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CONSTITUTIONAL LAW—SUPREME COURT INVALIDATES FEDERAL

I. INTRODUCTION

In United States v. Lopez,¹ the United States Supreme Court ruled unconstitutional Congress’s enactment of the Gun-Free School Zones Act of 1990² because Congress exceeded its power under the Commerce Clause³ of the United States Constitution.⁴ This decision reversed the Court’s trend granting Congress very broad Commerce Clause power. The Court concluded that possession of a firearm in a school zone did not constitute an interstate commerce activity,⁵ nor did the Act provide for a jurisdictional element that would guarantee an interstate economic effect.⁶

This casenote begins with a concise description of Lopez’s facts in Part II. Part III will review the case’s background and will track the evolution of the commerce power leading up to Lopez. In Part IV, the note will analyze the reasoning of the Court and will present a brief look at the concurring and dissenting opinions. Part V addresses the legal significance and post-decision ramifications of Lopez.

II. FACTS

On March 10, 1992, Alfonso Lopez, Jr., respondent in Lopez, was six weeks away from his graduation at San Antonio Edison High School.⁷ Lopez arrived at school that day concealing an unloaded .38 caliber handgun and five bullets.⁸ School authorities received an anonymous tip and confronted Lopez.⁹ Upon confrontation, he admitted he was carrying a gun, was arrested, and was charged with firearm possession on school premises under Texas state law.¹⁰

4. Lopez, 115 S. Ct. at 1634.
5. The Court, in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), defined commerce among the states as commerce concerning more than one state. Id. at 194. Consistent with Gibbons, throughout this note, the term “interstate commerce” will be used to refer to commercial activities among more than one state. The term “intrastate commerce” will refer to commercial transactions that occur entirely within one state.
10. Id. Gun possession violated TEX. PENAL CODE ANN. § 46.03(a)(1) (West Supp.
Carrying a gun to school violated both state law and the federal Gun-Free School Zones Act of 1990 ("the Act"), which created a federal offense for carrying a firearm within one thousand feet of a school. Federal agents charged Lopez with violating the Act, and the state charges were dismissed.

A federal grand jury indicted Lopez for violating the Act. Lopez moved to dismiss the indictment, claiming the Act was unconstitutional because Congress had exceeded its power to control public schools. Denying this motion, the district court found the Act within Congress’s power to exert control over interstate commerce activities. Subsequently, Lopez waived his right to a jury trial, and the court found him guilty of violating the Act, sentencing him to six months imprisonment and two years supervised release.

On appeal, Lopez argued that by passing the Act, Congress had exceeded its power under the Commerce Clause. The United States Court of Appeals for the Fifth Circuit reversed the conviction, holding the Act an invalid exercise of Congress’s commerce power and stating that neither the Act nor its legislative history established whether school zone gun possession affects interstate commerce. The United States Supreme Court granted certiorari and affirmed the Fifth Circuit’s decision after concluding that possessing a gun in a school zone did not constitute an interstate economic activity. Conceding that

11. 18 U.S.C. § 922(q)(1)(A). The statute makes it a federal crime to “possess a firearm [knowingly] at a place that the individual knows, or has reasonable cause to believe, is a school zone.” Id. The term “school zone” is defined as “in, or on the grounds of a . . . school” or “within a distance of 1,000 feet from the grounds of a . . . school.” Id. § 921(a)(25).
12. Lopez, 115 S. Ct. at 1626.
13. Id.
14. Id.
15. Id. (quoting Appellant’s Brief to Petition for Certiorari).
16. Id.
17. Id.
19. Id. at 1367-68.
20. Id. at 1366. The Fifth Circuit stated “we merely hold that Congress has not done what is necessary to locate section 922(q) within the Commerce Clause.” Id. at 1368. The Court further stated that a conviction under the Act conceivably could be sustained if “the government alleged and proved that the offense had a nexus to commerce.” Id.
23. Id.
prior Commerce Clause cases left room for expansion of Congress's powers, the Court declined to enlarge the scope of legislative control.24

III. BACKGROUND

Supreme Court interpretation of the Commerce Clause has evolved over the past 175 years. This Background section will peer chronologically into the Court's ever changing Commerce Clause theories, fitting the important cases into their respective social, political, and economic time frames.

A. Enactment of the Commerce Clause

Enacted in response to the Articles of Confederation,25 the Commerce Clause empowers Congress to regulate commerce with foreign countries, between states, and with Indian Tribes.26 Because the Commerce Clause possessed little legislative history regarding the regulation of commerce among the states, the early Supreme Court had to reflect upon the historical context from which it arose.27 The Commerce Clause addressed two broad concerns by creating: (1) a power capable of ending existing trade barriers, and (2) a federal authority expansive enough to address the nation's problems as a whole.28

Promulgated to balance the power between the federal government and the states,29 the Tenth Amendment states that powers not granted explicitly to the federal government by the Constitution vest in the states.30 This structural division of authority between the states and the federal government, federalism,31 has been the fulcrum upon which many Commerce

24. Id.
25. The Articles of Confederation gave Congress no authority over commerce between the states. RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.3, at 264 (1986). This absence of centralized federal control under the Articles of Confederation led to "economic chaos" among the states, with individual states establishing trade barriers. These barriers amounted to economic warfare and included economic sanctions against other states' products and taxes on trade coming into their state. Id.
26. U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have the power to . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").
27. ROTUNDA ET AL., supra note 25, at 265.
30. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").
31. Federalism "includes interrelationships among the states and relationships between
Clause cases have teetered. The central theme of the Tenth Amendment and, in turn, federalism, is that Congress’s powers are enumerated. This concept results in a dichotomy—for a Congressional act to be valid, the Constitution must explicitly authorize that act; conversely, a state’s act is presumed valid unless expressly forbidden by the Constitution.

B. Early Interpretation

Chief Justice Marshall penned the first significant Commerce Clause opinion, *Gibbons v. Ogden*. Although *Gibbons* could have turned on whether the case involved interstate commerce and whether New York was authorized to grant a monopoly for water rights, the Court exceeded these specific issues to hold that a state may not grant exclusive navigation rights conflicting with interstate commerce.

The Court addressed three foundational Commerce Clause concerns. First, the Court defined commerce as “all commercial intercourse.” Second, the Court clarified what constitutes commerce among the states, stating that it was commerce concerning more than one state. Third, the Court clarified the effect of the Tenth Amendment on federal power, not as a restriction on federal power, but as it related to Congress’s enumerated powers. The Court stated that, when acting under its enumerated powers, Congress deserved a plenary power to regulate, limited only by the Constitution.


32. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-2, at 298 (2d ed. 1988).

33. Id.

34. 22 U.S. (9 Wheat.) 1 (1824).

35. In *Gibbons*, New York had given the exclusive privilege to navigate its waters to the assignors of Ogden. Id. at 2. Ogden sought an injunction against Gibbons to prevent him from operating his steam boats between Elizabethtown, New Jersey, and New York City. *Id.* Gibbons defended his right to traverse New York waters based upon a federal license for engaging in “coasting trade.” *Id.*


37. *Gibbons*, 22 U.S. at 221.


40. *Id.* at 194. The Court stated, however, that congressional commerce power does not extend to commerce conducted exclusively within one state, as “[s]uch a power would be inconvenient, and is certainly unnecessary.” *Id.*

41. *Id.* at 196-97.

42. *Id.* at 196; but see Wilson v. Black-Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829) (upholding a Delaware statute authorizing state obstruction of a navigable creek with
Gibbons established that Congress's specifically enumerated powers are all-expansive and may be exercised for any goal. After Gibbons's broad grant of congressional power, the Commerce Clause enjoyed a quiet ride with little challenge until after the Civil War.

C. Post Civil War Commerce Clause Interpretation (1888-1936)

1. Dual Federalism

With the passing of several influential federal laws, including the Interstate Commerce Act in 1887 and the Sherman Antitrust Act in 1890, the Court entered an era that would involve the development of several new theories of Commerce Clause construction. "Dual federalism" emerged as a method of determining the federal-state balance of jurisdiction based on the Tenth Amendment. This compartmentalization of issues to either the states or Congress is illustrated by the Court's relegation of manufacturing, mining, and production to the states' control.

United States v. E. C. Knight Co. illustrates the Court's application of dual federalism and the specific reservation of issues for the states. In E. C. Knight, the Court addressed the Sherman Antitrust Act as it applied to a large sugar refining company that had acquired four Pennsylvania refineries and a dam and concluding that the act was within the state's police power and that Congress had not granted a right to traverse the creek).

43. Cirillo & Eisenhofer, supra note 29, at 909.
44. ROTUNDA ET AL., supra note 25, at 269. From Chief Justice Marshall's death in 1835 until 1888, few limits were placed on Congress's commerce power. ROTUNDA ET AL., supra note 25, at 269. However, Cooley v. Board of Port Wardens, 53 U.S. (12 How.) 299 (1851), effected a shift in the Court's style of analysis of Commerce Clause cases. ARCHIBOLD COX, THE COURT AND THE CONSTITUTION 91 (1987). In Cooley, the Court set forth that if the regulated "subject" was of a national nature or required uniform regulation it came under Congress's exclusive control, while if the subject required "diversity of regulation" it was left to the states. Cooley, 53 U.S. at 319-20. This decision created concurrent jurisdiction between the states and Congress, allowing the states to regulate interstate commerce in the absence of federal regulation. Id. at 319.
47. Dual federalism uses the Tenth Amendment to determine Congress's powers, while also limiting those powers. ROTUNDA ET AL., supra note 25, at 273. For a further description of dual federalism's application, see Edward S. Corwin, The Passing of Dual Federalism, 36 VA. L. REV. 1 (1950).
49. TRIBE, supra note 32, at 308; see, e.g., Kidd v. Pearson, 128 U.S. 1, 20-21 (1888) (concluding that manufacturing was outside Congress's control because it is reserved for local regulation).
50. 156 U.S. 1 (1895).
practically assuring itself a nationwide monopoly over the sugar industry. The Court held that even if this combination were a monopoly over sugar manufacturing, it did not constitute a monopoly over commerce, regardless of whether the sugar would soon move through interstate commerce. While reserving manufacturing for state regulation, the Court held this monopoly had no direct impact on interstate commerce and was therefore beyond Congress’s control.

In other cases decided during this period, the Court continued to compartmentalize issues, reserving certain issues for the states and others for Congress. Consistent with E.C. Knight’s delegation of manufacturing regulation to the states, the Court left authority over the interstate movement of goods produced by child labor to the states. However, the Court permitted federal laws forbidding the interstate movement of lottery tickets, impure foods, and stolen automobiles. In these cases, the Court concluded that Congress could exercise its commerce power as long as the regulated activity or product moved among the states.

2. Current of Commerce Theory

Without abandoning E.C. Knight’s direct effect analysis, the Court developed a “current of commerce” theory in Swift & Co. v. United States. Swift involved alleged price fixing in cattle stockyard activities conducted wholly within one state. However, the Court found, because the cattle merely rested in one state before continuing to a final destination in another

51. Id. at 12.
52. Id. at 17.
53. Id.
56. Champion v. Ames, 188 U.S. 321 (1903) (“The Lottery Case”). Although reconciling The Child Labor Case with The Lottery Case may appear difficult because both involved laws regulating the movement of prohibited products between states, Justice Day’s opinion in the former distinguishes the two. Maloney, supra note 54, at 1807. There, the Court pointed out that the “evil” of child labor was confined to its original location and had ceased by the time the goods, which were not evil, moved in interstate commerce. Hammer, 247 U.S. at 270-72.
60. 196 U.S. 375 (1905).
state, a current of commerce existed, which justified regulation under Congress's Commerce Clause power.\textsuperscript{61}

3. \textbf{Substantial Economic Effect Test}

\textit{Houston, East \& West Texas Railway Co. v. United States}\textsuperscript{62} ("The Shreveport Rate Case") marked an important expansion of Congress's commerce power.\textsuperscript{63} In that case, the Court's inquiry into the Commerce Clause developed still further as it analyzed whether a regulated activity closely and substantially affected interstate commerce.\textsuperscript{64} The Court upheld the Interstate Commerce Commission's ("ICC") right to regulate railroad rates between Louisiana and Texas,\textsuperscript{65} even though the ICC regulated both interstate and intrastate shipping operations.\textsuperscript{66} This case's relevance was that the Court allowed the ICC to regulate intrastate rates as long as they had a close and substantial relation to interstate traffic.\textsuperscript{67}

D. \textbf{New Deal Decisions (1933-1936)}

Although, early on, Congress exercised its commerce power mainly in conjunction with transportation between the states, the economic depression of the early 1930s sparked the demand for federal regulation under President Franklin D. Roosevelt's New Deal.\textsuperscript{68} During this period, however, the Court limited Congress's commerce power. In \textit{Schechter Poultry Corp. v. United States},\textsuperscript{69} the Court refused to grant Congress unlimited power to deal with the Depression.\textsuperscript{70} Striking down the National Industrial Recovery Act

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\textsuperscript{61} \textit{Id.} at 399. The Court stated that, because the cattle were "sent for sale from a place in one state with the expectation that they would end their transit, after purchase, in another state, . . . the current thus existing is a current of commerce among the states." \textit{Id.} at 398-99.

\textsuperscript{62} 234 U.S. 342 (1914).


\textsuperscript{64} \textit{The Shreveport Rate Case}, 234 U.S. at 351.

\textsuperscript{65} \textit{Id.} at 360.

\textsuperscript{66} \textit{Id.} at 352.

\textsuperscript{67} \textit{Id.} at 351.


\textsuperscript{69} 295 U.S. 495 (1935).

\textsuperscript{70} \textit{Id.} at 546. \textit{Schechter} addressed Congress's enactment of the National Industrial
"NIRA") as an unauthorized delegation of power to the President\textsuperscript{71} and an unauthorized departure from the scope of commerce power, the Court held that intrastate commerce must affect interstate commerce directly to fall within Congress's regulation power.\textsuperscript{72} The NIRA was terminated after Schechter.\textsuperscript{73}

In \textit{Carter v. Carter Coal Co.},\textsuperscript{74} the Court continued to enforce vigorously its view of the Tenth Amendment's limit on federal powers, even in the face of a national economic crisis. In \textit{Carter}, the Court held that federal regulation of miners' hours under the Bituminous Coal Conservation Act of 1935 was beyond Congress's power because mining was production, and production constituted a purely local activity reserved for local regulation.\textsuperscript{75}

E. Post-New Deal Interpretation

1. \textit{Expansion of Congress’s Power: Substantial Economic Effect and Aggregate Effect Theories}

\textit{NLRB v. Jones & Laughlin Steel Corp.}\textsuperscript{76} marked the Court's abandon-
ment of the "direct versus indirect" distinction\textsuperscript{77} from \textit{Schechter}.\textsuperscript{78}

Upholding the National Labor Relations Act of 1935,\textsuperscript{79} this watershed case

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\item Recovery Act, which granted the President discretion to adopt "codes of fair competition" in various industries. \textit{Id.} at 530. The Live Poultry Code was enacted under NIRA to regulate competition between poultry dealers around New York City. \textit{Id.} at 521.
\item \textsuperscript{71} \textit{Id.} at 542.
\item \textsuperscript{72} \textit{Id.} at 546. This requirement of a direct effect appears consistent with the "direct relation to commerce between the states" approach adopted in United States v. E.C. Knight Co., 156 U.S. 1, 17 (1895).
\item \textsuperscript{73} Stem I, \textit{supra} note 68, at 663. Stem argues NIRA sought to cover too much ground and was "too cumbersome and unworkable." Stem I, \textit{supra} note 68, at 663. He also states that the termination of NIRA codes ended federal regulation of industry as a whole, although industry-specific acts began to emerge soon thereafter. Stem I, \textit{supra} note 68, at 663-64. However, these new acts were also subject to Court scrutiny. \textit{See}, e.g., United States v. Butler, 297 U.S. 1 (1936) (striking down the Agricultural Adjustment Act of 1933 and stating that the regulation of the quantity and quality of farm output was reserved for the states).
\item \textsuperscript{74} 298 U.S. 238 (1936).
\item \textsuperscript{75} \textit{Id.} at 304. The Court recognized that everything that moves in interstate commerce had to be produced locally. \textit{Id.} The Court further stated: "Nevertheless, the local character of mining, of manufacturing and of crop growing is a fact, and remains a fact, whatever may be done with the products." \textit{Id.}
\item \textsuperscript{76} 301 U.S. 1 (1937).
\item \textsuperscript{77} \textit{Id.} at 36-38. Professor Tribe states that the Court abandoned its "formally analytical approach to the Commerce Clause, and return[ed] to Chief Justice Marshall's original empiricism." TRIBE, \textit{supra} note 32, at 309.
\item \textsuperscript{78} United States v. E.C. Knight Co., 156 U.S. 1, 17 (1895).
\item \textsuperscript{79} 49 Stat. 449 (codified at 29 U.S.C. § 151 (1988)). \textit{See also} NLRB v. Friedman-
declared that the power to regulate interstate commerce was one of degree, focusing on the close and substantial impact an activity exerted on interstate commerce. The Court abandoned the distinction between manufacturing and commerce developed in E.C. Knight, as well as Schechter's directness requirement, focusing instead on how the manufacturer's practices affected commerce. Additionally, the Court dismissed the current of commerce theory, deeming it metaphorical.

In United States v. Darby, the Court upheld the Fair Labor Standards Act of 1938 and overruled Hammer v. Dagenhart's use of the Tenth Amendment to restrict Congress's commerce power. The Court relied on Jones & Laughlin Steel to uphold federal hour and wage regulations on intrastate labor because the regulated labor propelled products into interstate commerce. Concluding that lower wages affected commerce negatively, the Court stated that Congress could adopt reasonable means of influencing commerce between the states, even if doing so meant controlling single state activities.

Many scholars believe that Wickard v. Filburn was the Court's most sweeping application of commerce power to intrastate transactions. In a unanimous decision, the Wickard Court upheld the application of the Agricultural Adjustment Act of 1938 ("AAA") to Roscoe Filburn, owner of a small Ohio farm.

Harry Marks Clothing Co., 301 U.S. 58 (1937) (upholding application of NLRA to a small clothing manufacturer).

80. Jones & Laughlin Steel, 301 U.S. at 37. The case involved the National Labor Relations Board’s attempt to keep Jones & Laughlin, the fourth largest steel producer in the United States, from engaging in unfair labor practices, including firing employees because of their union involvement. Id. at 26-29.

81. Id. at 36-38. The Court stated that Congress may regulate intrastate activities with “such a close and substantial relation to commerce that their control is essential . . . to protect that commerce from burdens and obstructions.” Id. at 37.

82. Id. at 36.

83. 312 U.S. 100 (1941).

84. Id. at 116-17. The Court found that Hammer was a “departure from the principles which have prevailed in the interpretation of the Commerce Clause.” Id. at 116.

85. Id. at 119-20.

86. Id. at 120-21. The Court held that Congress “may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities.” Id. at 121.

87. 317 U.S. 111 (1942).


89. Wickard, 317 U.S. at 128-29. One of the purposes of the AAA was to stabilize the market price of wheat by controlling the volume produced. Id. at 115. In the 1920s, the United States exported more than one-quarter of its wheat. Stern II, _supra_ note 68, at 901. The demand for wheat exports decreased sharply after foreign nations began producing more of their own wheat. Stern II, _supra_ note 68, at 901. Subsequently, the price of wheat
Filburn's operations consisted of maintaining dairy cattle and poultry and selling the products thereof. However, Filburn also produced approximately twenty-three acres of wheat, which exceeded his eleven-acre allotment under the AAA. The Court stated that Congress's commerce power should not be analyzed within the constraints of any formula such as classifying activities as production. Furthermore, the Court stated that, even if Filburn's wheat production was deemed local and did not amount to commerce, Congress could regulate such production if it had a substantial economic effect on commerce. In arriving at its conclusion, the Court expressly repudiated the "direct versus indirect" effects test.

Wickard established that Congress may regulate small, truly local activities if many similar activities aggregated together would have a substantial effect on interstate commerce. In Jones & Laughlin Steel and Wickard, the Court responded to the early twentieth century development of industry and fueled the destruction of geographical boundaries by generously enlarging Commerce Clause power.

2. The Civil Rights Cases—The 1960s

Utilizing its commerce power, Congress enacted Title II of the Civil Rights Act of 1964 to provide injunctive relief against discrimination in places of public accommodation. Heart of Atlanta Motel, Inc. v. United

plummeted from one dollar per bushel in 1929 to thirty-eight cents in 1932. Stem II, supra note 68, at 901.
90. Wickard, 317 U.S. at 114.
91. Id. Besides selling a portion, Filburn mostly used his wheat for personal purposes, such as feeding his cattle and poultry, making flour for home consumption, and reseeding his field. Id.
92. Id. at 120.
93. Id. at 125.
94. Id.
95. Stern II, supra note 68, at 909 ("[T]he opinion makes it plain that Congress may control all the necessarily interrelated operations of an interstate industry, no matter how 'local' particular transactions may appear . . . when viewed in isolation.").
97. Maloney, supra note 54, at 1812. Congress decided to rely on the Commerce Clause for authority, rather than on the Fourteenth Amendment because the latter's "inability to reach private action was perceived as a disadvantage." Maloney, supra note 54, at 1812.
States\textsuperscript{100} and Katzenbach \textit{v. McClung}\textsuperscript{101} were the two principle cases that addressed whether Congress could regulate such activities under the Commerce Clause. The Court upheld Title II in both, granting Congress practically limitless power to regulate activity under its commerce power.\textsuperscript{102}

Relying on pre-Civil Rights Act congressional hearings, the Court, in \textit{Heart of Atlanta Motel}, concluded that Congress had a rational basis for exercising its commerce power. These hearings found that African-Americans had difficulty finding lodging while traveling\textsuperscript{103} and that discrimination in lodging discouraged and decreased African-American travel between the states.\textsuperscript{104} Likewise, in \textit{McClung}, the Court upheld Title II of the Civil Rights Act, relying on congressional hearings that stated African-Americans spent less money in discriminating restaurants and theaters.\textsuperscript{105} This trend of peering into congressional hearings and legislative history to determine whether Congress had a rational basis for utilizing its commerce power continued after these cases.\textsuperscript{106}

3. \textit{Federal Criminal Law—The 1970s}

Before 1971, the Court had limited its use of the "affecting commerce" test by requiring a nexus to interstate commerce for offenses prosecuted under commerce-based federal criminal laws.\textsuperscript{107} However, in \textit{Perez v. United States},\textsuperscript{108} the Court upheld a conviction under Title II of the Consumer Credit Protection Act ("CCPA"),\textsuperscript{109} a federal loan-sharking statute,\textsuperscript{110} without any demonstration of a specific interstate nexus.\textsuperscript{111} The
Court concluded that extortionate credit transactions, when aggregated, affect interstate commerce.\textsuperscript{112} Perez was found guilty of using threats to collect money owed him by a local New York butcher.\textsuperscript{113} Acknowledging that the threats, taken alone, failed to impact interstate commerce, the Court decided Congress had concluded reasonably that loan sharking's proceeds could be used to finance interstate crime and thus affected interstate commerce.\textsuperscript{114} With this decision the Court appeared to concede it would defer to Congress's judgment in using its commerce power.

After Perez, the federalization of criminal laws increased,\textsuperscript{115} including laws proscribing arson,\textsuperscript{116} carjacking,\textsuperscript{117} and access to abortion clinics.\textsuperscript{118} With Congress's increased political appetite for the federalization of crimes, the federal court case backlog increased.\textsuperscript{119} Nonetheless, Congress's right to enact laws regulating activities that, when aggregated, are rationally determined to affect interstate commerce was established in the cases from Wickard to Perez.

IV. REASONING OF THE _LOPEZ_ COURT

A. Majority Opinion

In a five-to-four decision written by Chief Justice Rehnquist, the Court started its analysis by providing a thorough history of the Commerce Clause, mapping the evolution of judicial interpretation of Congress's commerce power.\textsuperscript{120} The Court then analyzed the constitutionality of the Gun-Free School Zones Act of 1990, concluding the Act does not substantially affect interstate commerce.\textsuperscript{121}
The Court stated that Congress's commerce power may exist under three wide areas. First, Congress may exercise power over channels of interstate commerce. Second, Congress may control the instrumentalities of commerce between states, or persons or things in it. Third, Congress may regulate transactions that substantially affect interstate commerce. The Court conceded that case law was not clear regarding whether an activity must "affect" or "substantially affect" interstate commerce to fall under the commerce power. However, the Court concluded the weight of case law demands that the controlled activity "substantially affect" interstate commerce.

With regard to Lopez, the Court dismissed the first two categories of commerce Congress may regulate, stating that the regulation of guns in school zones is not a regulation of the channels or instrumentalities of commerce. Therefore, to uphold the Act's constitutionality, the Court would have to find that the proscribed activity substantially affected interstate commerce.

1. Substantial Effect on Interstate Commerce

The Court then analyzed the substantial impact of an economic activity. After enumerating the Court's upholding the regulation of coal mining, loan sharking, restaurants using interstate supplies, and hotels frequented by interstate guests, the majority revisited the Wickard case. The Court used the facts from Wickard to describe the rationale behind the aggregate effects test.

The Court then noted that the Act is a criminal law, an area traditionally regulated by the states. Additionally, the Court found that

122. Id. at 1629 (citing Perez v. United States, 402 U.S. 146, 150 (1971); Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 276-77 (1981)).

123. Id. (citing United States v. Darby, 312 U.S. 100, 114 (1941)).

124. Id. (citing Houston, E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342 (1914)).

125. Id. at 1329-30 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)).

126. Id. at 1630.

127. Id. (citing Maryland v. Wirtz, 392 U.S. 183 (1968), overruled by National League of Cities v. Usery, 426 U.S. 833 (1976)). In Wirtz, the Court stated it had never declared that Congress "may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." Wirtz, 392 U.S. at 196 n.27.

128. Lopez, 115 S. Ct. at 1630.

129. Id.

130. Id. Because the facts and reasoning of these cases were described in Part III, the Court's analysis of these cases will not be presented again.

131. Id. (citing Wickard v. Filburn, 317 U.S. 111 (1942)).

132. Id. at 1630-31.

133. Id. at 1631 n.3 (quoting Brecht v. Abrahamson, 113 S. Ct. 1710, 1720 (1993))
the regulation of firearm possession around schools did not address commerce, nor did it fall within a larger economic regulatory scheme. The Court recognized that Congress could regulate an intrastate activity that in the aggregate impared a substantial impact on interstate commerce. However, the Court concluded that section 922(q) did not regulate economic activity and that the Act, when viewed in the aggregate, did not substantially affect interstate commerce.

2. Jurisdictional Issue

For a federal criminal law to pass Commerce Clause muster, the regulated activity must contain an identifiable connection with interstate commerce. The Court concluded that the Act contained no provision for determining whether any specific breach truly impacts commerce between multiple states.

In *United States v. Bass*, the Court addressed a federal statute making it a crime for a felon to receive, possess, or transport a firearm. The *Bass* Court interpreted the vague statute as requiring an identifiable connection to interstate commerce in addition to mere proof of gun possession.

In *Lopez*, the Government admitted the statute and its legislative history omitted any congressional findings regarding the interstate commerce effect of taking a gun to school. Agreeing that formal findings are not mandatory to uphold a law, the Court stated it could discern no apparent

("States possess primary authority for defining and enforcing the criminal law."); *Screws v. United States*, 325 U.S. 91, 109 (1945) ("The administration of criminal justice rests with the States except as Congress, acting within the scope of [its] delegated powers, has created offenses against the United States.").

134. *Id.* at 1631.
135. *Id.*
136. *Id.*
137. *Id.* (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)).
138. *Id.*
140. *Id.* at 337.
141. *Id.* at 347.
142. *Lopez*, 115 S. Ct. at 1631 (quoting Brief for the United States, *Lopez*, at 5-6 (No. 93-1260)). In a footnote, the Court acknowledged the Act was amended by the Violent Crime and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796. *Id.* at 1632 n.4. Section 320904 amends § 922(q) of the Gun-Free School Zone Act by including congressional findings regarding the interstate commerce effects of school zone firearm possession. *Id.* The Court noted the Government did not rely on these findings in *Lopez*; additionally, the Court did not rely on or repudiate these findings in its analysis. *Id.*
143. *Id.* (citing *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Perez v. United States*, 402 U.S. 146 (1971)).
substantial interstate commerce effects on the statute’s face.\textsuperscript{144} Although Congress produced findings regarding the effects of firearms, none of these findings addressed the Commerce Clause issues of the Act.\textsuperscript{145} While the Government argued Congress had accumulated insight into the effects of firearm regulation when passing prior laws, the Court rejected this justification of the Act.\textsuperscript{146}

The Government asserted two further arguments that the Act did substantially affect interstate commerce.\textsuperscript{147} First, the Government argued that allowing guns in schools would propagate violent crime, which, in turn, would harm the national economy through increased costs\textsuperscript{148} and diminished travel to crime-ridden areas.\textsuperscript{149} Second, the Government contended that guns at schools threaten the learning environment,\textsuperscript{150} which will manifest itself in the form of a less productive populace, consequently injuring national economic performance.\textsuperscript{151} The Court rejected both the cost and productivity arguments, implying that the Government’s logic, if strictly followed, would create a vast, almost limitless, congressional commerce power.\textsuperscript{152}

The Court then critiqued Justice Breyer’s dissent, finding that his enumerated limits on the commerce power conflicted with the dissent’s otherwise broad approach.\textsuperscript{153} The Court further questioned Congress’s intervention in other school issues, such as curriculum.\textsuperscript{154} After rebuffing the dissent’s overly broad classification of schools as commercial activities, the Court acknowledged that legal uncertainties will exist as long as the judicial branch interprets the limits on Congress’s Commerce Clause

\textsuperscript{144} Id. at 1632. The Court stated that congressional findings would have aided in the evaluation of “legislative judgment” and whether the regulated activity “substantially affected interstate commerce.” Id.

\textsuperscript{145} Id.

\textsuperscript{146} Id.

\textsuperscript{147} Id. (citing Brief for the United States, Lopez, at 17 (No. 93-1260)).

\textsuperscript{148} Id. (citing United States v. Evans, 928 F.2d 858, 862 (9th Cir. 1991)). The Government argued that insurance costs would escalate for everyone. Id.

\textsuperscript{149} Id. (citing Heart of Atlanta Motel, Inc. v United States, 379 U.S. 241, 253 (1964)).

\textsuperscript{150} Id.

\textsuperscript{151} Id.

\textsuperscript{152} Id. (“[I]f 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.”).

\textsuperscript{153} Id. at 1633. The Court noted Justice Breyer’s connection between interstate commerce and the proscribed conduct but found it unpersuasive. Id. His constitutional nexus was that gun-related violence is a serious problem that adversely affects learning, which subsequently threatens commerce. Id.

\textsuperscript{154} Id. The Court noted that, under Justice Breyer’s approach, if Congress determined that curriculum had a significant effect on learning, it could mandate federal curriculum for elementary and secondary schools. Id.
powers.\textsuperscript{155} However, the Court explained that such uncertainties are inherent in a system of enumerated powers.\textsuperscript{156}

3. \textit{Majority's Conclusion}

Acknowledging that no exact formula exists for analyzing Commerce Clause questions, the Court concluded that the possession of a gun in a school zone did not constitute an economic activity that would substantially affect interstate commerce.\textsuperscript{157} Lopez was a local student, and nothing indicated he had conducted interstate activities.\textsuperscript{158} Additionally, the Act contained no requirement of a nexus with interstate commerce.\textsuperscript{159}

The Court further stated that upholding Congress's passage of the Act could amount to the granting of a general police power normally reserved for the States.\textsuperscript{160} Conceding that prior cases hinted at a possible enlargement of Congress's power, the Court refused to do so.\textsuperscript{161} The Court concluded by expressing the importance of maintaining a separation between national and local powers and thus affirmed the Fifth Circuit's decision.\textsuperscript{162}

B. Concurring Opinions

Justice Kennedy joined the majority, but clarified his reasons for striking down the Act.\textsuperscript{163} He concluded that upholding the Act would interfere with states' judgment in an area they are capable of regulating.\textsuperscript{164} In his concurrence, Justice Thomas disagreed with the "substantial effects" test, stating that commerce should be viewed more narrowly.\textsuperscript{165} Asserting that, over the years, the Court has departed from the Constitution and early case law, he emphasized that the federal government's powers are enumerated and should not be conferred sweepingly, as under the substantial effects test.\textsuperscript{166}

\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} \textit{Id.} at 1634.
\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id.} (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937)).
\textsuperscript{163} \textit{See id.} at 1634-42 (Kennedy, J., concurring).
\textsuperscript{164} \textit{Id.} (Kennedy, J., concurring).
\textsuperscript{165} \textit{See id.} at 1642-51 (Thomas, J., concurring).
\textsuperscript{166} \textit{Id.} (Thomas, J., concurring).
C. Dissenting Opinions

In the shortest of the three dissents, Justice Stevens stated Congress should have the power to regulate gun possession at any location and that the Court’s previous cases reflect a respect for Congress’s judgment.\(^{167}\) In his dissenting opinion, Justice Souter criticized the majority for not concluding Congress had a rational basis for deciding that school zone firearm possession affects interstate commerce.\(^{168}\)

Finally, in the longest dissent, Justice Breyer argued the Act was within the commerce power’s scope as defined by the Court for the past six decades.\(^{169}\) He argued that the Court must look at the cumulative effect of regulated acts and must grant Congress leeway under the substantial effects test.\(^{170}\) He further pointed out three problems in the majority’s conclusion. First, he claimed the majority’s opinion conflicted with modern cases upholding laws with more tenuous interstate commerce connections.\(^{171}\) Next, he opined that distinguishing between the regulation of commercial versus noncommercial activities was flawed.\(^{172}\) Finally, he argued the decision created uncertainty in an area that, until now, had seemed reasonably settled.\(^{173}\)

V. SIGNIFICANCE

Views on the practical significance of *Lopez* vary widely. Senator Herb Kohl, Wisconsin Democrat and sponsor of the rejected provision of the Act, called the Court’s decision legal “nitpicking,”\(^{174}\) while J.B. Richeson, president of the San Antonio Teacher’s Council, stated the decision will mean very little because Texas state law still prohibits firearm possession at schools.\(^{175}\) While few would argue against gun prohibition in schools, the real issue appears to be jurisdiction—whether the states or Congress should regulate firearm possession in school zones.\(^{176}\)

\(^{167}\) Id. at 1651 (Stevens, J., dissenting).
\(^{168}\) See id. at 1656-57 (Souter, J., dissenting).
\(^{169}\) Id. at 1657 (Breyer, J., dissenting).
\(^{170}\) Id. at 1658 (Breyer, J., dissenting).
\(^{171}\) Id. at 1662-63 (Breyer, J., dissenting).
\(^{172}\) Id. at 1663-64 (Breyer, J., dissenting).
\(^{173}\) Id. at 1664 (Breyer, J., dissenting).
\(^{176}\) Forty-three states currently have laws similar to the Act. The seven states that do not are Alaska, Delaware, Hawaii, Iowa, Montana, New Hampshire, and Wyoming. Charles
In his radio address two days after the Lopez decision, President Clinton reacted strongly against Lopez, stating he would find a way to ban firearms in or near schools.\textsuperscript{177} Furthermore, the President presented Congress with the Gun-Free School Zones Amendments Act of 1995, which adds a requirement that the government prove the firearm moved in or otherwise affects interstate commerce.\textsuperscript{178} While the amendment, if passed, appears to solve the jurisdictional requirement, it remains to be seen whether Lopez creates a new commerce power limit that prevents Congress from reaching noncommercial activities in the regulation of interstate commerce.\textsuperscript{179}

Beyond the practical significance regarding the Act’s constitutionality, the decision could have lasting implications on Congress’s commerce power and federalism in general.\textsuperscript{180} With Lopez, the Court raised several questions that could call other federal statutes into question. First, Lopez raises the question as to whether the Court has implied that Congress may only regulate “commercial” activities that substantially affect interstate commerce.\textsuperscript{181} The Court did not clarify whether it will allow Congress to regulate noncommercial activities to protect interstate commerce.\textsuperscript{182}

Lopez also raises the issue of the quantity of legislative history and congressional findings required for the Court to conclude that Congress had a rational basis for determining whether the regulated activity substantially affects interstate commerce.\textsuperscript{183} Additionally, the Court did not specify whether this new reluctance to defer to Congress’s judgment will only apply to criminal laws or laws controlling noncommercial activities.


\textsuperscript{178} \textit{The President’s Radio Address, April 29, 1995}, WKLY. COMPILATION OF PRESIDENTIAL DOCUMENTS, May 8, 1995, at 735-36.


\textsuperscript{180} Russo, \textit{supra} note 176, at *7.

\textsuperscript{181} Lopez, 115 S. Ct. at 1633. The Court acknowledged that whether an activity is commercial may create “legal uncertainty,” but such uncertainty is a part of our legal system. \textit{Id.}

\textsuperscript{182} \textit{Id.}

\textsuperscript{183} \textit{Id.} at 1632. The Court refused to rely on Congress’s previous findings that failed to address directly § 922(q). \textit{Id.} Furthermore, the Court rejected the Government’s argument that Congress possessed “accumulated institutional expertise” regarding the regulation of firearms. \textit{Id.}
In United States v. Robertson, the Court upheld the application of the Racketeering Influenced and Corrupt Organization Act (RICO) to a business-related crime occurring primarily within one state. This case may establish that the Court is not determined to expand Lopez and curtail Congress’s commerce power. Nonetheless, Lopez may demonstrate that the determination of what is “commercial” is within the hands of the Court, not Congress.

While the Court’s more conservative justices appear to reflect the growing national clamor to divest the national government of power, both of President Clinton’s nominees, Justices Ginsburg and Breyer, dissented. This should prove very significant as future bench nominees could invite vigorous debate as to whether the Court should assume an activist role in reflecting current political climates.

Without a doubt, Congress’s commerce power is limited by the Supreme Court’s interpretation. In United States v. Lopez, without formally abandoning any of the existing commerce clause theories such as the substantial effects or aggregate effect tests, the Court reserved the issue of school-zone gun possession for the states. Whether or not the Court was evading a trend toward a national police power and returning to a clear-cut dual federalism approach to the commerce clause or simply analyzing one statute’s effect on interstate commerce remains to be seen.

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185. Id. at 1733.
186. See Lopez, 115 S. Ct. at 1633 (“We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities . . . . That authority, though broad, does not include the authority to regulate each and every aspect of local schools.”).
188. Russo, supra note 176, at *7.
189. Lopez, 115 S. Ct. at 1634.