal government could regulate intrastate activities that "affect commerce" when the object of the proposed legislation was other than economic was not conclusively established by *Wickard* itself. That development would await two cases that were decided in the 1960s.

C. *The Civil Rights Act Cases*

Among the most significant enactments to be upheld under the Commerce Clause in recent times was Title II of the Civil Rights Act of 1964,[113] which provides for injunctive relief against discrimination (on the basis of race, color, religion, or national origin) in places of public accommodation.[114] Particularly noteworthy is that the Civil Rights Act of 1964 became the subject of unusually extensive congressional deliberation on the possible sources of constitutional authority for the enactment.[115] These 1963 debates focused on two issues: (1) whether the source of legislative power for the proposed enactments should be the commerce power or the post-Civil War amendments, and (2) whether the

---

112. Such a broad reading of *Wickard*, however, may be unwarranted. The Court has explained the nature of the *Wickard* holding in Maryland v. Wirtz, 392 U.S. 183 (1968), in a footnote written in response to the dissent in that case:

> Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under the statute is of no consequence.

Wirtz, 392 U.S. at 197 n.27. Under this reading, *Wickard*'s holding does not support a finding of constitutionality for the Gun-Free School Zones Act, for that enactment is *directly aimed* at the "individual instances" and not, as with *Wickard*'s Agricultural Adjustment Act, at broad regulation of activities substantially affecting commerce. Unlike the farmer who grows some of his wheat crop for home consumption in violation of a statute directed at commercial farming, the high school student in possession of a firearm on school grounds is engaging in the very activity that the statute was enacted to prohibit. For further discussion of this reading of *Wickard* and its implications, see *infra* part IV.

113. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 243-46 (1964) (codified as amended at 42 U.S.C. §§ 2000a-2000b (1988 & Supp. IV 1992)).

114. *See id.*

115. *See generally* Gunther, *supra* note 11, at 145-51 (discussing congressional deliberations prior to the enactment of the Civil Rights Act of 1964).

"affecting commerce" rationale that had its inception in *Jones & Laughlin Steel* and had been developed in *Darby* and *Wickard* would provide adequate support for the proposed enactments.[116] In the end, the Fourteenth Amendment's inability to reach private action was perceived as a disadvantage,[117] and it was decided to rely on the Commerce Clause as the source of legislative power.[118]

The rationale behind grounding the enactments in the commerce power included that discrimination in hotels and restaurants burdens travelers, thereby inhibiting interstate commerce; that such discrimination artificially restricts the market available for interstate goods and services, thereby adversely affecting commerce; and that discrimination inhibits the holding of conventions and meetings in segregated cities, thereby reducing the flow of interstate commerce.[119] Thus, even if the effect of discrimination on commerce was not Congress's primary concern, there was ample support for the premise that discrimination in hotels and restaurants *did* substantially affect interstate commerce.

The two principal cases deciding the constitutionality of Title II of the Civil Rights Act of 1964 were *Katzenbach v. McClung*[120] and *Heart of Atlanta Motel v. United States*.[121] In both, the Court upheld the enactments, deciding that Congress "had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce"[122] and that "the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce."[123]

---

116. *See id.* at 147-49.

117. *See id.* at 148. It is noteworthy and a bit ironic that, although the deliberation concerning the post-Civil War Amendments focused on the Fourteenth Amendment, the 1968 case of Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), would later interpret the Thirteenth Amendment as a source of legislative power that may well have been appropriate for the proposed 1964 legislation. *See id.* at 438-39 (noting that the Thirteenth Amendment gave Congress the power to abolish all "badges and incidents" of slavery). The Thirteenth Amendment, however, was "barely mentioned in the early 1960s debates." *See* Gunther, *supra* note 11, at 148 n.1.

118. *See* Gunther, *supra* note 11, at 150-51.

119. *See id.* at 150. Notably, the Civil Rights Act of 1964 carried no formal congressional findings, *see* Katzenbach v. McClung, 379 U.S. 294, 299 (1964), but unlike the Gun-Free School Zones Act, had a legislative history "replete with testimony of the burdens placed on interstate commerce by racial discrimination . . . ." *See id.*

120. 379 U.S. 294 (1964).

121. 379 U.S. 241 (1964).

122. *Katzenbach*, 379 U.S. at 304.

123. *Heart of Atlanta Motel*, 379 U.S. at 258. One of the connections to interstate commerce that the Court adopted in permitting Congress to reach local activities in the state of destination of goods is that discrimination adversely affects the market for such goods, thus adversely affecting interstate commerce. *See id.* By contrast, the argument that possession of firearms in schools is an activity that may be regulated under the Commerce Clause because the firearms have moved in interstate commerce, *see infra* text accompanying note 212 (subparagraphs (c) & (d) of the proposed amendment to the

The Civil Rights Act cases were significant for two reasons. First, they signaled a willingness on the part of the Court to apply the *Wickard* rationale regarding the "aggregate effect of trivial instances" to legislation that had as its primary goal not economic concerns (as in *Wickard*) but social ones.[124] Second, the enactments were unaccompanied by formal findings, which has led the Ninth Circuit in *United States v. Edwards* to cite *Katzenbach* as authority for the proposition that formal findings are unnecessary when Congress seeks to ground new areas of federal regulation of intrastate activities in the Commerce Clause.[125] But the Civil Rights Act cases can be readily distinguished. While the Gun-Free School Zones Act had neither formal findings nor a significant legislative history indicating congressional inquiry into the proposed commerce nexus, the Civil Rights Act of 1964 was one of the best examples of congressional inquiry into the constitutional bases for enactment that has occurred in our history. For this reason, as explored in Part III, the precedential value of *Katzenbach* in support of the proposition that the absence of formal findings has no impact on an enactment's presumed constitutionality is questionable.

Before turning to an examination of the "findings" issue, however, it would be well to complete this historical sketch of the development of

---

Gun-Free School Zones Act), does not rely on any such premise that the proposed regulation would remedy some adverse effect on interstate commerce. The proposition that Congress may reach any local activity merely because the instrumentalities related to that activity have once moved in interstate commerce has been recently (and sharply) rejected by one federal district court: "[I]f it is sufficient to invoke the powers of the Commerce Clause that something has been manufactured outside the state . . . and previously transported [t]here, 90% of the merchandise on every merchant's shelf will qualify and any robbery of any store can be federalized by the Congress under this rationale." United States v. Cortner, 834 F. Supp. 242, 243 (M.D. Tenn. 1993).

124. There can be no doubt that the political motivation to enact Title II of the Civil Rights Act of 1964 came from social concerns and not from a fear that discrimination in the targeted establishments was ruining the national economy. Indeed, the very degree to which the source of legislative authority was deliberated by Congress suggests an awareness that the legislation represented a novel application of the commerce power even in the wake of the New Deal cases. That there was concern about using the commerce power disingenuously is reflected in the following statement by Senator Cooper of Kentucky:

> I do not suppose that anyone would seriously contend that the administration is proposing legislation [because] it has suddenly determined [that] segregation is a burden on interstate commerce. We are considering legislation because we believe [that] all citizens have an equal right to have access to goods, services, and facilities which are held out to be available for public use and patronage. If there is a right to the equal use of accommodations held out to the public, it is [a] constitutional right under the 14th amendment. It has nothing to do with whether a business is in interstate commerce or whether discrimination against individuals places a burden on commerce. It does not depend on the commerce clause and cannot be limited by that clause . . . .

Gunther, *supra* note 11, at 151 n.5 (quoting *Senate Hearings on Civil Rights Act of 1964* (statement of Sen. Cooper)).

125. *See* United States v. Edwards, 13 F.3d 291, 293-95 (9th Cir. 1993) (citing *Katzenbach*, 379 U.S. at 299).

the contemporary scope of the commerce power by examining two cases from the 1970s. Although even the broad commerce power of today will have to be extended a bit further to sustain legislation such as the Gun-Free School Zones Act, the Civil Rights Act cases provided an important link between the New Deal line of cases and the current interpretation of the Commerce Clause. The next link would be developed in less than a decade.

D. *The 1970s:* Perez *and* Bass

Like *Katzenbach*, the 1971 case of *Perez v. United States*[126] was cited by the *Edwards* court in support of the proposition that "Congress need not make particularized findings in order to legislate."[127] Unlike *Katzenbach*, *Perez* involved legislation that was arguably directly related to congressional concerns about commerce-related activity. At issue in *Perez* was whether Title II of the Consumer Credit Protection Act[128] was, as applied to the defendant-petitioner, "a permissible exercise by Congress of its powers under the Commerce Clause of the Constitution."[129] This enactment, again in contrast to the Civil Rights Act of 1964 (and to the Gun-Free School Zones Act of 1990), included formal findings by Congress establishing a nexus between the regulated activity (extortionate credit transactions or "loan sharking") and interstate commerce.[130]

After first tracing the development of Commerce Clause jurisprudence from *Gibbons* through *Darby* and *Wickard*,[131] to the Civil Rights Act cases of *Heart of Atlanta Motel* and *Katzenbach*,[132] the *Perez* opinion concluded by holding that Congress, having rationally decided that loan sharking is a crime that may substantially affect interstate commerce, acted within its constitutional power.[133] Given the precedents upon which the *Perez* Court could rely, this was unsurprising,[134] especially

126. 402 U.S. 146 (1971).

127. *See Edwards*, 13 F.3d at 294-95 (quoting *Perez*, 402 U.S. at 156); *see also infra* part III.A (discussing the "findings" issue).

128. Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146, 159-64 (1968) (codified as amended at 18 U.S.C. §§ 891-96 (1988)).

129. *Perez*, 402 U.S. at 146-47.

130. *See id.* at 147-48 n.1. One commentator noted shortly after *Perez* was decided that "[n]o connection between the particular offense and interstate commerce was required, though . . . the congressional findings baldly stated that there was such a connection." Stern, *supra* note 11, at 276.

131. *See Perez*, 402 U.S. at 150-51. Once again, *Perez* reiterated the notion that *Wickard* "restored" the commerce power to its "broader view . . . announced by Chief Justice Marshall." *See Perez*, 402 U.S. at 151. That oft-repeated notion, however, is not the only viewpoint. *See supra* notes 55-63 and accompanying text (discussing and supporting the alternative position that it was the New Deal decisions that departed from the *Gibbons* view).

132. *See Perez*, 402 U.S. at 153.

133. *See id.* at 154-55.

134. One commentator noted shortly after *Perez* was decided that the case "apparently surprised no one." *See* Stern, *supra* note 11, at 284. Interestingly, the article went on to note:

since the crime involved was, as mentioned above, arguably commercial in nature. But Justice Stewart, in lone dissent, indicated an awareness that the rationale being developed could be applied to other intrastate crime as well:

> I think the Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws.
>
> In order to sustain this law we would, in my view, have to be able at the least to say that Congress could rationally have concluded that loan sharking is an activity with interstate attributes that distinguish it in some substantial respect from other local crime. But it is not enough to say that loan sharking is a national problem, for *all crime is a national problem*. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.
>
> Because I am unable to discern any rational distinction between loan sharking and other local crime, I cannot escape the conclusion that this statute was beyond the power of Congress to enact. The definition and prosecution of local, intrastate crime are reserved to the States under the Ninth and Tenth Amendments.[135]

If Justice Stewart's observation is correct that loan sharking, despite its arguably commercial attributes, is indistinguishable from other local crime (such as possession of guns on school grounds), then it is certainly true that *Perez* opened the door to an unlimited federal criminal jurisdiction that may reach any intrastate activity.[136] One cannot help thinking, though, that the majority could not have intended that consequence.[137]

Very shortly after *Perez* was decided, another federal criminal provision relying on the commerce power was tested in *United States v. Bass*.[138] At issue was an enactment particularly germane here: a provi-

---

> The absence of comment upon or objection to the decision may attest to the fact that prior decisions had long prepared the public and the bar for such a conclusion—or perhaps prove merely that loan-sharking has little editorial, scholarly or public support. And the same is probably true as to possession of firearms by convicted felons. There might, of course, be more objection if the possession of all firearms were prohibited, even though that could be thought to be an even more effective way to reduce crimes which affect interstate commerce.

Id.

135. *Perez*, 402 U.S. at 157-58 (Stewart, J., dissenting) (emphasis in original).

136. Judge Hays, dissenting from the court of appeals decision, expressed misgivings about precisely this possibility: "If extortionate conduct unrelated to interstate commerce can be made a federal crime, so can such crimes as robbery, burglary, and larceny." United States v. Perez, 426 F.2d 1073, 1082 (2d Cir. 1970) (Hays, J., dissenting).

137. *See infra* notes 244-47 and accompanying text (interpreting *Perez* in light of both the majority's and the dissent's opinions).

138. 404 U.S. 336 (1971).

sion of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968[139] that imposed penalties on any felon who "receives, possesses, or transports in commerce or affecting commerce . . . any firearm."[140] Because the statutory language was ambiguous as to whether the commerce element ("in commerce or affecting commerce") applied to "receives" and "possesses" as well as "transports" (the defendant having been indicted for simple possession), and because the Court recognized that criminalizing simple intrastate possession may exceed Congress's commerce power,[141] it construed the statute narrowly under the rule of lenity:[142]

> [U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. *Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States.* . . . [Therefore] we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.[143]

Interestingly, the Second Circuit's opinion in *Bass* had stated: "An interpretation of the statute that would allow prosecution for receipt or possession of firearms without a showing in each case that such receipt or possession was in or affecting interstate commerce would be an unprecedented extension of federal power."[144]

The Supreme Court thus affirmed the Second Circuit's reversal of the defendant's conviction without reaching the primary issue that the *Lopez* and *Edwards* decisions have necessitated its addressing in the next Term.[145] The Court noted that, "[i]n light of our disposition of the case, we do not reach the question whether, *upon appropriate findings*, Congress can constitutionally punish the 'mere possession' of firearms."[146] It is significant that, in deferring on the issue, the Court used language indicating that "appropriate findings"[147] would be a minimal requirement to

---

139. Omnibus Crime Control and Safe Streets Act of 1968, Title VII, Pub. L. No. 90-351, 82 Stat. 197 (1968). The relevant provisions of this enactment were subsequently repealed, but were originally codified at 18 U.S.C. §§ 1201-1203. *See Lopez*, 2 F.3d at 1347, 1352.

140. 18 U.S.C. § 1202(a) (repealed 1986).

141. *See Bass*, 404 U.S. at 348-49. The Court specifically refrained from reaching the question of whether Congress could punish simple intrastate possession of firearms. *See id.* at 339 n.4.

142. *See Edwards*, 13 F.3d at 292 (explaining *Bass*).

143. *Bass*, 404 U.S. at 349 (emphasis added) (citations and footnotes omitted). It seems reasonable to conclude, based on the fact that the Gun-Free School Zones Act was passed, that Congress has since abandoned its "traditional reluctan[ce] to define as a federal crime conduct readily denounced by the States." *Id.* at 349.

144. United States v. Bass, 434 F.2d 1296, 1300 (2d Cir. 1970).

145. Nor did the appeal from a subsequent conviction under the same statute as in *Bass* decide the issue, since it was not raised on appeal. *See* Scarborough v. United States, 431 U.S. 563 (1977); *see also Lopez*, 2 F.3d at 1347 (discussing *Bass* and *Scarborough*).

146. *Bass*, 404 U.S. at 339 n.4 (emphasis added).

147. *Id.*

Congress's constitutionally reaching such "mere possession."[148]

III. FINDINGS

When Congress uses the Commerce Clause as a constitutional grant of power to enact legislation regulating an intrastate activity, it often makes findings of fact regarding the relationship between the proposed regulated activity and interstate commerce. For example, in enacting the Controlled Substances Act,[149] Congress found, among other things, that "[a] major portion of the traffic in controlled substances flows through interstate and foreign commerce[,]"[150] and that "[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances."[151] Simply because Congress has made formal findings in the past, however, does not establish that it must do so in the future.

A. *Are Congressional Findings Necessary?*

Perhaps the most salient point of divergence between the Fifth and Ninth Circuits concerns the issue of whether, in areas of legislation in which the connection to or effect on interstate commerce is not obvious or well established, Congress must[152] make express findings that establish a nexus between the activity sought to be regulated and interstate commerce, at least in the absence of a legislative history or a commerce element that would, alternatively, establish such a nexus.[153] Probably the reason that this area of inquiry assumed so much importance is that the Supreme Court has clearly delineated the role of the lower courts in deciding issues relating to the scope of the commerce power:

> The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a *congressional finding* that

148. *See id.*

149. Pub. L. No. 91-513, Title II, 84 Stat. 1236, 1242 (1970) (codified as amended at scattered sections of 21 U.S.C.).

150. 84 Stat. 1242 (codified at 21 U.S.C. § 801(3) (1988)).

151. 84 Stat. 1242 (codified at 21 U.S.C. § 801(4) (1988)). Interestingly, the *Lopez* court noted that, unlike the proscription of narcotics possession as a means to regulate intrastate trafficking therein, there has been no prior federal enactment "outlawing . . . the possession of ordinary firearms by ordinary citizens." *Lopez*, 2 F.3d at 1367 n.51. This point was made in support of the premise that the Gun-Free School Zones Act differs markedly from prior federal firearms legislation. *See infra* text accompanying notes 161-67. The *Lopez* court further noted that "firearms do not have the fungible and untraceable characteristics of narcotics." *Lopez*, 2 F.3d at 1367 n.51. Thus, the effect of intrastate possession of drugs on the interstate trafficking therein is not necessarily comparable to the situation with firearms.

152. It is recognized that basic separation-of-powers principles would be at odds with the judiciary unqualifiedly dictating how Congress is to legislate. "Must," as used in this context in the text, therefore, may be read as: "must, in order to support a presumption of constitutionality under the Commerce Clause."

153. *Compare* United States v. Lopez, 2 F.3d 1342, 1363-65 (arguing that findings are necessary) *with* United States v. Edwards, 13 F.3d 291, 293-95 (contra).

> a regulated activity affects interstate commerce, if there is any rational basis for such a finding.[154]

Accordingly, the *Lopez* court, noting that there had been no "congressional finding"[155] to which to defer,[156] did not reach the issue of whether Congress may have had a rational basis and instead simply held that Congress had not done what was necessary to ground the Gun-Free School Zones Act in the Commerce Clause.[157] The Ninth Circuit in *Edwards*, however, responded by taking the position that "it is unnecessary for Congress to make express findings that a particular activity or class of activities affects interstate commerce in order to exercise its legislative authority pursuant to the Commerce Clause."[158] The *Edwards* court further observed that, since Congress has repeatedly "relied upon the Commerce Clause as authority"[159] for federal gun legislation, it is even less subject to any requirement that may exist regarding formal findings.[160]

By contrast, the Fifth Circuit's lengthy *Lopez* opinion reviewed all previously enacted federal gun control legislation, beginning with the National Firearms Act of 1934,[161] in an effort to demonstrate that virtually all prior enactments either included findings of an express nexus to interstate commerce,[162] included a commerce element,[163] or regulated interstate transport of firearms or commercial transactions involving them.[164] The Gun-Free School Zones Act, by contrast, prohibits simple intrastate possession and contains neither a commerce element nor formal or informal findings of a nexus to commerce.[165] Thus, according to the Fifth Circuit, the Act "represents a sharp break with the long-standing pattern of Federal firearms legislation."[166] The nexus to interstate commerce, therefore, is neither readily apparent nor established by the earlier federal gun control enactments:

> Both the management of education, and the general control of simple firearms possession by ordinary citizens, have traditionally been a state

---

154. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (emphasis added).

155. *Id.*

156. *See Lopez*, 2 F.3d at 1366.

157. *See id.* at 1368.

158. *Edwards*, 13 F.3d at 293 (reiterating the holding in *United States v. Evans*, 928 F.2d 858, 862 (9th Cir. 1991)).

159. *Edwards*, 13 F.3d at 294.

160. *See id.* at 293-94.

161. *See Lopez*, 2 F.3d at 1348-60.

162. *See id.* at 1347.

163. *See id.*; *see also supra* note 36 and accompanying text (defining and discussing the term "element").

164. *See Lopez*, 2 F.3d at 1348 (citing United States v. Nelson, 458 F.2d 556, 559 (5th Cir. 1972) for the proposition that acquisition and sale of firearms is more closely related to interstate commerce than is mere possession).

165. *See Lopez*, 2 F.3d at 1366; *see also supra* notes 24, 35-36 and accompanying text (discussing the lack of a commerce element in the Gun-Free School Zones Act and the testimony of BATF officials on this subject).

166. *Lopez*, 2 F.3d at 1366 (footnote omitted).

> responsibility, and section 922(q) indisputably represents a singular incursion by the Federal Government into territory long occupied by the States. In such a situation where we are faced with competing constitutional concerns, the importance of Congressional findings is surely enhanced.[167]

The *Lopez* court explicitly recognized that, "[w]here Congress has made findings, formal or informal, that regulated activity substantially affects interstate commerce, the courts must defer 'if there is any rational basis for' the finding."[168] But the court then stated that, although "[c]ongressional enactments are . . . presumed constitutional[,] . . . in certain areas the presumption has less force."[169] Citing to the famous *Carolene Products* footnote,[170] the *Lopez* court posited that the Gun-Free School Zones Act, as a further expansion of the commerce power, conflicts with the Tenth Amendment and with the structural principles of federalism reflected therein.[171] The court reasoned that the Tenth Amendment is, "after all, as much a part of the Bill of Rights as the First."[172] Because Congress has failed to demonstrate a constitutional basis for an enactment that conflicts with the Tenth Amendment, the statute is not entitled to the presumption of constitutionality that would otherwise be the case.[173]

The Fifth Circuit drew support for its conclusion concerning the importance of congressional findings from "recent holdings that when Congress wishes to stretch its commerce power so far as to intrude upon state prerogatives, it must express its intent to do so in a perfectly clear fashion."[174] The cases cited, while each distinguishable from *Lopez*,[175] none-

---

167. *Id.* at 1364.

168. *Id.* at 1363 (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981)). The "rational basis for" language, as noted, *see supra* text accompanying note 154, was probably what led the *Lopez* court to focus on the issue of findings.

169. *Lopez*, 2 F.3d at 1364 (citing United States v. Carolene Products, 304 U.S. 144, 152-53 n.4 (1938)).

170. United States v. Carolene Products, 304 U.S. 144, 152-53 n.4 (1938)

171. *See Lopez*, 2 F.3d at 1364; *see also supra* notes 43-48 and accompanying text (discussing the relationship between the Commerce Clause and the Tenth Amendment). The following passage from the *Carolene Products* footnote is quoted in *Lopez*: " 'There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments. . . .' " *Lopez*, 2 F.3d at 1364 (quoting *Carolene Products*, 304 U.S. at 152-53 n.4). Interestingly, another well-respected authority, describing this paragraph from the *Carolene Products* footnote as "pure interpretivism," argues that, because "there are provisions in the Constitution that call for more," the footnote in its entirety can be seen as a call for the application of constitutional structural protections to judicial review. *See* Ely, *supra* note 46, at 76. The specific prohibition with which the Gun-Free School Zones Act conflicts is the Tenth Amendment. *See Lopez*, 2 F.3d at 1364. That amendment, in turn, reflects the structural protections inherent in a design of a federal government of limited powers. *See supra* notes 43-48. Therefore, the *Lopez* reliance on the *Carolene Products* language would seem to be supported by Professor Ely's interpretation of that footnote.

172. *Lopez*, 2 F.3d at 1364 (footnote omitted).

173. *See id.*

174. *Id.* at 1365 (citing Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (plurality

theless do stand for the proposition for which they were cited, i.e., that "Congress' *power* to use the Commerce Clause in such a way as to impair a State's sovereign status, and its *intent* to do so, are related inquiries."[176]

Lopez is without direct support, however, for the existence of any clear requirement that Congress *must*[177] make formal findings when it uses the Commerce Clause in such a way as to intrude into a new area of traditional states' domain, as has arguably occurred under the Gun-Free School Zones Act. The opinion acknowledged that, as articulated in *Woods v. Cloyd W. Miller Co.*,[178] " 'the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.' "[179] But *Lopez* then pointed out that the quoted language from *Woods* was therein immediately followed by a recognition that the legislative history had provided an alternative means of Congress's intent to invoke the war power.[180] Thus, the situation in *Woods* differs from *Lopez* in that the Gun-Free School Zones Act includes neither express findings nor an alternative legislative history demonstrating that the Commerce Clause was being invoked.[181]

More recent authority than *Woods*, though, has been cited by the Ninth Circuit in support of its position that Congress need *not* make particularized findings that an activity affects interstate commerce in order to enact legislation regulating that activity.[182] Of special relevance is

---

opinion); Dellmuth v. Muth, 491 U.S. 223 (1989); Gregory v. Ashcroft, 111 S. Ct. 2395 (1991)).

175. *Union Gas* involved the use of the commerce power to abrogate the sovereign immunity of a state under the Eleventh Amendment. *See* 491 U.S. at 7. *Dellmuth*, decided the same day, involved similar Eleventh Amendment issues. *See* 491 U.S. at 227. Lastly, *Gregory* denied the power of a federal age discrimination statute to preempt a provision of the Missouri Constitution that required mandatory retirement for state judges at age seventy. *See* 111 S. Ct. at 2400-01. This last case, admittedly, involved a considerably more direct invasion of states' rights than does the statute at issue in *Lopez*.

176. *Lopez*, 2 F.3d at 1365 (emphasis in original).

177. As mentioned, *see supra* note 152, "must," as used in this context, means "must, in order to support a presumption of constitutionality." The judiciary's power to specify the legislature's methods is, and should be, limited.

178. 333 U.S. 138 (1948).

179. *Lopez*, 2 F.3d at 1364 n.45 (quoting *Woods*, 333 U.S. at 144).

180. *See Lopez*, 2 F.3d at 1364 n.45 (citing *Woods*, 333 U.S. at 144).

181. *See Lopez*, 2 F.3d at 1364 n.45. Again, the statutory language in the Gun-Free School Zones Act did not include a commerce element. *See Edwards*, 13 F.3d at 292-93; *see also supra* note 36 (defining "element"). A commerce element may conceivably provide an alternative means by which Congress could establish a nexus to interstate commerce in lieu of formal findings or a legislative history that indicate a well-considered intention to ground the enactment in the commerce power. *See Lopez*, 2 F.3d at 1347-48 (discussing another federal firearms provision that contains a commerce element). *But see* United States v. Bass, 404 U.S. 336, 339 n.4 (1971) (implying, in a case in which a commerce element was present in the statute under review, that formal findings may also be necessary in order for Congress constitutionally to punish the "mere possession" of firearms) (dictum); *see also supra* text accompanying notes 146-48 (discussing the *Bass* language and its implications).

182. *See Edwards*, 13 F.3d at 294 (citing EEOC v. Wyoming, 460 U.S. 226 (1983); Fullilove v. Klutznick, 448 U.S. 448 (1980); Perez v. United States, 402 U.S. 146 (1971);

the 1971 case of *Perez v. United States*,[183] seen earlier,[184] which has become the focus of much intricate linguistic debate between the *Edwards* and *Lopez* positions. While the *Lopez* opinion acknowledged in a footnote the language in *Perez*, " 'We have mentioned in detail the economic, financial, and social setting of the problem as revealed to Congress. We do so not to infer that Congress need make particularized findings in order to legislate[,]' "[185] the same acknowledgement went on to note that "[n]o citation of authority is given, nor is the meaning of the second sentence entirely clear."[186]

The Ninth Circuit, however, found the meaning of the second sentence "unambiguous" and, quoting it, left off the potentially confusing "do so not to infer" language.[187] The *Edwards* opinion then cited an additional sentence from the same paragraph in *Perez* in an attempt to clarify the Court's meaning: " 'We relate the history of the Act in detail to answer the impassioned plea of the [sic] petitioner that all that is involved in loan sharking is a traditionally local activity.' "[188] According to the Ninth

Katzenbach v. McClung, 379 U.S. 294 (1964); as well as *Woods*, 333 U.S. 138 (1948), as consistent with the Ninth Circuit's own holding in United States v. Evans, 928 F.2d 858 (9th Cir. 1991), that Congress need not make particularized findings in order to legislate). The value of all of these cases, however, as support for an actual Supreme Court holding that findings are never required, is undermined by the fact that Congress, in enacting the statute in question in each case, had clearly established a nexus between the activity regulated and interstate commerce. *See Wyoming*, 460 U.S. at 231 n.3 (formal findings); *Fullilove*, 448 U.S. at 503 (Powell, J., concurring) (prior legislation in same subject area); *Perez*, 402 U.S. at 147 n.1 (formal findings); *Katzenbach*, 379 U.S. at 299-301 (extensive legislative history including prolonged congressional hearings addressing the question of the proposed legislation's constitutional basis).

183. 402 U.S. 146 (1971).

184. *See supra* part II.D.

185. *Lopez*, 2 F.3d at 1362 n.41 (quoting *Perez*, 402 U.S. at 156).

186. *Lopez*, 2 F.3d at 1362 n.41.

187. *See Edwards*, 13 F.3d at 295 (quoting *Perez*, 402 U.S. at 156). (The Ninth Circuit, however, quoted both sentences from *Perez* elsewhere in the opinion. *See Edwards*, 13 F.3d at 293.) Given that "infer" is frequently misused where "imply" is intended, it is submitted that the second sentence is indeed confusing (although no inference nor any implication concerning Justice Douglas's grammatical abilities is intended). Did the Court mean that by its mention of the "economic, financial and social setting of the problem[,]" there was no intent on the Court's part to draw any conclusions (i.e., infer anything) about the need for findings, since the "problem as revealed to Congress" obviated the need therefor? Or did the Court simply wish to qualify its mention of the revelation of these findings by stating that it did not wish to imply that findings are necessarily required? Or was some other meaning intended? Perhaps the most reliable meaning that may be extracted from this infamous "second sentence" is that the Court did not wish to decide on the issue of findings in *Perez*.

188. *Edwards*, 13 F.3d at 295 (quoting *Perez*, 402 U.S. at 156-57). The full text of the paragraph in question (as well as the brief one following it), which conclude the text of the majority's opinion in *Perez*, appears below:

> We have mentioned in detail the economic, financial, and social setting of the problem as revealed to Congress. We do so not to infer that Congress need make particularized findings in order to legislate. We relate the history of the Act in detail to answer the impassioned plea of petitioner that all that is involved in loan sharking is a traditionally local activity. It appears, instead, that loan sharking in its national setting is one way organized interstate crime holds

Circuit, this meant that "[t]he Supreme Court explained that it had set forth the legislative facts solely to respond to counsel's 'impassioned plea.' "[189] The *Edwards* opinion then referred to the "Supreme Court's holding in *Perez*" (one that the court implied may be extracted from a careful reading of these sentences at the end of the *Perez* opinion),[190] a "holding" to which, said the Ninth Circuit, the conclusion in *Lopez* is "squarely contrary."[191] But the language of the "second sentence," aside from being ambiguous, is merely dictum, since the Court's decision in the case did not depend on whether Congress had made express findings.[192] Further, what the *Edwards* court would seem to be proposing is that, in Commerce Clause cases, courts must not only defer to congressional findings that a regulated activity affects interstate commerce, as required under *Hodel*,[193] but that courts must actually speculate as to whether Congress could rationally have made such findings even when it has failed to do so.

The debate over the meaning of the *Perez* language and its precedential value on the question of findings was mentioned in *United States v. Trigg*,[194] a District of Kansas opinion that found the Gun-Free School Zones Act unconstitutional and dismissed an indictment thereunder:[195]

> The Ninth Circuit's disagreement with the Fifth Circuit rests on its conflicting interpretation of *Perez* and the necessity for express congressional findings that an activity affects interstate commerce. According to the Ninth Circuit, where Congress, in the course of adopting earlier legislation[,] has found that the activity sought to be regulated affects interstate commerce, additional hearings and findings on this question are unnecessary.
>
> With due respect to the Ninth Circuit, the court finds the views articulated by the Fifth Circuit to be more faithful to the values of federalism embodied in our Constitution. The court *cannot agree with the Ninth Circuit's statement that the Fifth Circuit's holding in* Lopez *is squarely contrary to the Supreme Court's holdings in* Perez *and* Katzen-

---

its guns to the heads of the poor and the rich alike and syphons funds from numerous localities to finance its national operations.

Affirmed.

Perez, 402 U.S. at 156-57.

189. *Edwards*, 13 F.3d at 295.

190. *See id.* The full text of the language at the end of the *Perez* opinion appears *supra* note 188.

191. *Edwards*, 13 F.3d at 295.

192. Similarly, in the other cases cited by the Ninth Circuit in support of the premise that findings are not required, Congress had established a nexus to interstate commerce by other means, or even by means of formal findings. *See supra* note 182.

193. *See supra* note 154 and accompanying text (discussing the Supreme Court's statement in Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), regarding the role of the lower courts in deciding Commerce Clause cases).

194. 842 F. Supp. 450 (D. Kan. 1994).

195. *See id.* at 452-53. It is noteworthy that, exactly one week after the *Trigg* decision, the opposite result regarding the Act's constitutionality was reached in the same district. *See* United States v. Glover, 842 F. Supp. 1327 (D. Kan. 1994). Even more ironic is that the two defendants, Glover and Trigg, were arrested together. *See id.* at 1328 n.1.

> bach. As the Fifth Circuit noted in footnote 41 of its opinion, the statute at issue in *Perez* reflects extensive consideration of and reliance on the evidence before Congress, the legislative history, as well as the formal [c]ongressional findings. In stark contrast, the congressional reports and legislative history make no reference to the impact upon commerce of firearms in schools.[196]

Similar commentary appears in *United States v. Glover*,[197] another District of Kansas case that decided the same issue a week later (albeit with opposite results, holding § 922(q) constitutional and denying a motion to dismiss).[198] There, the court observed: "I find the reasoning of the Ninth Circuit persuasive, although I do not join in that circuit's rebuke of the Fifth Circuit. *The* Perez *decision is open to more than one interpretation.*"[199]

Perhaps the best conclusion that can be drawn about the need for findings is that no conclusion can be drawn. No firm Supreme Court precedent decides the issue. *Edwards*, as has been seen,[200] went to great lengths to extract a decision on the issue from *Perez*, but the language there is ambiguous and, as has been suggested,[201] probably best supports the proposition that the Supreme Court did not wish to decide the issue in that case at all. Similarly, all the other cases mentioned in *Edwards* as supporting the premise that Congress need not make particularized findings involve statutes in which a nexus to commerce had been established by other means.[202] Thus, in the final analysis, it would seem that the Supreme Court has yet to decide the following question:

> When Congress enacts a statute regulating non-commercial intrastate activity and having no constitutional basis other than the Commerce Clause, and where neither the legislative history of the enactment, a commerce element, nor prior legislation in the same subject area establishes a nexus between the regulated activity and interstate commerce, must Congress make express findings of such a nexus in order for the statute to enjoy a presumption of constitutionality?

There is hope, though, that when *Lopez* is reviewed by the Supreme Court, a clearly articulated standard relating the presence or absence of congressional findings to the presumed constitutionality of legislation enacted under the commerce power may emerge. Arguably, such a stan-

196. *Trigg*, 842 F. Supp. at 452 (emphasis added) (citation omitted).

197. 842 F. Supp. 1327 (D. Kan. 1994).

198. *See id.* at 1336-37.

199. *Id.* at 1336 (emphasis added). Although the court noted that the *Perez* language is open to more than one interpretation, it found the Tenth Circuit's own position (citing Morgan v. Secretary of Hous. & Urban Dev., 985 F.2d 1451, 1455 (10th Cir. 1993)) to be more compatible with that of the Ninth Circuit, and ruled accordingly. *See Glover*, 842 F. Supp. at 1336-37.

200. *See supra* notes 187-92 and accompanying text.

201. *See supra* note 187 and text accompanying note 192.

202. *See supra* note 182. But in deference to the Ninth Circuit it must be reiterated that the *Edwards* court was relying primarily on the Ninth Circuit's own precedent in United States v. Evans, 928 F.2d 858 (1991). *See Edwards*, 13 F.3d at 293.

dard should take into account the justifiable concern that Congress may be less than diligent in ascertaining a proposed enactment's constitutional basis, especially when under intense political pressure to provide a solution to a problem publicly perceived to require a federal remedy.[203] As Judge Acker of the Northern District of Alabama noted, in his opinion granting a motion for dismissal of an indictment under the Gun-Free School Zones Act, that enactment seems to indicate a tendency for the legislative branch to "expect[ ] courts invariably to presume that Congress intends to hang any and all new federal legislation which purports to control activity within the several states on the so-called Commerce Clause, without Congress having to say so."[204] The *Lopez* position, which would encourage Congress to "say so," seems the better one, if only because findings are not much to ask for when a Constitution is at stake.

B. *On Finding Findings: The Proposed Amendment to § 922(q)*

The *Lopez* opinion carefully avoided addressing the question of whether the Act would be held constitutional given congressional findings showing a nexus to commerce,[205] although the opinion did note that, in the past fifty years, the Supreme Court has never set aside such findings as being without a rational basis.[206] The Fifth Circuit thus left room for the argument that, given a clear expression by Congress of its intent to ground the Gun-Free School Zones Act in the Commerce Clause, the Act could be held constitutional.[207] The *Lopez* opinion went on to add:

---

203. This was precisely the case with the Gun-Free School Zones Act. There is, and should be, overwhelming popular support for measures directed at solving the problem of violence in our schools. But the curious absence of findings or of a significant legislative history linking this violence to interstate commerce, together with the fact that testimony questioning the Act's constitutionality was given before the House Subcommittee, *see supra* notes 35-36 and accompanying text, all point to a conscious choice, at least on the part of some legislators, to ignore the constitutional implications of the measure in order to hasten its enactment.

204. United States v. Morrow, 834 F. Supp. 364, 365 (N.D. Ala. 1993). This opinion was written before the Ninth Circuit decided *Edwards*. Judge Acker was thus denied the opportunity to respond to that decision's holding that Congress need not make particularized findings.

205. *See Lopez*, 2 F.3d at 1368 ("Whether with adequate Congressional findings or legislative history, national legislation of similar scope could be sustained, we leave for another day.").

206. *See id.* at 1363 n.43; *cf. supra* text accompanying note 154 (noting, and commenting on, the Court's "rational basis" standard for assessing the constitutionality of enactments based on congressional findings that the regulated activity substantially affects interstate commerce).

207. The *Lopez* court does seem to take the position, though, that the commerce power is not broad enough to provide a constitutional basis for the Gun-Free School Zones Act. *See Lopez*, 2 F.3d at 1361 ("Broad as the commerce power is, its scope is not unlimited, particularly where intrastate activities are concerned.") But the *Lopez* opinion focuses on the absence of both formal and informal findings, *see supra* note 18, to provide a firm basis for its decision. *See Lopez*, 2 F.3d at 1368 ("Here we merely hold that Congress has not done what is necessary to locate section 922(q) within the Commerce Clause.").

> [W]e expressly do not resolve the question whether section 922(q) can ever be constitutionally applied. Conceivably, a conviction under section 922(q) might be sustained if the government alleged and proved that the offense had a nexus to commerce.[208]

Presumably even more conducive to upholding the Gun-Free School Zones Act, although not expressly mentioned in *Lopez*, would be formal findings enacted "retroactively." And, indeed, such a modification to the Act may yet occur. Subsequent to the *Lopez* decision, the court in *United States v. Glover*,[209] the District of Kansas opinion that found the Act constitutional and denied a motion to dismiss an indictment thereunder,[210] noted that "[i]n the fall of 1993, perhaps in response to the *Lopez* decision, an amendment to the Gun-Free School Zones Act explicitly setting forth such findings was introduced in both the House of Representatives and the Senate."[211] The proposed amendment inserts into section 922(q) a new paragraph (1):

> The Congress finds and declares that—
>
> (a) Crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;
>
> (b) Crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;
>
> (c) Firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Judiciary Committee of the House of Representatives and Judiciary Committee of the Senate;
>
> (d) In fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;
>
> (e) While criminals freely move from state to state, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;
>
> (f) The occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;
>
> (g) This decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;
>
> (h) States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other states or localities to take strong measures; and
>
> (i) Congress has power, under the Interstate Commerce Clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the nation's schools by enactment of this

208. *Lopez*, 2 F.3d at 1368.

209. 842 F. Supp. 1327 (D. Kan. 1994). The "companion case" of *United States v. Trigg*, decided a week earlier, is discussed *supra* note 195.

210. *See Glover*, 842 F. Supp. at 1336-37.

211. *Id.* at 1334.

subsection.[212]

But Congress's recital of a nexus to interstate commerce, whether pre- or post-enactment, does not necessarily end the inquiry and make the statute constitutional.[213] As an initial consideration, there is the observation, perhaps first expressed in an 1849 Georgia case: "The legislature has no power to legislate the truth of facts."[214] And one is reminded of John Marshall's famous statement that,

> should Congress, under the pretext of executing its powers, pass laws for the accomplishment of *objects not entrusted to the government*[,] it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.[215]

Arguably, a general police power over intrastate matters has *not* yet been entrusted to the federal government. Although the amendment bill declares that Congress has such powers,[216] this would appear to be an issue that (at least until the limits of the commerce power are better articulated) must be resolved on a case-by-case basis.[217] Perhaps the most convincing proposed nexus to interstate commerce in the amendment bill is that possession of firearms in schools adversely affects education, and that a decline in the quality of education, in turn, has an adverse effect on interstate commerce.[218] Yet, under this rationale, virtually any intrastate activity occurring in a school would be within the reach of Congress to regulate. To use an example that illustrates the absurdity of this approach, chewing gum in class could be made into a federal crime because that activity adversely affects education.

---

212. *Id.* at 1333-34 n.13 (quoting S. 1607, 103d Cong., 1st Sess. (1993); H.R. 3355, 103d Cong., 1st Sess. (1993)).

213. There must be a "rational basis for such a finding" that the regulated activity substantially affects interstate commerce. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981); *see also supra* text accompanying note 154 (discussing same). If the fact that guns have once moved in interstate commerce (subparagraphs (c) and (d) of the amendment bill) is a sufficiently "rational basis," virtually any intrastate activity may be regulated. *See supra* note 123 (discussing one court's treatment of this rationale, and differentiating the reasoning employed in the Civil Rights Act cases).

214. Dougherty v. Bethune, 7 Ga. 90, 92 (Ga. 1849). The quotation has recently been used in Cotton States Mut. Ins. Co. v. Lashley, 335 S.E.2d 855, 857 (Ga. 1985), and has been duplicated (although without a citation to its source) in Horace E. Read et al., Materials on Legislation 160 (4th ed. 1982), where, appropriately enough, it is included in a section on the use of preambles in statutes "as an aid in establishing constitutionality." *See id.*

215. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819) (emphasis added).

216. *See supra* text accompanying note 212 (proposed amendment, subparagraph (i) (declaring that "Congress has power . . . to enact measures to ensure the integrity and safety of the nation's schools")).

217. *See, e.g.*, Maryland v. Wirtz, 392 U.S. 183, 198 (1968) ("This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the states.").

218. *See supra* text accompanying note 212. The specific language referenced appears at subparagraphs (f) and (g) of the proposed amendment.

Whether or not Congress ever does adopt the proposed formal findings, the deeper issues raised in these Gun-Free School Zones Act must eventually be addressed. The constitutional grant of power contained in the Commerce Clause is, at best, not clearly defined. The Court has now been given the opportunity to outline the proper scope of the commerce power, which, as noted at the outset, is widely perceived as being without clearly articulated limits.[219]

IV. ON LOSING FINDINGS (AND FINDING THE LIMITS OF THE COMMERCE POWER)

The Gun-Free School Zones Act, with or without formal findings of a nexus to commerce, can only have been validly enacted under the Commerce Clause if the activity regulated (that is, firearms possession in and around schools) substantially affects interstate commerce.[220] *Wickard v. Filburn*[221] would provide the primary support for a decision upholding the Act on this basis, as the *Lopez*[222] opinion pointed out:

> "But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a *substantial economic effect on interstate commerce* and irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' "[223]

The Fifth Circuit further noted that the above passage from *Wickard* has been "quoted with approval many times[,]" and cited *Katzenbach* and *Perez*, among other cases, as examples.[224] But this is not to say that *Wickard* means that any local activity may be regulated. *Wickard* may indeed be read to mean that any intrastate activity that has a minimal or "trivial" effect on interstate commerce is within the reach of Congress to regulate, provided that the aggregate effect of such "trivial" instances is substantial. But such a broad reading may be at odds with subsequent interpretations of the case.[225] In *Maryland v. Wirtz*,[226] Justice Harlan

219. *See supra* note 9 and accompanying text.

220. *See, e.g.*, National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 43 (1937) (holding that Congress may regulate intrastate activities that substantially affect interstate commerce); Wickard v. Filburn, 317 U.S. 111, 127-28 (holding that even where the effect individual instances of such activities on interstate commerce is "trivial," Congress may still regulate if the aggregate effect is substantial). *But see* Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968) (explaining that *Wickard* did not mean that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of intrastate activities); *see also supra* notes 111-12 and accompanying text (commenting on the *Wirtz* explanation of *Wickard*).

221. 317 U.S. 111 (1942).

222. United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993), *cert. granted*, 62 U.S.L.W. 3690 (U.S. Apr. 18, 1994) (No. 93-1260).

223. *Lopez*, 2 F.3d at 1361 (quoting *Wickard*, 317 U.S. at 125) (emphasis added in *Lopez*).

224. *See Lopez*, 2 F.3d at 1361.

225. *See supra* notes 111-12 and accompanying text.

226. 392 U.S. 183 (1968).

explained that, where a statute validly enacted pursuant to the Commerce Clause affected "individual instances falling within a rationally defined class of activities[,]"[227] the Court could not "excise, as trivial"[228] those relatively minor instances affected by the statute.[229] This is, of course, quite different from saying that Congress may regulate the "trivial" activity as a primary object of the proposed regulation. In a footnote, the *Wirtz* opinion further clarified this proposition by noting that

> [n]either here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.[230]

The Agricultural Adjustment Act, whose application to the appellee in *Wickard* was challenged, was primarily aimed at wheat production for commercial use. The Court, however, refused to exempt from the statute's control that portion of the appellee's crop that was for home use.[231] By contrast, the Gun-Free School Zones Act targets the individually "trivial" activity itself—if that were to be "excised," no class remains upon which it may operate. Put another way, the high school student carrying a gun is a member of the primary class at which the Act is directed, in contrast to the "home-growing" farmer who violates a broader, commerce-regulating statute aimed at commercial wheat production. Congress did not enact the Agricultural Adjustment Act primarily to regulate the "trivial" activity of growing wheat for home use, but it did enact the Gun-Free School Zones Act primarily to reach the "trivial" (in terms of its effect on interstate commerce) activity of carrying weapons on school grounds.

The *Lopez* court recognized that the *Wirtz* footnote qualified *Wickard*,[232] and went on to note that the requirement that interstate commerce be "substantially" affected by the proposed regulated activity is constitutionally necessary, since the alternative would be to allow the Commerce Clause to become a grant of unlimited legislative power.[233] The *Lopez* opinion stopped short of concluding that Congress could have had no rational basis for determining that the intrastate possession of

227. *Id.* at 193.
228. *Id.*
229. *See id.*
230. *Id.* at 197 n.27.
231. *See Wickard*, 317 U.S. at 128-29. Borrowing the *Wirtz* language, *see Wirtz*, 392 U.S. at 193, 197 n.27, the *Wickard* Court would not "excise, as trivial," the appellee's "*de minimis*" activity, i.e., the growing of wheat for home use, which violated the broader, commerce-based regulation.
232. *Lopez*, 2 F.3d at 1362-62 (citing *Maryland v. Wirtz*, 392 U.S. at 196-97 n.27).
233. *See Lopez*, 2 F.3d at 1362 ("[I]f the reach of the commerce power to local activity that merely affects interstate commerce or its regulation is not understood as being limited by some concept such as 'substantially' affects, then, contrary to *Gibbons v. Ogden*, the scope of the Commerce Clause would be unlimited . . . .").

firearms in schools substantially affects interstate commerce,[234] instead focusing, as discussed earlier,[235] on the significance of Congress's failure to have made formal findings in this regard.[236]

The *Lopez* court also noted "that the imprecise and matter of degree nature of concepts such as 'substantially,' especially as applied to the effect on interstate commerce, generally renders decision making in this area particularly within the province of Congress, rather than the Courts."[237] It was further observed in *Lopez* that "the Supreme Court has consistently deferred to Congressional findings in this respect . . . ."[238]

But the time has come when deference must give way to decision. Unless the meaning of "substantial," as that term relates to Commerce Clause jurisprudence, is given a clearer definition, there is a danger, as *Lopez* warns,[239] that the commerce power will become the basis for the assumption by Congress of unlimited legislative authority. Moreover, the Court should address the disparity between the broad reading of *Wickard* that would allow direct regulation of any "trivial" activity, and the *Wirtz* explanation that implies that *Wickard*'s holding is more circumscribed than would be consistent with the broader reading.[240] It is submitted that the narrower reading of *Wickard* is the valid one, if only because the logical result of the broader interpretation would be that any activity at all may be regulated, since everything affects commerce in some way.[241] Because this result would be at odds with the Tenth Amendment, the *Wirtz* interpretation must prevail.

Wickard is also distinguishable because the statute in question in that case was generally aimed at the production of goods for the interstate

234. *See supra* text accompanying note 154 (discussing the "rational basis" standard of review and the reasons that it may have led the *Lopez* court to focus on the absence of findings).

235. *See supra* part III.

236. *See Lopez*, 2 F.3d at 1362-68.

237. *Id.* at 1362. *But see* Epstein, *supra* note 9, at 1388 ("The commerce power . . . does not convert the Constitution from a system of government with enumerated federal powers into one in which the only subject matter limitations placed on Congress are those which it chooses to impose on itself.").

238. *Lopez*, 2. F.3d at 1362. The tradition of deferring to congressional findings of a nexus to interstate commerce seems to have had its origins, not surprisingly, during the period of the commerce power's greatest expansion:

> It is noticeable that all the key New Deal commerce clause opinions took the substantive findings of Congress at face value. None was prepared to identify the powerful interest group politics that were so evident in both the labor and agricultural cases—the very policy areas in which the commerce clause reached its present scope.

Epstein, *supra* note 9, at 1451.

239. *See Lopez*, 2 F.3d at 1362.

240. *See supra* note 112 and text accompanying notes 225-32.

241. The *Lopez* opinion expresses this concept: "[T]he chain of causation is virtually infinite, and hence there is no private activity, no matter how local and insignificant, the ripple effect from which is not in some theoretical measure ultimately felt beyond the borders of the state in which it took place." *Lopez*, 2 F.3d at 1362.

market, whereas the Gun-Free School Zones Act is, quite simply, the creation of a federal crime. Put in its historical context,[242] it would seem that the holding in *Wickard* could not have contemplated application of its modified "affecting commerce" rationale to the broader federal criminal arena, especially given that it was not until *Perez* that such an extension of the doctrine was given the Court's explicit approval.[243]

Regarding *Perez*, a reading of both the majority and dissenting opinions in that case would indicate that the Court was distinguishing loan sharking from other local crime in finding federal regulation of the former constitutionally permissible under the commerce power. Indeed, the majority concluded that "loan sharking in its national setting is one way organized interstate crime holds its guns to the heads of the poor and rich alike and syphons funds from numerous localities to finance its national operations."[244] This implies that the intrastate crime of loan sharking is different, in terms of its relationship to interstate commerce, from most other intrastate criminal activities.[245] As noted earlier,[246] language in the dissent also supports the premise that the majority was making such a distinction, for Justice Stewart expressed doubts that the majority's distinction between loan sharking and other local crime was a valid one.[247] If it is true that the *Perez* decision rested on such a distinction between local crime that has an interstate commercial character and

---

242. *See supra* part II.B-D.

243. *See Perez*, 402 U.S. at 151-52; *see also supra* notes 126-38 and accompanying text (discussing *Perez*); Resch, *supra* note 11, at 813 ("[B]y the mid 1960's, the commerce clause still had not been conceptually stretched in respect to federal criminal jurisdiction beyond its 1930's status. . . . This state of affairs, however, soon changed with Congressional passage of an anti-loan sharking statute."). The *Perez* Court noted, 402 U.S. at 152, that United States v. Darby, 312 U.S. 100 (1941), involved a criminal prosecution. But *Darby*, decided before *Wickard*, could not have extended the *Wickard* rationale.

244. *Perez*, 402 U.S. at 157.

245. The unique qualities of loan sharking that enabled it to be made a federal crime, and the new constitutional questions that upholding the statute raised, drew commentary by a law student shortly after *Perez* was decided:

> Two circumstances combined in this case to make it an appropriate vehicle for the Supreme Court to use in expanding the substantive scope of the commerce clause as it relates to criminal law. First, the act was passed in order to curb those criminal activities which produce the revenue organized crime uses to finance its interstate activities; and, though the criminal acts themselves may be local, their impact is national. Second, the determination that loan sharking, as a class, has sufficient interstate ties to justify federal regulation was made by Congress as a result of substantial study.
>
> Because these special circumstances were present in the loan-sharking situation, *Perez* left unanswered the question whether the Court, in the future, will hold that customary crimes can be punished by the federal government though in the individual case the conduct is unrelated in a substantial way to interstate commerce.

Resch, *supra* note 11, at 816 (footnote omitted).

246. *See supra* notes 133-38 and accompanying text.

247. *See Perez*, 402 U.S. at 157 (Stewart, J., dissenting) ("[T]he circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity . . . .").

local crime that does not, it is equally true that *Perez* does not directly support a holding that the Gun-Free School Zones Act is a constitutional application of the commerce power. Criminal extortionate credit transactions have an obvious commercial character, but intrastate possession of firearms does not. It is only by the most attenuated connections, such as those recited in the proposed amendment to the Gun-Free School Zones Act,[248] that a nexus between interstate commerce and the regulated activity could even be suggested. Upholding the Act on the basis of such an attenuated nexus would effectively extend the *Perez* rationale to any and all local crime, thus simultaneously validating Justice Stewart's assertion and opening the door to a federal criminal jurisdiction of unprecedented proportions.[249]

It is paradoxical that, in the hopes of bringing the power of the national government to bear on local crimes, Congress would seem to be asking the nation's highest Court to disobey its highest law, the Constitution itself. In order to uphold the Gun-Free School Zones Act as a valid exercise of the commerce power, the Court must construe the Commerce Clause in a way that would conflict with the plain meaning of the text, as well as with the provisions for a government of limited, enumerated powers expressed in the Tenth Amendment and elsewhere.

Such a construction appears less tortured to those who focus on precedent rather than text because, as shown previously,[250] the commerce power has undergone what can only be described as a radical expansion during this century. Nevertheless, it does seem an affront to common sense to propose that the phrase "[t]o regulate Commerce . . . among the several States"[251] could have been ratified with the idea in mind that the provision would one day be used as the basis for prohibiting the intrastate possession of firearms on school grounds. It may be true, as Professor Ackerman has proposed, that the New Deal was one of three major periods of "constitutional politics" in United States history (the other two being the Founding and the Reconstruction) that fundamentally changed the nature of the American Constitution, and that the expansion of the power of the federal government that took place during that period in the absence of any constitutional amendment was legitimized by virtue of the intense political debate that shaped those changes.[252] But even assuming this to be true, the popular support for the fundamental changes that took place then cannot be assumed to have derived from the same concerns that today are driving the expansion of the federal crimi-

248. *See supra* text accompanying note 212 (listing the formal findings that have been proposed as an amendment to the Gun-Free School Zones Act).

249. *See supra* notes 136, 144 and accompanying text (discussing, respectively, the dissenting opinion of Judge Hays of the Second Circuit in the lower court's opinion in *Perez*, and his majority opinion in United States v. Bass, 434 F.2d 1296, 1300 (2d Cir. 1970)).

250. *See supra* part II.

251. U.S. Const. art. I, § 8, cl. 3.

252. *See* Ackerman, *supra* note 41; *see also supra* note 42 (discussing this theory of legitimacy and quoting from Professor Ackerman's work).

nal jurisdiction.[253] Thus, while a national government of expanded *economic* powers may have been legitimized by immense popular participation during the New Deal, an expanded federal *criminal* jurisdiction over intrastate matters traditionally under the states' regulation was not. If the Great Depression led to a public outcry for central control of the economy, it does not follow that the precedent that gave that expansion of the federal power constitutional acceptability must now be extended beyond its original scope.

Judge Wiseman of the Middle District of Tennessee has commented on the growth of the federal criminal jurisdiction and on the judiciary's tendency to support it:

> The Congress has had a recent penchant for passing a federal criminal statute on any well-publicized criminal activity. The courts, in an obeisant deference to the legislative branch, have stretched the Commerce Clause of the Constitution beyond the wildest imagination of the Framers and beyond any rational interpretation of the language itself. . . . The constant lament is that the constitutional concept of Federalism is being eviscerated by the Congress. The Congress is able to do this, however, only because we in the judicial branch are willing to interpret the Commerce Clause of the Constitution so broadly.[254]

CONCLUSION

"[T]he only causes worth fighting for [a]re the lost causes."[255]

During the latter part of the nineteenth and the early years of the twentieth century, the Supreme Court did not seem as hesitant as it has since become to strike down legislation that was beyond the power of Congress to enact under the plain meaning of the Commerce Clause.[256] Since that time, depending on one's viewpoint, the Court has either "returned" the commerce power to the broad grant of congressional authority that it once was, or, in the face of political and economic pressures to create a more powerful central government than was contemplated by the Framers, allowed the Commerce Clause to become the basis for such

253. On the political profitability of federalizing local crime and the pragmatic arguments against doing so, see Naftali Bendavid, *How Much More Can Courts, Prisons Take? It's Tempting to Federalize Crimes, but Opponents Are Gathering Momentum*, Legal Times, June 7, 1993, at 1, 22-25. *See also supra* note 17 (offering a possible explanation for the popular support for making local crime a federal concern: the perception that federal prosecutions will not be burdened by state procedural protections). The debate over federalizing local crime has also recently been addressed in Constance Johnson, *Law and Disorder: When Washington Takes on Crime, Its Bark Is Far Worse Than Its Bite*, U.S. News & World Report, Mar. 28, 1994, at 35-37.

254. United States v. Cortner, 834 F. Supp. 242, 244 (M.D. Tenn. 1993).

255. Mr. Smith Goes To Washington (Columbia Pictures 1939).

256. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918); United States v. E.C. Knight, 156 U.S. 1 (1895); United States v. Dewitt, 76 U.S. (9 Wall.) 41 (1869); *see also supra* note 63 (discussing the significance of *Dewitt*).

a creature.[257]

If the latter is the more accurate depiction of the history of Commerce Clause jurisprudence, there can be no doubt that this nation is nearing a stage in its development that resembles the image alluded to in *Jones & Laughlin Steel*,[258] where the cumulative judicial, legislative, and even executive stretching of the limits of the commerce power will soon "effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[259]

It is ironic that this warning should be found in the text of a case that many regard as crucial in the development of the modern commerce power.[260] Were anyone to have asked a Supreme Court justice on the day *Jones & Laughlin Steel* was decided whether the holding in that case could be extended to permit the expansion of the federal criminal jurisdiction into intrastate matters traditionally under the states' exclusive control, one can guess only that the answer would have been a resounding "No!"

Thirty-four years later, in 1971, the Court was divided on the question of whether loan sharking could be made a federal crime, with the majority finding that the activity was sufficiently related to commerce to be within the reach of Congress to regulate.[261] Now, the Court is about to consider the constitutionality of a statute that, if upheld, would strip away what vestiges remain of the federal system envisaged by the Tenth Amendment and by the original design of a federal government of limited powers. Although it may be true that those limited powers have been expanded for legitimate reasons, the justifications for the expansion of the commerce power following the Great Depression and the current politically profitable trend of making local crime a federal concern are simply not of the same order of magnitude. Further, the power that Congress now seeks can and should be obtained through the process of constitutional amendment.[262]

The Court should affirm *Lopez*, and should embrace the principle articulated therein that the presumption of constitutionality applies with less force to enactments having no readily apparent constitutional basis

257. *See supra* part II.B (discussing the beginnings of this transition during the New Deal). The need to find a constitutional basis by which the federal government could stabilize the national economy, though, is arguably more related to the Commerce Clause than is the currently perceived "need" to permit federal policing of local crime that is a "national" problem.

258. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

259. *Id.* at 37 (citations omitted). For a fuller quotation of this passage, see *supra* text accompanying note 93.

260. It is undoubtedly to *Jones & Laughlin Steel* that Professor Currie refers when he writes that "constitutional federalism had died in 1937." *See* Currie, *supra* note 69, at 238.

261. *See supra* text accompanying notes 244-47 (discussing Perez v. United States, 402 U.S. 146 (1971)).

262. *See* U.S. Const. art. V.

other than in the commerce power and lacking any indication that Congress intended to base the proposed legislation on the Commerce Clause. Although some may feel that setting affirmative limits on the commerce power at this late stage is a lost cause, it is nonetheless a cause worth fighting for. To do otherwise, which would be to abandon the principle of a federal government of limited powers, would be to abandon the Constitution itself.