April 1996

Lopez and the Federalization of Criminal Law

Russell L. Weaver

University of Louisville

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Constitutional Law Commons, and the Criminal Law Commons

Recommended Citation

This Symposium: Federalism and the Criminal Justice System is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
LOPEZ AND THE FEDERALIZATION OF CRIMINAL LAW

RUSSELL L. WEAVER*

I. INTRODUCTION ...................................... 815
II. THE HOLDING ........................................ 820
III. LOPEZ'S IMPLICATIONS FOR THE FUTURE .......... 828
    A. Lopez in the Supreme Court .................... 828
    B. Lopez in the federal courts ................... 838
IV. CONCLUSION ........................................ 851

I. INTRODUCTION

In the aftermath of the 1930s' constitutional crisis,¹ the Supreme Court adopted an extremely deferential interpretation of the Commerce Clause:² the Court sustained commercial legislation provided that Con-

---

* Professor of Law, University of Louisville.
2. Prior to the 1930s, the scope of review varied; courts generally upheld federal statutes regulating goods or commerce that travelled across state lines. For example, the Mann Act made it a federal crime to knowingly transport women across state lines for the purpose of prostitution or to compel the woman to engage in other “immoral practice[s].” 18 U.S.C. §§ 2421 to 2424 (1994). The Act read:
   [I]t shall be illegal to transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate [commerce], or [in] the District of Columbia, any woman [for] the purpose of prostitution [or] with the intent and purpose to induce, entice, or compel such woman [to] give herself up to debauchery, or to engage in any other immoral practice . . . .

During this period, the Court placed definite limits on the scope of Congress power. In Carter v. Carter Coal Co., 298 U.S. 238 (1936), the Court drew a distinction between activities that had a “direct” and those that had only an “indirect” effect on interstate commerce. Congress could regulate the former, but not the latter:
That the production of every commodity intended for interstate sale and transportation has some effect upon interstate commerce may be, if it has not already
gress had a rational basis for concluding that the regulated activity affected interstate commerce.\(^3\) Under this more permissive interpretation, Congress federalized many aspects of the criminal law. Affected activities included the non-payment of child support,\(^4\) drive-by shootings,\(^5\) terrorism,\(^6\) money laundering,\(^7\) animal enterprise terrorism,\(^8\) been, freely granted; and we are brought to the final and decisive inquiry, whether here that effect is direct, as the "Preamble" recites, or indirect. The distinction is not formal, but substantial in the highest degree, as we pointed out in the Schechter Case, . . . . "If the commerce clause were construed," we there said, "to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control." It was also pointed out, that "the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system."

\(^{Id.}\) at 307 (citations omitted) (quoting A.L.A. Schecter Poultry Corp. v. United States. 295 U.S. 495, 546).

In Hammer v. Dagenhart, 247 U.S. 251 (1918), the Court struck down a federal statute which prohibited the shipment across state lines of goods made with prohibited child labor.

3. See, e.g., Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) ("[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."). For example, in Perez v. United States, 402 U.S. 146 (1971), the Court upheld the Consumer Credit Protection Act without requiring proof that the particular transaction involved interstate commerce. The Court held that intrastate loan sharking constituted a significant aspect of the operation of organized crime, and that it had an adverse effect on interstate commerce.

8. 18 U.S.C. § 43 (1994). The law provides, in part, as follows:

(a) Offense.—Whoever—

(1) travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility in interstate or foreign commerce, for the purpose of causing physical disruption to the functioning of an animal enterprise; and

(2) intentionally causes physical disruption to the functioning of an animal enterprise by intentionally stealing, damaging, or causing the loss of, any property (including animals or records) used by the animal enterprise, and thereby causes economic damage exceeding $10,000 to that enterprise, or conspires to do so;
computer fraud and abuse, the malicious destruction of property, carjacking, aiding and abetting the manufacture of marijuana, and a host of other activities.

The federalization of criminal law did not occur in isolation; on the contrary, it coincided with a broad national trend towards federalization and centralization which extended to virtually all sectors of the U.S. economy. This expansion was a direct result of the constitutional crisis which produced, not only a more deferential approach to legislation enacted under the Commerce Clause, but also the removal of other limits on the scope of Congress' legislative power (i.e., the Court abandoned the nondelegation doctrine, and no longer viewed the Tenth Amendment as an independent limitation on federal power). The result was that Congress chose to regulate more activities, and

shall be fined under this title or imprisoned not more than one year, or both.

Id.

14. The Court applied this doctrine in only two cases, both of which were decided in the mid-1930s. See Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).
15. See, e.g., United States v. Darby, 312 U.S. 100 (1941) ("Our conclusion is unaffected by the Tenth Amendment which . . . . [It] states but a truism . . . . There is nothing in the history of its adoption to suggest that it was more than declaratory . . . .").
delegated ever more responsibility to administrative agencies. The federal government mushroomed in size and responsibility.

16. Some commentators have argued for a more restrictive interpretation of the Commerce Clause. For example, Professor Richard Epstein contended that "the expansive construction of the [commerce] clause accepted by the New Deal Supreme Court is wrong, and clearly so..." Richard A. Epstein, The Proper Scope of the Commerce Power, 73 VA. L. REV. 1387, 1388 (1987). Professor Epstein argued that the clause's scope should be far more limited: "The affirmative scope of the commerce power should be limited to those matters that today are governed by the dormant commerce clause: interstate transportation, navigation and sales, and the activities closely incident to them. All else should be left to the states." Id. at 1454.

Professor Epstein was aware of the far-reaching consequences of his argument, and he struggled with those consequences:

I realize that this conclusion seems radical because of the way the clock has turned. One is hesitant to require dismantling of large portions of the modern federal government, given the enormous reliance interests that have been created. And I do not have, nor do I know of anyone who has, a good theory that explains when it is appropriate to correct past errors that have become embedded in the legal system. It is far easier to keep power from the hands of government officials than it is to wrest it back from them once it has been conferred. We had our chance with the commerce clause, and we have lost it.

Still, the argument from principle seems clear enough, even if one is left at a loss as to what should be done about it. And in a sense that is just the point. Congress and the courts can proceed merrily on their way if they are convinced that the basis for an extensive federal commerce power is rooted firmly in the original constitutional text or structure. But uneasiness necessarily creeps into the legislative picture if, as I have argued, the commerce clause is far narrower in scope than modern courts have held. There is a powerful tension between the legacy of the past fifty years and the original constitutional understanding. It is a tension that we must face, even if we cannot resolve it.

Id. at 1454-55.


[O]ur national political scene has witnessed a ferocious debate over growing federal government. Huge budget deficits have resulted, in part, from the public's desire to maintain public services without a parallel commitment to fund these services. Recently, congressional opponents of the mounting deficits have imposed an automatic limit on spending. Nevertheless, the most effective check on spending may exist in the text of the Constitution itself. Indeed, because much of the growth of the federal government has been pursuant to the commerce clause, a more restrictive reading of that clause may aid in limiting governmental growth and federal deficits.

Id. at 901-02.
In *United States v. Lopez*,18 for the first time in nearly six decades, the judiciary reasserted itself. In that case, the Court struck down the Gun Free School Zones Act (Gun Free Schools Act) as applied to a student who brought a gun to school. The Court held that Congress had exceeded its power under the Commerce Clause.19 *Lopez* set off a storm of controversy. One commentator described *Lopez* as "one of the opening cannonades in the coming constitutional revolution."20 Another stated that "[t]he *Lopez* holding, even as cautiously explained by Chief Justice Rehnquist [is], as Justice John P. Stevens says in dissent, 'radical.' There is no other way to reverse nearly 60 years of total deference to Congress on the meaning of the commerce clause."21

Was *Lopez* "one of the opening cannonades in the coming constitutional revolution?" Undoubtedly, *Lopez* marks the end of an era of extreme deference to legislative determinations, but will it lead to an avalanche of decisions striking down federal statutes, and does it signal a return to pre-1937 Commerce Clause jurisprudence? In fact, *Lopez*

19. Id. at 1626. The Court added:

In the Gun-Free School Zones Act of 1990, Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V). The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "[t]o regulate Commerce . . . among the several States . . . ." U.S. CONST., art. I, § 8, cl. 3.

20. Stuart Taylor, Jr., *Judging with Pinpoint Accuracy*, THE RECORDER, May 8, 1991, at 10 (quoting Yale Law Professor Bruce Ackerman). Another commentator described *Lopez* as follows:

The Supreme Court's recent decision in *United States v. Lopez* marks a revolutionary and long overdue revival of the doctrine that the federal government is one of limited and enumerated powers. After being "asleep at the constitutional switch" for more than fifty years, the Court's decision to invalidate an Act of Congress on the ground that it exceeded the commerce power must be recognized as an extraordinary event.


ends a period of extreme deference to legislative judgments, but the decision's ramifications may be less profound than many initially thought.

II. THE HOLDING

Justice Rehnquist delivered the Court's decision, and sought to portray the Court's holding as decidedly unrevolutionary. The opinion did not explicitly overrule or overtly question the Court's post-'37 Commerce Clause precedent. On the contrary, the opinion embraced that precedent and strived to characterize its holding as consistent with that precedent:

Jones & Laughlin Steel, Darby, and Wickard ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.

But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In Jones & Laughlin Steel, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." . . . Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.22

Of course, in terms of result, the opinion was decidedly revolutionary. For nearly six decades, the Court had virtually rubberstamped congressionally-passed commercial legislation, including criminal legislation, enacted under the Commerce Clause. In Lopez, the Court articulated Madisonian themes regarding the scope of federal power. The

22. Lopez, 115 S. Ct. at 1628-29 (citations omitted).
opinion characterized the Constitution as creating a government of limited, enumerated, powers. And, specifically quoting James Madison, the Court flatly stated that "'[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite.'" Then for the first time in over half a century, the Court seriously reviewed a federal statute to see whether Congress had exceeded its commerce power. The Court articulated three situations in which congressional regulation of commerce is permissible:

[W]e have identified three broad categories of activity that Congress may regulate under its commerce power . . . . First, Congress may regulate the use of the channels of interstate commerce . . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities . . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce . . . .

The Court concluded that Section 922(q) did not fit within any of the three situations:

We now turn to consider the power of Congress, in the light of this framework, to enact § 922(q). The first two categories of authority may be quickly disposed of: § 922(q) is not a regulation of the use of the

23. Id. at 1626 (quoting THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)). In the Commerce Clause context, the Court construed this limitation as follows:

The Gibbons Court . . . acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause.

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

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one . . . . The enumeration presupposes something not enumerated; and that something, . . . must be the exclusively internal commerce of a State."

Id. at 1627 (quoting THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

24. Id. at 1629-30 (citations omitted).
channels of interstate commerce, nor is it an attempt to prohibit the inter-
state transportation of a commodity through the channels of commerce; nor 
can § 922(q) be justified as a regulation by which Congress has sought to 
protect an instrumentality of interstate commerce or a thing in interstate 
commerce. Thus, if § 922(q) is to be sustained, it must be under the third 
category as a regulation of an activity that substantially affects interstate 
commerce.

... [W]e have upheld a wide variety of congressional Acts regulat-
ing intrastate economic activity where we have concluded that the activity 
substantially affected interstate commerce ....

... 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. Section 922(q) is 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. It 
cannot, therefore, be sustained under our cases upholding regulations of 
activities that arise out of or are connected with a commercial transaction, 
which viewed in the aggregate, substantially affects interstate commerce.25

The Court might have upheld the law had the statute contained a 
jurisdictional provision requiring that the firearm possession in question 
affected interstate commerce.26 But the law contained no such provi-
sion. The Court might also have upheld the law had Congress made 
explicit findings regarding the effect of gun possession in a school 
zone on interstate commerce. But, as the Court noted, "to the extent 
that congressional findings would enable us to evaluate the legislative 
judgment that the activity in question substantially affected interstate

25. Id. at 1630-31 (footnote omitted). In a later portion of the opinion, the Court 
continued this theme:
The possession of a gun in a local school zone is in no sense an economic 
activity that might, through repetition elsewhere, substantially affect any sort 
of interstate commerce. 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.
Lopez, 115 S. Ct. at 1634.
26. Id. at 1631 ("[Section] 922(q) contains no jurisdictional element which would en-
sure, through case-by-case inquiry, that the firearm possession in question affects interstate 
commerce.").
commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."

The opinion then expressed specific concerns about the scope of federal power. The Court rejected the notion that guns in schools have a definite impact on "national productivity." The Court noted that, if Congress were free to regulate in this case, it would be free to regulate virtually all aspects of the educational process and society:

[U]nder the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.

Id. at 1362.

Id. The government argued:

[T]hat § 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.

Lopez, 115 S. Ct. at 1633 (citation omitted).
To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States . . . .

If that were to happen, then the distinction between "national" and "local" activities would disappear.

Although Justice Rehnquist tried to portray his opinion as consistent with the Court's modern Commerce Clause decisions, his result and approach were strikingly inconsistent with those decisions. In its modern precedent, the Court had reviewed commercial legislation under a rational basis analysis. As the Court stated in Katzenbach v. McClung, "where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." If the Court had applied the rational basis test to the Gun Free Schools Act, it would have been forced to sustain that Act. Justice Breyer made this point in his dissent: Congress had the power to pass the Act "as this Court has understood [Congress' Commerce Clause power] over the last half-century."

Justice Breyer construed that precedent as giving Congress the right to "regulate local activities insofar as they significantly affect interstate commerce," and as requiring the Court to "give Congress a

30. Id. at 1632.
31. The Court conceded:
Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

Id. at 1634 (citations omitted).
33. Id. at 303-04.
34. Lopez, 115 S. Ct. at 1657 (Breyer, J., dissenting).
35. The Court stated:
As this Court put the matter almost 50 years ago:
degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce.\textsuperscript{36} Justice Breyer characterized this deferential approach as requiring affirmance if Congress' determinations had a "rational basis."\textsuperscript{37} Justice Breyer then sought to demonstrate that Congress had a rational basis for concluding that the presence of guns in a school zone affects commerce:

[N]umerous reports and studies — generated both inside and outside government — make clear that Congress could reasonably have found the empirical connection that its law, implicitly or explicitly, asserts . . . .

Having found that guns in schools significantly undermine the quality of education in our Nation's classrooms, Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun-related violence in and around schools is a commercial, as well as a human, problem. Education, although far more than a matter of economics, has long been inextricably intertwined with the Nation's economy . . . .

The economic links I have just sketched seem fairly obvious. Why then is it not equally obvious, in light of those links, that a widespread, serious, and substantial physical threat to teaching and learning also substantially threatens the commerce to which that teaching and learning is inextricably tied? That is to say, guns in the hands of six percent of inner-city high school students and gun-related violence throughout a city's schools must threaten the trade and commerce that those schools support. The only question, then, is whether the latter threat is (to use the majority's terminology) "substantial." And, the evidence of (1) the extent of the gun-related violence problem, (2) the extent of the resulting negative effect on classroom learning and (3) the extent of the consequent negative commercial effects, when taken together, indicate a threat to trade and commerce that is "substantial." At the very least, Congress could rationally have concluded that the links are "substantial."\textsuperscript{38}

\textsuperscript{36} Id. at 1658.

\textsuperscript{37} Id. at 1658. Justice Breyer concluded that the Court was obligated to be deferential "both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy." \textit{Id.}

\textsuperscript{38} Id. at 1659 (citations omitted). Justice Breyer continued:
Justice Breyer argued that the Gun Free Schools Act did not transgress the boundaries between state and federal authority, and concluded by

Specifically, Congress could have found that gun-related violence near the classroom poses a serious economic threat (1) to consequently inadequately educated workers who must endure low paying jobs, and (2) to communities and businesses that might (in today's "information society") otherwise gain, from a well-educated work force, an important commercial advantage. The violence-related facts, the educational facts, and the economic facts, taken together, make this conclusion rational. And, because under our case law, the sufficiency of the constitutionally necessary Commerce Clause link between a crime of violence and interstate commerce turns simply upon size or degree, those same facts make the statute constitutional.

Id. at 1661 (citations omitted).

Justice Breyer went on to say:

Increasing global competition also has made primary and secondary education economically more important. The portion of the American economy attributable to international trade nearly tripled between 1950 and 1980, and more than 70 percent of American-made goods now compete with imports. Yet, lagging worker productivity has contributed to negative trade balances and to real hourly compensation that has fallen below wages in 10 other industrialized nations. At least some significant part of this serious productivity problem is attributable to students who emerge from classrooms without the reading or mathematical skills necessary to compete with their European or Asian counterparts and, presumably, to high school dropout rates of 20 to 25 percent (up to 50 percent in inner cities).

Id. at 1660 (citations omitted).

39. Id. at 1661-62. Justice Breyer noted:

To hold this statute constitutional is not to "obliterate" the "distinction of what is national and what is local," nor is it to hold that the Commerce Clause permits the Federal Government to "regulate any activity that it found was related to the economic productivity of individual citizens," to regulate "marriage, divorce, and child custody," or to regulate any and all aspects of education. For one thing, this statute is aimed at curbing a particularly acute threat to the educational process — the possession (and use) of life-threatening firearms in, or near, the classroom. The empirical evidence that I have discussed above unmistakably documents the special way in which guns and education are incompatible. This Court has previously recognized the singularly disruptive potential on interstate commerce that acts of violence may have. For another thing, the immediacy of the connection between education and the national economic well-being is documented by scholars and accepted by society at large in a way and to a degree that may not hold true for other social institutions. It must surely be the rare case, then, that a statute strikes
arguing that "[u]pholding this legislation would do no more than simply recognize that Congress had a 'rational basis' for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce they threaten ...."

Mr. Justice Stevens, who also dissented, agreed that the Court’s recent precedent required affirmance of Congress’ determinations. In his view, “Congress has ample power to prohibit the possession of firearms in or near schools — just as it may protect the school environment from harms posed by controlled substances such as asbestos or alcohol.”

at conduct that (when considered in the abstract) seems so removed from commerce, but which (practically speaking) has so significant an impact upon commerce.

In sum, a holding that the particular statute before us falls within the commerce power would not expand the scope of that Clause. Rather, it simply would apply preexisting law to changing economic circumstances. It would recognize that, in today’s economic world, gun-related violence near the classroom makes a significant difference to our economic, as well as our social, well-being. In accordance with well-accepted precedent, such a holding would permit Congress “to act in terms of economic . . . realities,” would interpret the commerce power as “an affirmative power commensurate with the national needs,” and would acknowledge that the “commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy.”

Lopez, 115 S. Ct. at 1661-62 (citations omitted).

40. Id. at 1665.
41. Id. at 1651 (Stevens, J., dissenting). In addition, he argued that:

Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity. In my judgment, Congress’ power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use; it necessarily follows that Congress may also prohibit their possession in particular markets. The market for the possession of handguns by school-age children is, distressingly, substantial. Whether or not the national interest in eliminating that market would have justified federal legislation in 1789, it surely does today.

Id. (footnote omitted).
III. Lopez’s Implications for the Future

What are Lopez’s implications for the future? Does that decision signal a radical restructuring of the Court’s Commerce Clause jurisprudence?

A. Lopez in the Supreme Court

In the short term, Lopez is unlikely to have cataclysmic effect, and certainly does not signal a return to pre-1937 Commerce Clause jurisprudence. The decision was rendered by a fragmented court which produced two concurring opinions (Justices Kennedy and Thomas with O’Connor concurring in Kennedy’s opinion), and three dissenting opinions joined by four justices (Justices Stevens, Souter and Breyer with Stevens, Souter and Ginsberg joining Breyer’s opinion). Several members of the Court expressed concern about the potential consequences of a radical shift in the Court’s Commerce Clause jurisprudence. Justice Kennedy supported the Court’s result but felt compelled to issue a concurring opinion urging the Court “not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature.” Justice Kennedy noted:

[The] fundamental restraint [of stare decisis] ... forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy, dependent then upon production and trading practices that had changed but little over the preceding centuries; it also mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system. Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.

He joined the Court’s opinion only because he felt that Congress had gone too far, and had intruded on state power.

42. Id. at 1637 (Kennedy, J., concurring).
43. Lopez, 115 S. Ct. at 1637.
44. Id. at 1640. The Court noted:
Other justices also counseled restraint including dissenting Justices Breyer and Souter. Although not a swing vote, Justice Souter's dis-

The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required . . . . [U]nlike the earlier cases to come before the Court here neither the actors nor their conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus . . . . The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far. If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.

An inference of these dimensions occurs here, for it is well established that education is a traditional concern of the States. The proximity to schools, including of course schools owned and operated by the States or their subdivisions, is the very premise for making the conduct criminal. In these circumstances, we have a particular duty to insure that the federal-state balance is not destroyed.

While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on schoo premises, considerable disagreement exists as to how best accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.

The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term.

Id. at 1640-41 (citations omitted).

45. Id. at 1650-51 (Thomas, J., concurring). Justice Breyer noted:

The third legal problem created by the Court's holding is that it threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled. Congress has enacted many statutes (more than 100 sections of the United States Code), including criminal statutes (at least 25 sections), that use the words "affecting commerce" to define their scope and other statutes that contain no jurisdictional language at all[.] Do these, or similar, statutes regulate noncommercial activities?

Id. at 1664 (Breyer, J., dissenting). He went on to state that:

If so, would that alter the meaning of "affecting commerce" in a jurisdictional element? More importantly, in the absence of a jurisdictional element, are the courts nevertheless to take Wickard . . . (and later similar cases) as inapplicable, and to judge the effect of a single noncommercial activity on interstate commerce without considering similar instances of the forbidden conduct? However these questions are eventually resolved, the legal uncertainty now created will restrict
sent expressly invoked the specter of the 1930s' constitutional crisis. He reminded the Court of the "chastening experiences" which led the Court to repudiate "an earlier and untenably expansive conception of judicial review in derogation of congressional commerce power." And he expressed concern that the majority’s decision "tugs the Court off course, leading it to suggest opportunities for further developments that would be at odds with the rule of restraint to which the Court still wisely states adherence." Justice Souter then traced the history of the Commerce Clause noting that "the period from the turn of the century to 1937 is better noted for a series of cases applying highly formalistic notions of ‘commerce’ to invalidate federal social and economic legislation . . . ." In Justice Souter's view, the Gun Free Schools Act

Congress’ ability to enact criminal laws aimed at criminal behavior that, considered problem by problem rather than instance by instance, seriously threatens the economic, as well as social, well-being of Americans.

Lopez, 115 S. Ct. at 1664-65 (Breyer, J., dissenting) (citation omitted).

46. Id. at 1652 (Souter, J., dissenting).

47. Id.

48. Id. at 1652. Justice Souter went on to state that:

"These restrictive views of commerce subject to congressional power complemented the Court's activism in limiting the enforceable scope of state economic regulation. It is most familiar history that during this same period the Court routinely invalidated state social and economic legislation under an expansive conception of Fourteenth Amendment substantive due process. The fulcrums of judicial review in these cases were the notions of liberty and property characteristic of laissez-faire economics, whereas the Commerce Clause cases turned on what was ostensibly a structural limit of federal power, but under each conception of judicial review the Court's character for the first third of the century showed itself in exacting judicial scrutiny of a legislature's choice of economic ends and of the legislative means selected to reach them.

It was not merely coincidental, then, that sea changes in the Court's conceptions of its authority under the Due Process and Commerce Clauses occurred virtually together, in 1937, with West Coast Hotel Co. v. Parrish, and NLRB v. Jones & Laughlin Steel Corp. In West Coast Hotel, the Court's rejection of a due process challenge to a state law fixing minimum wages for women and children marked the abandonment of its expansive protection of contractual freedom. Two weeks later, Jones & Laughlin affirmed congressional commerce power to authorize NLRB injunctions against unfair labor practices. The Court's finding that the regulated activity had a direct enough effect on commerce has since been seen as beginning the abandonment, for practical purposes, of the formalistic distinction between direct and indirect effects.

Id. at 1652-53 (citations omitted).
passed muster under the Court’s more recent precedent and did not improperly infringe the scope of state authority. Justice Souter also argued that the Court’s tendency to apply rational basis review in Commerce Clause cases constitutes “‘a paradigm of judicial restraint’” and “reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress’s

49. The Court noted:

The suggestion is either that a connection between commerce and these subjects is remote, or that the commerce power is simply weaker when it touches subjects on which the States have historically been the primary legislators. Neither suggestion is tenable. As for remoteness, it may or may not be wise for the National Government to deal with education, but Justice BREYER has surely demonstrated that the commercial prospects of an illiterate State or Nation are not rosy, and no argument should be needed to show that hijacking interstate shipments of cigarettes can affect commerce substantially, even though the States have traditionally prosecuted robbery. And as for the notion that the commerce power diminishes the closer it gets to customary state concerns, that idea has been flatly rejected, and not long ago. The commerce power, we have often observed, is plenary. Justice Harlan put it this way in speaking for the Court in Maryland v. Wirtz:

"There is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other . . . . [I]t is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests . . . . As long ago as [1925], the Court put to rest the contention that state concerns might constitutionally ‘outweigh’ the importance of an otherwise valid federal statute regulating commerce.”


50. The Court noted:

[O]ur hesitance to presume that Congress has acted to alter the state-federal status quo (when presented with a plausible alternative) has no relevance whatever to the enquiry whether it has the commerce power to do so or to the standard of judicial review when Congress has definitely meant to exercise that power. Indeed, to allow our hesitance to affect the standard of review would inevitably degenerate into the sort of substantive policy review that the Court found indefensible 60 years ago. The Court does not assert (and could not plausibly maintain) that the commerce power is wholly devoid of congressional authority to speak on any subject of traditional state concern; but if congressional action is not forbidden absolutely when it touches such a subject, it will stand or fall depending on the Court’s view of the strength of the legislation’s commercial justification.

Id. at 1655.

51. Id. at 1651 (quoting FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2101 (1993)).
political accountability in dealing with matters open to a wide range of possible choices.\textsuperscript{52}

Thus, six justices expressed concern for \textit{stare decisis}. And, although Justices Kennedy and O'Connor joined in the Court's judgment, they argued for a more moderate application of \textit{Lopez}'s holding. Only one justice, Justice Thomas, pushed for more sweeping changes in the Court's Commerce Clause jurisprudence, and his opinion was not joined by any other justice. Justice Thomas argued that the Court should undertake a review of the Court's precedent under the Commerce Clause:

\begin{quote}
[O]ur case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.\textsuperscript{53}
\end{quote}

He then urged the Court to return to a more historically justified approach to the Commerce Clause\textsuperscript{54} and the Tenth Amendment:\textsuperscript{55}

\begin{quote}
[Our] cases all establish a simple point: from the time of the ratification of the Constitution to the mid-1930's, it was widely understood that the Constitution granted Congress only limited powers, notwithstanding the
\end{quote}

\textsuperscript{52} \textit{id.} at 1651-52.

\textsuperscript{53} \textit{id.} at 1642 (Thomas, J., concurring).

\textsuperscript{54} \textit{Lopez}, 115 S. Ct. at 1643-45 (Thomas, J., concurring). Justice Thomas noted that “[a]t the time the original Constitution was ratified, ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes.” \textit{id.} at 1643.

\textsuperscript{55} The Court noted:

Our construction of the scope of congressional authority has the additional problem of coming close to turning the Tenth Amendment on its head. Our case law could be read to reserve to the United States all powers not expressly prohibited by the Constitution. Taken together, these fundamental textual problems should, at the very least, convince us that the “substantial effects” test should be reexamined.

. . . .

In short, the Founding Fathers were well aware of what the principal dissent calls “economic . . . realities.” Even though the boundary between commerce and other matters may ignore “economic reality” and thus seem arbitrary or artificial to some, we must nevertheless respect a constitutional line that does not grant Congress power over all that substantially affects interstate commerce.

\textit{id.} at 1645-46.
Commerce Clause. Moreover, there was no question that activities wholly separated from business, such as gun possession, were beyond the reach of the commerce power. If anything, the "wrong turn" was the Court's dramatic departure in the 1930's from a century and a half of precedent.\textsuperscript{56}

Justice Thomas took particular issue with the "substantial effects" test which he viewed as historically unjustified\textsuperscript{57} and as having permitted Congress to exercise sweeping power\textsuperscript{58} with few limits.\textsuperscript{59} He con-

---

\textsuperscript{56} Id. at 1649 (footnote omitted).
\textsuperscript{57} The Court noted:

Put simply, much if not all of Art. I, § 8 (including portions of the Commerce Clause itself) would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct. Yet this Court's Commerce Clause jurisprudence has endorsed just such an interpretation: the power we have accorded Congress has swallowed Art. I, § 8.

\textit{Id.} at 1644.

\textsuperscript{58} \textit{Lopez}, 115 S. Ct. at 1642-43 (Thomas, J., concurring). Justice Thomas noted: "[w]e have said that Congress may regulate . . . anything that has a 'substantial effect' on [interstate] commerce. This test, if taken to its logical extreme, would give Congress a 'police power' over all aspects of American life." \textit{Id.} at 1642.

\textsuperscript{59} The Court noted:

[T]he substantial effects test suffers from the further flaw that it appears to grant Congress a police power over the Nation. When asked at oral argument if there were any limits to the Commerce Clause, the Government was at a loss for words. Likewise, the principal dissent insists that there are limits, but it cannot muster even one example.

The substantial effects test suffers from this flaw, in part, because of its "aggregation principle." Under so-called "class of activities" statutes, Congress can regulate whole categories of activities that are not themselves either "interstate" or "commerce." In applying the effects test, we ask whether the class of activities as \textit{whole} substantially affects interstate commerce, not whether any specific activity within the class has such effects when considered in isolation.

The aggregation principle is clever, but has no stopping point. Suppose all would agree that gun possession within 1,000 feet of a school does not substantially affect commerce, but that possession of weapons generally (knives, brass knuckles, nunchakus, etc.) does. Under our substantial effects doctrine, even though Congress cannot single out gun possession, it can prohibit weapon possession generally. But one always can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce. Under our jurisprudence, if Congress passed an omnibus "substantially affects interstate commerce" statute, purporting to regulate every aspect of human existence, the Act apparently would be constitutional. Even though particular sections may govern only trivial activities, the statute in the aggregate regulates matters that substantially affect commerce.
cluded by noting that "[a]t an appropriate juncture, I think we must modify our Commerce Clause jurisprudence. Today, it is easy enough to say that the Clause certainly does not empower Congress to ban gun possession within 1,000 feet of a school." In his view, this modification need not be "radical."

Thus far, at least, the Court has not been inclined to follow Justice Thomas’ concurrence. In two post-Lopez actions, the Court had the chance to extend Lopez to other contexts and refused to do so. In the first case, United States v. Robertson, respondent was convicted on various narcotics offenses as well as for a violation of Section 1962(a) of the Racketeer Influenced and Corrupt Organizations Act (RICO). In an effort to satisfy RICO’s jurisdictional requirement, the government alleged that respondent had invested the proceeds of unlawful activities in a gold mine. The Ninth Circuit reversed the RICO conviction on the basis that the Government had failed to prove that the gold mine was "engaged in or affect[ed] interstate commerce." The Court disagreed finding that respondent had engaged in or affected interstate commerce.

---

Id. at 1649-50 (citations omitted).
60. Id. at 1651.
61. The Court noted:
   "This extended discussion of the original understanding and our first century and a half of case law does not necessarily require a wholesale abandonment of our more recent opinions. It simply reveals that our substantial effects test is far removed from both the Constitution and from our early case law and that the Court’s opinion should not be viewed as "radical” or another “wrong turn” that must be corrected in the future. The analysis also suggests that we ought to temper our Commerce Clause jurisprudence."

Id. at 1650 (footnoted omitted).
64. United States v. Robertson, 15 F.3d 862, 868 (1994).
65. The Court noted:
   "The facts relevant to the “engaged in or affecting interstate commerce” issue were as follows: Some time in 1985, Robertson entered into a partnership agreement with another man, whereby he agreed to finance a goldmining operation in Alaska. In fulfillment of this obligation, Robertson, who resided in Arizona, made a cash payment of $125,000 for placer gold mining claims near Fairbanks. He paid approximately $100,000 (in cash) for mining equipment and supplies, some of which were purchased in Los Angeles and transported to Alaska for use in the"
In the second case, *Cargill, Inc. v. United States*, the Court refused to grant certiorari. Obviously, the decision whether to grant certiorari is discretionary, and should not be given much weight. Nevertheless, Mr. Justice Thomas, in his dissent to the Court’s decision to deny certiorari, focused on the constitutionality of the Clean Water Act. The Army Corps of Engineers tried to apply the Act to water pools on petitioner’s land where migratory birds land. Relying on *Lopez*, Justice Thomas raised questions regarding the Act’s validity.

Robertson also hired and paid the expenses for seven out-of-state employees to travel to Alaska to work in the mine. The partnership dissolved during the first mining season, but Robertson continued to operate the mine through 1987 as a sole proprietorship. He again hired a number of employees from outside Alaska to work in the mine. During its operating life, the mine produced between $200,000 and $290,000 worth of gold, most of which was sold to refiners within Alaska, although Robertson personally transported approximately $30,000 worth of gold out of the State.

Most of the parties’ arguments, here and in the Ninth Circuit, were addressed to the question whether the activities of the gold mine “affected” interstate commerce. We have concluded we do not have to consider that point. The “affecting commerce” test was developed in our jurisprudence to define the extent of Congress’s power over purely intrastate commercial activities that nonetheless have substantial interstate effects. The proof at Robertson’s trial, however, focused largely on the interstate activities of Robertson’s mine. For example, the Government proved that Robertson purchased at least $100,000 worth of equipment and supplies for use in the mine. Contrary to the Court of Appeals’ suggestion, all of those items were not purchased locally (“drawn generally from the stream of interstate commerce”); the Government proved that some of them were purchased in California and transported to Alaska for use in the mine’s operations. The Government also proved that, on more than one occasion, Robertson sought workers from out of state and brought them to Alaska to work in the mine. Furthermore, Robertson, the mine’s sole proprietor, took $30,000 worth of gold, or 15% of the mine’s total output, with him out of the State.

Whether or not these activities met (and whether or not, to bring the gold mine within the “affecting commerce” provision of RICO, they would have to meet) the requirement of substantially affecting interstate commerce, they assuredly brought the gold mine within § 1962(a)’s alternative criterion of “any enterprise . . . engaged in . . . interstate or foreign commerce.” As we said in *American Building Maintenance*, a corporation is generally “engaged ‘in commerce’” when it is itself “directly engaged in the production, distribution, or acquisition of goods and services in interstate commerce.”

*Robertson*, 115 S. Ct. at 1732-33 (citations omitted).


67. The Court noted:
After noting that the pools "have never been, are not now, and probably will never be susceptible to use in interstate or foreign commerce," Justice Thomas questioned whether they substantially affect commerce. But Justice Thomas could not muster enough votes to have the case heard.

Only last Term, we held that possession of a firearm in a local school zone does not substantially affect interstate commerce. The basis asserted to create federal jurisdiction over petitioner's land in this case seems to me to be even more far-fetched than that offered, and rejected, in Lopez. At least in Lopez the Government could assert that the presence of weapons in and around schools may result in violent crime that affects education and, hence, the economy. In this case, the Corps' basis for jurisdiction rests entirely on the actual or potential presence of migratory birds on petitioner's land. In light of Lopez, I have serious doubts about the propriety of the Corps' assertion of jurisdiction over petitioner's land in this case.

Id. at 408 (Thomas, J., dissenting) (citations omitted).

68. Id.

69. The Court noted:

Apparently, the Corps' regulations are based on the assumption, improper in my opinion, that the self-propelled flight of birds across state lines creates a sufficient interstate nexus to justify the Corps' assertion of jurisdiction over any standing water that could serve as a habitat for migratory birds. As the Court of Appeals admitted, the Corps' expansive interpretation of its regulatory powers under the Clean Water Act may test the very "bounds of reason," and, in my mind, likely stretches Congress' Commerce Clause powers beyond the breaking point.

Both the Court of Appeals and the Government rely on the Seventh Circuit's declaration of an interstate nexus in Hoffman Homes, Inc. v. EPA, 999 F.2d 256, 261 (1993): "throughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds." That is no doubt true, and I do not challenge Congress' power to preserve migratory birds and their habitat through legitimate means. However, that substantial interstate commerce depends on the continued existence of migratory birds does not give the Corps carte blanche authority to regulate every property that migratory birds use or could use as habitat. The point of Lopez was to explain that the activity on the land to be regulated must substantially affect interstate commerce before Congress can regulate it pursuant to its Commerce Clause power.

Other than the occasional presence of migratory birds, there was no showing that petitioner's land use would have any effect on interstate commerce, much less a substantial effect. Nor was there any showing that the cumulative effect of land use involving seasonal standing water — water that is wholly isolated from any water used, or usable, in interstate commerce — would have a substantial effect on interstate commerce.

Id. at 409 (citations omitted).
Even though *Lopez* did not overturn the Court’s Commerce Clause jurisprudence, *Lopez* did produce a significant difference in the Court’s approach to Commerce Clause issues. The deferential approach used in cases like *Katzenbach*, in which the Court applied rational basis review, was rejected by a substantial number of justices. Justice Rehnquist’s first reference to the rational basis test was an historical reference. His second reference came when he responded to the government’s argument “that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.” When Rehnquist finally addressed the test head-on, he rejected it:

Justice BREYER rejects our reading of precedent and argues that “Congress . . . could rationally conclude that schools fall on the commercial side of the line.” Again, Justice BREYER’s rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial . . . .

Thus, if Justice Rehnquist has his way, the era of blind deference to legislative determinations would be over.

What test replaces the rational basis test? Justice Rehnquist’s opinion focuses on whether the regulated activity has a “substantial” relationship to interstate commerce. To the extent that Congress is not regulating the channels of interstate commerce themselves, or attempting to “regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce,” Congress can only regulate when the activity being regulated has a “substantial relation”

70. 379 U.S. 294 (1964).
71. The Court noted:
   In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power “must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.” Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce. *Lopez*, 115 S. Ct. at 1628-29 (citations omitted) (emphasis added).
72. *Id.* at 1632.
73. *Id.* at 1633 (citation omitted) (emphasis added).
to interstate commerce.” In *Lopez*, the Court struck down the Gun Free Schools Act because it found that

the possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. 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.

Although the *Lopez* decision may not result in a complete reversal of the Court’s post-'37 precedent, or the invalidation of numerous federal statutes, that decision will likely force Congress to be more careful in exercising its Commerce Clause power. If Congress wishes to spare future legislation the same fate as the Gun Free schools Act, it will need to provide more support in the form of a jurisdictional provision, requiring that an activity being criminalized affect interstate commerce, or in the form of specific findings regarding the effect of the activity on interstate commerce. If *Lopez* forces Congress to more carefully delineate its findings, the decision may have a healthy effect on the legislative process.

B. *Lopez* in the federal courts

In the lower federal courts, *Lopez* generated a predictable avalanche of litigation challenging other federal statutes. Defendants eagerly embraced *Lopez* in the hope of avoiding prosecution or overturning a conviction. But these so-called “*Lopez* challenges” have not been well-received. The lower courts have upheld numerous federal criminal statutes prohibiting many different types of conduct: the non-payment of child support, the use or possession of weapons, possession of

74. *Id.* at 1629.
75. *Id.* at 1634.
78. See, e.g., United States v. Brown, 72 F.3d 96 (8th Cir. 1995). The Court noted:
a firearm by a convicted felon, possession of firearms with obliterated serial numbers, possession of an unregistered destructive device, conspiracy to possess an unregistered firearm, possession or transfer of a machine gun, malicious destruction of property, the use of a residence located within 1000 feet of a secondary school for the distribution of cocaine and crack cocaine, possession of cocaine with intent to distribute, the obstruction of commerce, and aiding and abetting the manufacture of marijuana. In addition, the courts have upheld the Hobbs Act, the Drug Act, the federal carjacking statute, and the Freedom of Access to Clinic Entrances Act.

We note that intrastate drug activity affects interstate commerce, that Congress may regulate both interstate and intrastate drug trafficking under the Commerce Clause, and that section 841(a)(1) is a valid exercise of Congress's Commerce Clause power. Because Brown's section 924(c)(1) conviction is based on his section 841(a)(1) drug trafficking offense which involved "an activity that substantially affect[ed] interstate commerce," we reject Brown's Lopez challenge.

Id. at 97 (citations omitted).

79. See, e.g., United States v. Bell, 70 F.3d 495 (7th Cir. 1995); United States v. Hinton, 69 F.3d 534 (4th Cir. 1995); United States v. Shelton, 66 F.3d 991 (8th Cir. 1995).
82. See, e.g., Dodge, 61 F.3d at 142 (upholding 18 U.S.C. § 371 (1994)).
84. See, e.g., United States v. Sherrill, 67 F.3d 1208 (6th Cir. 1995); United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995); United States v. Martin, 63 F.3d 1422 (7th Cir. 1995).
85. See, e.g., United States v. Clark, 67 F.3d 1154 (5th Cir. 1995).
87. See, e.g., United States v. Bolton, 68 F.3d 396 (10th Cir. 1995).
89. See, e.g., United States v. Bolton, 68 F.3d 396 (10th Cir. 1995).
91. See, e.g., United States v. Bishop, 66 F.3d 569 (3d Cir. 1995) (upholding a statute prohibiting the armed theft of an automobile from the presence of another by force and violence or by intimidation); United States v. Robinson, 62 F.3d 234 (8th Cir. 1995); United States v. Carolina, 61 F.3d 917 (10th Cir. 1995).
92. See, e.g., Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995).
one case, a sheriff unsuccessfully tried to use *Lopez* to challenge the Brady Handgun Violence Prevention Act which required him to run background checks on those wishing to purchase handguns.\(^9\)

This response by the lower courts could have been predicted. Under the “modern view” of the Commerce Clause, which has been taught in law schools for decades, the idea of striking down a federal statute on the ground that Congress exceeded its authority under the Commerce Clause is a “radical” concept. When Congress passes legislation under the Commerce Clause, the courts are supposed to “defer” to rational legislative judgments. The *Lopez* decision, surprising as it was, did not break lower-court judges out of this mindset.

In a significant number of *Lopez* challenges, the lower courts summarily reject the challenge.\(^9\)\(^4\) Most of these decisions distinguish or limit *Lopez*.\(^9\)\(^5\) For example, in *United States v. Bell*,\(^9\)\(^6\) the Court upheld a federal law prohibiting the possession of a weapon by a con-

---

93. See, e.g., Mack v. United States, 66 F.3d 1025 (9th Cir. 1995).
94. See, e.g., United States v. Hinton, 69 F.3d 534 (4th Cir. 1995); United States v. Clark, 67 F.3d 1154 (5th Cir. 1995); United States v. Collins, 61 F.3d 1379 (9th Cir. 1995).
95. See, e.g., United States v. Sherlin, 67 F.3d 1208 (6th Cir. 1995); United States v. Shelton, 66 F.3d 991 (8th Cir. 1995); United States v. Leshuk, 65 F.3d 1105 (4th Cir. 1995). In *United States v. Kirk*, the court stated that:

It is particularly important to our determination that section 922(o) prohibits the private possession or transfer of machineguns only if they were not lawfully possessed prior to May 19, 1986. Thus, transfer or possession of a machinegun is unlawful under this section only if it was manufactured or illegally transferred after May 19, 1986. It is clear, therefore, that the activity Congress intended to prohibit by application of section 922(o) was the introduction into the stream of commerce machineguns manufactured, imported, or otherwise illegally obtained, after the effective date of the act. When read as a whole, it is plain that the activities prohibited by section 922(o) constitute commerce . . . .

Section 922(o) is restricted to a narrow class of highly destructive, sophisticated weapons that have been either manufactured or imported after enactment of the Firearms Owners Protection Act, which is more suggestive of a nexus to or affect on interstate or foreign commerce than possession of any firearms whatever, no matter when or where originated, within one thousand feet of the grounds of any school . . . .

Thus, section 922(o) falls into the first category identified by the Supreme Court in *Lopez*: a regulation of the use of the channels of interstate commerce. 70 F.3d 791, 796 (1995) (citations and footnotes omitted).
96. 70 F.3d 495 (7th Cir. 1995).
vicited felon. The court concluded that the statute "contains an explicit requirement that a nexus to interstate commerce be established." In *United States v. Bolton*, the court upheld the Hobbs Act which prohibited the obstruction of commerce. The court held "that the Hobbs Act regulates activities which in aggregate have a substantial effect on interstate commerce. In enacting the Hobbs Act, Congress determined that robbery and extortion are activities which through repetition may have substantial detrimental effects on interstate commerce."

Even those courts that engage in more extended review of federal statutes tend to tread very carefully. For example, *United States v. Bishop*, involved a *Lopez* challenge to the federal carjacking statute. In affirming, the Third Circuit noted that "[w]e are called upon in this case principally to perform one of our most delicate duties — determining whether Congress exceeded its constitutional authority in enacting a federal law." The court noted the government's alleged

---

98. *Bell*, 70 F.3d at 498.
99. 68 F.3d 396 (10th Cir. 1995).
100. *Id.* at 399. The Court further noted:

Unlike possession of a firearm in a school zone, therefore, robbery and extortion are activities that through repetition can substantially affect interstate commerce. Because the Hobbs Act regulates activities that in aggregate have a substantial effect on interstate commerce, "the de minimis character of individual instances arising under that statute is of no consequence." As a result, our precedent construing the Hobbs Act to require only a de minimis effect on interstate commerce in individual instances is consistent with *Lopez*. We therefore conclude the Hobbs Act represents a permissible exercise of the authority granted to Congress under the Commerce Clause, and that under *Lopez*, all the government need show is a de minimis effect on interstate commerce in order to support a conviction under the Act.

*Id.*

101. 66 F.3d 569 (3d Cir. 1995).
102. *Id.* at 571. The court went on to state that:

Appellants contend that the Supreme Court's *Lopez* decision is a sharp break with the Court's precedents. According to them, "the *Lopez* decision is a strong signal to the lower courts to eschew a casual calculus of whether interstate commerce is substantially implicated in a federal statutory scheme in favor of a carefully considered factual determination." We, however, do not believe that *Lopez* calls for federal courts to supplant Congressional judgments with their own. That would, indeed, be a profound departure from prior law, and it is important to keep
justification for the statute: "(1) Congress had a rational basis for believing that carjacking substantially affects interstate commerce; and (2) section 2119 has, as an element of the offense, a requirement that there be a constitutionally adequate nexus with interstate commerce." The court accepted both arguments. In doing so, the court articulated the need for deference to congressional determinations, suggesting that the primary check on legislative abuse is political:

The Supreme Court's jurisprudence makes it abundantly clear that our job in this case is not to second-guess the legislative judgment of Congress that carjacking substantially affects interstate commerce, but rather to ensure that Congress had a rational basis for that conclusion.

After summarizing extensive congressional testimony regarding the economic effects of carjacking, the court upheld the statute.

in mind that Justices Kennedy and O'Connor, who fully concurred in the majority opinion, did not view the majority that way. Rather, Justices Kennedy and O'Connor counseled "great restraint" before a court finds Congress to have overstepped its commerce power, and believed the Court's opinion to have been a "necessary though limited holding." Thus, despite protestations to the contrary, the winds have not shifted that much.

Id. at 590 (citations omitted).

103. Id. at 576.
104. Id. at 576-77. The Court noted:

Although ultimately the federal courts are the arbiters of constitutional questions, "the Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise." We therefore must give substantial deference to a Congressional determination that it had the power to enact particular legislation. . . . Deference to Congressional judgments about the contours of Commerce Clause power stems in part, as Justice Kennedy explained, from the fact that Congress is a coordinate branch of the federal government charged with the government's legislative authority.

Bishop, 60 F.3d at 576-77 (citations omitted).

105. "Indeed, the primary check upon Congressional action is its direct responsibility to the will of the people." Id.

106. Id. at 577.
107. The Court noted:

Together, the findings and floor statements — and the structure of the Act itself — suggest the following. Congress specifically found that auto theft is an interstate problem — both that it is often an interstate business itself (albeit an illegal one) and that it gnawed away at the innards of the American economy by imposing other costs on society as well. Congress believed that auto theft was a vast, illicit trade substantially affecting interstate and foreign commerce. Auto theft
The *Bishop* court was also presented with the argument that:

*Lopez* created a ‘bright line’ rule that unless an activity is ‘commercial’ or ‘economic,’ it is beyond the power of Congress to regulate no matter what its effect upon interstate commerce. Because carjacking is not ‘commercial’ or ‘economic,’ appellants contend, it is simply beyond the power of Congress to regulate.  

This argument received some support from Justice Kennedy’s *Lopez* concurrence. Nevertheless, the court rejected the argument:

The Court in *Lopez* disapproved of the statute at issue because possession of a handgun was neither economic nor “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” By contrast, we can easily appreciate how Congress could readily (and rationally) have believed that carjacking is both economically motivated and part of a greater economic activity.

The court also rejected the argument that the “costs of crime” can “support a finding that an activity substantially affects interstate commerce.”

---

costs consumers both through the direct economic losses caused by having their property taken from them, and through increased insurance costs. Congress further believed that carjacking was not mere joyriding, but a new and violent form of the illicit interstate business of auto theft. Finally, Congress believed that the national problem of auto theft required a comprehensive, national response addressing the many different aspects of the auto theft problem, because prior state efforts had failed to combat the problem effectively.

*Id.* at 580.

108. *Id.* (citations omitted).


110. *Bishop*, 68 F.3d at 581 (citations omitted). The court went on to state that:

   Indeed, the rationale supporting such a conclusion, and distinguishing this case from *Lopez*, is patently obvious. First, carjacking is economic in a way that possession of a handgun in a school zone is not. When a criminal points a gun at a victim and takes his or her car, the criminal has made an economic gain and the victim has suffered an undeniable and substantial loss. Replicated 15,000 or 20,000 times per year, the economic effects are indeed profound. By comparison, no matter how many criminals possess guns in school zones, there is no direct economic effect that arises from the crimes.

*Id* at 580-81 (citations omitted).

111. The Court noted that:
Judge Becker concurred in part and dissented in part. Although he agreed that carjacking is a heinous offense,\textsuperscript{112} he rejected the court’s holding that Congress has the power to pass a carjacking statute. He began by noting that “[s]ix months ago the majority’s opinion would have carried the day. But that was before \textit{United States v. Lopez}, which, fairly read, reflects a sea change in the Supreme Court’s approach to these types of questions.”\textsuperscript{113} In his view \textit{Lopez} is “a beacon that we must follow, and the direction in which the beacon points compels my vote to invalidate the carjacking statute as beyond the broad reach of Congress’s Commerce Clause power.”\textsuperscript{114} He stated:

In enacting this criminal statute, Congress improperly interfered with the primary authority of New Jersey to define and enforce its criminal code. Intrastate crimes of violence, like the carjacking in this case, are properly left to the states, whose law enforcement agencies and courts are well suited to handle such criminal activity . . . .\textsuperscript{115}

Judge Becker felt that the carjacking statute could not be justified under \textit{Lopez}:

It is clear that § 2119 was enacted to deal with carjacking as a crime of violence, not, as the majority now contends, to confront the effects of carjacking on the interstate economy. Congress has not made any findings

\begin{itemize}
\item [\textsuperscript{112}]In enacting the Anti Car Theft Act of 1992, Congress did not rest its findings of substantial effect upon interstate commerce solely upon increased insurance costs, but also relied upon the direct costs to consumers from lost property resulting from auto theft. Thus, the “cost of crime” justification used by Congress in this case is much more concrete than the theory rejected by the Court in \textit{Lopez}.
\item [\textsuperscript{113}]\textit{Id.} at 581 n.16 (citations omitted).
\item [\textsuperscript{114}]\textit{Id.} at 591. The court rejected this argument as well:
\item [\textsuperscript{115}]Available information actually undercuts appellants’ “common sense” assertions. In a 1992 report on carjacking, the Department of Justice noted that one of the motives behind carjacking is “to derive a profit from the resale of the vehicle or its parts.”
\end{itemize}

\textit{Id.} at 582 (citations omitted).

112. \textit{Bishop}, 68 F.3d at 590 (Becker, J., concurring in part and dissenting in part).
113. \textit{Id.} at 591 (citation omitted).
114. \textit{Id.}
115. \textit{Id.} at 592-93.
to support the conclusion that carjacking has a substantial effect on inter-
state commerce . . . . 116

Only a few lower courts have actually struck down federal statutes
as exceeding Congress' power. In United States v. Pappadopoulos,117
Pappadopoulos raised a Lopez challenge to her arson conviction under
18 U.S.C. § 844(i).118 The arson resulted when Pappadopoulos and

116. Id. at 600. He went on to state that:
The federal carjacking statute, unlike those statutes upheld in prior cases, in
no way regulates instrumentalities in any way engaged in interstate com-
merce. Rather, § 2119 is a criminal statute of general application, which, by
its terms, lacks any nexus to the use of automobiles in interstate com-
merce . . . .

Id. at 597. Additionally, he stated:
The majority sweeps within its definition of commercial activity all crim-
inal acts which involve a coercive (nonconsensual) transfer of economic ben-
efit from victim to perpetrator. A definition of this breadth would include not
only carjacking, but also all crimes of theft. Indeed, if Chief Judge Posner is
correct, perhaps it includes all criminal activity.

. . . .

[T]he new carjacking problem is more akin to the violent street crimes asso-
ciated with street gangs and the drug subculture . . . .

The primary motives appear to be transportation for a getaway after
robbing the driver, a source of transportation to commit another crime,
joyriding, and to a lesser degree, to derive a profit from the resale of the
vehicle or its parts.

Id. at 597-602. The majority responded in the following way:
Congress is not obligated, when enacting its statutes, to make a record of
the type that an administrative agency or court does to accommodate judicial
review. Congress need not even rely solely upon evidence provided in hear-
ings. Congress rationally believed that carjacking was a new but substantial
and growing aspect of the vast interstate auto theft problem. As we noted
earlier, Congress heard evidence that carjacking was a new form of auto
theft that was spreading throughout the nation. It also was presented with
evidence that even thieves who begin as joy riders tend to become profes-
sionals — professionals who would feed the illicit auto theft aftermarket for
stolen vehicles and parts. Thus, Congress may have believed that even if a
carjacker's first crime was committed for some non-economic motive, he or
she would likely soon be a part of the national auto theft problem. In such
circumstances, Congress need not have refrained from legislating until the
carjacking problem reached crisis proportions.

Id. at 582-83 (citations omitted).
117. 64 F.3d 522 (9th Cir. 1995).
118. The Act read as follows:
her husband, who were experiencing severe financial difficulties, con-
spired with another to burn down their 10,000 square foot home. 
Pappadopoulos contended that "the residence's receipt of natural gas 
from out-of-state sources was insufficient as a matter of law to estab-
lish the requisite nexus to interstate commerce . . . ." The court 
was receptive to the argument noting that, since the residence itself did 
not move in interstate commerce, "the government must rely on 
Congress’s power to regulate intrastate activities that ‘substantially 
affect’ interstate commerce." The government tried to meet the 
"substantial effects" test by relying on Wickard v. Filburn: "even 
though the effect on commerce of the destruction of one residence that 
receives out-of-state gas might be trivial, the combined effect 'of many 
others similarly situated, is far from trivial." The Court disagreed 
noting that "[t]he government’s argument does not get it home free. 
Lopez makes it clear that the Wickard line of cases "may not be ex-

119. Pappadopoulos, 64 F.3d at 525. The court concluded that “an essential element of 
the crime of arson . . . is that the property was ‘used in’ or ‘used in any activity affecting’ 
interstate or foreign commerce.” Id. at 524. The Court concluded that the requirement — 
that the arson be committed on property used in interstate commerce — was jurisdictional. 
The prosecution sought to satisfy this element by showing that the house used natural gas 
derived, at least in part, from out-of-state sources. Id. But the Court concluded that it must 
also examine the constitutionality of the jurisdictional provision:
We recognize that Lopez presented the Commerce Clause issue in a somewhat 
different posture, as there the question was whether Congress had exceeded its 
commerce powers in adopting a statute, whereas here the question is whether a 
jurisdictional element required to ensure the constitutional application of a statute 
has been met. This difference might be significant in another case, but it is not in 
the case before us.
Id. at 526.
The court also noted that “the question we must decide is whether Congress could 
constitutionally prohibit the destruction of the Pappadopoulos residence under the power 
vested in it by the Commerce Clause . . . .” Id. at 525.
120. Pappadopoulos, 64 F.3d at 526.
121. 317 U.S. 111 (1942).
122. Id. (quoting Wickard v. Filburn, 317 U.S. 111, 128 (1942)).
tended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

The court noted that "[l]ike the statute at issue in Lopez and unlike the case in Wickard, the conduct regulated by section 844(i) — arson — is not commercial or economic in nature." The court struck down the arson law:

Lopez demonstrates that the receipt of natural gas at the Pappadopulos residence from out-of-state sources is insufficient as a matter of law to confer federal jurisdiction over the section 844(i) count. The residence was not used at all for commercial activity. It was purely private. If the Commerce Clause were extended to reach the activity that the government seeks to punish here, we would be "hard-pressed to posit any activity by an individual that Congress is without power to regulate."

Unlike a firearm or a car, both of which can readily move in interstate commerce, a house has a particularly local rather than interstate character. Moreover, a private residence that merely receives natural gas from out-of-state sources is neither an article nor an instrumentality of commerce. The arson of such a structure has only a remote and indirect effect on interstate commerce.

[This] is a simple state arson crime. It should have been tried in state court . . .

In United States v. Martin, the court upheld the same statute. Fire destroyed a two-story apartment building. Martin contended that the conviction could not be sustained because the apartment was neither used in nor affected interstate commerce, as required by Section 844(i). The court noted that the Supreme Court had upheld the statute as applied to rental properties. But, at the time of the fire, the building had been unrented for three months and had no utilities. However, although the building's last tenant had ceased paying rent in

123. Id. at 526 (quoting Lopez, 115 S. Ct. at 1628-29 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937))).
124. Id.
125. Id. at 527-28.
126. 63 F.3d 1422 (7th Cir. 1995).
127. Martin, 63 F.3d at 1426-27.
August, she still had personal property there. Nevertheless, the court upheld the statute because Martin had only temporarily removed the property from the rental market.\textsuperscript{128}

A \textit{Lopez} challenge was also accepted in \textit{United States v. Bailey},\textsuperscript{129} in which Bailey was charged criminally for his failure to pay child support under the Child Support Recovery Act (CSRA).\textsuperscript{130} In striking down the CSRA, the court stated:

\begin{quote}
[\textit{E}ven the dissenters in \textit{Lopez} agree there are some limitations on Congress' commerce power, such as family law. Legal and economic arguments to the contrary notwithstanding, a statute which sounds, walks, and looks like a duck must be a duck statute \ldots. The CSRA, sounds, walks, and looks like a domestic relations statute and aims the central government down a slippery slope where it should not be. Though there may be other bases by which to challenge the constitutionality of 18 U.S.C. § 228, it is this Court's humble opinion that notions of federalism and comity preclude the Child Support Recovery Act from passing constitutional scrutiny \ldots.\textsuperscript{131}
\end{quote}

Other lower courts that have considered the CSRA's constitutionality have upheld it.\textsuperscript{132} Illustrative is \textit{United States v. Sage}:\textsuperscript{133} "Contrary to the Defendant's contentions, \textit{Lopez} does not mandate a finding that the CSRA is unconstitutional \ldots."\textsuperscript{134} The court used the rational basis test to justify its decision.\textsuperscript{135} The court upheld the law.\textsuperscript{136}

\textsuperscript{128} \textit{Id.} at 1428. The court noted:

Although Martin insists that his property had ceased to be a rental unit, the record tells a different story. Prior to its closing, 1414 Highland was "property with firmly established connections to interstate commerce," and the mere fact that a property is temporarily unrented does not reflect its permanent removal from the rental market. Most important, Martin himself testified that the vacancy was only temporary and that he intended to rent the property in the future.

\textit{Id.}

\textsuperscript{129} 902 F. Supp. 727 (W.D. Tex. 1995).

\textsuperscript{130} 18 U.S.C. § 228 (1994).

\textsuperscript{131} \textit{Bailey}, 902 F. Supp. at 730 (citations omitted).


\textsuperscript{133} 906 F. Supp. 84 (D. Conn. 1995).

\textsuperscript{134} \textit{Id.} at 89.

\textsuperscript{135} \textit{Id.} The Court added:
finding that child custody payments have a substantial effect on the national economy, as reflected in the Act's legislative history, and

When reviewing the CSRA, the court's role is narrow: the court must defer to a congressional determination that the regulated activity substantially affects interstate commerce if there is any rational basis for such a finding. A rational basis exists when the relationship between the activity and interstate commerce is not so tenuous as to defeat all limitations on congressional power pursuant to its authority under the Commerce Clause. Once a rational basis exists, the court must then decide whether the means chosen is reasonably adapted to the end permitted by the Constitution.

Id. (citations omitted).

The court noted:

The CSRA may be sustained under the line of cases which includes Wickard v. Filburn, Perez v. United States and Hodel v. Virginia Surface Mining & Reclamation Ass'n, in which individual instances viewed in the aggregate substantially affect interstate activity. Because it is not necessary to "pile inference upon inference" to perceive an explicit connection between the regulated activity and interstate commerce, and in light of the economic nature of the regulated activity, the legislative history, and the interstate commerce nexus within the language of the CSRA, the court concludes that the CSRA regulates a Category Three activity and finds that a rational basis exists for the conclusion that the non-payment of the "past due support obligations" substantially affects interstate commerce.

Sage, 906 F. Supp. at 92. (citations omitted).

The court noted:

Because the payments regulated by the CSRA have a substantial effect on the national economy, the court determines in this case they are "economic."

Support payments might not be considered traditional items of "commerce," but the non-payment of interstate support obligations is economic activity in a way that mere possession of a handgun in a school zone is not. The non-custodial parent reaps an economic gain each time a support payment is withheld, while the offspring suffers an economic loss.

The magnitude of the total economic loss and concomitant gain is significant. Congress considered that of the $48 billion in child support payments owed nationally according to court judgments, a total of $35 billion has never been collected. Of that amount, interstate cases are responsible for an estimated minimum of $14 billion in uncollected support.

The substantial economic gains and losses at issue in these cases have obvious implications on interstate commerce. Given the interrelated nature of our national economy, it is inevitable that local consumption will involve consumption of goods produced out of state. Thus, the non-payment of the "past due support obligation" will reduce the child's consumption of goods in interstate commerce. It will also reduce the custodial parent's consumption of such goods to the extent any alimony is included in the support obligation. Thus, the very act of withholding payment causes a depletion of assets that affects interstate commerce.
that the Act contains a jurisdictional requirement limiting its application to interstate payments.\textsuperscript{139} The court rejected the argument that the CSRA violates the Tenth Amendment by invading "a province which traditionally has been reserved to the states — criminal enforcement of state domestic relations orders,"\textsuperscript{140} noting:

\begin{quote}
\textit{Lopez} did not turn on whether a regulated activity traditionally has been the province of the states. Rather, the proper inquiry is whether the court can rationally find that an activity substantially affects interstate commerce without having to "pile inference upon inference." Because the connection between interstate support payments and commerce is not attenuated and a rational basis exists for finding a substantial effect on interstate commerce, whether an activity is traditionally regulated by the states is not a relevant inquiry . . . \textsuperscript{141}
\end{quote}

Thus, the court concluded that "the CSRA is not an impermissible violation of the Tenth Amendment, but rather a rational response by

\textsuperscript{138} \textit{Id.} at 91. The court noted:

\begin{quote}
Although legislative history is not necessarily a requirement for the court's finding that a rational basis for substantial effect exists in this case, the statistics and legislative judgment provided in the CSRA's legislative history provide support for this court's conclusion that Congress acted to control a national problem with substantial effects on interstate commerce.
\end{quote}

\textsuperscript{139} \textit{Id.} (citations omitted).

\textsuperscript{140} \textit{Id.} at 92.

\textsuperscript{141} \textit{Id.} (citation omitted).
Congress to a national problem that the federal government alone is equipped to handle.  

IV. CONCLUSION

Whether *Lopez* will lead to an outright reversal of the Court’s Commerce Clause precedent, and with it an end to the federalization of the criminal law, is far from clear. In any event, it seems unlikely that the Court will reverse that precedent in the short term. Only one justice (Justice Thomas) argued for a sweeping review of the Court’s Commerce Clause precedent. Four justices dissented (Souter, Stevens, Ginsberg & Breyer), and two of the concurring justices (Kennedy & O’Connor) counseled restraint. As a result, absent a change in position or a shift in the Court’s composition, a reversal seems unlikely.

In the short term, practical considerations virtually preclude the Court from radically altering its position on the Commerce Clause. Since the 1930s, Congress has used its commerce power to pass hundreds of commercial and criminal statutes. If the Court began overturning those statutes in quantity, the Court would cause an earthquake in the business and legal communities. Even Justice Thomas recognized this fact in his concurrence:

> Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of stare decisis and reliance interests may convince us that we cannot wipe the slate clean.  

As a result, it is not surprising that the lower federal courts have restrictively construed *Lopez*, and have not used that decision to strike down other federal statutes.

Nevertheless, *Lopez* does signal the end of an era. For the first time in more than half a century, the Court struck down a federal criminal statute enacted under Congress’ Commerce Clause authority.

142. *Id.* at 93.
143. *Lopez*, 115 S. Ct. at 1650 n.8 (Thomas, J., concurring).
In so doing, the Court ended an era of almost complete deference to legislative decisions as manifested by the rational basis test. In order to pass muster now, a statute must have a “substantial effect” on interstate commerce. And Congress, in light of *Lopez*, will be more forced to include jurisdictional statements and findings designed to demonstrate that effect. Otherwise, the Court may strike down other statutes.