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## United States v. Lopez: Theoretical Bang and Practical Whimper? An Illustrative Analysis Based on Lower Court Treatment of the Child Support Recovery Act

Sara L. Gottovi

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# NOTES

## UNITED STATES *v.* LOPEZ, THEORETICAL BANG AND PRACTICAL WHIMPER? AN ILLUSTRATIVE ANALYSIS BASED ON LOWER COURT TREATMENT OF THE CHILD SUPPORT RECOVERY ACT

"When parents separate, children may suffer. Their suffering is . . . often made much worse through the deliberate failure of a parent to comply with legally imposed child support obligations."<sup>1</sup> In the fall of 1992, Congress passed the Child Support Recovery Act<sup>2</sup> (the "Act" or CSRA) in an effort to end this suf-

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1. Statement by President George Bush on Signing The Child Support Recovery Act of 1992, 2 PUB. PAPERS OF THE PRESIDENTS: GEORGE BUSH 1978, 1978-79 (Oct. 25, 1992).

2. 18 U.S.C. § 228 (1994). The statute reads in pertinent part as follows:

§ 228. Failure to pay legal child support obligations

(a) OFFENSE.—Whoever willfully fails to pay a past due support obligation with respect to a child who resides in another State shall be punished as provided in subsection (b).

(b) PUNISHMENT.—The punishment for an offense under this section is—

(1) in the case of a first offense under this section, a fine under this title, imprisonment for not more than 6 months, or both; and

(2) in any other case, a fine under this title, imprisonment for not more than 2 years, or both.

(c) RESTITUTION.—Upon a conviction under this section, the court shall order restitution under section 3663 in an amount equal to the past due support obligation as it exists at the time of sentencing.

(d) DEFINITIONS.—As used in this section—

(1) the term "past due support obligation" means any amount—

(A) determined under a court order or an order of an administrative process pursuant to the law of a State to be due from a person for the support and maintenance of a child or of a child and the parent with whom the child is living; and

(B) that has remained unpaid for a period longer than one year, or is greater than \$5,000; and

(2) the term "State" includes the District of Columbia, and any other possession or territory of the United States.

*Id.*

fering of children and their custodial parents at the hands of those who have become known as "deadbeat" parents.<sup>3</sup> The Act made willful failure by a noncustodial parent to pay child support for a child residing in another state a federal crime.<sup>4</sup>

In spite of good intentions<sup>5</sup> and strong bipartisan support,<sup>6</sup> the Department of Justice made only nominal enforcement efforts until January of 1995,<sup>7</sup> at which time enforcement began

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3. The phrase "deadbeat dad" or "deadbeat parent" refers to a noncustodial parent who is in arrears in child support payments. See Joseph I. Lieberman, *Foreword* to ANDREA H. BELLER & JOHN W. GRAHAM, *SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT* xviii (1993); *Deadbeat Dad Prosecuted*, BUFF. NEWS, Oct. 17, 1995, at B4; Jan Larson, *Everyone Pays When Dad's a Deadbeat*, AM. DEMOGRAPHICS, July 1992, at 39; *60 Minutes: Deadbeat Dad* (CBS television broadcast, Oct. 29, 1995). Eighty-six percent of noncustodial parents are fathers. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, *CURRENT POPULATION REPORT SERIES 60-187, CHILD SUPPORT FOR CUSTODIAL MOTHERS AND FATHERS: 1991*, at 2 (1995) [hereinafter *CHILD SUPPORT 1991*]. The term "deadbeat dad" first was popularized in the national media in the early 1980s. See, e.g., Patricia A. Avery, *On the Trail of Those Deadbeat Dads*, U.S. NEWS & WORLD REP., Mar. 21, 1983, at 70; Anastasia Toufexis, *Color Gloria Allred All Rebel*, TIME, Dec. 3, 1984, at 67. Since that time, the connotation of "deadbeat parent" has evolved to apply to those parents who are financially able, but unwilling, to pay their child support obligations. See, e.g., Paul Taylor, *Delinquent Dads: When Child Support Lags, 'Deadbeats' May Go to Jail*, WASH. POST, Dec. 16, 1990, at A1 (discussing fathers who choose not to pay child support despite their financial resources).

4. See 18 U.S.C. § 228(a); Kitty Dumas, *Several Bills to Help Children Top List of Legal Measures*, 50 CONG. Q. WKLY. REP. 3172, 3172 (1992).

5. Purposes of the CSRA are: to "punish[ ] . . . persons who intentionally fail to pay their child support obligations," H.R. REP. NO. 102-771, at 4 (1992); to remedy the tragic effects of the increase in single parent households, see *id.* at 5; to alleviate reliance on the federal Aid to Families with Dependent Children program, see *id.*; to "tak[e] the incentive out of moving [between states] to avoid [child support] payment," *id.* at 6; to "target . . . the 'hard core' group of parents who flagrantly refuse to pay and whom traditional extradition procedures have utterly failed to bring to justice," *id.*; and to place "the burden of caring for these children . . . on the shoulders of the parents—where it rightfully belongs." *Id.* Deterrence also was considered to be a positive effect of the Act. See *Criminal Penalty for Flight To Avoid Payment of Arrearages in Child Support: Hearing on H.R. 1241 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 1-2 (1992) [hereinafter *House Hearing*] (statement of Rep. Schumer); see also *Support Law Ruled Unconstitutional*, HARRISBURG PATRIOT & EVENING NEWS, Oct. 31, 1995, at B14 (stating that the CSRA is well intentioned).

6. See 138 CONG. REC. S17,129-31 (daily ed. Oct. 7, 1992) (statement of Sen. Kohl); 138 CONG. REC. H7324-25 (daily ed. Aug. 4, 1992) (statement of Rep. Schumer).

7. See 140 CONG. REC. S9425 (daily ed. July 21, 1994) (statement of Sen. Shelby) (offering an amendment to spur CSRA enforcement by the Attorney General). As of

in earnest in response to presidential interest and senatorial pressure.<sup>8</sup> Since January of 1995, 119 indictments have been handed down against violators of the Act.<sup>9</sup>

Increased enforcement displeased delinquent parents indicted under the Act and they quickly sought means by which to challenge their indictments. The deadbeats' hopes were fueled by *United States v. Lopez*,<sup>10</sup> then a Commerce Clause challenge pending before the Supreme Court.<sup>11</sup> The Court's decision in *Lopez*, announced in April of 1995,<sup>12</sup> threw a hurdle into the path of full enforcement of the Act. As a result of *Lopez*, CSRA-indicted parents quickly began to challenge the constitutionality of the Act on the basis that it impermissibly overextended Congress's power to legislate under the Commerce Clause.<sup>13</sup> As of this writing, several cases based on this claim have been decided at the district and circuit court levels, yielding inconsistent results.<sup>14</sup> Four district courts, when faced with the question of

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July 1994, only five prosecutions had been instigated. *See id.* at S9430 (statement of Sen. Kohl).

8. *See id.* at S9425 (statement of Sen. Shelby); *The State of the Union: Clinton Speech Envisions Local Empowerment*, 53 CONG. Q. WKLY. REP. 300, 302 (1995) (indicating President Clinton's resolve to force deadbeat parents to pay child support).

9. *See No Breaks for Deadbeats*, USA TODAY, Aug. 21, 1996, at 12A, available in 1996 WL 2066312. Nationwide, convictions have recovered \$1 million in overdue child support. *See* Bruce Vielmetti, *Deadbeats Getting Federal Attention*, ST. PETERSBURG TIMES, Mar. 10, 1996, at B1.

10. 115 S. Ct. 1624 (1995).

11. The parties argued before the Court in November of 1994. *See* Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 CASE W. RES. L. REV. 845, 845 n.2 (1996).

12. *See Lopez*, 115 S. Ct. at 1624.

13. The first arguments on the issue of the constitutionality of the CSRA under *Lopez* were heard on May 8, 1995. *See United States v. Mussari*, 894 F. Supp. 1360, 1361 (D. Ariz. 1995), *rev'd*, 95 F.3d 787 (9th Cir. 1996); *United States v. Schroeder*, 894 F. Supp. 360, 362 (D. Ariz. 1995), *rev'd sub nom. Mussari*, 95 F.3d 787.

14. District courts in the Third, Fifth, and Ninth Circuits have held that the CSRA is an unconstitutional overextension of Congress's power. *See United States v. Parker*, 911 F. Supp. 830, 843 (E.D. Pa. 1995); *United States v. Bailey*, 902 F. Supp. 727, 730 (W.D. Tex. 1995); *Mussari*, 894 F. Supp. at 1368; *Schroeder*, 894 F. Supp. at 368-69. In contrast, district courts in the First, Second, Third, Fourth, Seventh, Tenth, and Eleventh Circuits have upheld the statute. *See United States v. Lewis*, 936 F. Supp. 1093, 1109 (D.R.I. 1996); *United States v. Ganaposki*, 930 F. Supp. 1076, 1082-83 (M.D. Pa. 1996); *United States v. Nichols*, 928 F. Supp. 302, 314-15 (S.D.N.Y. 1996); *United States v. Collins*, 921 F. Supp. 1028, 1037 (W.D.N.Y. 1996); *United States v. Johnson*, 940 F. Supp. 911, 915 (E.D. Va. 1996); *United States v.*

the constitutionality of the CSRA, determined that the Act was an unconstitutional overextension of Congress's commerce power under the *Lopez* analysis.<sup>15</sup> Two of those decisions have since been overturned by the Ninth Circuit Court of Appeals.<sup>16</sup> Eleven district courts reached the opposite conclusion and have upheld the constitutionality of the Act.<sup>17</sup> Two of those decisions have been affirmed in the circuit courts.<sup>18</sup> Another case was vacated for improper venue by a district court on appeal from a magistrate's initial ruling.<sup>19</sup> Though the circuits that have addressed the issue are in accord thus far,<sup>20</sup> lower court treatment of the constitutionality of the Act has been one of the few questions to split the courts since the Supreme Court handed down *Lopez*.<sup>21</sup> As the question of the Act's constitutionality has made its way through the federal courts, the bench has taken the op-

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Kegel, 916 F. Supp. 1233, 1239 (M.D. Fla. 1996); *United States v. Sims*, 936 F. Supp. 817, 820 (N.D. Okla. 1996); *United States v. Sage*, 906 F. Supp. 84, 92-93 (D. Conn. 1995), *aff'd*, 92 F.3d 101 (2d Cir. 1996); *United States v. Hopper*, 899 F. Supp. 389, 394 (S.D. Ind. 1995); *United States v. Murphy*, 893 F. Supp. 614, 617 (W.D. Va. 1995), *vacated for improper venue*, 934 F. Supp. 736 (W.D. Va. 1996); *United States v. Hampshire*, 892 F. Supp. 1327, 1330 (D. Kan. 1995), *aff'd*, 95 F.3d 999 (10th Cir. 1996).

15. See *Parker*, 911 F. Supp. at 843; *Bailey*, 902 F. Supp. at 730; *Mussari*, 894 F. Supp. at 1368; *Schroeder*, 894 F. Supp. at 368-69.

16. See *Mussari*, 95 F.3d at 791, *rev'g Mussari*, 894 F. Supp. 1360, and *rev'g Schroeder*, 894 F. Supp. 360.

17. See *Lewis*, 936 F. Supp. at 1109; *Ganaposki*, 930 F. Supp. at 1082-83; *Nichols*, 28 F. Supp. at 314-15; *Collins*, 921 F. Supp. at 1037; *Johnson*, 940 F. Supp. at 915; *Kegel*, 916 F. Supp. at 1239; *Sims*, 936 F. Supp. at 820; *Sage*, 906 F. Supp. at 92-93; *Hopper*, 899 F. Supp. at 394; *Murphy*, 893 F. Supp. at 617; *Hampshire*, 892 F. Supp. at 1330.

18. See *Sage*, 92 F.3d at 108, *aff'g* 906 F. Supp. 84; *United States v. Hampshire*, 95 F.3d 999, 1006 (10th Cir. 1996), *aff'g* 892 F. Supp. 1327.

19. See *Murphy v. United States*, 934 F. Supp. 736, 740 (W.D. Va. 1996), *vacating for improper venue* 893 F. Supp. 614.

20. See *Hampshire*, 95 F.3d at 1003-04; *Mussari*, 95 F.3d at 791; *Sage*, 92 F.3d at 107.

21. Though numerous other statutes have been challenged, see *infra* note 96, only a handful have been declared unconstitutional under *Lopez*. See, e.g., *United States v. Pappadopoulos*, 64 F.3d 522, 527-28 (9th Cir. 1995) (addressing 18 U.S.C. § 844(i) (1994)); *United States v. Olin Corp.*, 927 F. Supp. 1502, 1522-32 (S.D. Ala. 1996) (addressing Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1994)); *Hoffman v. Hunt*, 923 F. Supp. 791, 806-19 (W.D.N.C. 1996) (addressing the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248). These enactments, however, were held to be unconstitutional only by one or two courts, not four as was the CSRA. See *supra* note 15 and accompanying text.

portunity to interpret the effect of *Lopez* on Congress's ability to legislate broadly under the commerce power in order to cure nationally recognized social ills.<sup>22</sup>

This Note examines the analytical framework that lower courts have applied to the question of the constitutionality of the CSRA and proffers, based on this analysis, that the much heralded *Lopez* decision, though arguably a theoretical resurgence of federalism, has had little practical effect in framing a new paradigm in the lower courts. First, to provide background and context for *Lopez*, this Note briefly reviews the history of Commerce Clause jurisprudence. The Note then examines the *Lopez* holding and analyzes its potential impact on the future of Commerce Clause cases. Next, this Note applies the *Lopez* principles to the CSRA and demonstrates why it is difficult to hold the Act to be unconstitutional under that analysis. Finally, this Note surveys the lessons learned from the lower courts' treatment to offer practical suggestions for invigorating *Lopez's* reinvigoration of federalism.

### A BRIEF HISTORY OF COMMERCE CLAUSE JURISPRUDENCE

The United States Constitution created a government of enumerated powers.<sup>23</sup> That is, certain functions have been delegat-

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22. Courts will have similar opportunity to hear many other cases in which statutes have been challenged as unconstitutional overextensions of Congress's commerce power under the *Lopez* standard. See James Podgers, *Rethinking the Commerce Clause*, A.B.A. J., Dec. 1995, at 44 (stating that *Lopez* has reopened the Commerce Clause debate in the lower federal courts); see also *infra* note 96 (cataloguing the myriad circuit court of appeals decisions ruling on the constitutionality of various federal statutes under *Lopez*).

23. See THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) ("[P]owers delegated . . . to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."); *United States v. Lopez*, 115 S. Ct. 1624, 1626 (1995); *New York v. United States*, 505 U.S. 144, 155 (1992); *South Dakota v. Dole*, 483 U.S. 203, 218 (1987) (O'Connor, J., dissenting); *Garrison v. Louisiana*, 379 U.S. 64, 83 (1964) (Douglas, J., concurring); *McCulloch v. Maryland*, 17 U.S. 159, 199, 4 Wheat. 316, 405 (1819); Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 696-99 (1996); Vincent A. Cirillo & Jay W. Eisenhofer, *Reflections on the Congressional Commerce Power*, 60 TEMPLE L.Q. 901, 903 (1987); see also U.S. CONST. art. I, § 8 (enumerating Congress's powers); John G. Schmidt Jr., Note, *The Tenth Amendment: A "New" Limitation on Congressional Commerce Power*, 45 RUTGERS L. REV. 417, 420-27

ed to the federal government explicitly and those functions that have not been so assigned remain with the states through the Tenth Amendment.<sup>24</sup> The Commerce Clause explicitly enumerates a power that is assigned to the federal government rather than to the states.<sup>25</sup> The Commerce Clause delegates to Congress the "Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."<sup>26</sup> Because the Commerce Clause provides the federal government the ability to legislate in areas that otherwise would be reserved for the states, it has served as the jurisprudential backdrop for the federalism question throughout the nation's history; i.e., the Clause has served as the boundary line of federal government's sovereignty vis-à-vis the states.<sup>27</sup> This segment

(1993) (discussing the tensions at the constitutional convention between the federalists favoring a strong national government and the antifederalists favoring stronger local governments, and that debate's relationship to enumerated powers).

24. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

The Tenth Amendment is not considered to confer affirmative rights to the states, but reserves the powers not delegated to the federal government for the states:

The [Tenth] [A]mendment states but a truism that all is retained that has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution . . . or that its purpose was other than to allay fears that the new national government might seek to exercise fully their reserved powers.

United States v. Darby, 312 U.S. 100, 124 (1941); *see also* Schmidt, *supra* note 23, at 420-21 (outlining the origins of the Tenth Amendment). *But see* Cirillo & Eisenhofer, *supra* note 23, at 904 & n.20 (describing a competing view of the Tenth Amendment).

The concept of dual sovereignty between the federal government and the states, as represented by the concept of enumerated powers and the Tenth Amendment, is the United States' unique contribution to governmental structure. *See* BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 228-29 (enlarged ed. 1992).

25. *See* U.S. CONST. art. I, § 8, cl. 3; *see also id.* art. I, § 8, cl. 1-18 (enumerating this and other congressional powers); *id.* art. II, § 2, cl. 1-3 (enumerating presidential powers); *id.* art. III, § 2, cl. 1 (enumerating judicial powers).

26. *Id.* art. I, § 8, cl. 3.

27. *See* FELIX FRANKFURTER, *THE COMMERCE CLAUSE* 66-67 (1937), *quoted in* RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* 120 (1987); Richard S. Myers, *The Burger Court and the Commerce Clause: An Evaluation of the Role of State*

of the Note discusses the history of the debate over the appropriate breadth of the federal legislative power as framed by the Commerce Clause.

### *The Early Cases*

The first Supreme Court case to address the Commerce Clause, *Gibbons v. Ogden*,<sup>28</sup> has been interpreted as providing the federal government with broad commerce power.<sup>29</sup> At issue in the case was whether New York could enact a law providing for exclusive steamship franchises for passage to New Jersey.<sup>30</sup> In *Gibbons*, Chief Justice Marshall defined commerce as "traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all

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*Sovereignty*, 60 NOTRE DAME L. REV. 1056, 1056 (1985).

28. 22 U.S. (9 Wheat.) 1 (1824).

29. See *Wickard v. Filburn*, 317 U.S. 111, 120 (1942). Much debate as to the actual breadth that Chief Justice John Marshall intended to give the commerce power in *Gibbons* has ensued. According to Professor Tribe:

Marshall indicated that, in his view, congressional power to regulate "commercial intercourse" extended to all activity having any interstate impact—however indirect. Acting under the commerce clause, Congress could legislate with respect to all "commerce which concerns more states than one." This power would be plenary: absolute within its sphere, subject only to the Constitution's affirmative prohibitions on the exercise of federal authority.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-4 (1978) (footnotes omitted). Professor Tribe and those who agree with his view of *Gibbons* believe that the decision provides an historical basis for the broad powers given to Congress under the authority of the Commerce Clause in the 20th century. See Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1399-400 & n.32 (1987) (recognizing that many scholars embrace views similar to those of Professor Tribe).

Professor Epstein, however, disagreed with Tribe's analysis of *Gibbons*. Epstein stated that the breadth of commerce intimated by Marshall is broader than the limited area of the "boundary between the two states" but narrower than Tribe believed, and asserted that the Chief Justice's intent was to designate that the nature of the transaction rather than the strict geographical location of the transaction was the proper way to characterize what fell within Congress's commerce power. See *id.* at 1403. According to Epstein, "Marshall well understood the fact that local events affected interstate commerce, but he rejected it as a basis for extension of congressional power over internal matters." *Id.* at 1407. In Epstein's view, the scope of the modern commerce power has expanded well beyond that which Chief Justice Marshall envisioned. See *id.* at 1399-408.

30. See *Gibbons*, 22 U.S. at 1-3.



its branches, and is regulated by prescribing rules for carrying on that intercourse."<sup>31</sup> Marshall considered the commerce power to be "complete in itself," limited only by its constitutional parameters.<sup>32</sup>

After *Gibbons*, the question of the scope of Congress's Commerce Clause-based authority did not return to the Court's attention for fifty years.<sup>33</sup> When the Commerce Clause did return to the Court's docket, the resulting rulings did not give Congress the plenary power that many have credited *Gibbons* with providing.<sup>34</sup> Rather, the Court read the Commerce Clause to constrain legislators within narrow parameters to prevent laws that intruded into intrastate activities.<sup>35</sup>

Between 1824 and 1937,<sup>36</sup> the Supreme Court placed Congress's power to legislate on the basis of the commerce power within rigid boundaries.<sup>37</sup> Congress could pass laws regulating commerce but could not regulate manufacturing.<sup>38</sup> It could reg-

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31. *Id.* at 189-90.

32. *See id.* at 196.

33. *See* James M. Maloney, Note, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 FORDHAM L. REV. 1795, 1805 n.63 (1994) (stating that the Commerce Clause did not return to the Court's attention for 50 years after *Gibbons*); *see also* United States v. Lopez, 115 S. Ct. 1624, 1627 (1995) (indicating that there was a period in which the Court heard no Commerce Clause cases).

34. For a discussion of two views of the actual breadth of the commerce power provided by *Gibbons* see *supra* note 29. *See also* Epstein, *supra* note 29, at 1442 (stating that post-New Deal cases diverged from Chief Justice Marshall's intent in *Gibbons*); Debra L. Farmer, *Recent Developments*, United States v. Lopez: *The Fifth Circuit Declares the Gun-Free School Zones Act of 1990 an Unconstitutional Extension of Congressional Power Under the Commerce Clause*, 68 TUL. L. REV. 1674, 1677 (1994) (summarizing the Fifth Circuit's holding in *Lopez*).

35. *See* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 857 & n.255 (1995); Farmer, *supra* note 34, at 1677; *cf. Lopez*, 115 S. Ct. at 1628 (recognizing the constraints on Commerce Clause power before 1937).

36. This time period encompassed the years between the decisions in *Gibbons* and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). For discussion of *Jones & Laughlin*, see *infra* notes 44 & 90.

37. *See Lopez*, 115 S. Ct. at 1627; *Wickard v. Filburn*, 317 U.S. 111, 121 (1942); Farmer, *supra* note 34, at 1677.

38. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) ("Mining brings the subject matter of commerce into existence. Commerce disposes of it."); *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918) (the "Child Labor Cases") (invalidating child labor legislation on the grounds that Congress was regulating manufacturing); *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) ("Commerce succeeds to manu-

ulate both the instrumentalities of interstate commerce<sup>39</sup> and goods travelling in interstate commerce.<sup>40</sup> Finally, Congress had the power to regulate activities that had a direct effect upon interstate commerce but not those activities with an indirect effect.<sup>41</sup> These distinctions existed to differentiate local intrastate commerce from national interstate commerce and to ensure that congressional regulation affected only commerce having an interstate component.<sup>42</sup>

### *The New Deal Expansion*

The election of President Franklin Roosevelt and the development of the New Deal federal economic policies had an immeasurable impact on the development of Commerce Clause jurisprudence.<sup>43</sup> The narrow boundaries that had been established

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facture, and is not a part of it."); *Kidd v. Pearson*, 128 U.S. 1, 25-26 (1888) (holding that manufacturing is a matter of local concern and therefore beyond the scope of the commerce power); Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259, 260 n.8; Farmer, *supra* note 34, at 1677.

39. See *Railroad Comm'n v. Chicago, Burlington & Quincy R.R.*, 257 U.S. 563, 590-91 (1922) (upholding the Transportation Act of 1920); *Houston E. & W. Tex. Ry. v. United States*, 234 U.S. 342, 360 (1914) (the "Shreveport Rate Case") (allowing the Interstate Commerce Commission to set maximum rates for interstate train traffic); *Southern Ry. Co. v. United States*, 222 U.S. 20, 26-27 (1911) (upholding the Safety Appliance Act of Mar. 2, 1893); *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 566 (1870) (upholding a steamship license and inspection statute).

40. See *Hoke v. United States*, 227 U.S. 308, 323 (1913) (allowing prohibition of interstate transportation of impure women); *Hipolite Egg Co. v. United States*, 220 U.S. 45, 58 (1911) (allowing prohibition of interstate shipment of impure food); *Lottery Case*, 188 U.S. 321, 363-64 (1903) (allowing prohibition of interstate shipment of lottery tickets); *Leisy v. Hardin*, 135 U.S. 100, 125 (1890) (allowing regulation of interstate transportation of intoxicating beverages).

41. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935); *Swift & Co. v. United States*, 196 U.S. 375, 378 (1905); *E.C. Knight*, 156 U.S. at 16.

42. See *Cirillo & Eisenhofer*, *supra* note 23, at 910-12; Farmer, *supra* note 34, at 1677.

43. See *Cirillo & Eisenhofer*, *supra* note 23, at 912; Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 183 (1996) [hereinafter Epstein, *Constitutional Faith*]; Epstein, *supra* note 29, at 1443-47; Stempel, *supra* note 38, at 260 n.8; Farmer, *supra* note 34, at 1677; James A. Frechter, Note, *Alien Landownership in the United States: A Matter of State Control*, 14 BROOK. J. INT'L L. 147, 161 n.103 (1988); David S. Gehrig, Note, *The Gun-Free School Zones Act: The Shootout over Legislative Findings, the Commerce Clause, and*

for permissible regulation of commerce expanded tremendously; what remained was a reading of the Commerce Clause that allowed Congress to regulate extensively in economic areas.<sup>44</sup> By

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*Federalism*, 22 HASTINGS CONST. L.Q. 179, 184 (1994); Patricia S. Henry, Comment, *Constitutional Limitation of Congressional Commerce Clause Power*, 58 CHI-KENT L. REV. 109, 114 (1982); Maloney, *supra* note 33, at 1806-08; cf. Stephen Chippendale, Note, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, 460 n.28 (1994) (noting the importance of the New Deal); Schmidt, *supra* note 23, at 427-29 (noting that, by 1994, the Supreme Court had found unconstitutional only one commerce-based statute). But see Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from Swift to Jones & Laughlin*, 61 FORDHAM L. REV. 105, 105-06 (1992) (doubting the significance of New Deal politics on jurisprudential consistency).

The Supreme Court initially struck down the New Deal legislation as an unconstitutional overexpansion of the federal power into the individual's economic rights. See KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 279 (1989). Out of frustration with the Court's reluctance to uphold the sweeping economic reform embodied in the New Deal, President Roosevelt proposed a court-packing plan, which called for the appointment of additional judges in all federal courts where incumbent judges were age 70 or older. See *id.* at 282. Due to the ages of the Justices this would have increased the size of the Supreme Court substantially. See *id.* After Roosevelt announced this plan, two justices became consistently more liberal, and New Deal measures were upheld. See *id.*; Berger, *supra* note 23, at 713. "The story of the Court's change of doctrine usually resolves down to the 'switch in time that saved nine' that was coincident with, though probably not motivated by, Roosevelt's court-packing plan." Daniel J. Hulsebosch, Note, *The New Deal Court: Emergence of a New Reason*, 90 COLUM. L. REV. 1973, 1979 n.31 (1990).

"At the same time that the Court was jettisoning its concern with economic rights and government regulation, it announced clearly its intentions to take on new issues involving matters of human freedom." HALL, *supra*, at 313. For example, in 1937 the Court began to incorporate the Bill of Rights, which applied textually only to the federal government, to the states via the Fourteenth Amendment. See *id.* These simultaneous doctrinal changes have resulted in the expansive role that the federal government has taken on in both economic regulation and individual rights in the latter half of the 20th century. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 655-95 (2d ed. 1985); see also *United States v. Lopez*, 115 S. Ct. 1624, 1652 (1995) (Souter, J., dissenting) (stating that government regulation has expanded since the New Deal).

44. See *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (holding that Congress has the power to regulate via the Commerce Clause activities that, in their individual capacity, have a trivial effect on interstate commerce, but in the aggregate have a substantial effect); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942) (holding that commerce power can be exercised to regulate intrastate activities with substantial effects on interstate commerce); *United States v. Darby*, 312 U.S. 100, 116-17, 124-25 (1941) (overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and upholding the Fair Labor Standards Act of 1938); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 40-41 (1937) (abandoning the distinction between manufacturing and commerce as a boundary for Commerce Clause legislation).

1942, the strict prohibition against Congress's regulation of intrastate commerce had eased considerably.<sup>45</sup> The Supreme Court, through a series of decisions that recognized the interstate effects of local economic events, granted Congress the power to regulate incidences of intrastate commerce that, in the aggregate, substantially affected interstate commerce.<sup>46</sup>

### *Modern Commerce Clause Jurisprudence*

Commerce Clause jurisprudence expanded once again during the Civil Rights Era.<sup>47</sup> In the 1960s, Congress used its commerce power to enact laws that were social policies, not economic regulations.<sup>48</sup> For example, Title II of the Civil Rights Act of 1964, which prevents discrimination in places of public accommodation, was an exercise of Congress's commerce power.<sup>49</sup> Two cases decided by the Supreme Court in 1964, *Heart of Atlanta Motel, Inc. v. United States*<sup>50</sup> and *Katzenbach v. McClung*,<sup>51</sup> upheld the Civil Rights Act.<sup>52</sup> These decisions clearly reiterated both the substantial effects test and a standard of rational basis review for Commerce Clause-based legislation.<sup>53</sup> The Court, in later decisions, further clarified the breadth of Congress's commerce power, but the power has yet to be broadened further.<sup>54</sup>

Between 1964 and 1994, the Court held that a congressional

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45. See *Wickard*, 317 U.S. at 127-28; *Wrightwood Dairy*, 315 U.S. at 119.

46. See *Wickard*, 317 U.S. at 128-29; *Wrightwood Dairy*, 315 U.S. at 119, 125; *Darby*, 312 U.S. at 123; *Jones & Laughlin*, 301 U.S. at 31.

47. See Gehrig, *supra* note 43, at 185-87; Maloney, *supra* note 33, at 1813.

48. See Cirillo & Eisenhofer, *supra* note 23, at 913-14; Maloney, *supra* note 33, at 1813.

49. See Mark E. Herrmann, Note, *Looking Down from the Hill: Factors Determining the Success of Congressional Efforts to Reverse Supreme Court Interpretations of the Constitution*, 33 WM. & MARY L. REV. 543, 572 n.169 (1992); David Michael McConnell, Comment, *Title VII at Twenty—The Unsettled Dilemma of "Reverse" Discrimination*, 19 WAKE FOREST L. REV. 1073, 1076 n.18 (1983); Maloney, *supra* note 33, at 1813 n.124.

50. 379 U.S. 241 (1964).

51. 379 U.S. 294 (1964).

52. See *Heart of Atlanta Motel*, 379 U.S. at 258; *Katzenbach*, 379 U.S. at 302-04.

53. See *Heart of Atlanta Motel*, 379 U.S. at 258; *Katzenbach*, 379 U.S. at 302-04.

54. See *Perez v. United States*, 402 U.S. 146, 152-54 (1971) (basing its holding that a loan-sharking statute was constitutional on *Heart of Atlanta Motel* and *Katzenbach*); Farmer, *supra* note 34, at 1680-81.

act had exceeded the bounds of the Commerce Clause only once, and that case was overruled within ten years.<sup>55</sup> Cases were decided so consistently in favor of expansive congressional commerce power that commentators often considered any legislation passed under the Commerce Clause to be per se constitutional.<sup>56</sup> The Commerce Clause developed into the basis for a virtually unlimited congressional police power because any local activity, if considered in the aggregate, potentially could affect interstate commerce.<sup>57</sup> Nothing seemed beyond Congress's reach until the Court handed down *Lopez*.

### LOPEZ: THE HOLDING

The Supreme Court's decision in *United States v. Lopez* shattered the Commerce Clause's jurisprudential status quo.<sup>58</sup> Alphonso Lopez was convicted in the Western District of Texas for violating the Gun-Free School Zones Act of 1990, a federal criminal statute making it unlawful to possess a firearm within one thousand feet of a school.<sup>59</sup> On appeal of Lopez's conviction,

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55. See *National League of Cities v. Usery*, 426 U.S. 833, 855 (1976) (holding that it was an unconstitutional overextension of Congress's commerce power to regulate states' traditional governmental functions), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985) (eliminating the "traditional government function" analysis).

56. See JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* 161 (2d ed. 1983) ("The Supreme Court today interprets the commerce clause [sic] as a complete grant of power."); Cirillo & Eisenhofer, *supra* note 23, at 912-13; Rachel J. Littman, Comment, *Gun-Free Schools: Constitutional Powers, Limitations, and Social Policy Concerns Surrounding Federal Regulation of Firearms in School*, 5 SETON HALL CONST. L.J. 723, 746-47 (1995).

57. See *Perez*, 402 U.S. at 154 (describing the breadth of Congress's commerce power).

58. See Tushnet, *supra* note 11, at 864; Todd S. Purdum, *Clinton Seeks Way to Retain Gun Ban in School Zones*, N.Y. TIMES, Apr. 30, 1995, at A1; David Savage, *The Supreme Court Goes Back to Work*, A.B.A. J., Oct. 1995, at 62; David O. Stewart, *Back to the Commerce Clause*, A.B.A. J., July 1995, at 46 ("*Lopez* resembled a constitutional *Walpurgisnacht*, setting loose precedents that long ago had been consigned to the flames of the *auto-da-fé* for discredited cases.").

59. See *United States v. Lopez*, 2 F.3d 1342, 1367-68 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995) (striking down the Gun-Free School Zones Act of 1990). The statute made it "unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(2)(A) (1994).

the Fifth Circuit Court of Appeals held that, due to the total absence of congressional findings on the issue of the statute's nexus to interstate commerce and the court's inability to locate any reference to a commercial effect in the legislative history, the Gun-Free School Zones Act of 1990 was an unconstitutional overextension of Congress's legislative power.<sup>60</sup> In a similar case, the Ninth Circuit held that the Act was constitutional.<sup>61</sup> At this point, the issue was ripe for Supreme Court review.<sup>62</sup>

In *United States v. Lopez*, the Supreme Court affirmed the Fifth Circuit's holding that the Gun-Free School Zones Act of 1990 was not a valid exercise of Congress's commerce power.<sup>63</sup> After reviewing the historical development of Commerce Clause jurisprudence, Chief Justice Rehnquist, writing for the majority, used extant Commerce Clause precedents to promulgate a three-part test to determine whether a Commerce Clause-based regulation was constitutional.<sup>64</sup> The test defines the categories of activities that Congress is empowered to regulate under the authority of the Commerce Clause.<sup>65</sup> First, the Court held that "Congress may regulate the use of the channels of interstate commerce."<sup>66</sup> Second, the Court stated that "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."<sup>67</sup> Finally, the Court recognized Congress's ability to regulate activities that have a "substantial relation" to or that "substantially affect interstate commerce."<sup>68</sup>

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

61. See *United States v. Edwards*, 13 F.3d 291, 293 (9th Cir. 1993), *vacated*, 115 S. Ct. 1819 (1995).

62. See William Banks, *At the Halfway Point*, A.B.A. J., Apr. 1995, at 50 (stating that circuit splits most often lead to grants of certiorari).

63. See *Lopez*, 115 S. Ct. at 1626.

64. See *id.* at 1626-30.

65. See *id.* at 1629-30.

66. *Id.* at 1629 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964); *United States v. Darby*, 312 U.S. 100, 114 (1941)).

67. *Id.* (citing *Perez v. United States*, 402 U.S. 146, 150 (1971); *Houston E. & W. Tex. Ry. v. United States*, 234 U.S. 342 (1914); *Southern Ry. Co. v. United States*, 222 U.S. 20 (1911)).

68. *Id.* at 1629-30 (citing *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

The Court then proceeded to apply the "substantial effect" test to the Gun-Free School Zones Act.<sup>69</sup> The Act did not fare well under this analysis.<sup>70</sup> Initially, the Court contrasted the Gun-Free School Zones Act, which it characterized as having no connection to interstate commerce, with other regulations that had been upheld due to their subjects' substantial impacts on interstate commerce.<sup>71</sup> The Court showed that the other regulations had a clear or direct nexus to economic activity that the Gun-Free School Zones Act lacked.<sup>72</sup>

The Chief Justice's analysis also compared the Gun-Free School Zones Act to another federal criminal statute that addressed gun possession and that survived Commerce Clause challenges.<sup>73</sup> The other gun-possession measure had been saved by an interstate jurisdictional requirement, i.e., a requirement that the gun had traveled in interstate commerce.<sup>74</sup> This was not a required element of the offense set forth in the Gun-Free School Zones Act.<sup>75</sup> Clearly, such a jurisdictional element could have saved the legislation.<sup>76</sup>

Finally, the Court addressed the issue of legislative findings.<sup>77</sup> Though holding that, as a general rule, legislative findings were not necessary for legislation to survive a Commerce Clause-based challenge, such findings were necessary in the case of the Gun-Free School Zones Act because the commerce connection was not "visible to the naked eye."<sup>78</sup> Further, the Justices decided that congressional findings regarding the interstate nexus of past gun possession measures were insufficient to save the Gun-Free School Zones Act because those past findings did

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69. *See id.* at 1630.

70. *See id.* at 1630-33.

71. *See id.* at 1630-31.

72. *See id.* (comparing the statute in question in *Lopez*, 18 U.S.C. § 922(q) (1994), to the one examined in *Wickard v. Filburn*, 317 U.S. 111 (1942), "the most far reaching" of the Commerce Clause precedents, and finding that the wheat regulation in *Wickard* clearly related to economic markets and pricing, whereas 18 U.S.C. § 922(q) had no such relation).

73. *See id.* at 1631.

74. *See id.*

75. *See id.*

76. *See id.*

77. *See id.* at 1631-32.

78. *Id.*

not adequately clarify the specific relationship between possession of a gun within a school zone and interstate commerce.<sup>79</sup>

Next, the Court turned away from facial analysis of the statute and examined the arguments that the government proffered to illustrate the actual, substantial effect that the conduct regulated by the statute had on interstate commerce.<sup>80</sup> The government argued that gun possession in a school zone contributes to violence in the community and affects interstate commerce in three ways:<sup>81</sup> by increasing insurance rates, by dissuading individuals from travelling in an area, and by negatively affecting the learning process of students in the school and thereby leading to a less educated and less productive citizenry.<sup>82</sup> The Court did not question that the cited effects had a connection to the national economy; nevertheless, it rejected the government's argument due to the attenuated nature of the effects.<sup>83</sup> The Court concluded that if it accepted such an attenuated nexus to interstate commerce in upholding a Commerce Clause-based regulation, Congress's commerce power would become limitless and, in today's global economy, could lead to federal regulation of every aspect of daily life.<sup>84</sup> Chief Justice Rehnquist considered such a boundless reading of legislative authority under the Commerce Clause to be an impermissible intrusion on state sovereignty.<sup>85</sup>

By the end of the majority opinion, the Gun-Free School Zones Act had failed every portion of the Court's analysis.<sup>86</sup> The Act had no clear link to commercial activity, no jurisdictional nexus to interstate commerce, and no findings or legislative history regarding interstate commerce. Additionally, the government's arguments illustrating the statute's substantial relationship to

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79. *See id.* at 1632-33.

80. *See id.*

81. *See id.*; *see also* Brief for the United States at 17-25, *Lopez* (No. 93-1260) (outlining the government's arguments that the Gun-Free School Zones Act substantially affected interstate commerce).

82. *See Lopez*, 115 S. Ct. at 1632-33; *see also* Brief for the United States at 17-25, *Lopez* (No. 93-1260) (stating the government's arguments that the Gun-Free School Zones Act substantially affected interstate commerce).

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

84. *See id.* at 1632-34.

85. *See id.* at 1632.

86. *See id.* at 1630-34.



interstate commerce were too attenuated.<sup>87</sup> As a result of all of the aforementioned shortcomings, the Chief Justice concluded that the statute could not be found constitutional without further expanding the scope of Congress's commerce power, a step that the majority was unwilling to take.<sup>88</sup> The Court therefore struck down the Gun-Free School Zones Act, affirming the Fifth Circuit's decision regarding its unconstitutionality.<sup>89</sup>

### LOPEZ: THE EFFECTS

The actual effects of *Lopez* on the future of Commerce Clause jurisprudence will remain a mystery until the Court grants certiorari to another case and has the opportunity to clarify its holding through analysis of another legislative enactment. The *Lopez* holding leads to the anomalous conclusion that the "Constitutional Revolution" is over, but that the status quo still may be intact;<sup>90</sup> i.e., the outward expansion of the commerce power that

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87. See *id.*

88. See *id.* at 1634.

89. See *id.*

90. The Constitutional Revolution is considered to be the convergence and simultaneous expansion of Congress's power to regulate under the Commerce Clause with the expansion of the protection of individual liberty under substantive due process analysis, which began in 1937 with *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and several other cases decided in the Court's October Term of 1936. See EDWARD S. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. 65-79 (1941) ("[T]he remarkable reversal of the Court's attitude toward the New Deal early in 1937 [is] the event which comprises the more dramatic phase of the Constitutional Revolution . . ."); Berger, *supra* note 23, at 713.

Arguably, the cessation of the outward expansion of rights under substantive due process and equal protection began with the Burger Court. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (holding that the Fourteenth Amendment does not protect homosexual relations); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-47 (1985) (holding that mentally retarded adults are not a suspect class for equal protection analysis and indicating the Court's reticence to establish additional suspect classes). The Rehnquist Court has continued to limit the Fourteenth Amendment's reach. *Planned Parenthood v. Casey*, 505 U.S. 833, 872-73 (1992) (O'Connor, Kennedy, & Souter, JJ., plurality opinion), which supplanted the absolute right of women to obtain abortions within the first trimester of pregnancy with the right of the state to regulate abortions within the first trimester, illustrates this principle. Clearly, *Casey* was an actual rescission of the right of privacy expounded in *Roe v. Wade*, 410 U.S. 113, 164 (1973), which held that the right to an abortion in the first trimester was a fundamental right guaranteed by the Fourteenth Amendment. See *id.* Further, in recent Fourteenth Amendment cases, the Court has been

began with the Constitutional Revolution during the New Deal perhaps has ended, but, as a practical matter, the end of the revolution does not have any rescissionary impact on congressional power because the Commerce Clause analysis has not changed substantially.<sup>91</sup> So, though theoretically *Lopez* may mark a ma-

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reluctant to allow broad-based affirmative action programs without a specific remedial goal. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2112-13 (1995) (holding that even beneficial race classifications must be tied to specific past wrongs by the state). If the revolution was an outward expansion of rights, then that outward expansion apparently has halted, at least within the realm of the Fourteenth Amendment.

The *Lopez* decision may have begun to do for the Commerce Clause what the Rehnquist and Burger Courts already have done for the Fourteenth Amendment: define the outer boundary of the expansion begun during the New Deal. Cf. Tushnet, *supra* note 11, at 866 (noting that *Lopez* and *Adarand*, when taken "[t]ogether[,] . . . repudiate both the broad understanding[ ] of the post-New Deal constitutional synthesis, in which national government was required to act, and a narrower understanding in which it was permitted to act"). *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), a recent Eleventh Amendment case, also illustrates that the Rehnquist Court is placing limitations on Congress's power under the Commerce Clause. See *id.* at 1133 (holding that the Commerce Clause does not grant Congress sufficient powers to abrogate states' Eleventh Amendment immunity from suits in federal court).

Therefore, if one considers the Constitutional Revolution to have begun with the simultaneous expansion of both the federal government's power to regulate extensively under the Commerce Clause and the scope of individual liberty protected under the Fourteenth Amendment, the Rehnquist Court in *Lopez* and *Seminole Tribe* perhaps has ended the revolution by consistently defining the outer boundaries of the federalism prong of the revolutionary expansion.

91. *Lopez*, because it relies heavily on the "revolutionary" precedents of the late 1930s and the 1940s, does not indicate a rescissionary effect as did *Casey* in the abortion realm. See *Lopez*, 115 S. Ct. at 1628; *United States v. Wilson*, 73 F.3d 675, 685 (7th Cir. 1995), *cert. denied*, 117 S. Ct. 46 (1996); Suzanna Sherry, *The Barking Dog*, 46 CASE W. RES. L. REV. 877, 877, 881-83 (1996). Instead, *Lopez* indicates that the Commerce Clause will retain its current breadth. See *Wilson*, 73 F.3d at 685 ("[The Supreme Court] did not intend *Lopez* to be a departure from established Commerce Clause precedent."); Louis H. Pollak, Symposium, *Foreword*, 94 MICH. L. REV. 533, 550 (1995) (stating that *Lopez* is not "epochal"). The *Lopez* holding, however, has invigorated Commerce Clause jurisprudence. See Podgers, *supra* note 22, at 44; Pollak, *supra*, at 551 & n.96 (describing litigation producing disagreements among the lower federal courts). An outer boundary of Congress's commerce power is now within contemplation if not clear view. See *Wilson*, 73 F.3d at 685 ("*Lopez* is primarily significant because it helps define the line between what Congress may regulate and what it may not.").

One aspect of the Rehnquist Court's legacy may be to define the outer boundary fully. Activity in the lower courts indicates that the Supreme Court will have many opportunities to define that boundary if it chooses. See Pollak, *supra*, at 551 & n.96;

jor turning point in legal history, it will have little measurable effect on federalism in the purely pragmatic and operative senses, except in reiterating that an outer boundary exists.

In *Lopez*, the Court stated with clarity its unwillingness to expand any further the bounds of the commerce power, because doing so would create a congressional police power:

[Past decisions have] 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 will never be a distinction between what is truly national and what is truly local. . . . This we are unwilling to do.<sup>92</sup>

It follows that, as the Court has stated its unwillingness to expand congressional authority over that which is "truly local," the Court did not believe that the three-part test promulgated in the decision allowed the national government to intrude on local prerogatives.<sup>93</sup>

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*infra* note 96. Challenges have arisen in the circuit courts of appeals questioning the validity of a federal criminal statute under *Lopez*. See, e.g., *United States v. Carvell*, 74 F.3d 8 (1st Cir. 1996); *United States v. Malone*, 70 F.3d 1276 (8th Cir. 1995) (unpublished table decision); *United States v. Edmonds*, 69 F.3d 1172 (D.C. Cir. 1995); *United States v. Bell*, 70 F.3d 495 (7th Cir. 1995); *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995); *Kelley v. United States*, 69 F.3d 1503 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 1566 (1996); *United States v. Hinton*, 69 F.3d 534 (4th Cir. 1995) (unpublished table decision), *cert. denied*, 116 S. Ct. 1026 (1996); *United States v. Sherlin*, 67 F.3d 1208 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 795 (1996); *United States v. Bishop*, 66 F.3d 569 (3d Cir.), *cert. denied*, 116 S. Ct. 681 (1995); *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995); *United States v. Walker*, 59 F.3d 1196 (11th Cir.), *cert. denied*, 116 S. Ct. 547 (1995); *United States v. Dodge*, 61 F.3d 142 (2d Cir.), *cert. denied*, 116 S. Ct. 428 (1995).

At this stage, however, the conclusion must be that the revolution begun during the New Deal may have run its course, but within the Commerce Clause arena the status quo has not changed significantly. See Tushnet, *supra* note 10, at 850 (discussing *Lopez* in the framework of Professor Ackerman's theory of constitutional moments and concluding that the *Lopez* decision is "one item in the transformation process"). To change the breadth of the power granted by the Commerce Clause substantially, as a practical matter, would be extremely difficult because so many government functions rest squarely on that legislative justification. See *supra* notes 47-57 and accompanying text. The potential for the mass invalidation of legislation is not an appealing prospect. See Epstein, *Constitutional Faith*, *supra* note 43, at 189-90 (discussing the challenge of reevaluating the status quo in this area).

92. *Lopez*, 115 S. Ct. at 1634 (citations omitted).

93. For a discussion of the three-part test promulgated in *Lopez*, see *supra* notes

The Court derived *Lopez*'s three-part test, particularly the "substantial effect" prong, from cases that represent the pinnacles of Commerce Clause breadth.<sup>94</sup> Thus, despite the Court's stated desire to stop the New Deal-based expansion of the commerce power, reliance on these cases indicates that no rescission of the current congressional commerce power should occur as a result of *Lopez*.<sup>95</sup> Because congressional power has not been rescinded, the status quo essentially remains intact.<sup>96</sup>

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64-68 and accompanying text. *But see Lopez*, 115 S. Ct. at 1642-43 (Thomas, J., concurring) (stating the need to reconsider the "substantial effects" test in light of the text and history of the Commerce Clause).

94. *See Lopez*, 115 S. Ct. at 1629-30 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-77 (1981); *Perez v. United States*, 402 U.S. 146, 150 (1971); *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964); *United States v. Darby*, 312 U.S. 100, 114 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). *See supra* note 43 and accompanying text for a discussion of the expansion of the breadth of the commerce power after the New Deal.

The substantial effects prong, in particular, relied on cases standing for the increased breadth of the Commerce Clause. *See Lopez*, 115 S. Ct. at 1630 (citing *Perez*, 402 U.S. at 146; *Heart of Atlanta Motel*, 379 U.S. at 241; *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942)).

95. The cited cases are valid, post-New Deal precedents that gave Congress broad commerce power. *See Lopez*, 115 S. Ct. at 1629-30. In contrast, the Court could have relied on the pre-New Deal cases that constrained Congress. *See supra* notes 28-42 and accompanying text (discussing pre-New Deal constraints). Reliance on the older cases would have indicated rescission of the breadth of the commerce power as developed after the New Deal.

96. The vast majority of cases that have addressed the constitutionality of a particular statute under *Lopez* have held that the challenged statute was constitutional. *See United States v. Garcia*, 94 F.3d 57, 64 (2d Cir. 1996) (upholding 18 U.S.C. § 922(g), which prohibits the possession of firearms by a convicted felon); *United States v. Zorilla*, 93 F.3d 7, 8-9 (1st Cir. 1996) (upholding 21 U.S.C. § 860(a), a federal drug trafficking statute); *United States v. Wall*, 92 F.3d 1444, 1452 (6th Cir. 1996) (upholding 18 U.S.C. § 1955, which criminalizes illegal gambling businesses); *United States v. Joost*, 92 F.3d 7, 14 (1st Cir. 1996) (upholding 18 U.S.C. § 922(g)); *United States v. Kenney*, 91 F.3d 884, 891 (7th Cir. 1996) (upholding 18 U.S.C. § 922(o), which prohibits the possession or transfer of a machine gun); *United States v. Beuckelaere*, 91 F.3d 781, 784 (6th Cir. 1996) (upholding 18 U.S.C. 922(o)); *United States v. McMasters*, 90 F.3d 1394, 1397-99 (8th Cir. 1996) (upholding 18 U.S.C. § 371, which prohibits conspiracy to commit arson, a violation of 18 U.S.C. § 844(i)); *United States v. Tucker*, 90 F.3d 1135, 1140 (6th Cir. 1996) (upholding 21 U.S.C. § 860(a), which enhances the sentencing penalty for distributing drugs within 1000 feet of a school); *United States v. Bell*, 90 F.3d 318, 320-21 (8th Cir. 1996) (upholding 18 U.S.C. § 924(c)(1), which prohibits the use of firearms in connection with drug trafficking); *United States v. Lerebours*, 87 F.3d 582, 583-85 (1st Cir. 1996)

### *Rational Basis Review?*

*Lopez* does raise a question as to the continued vitality and appropriateness of rational basis review of Commerce Clause questions.<sup>97</sup> Until *Lopez*, rational basis was firmly ensconced as the standard for evaluating whether a congressional enactment was a valid exercise of the commerce power.<sup>98</sup> In *Lopez*, the Court did not ask whether Congress had a rational basis to believe that the Gun-Free School Zones Act substantially affected

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(upholding 21 U.S.C. § 841(a)(1), which prohibits the manufacture, distribution, or dispensing of controlled substance), *cert. denied*, 117 S. Ct. 694 (1997); *United States v. Bolton*, 68 F.3d 396, 399 (10th Cir. 1995) (upholding 18 U.S.C. § 1951, which prohibits interfering with commerce by committing robbery), *cert. denied*, 116 S. Ct. 966 (1996); *United States v. Sherlin*, 67 F.3d 1208, 1213-14 (6th Cir. 1995) (upholding 18 U.S.C. § 844(i), which criminalizes arson), *cert. denied*, 116 S. Ct. 795 (1996); *United States v. Bishop*, 66 F.3d 569, 590 (3d Cir.) (upholding 18 U.S.C. § 2119, which criminalizes carjacking), *cert. denied*, 116 S. Ct. 681 (1995); *United States v. Rankin*, 64 F.3d 338, 339 (8th Cir. 1995) (*per curiam*) (upholding 18 U.S.C. § 922(g), which deals with illegal possession or transfer of firearms or ammunition); *United States v. Carolina*, 61 F.3d 917 (10th Cir. 1995) (unpublished table decision) (upholding 18 U.S.C. § 2119, which criminalizes carjacking, and 18 U.S.C. § 924(c)(1), which prohibits carrying a firearm during a crime of violence); *United States v. Dodge*, 61 F.3d 142, 145 (2d Cir.) (upholding 26 U.S.C. § 5801, which prohibits possession of an unregistered destructive device, and 18 U.S.C. § 371, which criminalizes a conspiracy to possess an unregistered firearm), *cert. denied*, 116 S. Ct. 428 (1995); *United States v. Wilks*, 58 F.3d 1518, 1522 (10th Cir. 1995) (upholding 18 U.S.C. § 922(o), which defines illegal possession or transfer of handguns); *Cheffer v. Reno*, 55 F.3d 1517, 1520-21 (11th Cir. 1995) (upholding 18 U.S.C. § 248, known as the Freedom of Access to Clinic Entrances Act); *see also Wall*, 92 F.3d at 1447-49 & nn.7-11 (discussing application of *Lopez* by lower federal courts overwhelmingly to uphold federal statutes). *But see United States v. Pappadopoulos*, 64 F.3d 522, 528 (9th Cir. 1995) (holding that the destruction of a personal residence did not substantially affect interstate commerce merely because of the residence's connection to the utilities lines).

97. *See Lopez*, 115 S. Ct. at 1629-33 (mentioning only briefly that the traditional standard of review for Commerce Clause-based legislation has been rational basis and applying a test to the Gun-Free School Zones Act without asking whether Congress had a rational basis for finding that the activity regulated by the statute had a substantial effect on interstate commerce); Epstein, *Constitutional Faith*, *supra* note 43, at 177, 189 (asserting that *Lopez* represents a return to intermediate scrutiny); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 682-85 (1995).

98. *See Lopez*, 115 S. Ct. at 1629 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-280 (1981); *Perez v. United States*, 402 U.S. 146, 155-56 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 299-301 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-53 (1964)); Epstein, *Constitutional Faith*, *supra* note 43, at 182.

interstate commerce; it asked whether the actual effects on interstate commerce were substantial.<sup>99</sup>

The Gun-Free School Zones Act's lack of legislative findings or history regarding the interstate commerce nexus complicates the inquiry as to whether rational basis review has survived *Lopez*.<sup>100</sup> Sufficient indicia in the opinion point out that, had there been findings or history, the statute would have been upheld.<sup>101</sup> These indicia lead to the conclusion that rational basis review may yet be alive and well in the presence of legislative findings.<sup>102</sup>

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99. See *Lopez*, 115 S. Ct. at 1629-33. One may construe the *Lopez* opinion as having subsumed the rational basis standard into the three-part Commerce Clause analysis, thus eliminating the separate application of a rational basis test and instead inquiring only whether the activity fell within the three designated areas: channels of interstate commerce, instrumentalities of or objects in interstate commerce, or things having a substantial effect upon or relation to interstate commerce. See *id.* at 1629 (stating first that the Court had applied a rational basis test, then stating that even under a rational basis standard the commerce power was limited by federalism concerns, and finally pronouncing that "[c]onsistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power"). If, after an independent assessment by the Court, the regulated activity were found to fall within one of the three categories, there would be a presumption of validity under the Commerce Clause. See *id.* at 1629-33.

Such a scheme necessarily would heighten the scrutiny under the substantial effects prong of the *Lopez* analysis. Rather than inquiring whether Congress had a rational basis to believe that the regulated activity substantially affected interstate commerce, see *Hodel*, 452 U.S. at 272-80; *Perez*, 402 U.S. at 155-56; *Katzenbach*, 379 U.S. at 299-301; *Heart of Atlanta Motel*, 379 U.S. at 252-53, courts would ask a different question, a question of fact. See *Lopez*, 115 S. Ct. at 1629-33. A substantial effect would exist only if the challenged statute empirically had a substantial effect on interstate commerce. Congress's belief would be irrelevant. See *id.*

The investigation undertaken in the *Lopez* decision is consistent with this reading in that the government's arguments regarding the substantial effect of the Gun-Free School Zones Act were not accepted at face value as they generally would have been under a traditional rational basis review. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 164-68 (5th ed. 1995). The Court evaluated the strength of the arguments and examined the closeness of the connection between the regulated activity and interstate commerce. See *Lopez*, 115 S. Ct. at 1632. If, however, the Court's intention was to eliminate the rational basis and instead independently investigate whether the enactment fell within three acceptable areas of congressional regulation, that intention was not made clear. See *id.* at 1629-30.

100. See Merritt, *supra* note 97, at 693-94.

101. See *Lopez*, 115 S. Ct. at 1631-32 (indicating that findings could clarify the application of the substantial effect test).

102. See *id.*; see also *United States v. Wilson*, 73 F.3d 675, 679-80, 688-89 (7th Cir. 1995), *cert. denied*, 117 S. Ct. 46 (1996) (stating that a rational basis test should be

The Court's treatment of the government's arguments regarding the connection that the Gun-Free School Zones Act bore to interstate commerce may indicate that, in the absence of legislative findings or history, rational basis review no longer applies.<sup>103</sup> The traditional deferential rational basis question: Could Congress have concluded that the Gun-Free School Zones Act substantially affected interstate commerce?, seems to be answered affirmatively by the government's arguments regarding the effects of violence.<sup>104</sup> The Gun-Free School Zones Act did not survive scrutiny, however, and the Court did not use the language typical of rational basis review in making that determination, i.e., that the government's arguments had no rational relationship to interstate commerce.<sup>105</sup> In the end, it is unclear whether the Court applied heightened scrutiny to these arguments and disposed of them because of an empirical inadequacy, or whether the Court disposed of the arguments because it found them to be irrational.<sup>106</sup>

The possibility of a disjunction in the Court's view of the applicability of rational basis review in the presence or absence of legislative findings and history may lead to separate tests: a deferential, rational basis test when findings or history are present, and a heightened, "actual effects" test when they are absent.<sup>107</sup>

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applied in the presence of findings, and upholding 18 U.S.C. § 248 (1994), the Freedom of Access to Clinic Entrances Act under a rational basis test). Rational basis would be the standard if the stated substantial effect were accepted without further inquiry. See NOWAK & ROTUNDA, *supra* note 99, at 164-68.

103. See *Lopez*, 115 S. Ct. at 1629-33 (lacking any meaningful reference to rational basis review). Rational basis review is a deferential standard under which courts usually accept congressional assertions at face value without further inquiry into actual reasoning or purpose. Cf. NOWAK & ROTUNDA, *supra* note 99, at 164-68 (illustrating the Court's deference).

104. See *Lopez*, 115 S. Ct. at 1632 (explaining the government's view of the congressional intent); Brief for Petitioner at 12-19, *Lopez* (No. 93-1260); Reply Brief for the United States at 11-13, *Lopez* (No. 93-1260).

105. See *Lopez*, 115 S. Ct. at 1632-34 (lacking any reference to rationality or rational basis review in applying the substantial effects analysis to the Gun-Free School Zones Act).

106. See *id.*

107. This interpretation could prove to be a sensible approach. In the presence of legislative findings and/or history, Congress's reasoning is clear and represented on the face of the enactment or in the record of the legislative process. In such a case, no need exists to second-guess the reasoning used in formulating the law. Without

*Lopez: A Failure?*

Many questions remain in the wake of *Lopez*, though perhaps these questions will be resolved if the Court grants certiorari to one of the many Commerce Clause-based challenges to federal statutes making their way through the federal courts. What the Court meant to accomplish in the *Lopez* decision remains a question. The case may stand as a judicial slap on the wrist for congressional overreaching: enacting legislation that is not mindful of either Congress's own enumerated powers or states' rights.<sup>108</sup> The Gun-Free School Zones Act, however, exemplified

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such a record, however, further investigation by a reviewing court is necessary to establish congressional intent. If during this investigation no clear basis for the enactment is forthcoming, the determination of the rational basis for the enactment is left to a court's ingenuity and ability to conceive of a rational interstate commerce nexus addressed by the statute. For a court then to evaluate whether its version of the interstate commerce connection is substantial is a flawed exercise. It is neither a true evaluation of the congressional intent upon enactment of the statute nor a true evaluation of the substantial effect that the legislation actually has on interstate commerce. Evaluating the actual, substantial effects of the statute produces a much more direct conclusion regarding the validity of Congress's action. Further, because the court would not be contradicting a direct finding by Congress, interbranch harmony would not be implicated, as it would be were the reviewing court to question the rationality of congressional findings directly.

Whether the evaluation bears the label "rational basis" may, in practical terms, be a de minimis distinction because the rational basis test has been applied inconsistently. See Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987) (discussing varying applications of rational basis review in the equal protection context).

108. See *supra* note 101 and accompanying text (stating the proposition that the statute could have survived with the presence of findings or history related to commerce). Another argument suggests that the Court intended to signal Congress to check the expansion of federal criminal jurisdiction. See generally Charles B. Schweitzer, Comment, *Street Crime, Interstate Commerce and the Federal Docket: The Impact of U.S. v. Lopez*, 34 DUQ. L. REV. 71 (1995) (suggesting that the crisis of federal criminal jurisdiction was the primary motivator for the *Lopez* decision). Chief Justice Rehnquist has been particularly vocal on the issue of burgeoning federal dockets. See William H. Rehnquist, Address, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1; 140 CONG. REC. S6090 (daily ed. May 19, 1994) (statement of Sen. Biden containing the letter of William H. Rehnquist) (opposing federal jurisdiction over offenses traditionally reserved for the states in his capacity as Presiding Officer of the Judicial Conference of the United States). In fact, the Judicial Conference opposed the CSRA at the time of its passage on the grounds that it would overtax the federal courts. See Vielmetti, *supra* note 9, at 1B.

A full discussion of the issues surrounding federalization of crime and the resulting burdens placed upon the federal court system is beyond the scope of this



incredibly sloppy drafting.<sup>109</sup> So, though *Lopez* has pointed to the outer bounds of congressional power, it does not represent a bright boundary line defining what is local and what is national.<sup>110</sup> Where and if that bright line will emerge is a question for the future. *Lopez* simply indicates that although the Commerce Clause is a broad grant of power in light of the modern economy, it is not all-reaching, and Congress must remain mindful of that fact.<sup>111</sup>

If the Court's intent was more far-reaching, i.e., to revitalize the federalism doctrine, the cases addressed in the lower courts during the year-and-a-half since the *Lopez* decision indicate that the Court has failed to accomplish its goal.<sup>112</sup> By relying on a three-part test derived from the heights of Commerce Clause breadth<sup>113</sup> (and correspondingly the nadir of constitutional federalism), the Court has undermined the opinion's pro-federalist strength. This undermining has in large part left the lower courts with little choice but to apply the broad precedents with which they are familiar. Thus, the lower courts have continued the pre-*Lopez* breadth of the congressional commerce power. The Court in *Lopez* offered no clearly heightened level of scrutiny as

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Note. Several articles have discussed the issue in recent years. See Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995); Robert E. Cowen, *Federalization of State Law Questions: Upheaval Ahead*, 47 RUTGERS L. REV. 1371 (1995); William N. Eskridge Jr. & Philip P. Frickey, *The Supreme Court 1993 Term, Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 70 n.196 (1994); Leonard I. Garth, *Views from the Federal Bench: Past, Present & Future*, 47 RUTGERS L. REV. 1361 (1995); Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029 (1995); William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719 (1995); J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147 (1994); H. Scott Wallace, *Compulsive Disorder: Stop Me Before I Federalize Again*, PROSECUTOR, May-June 1994, at 21.

109. See *Lopez*, 115 S. Ct. at 1632 (stating that findings enable the Court to determine congressional judgment that was not otherwise apparent and implying that the judgment exercised regarding the Gun-Free School Zones Act was minimal or absent); see also *id.* at 1632 n.4 (discussing the post hoc findings promulgated in a last-ditch effort to save the statute).

110. See *id.* at 1633-34.

111. See *id.*

112. See *supra* note 96 and accompanying text.

113. See *supra* notes 91-92 and accompanying text (discussing the precedents relied upon and why such reliance created the inference that a broad commerce power was retained).

an alternative to applying these broad precedents. Instead, the Court merely observed that some fuzzy area of law making is beyond the reach of congressional power.<sup>114</sup> This situation has left the lower courts the option of applying clear, familiar tests of congressional legitimacy or applying a vague remark that there is some area that is beyond federal power. The evaluation of the CSRA by the lower federal courts illustrates the lack of guidance from *Lopez* and points to the conclusion that *Lopez* has not reinvigorated the federalism value on a practical level.

#### THE CHILD SUPPORT RECOVERY ACT: APPLYING *LOPEZ*

##### *The Act*

The CSRA criminalizes the willful failure to pay child support in another state.<sup>115</sup> Congress passed the CSRA in order to address the growing problem of interstate enforcement of child support awards by punishing certain parents who intentionally had failed to fulfill their support payment obligations.<sup>116</sup> Under the Act, a first offense is punishable by a fine, imprisonment of up to six months, or both.<sup>117</sup> In passing the legislation, Congress intended to add another weapon to the child support enforcement arsenal:

Although many of our States have made willful failure to pay child support a crime, punishable in some States by 10 years in prison, the ability of those States to enforce such laws outside their borders is hobbled by snarls of redtape and extradition laws.

Failure to pay child support amounts to a double robbery that makes the Brinks heist look like petty larceny. First, more than a million American children are robbed of a cumulative \$18 billion in needed financial support. A decent stan-

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114. See *Lopez*, 115 S. Ct. at 1633-34.

115. See 18 U.S.C. § 228(a) (1994). For the relevant text of the CSRA, see *supra* note 2.

116. See H.R. REP. NO. 102-771, at 4 (1992).

117. See 18 U.S.C. § 228(b)(1). It appears, however, that the sentence imposed is usually far shorter than six months. See *Failure To Pay Support Draws Stiff 60-Day Term*, RICHMOND TIMES-DISPATCH, Feb. 7, 1996, at B4.

dard of living is literally stolen from them by the estranged parent. The obstacles they face to becoming productive adults increase substantially.<sup>118</sup>

The CSRA also requires that offenders pay restitution to the custodial parent in the amount of the total arrearage.<sup>119</sup> The CSRA and the punishments thereunder were designed to fill a gap in the child support enforcement system that had allowed parents desiring to evade their child support obligations to do so successfully by crossing a state line.<sup>120</sup>

The challenges to the CSRA typically assert that child support does not in itself constitute "commerce"; that the regulated act, interstate payment of child support, does not substantially affect interstate commerce; and, further, that the regulation of interstate child support payments constitutes neither the regulation of instrumentalities of interstate commerce nor the regulation of goods in commerce.<sup>121</sup>

### *The Analysis*

Under the *Lopez* Commerce Clause analysis, the issue of the constitutionality of the CSRA has divided lower courts more severely than has the constitutionality of any other challenged statute.<sup>122</sup> The courts' division illustrates competing interpreta-

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118. *House Hearing, supra* note 5, at 1-2 (statement of Rep. Schumer).

119. *See* 18 U.S.C. § 228(c).

120. *See* H.R. REP. No. 102-771, at 5-6.

121. *See* *United States v. Lewis*, 936 F. Supp. 1093, 1097-100 (D.R.I. 1996); *United States v. Ganapowski*, 930 F. Supp. 1076, 1083 (M.D. Pa. 1996); *United States v. Sims*, 936 F. Supp. 817, 819-20 (N.D. Okla. 1996); *United States v. Johnson*, 940 F. Supp. 911, 915 (E.D. Va. 1996); *United States v. Nichols*, 928 F. Supp. 302, 305-15 (S.D.N.Y. 1996); *United States v. Collins*, 921 F. Supp. 1028, 1034-37 (W.D.N.Y. 1996); *United States v. Kegel*, 916 F. Supp. 1233, 1235-39 (M.D. Fla. 1996); *United States v. Parker*, 911 F. Supp. 830, 834-35 (E.D. Pa. 1995); *United States v. Sage*, 906 F. Supp. 84, 91 (D. Conn. 1995), *aff'd*, 92 F.3d 101, (2d Cir. 1996); *United States v. Hopper*, 899 F. Supp. 389, 392 (S.D. Ind. 1995); *United States v. Mussari*, 894 F. Supp. 1360, 1364-65 (D. Ariz. 1995), *rev'd*, 95 F.3d 787 (9th Cir. 1996); *United States v. Schroeder*, 894 F. Supp. 360, 364-65 (D. Ariz. 1995), *rev'd sub nom. Mussari*, 95 F.3d 78; *United States v. Murphy*, 893 F. Supp. 614, 616-17 (W.D. Va. 1995), *vacated for improper venue*, 934 F. Supp. 736 (W.D. Va. July 9, 1996); *United States v. Hampshire*, 892 F. Supp. 1327, 1329-30 (D. Kan. 1995), *aff'd*, 95 F.3d 999 (10th Cir. 1996).

122. *See supra* note 96.

tions of the meaning and scope of *Lopez*.<sup>123</sup> Those courts that have upheld the CSRA have done so primarily on the basis of the economic nature of the child support payment and the likelihood that nonpayment will exert substantial economic effects on interstate commerce.<sup>124</sup> Those courts that have found the Act to be unconstitutional have asserted a stronger federalism value and have concluded that child support is an element of family law, traditionally a state concern, over which Congress has no legitimate power.<sup>125</sup>

This section of the Note applies the analytical framework of *Lopez* to the CSRA. In instances where the lower federal courts have addressed specific issues in the analysis, those court decisions will be compared and contrasted with possible competing interpretations of the *Lopez* decision. In the final section of the Note, the lower court interpretations of the *Lopez* standard as applied to the CSRA provide a starting point for a discussion of the steps that the Supreme Court may take in future Commerce Clause cases if the Court would like to revitalize federalism on a practical level.

Several issues arose in the *Lopez* decision's discussion of the Gun-Free School Zones Act that are applicable to the CSRA. Three issues are readily apparent: jurisdictional element, findings or legislative history, and the three-pronged analytical framework.<sup>126</sup>

### *Interstate Jurisdictional Element*

Unlike the Gun-Free School Zones Act, the CSRA contains a jurisdictional element with an interstate nexus.<sup>127</sup> The Act re-

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123. See *supra* notes 108-14 and accompanying text.

124. See *Lewis*, 936 F. Supp. at 1097-100; *Ganaposki*, 930 F. Supp. at 1083; *Sims*, 936 F. Supp. at 819-20; *Johnson*, 940 F. Supp. at 914; *Nichols*, 928 F. Supp. at 314-15; *Collins*, 921 F. Supp. at 1036-37; *Kegel*, 916 F. Supp. at 1236-39; *Sage*, 906 F. Supp. at 93; *Hopper*, 899 F. Supp. at 393; *Murphy*, 893 F. Supp. at 616-17; *Hampshire*, 892 F. Supp. at 1330.

125. See *Parker*, 911 F. Supp. at 834-35; *United States v. Bailey*, 902 F. Supp. 727, 728-29 (W.D. Tex. 1995); *Mussari*, 894 F. Supp. at 1364-65; *Schroeder*, 894 F. Supp. at 364-65.

126. See *United States v. Lopez*, 115 S. Ct. 1624, 1631-32 (1995).

127. Compare 18 U.S.C. § 922(q) (containing no mention of interstate issues), with 18 U.S.C. § 228(a) (requiring the parent and child to live in different states). In sev-

quires that the noncustodial parent in arrears must have failed to pay court-ordered child support for a child living in another state before criminal liability will attach.<sup>128</sup> Under *Lopez*, this element may be enough to support a finding that the statute is constitutional on Commerce Clause grounds because such an element ensures that the monetary transaction being regulated, the payment of child support, must cross state boundaries before the Act is implicated.<sup>129</sup> In effect, the CSRA's jurisdictional element ensures that the federal government regulates the payment of money that would be traveling interstate if it were being paid.<sup>130</sup> This element limits the regulation so that it only affects items within Congress's commerce power—those traveling interstate—and, as a result, narrows the federal government's grasp to items specifically within its enumerated powers.<sup>131</sup> Many lower courts have upheld the statute precisely on these grounds.<sup>132</sup>

The interstate jurisdictional element, however, differs somewhat from the jurisdictional element described favorably in *Lopez*. The element discussed in *Lopez* required that the regulated item, in that case a gun, must have traveled interstate before the crime was committed.<sup>133</sup> Because the purpose of the CSRA is to punish individuals for the failure to make a specific transaction,<sup>134</sup> nothing has moved via interstate commerce. The gov-

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eral cases this jurisdictional element has been the basis for the finding that the CSRA is constitutional. See *Sage*, 906 F. Supp. at 91-92; *Hopper*, 899 F. Supp. at 392-93; *Murphy*, 893 F. Supp. at 616-17; *Hampshire*, 892 F. Supp. at 1329.

128. See 18 U.S.C. § 228(a).

129. See *Hampshire*, 892 F. Supp. at 1329.

130. Cf. *id.* ("The statute . . . only affects willful violations of interstate child support obligations.").

131. Cf. *id.* (reasoning that the interstate jurisdictional requirement placed the CSRA within Congress's constitutional reach).

132. See *United States v. Lewis*, 936 F. Supp. 1093, 1098 (D.R.I. 1996); *United States v. Nichols*, 928 F. Supp. 302, 313 (S.D.N.Y. 1996); *Sage*, 906 F. Supp. at 91 (D. Conn. 1995), *aff'd*, 92 F.3d 101 (2d Cir. 1996); *Hampshire*, 899 F. Supp. at 1339 (D. Kan. 1995), *aff'd*, 95 F.3d 999 (10th Cir. 1996).

133. See *United States v. Lopez*, 115 S. Ct. 1624, 1631 (1995) (comparing the Gun-Free School Zones Act to the statute in *United States v. Bass*, 404 U.S. 336 (1971), the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 1202, and holding that unlike the statute in *Bass*, the Gun-Free School Zones Act had "no express jurisdictional element which might limit its reach . . . to interstate commerce").

134. See 18 U.S.C. § 228. Punishment under the statute accrues when payments

ernment is stepping in and punishing an individual because money *should* have traveled in interstate commerce but did not.<sup>135</sup> This distinction may prove to be significant enough to preclude the CSRA's jurisdictional provision from saving the statute.<sup>136</sup> Viewed in the light that the statute's jurisdictional element really is looking for the absence of an interstate transaction, this jurisdictional requirement that the delinquent parent reside in another state easily is seen as a domiciliary requirement rather than an interstate element.<sup>137</sup> The CSRA really seeks only separate states of residence for the parent and child.<sup>138</sup> The simple act of living in another state without some direct interstate transaction may not be enough to satisfy the interstate jurisdictional requirement as outlined in *Lopez*.<sup>139</sup> One lower court utilized this distinction and determined that the CSRA's jurisdictional element did not save the statute.<sup>140</sup>

### *Findings and Legislative History*

In the area of findings and legislative history, two major similarities exist between the CSRA and the Gun-Free School Zones

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are not made to a child that lives out of state; the only thing that has travelled out of state is either the noncustodial parent or the child. *See id.* § 228(a). The CSRA criminalizes the behavior of failing to pay child support, i.e., the failure to make payment when one is under a legal duty to do so.

135. *See supra* note 128 and accompanying text.

136. No exact analogy exists between criminalizing possession and criminalizing failure to pay child support. The physical act of possession is much more tangible, as is the object possessed. Proof can exist that the object travelled through interstate commerce, and such proof is a separate consideration from the criminal act of possession. In the case of failure to make a payment, the criminalized act is the failure to fulfill the legal duty of paying the support, and the jurisdictional element attaches to the individual under the duty. *See* 18 U.S.C. § 228(a). In other words, the interstate element attaches to the person who has failed to perform an act, the performance of which would be an interstate transaction. Because no transaction occurred, it cannot be evaluated separately for proof of an interstate component.

137. The only relevant factors are the states of residence of the child and the non-custodial parent. *See id.*

138. *See id.*

139. Unless the domiciliary/jurisdictional component of 18 U.S.C. § 228 is considered to have the same limiting effect discussed in *Lopez* it will not meet the requirement. *See United States v. Lopez*, 115 S. Ct. 1624, 1631 (1995).

140. *See United States v. Parker*, 911 F. Supp. 830, 843 (E.D. Pa. 1995).

Act. First, as with gun possession statutes,<sup>141</sup> Congress has enacted statutes related to enforcement of child support payments in the past.<sup>142</sup> Also, neither act mentions "interstate commerce" in either its legislative history or its findings.<sup>143</sup>

In the past, Congress has used its spending power to enact legislation requiring states to institute child support recovery programs.<sup>144</sup> Under this arrangement, the federal government would cut Aid to Families with Dependent Children contributions<sup>145</sup> if the state did not institute the child support collection program.<sup>146</sup> Under the *Lopez* reasoning, the findings made in the formulation of the Social Security IV-D Program and its later amendments would not apply to the CSRA, even though they address the same general topic of child support collection and delinquency.<sup>147</sup> In *Lopez*, the Court refused to apply findings from other criminal gun possession statutes grounded on the Commerce Clause to the Gun-Free School Zones Act because the older findings did not address the specific issue of gun

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141. See *Lopez*, 115 S. Ct. at 1632.

142. See KENNETH R. REDDEN, FEDERAL REGULATION OF FAMILY LAW § 5.1 (1982) (discussing the Child Support Enforcement Act, 42 U.S.C. §§ 651-665 (1994), and its precursors).

143. See *House Hearing*, *supra* note 5, at 1-115 (failing to refer to interstate commerce); *Criminal Penalty for Flight to Avoid Arrearages in Child Support: Hearing Before the Subcomm. on Juvenile Justice of the Comm. on the Judiciary of the U.S. Senate on S. 1002*, 102d Cong. (1992) [hereinafter *Senate Hearing*] (ignoring interstate commerce); H.R. REP. No. 102-771, at 1-8 (1992) (failing to refer to interstate commerce).

144. REDDEN, *supra* note 142, § 5.1. At the time of its inception in 1935, Aid to Dependent Children, later known as Aid to Families with Dependent Children, sought to provide financial assistance to the children of widowed, unwed, divorced, or separated mothers. See Victoria Vasquez, Note, *Evaluation of the New York Child Support Standards Act: Have the Guidelines Really Made a Difference?*, 4 J.L. & POL'Y 279, 282 n.14 (1995).

145. Cf. 42 U.S.C. § 651 (stating the purposes for which federal funding will be available). Seventy-five percent of child support enforcement programs and paternity establishment programs were federally funded. See Vasquez, *supra* note 144, at 283 n.16 (citing Michael E. Barber, *Update on Title IV-D*, 1 AM. J. FAM. L. 383, 383 (1987)). Local jurisdictions received an incentive of 25% of welfare dollars saved as encouragement for the establishment of child support enforcement programs. See *id.*

146. See 42 U.S.C. §§ 651-665.

147. See *United States v. Lopez*, 115 S. Ct. 1624, 1632 (1995) (discussing reasons that past legislative findings cannot support the Gun-Free School Zones Act).

possession on school grounds.<sup>148</sup> The findings from the earlier congressional child support enactments fall even further from the tree in the case of the CSRA because the other child support-related programs were implemented under the spending power and focused on promoting intrastate child support collection. Thus, no need existed to address any type of interstate effects,<sup>149</sup> nor would relevant findings be pertinent to interstate child support collection issues.<sup>150</sup>

The CSRA compares favorably to the Gun-Free School Zones Act, however, when one examines the findings and legislative history of the acts themselves. Whereas the legislative history and findings of the Gun-Free School Zones Act were devoid of economic data, the history and findings of the CSRA are full of references to the economic effects of the failure by noncustodial parents to make their court-ordered child support payments.<sup>151</sup> As a result of these findings and history, it is abundantly clear that the CSRA had an economic basis.<sup>152</sup> Several lower courts cited these findings and legislative history in determining that the CSRA is constitutional under the *Lopez* analysis.<sup>153</sup>

Three economic considerations dominated the legislative consideration of the CSRA. First, legislators addressed the issue of the feminization of poverty.<sup>154</sup> The feminization of poverty has

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148. *See id.*

149. *Cf.* 42 U.S.C. §§ 651-665 (lacking any distinction between intrastate and interstate issues).

150. The findings that were dismissed in *Lopez*, 115 S. Ct. at 1632, were relevant to the criminalization of gun possession but not specifically on school grounds. Those findings nevertheless are connected more closely to the Gun-Free School Zones Act than are the 42 U.S.C. §§ 651-660 findings, which related to the need for instituting a nationwide network of intrastate child support collection programs, connected to the CSRA.

151. *See House Hearing, supra* note 5, at 1-2, 8-9 (statements of Reps. Schumer and Hyde); *Senate Hearing, supra* note 143, at 1-2, 7-10 (statements of Sens. Kohl and Shelby); H.R. REP. NO. 102-771, at 5-6 (1992); *see also Lopez*, 115 S. Ct. at 1631-32 (discussing the insufficiency of the Gun-Free School Zones Act's findings).

152. *See House Hearing, supra* note 5, at 1-2, 8-9 (statements of Reps. Schumer and Hyde); *Senate Hearing, supra* note 143, at 1-2, 7-10 (statements of Sens. Kohl and Shelby); H.R. REP. NO. 102-771, at 5-6.

153. *See United States v. Hampshire*, 95 F.3d 999, 1002-04 (10th Cir. 1996); *United States v. Lewis*, 936 F. Supp. 1093, 1098-99 (D.R.I. 1996); *United States v. Nichols*, 928 F. Supp. 302, 311-13 (S.D.N.Y. 1996).

154. *See House Hearing, supra* note 5, at 2 (statement of Rep. Schumer).



directly resulted, in most instances, from child-rearing responsibilities in a household headed by a single mother with insufficient economic resources.<sup>155</sup> This economic insufficiency often arises due to insufficient child support awards or payments.<sup>156</sup> Congress also considered the phenomenon of single mothers being forced onto the welfare roles as a result of the failure of fathers to pay child support.<sup>157</sup> Finally, throughout the discussions of the CSRA, Congress considered the economic effects of failure to pay child support on the children themselves.<sup>158</sup> The scope of the economic effects on children was considered separately from the economic effects on their mothers. Whereas maternal effects included issues such as work force participation and child-care costs,<sup>159</sup> the discussed effects on children were more likely to be the result of inadequate access to goods or services, such as food and clothing which could have been purchased with the proceeds of the child support payments.<sup>160</sup> Also considered as part of the economic effects on children were the

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155. See TERRY ARENDELL, *MOTHERS AND DIVORCE: LEGAL, ECONOMIC, AND SOCIAL DILEMMAS* 1-3 (1986); Archibald Stuart, *Rescuing Children: Reforms in the Child Support Payment System*, SOC. SERV. REV., June 1986, at 201; Jay D. Teachman, *Who Pays? Receipt of Child Support in the United States*, 53 J. OF MARRIAGE & FAM., 759, 759 (1991); see also Ann Nichols-Casebolt, *The Economic Impact of Child Support Reform on the Poverty Status of Custodial and Noncustodial Families*, 48 J. MARRIAGE & FAM., 875, 875 (1986) (addressing the economic impact of insufficient child support payments); Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*, reprinted in FREDERICA LOMBARD, *READINGS IN FAMILY LAW: DIVORCE AND ITS CONSEQUENCES* 83-96 (1990) (discussing the economic effects that divorce has on women).

156. See ARENDELL, *supra* note 155, at 76-79; Nichols-Casebolt, *supra* note 155, at 875; Stuart, *supra* note 155, at 201-02; Jay D. Teachman, *Contributions to Children by Divorced Fathers*, 38 SOC. PROBS. 358, 358 (1991).

157. See *House Hearing*, *supra* note 5, at 2 (statement of Rep. Schumer); *Senate Hearing*, *supra* note 143, at 1-2, 7 (statements of Sens. Kohl and Shelby); see also, Philip K. Robins, *Child Support, Welfare Dependency and Poverty*, AM. ECON. REV., Sept. 1986, at 768-78 (studying and analyzing the economic effects of nonreceipt of child support).

158. See *House Hearing*, *supra* note 5, at 6, 9 (statement of Rep. Hyde); *Senate Hearing*, *supra* note 143, at 2-4 (statements of Sens. Kohl and Biden); H.R. REP. NO. 102-771, at 5-6 (1992).

159. See John W. Graham & Andrea H. Beller, *The Effect of Child Support Payments on the Labor Supply of Female Family Heads: An Econometric Analysis*, 24 J. HUM. RESOURCES 664, 682 (1989).

160. See Gladys Kessler, *Crisis in Child Support*, TRIAL, Dec. 1984, at 30; see also CAROLE A. CHAMBERS, *CHILD SUPPORT* 37-75 (1991) (listing child-related expenses).

long-term effects that result from living in poverty, such as diminished educational attainment.<sup>161</sup>

Congress backed the CSRA with findings and a legislative history based on the economic effects of the proposed legislation. Such findings and history were wholly lacking in the Gun-Free School Zones Act.<sup>162</sup> The CSRA's history did not make clear, however, that these effects had an interstate component.<sup>163</sup> At this point in the analysis, it becomes important to consider whether the rational basis test still applies. If so, there seems to be a clear inference that CSRA's findings and legislative history indicate the congressional belief that instances of noncustodial parents failing to pay child support for a child who resides in another state, when aggregated, substantially impact the national economy.<sup>164</sup> Under rational basis review, such an inference should be a sufficient basis upon which a court could uphold the statute.<sup>165</sup>

Of course, the findings do not state directly that the cumulative failures of noncustodial parents to pay child support for children residing out of state substantially affect interstate commerce, leaving room to make an alternative interpretation.<sup>166</sup> Under *Lopez*, it would appear that the Court might look to the actual evils that Congress sought to remedy through the enactment of the CSRA and evaluate their effects on interstate com-

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161. Cf. *House Hearing*, *supra* note 5, at 2 (statement of Rep. Schumer) (noting that the money "freed-up" if deadbeats would pay child support could go toward programs such as Head Start).

162. See *United States v. Lopez*, 115 S. Ct. 1624, 1631-32 (1995). But see *Maloney*, *supra* note 33, at 1825-26 (noting that the legislative history of the Gun-Free School Zones Act is not devoid of evidence that the Commerce Clause was considered).

163. The CSRA's legislative history lacks any specific reference to interstate commerce. See *House Hearing*, *supra* note 5, at 1-115; *Senate Hearing*, *supra* note 143, at 1-121; H.R. REP. No. 102-771, at 1-8 (1992). Congress may have assumed that the frequently mentioned interstate jurisdictional element was sufficient. See *House Hearing*, *supra*, at 1-115; *Senate Hearing*, *supra* note 143, at 1-121; H.R. REP. No. 102-771, at 1-8.

164. See *Senate Hearing*, *supra* note 143, at 8-9 (Statement of Sen. Shelby).

165. See NOWAK & ROTUNDA, *supra* note 99, at 16 (illustrating the Supreme Court's willingness to find a rational basis).

166. For example, one might argue that Congress's primary interest in passing the CSRA was political expedience—exactng punishment on deadbeat dads for easy political gain—and that the bill's effects on the national economy were irrelevant during consideration and passage of the CSRA.

merce under a form of intermediate scrutiny analysis.<sup>167</sup>

### *Three-pronged Analysis*

#### *Channels or Instrumentalities of Interstate Commerce*<sup>168</sup>

In determining the constitutionality of the CSRA under *Lopez*, only one district court explicitly determined that the CSRA regulated the instrumentalities of interstate commerce. In *United States v. Lewis*,<sup>169</sup> the court stated: "The CSRA only applies where there is a court order requiring the transfer of money across state lines to fulfill a child support obligation. Thus, the CSRA clearly involves channels of interstate commerce and is a permissible use of Congress's authority under the Commerce Clause."<sup>170</sup> In contrast, one of the district courts finding that the CSRA was an unconstitutional overextension of congressional power found the assertion that the CSRA was a regulation of the instrumentalities of interstate commerce to be untenable: "[N]o one contends, *as they surely could not*, that the CSRA somehow is an exercise of Congressional power under the second category, i.e. the instrumentalities of interstate commerce . . . ."<sup>171</sup>

These courts differ in their interpretation of the scope of interstate commercial instrumentalities. The view espoused in *Lewis* reflects a belief that Congress is able to pass legislation promoting the use of interstate channels without directly regulating them. The *Mussari* view is a narrower construction and seeks the direct regulation of instrumentalities of interstate commerce

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167. See *Lopez*, 115 S. Ct. at 1632-33 (considering first the lack of findings or legislative history for the Gun-Free School Zones Act, then proceeding to look at the actual effects on interstate commerce proffered by the government).

168. Under *Lopez*, channels and instrumentalities of interstate commerce technically are separate parts of the three-part analysis of permissible, congressional, commerce-based legislation, however, the lower courts addressing the issues tend to use the language interchangeably to identify the telephone, mail, and electronic transfers that would occur as a result of child support payments. Because the cases have not clearly distinguished between channels and instrumentalities, this section of the Note uses the terms interchangeably.

169. 936 F. Supp. 1093 (D.R.I. 1996).

170. *Id.* at 1097-98.

171. *United States v. Mussari*, 912 F. Supp. 1248, 1256 (D. Ariz. 1995), *rev'd*, 95 F.3d 787 (9th Cir. 1996) (emphasis added). In its reversal of the district court, the Ninth Circuit did not address the "instrumentality of interstate commerce" issue.

in order for a legislative enactment to fit under the "instrumentalities" category of the *Lopez* analysis.<sup>172</sup>

*Lopez*, because it applied only the substantial effects test, does not guide the lower courts as to the proper scope of Congress's ability to regulate the instrumentalities of interstate commerce.<sup>173</sup>

### *Persons or Things in Interstate Commerce*

Lower courts are also split on the issue of whether the CSRA regulates a person or thing in interstate commerce. On one hand, courts have noted that the cash payment required under the Act would be a thing moving in interstate commerce if it were paid.<sup>174</sup> Therefore, those courts have considered nonpayment of court-ordered child support to be an "impediment" to interstate commerce.<sup>175</sup> Considering the payment in this manner, these courts have upheld the CSRA under the *Lopez* analysis.<sup>176</sup>

On the other hand, another court considering the identical issue has reached the opposite conclusion, noting that regulating the *nontransfer* of funds across state lines means that no good or person in interstate commerce exists for Congress to regulate.<sup>177</sup> Because no payment or person is traveling in interstate commerce when the CSRA is applied, this line of reasoning concludes that the "persons or things in interstate commerce" prong of the *Lopez* analysis<sup>178</sup> does not save the statute from a finding of unconstitutionality.<sup>179</sup>

### *Actual Substantial Effects*

Through this intermediate-type scrutiny, the differences between the CSRA and the Gun-Free School Zones Act become

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172. See *Lopez*, 115 S. Ct. at 1629-30.

173. See *id.* at 1631-32.

174. See *United States v. Hampshire*, 95 F.3d 999, 1002 (10th Cir. 1996); *United States v. Mussari*, 95 F.3d 787, 790 (9th Cir. 1996); *Sage v. United States*, 92 F.3d 101, 107 (2d Cir. 1996).

175. See *Mussari*, 95 F.3d at 790.

176. See *id.*; *Hampshire*, 95 F.3d at 1002; *Sage*, 92 F.3d at 107.

177. See *United States v. Parker*, 911 F. Supp. 830, 842-43 (E.D. Pa. 1995).

178. See *United States v. Lopez*, 115 S. Ct. 1624, 1629 (1995).

179. See *Parker*, 911 F. Supp. at 842-43.

clearer. Throughout its analysis of the Gun-Free School Zones Act, the Court continually emphasized that the prohibition on carrying guns within 1000 feet of a school had no effect on commerce or any sort of economic enterprise.<sup>180</sup> The government could only offer very attenuated economic effects resulting from the carriage of guns in a school zone.<sup>181</sup> Child support payments, in contrast, may themselves qualify as commerce.<sup>182</sup> Further, the enormous monetary transfers that comprise child support payments exert a substantial impact on the economy.<sup>183</sup>

### *Interstate Child Support Payments as Commerce*

Interstate child support payments can qualify as a form of interstate commerce.<sup>184</sup> Such payments comprise the transfer of large sums of money over state lines.<sup>185</sup> Further, delinquent child support payments can be considered debt, such that efforts to collect interstate delinquent payments across state lines qualify as interstate debt collection.<sup>186</sup> The Supreme Court, in *United States v. Shubert*,<sup>187</sup> defined commerce as "a 'continuous and indivisible stream of intercourse among the states' involving the transmission of large sums of money and communication by mail, telephone and telegraph."<sup>188</sup> Typically, debt collection in-

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180. See *Lopez*, 115 S. Ct. at 1631-34.

181. See *id.* at 1632.

182. See *infra* notes 184-204 and accompanying text.

183. See *infra* notes 190-98 and accompanying text (calculating the substantial proportion of delinquent child support payments attributable to interstate enforcement difficulties); see also CHILD SUPPORT 1991, *supra* note 3 (analyzing child support obligations in 1991 statistically and indicating substantial dollar values).

184. "There is no authority for the proposition that Congress's power extends only to the regulation of commercial entities. To the contrary, courts have upheld numerous statutes which regulate private conduct that affects commercial entities or commercial activity." *United States v. Wilson*, 73 F.3d 675, 684 (7th Cir. 1995), *cert. denied*, 117 S. Ct. 46 (1996).

185. See Irwin Garfinkel, *The Child Support Revolution*, 84 AM. ECON. REV. 81 (1994) (describing child support as a cash transfer).

186. See Wendy Gerzog Shaller, *On Public Policy Grounds, A Limited Tax Credit for Child Support and Alimony*, 11 AM. J. TAX POL'Y 321, 334-35 (1994) (referring to delinquent child support obligations as debts).

187. 348 U.S. 222, 226 (1955).

188. *Id.* at 226 (quoting *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 541 (1944)); accord *United States v. Hopper*, 899 F. Supp. 389, 392 (S.D. Ind. 1995) ("[T]he act of collecting an obligation, though dealing with an intangible,

volves such a process.<sup>189</sup>

As of spring 1992, there were 11.5 million single-parent households of which 6.2 million were owed child support.<sup>190</sup> Of the single-parent households, almost 4 million included children whose noncustodial parent resided in a different state.<sup>191</sup> The average annual child support received in single-parent households was approximately \$2652 in 1991.<sup>192</sup> The aggregate child support payment due to all such households was \$17.7 billion, of which \$11.9 billion was received, leaving a payment gap in 1991 alone of \$5.8 billion.<sup>193</sup> About thirty-five percent of delinquent payments are attributable to noncustodial parents who live out of state.<sup>194</sup> In 1991, therefore, interstate deficiencies in payment totaled approximately \$2.0 billion.<sup>195</sup> If one assumes that each single parent affected by an interstate delinquency is owed the average award of \$2652, then approximately 754,148 families must attempt to collect their interstate debts.<sup>196</sup> It is not difficult to imagine that such efforts would generate the consistent interstate phone and mail contact envisioned in *Shubert*.<sup>197</sup>

These statistics present only a snapshot of interstate child support collection because they represent statistics for only one year.<sup>198</sup> Each delinquent parent conceivably could fail to pay court-ordered child support for eighteen or more years.<sup>199</sup> From these statistics, one can conclude that interstate child support collection efforts for delinquent payments, which result in large

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does amount to commerce.”).

189. See, e.g., Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692(o) (1994) (regulating the use of phone and mail in pursuit of collecting past-due debts).

190. See CHILD SUPPORT 1991, *supra* note 3, at 7.

191. See *id.* at 8.

192. See *id.* at 2 (averaging the mean receipts of child support for custodial mothers and custodial fathers).

193. See *id.*

194. See *Senate Hearing, supra* note 143, at 1 (statement of Sen. Kohl).

195. Two billion is 35% of 5.8 billion.

196. This figure is the result of dividing 2.0 billion by 2652.

197. See *supra* note 187 and accompanying text.

198. See CHILD SUPPORT 1991, *supra* note 3, at 1.

199. See Bruce C. Hafen, *The Learning Years: A Review of the Changing Legal World of Adolescence*, 81 MICH. L. REV. 1045, 1053 (1983) (book review) (discussing the possible ages at which child support no longer is available).

amounts of money crossing state borders, constitute a form of interstate commerce that the CSRA is designed to expedite through the use of a criminal sanction for nonpayment.<sup>200</sup>

In addition, one district court held that child support can be considered to be interstate commerce under a contract theory.<sup>201</sup> That court found that an agreement to pay child support was contractual in nature,<sup>202</sup> and that due to the mobile nature of American society, it was foreseeable that the agreement would become an interstate matter.<sup>203</sup> The court reasoned that contracts with interstate application long have been considered to be part of interstate commerce.<sup>204</sup> Therefore, because the child support contract was itself interstate commerce, the Court upheld the CSRA under this reasoning.

*Direct Effects of Delinquent Child Support Payments on Interstate Commerce*

Narrower definitions of commerce would exclude child support payments.<sup>205</sup> Such definitions change the analysis under *Lopez*. If collection of delinquent child support payments is not commerce, then the constitutionality of the Act turns on whether Congress is regulating an activity that substantially affects interstate commerce when viewed in the aggregate.<sup>206</sup> So, the focus of the analysis shifts from the activity itself to its commercial effects.

In passing the CSRA, Congress was regulating interstate child

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200. The systematic attempts by over 700,000 families to collect \$2 billion in unpaid support necessarily would yield the constant telephone and mail discourse that the Court described as "commerce" in *United States v. Shubert*, 348 U.S. 222, 226 (1955). See *supra* notes 187-88 and accompanying text for a discussion of *Shubert*.

201. See *United States v. Collins*, 921 F. Supp. 1028, 1035-36 (W.D.N.Y. 1996).

202. See *id.*

203. See *id.* at 1036.

204. See *id.* at 1035-36 (citing *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 292 (1921)).

205. The cases holding the CSRA to be unconstitutional have stated that child support does not constitute commerce. See *United States v. Bailey*, 902 F. Supp. 727 (W.D. Tex. 1995); *United States v. Mussari*, 894 F. Supp. 1360 (D. Ariz. 1995), *rev'd*, 95 F.3d 787 (9th Cir. 1996); *United States v. Schroeder*, 894 F. Supp. 360 (D. Ariz. 1995), *rev'd sub nom. Mussari*, 95 F.3d. 787.

206. See *United States v. Lopez*, 115 S. Ct. 1624, 1629 (1995).

support delinquencies.<sup>207</sup> Such delinquencies constituted \$2 billion in 1991.<sup>208</sup> As a direct effect of this delinquency, \$2 billion is not moving over state boundaries.<sup>209</sup> That money is spent in the home state of the noncustodial parent rather than in the home state of the custodial parent,<sup>210</sup> and therefore is distributed differently among products markets.<sup>211</sup> The money is being spent on items of importance to the noncustodial parent rather than on items of importance to the custodial parent.<sup>212</sup> These results directly affect commercial markets.<sup>213</sup> Because a large amount of money is diverted from one use to another in the economic marketplace, child support delinquency affects interstate commerce.<sup>214</sup> The question then becomes whether \$2 billion per year is considered substantial. Many courts have held that it is.<sup>215</sup>

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207. The CSRA's legislative history states clearly that one of the purposes of the Act is to encourage payments of child support for children who live in a separate state from their noncustodial parents. See *House Hearing, supra* note 5, at 6 (statement of Rep. Hyde); *Senate Hearing, supra* note 143, at 2 (statement of Sen Kohl); H.R. REP. No. 102-771, at 4 (1992).

208. For an explanation of the \$2 billion figure, see *supra* note 195.

209. See *United States v. Sage*, 906 F. Supp. 84, 90 (D. Conn. 1995), *aff'd*, 92 F.3d 101 (2d Cir. 1996) ("The non-custodial parent reaps an economic gain each time a support payment is withheld, while the offspring suffers an economic loss.").

210. See *id.* ("[T]he non-payment of the 'past due support obligation' will reduce the child's consumption of goods in interstate commerce.").

211. See *id.* ("A shift in interstate market demand occasioned by non-payment would cause businesses to ship their goods to different states to accommodate this shift.").

212. See *id.* at 91-92.

213. See *id.*

214. See *id.* at 92.

215. See *United States v. Lewis*, 936 F. Supp. 1093, 1100 (D.R.I. 1996); *United States v. Ganapowski*, 930 F. Supp. 1076, 1083 (M.D. Pa. 1996) ("That billions of dollars in child support goes unpaid annually is evidence both that the activity is economic in nature and that the effect of not paying child support is substantial."); *United States v. Sims*, 936 F. Supp. 817, 819-20 (N.D. Okla. 1996); *United States v. Johnson*, 940 F. Supp. 911, 914 (E.D. Va. 1996) ("[T]he non-payment of child support creates an economic problem on a national scale."); *United States v. Nichols*, 928 F. Supp. 302, 310 (S.D.N.Y. 1996) ("[T]he payment of child support is an economic activity which[,] . . . viewed in the aggregate, has a substantial effect on interstate commerce."); *United States v. Sage*, 906 F. Supp. 84, 91 (D. Conn. 1995), *aff'd*, 92 F.3d 101 (2d Cir. 1996) ("The activity regulated in this case has a substantial effect on interstate commerce in part because states have been unable to enforce their own support orders through interstate enforcement efforts."); *id.* ("[T]he 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



*Indirect Effects of Delinquent Child Support Payments on Interstate Commerce*

Indirect effects of interstate child support delinquencies are numerous but harder to quantify. Mothers, for example, are pushed into poverty because they do not receive adequate child support.<sup>216</sup> Some of these women land on the welfare rolls; others do not.<sup>217</sup> Those that are on welfare rolls receive their child support from taxpayers.<sup>218</sup> Receipt of adequate child support (in contrast to its nonreceipt) also affects the economic well-being of single mothers; there is positive correlation between receipt of child support and female participation in the labor force.<sup>219</sup>

Children also are affected by child support delinquencies. Unmet child support obligations yield greater numbers of children growing up in poverty.<sup>220</sup> Children who grow up in poverty perform less well in school, have lower self-esteem, and tend to contribute to a cycle of poverty.<sup>221</sup> These effects are more direct and economically oriented than the effects that failed to save the Gun-Free School Zones Act.<sup>222</sup> Lower courts have based their holdings that the CSRA is constitutional on these effects on mothers and children.<sup>223</sup>

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effects on interstate commerce.”).

216. See H.R. REP. NO. 102-771, at 5 (1992).

217. See Robins, *supra* note 157, at 769; see also CHILD SUPPORT 1991, *supra* note 3 (breaking down statistically the percentages of single parent households that fell below the poverty line in 1991).

218. See *House Hearing*, *supra* note 5, at 2 (statement of Rep. Schumer); *Senate Hearing*, *supra* note 143, at 7 (statement of Sen. Shelby).

219. See Graham & Beller, *supra* note 159, at 669.

220. See H.R. REP. NO. 102-771, at 5.

221. See *House Hearing*, *supra* note 5, at 1-2 (statement of Rep. Schumer); Teachman, *supra* note 156, at 358-71.

222. Cf. *United States v. Sage*, 906 F. Supp. 84, 89-90 (D. Conn. 1995) (discussing child support payments as commerce and comparing those payments to the possession of a handgun in a school zone), *aff'd*, 92 F.3d 101 (2d Cir. 1996).

223. See *supra* note 214 and accompanying text; see also *Sage*, 906 F. Supp. at 91 (relying on a legislative recitation of similar effects for its determination that such effects are substantial).

*Delinquent Child Support Payments: A Local or National Issue?*

One final consideration must be addressed before the *Lopez* analysis can be put to rest; namely, whether upholding the CSRA would represent an expansion of the national government into what should be a "truly local" realm.<sup>224</sup> Family law, which encompasses child support issues, is generally considered to be an area of state sovereignty.<sup>225</sup> In light of the traditional view of family law, the CSRA, which regulates child support enforcement, can be viewed as an intrusion into state sovereignty.<sup>226</sup> The real question, though, is whether it is an unjust intrusion, i.e., one beyond Congress's power.<sup>227</sup> *Lopez* reiterated that whatever exerts a substantial effect on interstate commerce is within the realm of the commerce power.<sup>228</sup> The majority of lower courts considering the issue have held that the CSRA is

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224. *United States v. Lopez*, 115 S. Ct. 1624, 1634 (1995).

225. The actual adjudication of a child support order or a conflict relating to child custody is considered to be local as indicated by its exclusion from federal diversity jurisdiction under an abstention doctrine known as the Domestic Relations Exception. See Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C. L. REV. 669, 669-70 (1995). This exception first appeared in *Barber v. Barber*, 62 U.S. (21 How.) 582 (1858) and is based on the theory that regulation of family obligations and rights falls within the sphere of state sovereignty. See Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1821-22 (1995) (citing *In re Burrus*, 136 U.S. 586, 593-94 (1890)). Although beyond the scope of this Note, the propriety and scope of the Domestic Relations Exception both are open to scholarly debate. See Naomi R. Cahn, *Family Law, Federalism and the Federal Courts*, 79 IOWA L. REV. 1073, 1087-94 (1994) (arguing that none of the rationales provided for continuing to allow the exception are satisfactory); Stein, *supra*, at 679-80. The criminal nature of the CSRA, however, brings it within the jurisdiction of federal courts despite of the exception. See *United States v. Kegel*, 916 F. Supp. 1233, 1235-36 (M.D. Fla. 1996) (discussing the applicability of the Domestic Relations Exception to the CSRA and finding it inapposite).

226. In fact, the cases that have held the CSRA to be unconstitutional have focused on the statute as an unnecessary intrusion into state prerogatives by the federal government in violation of principles of federalism and comity. See *United States v. Bailey*, 902 F. Supp. 727, 728 (W.D. Tex. 1995); *United States v. Mussari*, 894 F. Supp. 1360, 1363 (D. Ariz. 1995), *rev'd*, 95 F.3d 787 (9th Cir. 1996); *United States v. Schroeder*, 894 F. Supp. 360, 363 (D. Ariz. 1995), *rev'd sub nom. Mussari*, 95 F.3d 787.

227. See *Lopez*, 115 S. Ct. at 1628-29.

228. See *id.* at 1629-34.

not an example of Congress overstepping its bounds and preempting an area of state sovereignty having no effect on interstate commerce.<sup>229</sup> In this case, Congress has decided to legislate on only one discrete, interstate portion of a much larger child support collection problem.<sup>230</sup> The portion that Congress has decided to control is the interstate portion, which, according to the lower courts, falls within an area of federal power by virtue of the Commerce Clause.<sup>231</sup> Thus, the majority of court decisions have held that Congress has stayed within its Commerce Clause boundaries with the CSRA.

Those courts that have held the CSRA to be unconstitutional have relied in large part on *Lopez*'s admonition that a distinction exists between the "truly local" and the "truly national" and that such a distinction must be maintained to protect federalism.<sup>232</sup> Child support, according to these courts, is a traditional area of state sovereignty beyond the scope of federal regulation.<sup>233</sup> Though the cases holding the CSRA to be unconstitutional have applied the three-pronged *Lopez* analysis, their holdings are based on a more expansive evaluation of the commerce power, one that steps beyond the literal application of *Lopez*'s three-pronged test and accounts directly for the intrusiveness of the

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229. See *United States v. Lewis*, 936 F. Supp. 1093, 1098 (D.R.I. 1996); *United States v. Ganapowski*, 930 F. Supp. 1076, 1083 (M.D. Pa. 1996); *United States v. Nichols*, 928 F. Supp. 302, 313 (S.D.N.Y. 1996); *United States v. Collins*, 921 F. Supp. 1028, 1036 (W.D.N.Y. 1996); *United States v. Johnson*, 940 F. Supp. 911, 915 (E.D. Va. 1996); *United States v. Sims*, 936 F. Supp. 817, 820 (N.D. Okla. 1996); *Kegel*, 916 F. Supp. at 1235; *United States v. Sage*, 906 F. Supp. 84, 91 (D. Conn. 1995), *aff'd*, 92 F.3d 101 (2d Cir. 1996); *United States v. Hopper*, 899 F. Supp. 389, 393 (S.D. Ind. 1995); *United States v. Murphy*, 893 F. Supp. 614, 616 (W.D. Va. 1995), *vacated for improper venue*, 934 F. Supp. 736 (W.D. Va. 1996); *United States v. Hampshire*, 892 F. Supp. 1327, 1329 (D. Kan. 1995), *aff'd*, 95 F.3d 999 (10th Cir. 1996).

230. See *House Hearing*, *supra* note 5, at 11 (statement of Rep. Hyde). For a full statistical analysis of child support issues for the year 1991, see CHILD SUPPORT 1991, *supra* note 3.

231. See U.S. CONST. art. I, § 8, cl. 3.

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

233. See *United States v. Parker*, 911 F. Supp. 830, 843 (E.D. Pa. 1995); *United States v. Bailey*, 902 F. Supp. 727, 730 (W.D. Tex. 1995); *United States v. Mussari*, 894 F. Supp. 1360, 1368 (D. Ariz. 1995), *rev'd*, 95 F.3d 787 (9th Cir. 1996); *United States v. Schroeder*, 894 F. Supp. 360, 368-69 (D. Ariz. 1996), *rev'd sub nom. Mussari*, 95 F.3d 787.

legislation on state prerogatives.<sup>234</sup>

CONCLUSION: USING THE LESSONS LEARNED FROM LOWER COURT ASSESSMENT OF THE CONSTITUTIONALITY OF THE CSRA

Lower courts' treatment of the constitutionality of the CSRA directs us to the central, practical question raised by *Lopez*: What does it mean that the Supreme Court invalidated a statute under the Commerce Clause for the first time in over fifty years? At this point, the answer is unsatisfactory and unclear: "*Lopez* means something, maybe."

*Lopez* has fueled a tremendous resurgence in Commerce Clause-based challenges to federal legislation.<sup>235</sup> The reinvigoration of what once was considered to be a virtually dead area of constitutional jurisprudence has swamped the courts with numerous challenges, primarily to criminal statutes. Thus far, the massive influx of challenges has proceeded through the circuit courts of appeals and has yielded little change in the lower courts' jurisprudential vision of the Commerce Clause.<sup>236</sup> Statutes, for the most part, have been upheld uniformly as constitutional exercises of congressional commerce power.<sup>237</sup> Though the question of federalism's demarcation lines has been raised on numerous occasions, those lines have not shifted in response to *Lopez*.

One can point to a number of factors to explain this phenomenon. Some are measures of the imprecise language and vagaries of the *Lopez* decision itself. Others are more fundamental questions of constitutional structure and values. If the Supreme Court's goal in handing down *Lopez* was to reinvigorate federalism, and not merely to spawn a wave of fruitless constitutional litigation, then the Court needs to address both the technical and theoretical elements of the inquiry in a future case.

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234. "Legal and economic arguments to the contrary notwithstanding, a statute which sounds, walks, and looks like a duck must be a duck statute. 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." *Bailey*, 902 F. Supp. at 730 (citations omitted).

235. See *supra* note 96 and accompanying text.

236. See *supra* note 96 and accompanying text.

237. See *supra* note 96 and accompanying text.

The technical questions left in the wake of *Lopez* relate to standards of review for Commerce Clause challenges. The Court needs to clarify whether a rational basis test still applies to Commerce Clause challenges. If the Court intends that a nondeferential standard of review now apply, it should stop using the appellation "rational basis" when describing the test. Calling the test "intermediate scrutiny" would enable the lower courts to quickly identify that the old precedents, though relied upon to formulate the *Lopez* test, are to be applied with new vigor.

Similarly, the Court also needs to address the role of congressional decision making, specifically regarding legislative findings and history. Appropriate findings that clearly outline the interstate nexus of particular legislation made by Congress during consideration and debate of legislation may yield deferential review. If the Court's intention in *Lopez* was to insist on clear legislative reasoning for Congress's broad use of its commerce power, the imposition of a deferential standard of review when adequate findings are present would meet that goal. Of course, some debate remains over whether congressional findings alone are enough to prevent overreaching. If *Lopez* was meant to reinvigorate federalism as a constitutional value, then perhaps the same intermediate standard of review should apply regardless of congressional findings. The structural issue of the federalism debate (whether Congress has stepped over the line of federal authority in enacting legislation) is not squarely addressed by insistence on proper congressional findings.

In the final analysis, technical issues related to the standard of review are not the most important questions that must be clarified by the Court if it chooses to revisit *Lopez*. Federalism's real question—how to balance federal and state power—is not straightforwardly addressed by the substantial effects test stated in *Lopez*. To promote federalism, the Court should transform Commerce Clause inquiry into a balancing test. Such a test would evaluate congressional legislation for its intrusiveness into areas of state sovereignty. The appropriate inquiry should be whether the federal interest is strong enough to displace state sovereignty in the regulated area. The substantial effects test, when applied as a quantitative analysis of the economic

impact of legislation, does not adequately address the core issue of federalism: When has federal power gone too far?

If the Supreme Court wants to bolster federalism, the substantial effects test should be enhanced to include an explicit consideration of the balance of state and federal power. As a threshold matter, the Court would inquire into the substantial effects the legislation has on the national economy by applying the current substantial effects test. If the legislation has no such effects, then it should fail as falling outside of the Commerce Clause's legislative parameters. If substantial effects exist, the analysis must proceed to address the heart of the federalism question—power. The Court should ask an additional question: Is the federal interest in regulating an issue strong enough to outweigh state sovereignty interests?

The addition of this second balancing factor to the substantial effects test outlined in *Lopez* gives content to the assertion that there are some areas that are "truly local" and therefore beyond congressional power. This additional inquiry would enable lower courts to evaluate more strenuously congressional enactments for intrusion into state prerogatives. With the imposition of a new balancing test, *Lopez*'s theoretical and practical implications would be more closely aligned, transforming it from its current status of theoretical bang and practical whimper into an effective shift in jurisprudential vision.

*Sara L. Gottovi*