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## The Impact of *United States v. Lopez*: The New Hybrid Commerce Clause

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### Introduction

The Commerce Clause has long been a constitutional powerhouse underlying federal legislation. 1 The recent decision in *United States v. Lopez* 2 marks the first time in almost sixty years that the Supreme Court has held that Congress had exceeded its power to regulate interstate commerce. 3 In *Lopez*, the Court held that Congress overreached its power in enacting the Gun-Free School Zones Act of 1990, 4 which prohibited possession of firearms within one thousand feet of a school. *Lopez* thus breaks a long line of cases deferring to congressional action. Historically, the Court has sustained federal regulation of civil rights, 5 loan-sharking, 6 restoration of environmental damage, 7 labor relations, 8 and home-grown wheat, 9 even where such activities had tenuous links to interstate commerce. The *Lopez* Court, although recognizing the great breadth accorded Congress under such decisions, attempted to create special protection for state sovereignty. 10 This article will argue that *Lopez* does so by implicitly combining two previously separate limitations on the commerce power into a heightened scrutiny of federal legislation regulating areas of traditional concern to the states.

As the first case since the New Deal nullifying congressional action as beyond the reach of the Commerce Clause, *Lopez* inevitably will play an important role in the Court's continuing definition of federalism, the distribution of powers between the federal and state governments. 11 The Court has historically [\*3] struggled to define the limits on congressional power vis-a-vis the states. 12 Shifting majorities of the Court have disagreed on whether the Tenth Amendment imposes substantive or procedural limits on the commerce power. 13 The

rhetoric of Lopez clearly envisions substantive limits on the federal government's power to legislate on local matters. 14 Lopez purports to preserve certain domains of activity for state regulation. The Gun-Free School Zones Act was held to be an incursion on the states' police power 15 and ability to conduct education. 16 Allowing the statute to stand would have imperiled the "distinction between what is truly national and what is truly local." 17 This article will conclude that such a dichotomy is likely to prove illusory, that the doctrinal limits of Lopez will in practice be more modest than its rhetoric suggests. The decision, however, may play an important role in a rather different conception of federal-state relations. Part I sets out the doctrinal development of the two limits on the commerce power that come together in the Lopez analysis. The first limit is the scope of the Commerce Clause itself. Modern case law has interpreted the provision very broadly, upholding wide-ranging congressional regulation of activity with indirect links to interstate commerce. The other limit is the extrinsic limit imposed by the Tenth Amendment. Recent case law has developed several Tenth Amendment doctrines that restrict the ability of Congress to regulate the operations of state governments. Part II argues that under Lopez, the Tenth Amendment limits on regulation of state governments have been extended to cover regulation of private activity within areas of traditional concern to the states. Part III analyzes the likely effect of Lopez as a limit on federal legislative power. Lopez seeks to bar federal regulation of the "truly local" aspects of such areas as education and crime. But Congress will remain able to legislate widely in such areas because of inevitable jurisdictional links to commercial and economic activity. However, Congress will be able to do so only by addressing heightened requirements in the legislative process. Thus, although Lopez seeks to create substantive limits protecting areas of state concern, its effect is likely to be more consistent with the procedural conception of federalism.

## I. Internal and External Limits on the Commerce Power

Lopez implicitly brings together two related sets of cases interpreting the limits of Congress' commerce power. Section A of this Part discusses the cases addressing the Commerce Clause

[\*5] itself, which grants Congress the power "to regulate Commerce . . . among the several States." 18 During the first third of this century, the Court nullified a number of federal statutes with a narrow interpretation of the Clause. Since then, however, the Court has construed the power much more broadly, consistently finding a sufficient link to commerce to uphold legislation directed at more general social problems. Section B discusses the case law under the Tenth Amendment, which reserves to the states all powers not granted to Congress. 19 The Tenth Amendment had been read simply as a grant of residuary power, granting the states whatever powers remained after determining what fell within the federal powers. But the Court has recently interpreted the

Tenth Amendment as supplying affirmative limitations on the powers of the federal government to regulate state governments. As the next Part will discuss, Lopez implicitly extends this approach by bringing Tenth Amendment concerns into the analysis when the federal government regulates individuals.

#### A. The Scope of the Commerce Power

Understanding the impact of Lopez on federal legislative power requires reexamining the cases applying the Commerce Clause, because Lopez turns on distinctions not discovered in previous cases. An early case still sets the terms for debate. 20 The phrase giving Congress the power "to regulate Commerce . . . among the several States" 21 provides several hooks for a narrow construction. The power to "regulate" could be limited to something like setting shipping terms. "Commerce" could be understood to cover only commodities transactions between merchants. The qualifier "among the several States" could limit the regulatory power of Congress to interstate shipments or even to actual crossing of state boundaries. 22 Gibbons v. Ogden, 23 however, yielded a broad interpretation on all counts. In ruling that the power to regulate commerce included the power to regulate shipping in the waters of New York State, Chief Justice John Marshall established several points. The [\*6] power to "regulate" was broad: "to prescribe the rule by which commerce is to be governed." 24 "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." 25 The Court also read "commerce" broadly, rejecting a definition limited to buying and selling commodities:

This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. 26

Nor was the power limited to interstate activity: "Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior." 27

But the decision also recognized limits: the power would not extend to commerce

that was "completely internal" to a state and that did not "extend to or affect other States." 28 Such vague limits are not easily applied. The key cases from that day to the present have turned on how those limits should be defined.

Until the turn of the century, the Court had few occasions to address how far the commerce power extended. 29 Then, as Congress became more active in regulation, the Court decided a number of cases which are hard to reconcile. Some cases upheld congressional action in the expansive spirit of *Gibbons*. So understood, Congress' power to regulate commerce went well beyond regulating the manner in which commerce was conducted. The Court sustained a number of statutes that used a link to interstate commerce as a method of controlling activity within the states. Thus, the Court upheld statutes prohibiting the interstate transportation of stolen cars, 30 of lottery tickets, 31 of prosti- [\*7] tutes, 32 and of impure food. 33 The Court also construed the power to regulate interstate commerce to extend to intrastate activity that affected interstate commerce. Thus, the *Shreveport Rate Cases* 34 upheld legislation authorizing rates for intrastate rail shipments because such control was "essential or appropriate" to regulation of interstate commerce. 35 *Swift & Co. v. United States* 36 sustained the application of the federal anti-trust laws to a conspiracy among meat packers on the grounds that the conspiracy affected the amount of shipments made, the market prices of meat, and the shipping fees paid railroads. 37 *Swift* relied on a practical, rather than technical conception of interstate commerce, i.e., whether an activity in actuality affects commerce, rather than a technical distinction between commerce and noncommerce. 38

Other cases during the same period, however, sought to limit Congress with confined readings of the Commerce Clause. In contrast to the sweeping language of *Gibbons*, these cases hemmed in the commerce power with formalistic distinctions. *United States v. E. C. Knight Co.* 39 held that the federal antitrust laws could not reach a conspiracy among sugar manufacturers because manufacturing was not commerce, on the theory that the manufacture of a good precedes its shipment and thus its entry into commerce. 40 Similarly, *Carter v. Carter Coal Co.* 41 held that the commerce power did not authorize the regulation of bituminous coal production, on the basis that mining precedes [\*8] commerce. 42 The Court also struck down regulation of activity that succeeded to commerce. *A. L. A. Schechter Poultry Corp. v. United States* 43 invalidated rules setting maximum hours and minimum wages for slaughterhouse workers, who dealt with livestock after it had been transported from state to state. 44 *Schechter* relied on another formalism when it held that the effect of the regulated activity on meat prices was only an "indirect" effect on interstate commerce and therefore not within the purview of Congress' commerce power. 45 Similarly, *Railroad Retirement Board v. Alton Railroad Co.* 46 ruled that requiring railroads to establish pension plans was not an authorized exercise of the commerce power because the social welfare of the worker was too remote from commerce. 47

In other cases where interstate commerce was plainly part of the activity at issue, the Court held that the statute regulated not commerce but a non-commercial aspect of the activity. Thus, *Adair v. United States* 48 invalidated a statute that barred railroads from discharging workers for being members of a union, on the basis that the statute regulated union membership, not interstate commerce. 49 The Court made another elusive distinction in invalidating a statute making common carriers liable if their negligence injured their employees, stating that the statute impermissibly regulated the employees involved in commerce, rather than regulating the business of interstate commerce. 50 In *Federal Baseball Club of Baltimore, Inc. v. National League*, 51 Justice Holmes held professional baseball not to be interstate commerce and thus not subject to the federal antitrust laws. 52 The necessary travel and transportation of equipment across state lines were not commerce because they were merely incident to the games, which in turn were not commerce because the personal effort was not related to production. 53

Even where the statute governed interstate commerce, the [\*9] Court might deem it to go beyond regulation. *Hammer v. Dagenhart* 54 limited the range of permissible "regulation." Congress had banned transport in interstate commerce of goods made in factories that violated child labor standards. 55 The Court held that the power to regulate commerce did not permit Congress to exclude goods from commerce. 56 The Court distinguished the cases involving interstate transportation of impure food and lottery tickets on the basis that those involved the exclusion from commerce of goods having harmful qualities, whereas products of child labor were not inherently harmful. 57 Rather than excluding harmful goods from interstate commerce, the statute impermissibly regulated a local evil that had not extended into interstate commerce. 58

At the same time as the Court regularly used the Commerce Clause and other constitutional doctrines to nullify federal statutes, the New Deal greatly widened the scope of federal legislation. 59 Perhaps due to the political pressure to let social legislation stand 60 (most notably, President Franklin Roosevelt's storied attempt to increase the size of the Court to permit appointment of more congenial Justices), the Court's application of the Commerce Clause took a sharply different tack with *NLRB v. Jones & Laughlin Steel Corp.*, 61 in which steel manufacturers

[\*10] challenged the National Labor Relations Act of 1935. 62 The statute granted employees the right to form unions, imposed duties to engage in collective bargaining, and created the National Labor Relations Board, with power to act against "unfair labor practices . . . affecting commerce." 63 A narrow majority of the Court declined to apply the manufacturing/commerce distinction of *E.C. Knight and Carter Coal* or to rule that the effect on commerce was merely indirect. Rather, the Court held regulation of labor relations to be within Congress' broad powers to protect interstate commerce from burdens and obstructions, regardless of the source. 64

In the following decades, an unbroken series of cases continued to uphold a broad conception of the commerce power. The Court repudiated the limiting distinctions of its restrictive holdings and, over time, adopted three alternative bases for justifying legislation. The commerce power covered three broad categories: regulating the use of channels of interstate commerce; 65 protecting goods or people in commerce and the instrumentalities of interstate commerce; 66 and regulating activities affecting commerce. 67 In applying each category, the Court explicitly rejected the restrictive distinctions of earlier cases. Accordingly, the power to regulate the use of the channels of commerce was not limited to regulation directed at commerce itself. *United States v. Darby* 68 upheld the Fair Labor Standards Act, which prohibited interstate shipment of goods if minimum wage and maximum hour standards were violated respecting anyone employed in their production. 69 *Darby* held that Congress had the power to exclude any article from interstate commerce, explicitly overruling *Hammer v. Dagenhart*, 70 which had struck down the ban on interstate shipment of the products of child labor. 71 An even [\*11] broader alternative holding in *Darby* was that Congress could regulate intrastate labor conditions in order to prevent the spread of substandard wages. 72 If intrastate producers were not subject to regulation, they could reduce costs by paying less than a minimum wage and thereby gain a competitive advantage against other goods sold in interstate commerce. 73 Under such a view, Congress could regulate intrastate activities to prevent them from spreading a perceived problem through interstate commerce.

The second category, the power to protect the instrumentalities of commerce and persons in commerce, also supported legislation directed at social ills much broader than commerce. The Civil Rights Act of 1964 prohibited racial discrimination by hotels and restaurants whose operations affected commerce, broadly defined. 74 In upholding the statute, *Heart of Atlanta Motel, Inc. v. United States* 75 noted testimony before congressional committees that racial discrimination made it more difficult and sometimes impossible for some travellers to find accommodations. 76 Notably, the Court held that it made no difference whether the travel was commercial or was by private automobile. 77 The Court also upheld application of the statute even to motels of a purely local character. 78 If the motel served travellers, then it could be regulated in order to protect interstate commerce from racial discrimination. 79 Likewise, *Katzenbach v. McClung* 80 upheld application of the statute to any restaurant if it served interstate travellers or if a substantial portion of the food it served had moved in commerce. 81 Accordingly, the commerce power authorized regulation of a local restaurant with no interstate travellers as customers, where it purchased 46% of its food from a supplier who had procured it from out of state. 82 Thus the power to protect the movement of products in commerce was also drawn very broadly.

The last category, activities affecting commerce, provided an even wider scope

for congressional regulation, as the Court consistently found sufficient links to commerce to uphold legislation. Purely intrastate activity was subject to regulation if it had effects on interstate commerce. 83 The effects were sufficient if they went to the terms on which commerce was conducted, such as the price of goods. 84 *United States v. Wrightwood Dairy Co.* 85 upheld the application of price regulations to milk even when produced and sold intrastate, holding that Congress could regulate intrastate transactions in order to effectively regulate interstate prices. 86 *Wickard v. Filburn* 87 upheld congressional authority to regulate production of goods that never reached interstate commerce, or even intrastate commerce. 88 *Wickard* sustained the application of production quotas to a small farmer's wheat that was not sold but rather used for home consumption, fed to his livestock or kept for the next year's sowing. 89 The Court held distinctions between production and commerce or between direct and indirect effects on commerce to be irrelevant. 90 Home-grown wheat affected the overall demand for wheat and therefore affected the market price of wheat. 91 A farmer that used home-grown wheat would not need to purchase such wheat on the market. 92 In order to control the market price of wheat, Congress could regulate production of wheat that never left the farm, let alone moved in interstate commerce. 93

In addition, the Court accorded great deference to Congress in deciding whether an activity affected commerce, requiring only that Congress have "a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce." 94 Accordingly, the Court sustained statutes with attenuated links to interstate commerce. *Maryland v. Wirtz* 95 upheld the expansion of the federal minimum wage and maximum hour statute to cover not just employees engaged in commerce or in production of goods for commerce, but also all employees of an enterprise that

[\*13] had any employees engaged in interstate commerce. 96 An employer could reduce overall costs by paying substandard wages to employees who were not involved in production for interstate commerce, which would affect the prices at which the employer sold products in interstate commerce. 97 In order to compete, companies in other states might have to pay their employees substandard wages. 98 *Perez v. United States* 99 sustained a federal conviction for loansharking, where the defendant had made a loan to a butcher and used threats of violence to extract usurious interest. 100 Even if the particular transaction did not affect interstate commerce, it was sufficient that such activity in general affected commerce by funding organized crime and permitting it to take over legitimate businesses. 101 *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.* 102 sustained federal regulation of various environmental aspects of surface mining, including restoration of land and vegetation, preservation of topsoil, and disposition of waste. 103 The Court looked to both the adverse economic effects from environmental damage and to the possibility that interstate competition between mining companies created incentives to reduce costs by not remedying environmental damage. 104



Such decisions left no doubt that the commerce power was extremely broad. 105 But, on the basis of the case law, it was very difficult to state where the outer limits lay. There were a number of cases providing examples of legislation that fell within the power, but now there existed not a single example of a statute that definitively exceeded the power. None of the earlier cases invalidating statutes provided a reliable benchmark for when congressional action would exceed the commerce power, for each case either had been explicitly overruled or was very questionable authority in light of later case law. So at the time that *Lopez* came before the Court, it was unclear how close a connection to interstate commerce was required to sustain legislation.

[\*14] Section B will argue that, in redefining the analysis of that issue, *Lopez* was strongly influenced by a different type of limit on the commerce power, the Tenth Amendment cases.

## B. Tenth Amendment Limitations on the Commerce Power

The second set of cases that converge in *Lopez* address limits on the commerce power stemming from the Tenth Amendment's reservation of power to the states. Such cases limit congressional power not because the regulated activity does not affect interstate commerce, but rather because Congress' action infringes on state sovereignty. In recent times, the Court has applied three related doctrines to protect the operations of the states from regulation under the commerce power. Under the holding of *National League of Cities v. Usery* 106 (which has been overruled but retains vigorous support by some Justices on the Court), federal regulation could not infringe the states' freedom to structure integral governmental operations. 107 Under *New York v. United States*, 108 Congress may not require state legislatures and administrations to participate in federal regulatory schemes. 109 Under the clear statement rule of *Gregory v. Ashcroft*, 110 the Court will avoid applying federal regulatory statutes to state governments unless the statute unmistakably applies. 111 Although these doctrines apply only to federal statutes regulating state governments, Part II will discuss how they strongly influence the *Lopez* analysis of congressional power to regulate the activity of individuals.

The first of the three doctrines has a tangled history. The Court has consistently recognized that the Constitution protects state sovereignty from federal incursions. But the Court's definition of the nature of such protection has changed dramatically. *Wirtz* sustained application of minimum wage and maximum hour regulations of the Fair Labor Standards Act to state-run schools and hospitals. 112 The Court rejected the argument that such control infringed state sovereignty protected by the Tenth

[\*15] Amendment. 113 If general regulations were within the commerce power, the Court held that it made no difference if a state was among the regulated entities. 114 The federal statute would apply even to what might be considered

core governmental functions, as well as proprietary activities in which the state resembled other employers. 115 *Fry v. United States* 116 followed *Wirtz* in upholding the application to state employees of federal limits on salary increases under the Economic Stabilization Act of 1970. 117 But the Court no longer dismissed the proposition that state governments might be less subject to federal regulation than other entities. 118 The Court stated that the Tenth Amendment would prevent congressional action that damaged the capacity of a state government to operate. 119 Controls on wages, however, were not sufficiently invasive to invalidate the regulation. 120 Justice Rehnquist dissented, voicing concerns that would reappear in a different rubric in *Lopez*. In his view, the controls violated affirmative limits on the ability of Congress to regulate traditional governmental activities of the states, such as operating schools and hospitals. 121

A narrow majority of the Court adopted Justice Rehnquist's view in *National League of Cities v. Usery*. 122 Overruling *Wirtz*, 123 the Court struck down the application of federal minimum wage and maximum hour provisions to state employees. 124 The opinion drew an analogy between individual rights and the rights of states. 125 Just as a federal statute within the commerce power would be invalid if it violated an individual's right

[\*16] to a fair trial or to due process, a federal statute regulating commerce could not "displace the States' freedom to structure integral operations in areas of traditional governmental functions." 126 Regulation of state employees was held to be such an infringement. 127 The power to set the wages and hours of state employees in governmental functions was essential to the states' "separate and independent existence" and therefore beyond the power of Congress. 128

But after several decisions struggling with the application of its doctrine, 129 *National League of Cities* was overruled by *Garcia v. San Antonio Metropolitan Transit Authority* 130 Like *National League of Cities*, *Garcia* was a five to four decision, a change of position by Justice Blackmun tipping the scales. *Garcia* recognized that application of the vague protections afforded to the states had been difficult. 131 The rule of *National League of Cities*, which protected "traditional" and "integral" state governmental functions, had proved "unsound in principle and unworkable in practice." 132 Lower court decisions exhibited considerable confusion. Courts had held that licensing automobile drivers and operating an airport were integral governmental functions, but regulating road traffic and regulating air transportation were

[\*17] not, drawing apparently arbitrary distinctions. 133 In addition, providing special protection for "traditional" and "integral" functions actually undercut an important rationale for federalism. One purpose of vesting states with governmental powers is to permit them to experiment with various approaches in whatever areas the state and its people choose. 134 There is no reason to give less protection to a state activity simply because it is of recent origin.

135

But the main reason for the change in doctrine was that *Garcia* stands for a different conception of federalism than *National League of Cities*. Rather than relying on substantive limits on congressional power devised by the courts, *Garcia* relied primarily on the political processes inherent in the structure of federal and state government. 136 *Garcia* recognized that the federal structure of the Constitution required protection of state sovereignty. 137 But sufficient protection was to be found not in substantive limits but rather in the procedural safeguards in the constitutional structure, such as the limited powers granted to Congress, the representation of the states in Congress and their role in selecting the members of the federal government. 138 These provided more effective means for the states to control the federal government than judicial attempts to strike a balance. 139 The Court left open the possibility that a failure in those procedural safeguards could warrant judicial invalidation of a congressional action. 140 Conceivably, a state could have been denied participation in the political process or somehow made isolated or powerless. 141 But absent such a showing, federal ac- [\*18] tion under the Commerce Clause would not be invalidated simply because of its substantive effect on a state. Thus *Garcia* appeared to consign the implementation of federalism to the political process rather than judicial review. 142 Forceful dissents by Justices O'Connor and Rehnquist, however, predicted that future decisions would in turn overrule *Garcia*, reinstating the doctrine of *National League of Cities*. 143 Subsequent Supreme Court opinions have echoed those sentiments. 144

The Court indeed recently adopted a second Tenth Amendment doctrine 145 that, although narrower in scope, represents a return to application of substantive limits on Congress, rather than reliance on political processes. *New York v. United States* nullified parts of a federal scheme for regulating waste disposal on the basis that the statute "commandeered" state legislatures by requiring them to enact statutes according to congressional direction. 146 The Low-Level Radioactive Waste Policy Amendments Act of 1985 147 made states responsible for regulating disposal of low-level radioactive waste. 148 The Act set deadlines for each state to ratify legislation either joining a regional compact with [\*19] other states or developing disposal facilities within the state. 149 A state that failed to meet deadlines would: (i) not receive a share of certain fees collected at disposal sites; (ii) not be permitted access to certain disposal sites; and (iii) be required to take title to and possession of waste generated in that state. 150 There was no dispute that regulation of low-level radioactive waste disposal is within the commerce power, because of the interstate market for such disposal. 151 But *New York v. United States* held that Congress could not exercise that power in a way that required state legislatures to play a prescribed role. 152

The Court reached this result by way of a new understanding of the Tenth Amendment. 153 Under the Tenth Amendment, the [\*20] powers that are not delegated to the federal government are "reserved to

the States." 154 One can infer from this that not all governmental powers are granted to the federal government, for that would leave nothing for the states. 155 Thus, congressional action must have a basis in one of its enumerated powers, not just the general power of a sovereign government. 156 *New York v. United States* took the inference one step further, stating that one could determine the extent of federal power by first determining the extent of state power. 157 The Court characterized the Tenth Amendment as a tautology: all powers not delegated to the federal government are reserved to the states; therefore, a power reserved to the states was not delegated to the federal government. 158 The Court reasoned that if a power should belong to the states, then it must not have been delegated to the federal government. 159 As a matter of mere logic, such reasoning is specious, 160 but it sufficed for the Court to reconcile its analysis with previous cases characterizing the Tenth Amendment as a mere truism. 161

Using the Tenth Amendment as a limitation on the commerce power, the Court held that the power to regulate interstate commerce did not give Congress power to direct state regulation. 162 The first two incentives of the statute were valid exercises of the power because they did not mandate state action. 163 They offered money and access to waste disposal sites to states that [\*21] chose to enact legislation, but left the states free to choose not to act. 164 But the third incentive impermissibly forced states either to enact legislation according to the instructions of Congress or take title to waste. 165 Congress could not so commandeer state governments into service as federal regulators. 166 Accordingly, the provision was unconstitutional. 167

A third check on congressional action that affects states is the "clear statement rule," as applied with particular force in *Gregory v. Ashcroft*. 168 A number of cases have interpreted federal statutes not to interfere with state interests absent a clear statement in the statute itself. 169 Thus, the Court has read ambiguous statutes not to regulate criminal activity within the police power of the states, 170 to pre-empt state regulation in an area of commerce, 171 or to make states liable to individuals under federal laws. 172 *Gregory v. Ashcroft* formulated a particularly demanding form of this approach. Missouri law required that appointed state judges retire at age seventy. 173 The issue was whether such mandatory retirement violated the Federal Age Discrimination in Employment Act of 1967 (the "ADEA"), 174 or fell within the ADEA's exception for "an appointee on the policymaking level." 175 Justice O'Connor's majority opinion held the language of the exception to be ambiguous. 176 Where congressional intent was not clearly spelled out, a federal statute would not be read to interfere with state decisions on the qualifications of judges. 177 Therefore, since Congress had not made it plain that state judges were included, the Court held them to be excluded under the exception. 178 The holding went beyond previous clear statement cases. First, previous cases had concerned whether Congress intended a statute to apply to states at all. 179 The ADEA, however, explicitly included states as employers. 180 Thus *Gregory*

extended the clear statement requirement to interpretation of not only the scope of the statute, but also individual statutory provisions. Secondly, it found ambiguity very readily. As the Court itself stated, it requires an "odd" reading of the statute to exclude judges as policymaking appointed officials, especially within the context of the definition. 181 Nevertheless, the Court held that Congress had failed to make it clear that judges were included. 182 Gregory goes beyond a method for determining the meaning of statutory language to an affirmative check on congressional action. If Congress intends to take action pursuant to the commerce power which interferes with the way a state exercises its sovereign powers, then Congress must take pains to be very [\*23] clear about it. 183

Thus, at the time that *Lopez* came before the Court, congressional action under the Commerce Clause could be subject to four related limitations:

1. In order for Congress to regulate an activity under the Commerce Clause, the regulated activity had to affect commerce.
2. A generally applicable federal statute that impaired a state's ability to structure integral operations in an area of traditional governmental functions could be invalidated, if the *National League of Cities* rule were revived by overruling *Garcia*.
3. A statute that required a state to participate in a federal regulatory scheme could be impermissible "commandeering" under *New York v. United States*.
4. The Court would seek to interpret a federal statute to avoid interference with a state's exercise of its sovereign powers.

The application of the first limitation was the issue in *Lopez*. But the next Parts seek to demonstrate that all four affected the Court's analysis and are likely to affect the ultimate effect of *Lopez* on the allocation of power between the state and federal governments.

## II. The *Lopez* Opinion: A Doctrinal Hybrid

The specific issue in *Lopez* was whether Congress had authority under the Commerce Clause to enact the Gun-Free School Zones Act of 1990, 184 which prohibited knowing possession of a firearm on or within one thousand feet of school grounds, subject to a number of exceptions. 185 By a vote of five to four, the Court held that the statute unconstitutionally exceeded the commerce power. 186 The broader significance of the opinion is that for the first time since it abandoned the formalistic distinctions of the pre-New Deal era, the Court held that Congress had exceeded the commerce power. The Court noted that

the case law of the modern era had consistently rejected Commerce Clause challenges, 187 but emphasized that even while expanding congressional power, these decisions had regularly contained dicta reaffirming

[\*24] that limits to the commerce power remained. 188 The Court declared that its decision represented the enforcement of boundaries between the powers of the federal and state governments, in order to preserve "a distinction between what is truly national and what is truly local." 189 Such a distinction was intended to prevent the federal government from impermissibly regulating areas of traditional concern to the states. This Part critically examines the analysis the Court followed in reaching the result. The Lopez decision changes analysis of the commerce power in several ways. Earlier decisions had framed the commerce power analysis as a single issue, whether the regulated activity affected interstate commerce. 190 The Lopez Court, however, split the analysis into several steps. 191 At each step, the Court narrowed the scope of permissible regulation. In addition to taking a narrow approach to the existing doctrine, the Court appears to have added specific protection from federal regulation for areas of traditional concern to the states.

The initial step was to frame the applicable test for analyzing the effect of the activity on interstate commerce. The Court noted some equivocation in the language of earlier decisions as to whether the activity must affect or substantially affect interstate commerce. 192 The Court chose the more demanding standard, holding "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." 193 Even meeting that higher standard, however, would not always be sufficient, as the Court introduced considerations beyond the

[\*25] effect on interstate commerce. 194 Although broad language in modern cases had stated that the power to regulate interstate commerce included the power to regulate activities that affected it, the Lopez court announced important qualifications. 195

The Court first introduced a distinction that made its scrutiny of legislation more demanding. It read the modern cases to extend only to "economic" or "commercial" activity. 196 Under the modern case law, intrastate activities with a sufficient effect on interstate commerce to come within the commerce power had included coal mining, extortionate credit transactions, restaurants using substantial interstate supplies, hotels, and the production and consumption of home-grown wheat. 197 The Court generalized a rule from these holdings: "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." 198 But the Court also relied solely on these cases for the converse proposition: that legislation regulating activity that was not "economic" or "commercial" may not necessarily be upheld. In formulating this rule, the Court relied only upon cases sustaining congressional action. It surveyed a number of cases in which the Court had upheld an act of Congress, and found a pattern that each case involved economic activity. That conclusion certainly is not compelled by the cases the Court

cited. Every case had upheld the statute in question, so the cases presented no distinction between permissible and impermissible legislation. Moreover, none of the cases had limited its holding to economic activity. The reasoning would be more compelling if the Court had relied on a single case holding that Congress had exceeded the commerce power and if that case had involved non-economic activity. But all of the cases striking statutes down are now of dubious authority, each having been explicitly rejected or eclipsed by subsequent cases. 199 So the only firm conclusion compelled by the case law was that the commerce power is at least broad enough to sustain the regulation at issue in those cases; by the same token, however, the fact that the limits were undefined makes it legitimate for Lopez to draw a distinction.

[\*26]

The limiting distinction chosen by the Court, that the existing Commerce Clause cases apply only to regulation of commercial and economic activity, owes more to the Court's objective of delimiting spheres of national and local power than to an attempt to maintain the existing analytical framework. The basis for upholding broad congressional regulation in each of the existing Commerce Clause cases had been that the regulated activity could affect interstate commerce. Interstate commerce can be affected by intrastate commercial activity and by intrastate noncommercial activity, so if the effect on interstate commerce were really the only issue, the distinction between intrastate commercial and non-commercial activity would be untenable. Under the analysis of the modern Commerce Clause cases prior to Lopez, intrastate commerce is within the commerce power because it affects interstate commerce, not because it is commerce. But because the cases to date have all involved activity that could be characterized as commercial or economic, the Lopez Court was able to draw that distinction without upsetting settled precedent. Presumably, the Court included as within the sweep of the precedent not just commercial but more broadly economic activity in order to accommodate the holding in *Wickard v. Filburn*, 200 which upheld regulation of home-grown wheat. *Wickard* involved no commercial transaction; the farmer grew the wheat for his family's consumption and for use on the farm. 201 So either commercial or more generally economic activity will still be broadly subject to federal regulation even under the distinction found by Lopez.

The distinction may not prove to be a clear one. The Court made no attempt to define what it meant by "economic" and "commercial," as though the terms needed no further definition. Rather, in a subtle shift, the Court concluded without discussion that gun possession is not an economic activity, as it understood the term, or indeed as anyone could understand the term: "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 202 But of course one

[\*27] could define those terms broadly enough to include gun possession. Indeed, the Court's opinion itself proves this, with the contradictory assertion

that under the dissent of Justice Breyer, "any activity can be looked upon as commercial." 203 Similarly, "economic activity" is understood by some broadly enough to include the decision whether to carry a gun. Economics is much broader than the study of markets and commerce. A leading treatise on the economic analysis of law defines economics as the study of "rational choice in a world--our world--in which resources are limited in relation to human wants." 204 Much literature analyzes criminal law in economic terms, as a system of incentives to affect behavior. 205 Likewise, education is an economic activity, in the sense that it involves investment of time and resources in the accumulation of knowledge and skills for future use in work and other activities. 206 The Court evidently used the term in a narrower sense, leaving it for future cases to distinguish between economic and non-economic activity. Although the Court's distinction may lack analytical rigor, it has appeal on prudential grounds. In effect, the Court has abandoned the somewhat strained analysis of earlier cases finding links between intrastate commercial or economic activity and interstate commerce, apparently conceding that such links can generally be found. But the remainder of the opinion apparently shifts to imposing additional limits on regulation of non-commercial, non-economic activity beyond the question of effects on interstate commerce.

The Court may have framed the issue as whether firearm possession in a school zone substantially affects interstate commerce, 207 but its actual analysis was rooted in concerns of federalism. Its analysis of the issue departs from the recent cases in two ways. First, the Court appeared to reduce the deference it had previously accorded congressional action. The opinion had earlier recognized that previous cases had applied a low-level of scrutiny, "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." 208

[\*28] But in discussing the possible links between gun possession and commerce, the Court did not term the issue as whether Congress had a rational basis for finding a sufficient link, but rather as whether possession of a firearm in a school zone in fact substantially affects interstate commerce. 209 Although not explicitly rejecting the "rational basis" precedents, the Court appears to have abandoned its previous deference to Congress in favor of its own independent assessment of the effect on commerce.

Second, in making its assessment, the Court departed from the approach of recent cases in another way that makes it more difficult for a statute to pass muster. In its analysis of whether the regulated activity had a substantial effect on commerce, the opinion did not focus upon whether gun possession in a school zone could affect interstate commerce. The Court recognized several strong arguments that such an effect could exist: guns in school zones could increase violent crime, which in turn could increase the costs of insurance, which are spread through the country; people might avoid travel to areas they regard as unsafe; guns in schools could adversely affect education, resulting in a less productive work force. 210 The Lopez Court, however, never directly addressed the arguments



that gun possession in school zones could substantially affect interstate commerce. 211 Rather, it considered instead the implications of accepting those arguments. 212 The Court reasoned that holding the Gun-Free School Zones Act constitutional would leave no area to exclusive state regulation. 213 Accepting the "costs of crime" argument, in the Court's view, would mean that Congress could regulate all violent crime and even any activity that could lead to violent crime. 214 The Court foresaw an even greater slippery slope with the education argument. If Congress could regulate education because it affected national productivity, it could regulate marriage, divorce, and child custody under the Commerce Clause. 215 Likewise, if Congress could regulate gun possession because it adversely affects education, then it could regulate the educational process directly. 216 Accordingly, Congress could require that all schools follow a federally mandated curriculum. 217 In short, the Court did not conclude that gun possession could not have a substantial effect on commerce, although it had phrased the issue in those terms. Rather, it concluded that it would be bad policy to reach such a conclusion, because it would open the door to complete federal regulation of two areas traditionally regulated by the states--crime and education.

Thus, in deciding whether the activity has a substantial effect on interstate commerce, the Court considered whether that activity was one traditionally regulated by the states. 218 The two issues would appear to be separate. An activity that states commonly regulate may very well have an effect on interstate commerce. Indeed, states have traditionally regulated areas at the heart of interstate commerce. For example, the Uniform Commercial Code has been enacted in every state and specifically contemplates application to interstate commercial transactions. 219 More broadly, traditional areas of state common law such as

[\*30] contracts and torts frequently cover interstate interactions and inevitably have a considerable effect on interstate commerce. Indeed, states have regulated commercial activity so much that most Commerce Clause cases concern the validity not of federal legislation but rather of state regulation of commerce. 220 Whether an activity is one traditionally regulated by the states does not determine whether that activity has an effect on interstate commerce. However, the Court left no doubt that the question of traditionally state-regulated activity was now part of determining the extent of the federal commerce power. Accordingly, the principal doctrinal effect of *Lopez* will likely be that state sovereignty concerns move from a background policy concern in Commerce Clause analysis to an explicit part of the test.

In combining the two questions (whether an activity has a substantial effect on interstate commerce and whether the activity is one of traditional state concern), the Court implicitly extended the approach of *New York v. United States*. That case held that in determining the extent of the federal commerce power, a court must consider the extent of the powers reserved to the states. 221 *Lopez* extends that approach from questions of direct regulation of state

government to questions of regulation of any area of traditional state concern. In so doing, Lopez may make the state sovereignty test more difficult to apply. New York v. United States, by its terms, is limited to federal statutory provisions which mandate that state governments regulate in a certain manner. Such statutory provisions should be easily identified and, if history is any guide, rather infrequent. 222 Under Lopez, however, state sovereignty could be part of the Commerce Clause analysis for any statute that touched on an area of traditional state concern--an extremely broad and vague domain. States have traditionally concerned themselves with any number of activities. Courts may find it as difficult to determine whether an activity is within an area of traditional state concern as it was to determine whether a state function qualified as traditional or integral, the National League of Cities categories that Garcia rejected as unworkable. 223 Lopez also sets a very low threshold [\*31] for finding interference with an area of traditional state concern. The Gun-Free School Zones Act did not regulate education, but rather regulated an activity that could affect education. 224 Under that broad an approach, most federal statutes will affect some area of state concern.

As a matter of constitutional doctrine, Lopez marks a notable change. Before Lopez, a broad reading of the case law would suggest that the Commerce Clause authorized Congress to regulate any activity that Congress had a rational basis for concluding affected commerce. 225 The Lopez opinion is far from clear about how it would apply in future cases, but a pragmatic assessment suggests that the analysis will proceed along the following lines: the Court will sustain regulation of an intrastate activity only if the Court (not Congress) determines:

- (i) the activity is a commercial transaction or economic activity that substantially affects interstate commerce; or
- (ii) the regulation is a necessary part of a broader regulation of commercial or economic activity; 226 or
- (iii) the activity is non-commercial and non-economic, has a substantial effect on interstate commerce and is not an area of traditional concern to the states.

Thus, scrutiny of federal legislation may be more demanding. However, this does not necessarily imply a limitation on the extent of Congress' power, if avenues are available to satisfy such review while enacting equally extensive regulation. If the interpretation above reflects how the Lopez Court has framed the analysis, special protection for areas of traditional state concern exists only for activity that is neither commercial nor economic [\*32] and is not regulated as part of a broader permissible regulation. The next Part turns to whether this new doctrinal restriction will result in a political limitation, and if so, the nature of that limitation.

### III. Lopez as Federalism

This Part turns to the place of Lopez in the federalism debate, especially its relationship to the Court's Tenth Amendment cases. In recent years, the members of the Court have differed sharply on whether implementing federalism should be left to political processes or be enforced by judicial review protecting substantive limits on federal legislation.<sup>227</sup> The rhetoric of the Lopez opinion characterizes the opinion as creating a substantive limit on federal regulation of areas of traditional concern to the states, such as crime and education. But rather than creating a line over which Congress cannot reach, it may prove merely to create a jurisdictional requirement that Congress could meet with the necessary political will. Lopez may bar blanket federal regulation of noncommercial activity, but it leaves Congress with the power to reach such activity through a number of possible links to commerce. But even if the case does not create effective substantive protection of such areas, it may prove to contribute to the procedural protections of federalism. In order for Congress to regulate non-commercial activities, the legislation will require detailed jurisdictional provisions. Thus, Congress must affirmatively address concerns of federalism during the legislative process. Ironically, then, a case that draws so much from *National League of Cities* (which attempted to create spheres of activity in which states were free from federal regulation) may prove more consistent with the approach of *Garcia* (which relied on political processes to balance state and federal interests).

In considering the likely effect of Lopez, a threshold question is whether the case represents the repudiation of the expansive reading of the Commerce Clause in the modern era. Justice Thomas' concurring opinion forthrightly invites such a retrenchment. Justice Thomas would construe "commerce" to cover not commercial activities generally but only transactions in goods and transportation for such purposes.<sup>228</sup> In addition, Congress

[\*33] could regulate only interstate commerce, not other activities simply because they affect interstate commerce.<sup>229</sup> Thus, the commerce power would no longer authorize regulation of manufacturing or production, let alone non-commercial activities that affected the markets for goods and services.<sup>230</sup> This indeed would represent a substantive limit on the power of Congress. But none of the other opinions in Lopez appear even to consider such radical surgery on the powers of the federal government.

The approach of the majority opinion, rather, is to trim existing Commerce Clause doctrine around the edges. As discussed above, the case makes judicial review under the Commerce Clause more demanding in several ways. It requires not just an effect but a substantial effect on commerce; the Court evaluated the effect independently rather than simply determining if there was a rational basis for Congress to find such an effect; the existing cases were read to apply

only to commercial or economic activity; and even a substantial effect on commerce would not sustain regulation of non-commercial, non-economic activity in an area of traditional concern to the states. 231 But Lopez did not suggest that any of the recent opinions were wrongly decided. Rather, the Court went to considerable lengths to reconcile its analysis with both the results and the reasoning of the earlier cases. The Court characterized its decision not as a limit on those decisions, but a refusal to proceed any further. 232 While recognizing that some of the recent decisions contained language broad enough to support further expansion, the Court carefully showed that those decisions consistently acknowledged limits on the commerce power, cataloging language from the cases recognizing that the commerce power must have meaningful boundaries. 233 The majority opinion also devotes considerable effort to fitting the cases within its formulation of the analysis. The majority's detailed discussion of Wickard argues that the Lopez analysis is consistent with the most far-reaching of the earlier cases. 234 The concurring opinion of Justice Kennedy, joined by Justice O'Connor, is even more careful to cast the holding as [\*34] consistent with existing case law. 235 Add to that the fact that four of the Justices dissented in favor of more deference to Congress, and it becomes clear that, to the present members of the Court, the modern cases continue as binding authority. The question then becomes whether the Lopez analysis will prevent Congress from regulating particular areas of activity.

Even though Lopez has announced a narrower doctrinal approach to the commerce power, that likely will not translate into creation of areas of activity immune to regulation by Congress. As discussed above, Lopez cast its holding as necessary to protect local power in areas of traditional concern to the states. In the Court's view, upholding the Gun-Free School Zones Act would have eroded the police power of the states and the states' control of education. 236 If Congress could outlaw gun possession, then it could regulate any violent crime. 237 If Congress could prohibit gun possession in school zones, it could regulate every aspect of education, to the extent of ordering a particular federal curriculum to be taught in the states' schools. 238 These are both slippery slope arguments, but of different types. The first goes to how far Congress may displace state regulation of the activities of citizens. The second goes to how far Congress may control how the state conducts its own activities. The Lopez holding presents a rather porous limit as to the first and an unnecessary one as to the second.

Lopez will likely prove not to be a complete substantive protection of any police power of the states. Even though it formulates a narrow version of the "effect on commerce" approach, the doctrine does not protect areas of activity from federal regulation. The fact that the activity is an area of traditional state concern is not a limit if the activity is economic or commercial, or is regulated as part of a larger regulation of commercial or economic activity. To use the activity at issue in Lopez as an example, the opinion still leaves ample means for Congress to regulate gun possession near schools. A federal statute

could prohibit gun possession in school zones with a jurisdictional element requiring a link to interstate commerce. 239 One could use the Court's recent cases to draft a clause with broad coverage. The statute might prohibit possession of a firearm in a school zone, where: (i) the firearm was or had been in interstate commerce or affected interstate commerce; 240 or (ii) the defendant had moved in interstate commerce; 241 or (iii) possession of the firearm affected a person moving in interstate commerce or engaging in a commercial transaction; 242 or (iv) the school acquired a substantial amount of books or supplies in interstate commerce. 243 In most cases, one of the alternatives would be met. Perhaps in a given case a court might hold one of the foregoing provisions to be overbroad, but in general Congress clearly retains a great deal of power to regulate gun possession in school zones. Thus, *Lopez* may prevent Congress from general regulation of crime, but it does not reserve meaningful areas of regulation to the states. Rather, it reserves to the states only sporadic instances of crime. To measure this as a protection of the police power of the states, one could imagine a statute that, unlike the actual statute in *Lopez*, preempted state regulation. The only police power reserved to the states in absolute terms is the ability to regulate those instances where, by a combination of circumstances, none of the jurisdictional alternative were met. Thus, *Lopez* reserves exclusive police power to the states only over random, isolated instances of crime. The power to regulate such activities hardly amounts to the right to govern areas of traditional concern to the states.

An alternative approach to drafting the statute could cover even more cases. Rather than regulating gun possession as such, Congress could regulate commercial transactions involving guns; *Lopez* appears to leave regulation of commercial transactions generally within the commerce power. 244 Accordingly, Congress

[\*36] could prohibit the sale or lease of a firearm to a minor or within a school zone. As a means of making that prohibition effective, Congress could also prohibit possession of firearms in a school zone. Such a regulation would be well within the rationale of *Wickard*, which upheld congressional regulation of a farmer growing and consuming wheat at home, because such activity affected the market price of wheat. 245 Moreover, there would be no need to show a nexus to interstate commerce in individual cases, just as *Perez* upheld application of a general loan-sharking statute to a wholly intrastate transaction. 246 Thus, with respect to police powers, *Lopez* does not really create "a distinction between what is truly national and what is truly local." 247 The reason is that *Lopez* draws a distinction between commercial and non-commercial activity, but there is little correlation between whether an activity is commercial in nature and whether it falls within an area of traditional state concern. So the effective limits imposed by *Lopez* do not mark off areas of traditional concern to the states but rather cut broad swathes through such areas.

With respect to regulation of education, the analysis is different. *Lopez* reasoned that if Congress could regulate gun possession because it adversely

affected education, then "a fortiori, it can also regulate the educational process directly." 248 Accordingly, Congress could regulate every aspect of state schools, including prescribing the curriculum. 249 But the label "a fortiori" is inappropriate, because prescriptive regulation is not contained within prohibitive regulation. The distinction is important, because such prescriptive regulation invokes other considerations. In the unlikely event that Congress were to dictate how state schools were to be run, the rule of *New York v. United States* would be applicable. 250 The issue would be whether Congress had required the states to play prescribed roles in a federal program, or had offered states the opportunity to participate but the freedom to decline. An attempt by Congress to dictate every aspect of how state schooling must be conducted would not survive such scrutiny. Such analysis provides a much more effective

[\*37] protection than *Lopez*. Under *Lopez*, Congress could still use either jurisdictional links to commerce or regulation of commercial transactions to regulate many aspects of education. For example, the *Lopez* view of the Commerce Clause would not prevent Congress from prohibiting the interstate shipment of school books not included in the federal curriculum (although, of course, the First Amendment would).

*Lopez* certainly affirms that the commerce power has limits, 251 but as a matter of federalism it does not create special protection for areas of traditional concern to the states, in the manner that National League of Cities sought to do for "integral functions" of state governments. 252 Rather, even after the tightening of *Lopez*, such areas as crime and education will retain far too many links to interstate commerce to be immune from federal legislation. 253 If substantive protections are to be effective, they are more likely to come in the form of affirmative limits on particular types of federal legislation, as found in *New York v. United States*. 254

Thus *Lopez*, although it relies heavily on principles of state sovereignty, seems to offer little practical support for the idea that federalism requires the creation of separate spheres of responsibility for state and federal governments. In particular, it undercuts a view of federalism enunciated in Justice Kennedy's concurring opinion. Justice Kennedy, elaborating on views expressed by Justice O'Connor in earlier cases, characterized federalism as increasing governmental accountability by allocating governmental functions between the federal and state governments. 255 Because the Constitution divides governmental authority, citizens know whether to hold the federal or state government accountable for failing to fulfill a particular function. 256 But *Lopez* does not completely insulate particular areas of activ- [\*38] ity from federal regulation but rather leaves considerable room for overlap. Thus it will not necessarily be clear to a citizen aggrieved about a particular social problem in which the government has failed to fulfill its regulatory responsibility.

But Lopez does support another conception of federalism. Lopez is likely to play an important role in providing procedural protection against changes in the allocation of governmental responsibilities. Although Congress will not be barred from regulating non-commercial activity of concern to the states, Lopez will require Congress to address directly issues of federalism in the legislative process. In order to regulate non-commercial activity, the statute will need to include explicit jurisdictional links to interstate commerce or regulate the non-commercial activity as part of a broader scheme regulating commerce. Congress must thus directly consider the effects of the proposed regulation on non-commercial activity and affirmatively state exactly how far it intends to use its powers. In this sense, the principal effect of Lopez is that of a clear statement rule. In interpreting ambiguous federal statutes, the Court avoids interpretations that change federal-state relations unless the statute is unmistakably clear. Under the strong formulation of the clear statement rule in *Gregory v. Ashcroft*, the Court will require such federalism issues to be addressed in every relevant part of the statute. Thus, Congress can only alter the federal balance by addressing the effect on states clearly and in detail. Lopez, although not a statutory interpretation case, will have a similar effect. Although Lopez does not insulate broad areas of non-commercial, non-economic activity from federal regulation, it will uphold such regulation only if clear and explicit jurisdictional provisions address the federalism issues. Thus, the issue of a statute's effect on areas of traditional concern to the states must necessarily be directly and specifically addressed if legislation altering the existing balance is considered, an approach consistent with Garcia's reliance on the political structure of the Constitution to protect the interests of the states. 257

#### IV. Conclusion

Lopez changes the basic structure of Commerce Clause analysis. The modern cases had left an open-ended rule that Congress could regulate activity that affected interstate commerce. The Lopez Court did not attempt the impossible task of defining just

[\*39] how substantial such effects must be to sustain regulation. Although the opinion in form followed the "substantial effect on interstate commerce" approach, it shifted the analysis from the effect on interstate commerce to whether the regulated activity itself is commercial. In effect, Lopez concedes that Congress may regulate commercial and economic activity (whether intrastate or interstate), but attempts to preserve to the states regulation of non-commercial and non-economic activity in areas of traditional concern to the states (even where such activity affects interstate commerce). The Court drew these limits by implicitly adopting the approach of its Tenth Amendment cases, looking to state sovereignty for affirmative limits on the federal power. But the new approach will probably not succeed in delimiting "truly local" areas,

because Congress will still be able to regulate such areas through fashioning legislation based on links to commercial or economic activity.

However, although Lopez will thus not support the "substantive areas" conception of federalism that informs its analysis, it will contribute to the procedural conception. Congress will need to address issues of federalism clearly and specifically if a statute alters the federal-state balance in non-commercial domains. Seen in this light, the vagueness of the distinctions that Lopez relies upon are also less troubling. "Economic," "commercial," and "area of traditional concern to the states" are indeterminate, broad categories. 258 If Congress drafts statutes to meet the commerce power requirements, however, courts will rarely need to apply those categories in order to decide the constitutionality of the statute. 259 At a time when the extent of the regulatory power of the federal government has become a matter of intense debate, Lopez may ultimately amount to a rule encouraging a measure of deliberation in the political process without hobbling Congress.

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Governments > State & Territorial Governments > Employees & Officials  
Constitutional Law > Congressional Duties & Powers > Commerce Clause >  
Interstate Commerce > Prohibition of Commerce  
Constitutional Law > Congressional Duties & Powers > Reserved Powers

#### FOOTNOTES:

n1 "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, section 8, cl. 3.

n2 115 S. Ct. 1624 (1995). Chief Justice Rehnquist wrote the majority opinion striking down the statute in question, joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Kennedy filed a concurring opinion, joined by Justice O'Connor, and Justice Thomas filed a concurring opinion. Justice Breyer filed a dissenting opinion, joined by Justices Stevens, Souter, and Ginsburg. Lopez, 115 S. Ct. at 1625.

n3 The Court had not held since 1937 that Congress had enacted a statute beyond the scope of the commerce power, and had so held only eight times. Laurence H. Tribe, American Constitutional Law section 5-4, at 307 n.8 (2d ed. 1988)



(citations omitted). Also, both in *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), and in *New York v. United States*, 505 U.S. 144 (1992), the Court held a statute to be an unauthorized exercise of the commerce power, not because it exceeded the scope of the Commerce Clause but because it infringed state sovereignty. See *infra* notes 106-28 and 145-67 and accompanying text.

n4 Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, section 1702(b)(1), 104 Stat. 4844-45 (codified at 18 U.S.C. section 922(q) (1988 & Supp. V 1993)). The statute provided a number of exceptions, excluding gun possession on private property not on school grounds, section 922(q)(2)(B)(i); individuals employed by the school, section 922(q)(2)(B)(v), or licensed to carry a firearm, section 922(q)(2)(B)(ii); participants in school programs, section 922(q)(2)(B)(iv); law enforcement officers, section 922(q)(2)(B)(vi); and hunters permitted to cross school property, section 922(q)(2)(B)(vii). The statute also provided that it did not preempt state or local governments from establishing gun-free school zones, section 922(q)(4). *Lopez*, 115 S. Ct. at 1630-31.

n5 See *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

n6 See *Perez v. United States*, 402 U.S. 146 (1971).

n7 See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

n8 See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

n9 See *Wickard v. Filburn*, 317 U.S. 111 (1942).

n10 See *Lopez*, 115 S. Ct. at 1634.

n11 This article focusses on the Commerce Clause as a limit on federal legislative power; the Clause also acts as a limit on state power, by giving the federal government the primary power to regulate interstate commerce. See, e.g., *Martin H. Redish & Shane v. Nugent*, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 *Duke L.J.* 569; *Stephen A. Gardbaum*, *The Nature of Preemption*, 79 *Cornell L. Rev.* 767 (1994). The allocation of powers between federal and state courts also raise issues of federalism. See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971) (holding that federal courts should abstain from hearing claims that are already at issue in a pending state criminal proceeding); *Testa v. Katt*, 330 U.S. 386 (1947) (holding that state courts may not refuse to hear federal claims); *Naomi R. Cahn*, *Family Law, Federalism, and the Federal Courts*, 79 *Iowa L. Rev.* 1073 (1994); *Dolores K. Sloviter*, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 *Va. L. Rev.* 1671 (1992); *Margaret G. Stewart*, *Federalism and*

Supremacy: Control of State Judicial Decision-Making, 68 Chi-Kent L. Rev. 431 (1992). Federalism also protects individual rights by setting the federal and state governments as checks on each other's actions. See, e.g., Akhil Reed Amar, Five Views of Federalism: "Converse-1983" in Context, 47 Vand. L. Rev. 1229 (1994) (proposing expansion of states' roles in protecting individual rights); Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425 (1987); James F. Blumstein, Federalism and Civil Rights: Complementary and Competing Paradigms, 47 Vand. L. Rev. 1251 (1994) (arguing that federalism protects minorities in the political process). Such questions of local autonomy reach beyond the United States. See, e.g., George A. Bermann, Taking Subsidiarity Seriously: Federalism in the European Community and the United States, 94 Colum. L. Rev. 331 (1994); Daniel A. Farber & Robert E. Hudec, Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause, 47 Vand. L. Rev. 1401 (1994).

n12 The differences among the Justices on the issue reflect a broader debate about the nature of federalism, one of the core concepts of the constitutional scheme. See, e.g., William N. Eskridge, Jr. & John Ferejohn, The Elastic Commerce Clause: A Political Theory of American Federalism, 47 Vand. L. Rev. 1355, 1357-60 (1994) (discussing political and historical theories of American Federalism, including William H. Riker, *Federalism: Origin, Operation, Significance* (1964), Samuel H. Beer, *To Make A Nation: The Rediscovery Of American Federalism* (1993)), Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484 (1987) (reviewing Raoul Berger, *Federalism: The Founders' Design* (1987)); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 907 (1994) (enumerating justifications for federalism as stated by Justice O'Connor, including competition among states, participation and experimentation at a local level, division of power to enhance the political accountability of each level of government, diffusion of power as a check on power, and furthering of local communitarian interests). Some scholars have expressed skepticism about the real significance of the federalism cases. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 907 (1994) (questioning the value of the Supreme Court's federalism jurisprudence as a norm of governance); Ann Althouse, *Federalism, Untamed*, 47 Vand. L. Rev. 1207 (1994) (characterizing federalism as a relatively ineffectual doctrine); Charles L. Black, Jr., *On Worrying About the Constitution*, 55 U. Colo. L. Rev. 469 (1984) (characterizing federalism jurisprudence as lacking overall coherence).

n13 "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." U.S. Const. amend. X. See *infra* notes 106-44 and accompanying text, discussing, *inter alia*, *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (applying a view of federalism based on substantive limits on federal power to regulate state governmental activities) and *Garcia v. San Antonio Metro. Transit*

Auth., 469 U.S. 528 (1985) (overruling *National League of Cities* and adhering to the view that protection of states from federal power is to be found in the national political process, not in judicially imposed limits).

n14 *Lopez*, 115 S. Ct. at 1634.

n15 *Id.* Generally defined, the police power is a state's power:

To place restraints on the personal freedom and property rights of persons for the protection of public safety, health, and morals or the promotion of the public convenience and general prosperity. The police power is subject to limitations of the federal and state constitutions, and especially to the requirement of due process.

*Black's Law Dictionary* 1156 (6th ed. 1990).

n16 *Lopez*, 115 S. Ct. at 1633.

n17 *Id.* at 1634 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)).

n18 U.S. Const., art. I, section 8, cl. 3.

n19 See *supra* note 13 for the text of Tenth Amendment.

n20 See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

n21 U.S. Const. art. I section 8, cl. 3.

n22 The concurring opinion of Justice Thomas in *Lopez* advocates a narrow construction of the Commerce Clause. *Lopez*, 115 S. Ct. at 1642 (Thomas, J., concurring). See *infra* notes 233-35 and accompanying text.

n23 22 U.S. (9 Wheat.) 1 (1824).

n24 *Gibbons*, 22 U.S. (9 Wheat.) at 196.

n25 *Id.*

n26 *Id.* at 189-90.

n27 *Id.* at 194.

n28 Id.

n29 One such case is *United States v. Dewitt*, 76 U.S. (9 Wall.) 41 (1869), in which the Court struck down a federal statute regulating the sale of unsafe lamp oil, on the basis that the commerce power did not create a general federal police power. *Dewitt*, 76 U.S. (9 Wall.) at 43-44.

n30 See *Brooks v. United States*, 267 U.S. 432 (1925).

n31 See *Champion v. Ames*, 188 U.S. 321 (1903); see also *Clark Distilling Co. v. Western Maryland Ry.*, 242 U.S. 311 (1917) (upholding regulation of interstate transportation of liquor).

n32 See *Hoke v. United States*, 227 U.S. 308 (1913).

n33 See *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911).

n34 234 U.S. 342 (1914); see also *Southern R.R. v. United States*, 222 U.S. 20 (1911) (sustaining federal regulation of intrastate railroad equipment).

n35 *The Shreveport Rate Cases*, 234 U.S. at 351.

n36 196 U.S. 375 (1905).

n37 *Swift*, 196 U.S. at 397-98.

n38 Id. at 398. In Justice Holmes' words, "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." Id. Subsequent cases relied on *Swift* for the proposition that the commerce power authorized regulation protecting the "stream of commerce" from obstructions or burdens. See *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 439 (1930); *Stafford v. Wallace*, 258 U.S. 495, 518-19 (1922) (sustaining regulation of stockyards).

n39 156 U.S. 1 (1895); see also *Hopkins v. United States*, 171 U.S. 578 (1898) (holding that transactions at stockyards were local and therefore not interstate commerce within the scope of the Sherman Act).

n40 *E. C. Knight*, 156 U.S. at 12. In the Court's well-known formulation, "Commerce succeeds to manufacture, and is not a part of it." Id. In drawing these distinctions, the Court frequently relied on its earlier decisions, under what is commonly referred to as the "dormant" Commerce Clause, addressing whether state statutes impermissibly attempted to regulate commerce. See, e.g., *Kidd v. Pearson*, 128 U.S. 1 (1888).

n41 298 U.S. 238 (1936).

n42 Carter Coal, 298 U.S. at 303-04; see also *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922) (holding that a strike at a coal mine was not restraint of interstate commerce subject to the Sherman Act).

n43 295 U.S. 495 (1935).

n44 *Schechter*, 295 U.S. at 548-49.

n45 *Id.* at 546-47.

n46 295 U.S. 330 (1935).

n47 *Alton*, 295 U.S. at 362.

n48 208 U.S. 161 (1908).

n49 *Adair*, 208 U.S. at 179.

n50 See *The Employers' Liability Cases*, 207 U.S. 463 (1908).

n51 259 U.S. 200 (1922)

n52 *Federal Baseball Club*, 259 U.S. at 208-09.

n53 *Id.* at 209.

n54 247 U.S. 251 (1918), overruled by *United States v. Darby*, 312 U.S. 100 (1941).

n55 *Hammer*, 247 U.S. at 268.

n56 *Id.* at 273-74.

n57 *Id.* at 271-72.

n58 *Id.* at 276.

n59 For a broader political theory explaining the Court's Commerce Clause jurisprudence, see Eskridge & Ferejohn, *supra* note 12 (arguing that because the Supreme Court is politically vulnerable to Congress and the President, it has only limited congressional authority in exceptional and temporary periods when members of the Court had distinct ideological differences with other branches). See also William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term: Foreword: Law As Equilibrium*, 108 Harv. L. Rev. 26 (1994) (discussing more

generally such strategic behavior by the Court).

n60 The received view is that the Court's dramatic shift in approach was a straightforward concession to the national mood, but the view has been challenged. See Barry Cushman, *Rethinking the New Deal Court*, 80 Va. L. Rev. 201 (1994) (arguing that the shift in decisions reflected early New Deal statutes' poor drafting and lack of attention to constitutional requirements); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. Pa. L. Rev. 1891 (1994) (arguing that the Court's shift in stance was more gradual than commonly described); Michael Arians, *A Thrice-Told Tale, or Felix the Cat*, 107 Harv. L. Rev. 620 (1994) (describing how Justice Felix Frankfurter may have rendered the history of the New Deal Court unclear in his efforts to present the Court favorably).

n61 301 U.S. 1 (1937). Although *Jones & Laughlin* is conventionally considered the first case of the era of expansive Commerce Clause jurisprudence, a close reading of the cases may show it more consistent with the earlier cases than commonly thought. See Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine From Swift to Jones & Laughlin*, 61 Fordham L. Rev. 105 (1992) (arguing that *Jones & Laughlin* was still consistent with a restrictive view of earlier cases and that only after the composition of the Court changed did the Court adopt a much more expansive approach in subsequent cases).

n62 *Jones & Laughlin*, 301 U.S. at 22.

n63 *Id.* at 22-24, 30.

n64 *Id.* at 36-37.

n65 See *United States v. Darby*, 312 U.S. 100 (1941).

n66 See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

n67 See, e.g., *Perez v. United States*, 402 U.S. 146, 150 (1971).

n68 312 U.S. 100 (1941).

n69 *Darby*, 312 U.S. at 115.

n70 247 U.S. 251 (1918), overruled by *United States v. Darby*, 312 U.S. 100 (1941).

n71 *Darby*, 312 U.S. at 115-16.

n72 *Id.* at 122-23.

n73 Id.

n74 Civil Rights Act of 1964, Pub. L. No. 88-352, sections 201-207, 78 Stat. 241, 243-46 (codified as amended at 42 U.S.C. sections 2000a to 2000a-6 (1988 & Supp. V 1993)).

n75 379 U.S. 241 (1964).

n76 Heart of Atlanta Motel, 379 U.S. at 252-53.

n77 Id. at 256.

n78 Id. at 258.

n79 Id.

n80 379 U.S. 294 (1964).

n81 Id. at 298, 302-04.

n82 Id. at 296-97.

n83 See United States v. Wrightwood Dairy Co., 315 U.S. 110, 121 (1942).

n84 Wrightwood Dairy, 315 U.S. at 121.

n85 315 U.S. 110 (1942).

n86 Wrightwood Dairy, 315 U.S. at 121.

n87 317 U.S. 111 (1942).

n88 Wickard, 317 U.S. at 128-29.

n89 Id. at 127.

n90 Id. at 120, 124-25.

n91 Id. at 127.

n92 Id. at 128.

n93 Wickard, 317 U.S. at 128-29.

n94 Katzenbach, 379 U.S. at 303-04.

n95 392 U.S. 183 (1968), overruled by *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

n96 *Wirtz*, 392 U.S. at 190-91.

n97 *Id.* at 192.

n98 *Id.*

n99 402 U.S. 146 (1971).

n100 *Perez*, 402 U.S. at 147-48.

n101 *Id.* at 153-56.

n102 452 U.S. 264 (1981).

n103 *Hodel*, 452 U.S. at 277-82.

n104 *Id.* at 281-82.

n105 See James M. Maloney, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 *Fordham L. Rev.* 1795, 1796 (1994) (citing commentators questioning whether there were any real limits left to the commerce power).

n106 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)

n107 *National League of Cities*, 426 U.S. at 852.

n108 505 U.S. 144 (1992).

n109 *New York v. United States*, 505 U.S. at 188.

n110 501 U.S. 452 (1991).

n111 *Gregory*, 501 U.S. at 467.

n112 *Wirtz*, 392 U.S. at 198-99. The case also held that such regulation was within the scope of the commerce power. See *supra* notes 95-98 and accompanying text.

n113 *Wirtz*, 392 U.S. at 198-99.



n114 Id. at 196-97.

n115 Id. at 195-96; see also Michael Wells & Walter Hellerstein, The Governmental-Proprietary Distinction in Constitutional Law, 66 Va. L. Rev. 1073 (1980) (criticizing the distinction).

n116 421 U.S. 542 (1975).

n117 Fry, 421 U.S. at 548.

n118 Id.

n119 Id. at 547 n.7. Under the Tenth Amendment, "Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Id.

n120 Id.

n121 Id. at 557-59 (Rehnquist, J., dissenting).

n122 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)

n123 *National League of Cities*, 426 U.S. at 855. The Court did not overrule but rather distinguished Fry, stating that the temporary wage freeze in Fry did not displace state choices about how to structure operations but only temporarily maintained choices already made. Id. at 853.

n124 Id. at 844 (quoting *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)).

n125 Id. at 841.

n126 Id. at 841, 852. The Court's understanding of state sovereignty was somewhat vague. See Frank I. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty"* in *National League of Cities v. Usery*, 86 Yale L.J. 1165 (1977) (arguing that *National League of Cities* relies on an inherently contradictory vision of state sovereignty).

n127 *National League of Cities*, 426 U.S. at 852.

n128 Id. at 845-46, 851-52 (citations omitted). The case law support for the decision was sparse. The primary authority relied upon by the Court was *Coyle v. Oklahoma*, 221 U.S. 559 (1911), which held that the federal government could not require Oklahoma to move the location of its state capital as a condition for

becoming a state. *National League of Cities*, 426 U.S. at 845 (citing *Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911)). The *Coyle* holding lends support to the general proposition that states have protected aspects of sovereignty, but hardly compels as broad a protection as *National League of Cities* announced. Cf. *United States v. California*, 297 U.S. 175 (1936) (upholding the application of statutes setting railroad safety, labor relations, and employer liability requirements for railroad companies owned by state governments).

n129 See *EEOC v. Wyoming*, 460 U.S. 226 (1983); *FERC v. Mississippi*, 456 U.S. 742 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); *Transportation Union v. Long Island R.R.*, 455 U.S. 678 (1982); Tribe, *supra* note 3, section 5-22 (describing how subsequent decisions narrowed the application of *National League of Cities* before it was finally overruled by *Garcia*).

n130 469 U.S. 528 (1985). For an approving analysis of *Garcia*, see Martha A. Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 Harv. L. Rev. 84, 110-18 (1985) and Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 Vand. L. Rev. 1623 (1994).

n131 *Garcia*, 469 U.S. at 531.

n132 *Id.* at 546-47.

n133 *Id.* at 538-39.

n134 *Id.* at 545-46. One may question how much local governments will test social policy by experimenting. See Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. Legal Stud. 593 (1980) (arguing that economic incentives weigh against local politicians experimenting with social policies); Fernando R. LaGuarda, *Federalism Myth: States as Laboratories of Health Care Reform.*, 82 Geo. L.J. 159 (1993).

n135 *Garcia*, 469 U.S. at 546.

n136 *Id.* at 550-53.

n137 *Id.* at 547-50.

n138 *Id.* at 550-53. "State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552. The classic statement of this view is Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954). See also Jesse H. Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial*

Review, 86 Yale L.J. 1552 (1977).

n139 Garcia, 469 U.S. at 550-53 (quoting The Federalist No. 46, at 332, and No. 62, at 408 (James Madison) (B. Wright ed., 1961)).

n140 Id. at 556.

n141 See South Carolina v. Baker, 485 U.S. 505, 512 (1988) (discussing Garcia).

n142 Thus, it appeared at the time that National League of Cities may only have been a temporary break in the usual reluctance of the courts to limit the federal legislative power. See William W. Van Alstyne, The Second Death of Federalism, 83 Mich. L. Rev. 1709 (1985) (criticizing Garcia as failing to fulfill responsibilities of judicial review of legislative action); Andrzej Rapaczynski, From Sovereignty to Process: The Jurisprudence of Federalism After Garcia, 1985 Sup. Ct. Rev. 341.

n143 Garcia, 469 U.S. at 581, 589 (Rehnquist, J., dissenting). Another possible limit on the commerce power that was rejected by a narrow majority of the Court but may gain a majority under the present composition of the Court was the subject of Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), which held that federal legislation pursuant to the Commerce Clause may abrogate a state's Eleventh Amendment sovereign immunity. Union Gas, 491 U.S. at 22. See Eskridge & Ferejohn, *supra* note 12, at 1394 (discussing how changing membership of the Court could affect continuing authority of Union Gas).

n144 See New York v. United States, 505 U.S. 144, 160 (1992) (majority opinion by Justice O'Connor noting that the case did not present an occasion to apply or revisit the holding of Garcia); South Carolina v. Baker, 485 U.S. 505, 531 (1988) (O'Connor, J., dissenting) (reaffirming statement from Justice O'Connor's dissent in Garcia that the Court should enforce federalism through judicial review).

n145 Both National League of Cities and New York v. United States are fairly regarded as Tenth Amendment cases, although neither purported to rest their holdings on the actual words of the Tenth Amendment.

n146 New York v. United States, 505 U.S. at 176. For commentary on the decision, see William A. Hazeltine, New York v. United States: A New Restriction on Congressional Power vis-a-vis the States?, 55 Ohio St. L.J. 237 (1994) and Wayne O. Hanewicz, New York v. United States: The Court Sounds a Return to the Battle Scene, 1993 Wis. L. Rev. 1605 (1993).

n147 Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240, 99 Stat. 1842 (codified at 42 U.S.C. section 2021 (1988 & Supp. V 1993)).

n148 42 U.S.C. section 2021(b) (1988 & Supp. V 1993).

n149 New York v. United States, 505 U.S. at 151-52.

n150 Id. at 152-53.

n151 Id. at 159-60.

n152 Id. at 166 (holding that the Commerce Clause "authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."). The Court rested on the basic idea that the Constitution "looks to an indestructible Union, composed of indestructible States." Id. at 162 (quoting *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868), overruled by *Morgan v. United States*, 113 U.S. 476 (1885)). Notably, it did not rest on another possible constitutional basis, the Guarantee Clause, U.S. Const. art. IV, section 4, under which states are guaranteed a republican form of government. See Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1 (1988) (arguing that the Guarantee Clause protects state government autonomy from required participation in federal regulation). Rather, the Court relied primarily on two earlier cases that had sustained congressional action while noting that Congress had not required the states to adopt specific regulations. *New York v. United States*, 505 U.S. at 161-62 (discussing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) and *FERC v. Mississippi*, 456 U.S. 742 (1982)). Neither case held that such a requirement would necessarily be invalid, so *New York v. United States* was breaking new ground. The sparse case law support may receive little assistance from the historical record. See Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 Va. L. Rev. 1957 (1993) (arguing on the basis of historical sources that *New York v. United States* is not consistent with the historical intent of the Framers of the Constitution); Martin H. Redish, *Doing It with Mirrors: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation*, 21 Hastings Const. L.Q. 593 (1994) (arguing that *New York v. United States* was wrongly decided and that the Court's precedents do not impose a state sovereignty limitation on the federal commerce power); see also Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 Colum. L. Rev. 1001 (1995) (criticizing *New York v. United States* as taking a simplistic approach to the complex issue of state autonomy).

n153 For an argument that the result in *New York v. United States* may have been correct but that the opinion's use of authority is misleading, see Richard E. Levy, *New York v. United States: An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 Kan. L. Rev. 493 (1993). On the same theme, see James W. Ducayet, *Publius and Federalism: On the Use and Abuse of The Federalist in Constitutional Interpretation*, 68 N.Y.U. L. Rev. 821 (1993). The decision has also been characterized as justifiable on

prudential grounds but doctrinally questionable. See H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 Va. L. Rev. 633 (1993).

n154 U.S. Const. amend X.

n155 *New York v. United States*, 505 U.S. at 156 (citing 3 Joseph Story, *Commentaries On The Constitution Of The United States* 752 (1833)).

n156 *Id.*

n157 *Id.* at 157.

n158 *Id.*

n159 *Id.*

n160 An analogy to a residuary clause in a will might illustrate how strained such reasoning is. A public-spirited decedent might have left her estate to the federal and state governments. "I leave my personal effects to the federal government; everything else I leave to the state." In order to determine what the state gets, it would seem necessary to first decide what constituted her personal effects. For example, to decide who would get her books, one would first decide whether the phrase "personal effects" covered books. Reading the clause the way that *New York v. United States* reads the Tenth Amendment, one could first decide whether the books should go to the state; if so, then they were not personal effects that went to the federal government.

n161 *New York v. United States*, 505 U.S. at 156 (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941) (characterizing the Tenth Amendment as a truism that contains no substantive limits)). As recently as 1988, the Court had stated that the Tenth Amendment provided no substantive limits on federal powers. See *South Carolina v. Baker*, 485 U.S. 505, 512-13 (1988).

n162 *New York v. United States*, 505 U.S. at 166.

n163 *Id.* at 173-74.

n164 *Id.*

n165 *Id.* at 174-77. *New York v. United States* could have served as a vehicle for reconsidering *Garcia*. A statute that commandeers state legislatures would seem to threaten states' ability to structure integral operations and the states' independent sovereignty. See *National League of Cities*, 426 U.S. at 841, 845-46, 852. But Justice O'Connor's opinion distinguished that line of cases as applicable only to general statutes regulating both states and private parties. *New York v. United States*, 505 U.S. at 160. The opinion made no effort to

explain why concerns of state sovereignty were any different in the present case, or indeed whether scrutiny of federal action would be any different at all. Justice O'Connor also carefully did not acknowledge *Garcia* as sound authority, stating simply that "this case presents no occasion to apply or revisit the holdings of any of these cases." *Id.* So for the present, the possible return of *National League of Cities* is left for a future Court.

n166 *New York v. United States*, 505 U.S. at 176. This view was anticipated in Joseph Lipner, *Imposing Federal Business on Officers of the States: What the Tenth Amendment Might Mean*, 57 *Geo. Wash. L. Rev.* 907 (1989) (arguing that the Tenth Amendment shields inner workings of state governments from federal regulation).

n167 *New York v. United States*, 505 U.S. at 177. The Court stated that, consistent with its view of the Tenth Amendment as a tautology, one could view the provision as unconstitutional because it exceeded the enumerated powers of Congress or because it infringed "upon the core of state sovereignty reserved by the Tenth Amendment." *Id.*

n168 501 U.S. 452 (1991); see also William N. Eskridge Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 *Vand. L. Rev.* 593 (1992) (questioning whether clear statement rules are beneficial because they protect constitutional structures by giving weight to underenforced constitutional norms, or harmful because they reflect undemocratic judicial restrictions on legislative action); Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 *Harv. L. Rev.* 1959 (1994) (arguing that clear statement rules borrow from both the procedural and substantive conceptions of federalism); Deanna L. Ruddock, Note, *Gregory v. Ashcroft: The Plain Statement Rule and Judicial Supervision of Federal-State Relations*, 70 *N.C.L. Rev.* 1563 (1992).

n169 See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 2608, 2617 (1992).

n170 See *Tribe*, *supra* note 3, section 5-6 at 316.

n171 See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

n172 See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (applying clear statement rule in interpreting federal statute to determine whether Congress has abrogated a state's Eleventh Amendment sovereign immunity); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (holding that states are not "persons" liable for civil rights violations under 42 U.S.C. section 1983 because Congress did not make it clear that it intended states to be covered); see also *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981) (applying presumption against interpreting federal statute granting money to states to be conditioned on state compliance with federal regulation).

n173 Gregory, 501 U.S. at 455.

n174 Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. sections 621-634 (1988 & Supp. V 1993)).

n175 Gregory, 501 U.S. at 456 (quoting 29 U.S.C. section 630(f)).

n176 Id. at 467.

n177 Id.

n178 Id.

n179 Id. at 476 (White, J., concurring in part, dissenting in part, and concurring in the judgement) (citing *Atascadero State Hospital v. Scanlon*, 437 U.S. 234 (1985) and *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989)).

n180 Gregory, 501 U.S. at 456 (citing 29 U.S.C. section 630(b)(2)).

n181 Id. at 467.

n182 Id.

n183 Requiring Congress to be specific thus works against the incentives of legislatures to be vague in enacting statutes in order to avoid making difficult decisions about changes in the federal-state balance. See Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 *Duke L.J.* 979, 1006-07 (1993). The clear statement rule also may lead to a clearer interpretive regime on the part of the Court.

n184 See *supra* note 4.

n185 *Lopez*, 115 U.S. at 1626.

n186 Id.

n187 Id. at 1628.

n188 Id. at 1628-29.

n189 Id. at 1634 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)).

n190 See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981) ("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 a regulated activity affects interstate commerce, if there is any rational basis for such a finding." (citations omitted)); *Perez v. United States*, 402 U.S. 146, 150-52 (1971).

n191 The steps are: (i) determining whether the regulated activity affects interstate commerce; (ii) determining whether or not the regulated activity is commercial/economic; and (iii) determining whether the activity is one of traditional state concern. See *infra* notes 192-224 and accompanying text.

n192 *Lopez*, 115 S. Ct. at 1630. As discussed above, previous decisions had established three categories subject to regulation under the commerce power: (i) the use of the channels of interstate commerce; (ii) the instrumentalities of interstate commerce and persons or things in interstate commerce; and (iii) activities affecting commerce. *Id.* at 1629-30. The *Lopez* Court held with little discussion that the first two categories were inapplicable to gun possession in school zones. *Id.* at 1630. Accordingly, the issue was whether gun possession in a school zone had a sufficient effect on interstate commerce to come within the commerce power of Congress. *Id.*

n193 *Id.* at 1630.

n194 *Id.* at 1630-32.

n195 *Id.*

n196 *Id.* at 1630.

n197 *Lopez*, 115 S. Ct. at 1630 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), *Perez v. United States*, 402 U.S. 146 (1971), *Katzenbach v. McClung*, 379 U.S. 294 (1964), *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) and *Wickard v. Filburn*, 317 U.S. 111 (1942)).

n198 *Id.*

n199 See *supra* notes 59-104 and accompanying text.

n200 317 U.S. 111 (1942).

n201 *Wickard*, 317 U.S. at 114.

n202 *Lopez*, 115 S. Ct. at 1630-31. The Court also noted that the Gun-Free School Zones Act did not include either of two means that might keep legislation within the scope of the Commerce Clause: a jurisdictional element requiring a nexus to



commerce or legislative findings that guns in school zones affected interstate commerce. *Id.* at 1631. Congress amended the Gun-Free School Zones Act to include findings of a link to interstate commerce while the *Lopez* case was pending. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, section 320904, 108 Stat. 2125 (codified at 18 U.S.C. section 922(q) (1994)). The Government did not rely on those findings to apply retroactively and the Court did not consider them. *Lopez*, 115 S. Ct. at 1632 n.4.

n203 *Lopez*, 115 S. Ct. at 1633.

n204 Richard A. Posner, *Economic Analysis of Law* 3 (4th ed. 1992) (citing Gary S. Becker, *The Economic Approach to Human Behavior* (1976)).

n205 See, e.g., Posner, *supra* note 204, at 217-49 (analyzing crime as economic behavior and citing similar work).

n206 See Gary S. Becker, *Human Capital* (2d ed. 1975).

n207 *Lopez*, 115 S. Ct. at 1630.

n208 *Id.* at 1629. See also, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981) (citations omitted).

n209 *Lopez*, 115 S. Ct. at 1631-32. Rational basis review plays an important role in balancing judicial review with legislative democracy. Robert W. Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 Cal. L. Rev. 1049, 1056-60 (1979) (discussing the role of rational basis review in various areas of constitutional law).

n210 *Lopez*, 115 S. Ct. at 1632-33. Justice Breyer's dissent demonstrates at length the connection between education and the economy, citing a number of studies on the economic effects of education. *Id.* at 1657-71 (Breyer, J., dissenting).

n211 To refute such arguments convincingly, one would have to show that such effects were not sufficient under the case law. This would require distinguishing the facts of cases that found a sufficient link to commerce. Under the analysis of previous cases, such a showing would be difficult. In every case since 1937, the Court has considered whether the regulated activity affected commerce and has each time held it did, often relying on links to commerce similar to the foregoing, or even more indirect. Thus, previous cases found sufficient effect on interstate commerce where mining caused environmental damage that diminished the value of land, *Hodel*, 452 U.S. at 277-82, where extortion permitted criminal syndicates to raise funds and to take control of businesses, *Perez v. United States*, 402 U.S. 146 (1971), and where a farmer grew his own wheat at home, therefore making it unnecessary to buy from others,

Wickard v. Filburn, 317 U.S. 111 (1942). Gun possession in schools can affect education, which undoubtedly has economic effects on salaries and productivity, and can affect the market for guns and whether they flow from state to state. To literally apply the test--whether there was a substantial effect on interstate commerce--would require distinguishing those cases.

n212 Lopez, 115 S. Ct. at 1632-33.

n213 Id.

n214 Id. at 1632. One judge has calculated that federal statutes define over three thousand crimes; since that calculation, Congress has added a significant number of offenses, including those of the 1994 Crime Bill. Sara Sun Beale, Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction, 46 Hastings L.J. 979, 980 n.10 (1995); Roger J. Miner, Crime and Punishment in the Federal Courts, 43 Syracuse L. Rev. 681 (1992).

n215 Lopez, 115 S. Ct. at 1632.

n216 Id. at 1633.

n217 Id.

n218 Id. at 1633-34. Justice Kennedy's concurring opinion, joined by Justice O'Connor, also emphasized the view that Congress was regulating a non-commercial activity in a way that encroached on an area of "traditional state concern"--education. Id. at 1640 (Kennedy, J., concurring).

n219 For a discussion of the role of uniform state laws in federalism, see Kathleen Patchel, Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code, 78 Minn. L. Rev. 83 (1993).

n220 See Tribe, *supra* note 3, sections 6-2 to 6-29 (discussing Commerce Clause scrutiny of state legislation under "dormant" Commerce Clause analysis, preemption, and related doctrines).

n221 New York v. United States, 505 U.S. 144, 157 (1992).

n222 The majority opinion in New York v. United States noted that "the take title provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress." New York v. United States, 505 U.S. at 177.

n223 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546-47 (1985).

n224 Note also that even if Congress lacked power to regulate aspects of education under the Commerce Clause, it nevertheless could affect the way a state conducts education through its other powers, for example by giving funds for education to the states with conditions attached. See *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding grants to states conditioned on following regulatory conditions); Thomas R. McCoy & Barry Friedman, Conditional Spending: Federalism's Trojan Horse, 1988 Sup. Ct. Rev. 85; Ronald D. Rotunda, The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions, 132 U. Pa. L. Rev. 289 (1984); see also David E. Engdahl, The Spending Power, 44 Duke L. J. 1 (1994).

n225 See supra notes 59-104 and accompanying text. Lopez leaves intact the other two categories of permissible regulation under the Commerce Clause: regulating the use of channels of interstate commerce and protecting goods or people in commerce and the instrumentalities of interstate commerce. Both before and after Lopez, the commerce power is also subject to specific limits in other provisions of the Constitution, such as the Bill of Rights.

n226 See Lopez, 115 S. Ct. at 1630-31 (holding that the prohibition of gun possession near schools did not regulate commerce or economic enterprises and was not "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.").

n227 See *New York v. United States*, 505 U.S. at 205-06 (White, J., concurring in part and dissenting in part) (arguing that the majority opinion incorrectly returned to a substantive view rather than the procedural view found in *Garcia*).

n228 Lopez, 115 S. Ct. at 1643-44 (Thomas, J., concurring); see also Richard A. Epstein, The Proper Scope of the Commerce Power, 73 Va. L. Rev. 1387 (1987) (advocating an extremely narrow understanding of the commerce power); Jacques LeBoeuf, The Economics of Federalism and the Proper Scope of the Federal Commerce Power, 31 San Diego L. Rev. 555 (1994) (arguing that commerce power should extend only to areas of commerce where externalities prevent efficient state regulation).

n229 Lopez, 115 S. Ct. at 1644-45 (Thomas, J., concurring).

n230 Id.

n231 See supra notes 192-224 and accompanying text.

n232 Lopez, 115 S. Ct. at 1634.

n233 Id. at 1628-29.

n234 Id. at 1630.

n235 Id. at 1634 (Kennedy, J., concurring) (joining in the majority opinion's "necessary though limited holding"). In addition, even if Justices Kennedy and O'Connor were inclined toward Justice Thomas' reading of the Commerce Clause as an abstract matter, they have in other contexts expressed great reluctance to depart from settled law in important constitutional questions. See *Planned Parenthood v. Casey*, 505 U.S. 2791, 2814-16 (1992) (opinion by Justice O'Connor, joined by Justices Kennedy and Souter, expressing the importance to the public legitimacy of the Court of following *stare decisis*).

n236 *Lopez*, 115 S. Ct. at 1633.

n237 Id. at 1632.

n238 Id. at 1633.

n239 See *Lopez*, 115 S. Ct. at 1631.

n240 See *United States v. Bass*, 404 U.S. 336 (1971).

n241 See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); see also *Lopez*, 115 S. Ct. at 1634 ("Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.").

n242 See *Perez v. United States*, 402 U.S. 146 (1971).

n243 See *United States v. Robertson*, 115 S. Ct. 1732 (1995) (sustaining federal racketeering conviction as having sufficient nexus to interstate commerce, where defendant operated gold mine in Alaska using substantial equipment and supplies purchased in California). See also *Katzenbach v. McClung*, 379 U.S. 294 (1964). To regulate the entire school zone on the basis of the school purchasing interstate supplies might be beyond the holding of *Katzenbach*. This element could be limited to possession of a firearm on the grounds of the school itself.

n244 See *Lopez*, 115 S. Ct. at 1633. Justice Kennedy's concurrence, in which Justice O'Connor joined, characterized "the congressional power to regulate transactions of a commercial nature [as an] essential principle." Id. at 1637 (Kennedy, J., concurring).

n245 *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942).

n246 *Perez v. United States*, 402 U.S. 146, 156-57 (1971).

n247 Lopez, 115 S. Ct. at 1634 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937)).

n248 Id. at 1633.

n249 Id.

n250 See supra notes 145-67 and accompanying text.

n251 Lopez, 115 S. Ct. at 1633.

n252 See National League of Cities v. Usery, 426 U.S. 833 (1976), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

n253 The broad array of federal crimes has sparked considerable discussion about the appropriate functions of the local and national governments. See, e.g., Symposium, Federalization of Crime: The Roles of the Federal and State Governments in the Criminal Justice System, 46 Hastings L. J. 965 (1995).

n254 See New York v. United States, 505 U.S. 144, 176 (1992).

n255 Lopez, 115 S. Ct. at 1638-39 (Kennedy, J., concurring) (citing FTC v. Ticor Title Ins. Co., 504 U.S. 621, 636 (1992), New York v. United States, 505 U.S. 144, 155-66 (1992) and FERC v. Mississippi, 456 U.S. 742, 787 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part)). Such a rationale can be seen as consistent with a procedural rationale for federalism. See D. Bruce La Pierre, Political Accountability in the National Political Process--The Alternative to Judicial Review of Federalism Issues, 80 NW. U.L. Rev. 577 (1985).

n256 Lopez, 115 S. Ct. at 1638-39.

n257 See Garcia, 469 U.S. at 550-53.

n258 The Court had little success in applying the categories of "integral" and "traditional" state governmental functions, which are narrower if no less vague.

n259 Such issues may continue to arise in considering the application of a statute in particular instances. See, e.g., United States v. Robertson, 115 S. Ct. 1732 (1995); Gregory v. Ashcroft, 501 U.S. 452 (1991); United States v. Bass, 404 U.S. 336 (1971).