

**AN UTTER DISREGARD FOR PRECEDENT:  
MISCONSTRUING COMMERCE CLAUSE  
PRECEDENT IN *UNITED STATES*  
V. LOPEZ**

The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally, but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.<sup>1</sup>

## INTRODUCTION

In *Gibbons v. Ogden*,<sup>2</sup> the United States Supreme Court issued one of the earliest interpretations of the Commerce Clause and held that only Congress possessed the power to regulate interstate commerce.<sup>3</sup> Since the 1824 decision of *Gibbons*, the Supreme Court has recognized that Congress has the authority to regulate articles of commerce, instrumentalities that restrain the flow of commerce, and intrastate activities that substantially affect commerce.<sup>4</sup> Following *Gibbons*, the regulation of intrastate activities proved to be a source of dispute between the legislative and the judicial branches, because the Court often interjected its own idea of what constituted commerce and struck down regulations that did not comport with its views.<sup>5</sup> Since

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1. *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824).

2. 22 U.S. 1 (1824).

3. *Gibbons v. Ogden*, 22 U.S. 1, 196-97 (1824).

4. See *Perez v. United States*, 402 U.S. 146, 150 (1971). The United States Supreme Court stated that:

[t]he Commerce Clause reaches . . . three categories of problems. First, in the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods (18 U.S.C. §§ 2312-2315) or of persons who have been kidnapped (18 U.S.C. § 1201). Second, protection of the instrumentalities of interstate commerce, as for example, the destruction of an aircraft (18 U.S.C. § 32), or persons or things in commerce, as, for example, thefts from interstate shipments (18 U.S.C. § 659). Third, those activities affecting commerce.

*Perez*, 402 U.S. at 150.

5. See generally *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) (stating that "mining brings the subject matter of commerce into existence. Commerce disposes of it."); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546-50 (1935) (holding that Congress could not prescribe wage and hour laws for local poultry employers engaged in commerce because such activities did not directly affect interstate commerce); *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918), *overruled by United States v. Darby*, 312 U.S.

1941, however, the Court has not made an independent determination of whether an activity fell within the reach of the commerce power, but instead has simply asked whether Congress could have rationally concluded that the regulated intrastate activity substantially affected interstate commerce.<sup>6</sup>

Recently, in *United States v. Lopez*,<sup>7</sup> the United States Supreme Court determined that congressional regulation of firearms in school zones "had nothing to do with commerce."<sup>8</sup> The Supreme Court stated that, because the act of possessing a firearm on school property was unrelated to commerce, the Gun-Free School Zones Act of 1990 ("§ 922(q)") could not be upheld as a regulation of intrastate economic activities that affected commerce.<sup>9</sup> The Court found that § 922(q)'s legislative history failed to show whether Congress had actually determined that the regulated activity substantially affected interstate commerce.<sup>10</sup> The Court concluded that the validity of § 922(q) was questionable, because, if upheld, Congress would have almost unlimited power to regulate commerce even in areas traditionally sovereign to the states.<sup>11</sup>

This Note will first review the facts and holding of *United States v. Lopez*.<sup>12</sup> This Note will then examine the prior cases in which the Court has evaluated constitutional challenges to federal regulations of intrastate activities.<sup>13</sup> Finally, this Note will scrutinize the Court's decision in *Lopez* and will criticize the Court for 1) holding that the

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100 (1941) (finding that congressional regulation of goods manufactured by child labor was not within the scope of the commerce power).

6. See, e.g., *Maryland v. Wirtz*, 392 U.S. 183, 192 (1968) (holding that once Congress has declared that an entire class of activities affects interstate commerce, the Court's only responsibility is to determine whether the class falls within the commerce power); *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964) (stating that where Congress deems that a particular activity affects commerce, the Court's only inquiry is whether Congress has a "rational basis for finding a chosen regulatory scheme necessary to the protection of commerce"); *United States v. Darby*, 312 U.S. 100, 120-21 (1941) (holding that when Congress has said that an activity affects commerce, "the only function of the courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power").

7. 115 S. Ct. 1624 (1995).

8. *United States v. Lopez*, 115 S. Ct. 1624, 1630-31 (1995).

9. *Lopez*, 115 S. Ct. at 1630-31. See 18 U.S.C. § 922(q)(1)(A) (1988 Supp. V) which provides in pertinent part: "It shall be 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." *Id.*; 18 U.S.C. § 922(q)(1)(A) (1988 Supp. V) is now known as 18 U.S.C. § 922(q)(2)(A) (West Supp. 1995). See 18 U.S.C. § 921(a)(25) in which Congress defines a school zone as "in, or on the grounds of, a public, parochial or private school . . . or within a distance of 1,000 feet from the grounds of a public, parochial or private school." *Id.*

10. *Lopez*, 115 S. Ct. at 1630-32.

11. *Id.* at 1632.

12. 115 S. Ct. 1624 (1995); see *infra* notes 15-97 and accompanying text.

13. See *infra* notes 98-261 and accompanying text.

possession of a firearm within 1,000 feet of a school zone did not substantially affect interstate commerce because the regulated activity exuded a noneconomic nature, 2) stating that the commerce power might not be able to reach areas where states historically have been sovereign, 3) placing importance on express findings by Congress that the regulated activity had an effect upon commerce, and 4) determining that § 922(q) could not have been upheld as a regulation of articles of commerce.<sup>14</sup>

## FACTS AND HOLDING

On March 10, 1992, school officials at Edison High School in San Antonio, Texas, acting on an anonymous tip, asked Alfonso Lopez, Jr. whether he was carrying a firearm.<sup>15</sup> Lopez admitted that he was concealing a .38 caliber handgun.<sup>16</sup> Though Lopez had not loaded the gun, Lopez did have five bullets in his possession.<sup>17</sup> Lopez claimed that the gun was not his but rather that an acquaintance had given him the firearm so that Lopez could deliver the handgun to another acquaintance for use in gang warfare.<sup>18</sup> Lopez stated that he was to receive forty dollars for the transaction.<sup>19</sup>

State officials arrested Lopez and charged him with violating a state law making possession of a firearm on school premises illegal.<sup>20</sup> The next day, Lopez was also charged with violating the federal Gun-Free School Zones Act ("§ 922(q)") in a one-count indictment.<sup>21</sup> Sec-

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14. See *infra* notes 262-436 and accompanying text.

15. *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993).

16. *Lopez*, 115 S. Ct. at 1345.

17. *Lopez*, 2 F.3d at 1345.

18. *Id.*

19. *Id.*

20. *Id.* at 1345 n.1.

21. *Id.* See 18 U.S.C. § 922(q)(1)(A) (1988 Supp. V). The Gun-Free School Zones Act provides in pertinent part:

(1)(A) It shall be 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. (B) Subparagraph (A) shall not apply to the possession of a firearm — (i) on private property not part of school grounds; (ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtain such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license; (iii) which is — (I) not loaded; and (II) in a locked container, or locked firearms rack which is on a motor vehicle; (iv) by an individual for use in a program approved by a school in a school zone; (v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual; (vi) by a law enforcement officer acting in his or her official capacity; or (vii) that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by the school

tion 922(q) makes it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."<sup>22</sup> The state dropped its charges against Lopez because of the federal indictment.<sup>23</sup>

In the United States District Court for the Western District of Texas, Lopez pled not guilty to the allegation against him and moved to dismiss the charge on the ground that § 922(q) was "unconstitutional, as it is beyond the power of Congress to legislate control over our public schools."<sup>24</sup> The district court denied the motion, stating that § 922(q) was "a constitutional exercise of Congress' well-defined power to regulate activities in an[d] affecting commerce, and the 'business' of elementary, middle and high schools . . . affects interstate commerce."<sup>25</sup> After Lopez waived his right to a jury trial, the district court found that Lopez violated federal law and sentenced him to a six month prison term and two years of supervised release.<sup>26</sup> Subsequently, Lopez appealed his conviction.<sup>27</sup>

On appeal before the United States Court of Appeals for the Fifth Circuit, Lopez challenged his conviction on the grounds that § 922(q) exceeded Congress' power to legislate under the Commerce Clause and violated the Tenth Amendment.<sup>28</sup> The government argued that § 922(q) was a "permissible exercise of Congress' power under the Commerce Clause."<sup>29</sup> The Fifth Circuit agreed with Lopez and re-

authorities. (2)(A) Except as provided in subparagraph (B), it shall be unlawful for any person, knowingly or with reckless disregard for the safety of another, to discharge or attempt to discharge a firearm at a place that the person knows is a school zone. (B) Subparagraph (A) shall not apply to the discharge of a firearm — (i) on private property not part of school grounds; (ii) as part of a program approved by a school in the school zone, by an individual who is participating in the program; (iii) by an individual in accordance with a contract entered into between a school in a school zone and the individual or an employer of the individual; or (iv) by a law enforcement officer acting in his or her official capacity. (3) Nothing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun-free school zones as provided in this subsection.

18 U.S.C. § 922(q)(1)(A) (1988 Supp. V). See 18 U.S.C. § 921(a)(25) (1988 Supp. V).

22. 18 U.S.C. § 922(q)(1)(A) (1988 Supp. V). A "school zone" is defined as "in, or on the grounds of, a public, parochial or private school or within a distance of 1,000 feet from the grounds of a public, parochial or private school." 18 U.S.C. § 921(a)(25) (1988 Supp. V).

23. *Lopez*, 2 F.3d at 1345 n.1.

24. *Id.* at 1345.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 1346. The Tenth Amendment provides in pertinent part 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.

29. *Lopez*, 2 F.3d at 1346. The Commerce Clause provides in pertinent part that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

versed the lower court decision, holding that the Commerce Clause did not authorize Congress to regulate the type of activities found in § 922(q).<sup>30</sup> The Fifth Circuit stated that “Congress surely intended to make the possession of a firearm near a school a federal crime, but it has not taken the steps necessary to demonstrate that such an exercise is within the scope of the Commerce Clause.”<sup>31</sup> The Fifth Circuit noted that neither the legislative history nor the statute itself reflected a congressional determination that the regulated activity was related to interstate commerce.<sup>32</sup> The Fifth Circuit stated that “[w]here Congress has made findings . . . that [a] regulated activity substantially affects interstate commerce, the courts must defer ‘if there is any rational basis for’ the finding.”<sup>33</sup> However, the Fifth Circuit concluded that “courts cannot properly perform their duty to determine if there is any rational basis for a [c]ongressional finding if neither the legislative history nor the statute itself reveals any such relevant finding.”<sup>34</sup> The United States government appealed the Fifth

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30. *Lopez*, 2 F.3d at 1367-68.

31. *Id.* at 1365-66.

32. *Id.* at 1366. The United States Court of Appeals for the Fifth Circuit stated that, though the United States Supreme Court repeatedly held that Congress need not make express findings that a particular activity affected commerce before it could legislate, the Supreme Court still looked to either congressional findings or the language of the statute itself when reviewing the validity of federal law. *Id.* at 1362.

33. *Lopez*, 2 F.3d at 1363.

34. *Id.* at 1363-64. The United States Court of Appeals for the Fifth Circuit also struck down the statute because § 922(q) did not require the government to establish a nexus between the activity sought to be regulated and interstate commerce. *Id.* Section 922(q) made it illegal to possess a firearm within a school zone, but § 922(q) did not require the government to prove any connection between gun possession and commerce. 18 U.S.C. § 922(q). The government also argued that § 922(q) was similar to other federal statutes that regulated firearms. *Lopez*, 2 F.3d at 1347-48. The Fifth Circuit disagreed and stated that the vast majority of federal firearm regulations contained a commerce nexus “and require[d] the government to prove a connection to commerce.” *Id.* at 1347. The Fifth Circuit noted that few other statutes lacked this nexus requirement; unlike § 922(q), these other statutes pertained to commercial transactions and each targeted such individuals as dealers, importers, or manufacturers. *Id.* at 1348 n.9. The Fifth Circuit also distinguished § 922(q) from § 922(o), which made it unlawful for “any person to transfer or possess a machine-gun”; the Fifth Circuit stated that § 922(o) was “restricted to a narrow class of highly destructive, sophisticated weapons.” *Id.* at 1356. The Fifth Circuit noted that possession of a machine-gun involved a commercial activity. *Id.*

The Fifth Circuit also found that this case implicated the Tenth Amendment, citing the opinion of Justice Sandra Day O'Connor in *New York v. United States*, 505 U.S. 144 (1992), in which Justice O'Connor stated that the Tenth Amendment and the Commerce Clause were “mirror images of each other.” *Lopez*, 2 F.3d at 1346 (quoting *United States v. New York*, 505 U.S. at 162). The Fifth Circuit stated that, though the Supreme Court had held that the Tenth Amendment did not place any limits on the Commerce Clause or Congress' power under the Clause, the mere existence of the Tenth Amendment suggested that “the reach of [the commerce] power is not unlimited, else there would be nothing on which the Tenth Amendment could operate.” *Id.* at 1347.

Circuit decision.<sup>35</sup>

The United States Supreme Court granted certiorari in April of 1994.<sup>36</sup> On appeal, the Supreme Court affirmed the Fifth Circuit's ruling and held that possession of a firearm within a school zone was a noncommercial activity that in no way substantially affected interstate commerce.<sup>37</sup> The Court began its discussion with the history of Commerce Clause jurisprudence and identified three classes of activities that Congress could regulate pursuant to the commerce power.<sup>38</sup> The Court stated that Congress may: 1) "regulate the use of the channels of interstate commerce"; 2) "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"; and 3) regulate those activities that substantially affect interstate commerce.<sup>39</sup> The Court determined that, because § 922(q) involved neither the regulation of the use of commercial channels nor articles of commerce themselves and because the law was not an attempt to protect interstate commerce from intrastate activities, the Court could uphold the regulation only if the regulation fell within the category of activities that bore a substantial relation to interstate commerce.<sup>40</sup>

The Court stated that § 922(q)'s prohibition of firearms within school zones was impermissible for two principal reasons.<sup>41</sup> First, the Court found that the regulated activity was outside the reach of the commerce power because § 922(q) constituted a regulation of a noneconomic intrastate activity.<sup>42</sup> The Court stated that, where commercial activity substantially affects interstate commerce, the Court will sustain regulation of that activity.<sup>43</sup> The Court noted that it had upheld "a variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce."<sup>44</sup> However, the Court distinguished § 922(q) from other congressional acts that regulate intrastate activities, because "[§] 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, how-

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35. *United States v. Lopez*, 114 S. Ct. 1536 (1994).

36. *Lopez*, 115 S. Ct. at 1536.

37. *Id.* at 1634.

38. *Id.* at 1626-30.

39. *Id.* at 1629-30 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

40. *Id.* at 1630.

41. *See infra* notes 42-50 and accompanying text.

42. *Lopez*, 115 S. Ct. at 1630-31, 1634.

43. *Id.* at 1630.

44. *Id.*

ever broadly one might define those terms.”<sup>45</sup> Furthermore, the Court stated that the regulation of firearm possession was not “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”<sup>46</sup>

Second, the Court found that § 922(q) did not contain a jurisdictional element that would have required the government to show an explicit connection between the regulated activity and interstate commerce.<sup>47</sup> The Court was troubled by the fact that § 922(q) lacked an “express jurisdictional element” limiting its reach to a discrete set of firearm possessions affecting interstate commerce.<sup>48</sup> In addition, the Court found that neither the statute nor the legislative history expressly referred to the effects that gun possession in a school zone had on interstate commerce.<sup>49</sup> Although the Court agreed with the government “that Congress normally [was] not required to make formal findings as to the substantial burdens that an activity has on interstate commerce,” the Court stated that such findings would have enabled it to evaluate Congress’ judgment that the activity affected commerce.<sup>50</sup>

The Court dismissed each of the three arguments made by the government in support of its claim that the regulated activity substantially affected interstate commerce.<sup>51</sup> The government first contended that possession of a firearm in a school zone could result in violent crime and that the costs of this crime would be spread across the population by higher insurance premiums.<sup>52</sup> The Court responded that, if the “cost of crime” reasoning was to be determinative, Congress would then be able to regulate all violent crime as well as activities that might lead to violent crime.<sup>53</sup> Second, the government argued that violent crime served as a deterrent to interstate travel, causing individuals to avoid certain areas that they considered to be unsafe.<sup>54</sup> The Court stated that, if this argument prevailed, there would be no limit to congressional power, “even in areas such as criminal law enforcement or education where States historically have been sovereign.”<sup>55</sup> Third, the government claimed that the proximity of guns to school

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45. *Id.* at 1630-31.

46. *Id.* at 1631.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 1631-32.

51. *See infra* notes 52-59 and accompanying text.

52. *Lopez*, 115 S. Ct. at 1632.

53. *Id.*

54. *Id.* (citing *United States v. Evans*, 928 F.2d 858 (9th Cir. 1991)).

55. *Id.*

zones weakened the educational environment, creating a "less productive citizenry" and causing a downturn in the national economy.<sup>56</sup> The Court responded that, if Congress could regulate activities affecting the educational process, Congress could regulate all aspects of education because of the effect of education upon interstate commerce.<sup>57</sup> The Court stated that, while "Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process . . . [t]hat authority, though broad, does not include the authority to regulate each and every aspect of local schools."<sup>58</sup> Thus, because § 922(q) involved the regulation of a noncommercial, noneconomic activity and contained no legislative finding that the possession of a firearm in a school zone affected commerce, the Court struck down the statute.<sup>59</sup>

Justice John Paul Stevens dissented, contending that Congress had sufficient power to ban firearms in school zones.<sup>60</sup> Justice Stevens argued that guns were articles of commerce as well as articles that could restrain commerce.<sup>61</sup> Therefore, Justice Stevens stated that "Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use; it necessarily follows that Congress may also prohibit their possession in particular markets."<sup>62</sup>

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56. *Id.*

57. *Id.* at 1633.

58. *Id.*

59. See *supra* notes 41-58 and accompanying text. Justice Anthony Kennedy, joined by Justice Sandra Day O'Connor, concurred with the Court but offered a separate, more limited opinion. *Lopez*, 115 S. Ct. at 1634 (Kennedy, J., concurring). Justice Kennedy explained that *stare decisis* "mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system." *Id.* at 1637 (Kennedy, J., concurring). However, Justice Kennedy stated that the Court was not powerless to examine congressional attempts to tamper with the federal-state balance. *Id.* (Kennedy, J., concurring). Though Justice Kennedy acknowledged the contention that this balance was protected by the political process, Justice Kennedy emphasized that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Id.* at 1639 (Kennedy, J., concurring). Rather, Justice Kennedy insisted that precedent holds that the Court has a role in interpreting the meaning of the Commerce Clause. *Id.* at 1640 (Kennedy, J., concurring). Justice Kennedy reasoned that, because § 922(q) altered the federal balance by impinging upon areas of traditional state concern, "[a]bsent a stronger connection or identification" with interstate commerce, the Court was obligated to intervene on behalf of the states and invalidate the statute. *Id.* at 1640, 1642 (Kennedy, J., concurring).

60. *Lopez*, 115 S. Ct. at 1651 (Stevens, J., dissenting).

61. *Id.* (Stevens, J., dissenting).

62. *Id.* (Stevens, J., dissenting).

Justice David Souter also dissented, criticizing the Court for both the outcome and the method by which the Court reached its result.<sup>63</sup> Justice Souter disagreed with the Court's decision, arguing that the decision was at odds with "the rule of restraint to which the Court still wisely states adherence."<sup>64</sup> Justice Souter emphasized that, prior to this ruling, the Court regularly deferred to congressional judgment that a particular activity substantially affected commerce "if there is any rational basis for such a finding."<sup>65</sup> Justice Souter stated that, if the Court found that Congress' determination was a rational one, the only inquiry left for the judiciary was whether Congress chose a rational means to achieve a constitutional end.<sup>66</sup> Justice Souter stated that this judicial restraint reflected the Court's respect for the "institutional competence of the Congress on a subject expressly assigned to it by the Constitution."<sup>67</sup> However, Justice Souter claimed that the Court had taken a backwards step when the Court treated "deference under the rationality rule as subject to gradation according to the commercial or noncommercial nature of the immediate subject of the challenged regulation."<sup>68</sup>

Justice Souter then expressed his concern that the Court's opinion in *Lopez* significantly altered the traditional standard of rationality review in two respects.<sup>69</sup> Justice Souter stated that the Court had placed emphasis on the fact that § 922(q) operated in the areas of law enforcement and education — two areas that traditionally have been of state concern.<sup>70</sup> Justice Souter dismissed the Court's suggestion, however, that Congress' power was somewhat weaker when Congress

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63. *Id.* at 1651 (Souter, J., dissenting); see *infra* notes 64-72 and accompanying text.

64. *Lopez*, 115 S. Ct. at 1652 (Souter, J., dissenting). Justice Souter stated that, over the years, the Court's policy of giving Congress great deference and granting it wide latitude to make the determination of whether an article or activity was or affected commerce gave rise to the standard of rationality review. *Id.* at 1653 (Souter, J., dissenting) (quoting *Katzenbach v. McClung*, 379 U.S. 294, 303-304 (1964)) (stating "where we [the Court] find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end").

65. *Lopez*, 115 S. Ct. at 1651 (Souter, J., dissenting) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264, 276 (1981)).

66. *Id.* (Souter, J., dissenting) (quoting *Hodel*, 452 U.S. at 276).

67. *Id.* at 1651 (Souter, J., dissenting).

68. *Id.* at 1653 (Souter, J., dissenting). Justice Souter stated that "[t]he distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly." *Id.* at 1654 (Souter, J., dissenting).

69. *Id.* at 1654 (Souter, J., dissenting).

70. *Id.* (Souter, J., dissenting).

regulated these historical subjects of state power.<sup>71</sup> Justice Souter also found fault with the importance that the Court and the Fifth Circuit placed on legislative findings.<sup>72</sup> Justice Souter stated that, contrary to the statements of the lower court, the judiciary was not bound to defer to Congress' findings that an activity affected interstate commerce.<sup>73</sup>

Justice Stephen Breyer, joined by Justices Stevens, Souter, and Ginsburg, also dissented.<sup>74</sup> Justice Breyer argued that regulation of the possession of firearms within 1,000 feet of a school was well within Congress' commerce power.<sup>75</sup> Justice Breyer contended that there were "three basic principles of Commerce Clause interpretation."<sup>76</sup> First, Justice Breyer stated that the power of Congress to regulate commerce included the power to regulate local activities that significantly or substantially affected interstate commerce.<sup>77</sup> Second, Justice Breyer stated that the Court measured an activity's effect upon interstate commerce by "the cumulative effect of all similar instances (i.e., the effect of all guns possessed in or near schools)" and not by the effect of each individual act.<sup>78</sup> Third, Justice Breyer stated that the Court was obligated to give leeway to Congress' judgment that the regulated activity was substantially related to interstate commerce.<sup>79</sup> Justice Breyer stressed that, because the Constitution authorizes Congress alone to police the national economy, it is much more likely that Congress, rather than the Court, would make an accurate determination of what activities did or did not affect commerce.<sup>80</sup>

Justice Breyer then addressed whether Congress had a rational basis for concluding that the possession of a firearm within a school zone substantially affected interstate commerce.<sup>81</sup> Arguing that "commerce" is endowed with a practical meaning and not a technical or legal meaning, Justice Breyer contended that "the answer to this

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71. *Id.* at 1654 (Souter, J., dissenting) (citing *Maryland v. Wirtz*, 392 U.S. 183, 195-96 (1968); *United States v. Darby*, 312 U.S. 100, 114 (1941); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *United States v. Carolene Products Co.*, 304 U.S. 144, 147 (1938)).

72. *Id.* at 1655-56 (Souter, J., dissenting).

73. *Id.* (Souter, J., dissenting).

74. *Lopez*, 115 S. Ct. at 1657 (Breyer, J., dissenting).

75. *Id.* (Breyer, J., dissenting).

76. *Id.* (Breyer, J., dissenting).

77. *Id.* (Breyer, J., dissenting).

78. *Id.* at 1658 (Breyer, J., dissenting).

79. *Id.* (Breyer, J., dissenting). Justice Breyer also disagreed with the Court that the absence of congressional findings was crucial to the statute's validity, stating that the constitutionality of federal law did not depend upon legislative records and findings. *Id.* (Breyer, J., dissenting).

80. *Lopez*, 115 S. Ct. at 1658 (Breyer, J., dissenting).

81. *Id.* at 1659 (Breyer, J., dissenting).

question must be yes.”<sup>82</sup> Justice Breyer first suggested that Congress could have rationally found a connection between the regulated activity and commerce based upon numerous private and government reports showing the relationship between guns and education.<sup>83</sup> These reports demonstrated that four percent of high school students carried guns to school and that such activities contributed to violence throughout the schools and “significantly interfere[d] with the quality of education in those schools.”<sup>84</sup> Justice Breyer then stated that Congress also could have determined that education and interstate commerce were substantially related because “education, although far more than a matter of economics, has long been inextricably intertwined with the Nation’s economy.”<sup>85</sup> Justice Breyer acknowledged the importance of education in the economic growth of the country, the need for improved education in the wake of growing global competition, and the impact that education can have upon corporate decisions to locate businesses in particular areas.<sup>86</sup> Noting the relationships between firearms, education, and commerce and the substantial effects that each has on the others, Justice Breyer concluded that Congress could have reasonably found that a significant connection existed between gun possession and interstate commerce.<sup>87</sup>

Finally, Justice Breyer turned to what he identified as the three serious legal problems created by the Court’s holding.<sup>88</sup> First, Justice Breyer criticized the Court for failing to adhere to modern United States Supreme Court precedent.<sup>89</sup> Justice Breyer cited to several cases in which the Court upheld Congress’ power over certain activities that, in his opinion, had a less significant impact upon interstate commerce than gun possession.<sup>90</sup> Furthermore, Justice Breyer emphasized that “it is enough that the individual activity when multiplied into a general practice . . . contains a threat to the interstate economy that requires preventative regulation.”<sup>91</sup> Second, Justice

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82. *Id.* (Breyer, J., dissenting) (citing *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905)).

83. *Id.* at 1659 (Breyer, J., dissenting).

84. *Id.* (Breyer, J., dissenting).

85. *Id.* (Breyer, J., dissenting).

86. *Id.* at 1659-61 (Breyer, J., dissenting).

87. *Id.* at 1661 (Breyer, J., dissenting).

88. *Id.* at 1662 (Breyer, J., dissenting).

89. *Id.* (Breyer, J., dissenting).

90. *Id.* (Breyer, J., dissenting). See *Perez v. United States*, 402 U.S. 146, 154 (1971) (regulating extortionate credit transactions); *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964) (prohibiting discrimination at restaurants serving interstate customers and selling food that traveled in interstate commerce); *Daniel v. Paul*, 395 U.S. 298, 304-05, 308 (1969) (regulating an amusement park located several miles down a country road because food, 15 paddleboats, and a juke box came from outside the state).

91. *Id.* at 1663 (Breyer, J., dissenting) (quoting *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)).

Breyer attacked the Court for making a distinction between "commercial" and "non-commercial" activities.<sup>92</sup> Justice Breyer stated that, although the Court historically warned against using formulas that differentiated between certain types of activities such as those with "direct" and "indirect" effects upon commerce, the Court in *Lopez* ignored this mandate.<sup>93</sup> Justice Breyer also cited inconsistencies with the Court's characterizations of several Commerce Clause cases; where the Court saw prior cases as regulation of economic intrastate activities, Justice Breyer claimed that these same cases "focused on whether that intrastate activity affected interstate or foreign commerce."<sup>94</sup> Finally, Justice Breyer stated that the Court's holding created legal uncertainty in an area that was reasonably settled.<sup>95</sup> According to Justice Breyer, Congress had enacted over 100 sections of the United States Code including over twenty-five sections of criminal statutes that either used the words "affecting commerce" or contained no jurisdictional language at all.<sup>96</sup> Justice Breyer warned that this legal uncertainty would limit Congress' ability to promulgate criminal laws aimed at behavior that threatened the economic and social wellbeing of the nation.<sup>97</sup>

## BACKGROUND

### THE EVOLUTION OF THE COMMERCE POWER

Article I, section 8 of the United States Constitution grants Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."<sup>98</sup> Though the language of the Commerce Clause is relatively brief, its brevity belies the importance that the Commerce Clause has played in defining the

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92. *Id.* at 1663 (Breyer, J., dissenting).

93. *Id.* (Breyer, J., dissenting).

94. *Id.* (Breyer, J., dissenting). Justice Breyer stated that "although the majority today attempts to categorize *Perez*, *McClung* and *Wickard* as involving intrastate 'economic activity,' the Courts that decided each of those cases did not focus upon the economic nature of the activity regulated. Rather, they focused on whether that activity affected interstate or foreign commerce." *Id.* (Breyer, J., dissenting). Justice Breyer stated that, under *Wickard v. Filburn*, 317 U.S. 111 (1942), an activity, "though it may not be regarded as commerce," could be regulated if it "exert[ed] a substantial economic effect on interstate commerce." *Lopez*, 115 S. Ct. at 1663-64 (Breyer, J., dissenting) (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)). Moreover, Justice Breyer stated that, because the nation spent \$230 billion dollars on educational expenses in 1990 alone, Congress could have rationally concluded that education was an economic activity well within the scope of the commerce power as described by the Court. *Id.* at 1664 (Breyer, J., dissenting).

95. *Lopez*, 115 S. Ct. at 1664 (Breyer, J., dissenting).

96. *Id.* (Breyer, J., dissenting).

97. *Id.* at 1665 (Breyer, J., dissenting).

98. U.S. CONST. art. I, § 8, cl. 2.

scope of federal power.<sup>99</sup> Since the early days of the Constitution, Congress' authority to regulate commerce has been a subject of extensive and continuous review by the United States Supreme Court.<sup>100</sup> For years, the legislative and judicial branches of government struggled to determine the limits of the commerce power.<sup>101</sup> Today, however, the Supreme Court interprets the Commerce Clause as a complete grant of power and recognizes that Congress is the proper institution both to identify the commercial needs of the nation and to implement the policies necessary to accomplish these goals.<sup>102</sup> In evaluating congressional action implicating the Commerce Clause, the modern Court simply asks whether Congress had some rational argument for concluding that the regulated activity fell within the scope of the commerce power.<sup>103</sup> The following cases illustrate both the evolution of the Commerce Clause and how the Court has defined and redefined its interpretation of this constitutional grant of power.<sup>104</sup>

*Gibbons v. Ogden*<sup>105</sup> is one of the first cases in which the Court addressed the scope of Congress' authority to regulate interstate commerce.<sup>106</sup> Aaron Ogden and Thomas Gibbons were partners in a steamboat business that ferried passengers between New York City and Elizabethtown, New Jersey.<sup>107</sup> Ogden and Gibbons operated under an exclusive license that the New York Legislature granted to Robert Livingston and Robert Fulton who, in turn, licensed Gibbons and Ogden.<sup>108</sup> After Gibbons and Ogden terminated their relationship, Gibbons obtained a federal license to operate a steamboat on the same route.<sup>109</sup> Before the Court of Chancery of New York, Ogden sought and was granted an injunction to prevent Gibbons from running a competing line on the grounds that the competing line violated the exclusive grant of authority to Ogden.<sup>110</sup> The Court for the Trial of Impeachments and Correction of Errors of the State of New York

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99. 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW 355 (2nd ed. 1992) [hereinafter ROTUNDA & NOWAK].

100. GERALD GUNTHER, CONSTITUTIONAL LAW 93 (12th ed. 1991) [hereinafter GUNTHER].

101. ROTUNDA & NOWAK, *supra* note 99, at 356.

102. *Id.* at 356, 394.

103. *Id.* at 356.

104. See *infra* notes 105-246 and accompanying text.

105. 22 U.S. 1 (1824).

106. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 306 (2nd ed. 1988) [hereinafter TRIBE]. "The opinion [in *Gibbons*] today ranks as one of the most important in history." ROTUNDA & NOWAK, *supra* note 99, at 371.

107. GUNTHER, *supra* note 100, at 94.

108. *Id.*

109. *Id.* Gibbons obtained his license pursuant to an act of Congress. *Id.*

110. GUNTHER, *supra* note 100, at 94.

affirmed the lower court decision, and Gibbons appealed the decision to the United States Supreme Court.<sup>111</sup>

On appeal, the United States Supreme Court held that the power to regulate commerce was vested in Congress.<sup>112</sup> The Supreme Court first dismissed Ogden's claim that "commerce" encompassed only the exchange or trafficking of goods and did not include navigation.<sup>113</sup> The Court stated that "[c]ommerce, undoubtedly, is traffic, but it is something more — it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."<sup>114</sup> Next, the Court found that this commerce power extended to "every species of commercial intercourse between the United States and foreign nations" and to commerce "among the several States."<sup>115</sup> The Court noted that Congress was powerless to regulate intrastate commerce — commerce that was completely internal and did not extend to other states.<sup>116</sup> However, the Court stated that the stream of commerce did not stop at fictional state boundary lines, and when the stream of commerce entered other states, Congress had the power to regulate its flow.<sup>117</sup> Finally, the Court addressed the scope of the commerce power, stating that:

[i]t is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.<sup>118</sup>

While Congress' power was not without limits, the Court found that the "wisdom and the discretion of Congress . . . and the influence which their constituents possess at elections" were the sole restraints upon the Commerce Clause.<sup>119</sup> The Court further stated that "[t]hey are the restraints on which the people must often rely solely, in all representative governments."<sup>120</sup> The Court concluded that a narrower interpretation of the commerce power would severely weaken

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111. *Id.*

112. *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824). The Commerce Clause states that Congress shall have the power "to regulate Commerce with Foreign nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 2.

113. *Gibbons*, 22 U.S. at 189-93. Chief Justice John Marshall issued the opinion for the Court. *Id.* at 186.

114. *Gibbons*, 22 U.S. at 189-90.

115. *Id.* at 193-94.

116. *Id.* at 195.

117. *Id.* at 194-97.

118. *Id.*

119. *Id.* at 197.

120. *Id.*

the Constitution, leaving it "a magnificent structure . . . but totally unfit for use."<sup>121</sup>

Throughout the next century, the United States Supreme Court's decisions regarding Congress' authority to regulate intrastate activities affecting interstate commerce encompassed a variety of themes.<sup>122</sup> From 1824 to 1888, the Supreme Court rarely reviewed challenges to congressional action, but rather most litigation involved state legislation that infringed upon the dormant commerce power.<sup>123</sup> From 1888 to 1937, however, the Court frequently examined the constitutionality of federal regulations of intrastate activities.<sup>124</sup> In some instances, the Court permitted Congress to regulate those local activities directly related to interstate commerce.<sup>125</sup> For example, in the 1914 *Shreveport Rate Cases*,<sup>126</sup> the Court held that Congress could regulate intrastate rail rates, because the Court determined that this intrastate activity was so intertwined with interstate commerce that its regulation was necessary to protect national trade.<sup>127</sup> Yet, for the most part, the Court rejected the empirical test of *Gibbons* and substituted in its place a formalistic classification system that severely restricted congressional power.<sup>128</sup> In the majority of the cases decided during this period, the Court held that the Constitution precluded Congress from regulating intrastate activities such as production, manufacturing, and mining.<sup>129</sup> The Court stated that activities that directly affected interstate commerce were amenable to the commerce power but those activities with only an indirect effect were beyond Congress' reach.<sup>130</sup>

Then, in 1937, the Court affirmed Congress' power to regulate the national economy under the Commerce Clause when the Court upheld the constitutionality of the National Labor Relations Act ("Act") and rejected the distinction between direct and indirect effects upon com-

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121. *Id.* at 222.

122. *See infra* notes 123-246 and accompanying text.

123. *TRIBE, supra* note 106, at 306-07.

124. *Id.* at 307.

125. *Id.*

126. 234 U.S. 342 (1914). These cases were consolidated into one opinion. *Id.* at 345.

127. *Houston, E. & W. Texas R. Co. v. United States*, 234 U.S. 342, 351-52 (1914).

128. *TRIBE, supra* note 106, at 307.

129. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) (stating that "mining brings the subject matter of commerce into existence"); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546-50 (1935) (holding that Congress could not prescribe wage and hour laws for employers engaged in intrastate commerce because such activities did not directly affect commerce); *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (stating that "[c]ommerce succeeds to manufacture, and is not a part of it").

130. *Schechter Poultry Corp.*, 295 U.S. at 546; *E.C. Knight Co.*, 156 U.S. at 17; *Carter*, 298 U.S. at 308.

merce.<sup>131</sup> In *National Labor Relations Board v. Jones & Laughlin Steel Corporation*,<sup>132</sup> the federal government charged a steel producer with violating the Act by "engaging in unfair labor practices affecting commerce."<sup>133</sup> Specifically, the National Labor Relations Board ("NLRB") claimed that the Jones & Laughlin Steel Corporation ("Corporation") discriminated in the hiring and firing of union members and that the Corporation coerced its employees to disrupt union operations.<sup>134</sup> Though the NLRB ordered the Corporation to end these labor practices, the United States Court of Appeals for the Fifth Circuit rescinded the NLRB's petition and struck down the Act on the grounds that the Act was outside the federal power.<sup>135</sup> The NLRB appealed the decision of the Fifth Circuit.<sup>136</sup>

On appeal, the United States Supreme Court reversed the Fifth Circuit and upheld the validity of the Act.<sup>137</sup> The Supreme Court rejected, first, the argument that the Act was an attempt to regulate all industry, including those activities solely intrastate in nature.<sup>138</sup> The Court stated that, while the Act empowered the NLRB to eliminate any unfair labor practice affecting commerce, the Act had not extended this authority to all labor relationships not directly related to interstate commerce.<sup>139</sup> While the distinction between national and local activities of commerce was essential to the federal-state balance of power, the Court found that the language of the Act sufficiently lim-

131. See *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

132. 301 U.S. 1 (1937).

133. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 22 (1937). The Court briefly summarized the National Labor Relations Act of 1935, 29 U.S.C. §§ 151 *et seq.* The Court stated that Section 1:

sets forth the findings with respect to the injury to commerce resulting from the denial by employers of the right of employees to organize and from the refusal of employers to accept the procedure of collective bargaining. There follows a declaration that it is the policy of the United States to eliminate these causes of obstruction to the free flow of commerce.

*Jones & Laughlin Steel Corp.*, 301 U.S. at 22-23. Section 2 "defines the terms it uses, including the terms 'commerce' and 'affecting commerce.'" *Id.* at 23-24. Sections 3 through 6 create the National Labor Relations Board and prescribe its organization. *Id.* at 24. Section 7 "sets forth the rights of employees to self-organization and to bargain collectively through representatives of their own choosing." *Id.* Section 8 defines "unfair labor practices," and Section 9 "lays down rules as to the representation of employees for the purpose of collection bargaining." *Id.* Section 10 authorizes the Board to petition designated courts for enforcement of its orders to cease and desist unfair labor practices. *Id.*

134. *Jones & Laughlin Steel Corp.*, 301 U.S. at 22.

135. *Id.*

136. *Id.*

137. *Id.* at 49. Chief Justice Charles Hughes delivered the opinion of the Court. *Id.*

138. *Jones & Laughlin Steel Corp.*, 301 U.S. at 29-32.

139. *Id.* at 31.

ited the NLRB's authority to those activities that burdened interstate commerce.<sup>140</sup>

The Court also dismissed the Corporation's claim that the NLRB lacked the power to regulate its employee relations because manufacturing and production did not constitute commerce.<sup>141</sup> The Court stated that the power to regulate commerce was plenary and could be exercised for the protection of commerce "no matter what the source of the dangers which threaten it."<sup>142</sup> The Court found that the determinative question was not whether the employees were engaged in production or manufacturing, but rather what effect their labor efforts had upon interstate commerce.<sup>143</sup> Though Congress could not control intrastate activities that had only an indirect effect on interstate commerce, the Court noted that such activities were amenable to regulation under the Commerce Clause if "they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions."<sup>144</sup> The Corporation was the nation's fourth largest producer and distributor of steel with operations in several states and Canada, and, therefore, the Court found that "the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce," and thus Congress could regulate this area.<sup>145</sup>

Four years later, in *United States v. Darby*,<sup>146</sup> the United States Supreme Court reviewed the constitutionality of another regulation of intrastate activities and upheld the validity of the Fair Labor Standards Act ("FLSA"), holding that Congress could regulate both articles of commerce and intrastate activities that substantially affected interstate commerce.<sup>147</sup> The federal government indicted Darby for transporting finished lumber across states lines; the finished lumber was produced by workers whom Darby paid less than the prescribed minimum wage or who had worked more than the prescribed maximum hour limit.<sup>148</sup> The United States District Court for the Southern

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140. *Id.*

141. *Id.* at 34, 40.

142. *Id.* at 37 (citations omitted).

143. *Id.* at 40.

144. *Id.* at 37 (citing *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

145. *Id.* at 26-27, 41-43.

146. 312 U.S. 100 (1941).

147. *United States v. Darby*, 312 U.S. 100, 116, 123 (1941).

148. *Darby*, 312 U.S. at 111. The Court stated that the purpose of the FLSA was to:

exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states.

District of Georgia quashed the indictment on the grounds that regulation of these intrastate activities was unconstitutional.<sup>149</sup>

The federal government appealed directly to the United States Supreme Court, and the Supreme Court reversed, upholding the constitutionality of the FLSA.<sup>150</sup> The Court first addressed whether Congress had the power to prohibit the shipment of certain goods in interstate commerce.<sup>151</sup> Darby conceded that Congress had the authority to exclude articles from commerce that Congress perceived to be "injurious to the public health, morals or welfare," but Darby argued that the FLSA regulated, not the articles themselves, but the wages and hours of persons producing the goods — activities that were regulated by the states.<sup>152</sup> In response, the Court stated that "[t]he power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.'"<sup>153</sup> The Court stated that, even if Congress had been motivated to legislate in this area by the poor working conditions, and not out of concern for the quality of the actual products, "[t]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control."<sup>154</sup> In upholding the FLSA, the Court noted that, since *Gibbons*, the Court had recognized that Congress could control the articles of commerce.<sup>155</sup>

Second, the Court stated that Congress possessed the power to prescribe minimum wage and maximum hour requirements, because employment was an intrastate activity that substantially affected interstate commerce.<sup>156</sup> Darby argued that his employees were not engaged in interstate commerce, because the production of goods was an intrastate activity far removed from the reaches of federal power.<sup>157</sup>

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*Id.* at 109-10.

149. *Darby*, 312 U.S. at 111.

150. *Id.* at 112, 125. Justice Harlan Stone delivered the opinion of the Court. *Id.* at 108. The Court stated that this "case comes here on direct appeal under § 238 of the Judicial Code as amended, 28 U.S.C. § 345 . . . which authorizes an appeal to this Court when the judgment sustaining the demurrer 'is based upon the invalidity, or construction of the statute upon which the indictment is founded.'" *Id.* at 108-09.

151. *Darby*, 312 U.S. at 112.

152. *Id.* at 113-14.

153. *Id.* at 114 (quoting *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824)).

154. *Id.* at 113-15.

155. *Id.* at 115. The one notable exception, the Court stated, occurred in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), when "a bare majority of the Court" found that Congress lacked the power to prohibit from commerce goods produced by child labor. *Darby*, 312 U.S. at 115-16. The Court found *Hammer* irreconcilable with the decision in *Darby* and overruled that case. *Id.* at 116-17.

156. *Darby*, 312 U.S. at 123.

157. *Id.* at 117-18.

However, the Court rejected this narrow interpretation of the Commerce Clause and stated that:

[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.<sup>158</sup>

The Court also stated that, when reviewing a statute promulgated under the Commerce Clause in which Congress found that a particular activity affected interstate commerce, the only duty of the judiciary was to “determine whether the particular activity regulated or prohibited [was] within the reach of the federal power.”<sup>159</sup> In addition, the Court noted that the Tenth Amendment did not affect the validity of the statute, because “the amendment [had] been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.”<sup>160</sup> Thus, because goods produced under unlawful labor conditions competed with those produced legally and affected interstate commerce, the Court upheld the wage and hour regulations.<sup>161</sup>

Just one year later, in *Wickard v. Filburn*,<sup>162</sup> the Court again held that Congress could legislate regarding those intrastate activities that were substantially related to interstate commerce.<sup>163</sup> In *Wickard*, a farmer challenged the validity of the Agricultural Adjustment Act (“Act”) which limited the amount of wheat that could be produced in any given year.<sup>164</sup> The Secretary of Agriculture imposed a penalty

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158. *Id.* at 118.

159. *Id.* at 120-21.

160. *Id.* at 123-24 (citing *United States v. Sprague*, 282 U.S. 716 (1931); *James Everard's Breweries v. Day*, 265 U.S. 545 (1924); *Champion v. Ames*, 188 U.S. 321 (1903); *Northern Securities Co. v. United States*, 193 U.S. 197, 198 (1904); *McCulloch v. Maryland*, 17 U.S. 316, 406 (1819); *Martin v. Hunter's Lessee*, 14 U.S. 304, 324-25 (1816)). 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. In *Darby*, the Court stated that the Tenth Amendment is “but a truism that all is retained which has not been surrendered.” *Darby*, 312 U.S. at 124. See *E.E.O.C. v. Wyoming*, 460 U.S. 226, 248 (1983) (Stevens, J., dissenting), in which Justice Stevens wrote in his dissent that neither the Tenth Amendment nor any other provision of the Constitution affords any support for that judicially constructed limitation on the scope of the federal power granted to Congress by the Commerce Clause. *E.E.O.C. v. Wyoming*, 460 U.S. 226, 248 (1983) (Stevens, J., dissenting).

161. *Darby*, 312 U.S. at 122-23.

162. 317 U.S. 111 (1942).

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

164. *Wickard*, 317 U.S. at 114-15.

against Filburn for violating the Act when Filburn planted more wheat than the government had allotted for his farm and used this excess in domestic consumption.<sup>165</sup> Filburn sought to enjoin the government from collecting the penalty assessed against him, and he also sought a declaratory judgment that the Act was invalid under the Commerce Clause.<sup>166</sup> The United States District Court for the Southern District of Ohio granted Filburn's request for an injunction and struck down the Act as violative of the Constitution.<sup>167</sup>

The Secretary of Agriculture appealed directly to the United States Supreme Court which reversed, holding that Congress could regulate agriculture because of agriculture's effect on interstate commerce.<sup>168</sup> Filburn argued that the Act regulated the production and consumption of wheat — activities that only indirectly affected commerce.<sup>169</sup> In contrast, the government argued that the statute regulated only the marketing of wheat and that the Act itself was a proper exercise of Congress' commerce power.<sup>170</sup> The Supreme Court first stated that any suggestions by previous members of the Court "which might be understood to lay it down that activities such as 'production,' 'manufacturing,' and 'mining' are strictly 'local' and . . . cannot be regulated under the commerce power because their effects upon interstate commerce are, as a matter of law, only 'indirect'" were mere dicta and provided no support for Filburn's claim.<sup>171</sup> The Court stated that the scope of the commerce power should not be measured by for-

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165. *Id.* at 114-15. The Court stated that:

[the] general scheme of the Agricultural Adjustment Act of 1938 as related to wheat [was] to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. Within prescribed limits and by prescribed standards the Secretary of Agriculture is directed to ascertain and proclaim each year a national acreage allotment for the next crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms. . . . The Act provides further that whenever it appears that the total supply of wheat as of the beginning of any marketing year, beginning July 1, will exceed a normal year's domestic consumption and export by more than 35 percent, the Secretary shall so proclaim not later than May 15 prior to the beginning of such marketing year; and that during the marketing year a compulsory national marketing quota shall be in effect with respect to the marketing of wheat. Between the issuance of the proclamation and June 10, the Secretary must, however, conduct a referendum of farmers who will be subject to the quota, to determine whether they favor or oppose it; and, if more than one-third of the farmers voting in the referendum do oppose, the Secretary must, prior to the effective date of the quota, by proclamation suspend its operation.

*Id.* at 115-16.

166. *Wickard*, 317 U.S. at 113-14.

167. *Id.* at 116-17.

168. *Id.* at 119, 124-25.

169. *Id.* at 119.

170. *Id.*

171. *Id.* at 119-120.

mulas asking whether activities such as production had a direct or an indirect impact on commerce.<sup>172</sup> The Court found that, once Congress believed an activity was related to the national economy, whether the activity was local in nature or had only an indirect effect on commerce mattered very little.<sup>173</sup> Thus, the Court rejected the distinction between an activity's "direct" or indirect" effect on commerce and held that "even if appellee's activity [was] local and [might] not be regarded as commerce," Congress could still regulate the activity if the activity substantially affected interstate commerce.<sup>174</sup>

The Court then reviewed the facts of the case and concluded that consumption of homegrown wheat did exert a substantial influence on interstate commerce.<sup>175</sup> The Court noted that, while the individual effect of Filburn's consumption of his wheat grown in violation of the Act might not have had a substantial impact upon the national economy, when combined with similar acts of others, the effect was far from trivial.<sup>176</sup> The Court reasoned that the conflict between the regulated persons and those who benefited from the regulation was "wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination."<sup>177</sup>

More than twenty years later, the Court in *Katzenbach v. McClung*<sup>178</sup> upheld the Civil Rights Act of 1964 ("Act") in which Congress utilized the Commerce Clause to combat racial discrimination.<sup>179</sup> In *McClung*, the owners of a restaurant sought an injunction to restrain the government from enforcing Title II of the Act against the restaurant which refused to serve African-American customers.<sup>180</sup> The

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172. *Id.* at 120.

173. *Id.* at 124.

174. *Id.* at 125.

175. *Id.* at 125-29.

176. *Id.* at 127-28.

177. *Id.* at 129.

178. 379 U.S. 294 (1964).

179. *Katzenbach v. McClung*, 379 U.S. 294, 304-05 (1964). See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (concluding "that the action of the Congress in the adoption of [the Civil Rights Act] as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years").

180. *McClung*, 379 U.S. at 295-97. The Court stated that:

Section 201(a) of Title II commands that all persons shall be entitled to the full and equal enjoyment of the goods and services of any place of public accommodation without discrimination or segregation on the ground of race, color, religion, or national origin; and § 201(b) defines establishments as places of public accommodation if their operations affect commerce or segregation by them is supported by state action. Sections 201(b)(2) and (c) place any 'restaurant . . . principally engaged in selling food for consumption on the premises' under the Act 'if . . . it serves or offer to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce.'

United States District Court for the Northern District of Alabama granted the restaurant owners' request, finding that "there was no demonstrable connection between food purchased in interstate commerce and sold in a restaurant and the conclusion of Congress that discrimination in the restaurant would affect that commerce."<sup>181</sup> The federal government appealed directly to the United States Supreme Court.<sup>182</sup>

The United States Supreme Court held that Title II, as applied to a restaurant receiving annually about \$70,000 in supplies shipped in interstate commerce, was a constitutionally permitted exercise of Congress' power under the Commerce Clause.<sup>183</sup> The Supreme Court first noted that, though Congress held extensive hearings on the Act, no formal findings were made showing that racial discrimination was sufficiently related to interstate commerce.<sup>184</sup> The restaurant argued that Congress was required to include such formal findings within the Act itself, but the Court noted that the absence of such findings was not "fatal to the validity of the statute."<sup>185</sup> Despite the lack of findings, the Court found that congressional testimony "afforded ample basis for the conclusion that established restaurants in such areas sold less interstate goods because of the discrimination, that interstate travel was obstructed directly by it, that business in general suffered and that many new businesses refrained from establishing there as a result of it."<sup>186</sup>

The Court also upheld Title II because the denial of service to African-Americans "imposed burdens upon the interstate flow of food and upon the movement of products [and persons] generally."<sup>187</sup> The Court stated that the commerce power extended to those intrastate activities that Congress concluded substantially affected interstate commerce.<sup>188</sup> Though a determination by Congress that an activity impacted on commerce did not preclude further review by the judiciary, the Court held that "where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce,

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*Id.* at 298. See 42 U.S.C. §§ 2000a *et seq.* (1988).

181. *McClung*, 379 U.S. at 297.

182. *Id.* at 295-97.

183. *Id.* at 298, 304. The Court stated that § 201(a) of Title II commands that "all persons shall be entitled to the full and equal enjoyment of the goods and services of any place of public accommodation without discrimination or segregation on the ground of race, color, religion, or national origin." *Id.* at 298.

184. *McClung*, 379 U.S. at 299.

185. *Id.* at 304.

186. *Id.* at 300.

187. *Id.* at 303-04.

188. *Id.* at 302 (citing *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942)).

our investigation is at an end.”<sup>189</sup> The Court concluded that, because Congress had a rational basis for finding that racial discrimination by restaurant owners and employees was a severe burden on interstate commerce, Title II was within the scope of the commerce power.<sup>190</sup>

On the same day that the Court issued its decision in *McClung*, the Court also held that Title II of the Civil Rights Act (“Act”) applied to motel owners who served interstate travelers.<sup>191</sup> In *Heart of Atlanta Motel, Inc. v. United States*,<sup>192</sup> the owners of a Georgia motel sought a declaratory judgment regarding the constitutionality of Title II and an injunction restraining the government from enforcing the provisions of the Act.<sup>193</sup> The motel owners complained of the sections of the Act that prohibited discrimination on the basis of race, color, religion, or national origin at any place of public accommodation; places of public accommodation included “any inn, hotel, motel, or other establishment which provides lodging to transient guests.”<sup>194</sup> The Heart of Atlanta Motel (“Motel”) was a 216-room motel located in downtown Atlanta, Georgia; approximately seventy-five percent of the Motel’s guests were interstate travelers.<sup>195</sup> The Motel had long practiced a policy of refusing to rent rooms to African-Americans, and, despite the passage of the Act, the Motel had no intention of changing its policy.<sup>196</sup> Before the United States District Court for the Northern District of Georgia, the owners of the Motel claimed that Congress exceeded its commerce power in passing the Act.<sup>197</sup> The district court rejected the owners’ claim and sustained the validity of the Act.<sup>198</sup>

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189. *Id.* at 303-04. See *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990) (stating that “we must ensure only that the means selected by Congress are ‘reasonably adapted to the end permitted by the Constitution’”) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 276 (1981)); *F.E.R.C. v. Mississippi*, 456 U.S. 742, 758 (1982). The Court stated that:

[i]t is not for us to say whether the means chosen by Congress represent the wisest choice. It is sufficient that Congress was not irrational in concluding that limited federal regulation of retail sales of electricity and natural gas, and of relationships between cogenerators and electric utilities, was essential to protect interstate commerce.

*F.E.R.C. v. Mississippi*, 456 U.S. 742, 758 (1982).

190. *McClung*, 379 U.S. at 304.

191. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964).

192. 379 U.S. 241 (1964).

193. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 242-43 (1964).

194. *Heart of Atlanta Motel, Inc.*, 379 U.S. at 247. Section 201(a) of the Act provided that “all persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.” *Id.*

195. *Heart of Atlanta Motel, Inc.*, 379 U.S. at 243.

196. *Id.*

197. *Id.* at 243-44.

198. *Id.* at 243.

On appeal, the United States Supreme Court affirmed the district court and held that the application of Title II to establishments that served interstate travelers was within the commerce power.<sup>199</sup> The Supreme Court stated that the Commerce Clause extended to Congress the authority to eliminate obstructions from interstate commerce.<sup>200</sup> The Court found that if a particular local activity, such as discriminating against certain persons who moved in interstate travel, had a substantial and harmful effect upon commerce, Congress had the power to regulate those local activities.<sup>201</sup> As such, the Court stated that, though the operation of a motel might be a local activity, the effects of discriminating against persons on the basis of color and race were felt by the nation as a whole and thus rendered the activity subject to federal regulation.<sup>202</sup>

Continuing this trend, the United States Supreme Court in *Maryland v. Wirtz*<sup>203</sup> held that Congress could extend the Fair Labor Standards Act ("FLSA") to employees of state-run hospitals, schools, and other such institutions, reasoning that Congress could regulate those intrastate activities that were substantially related to interstate commerce.<sup>204</sup> In 1961, Congress amended the FLSA by removing "the exemption of the States and their political subdivisions with respect to employees of hospitals, institutions, and schools" and adding to the FLSA's coverage "all employees of any 'enterprise' engaged in commerce or production for commerce."<sup>205</sup> Twenty-eight states sought an injunction against the Secretary of Labor, claiming that the FLSA regulated state schools and hospitals, exceeding the power of Congress under the Commerce Clause.<sup>206</sup> The United States District Court for the District of Maryland rejected the challenge and upheld the validity of the FLSA.<sup>207</sup> The local governments appealed, and the United States Supreme Court granted certiorari.<sup>208</sup>

The United States Supreme Court affirmed the lower court, upholding the constitutionality of the FLSA amendments.<sup>209</sup> The Supreme Court first held that the "enterprise concept" of the FLSA amendments was a permissible extension of Congress' commerce

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199. *Id.* at 261.

200. *Id.* at 253.

201. *Id.* at 258.

202. *Id.*

203. 392 U.S. 183 (1968), *overruled by* 426 U.S. 833 (1976).

204. *Maryland v. Wirtz*, 392 U.S. 183, 195 (1968), *overruled by* 426 U.S. 833 (1976).

205. *Wirtz*, 392 U.S. at 186-87 (citing 29 U.S.C. §§ 203(d), 206 (1964 Supp. II)).

206. *Id.* at 187.

207. *Id.* at 187-88.

208. *Maryland v. Wirtz*, 389 U.S. 1031 (1968).

209. *Wirtz*, 392 U.S. at 187-88. Justice John Marshall Harlan wrote the opinion for the Court. *Id.* at 185.

power.<sup>210</sup> In upholding the validity of the FLSA, the Court relied on its holding in *Darby* and noted that Congress could regulate those intrastate activities that substantially affected interstate commerce.<sup>211</sup> The Court stated that because competition in the marketplace was affected by all labor costs — and not just those for the employees who physically manufactured or transported the goods — Congress could have rationally concluded that these “activities” were subject to the commerce power.<sup>212</sup> The Court also rejected the argument that the FLSA was invalid because individual labor relationships had an insignificant impact upon interstate commerce.<sup>213</sup> The Court stated that “the contention . . . in Commerce Clause cases [that] the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest.”<sup>214</sup>

The Court then addressed whether it was within Congress’ power to place wage and hour restrictions on state schools and hospitals.<sup>215</sup> The Court stated that it was “clear that labor conditions in schools and hospitals” could affect commerce.<sup>216</sup> The states argued that the law was invalid because Congress was powerless to legislate in areas traditionally regulated by local governments.<sup>217</sup> The Court dismissed this claim on the grounds that there was no doctrine in the Constitution forbidding federal and state governments from interfering with one another.<sup>218</sup> Furthermore, the Court noted that the federal government had the power to override countervailing state interests.<sup>219</sup> Finally, the Court rejected the states’ contention that a valid regula-

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210. *Wirtz*, 392 U.S. at 188. The Court stated that:

[w]hereas the [FLSA] originally extended to every employee ‘who is engaged in commerce or in the production of goods for commerce,’ it now protects every employee who ‘is employed in an enterprise engaged in commerce or in the production of goods for commerce.’ Such an enterprise is defined as one which, along with other qualifications, ‘has employees engaged in commerce or in the production of goods for commerce.’

*Id.*

211. *Wirtz*, 392 U.S. at 188-89.

212. *Id.* at 190-91.

213. *Id.* at 192-93.

214. *Id.* In addition, the Court noted that, while Congress did not have the final say as to whether it could regulate a particular activity, the Court’s only role was to determine whether Congress had a rational basis supporting a statute. *Id.* at 190 (citing *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964)).

215. *Wirtz*, 392 U.S. at 193.

216. *Id.* at 194. For example, the Court noted that, in 1965, the United States spent an estimated \$38.3 billion on public education, and strikes at these schools would “obviously interrupt and burden this flow of goods across state lines.” *Id.* at 195.

217. *Wirtz*, 392 U.S. at 195.

218. *Id.* (citing *Case v. Bowles*, 327 U.S. 92, 101 (1946)).

219. *Id.* at 195.

tion of intrastate activities somehow lost validity when a state employed workers in an enterprise that affected interstate commerce.<sup>220</sup>

In *Perez v. United States*,<sup>221</sup> the Supreme Court upheld Congress' prohibition against extortionate credit activities, or loan sharking, as within the constitutional power to regulate interstate commerce.<sup>222</sup> Before the United States District Court for the Eastern District of New York, Alcides Perez, a loan shark, was convicted of violating Title II of the Consumer Credit Protection Act ("Act").<sup>223</sup> On appeal to the United States Supreme Court, Perez challenged the constitutionality of the Act.<sup>224</sup>

The United States Supreme Court affirmed the lower court and held that Congress could prohibit loan sharking activities because those activities affected interstate commerce.<sup>225</sup> The Supreme Court first stated that, of the three categories that Congress could regulate, the Act fell within the category of those activities that may affect interstate commerce.<sup>226</sup> The Court then stated that the commerce power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce."<sup>227</sup> The Court then stated that courts should

220. *Id.* at 196-97. See *United States v. State of California*, 297 U.S. 175, 183-84 (1936) (holding that a state engaged in economic activities that substantially affected interstate commerce, such as by operating a railroad, was subject to the same federal regulation as if the state was a private enterprise). The Court in *United States v. California* stated:

[The] only question we need consider is whether the exercise of the power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.

*Id.* at 183-84.

221. 402 U.S. 146 (1971).

222. *Perez v. United States*, 402 U.S. 146, 147 (1971).

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

224. *Id.* at 149.

225. *Id.* at 154. Justice William O. Douglas issued the opinion for the Court. *Id.* at 146.

226. *Perez*, 402 U.S. at 150. The Court stated:

The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods (18 U.S.C. §§ 2312-2315) or of persons who have been kidnapped (18 U.S.C. § 1201). Second, protection of the instrumentalities of interstate commerce, as, for example, the destruction of an aircraft (18 U.S.C. § 32), or persons or things in commerce, as, for example, thefts from interstate shipments (18 U.S.C. § 659). Third, those activities affecting commerce.

*Id.*

227. *Perez*, 402 U.S. at 151 (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)).

not measure the effect that one act of extortion had upon the national economy but, rather, the cumulative effect that the entire "industry" had upon interstate commerce.<sup>228</sup> Finally, the Court noted that Congress made extensive findings showing the effect of loan sharking on commerce.<sup>229</sup> However, the Court added that the review of legislative history did not imply that "Congress need make particularized findings in order to legislate."<sup>230</sup>

In 1985, the United States Supreme Court held that Congress could regulate certain intrastate activities that had traditionally been the subject of state concern.<sup>231</sup> In *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>232</sup> the San Antonio Metropolitan Transit Authority ("SAMTA") challenged the minimum wage and maximum hour provisions of the Fair Labor Standards Act ("FLSA") on the ground that the Tenth Amendment provided states and public entities immunity from federal regulation.<sup>233</sup> Joe Garcia and several other SAMTA employ-

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228. *Id.* at 154-55.

229. *Id.* at 155-56.

230. *Id.* at 156. See *United States v. Wilks*, 58 F.3d 1518, 1519 (10th Cir. 1995) (rejecting, despite a lack of any legislative history, a challenge to 18 U.S.C. § 922(o) (1988 Supp. V), which prohibited the transfer or possession of machine guns).

231. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531 (1985).

232. 469 U.S. 528 (1985).

233. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 534 (1985). The Court stated:

The present controversy concerns the extent to which SAMTA may be subjected to the minimum-wage and overtime requirements of the FLSA. When the FLSA was enacted in 1938, its wage and overtime provisions did not apply to local mass-transit employees or, indeed, to employees of state and local-government. §§ 3(d), 13(a)(9), 52 Stat. 1060, 1067. In 1961, Congress extended minimum-wage coverage to employees of any private mass-transit carrier whose annual gross revenue was not less than \$1 million. Fair Labor Standards Amendments of 1961, §§ 2(c), 9, 75 Stat. 65, 71. Five years later, Congress extended FLSA coverage to state and local government employees for the first time by withdrawing the minimum-wage and overtime exemptions from public hospitals, schools, and mass-transit carriers whose rates and services were subject to state regulation. Fair Labor Standards Amendments of 1966, §§ 102(a) and (b), 80 Stat. 831. At the same time, Congress eliminated the overtime exemption for all mass-transit employees other than drivers, operators, and conductors. § 206(c), 80 Stat. 836. The application of the FLSA to public schools and hospitals was ruled to be within Congress' power under the Commerce Clause. *Maryland v. Wirtz*, 392 U.S. 183 (1968).

The FLSA obligations of public mass-transit systems like SATS were expanded in 1974 when Congress provided for the progressive repeal of the surviving overtime exemptions for mass-transit employees. Fair Labor Standards Amendments of 1974, § 21(b), 88 Stat. 68. Congress simultaneously brought the States and their subdivisions further within the ambit of the FLSA by extending FLSA coverage to virtually all state and local-government employees.

*Garcia*, 469 U.S. at 533.

SAMTA relied on the 1976 decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), in which the Court stated that "the Commerce Clause does not empower Congress to enforce the minimum-wage and overtime provisions of the [FLSA] against the States 'in areas of traditional governmental functions.'" *Garcia*, 469 U.S. at 530

ees filed suit seeking overtime pay, and SAMTA itself sought a declaratory judgment that the wage and hour provisions of the FLSA were inapplicable to a government organization.<sup>234</sup> The United States District Court for the Western District of Texas granted SAMTA's motion for summary judgment, ruling that public mass transit was traditionally an area of state governmental concern.<sup>235</sup>

Garcia appealed directly to the United States Supreme Court, and the Supreme Court reversed.<sup>236</sup> The Court stated first that, since the holding in *National League of Cities v. Usery*,<sup>237</sup> judicial attempts "to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function'" had proven that the government/proprietary distinction was both unworkable and "inconsistent with established principles of federalism."<sup>238</sup> Finding that no standard or test properly respected the role of federalism, the Court rejected "as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turn[ed] on a judicial appraisal of whether a particular governmental function [was] 'integral' or 'traditional.'"<sup>239</sup> Thus, the Court expressly overruled *National League of Cities* and its state immunity test, stating that the Court in *National League of Cities* "tried to repair what did not need repair."<sup>240</sup>

Second, the Court dismissed SAMTA's argument that Congress' commerce power was somehow limited by the sovereignty of the states.<sup>241</sup> The Court found that determining the elements of state sovereignty was just as difficult as determining the scope of "traditional governmental functions."<sup>242</sup> More importantly, however, the Court stated that state sovereignty could not limit the expanse of Congress' power because the sovereignty of the states was limited by the

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(quoting *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976)). The Court stated that "[f]our months after *National League of Cities* was handed down, SATS (San Antonio Transit System) informed its employees that the decision relieved SATS of its overtime obligations under the FLSA." *Id.* at 534.

See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287-88 (1981) (summarizing the prerequisites for Tenth Amendment government immunity and developing a four-part test which a state must satisfy before the state was immune from the regulation).

234. *Garcia*, 469 U.S. at 534.

235. *Id.* at 535.

236. *Id.* at 536. Justice Harry Blackmun issued the opinion of the Court. *Id.* at 530.

237. 426 U.S. 833 (1976).

238. *Garcia*, 469 U.S. at 530-31, 545-46. See *United States v. State of California*, 297 U.S. 175, 185 (1936) (holding that power delegated to the federal government "may override countervailing state interests").

239. *Garcia*, 469 U.S. at 545-46.

240. *Id.* at 546, 557.

241. *Id.* at 548.

242. *Id.*

provisions of the Constitution.<sup>243</sup> Although the Court noted that the states did retain a sufficient amount of sovereignty, the Court stated that this authority was restricted to only those powers that had not been divested and transferred to the federal government.<sup>244</sup> The Court stated that, despite SAMTA's contention, the Constitution did not include elements of state sovereignty imposing limits upon Congress' delegated power to regulate commerce.<sup>245</sup> The Court concluded that the principal limit on the Commerce Clause was "that [limit] inherent in all congressional action — the built-in restraints that our system provides through state participation in federal government action. The political process ensures that laws that unduly burden the States will not be promulgated."<sup>246</sup>

#### THE AFTERMATH OF *LOPEZ*

Following the United States Supreme Court decision in *United States v. Lopez*,<sup>247</sup> the United States Court of Appeals for the Tenth Circuit reviewed a challenge to another federal firearm regulation in which the defendant contended that Congress exceeded its power to regulate commerce.<sup>248</sup> In *United States v. Wilks*,<sup>249</sup> Larry Wilks was convicted of illegal possession and transfer of a machine gun in violation of 18 U.S.C. § 922(o) ("§ 922(o)").<sup>250</sup> Under § 922(o), it was "unlawful for any person to transfer or possess a machine gun."<sup>251</sup> Wilks sold three machine guns to undercover Bureau of Alcohol, Tobacco, and Firearms ("BATF") agents, and BATF agents discovered two more machine guns when they searched Wilks' house.<sup>252</sup> Wilks was charged with three counts of the illegal transfer of a machine gun and one count of illegal possession of a machine gun.<sup>253</sup> Wilks claimed

243. *Id.*

244. *Id.* at 549.

245. *Id.* at 550. Justice Blackmun stated that "the fact that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies." *Id.*

246. *Garcia*, 469 U.S. at 556.

247. 115 S. Ct. 1624 (1995).

248. *United States v. Wilks*, 58 F.3d 1518, 1519 (10th Cir. 1995).

249. 58 F.3d 1518 (10th Cir. 1995).

250. *United States v. Wilks*, 58 F.3d 1518, 1519 (10th Cir. 1995).

251. 18 U.S.C. § 922(o) (1988 Supp. V). Section 922(o) states in pertinent part:

(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun. (2) This subsection does not apply with respect to — (A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department or political subdivision; or (B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed by before the date this subsection takes effect.

18 U.S.C. § 922(o) (1988 Supp. V).

252. *Wilks*, 58 F.3d at 1519.

253. *Id.* at 1519.

that § 922(o) was unconstitutional as beyond the commerce power, but the United States District Court for the Northern District of Oklahoma disagreed and sentenced Wilks to thirty-four months in prison.<sup>254</sup> Wilks appealed the decision of the district court.<sup>255</sup>

On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the lower court and held that § 922(o) was a "permissible exercise of the authority granted to Congress under the Commerce Clause."<sup>256</sup> The Tenth Circuit found that, though the "legislative history surrounding § 922(o) [was] virtually nonexistent," thus making it difficult to observe the effect that machine gun possession had on commerce, the Tenth Circuit agreed with the United States Court of Appeals for the Eighth Circuit that a nexus between the regulation of firearms and the commerce power could be found when Congress first enacted § 922 in 1968.<sup>257</sup> The Tenth Circuit also noted the recent decision in *Lopez* in which the United States Supreme Court struck down § 922(q) and held that Congress could not regulate the possession of firearms in school zones.<sup>258</sup> However, the Tenth Circuit distinguished *Lopez* on the grounds that § 922(q) regulated an intrastate activity, whereas § 922(o) regulated "things in interstate commerce — i.e., machine guns."<sup>259</sup> The Tenth Circuit found that, while § 922(q) attempted to regulate a local activity that did not substantially affect interstate commerce, § 922(o) regulated machine guns which by their nature were "a commodity . . . transferred across state lines for profit by business entities."<sup>260</sup> The Tenth Circuit concluded that, because machine guns constituted articles of interstate commerce, Congress possessed the power to regulate their possession and transfer.<sup>261</sup>

## ANALYSIS

In *United States v. Lopez*,<sup>262</sup> the United States Supreme Court held that the Gun-Free School Zones Act of 1990 ("§ 922(q)") exceeded Congress' power to legislate under the Commerce Clause.<sup>263</sup> Though the Supreme Court characterized its decision as consistent with other

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254. *Id.*

255. *Id.*

256. *Id.* at 1522.

257. *Id.* at (citing *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1614 (1993)).

258. *Id.* at 1520.

259. *Id.* at 1521 (citations omitted).

260. *Id.* at 1521 (quoting *United States v. Hunter*, 843 F. Supp. 235, 249 (Mich. 1994)).

261. *Id.* at 1522.

262. 115 S. Ct. 1624 (1995).

263. *United States v. Lopez*, 115 S. Ct. 1624, 1626 (1995). *See* 18 U.S.C. § 922(q) (1988 Supp. V).

modern cases in which the Court rejected constitutional challenges to federal regulations of intrastate activities, a review of Court precedent demonstrates that, in *Lopez*, the Court either narrowly interpreted or contradicted the holdings in these prior cases.<sup>264</sup> The failure of the Court to follow its own precedent creates four points of criticism.<sup>265</sup> First, the Court ignored precedent in holding that Congress may regulate only those intrastate activities that have a substantial effect upon interstate commerce displaying an economic character.<sup>266</sup> Second, in actively determining which activities fall within the scope of the commerce power, the Court portrayed a role of the judiciary that the Court abandoned years earlier.<sup>267</sup> Third, the Court contradicted its prior holdings by stating that congressional findings showing the regulated activity's effect on interstate commerce were important to the validity of the statute.<sup>268</sup> Finally, the Court did not adequately address whether § 922(q) involved a regulation of articles of commerce.<sup>269</sup>

#### THE REGULATION OF INTRASTATE ACTIVITIES SUBSTANTIALLY AFFECTING INTERSTATE COMMERCE

Prior to *Lopez*, the United States Supreme Court consistently held that, when Congress enacted federal regulations under the Commerce Clause, the Court had a duty to determine whether Congress had a rational basis for concluding that the regulated activity substantially affected interstate commerce.<sup>270</sup> Yet in *Lopez*, the Court did not ascertain whether Congress had a rational basis for enacting § 922(q).<sup>271</sup> Rather, the Court struck down the prohibition against gun possession in school zones because § 922(q) regulated a noncommercial activity in an area traditionally governed by the states.<sup>272</sup> In so ruling, the Court appears to have abandoned previous decisions up-

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264. See *infra* notes 270-436 and accompanying text.

265. See *infra* notes 266-69 and accompanying text.

266. See *infra* notes 270-361 and accompanying text.

267. See *infra* notes 362-402 and accompanying text.

268. See *infra* notes 403-18 and accompanying text.

269. See *infra* notes 419-36 and accompanying text.

270. See *Maryland v. Wirtz*, 392 U.S. 183, 198 (1968), *overruled by* 426 U.S. 833 (1976) (stating that "this Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the States"); *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964) (holding that "where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end"); *United States v. Darby*, 312 U.S. 100, 120-21 (1941) (holding that "the only function of the courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power").

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

272. *Lopez*, 115 S. Ct. at 1630-34. See *supra* notes 41-59 and accompanying text.

holding congressional regulation of intrastate activities.<sup>273</sup> However, had the Court followed precedent, the Court could have found that Congress' regulation of firearm possession within 1,000 feet of a school fell within the scope of the commerce power.<sup>274</sup>

*Determining Whether an Activity Substantially Affects Interstate Commerce*

By making its own determination that the regulated activity of § 922(q) did not substantially affect interstate commerce, the United States Supreme Court in *Lopez* contradicted the line of cases holding that only Congress, and not the Court, may reach such a conclusion.<sup>275</sup> The Supreme Court noted early in the *Lopez* opinion that the Court must decide whether Congress had a rational basis for its finding that the possession of guns in schools affected commerce.<sup>276</sup> Yet, later in the opinion, the Court stated that it would uphold congressional regulation of intrastate activities "where we have concluded that the activity substantially affected interstate commerce."<sup>277</sup> The Court ultimately determined that, because the statute involved the regulation of a noncommercial activity, § 922(q) did not purport to regulate intrastate activities that had a substantial effect upon interstate commerce.<sup>278</sup>

In previous cases, however, the Court acknowledged that the power to determine whether an activity has a substantial effect on commerce belongs to Congress and not to the judiciary.<sup>279</sup> As the Court stated in *Gibbons v. Ogden*,<sup>280</sup> the commerce power, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the [C]onstitution. . . . If Congress has the power to regulate it, that power must be exercised whenever the subject exists."<sup>281</sup> The Court has interpreted this grant of power to extend to those activities that are substantially related to interstate commerce.<sup>282</sup> In the

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273. See *supra* notes 131-220 and accompanying text.

274. *Lopez*, 115 S. Ct. at 1659-62 (Breyer, J., dissenting).

275. See *infra* notes 276-312 and accompanying text.

276. *Lopez*, 115 S. Ct. at 1629.

277. *Id.* at 1630.

278. *Id.* at 1630-31.

279. See *supra* notes 105-246 and accompanying text.

280. 22 U.S. 1 (1824).

281. *Gibbons v. Ogden*, 22 U.S. 1, 195-96 (1824).

282. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985) (holding that mass transit systems operated by local governments have substantial impacts upon interstate commerce); *Maryland v. Wirtz*, 392 U.S. 183, 194 (1968) (holding that labor conditions in public schools have a substantial effect upon interstate commerce); *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964) (stating that "this Court has held time and again that this power extends to activities of retail establishments,

late nineteenth and early twentieth centuries, the Court often independently reviewed the purpose of federal regulation of local activities, refusing to accept Congress' justification as to how the activity affected commerce.<sup>283</sup> Since 1937, however, the Court "has exercised little independent judgment, choosing instead to defer to the expressed or implied findings of Congress to the effect that regulated activities have the requisite 'substantial economic effect' on interstate commerce."<sup>284</sup>

For almost sixty years, the Court has taken a "hands-off" approach to regulations promulgated under the Commerce Clause and has adopted a practice of judicial restraint that limits the role of the Court.<sup>285</sup> For example, in *Darby*, the Court stated that once Congress had concluded that an activity substantially affected commerce, the only function of the Court was to determine whether the particular activity fell within the reach of the commerce power.<sup>286</sup> Later, in *McClung*, the Court stated that "where we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."<sup>287</sup> Furthermore, in *Federal Energy Regulatory Commission v. Mississippi*,<sup>288</sup> the Court stated that "[i]t is not for us to say whether the means chosen by Congress represent the wisest choice. It is sufficient that Congress was not irrational in concluding that [the regulation of the activity] was essential to protect interstate commerce."<sup>289</sup>

In modern Commerce Clause cases, then, the question before the Court prior to *Lopez* has not been whether the regulated activity substantially affected commerce, or even whether Congress' finding was correct, but whether the legislative judgment was within the realm of

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including restaurants, which directly or indirectly burden or obstruct interstate commerce"); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (holding that local activity may "be reached by Congress if it exerts a substantial economic effect on interstate commerce"); *United States v. Darby*, 312 U.S. 100, 119-20 (1941) (stating that "this Court had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of intrastate activities which have a substantial effect on the commerce").

283. ROTUNDA & NOWAK, *supra* note 99, at 379.

284. TRIBE, *supra* note 106, at 309.

285. *Lopez*, 115 S. Ct. at 1653 (Souter, J., dissenting). Justice Souter stated that: under commerce, as under due process, adoption of rational basis review expressed the recognition that the Court had no sustainable basis for subjecting economic regulation as such to judicial policy judgments, and for the past half-century the Court has no more turned back in the direction of formalistic Commerce Clause review . . . than it has inclined toward reasserting the substantive authority of *Lochner* due process.

*Id.*

286. *Darby*, 312 U.S. at 120-21.

287. *McClung*, 379 U.S. at 303-04.

288. 456 U.S. 742 (1982).

289. *F.E.R.C. v. Mississippi*, 456 U.S. 742, 752, 758.

reason.<sup>290</sup> When Congress ascertained that there was a connection between an intrastate activity and interstate commerce, the only function of the judiciary prior to *Lopez* was to determine whether the means chosen by Congress were reasonably adapted to a permitted end.<sup>291</sup> As the Court stated, the judiciary may invalidate only those laws for which there was no rational basis for "the congressional finding that the regulated activity affects interstate commerce."<sup>292</sup> Such deference to Congress' judgment amounted to "respect for the institutional competence of Congress on a subject expressly assigned to it by the Constitution."<sup>293</sup> Furthermore, the Court did not abdicate all obligations of judicial review, but rather afforded the legislative branch much-deserved deference in areas of economics.<sup>294</sup> As Justice Stephen Breyer stated in his dissenting opinion in *Lopez*:

Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy.<sup>295</sup>

If the Court in *Lopez* had followed precedent, the Court would have accepted Congress' conclusion that the possession of guns in school zones substantially affected interstate commerce.<sup>296</sup> The fact that Congress enacted a statute regulating this type of activity indicated that Congress believed the activity bore a substantial relation to interstate commerce.<sup>297</sup> Had the Court accepted Congress' finding, the Court should have then proceeded to determine whether this conclusion was rationally based.<sup>298</sup> Had the Court conducted this inquiry, the Court would have concluded that Congress did have a rational basis for enacting § 922(q).<sup>299</sup> For example, as Justice Breyer indicated in his dissenting opinion, numerous reports and studies depicted the widespread problem of guns in schools and their ill effects upon education.<sup>300</sup> From these and other reports, Congress could

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290. *Lopez*, 115 S. Ct. at 1656 (Souter, J., dissenting).

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

292. *F.E.R.C. v. Mississippi*, 456 U.S. 742, 754 (1982) (quoting *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981)).

293. *Lopez*, 115 S. Ct. at 1651 (Souter, J., dissenting).

294. ROTUNDA & NOWAK, *supra* note 99, at 379.

295. *Lopez*, 115 S. Ct. at 1658 (Breyer, J., dissenting).

296. *See supra* notes 231-46 and accompanying text.

297. *Lopez*, 115 S. Ct. at 1656 (Souter, J., dissenting).

298. *See Perez v. United States*, 402 U.S. 146, 151 (1971).

299. *See infra* notes 300-12 and accompanying text.

300. *Lopez*, 115 S. Ct. at 1659 (Breyer, J., dissenting).

have found that guns placed a substantial burden upon education.<sup>301</sup> Additionally, Congress could have determined that education was “intertwined with the Nation’s economy.”<sup>302</sup> As Justice Breyer stated in his dissenting opinion in *Lopez*, employers have long recognized the importance of a well-educated workforce, and “many firms base their location decisions upon the presence, or absence, of a work force with a basic education.”<sup>303</sup> Furthermore, as Justice Breyer also stated, an increase in global competition has placed a premium on the need for quality primary and secondary education.<sup>304</sup> Given these relationships, Justice Breyer illustrated how Congress could have reasonably determined that gun possession on school grounds posed a serious threat to education, interstate commerce, and the national economy.<sup>305</sup> Thus, the critical determination for the Court in *Lopez* should have been whether congressional prohibition of firearms in school zones was a rational choice.<sup>306</sup>

Though the Court in *Lopez* acknowledged that it was obligated to decide whether Congress’ conclusion that gun possession affected interstate commerce was reasonable, the Court did not make such a determination.<sup>307</sup> Rather, the Court concerned itself with determining whether firearm possession substantially affected commerce — a determination which the Constitution does not authorize the Court to make.<sup>308</sup> The Court found that the regulated activity of § 922(q) did not affect interstate commerce.<sup>309</sup> In reaching this decision, the Court did not explain why it ignored precedent so as to now examine the effects that an intrastate activity had upon interstate commerce.<sup>310</sup> Though the Court is not obligated to justify its holdings, the Court would have difficulty reconciling its actions in *Lopez* with prior case precedent.<sup>311</sup> Thus, by making its own assessment that gun possession did not substantially affect interstate commerce, the Court usurped a function of the legislative branch.<sup>312</sup>

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301. *Id.* (Breyer, J., dissenting).

302. *Id.* (Breyer, J., dissenting).

303. *Id.* at 1660 (Breyer, J., dissenting).

304. *Id.* (Breyer, J., dissenting).

305. *Id.* at 1661 (Breyer, J., dissenting). Justice Breyer also stated that “guns in the hands of six percent of inner-city high school students and gun-related violence throughout a city’s schools must threaten the trade and commerce that those schools support.” *Id.* (Breyer, J., dissenting).

306. *See supra* notes 275-305 and accompanying text; *F.E.R.C.*, 456 U.S. at 758.

307. *See United States v. Lopez*, 115 S. Ct. 1624-65 (1995).

308. *Lopez*, 115 S. Ct. at 1630-31.

309. *Id.*

310. *See Lopez*, 115 S. Ct. at 1624-65 (1995).

311. *See supra* notes 279-89 and accompanying text.

312. *See supra* notes 275-311 and accompanying text.

*The "Critical Distinction" Between Commercial and Noncommercial Intrastate Activities*

The Court in *Lopez* also departed from its past holdings by finding a "critical distinction" between commercial and noncommercial intrastate activities having an effect on interstate commerce.<sup>313</sup> The Court cited cases in which it had sustained the federal regulation of economic intrastate activities substantially affecting interstate commerce.<sup>314</sup> The Court then stated that it would uphold regulations of those economic activities substantially related to commerce.<sup>315</sup> Finally, the Court concluded that, because possession of a firearm within a school zone had nothing to do with commerce and could not be classified as an economic activity, Congress lacked the authority to regulate this intrastate activity.<sup>316</sup>

The Court in *Lopez*, however, did not establish that the distinction between economic and noneconomic intrastate activities was consistent with Court precedent.<sup>317</sup> To the contrary, by placing "economic" and "noneconomic" labels upon certain classes of intrastate activities, the Court appears to have revived a practice that the Court abandoned over fifty years ago.<sup>318</sup> Moreover, the Court failed to cite any cases supporting its statement that Congress was precluded from regulating noneconomic intrastate activities, even when these activities have an effect on interstate commerce.<sup>319</sup>

First, the Court stated that Congress' authority to regulate intrastate activities depended on whether the activity had a commercial nature.<sup>320</sup> In making this "commercial-noncommercial" distinction, the Court failed to heed prior warnings of the Court itself not to define the scope of the commerce power with formulas or words.<sup>321</sup> Over the years, the Court has relied on Justice Holmes' declaration that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."<sup>322</sup> The Court also has stated that the judiciary should not place labels on certain activities as a means of determining whether the activities are amenable to the commerce power.<sup>323</sup> For example, in *United States v. Darby*,<sup>324</sup> the

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313. *Lopez*, 115 S. Ct. at 1663 (Breyer, J., dissenting).

314. *Id.* (Breyer, J., dissenting); *Id.* at 1630.

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

316. *Id.* at 1630-31.

317. See *infra* notes 318-61 and accompanying text.

318. *Lopez*, 115 S. Ct. at 1654 (Souter, J., dissenting).

319. *Id.* at 1624-65.

320. *Id.* at 1630-31.

321. *Id.* at 1663 (Breyer, J., dissenting).

322. *Wickard v. Filburn*, 317 U.S. 111, 122 (1942) (quoting *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905)).

323. *Wickard*, 317 U.S. at 120.

Court rejected the judicial distinction created in *Hammer v. Dagenhart*<sup>325</sup> between “commerce” and “production.”<sup>326</sup> In *Wickard v. Filburn*,<sup>327</sup> the Court stated that commerce could not be measured by formulas or nomenclature that would allow Congress to regulate those activities that “directly” affected interstate commerce, but not those having only an “indirect” effect on commerce.<sup>328</sup> Similarly, in *Garcia v. San Antonio Metro Transit Authority*,<sup>329</sup> the Court held that neither the courts nor the states could limit Congress’ authority to regulate certain intrastate activities based on a state’s characterization that the regulation involved “traditional governmental functions.”<sup>330</sup> Quite clearly, the distinction between “commercial” and “noncommercial” intrastate activities resembles the historic distinction between “direct” and “indirect” effects upon commerce.<sup>331</sup> Had the Court in *Lopez* adhered to its prior decisions, the Court would not have denied Congress’ authority to enact § 922(q) simply because possession of a firearm in a school zone was a noneconomic intrastate activity.<sup>332</sup> Rather, a Court subscribing to sixty years of Commerce Clause precedent would have concentrated on the regulated activity’s effect on interstate commerce and would not have attempted to note distinctions between certain classes of activities.<sup>333</sup> In focusing on the activity’s effect on commerce, the Court could have reviewed the numerous studies and statistics showing the harmful effects that firearms in schools have on interstate commerce.<sup>334</sup> Thus, it is difficult to agree with how the Court justified a distinction between these supposedly different types of intrastate activities.<sup>335</sup>

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324. 312 U.S. 100 (1941).

325. 247 U.S. 251 (1918).

326. *United States v. Darby*, 312 U.S. 100, 116-17 (1941).

327. 317 U.S. 111 (1942).

328. *Wickard v. Filburn*, 317 U.S. 111, 120 (1942). The Court noted that, because the branches of government viewed “commerce” in a practical light, it was possible that “many kinds of intrastate activity upon interstate commerce were such as to make them a proper subject of federal regulation.” *Wickard*, 317 U.S. at 122. In his dissenting opinion in *Lopez*, Justice Souter argued that the “distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly.” *Lopez*, 115 S. Ct. at 1654 (Souter, J., dissenting). Justice Breyer also contended that the Court’s approach of distinguishing between commercial and noncommercial activities failed to heed the Court’s prior warnings not to measure the extent of the commerce power with formulas and nomenclature and thus “foreclose consideration of the actual effects of the activity in question upon interstate commerce.” *Id.* at 1663 (Breyer, J., dissenting).

329. 469 U.S. 528 (1985).

330. *Garcia*, 469 U.S. at 546-47.

331. See *supra* notes 314-30 and accompanying text.

332. *Lopez*, 115 S. Ct. at 1633. See *supra* notes 98-261 and accompanying text.

333. *Lopez*, 115 S. Ct. at 1663 (Breyer, J., dissenting).

334. *Id.* (Breyer, J., dissenting).

335. See *supra* notes 314-34 and accompanying text. The Court admitted that “a determination whether an intrastate activity is commercial or noncommercial may in

Second, and more importantly, the Court failed to support its statement that Congress may regulate only those intrastate activities of an economic nature affecting interstate commerce.<sup>336</sup> The Court stated that, in prior cases where the Court had upheld the congressional regulation of an intrastate activity, the regulated activity exuded an economic character.<sup>337</sup> After contrasting the regulation of firearm possession in school zones with previous regulations of intrastate coal mining, intrastate extortionate credit transactions, and the production and consumption of domestically-grown wheat, the Court concluded that § 922(q) involved a noneconomic activity that could not be controlled by the commerce power.<sup>338</sup>

Contrary to the opinion in *Lopez*, Commerce Clause precedent instructs that Congress may regulate all intrastate activities exhibiting a substantial effect on interstate commerce, regardless of the nature of the activity.<sup>339</sup> In fact, over the last sixty years, the Court has stated that the judiciary should focus on the activity's ultimate effect on commerce — not on the activity's economic character.<sup>340</sup> For example, in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*,<sup>341</sup> the Court stated that "it is the effect upon commerce, not the source of injury, which is the criterion."<sup>342</sup> In *F.E.R.C.*, the Court rejected the state's argument that "Congress is powerless to regulate anything which is not commerce" and held that Congress could have rationally concluded that public utilities affected interstate commerce.<sup>343</sup> The Court in *Wickard* stated that "even if the appellee's activity [was] local and . . . [might] not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."<sup>344</sup> The Court in *Lopez* quoted this passage from *Wickard*, but distinguished the two cases on grounds that the domestic consumption of wheat was an economic activity whereas the possession of a gun in a school zone was not.<sup>345</sup> Thus, it appears that the *Lopez* Court would argue that the act of grinding up wheat and turning it into bread has more of an impact

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some cases result in legal uncertainty," but the Court stated that "legal uncertainty" was a usual consequence of enacting legislation under the Commerce Clause. *Lopez*, 115 S. Ct. at 1633.

336. See *Lopez*, 115 S. Ct. at 1630-31.

337. *Id.* at 1630.

338. *Id.* at 1630-31.

339. See *supra* notes 105-246 and accompanying text.

340. See *infra* notes 341-56 and accompanying text.

341. 301 U.S. 1 (1937).

342. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 32 (1937).

343. *F.E.R.C. v. Mississippi*, 456 U.S. 742, 754-57 (1982).

344. *Wickard*, 317 U.S. at 125.

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

on interstate commerce than allowing firearms on school property.<sup>346</sup> Such a narrow interpretation of *Wickard*, however, is inconsistent with the *Wickard* Court's pronouncement that it was returning to a broader view of the Commerce Clause.<sup>347</sup>

In addition, the cases cited by the Court in *Lopez* do not support its claim that Congress lacked the authority to regulate noneconomic intrastate activities.<sup>348</sup> For example, in *Katzenbach v. McClung*,<sup>349</sup> the Court stated that the commerce power "extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end."<sup>350</sup> In *Perez v. United States*,<sup>351</sup> the Court again held that Congress could regulate those intrastate activities that substantially affect commerce.<sup>352</sup> The Court in *Heart of Atlanta Motel, Inc. v. United States*<sup>353</sup> held that the power of Congress over commerce included "those activities intrastate which so affect interstate commerce."<sup>354</sup> Moreover, in *Maryland v. Wirtz*,<sup>355</sup> the Court stated that "Congress may by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce."<sup>356</sup>

In each of these cases, the Court failed to draw attention to the economic nature of the regulated activity or to state that Congress could regulate only those intrastate activities that contained an economic characteristic.<sup>357</sup> Rather, as Justice Breyer emphasized in his

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346. Compare *Lopez*, 115 S. Ct. at 1624-65 (holding that possession of a firearm in a school zone is not an economic activity) with *Wickard*, 317 U.S. at 128-29 (stating that wheat consumed on a farm has a substantial impact upon interstate commerce).

347. *Wickard*, 317 U.S. at 122-24. Compare *Lopez*, 115 S. Ct. at 1630 (stating that "[e]ven *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a firearm does not") with *Wickard*, 317 U.S. at 122 (stating that recent Commerce Clause cases brought about a return of the broad interpretations of the Commerce Clause first enunciated in *Gibbons*).

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

349. 379 U.S. 294 (1964).

350. *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)).

351. 402 U.S. 146 (1971).

352. *Perez v. United States*, 402 U.S. 146, 151 (1971) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)).

353. 379 U.S. 241 (1964).

354. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) (quoting *United States v. Darby*, 312 U.S. 100, 118 (1941)).

355. 392 U.S. 183 (1968).

356. *Maryland v. Wirtz*, 392 U.S. 183, 189 (1968) (citation omitted).

357. *Perez v. United States*, 402 U.S. 146 (1971); *Maryland v. Wirtz*, 392 U.S. 183 (1968); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942).

dissenting opinion in *Lopez*, the prior Courts focused on the activity's effect on interstate or foreign commerce.<sup>358</sup> As the Court stated in *Wickard*, an activity could have a substantial impact upon interstate commerce even if the activity itself might not be regarded as commerce.<sup>359</sup> Congress' authority to regulate interstate commerce, then, should not be limited to those activities that exude an economic character.<sup>360</sup> The Court's holding in *Lopez* that Congress may regulate only economic intrastate activities is irreconcilable with modern cases addressing the scope of the commerce power.<sup>361</sup>

#### THE LIMITS ON THE COMMERCE POWER

Not only did the United States Supreme Court in *Lopez* fail to find that Congress had a rational basis for enacting § 922(q), the Supreme Court also misconstrued the restraints on the commerce power.<sup>362</sup> In striking down Congress' regulation of gun possession in school zones, the Court stated that modern case law confirmed its view that the Commerce Clause had "judicially enforceable outer limits."<sup>363</sup> In addition to limits found in noneconomic intrastate activities, the Court suggested that § 922(q) was invalid because it infringed on criminal law and education — areas of traditional state concern.<sup>364</sup> The Court also criticized Justice Breyer's argument in support of upholding the

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358. *Lopez*, 115 S. Ct. at 1663 (Breyer, J., dissenting).

359. *Wickard*, 317 U.S. at 125.

360. See *supra* notes 320-59 and accompanying text.

361. See *supra* notes 313-60 and accompanying text. Regardless of whether there is a constitutional distinction between commercial and noncommercial intrastate activities, it would have been reasonable for Congress to conclude that the educational activities of local schools had an economic nature. *Lopez*, 115 S. Ct. at 1664 (Breyer, J., dissenting). Justice Breyer argued in his dissenting opinion that, in light of numerous reports and statistics, Congress could have rationally concluded that educational activities "[fell] on the commercial side of the line" and thus deemed possession of a firearm in a school zone an economic intrastate activity. *Id.* (Breyer, J., dissenting). Justice Breyer noted that the \$230 billion the United States spent on educational expenses in 1990 constituted a significant portion of the nation's \$5.5 trillion Gross Domestic Product. *Id.* (Breyer, J., dissenting). Furthermore, Justice Breyer suggested that Congress could have compared school expenditures with commercial investments, finding that the benefits the nation derives from an educated workforce is analogous to the benefit the nation receives from investments in commercial enterprises. *Id.* (Breyer, J., dissenting).

Although the Court omitted from its opinion the fact that Lopez was to receive \$40 for delivering the gun to another student, the Court nonetheless stated that gun possession in a school zone was not an economic activity and thus did not affect commerce. Compare *United States v. Lopez*, 115 S. Ct. 1624 (1995) (stating that possession of a gun in a school zone is not an economic activity) with *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993) (noting that possession of this gun on school grounds was to benefit Lopez financially).

362. See *infra* notes 363-68 and accompanying text.

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

364. *Id.* at 1632.

federal regulation because the Court claimed that Justice Breyer failed to identify any real limits on the commerce power.<sup>365</sup>

It is difficult, however, to reconcile the *Lopez* Court's position regarding limitations on the commerce power with prior Court precedent.<sup>366</sup> First, in discussing the restraints on the commerce power, the Court failed to ascertain whether these limits were found in the Constitution.<sup>367</sup> Second, in concluding that Congress could not regulate certain aspects of local schools because these aspects entailed areas of state sovereignty, the Court failed to note that this limit has been expressly rejected by the Court in prior cases.<sup>368</sup>

### *Constitutional Limitations on the Commerce Power*

Over the years, the United States Supreme Court has been quite explicit regarding the restraints and limits on Congress' power to regulate commerce.<sup>369</sup> In *Gibbons v. Ogden*,<sup>370</sup> the Supreme Court stated that all limitations on Congress' authority to regulate commerce must emanate from provisions of the Constitution.<sup>371</sup> The Court stated that the sole constitutional restraints on Congress' commerce power were "the wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections."<sup>372</sup>

Since the decision in *Gibbons*, the Court has looked to the Constitution to discover limits applicable to the Commerce Clause.<sup>373</sup> For example, the Court has recognized that specific provisions of the Bill of Rights impose restrictions upon Congress' exercise of the commerce power.<sup>374</sup> The Court has stated that another limitation on Congress' authority to regulate commerce rests in the "political process."<sup>375</sup> When conflicts arise between those regulated and those advantaged by the regulation, the Court has held that resolution of these issues

365. *Id.*

366. *See infra* notes 367-68 and accompanying text; *see supra* notes 98-246 and accompanying text.

367. *See* United States v. *Lopez*, 115 S. Ct. 1624-65 (1995).

368. *See infra* notes 386-402 and accompanying text.

369. *See infra* notes 370-85 and accompanying text.

370. 22 U.S. 1 (1824).

371. *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824).

372. *Gibbons*, 22 U.S. at 197.

373. *See infra* notes 374-85 and accompanying text.

374. ROTUNDA & NOWAK, *supra* note 99, at 396.

375. TRIBE, *supra* note 106, at 313-16. *See Wickard*, 317 U.S. at 120 (citing *Gibbons v. Ogden*, 22 U.S. 1, 197 (1824) (holding that "restraints on its exercise must proceed from political rather than from judicial processes")); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985) (stating that "the principal and basic limit on the federal commerce power is that inherent in all congressional action — the built-in restraints that our system provides through state participation in federal governmental action").

should be left to the more flexible and responsible legislative process in lieu of an unelected judiciary.<sup>376</sup> Thus, when constituents are dissatisfied with federal regulations, the Court has stated that these constituents should seek redress from their legislators rather than judicial solutions from the courts.<sup>377</sup> In fact, as Justice Brennan once stated, "It is unacceptable that the judicial process should be thought superior to the political process in this area. . . . [D]ecisions upon the extent of the commerce power should be made by the members of the legislature."<sup>378</sup> Furthermore, after the *Garcia* decision, it became apparent that local governments dissatisfied with such federal regulations must persuade the Congress — and not the Court — that local governments should not be subject to the commerce power.<sup>379</sup> Thus, the *Lopez* Court could have restrained its own actions and held that the proper vehicle for challenging Congress' regulation was the ballot box, not the court room.<sup>380</sup>

The judicial branch is not powerless to prevent Congress from enacting regulations that exceed the scope of the commerce power.<sup>381</sup> However, the Court does not have the power to control the motive and purpose of regulations of interstate commerce.<sup>382</sup> Rather, the Constitution provides that, under the doctrine of judicial review, the judiciary is authorized to measure the relationship between the regulated activity and interstate commerce.<sup>383</sup> As Justice Breyer correctly pointed out in his dissent in *Lopez*, the Court does not judge directly Congress' exercise of its constitutional power but rather determines whether Congress had a rational basis for enacting the statute.<sup>384</sup> Thus, the judiciary "cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers."<sup>385</sup>

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376. TRIBE, *supra* note 106, at 313-16. See *Wickard*, 317 U.S. at 129.

377. TRIBE, *supra* note 106, at 313-16.

378. *National League of Cities v. Usery*, 426 U.S. 833, 876-77 (1976) (Brennan, J., dissenting).

379. ROTUNDA & NOWAK, *supra* note 99, at 417.

380. See *supra* notes 369-79 and accompanying text.

381. *McClung*, 379 U.S. at 303.

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

383. *Lopez*, 115 S. Ct. at 1658 (Breyer, J., dissenting).

384. *Id.* (Breyer, J., dissenting).

385. *Hammer v. Dagenhart*, 247 U.S. 251, 279 (1918) (Holmes, J., dissenting) (citing *Veazie Bank v. Fenno*, 75 U.S. 533 (1869)). Justice Oliver Wendell Holmes also stated that the Court had "disavowed the right to intrude its judgment upon questions of policy or morals." *Hammer*, 247 U.S. at 280 (Holmes, J., dissenting).

*Congressional Authority to Regulate in Areas of Traditional State Concern*

More importantly, the United States Supreme Court also made the untenable suggestion that the commerce power is somewhat weaker in areas traditionally regulated by state governments.<sup>386</sup> The Supreme Court in *Lopez* refused to accept the government's "costs of crime", "national productivity", and "education as commerce" arguments for why gun possession in school zones substantially affected interstate commerce, because the Court claimed that this would give Congress an unlimited commerce power that could reach areas "where States historically have been sovereign."<sup>387</sup> In addition, the Court stated that, while "Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce . . . [t]hat authority, though broad, does not include the authority to regulate each and every aspect of local schools."<sup>388</sup> The Court offered no explanation as to why Congress could not regulate areas of traditional state concern.<sup>389</sup> The Court simply stated that "if we were to accept the government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate."<sup>390</sup>

The Court seemed to suggest that the power to regulate commerce did not include the power to regulate certain activities traditionally subject to state regulation.<sup>391</sup> If the Court was making this claim, the Court has failed to produce any support.<sup>392</sup> A review of Commerce Clause precedent reveals that the Court had already addressed and dismissed the issue of whether Congress may legislate in areas traditionally governed by the states.<sup>393</sup> In fact, the Court has "flatly rejected" the contention that "the commerce power diminishes the closer it gets to customary state concerns."<sup>394</sup> In *Maryland v. Wirtz*,<sup>395</sup> the Court stated that "it is clear that the [f]ederal [g]overnment, when acting within a delegate power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character."<sup>396</sup> Even more important is the recent *Garcia* decision in

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386. *Lopez*, 115 S. Ct. at 1633, 1634; *Lopez*, 115 S. Ct. at 1654 (Souter, J., dissenting).

387. *Lopez*, 115 S. Ct. at 1632.

388. *Id.* at 1633.

389. *Id.*

390. *Id.* at 1632.

391. See *supra* notes 387-90 and accompanying text.

392. See *infra* notes 393-402 and accompanying text.

393. See *supra* notes 203-46 and accompanying text.

394. *Lopez*, 115 S. Ct. at 1654 (Souter, J., dissenting).

395. 392 U.S. 183 (1968).

396. *Maryland v. Wirtz*, 392 U.S. 183, 195 (1968).

which the Court rejected "a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'"<sup>397</sup> The Court in *Garcia* held that limiting Congress' power in areas of "traditional governmental functions" was both unworkable and inconsistent with the principles of federalism.<sup>398</sup>

It is difficult to perceive what basis the Court had in claiming that § 922(q) was unconstitutional because it prohibited guns on local school property.<sup>399</sup> Had the Court adhered to precedent, the Court should not have entertained a discussion of whether § 922(q) operated in the areas of criminal law and education that generally were regulated by the states.<sup>400</sup> Instead, the Court should have focused its attention on whether the prohibition was a reasonable means to the end of protecting commerce.<sup>401</sup> Thus, the Court cannot justify its holding as consistent with either precedent or the existing constitutional limitations on the commerce power.<sup>402</sup>

#### THE SUDDEN IMPORTANCE OF CONGRESSIONAL FINDINGS

The United States Supreme Court in *Lopez* stated that it would have been able to evaluate Congress' judgment that the regulated activity substantially affected interstate commerce had Congress indicated this relationship in express congressional findings.<sup>403</sup> The Supreme Court found that, even though Congress was not normally obligated to produce formal findings, "neither the statute nor its legislative history contain[ed] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone."<sup>404</sup> The Court also stated that the government could not import congressional findings from previous federal firearm regulations because those findings did not address the new subject matter found in § 922(q).<sup>405</sup>

Although the Court agreed with the government that formal findings were not necessary, it appears that the Court has contradicted itself by viewing the absence of such findings as detrimental to

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397. *Garcia*, 469 U.S. at 546-47.

398. *Id.* at 530-31. See *United States v. State of California*, 297 U.S. 175, 185 (1936) (holding that, while the judiciary must determine if an activity regulated pursuant to the Taxing Power infringed on an area of state concern, there was no such limitation upon the Commerce Clause).

399. See *supra* notes 386-98 and accompanying text.

400. *Lopez*, 115 S. Ct. at 1632.

401. See *supra* notes 286-95 and accompanying text.

402. See *supra* notes 386-401 and accompanying text.

403. *Lopez*, 115 S. Ct. at 1631-32.

404. *Id.* at 1631 (citations omitted).

405. *Id.* at 1632.

§ 922(q).<sup>406</sup> For example, in *Katzenbach v. McClung*,<sup>407</sup> the Court stated that Congress could combat discrimination in restaurants without making formal findings of the activity's effect on commerce.<sup>408</sup> Then, in *Perez*, the Court stated that Congress was not required to make "particularized findings in order to legislate."<sup>409</sup> As commentators have noted regarding *Heart of Atlanta Motel, Inc.*, formal findings were not needed to support regulations enacted under the Commerce Clause because the Court was not the proper governmental branch to "review economic decisions of the legislature."<sup>410</sup>

In addition, Justice David Souter argued in his dissenting opinion in *Lopez* that the presence or absence of congressional findings should not affect a court's ability to determine whether Congress had a rational basis.<sup>411</sup> Justice Souter stated that the enactment of the statute implied that Congress had already determined that the regulated activity substantially affected interstate commerce and thus eliminated the need for additional findings.<sup>412</sup> Justice Souter further stated that "[c]ongressional findings do not . . . directly address the question of reasonableness; they tell us what Congress actually has found, not what it could rationally find."<sup>413</sup> An increased emphasis on congressional findings, Justice Souter concluded, would significantly alter the test of rationality review.<sup>414</sup>

It is difficult to perceive the Court's rationale in *Lopez* for concluding that the lack of congressional findings was detrimental to § 922(q).<sup>415</sup> In prior years, the Court had been quite explicit that the presence or absence of formal findings did not affect the validity of statutes enacted under the Commerce Clause.<sup>416</sup> Yet, though the Court acknowledged the decisions of *McClung* and *Perez*, the Court in *Lopez* still viewed the absence of findings as a setback to the government's case.<sup>417</sup> Moreover, the absence of congressional findings demonstrating the regulated activity's effect on interstate commerce should not have affected the Court's determination of whether Con-

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406. *Id.* at 1631-32.

407. 379 U.S. 294 (1964).

408. *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964). The Court further stated that "formal findings . . . of course are not necessary." *McClung*, 397 U.S. at 299.

409. *Perez*, 402 U.S. at 156.

410. *ROTUNDA & NOWAK*, *supra* note 99, at 412.

411. *Lopez*, 115 S. Ct. at 1656-57 (Souter, J., dissenting).

412. *Id.* at 1656 (Souter, J., dissenting).

413. *Id.* (Souter, J., dissenting).

414. *Id.* at 1657 (Souter, J., dissenting).

415. *See supra* notes 403-05 and accompanying text.

416. *McClung*, 379 U.S. at 304.

417. *See supra* notes 403-06 and accompanying text; *Lopez*, 115 S. Ct. at 1631.

gress had a rational basis, because findings show what Congress actually found — not whether the conclusion was rational.<sup>418</sup>

SECTION 922(q) INVOLVES THE REGULATION OF ARTICLES OF COMMERCE

The United States Supreme Court failed to adequately address whether § 922(q) could have been upheld as a regulation of articles of commerce.<sup>419</sup> When reviewing the “three broad categories of activity that Congress may regulate under its commerce power,” the Court concluded that it could not validate § 922(q) as a federal regulation of commodities within the stream of interstate commerce.<sup>420</sup> In “quickly dispos[ing] of” this category, however, the Court did not explain why it could not sustain § 922(q) as a regulation of articles of commerce.<sup>421</sup>

As Justice John Paul Stevens argued in his dissenting opinion in *Lopez*, the Court should not have limited its analysis to whether § 922(q) regulated an activity that substantially affected interstate commerce.<sup>422</sup> Justice Stevens stated that “[g]uns are both articles of commerce and articles that can be used to restrain commerce,” and the possession of these guns in school zones resulted from a commercial activity.<sup>423</sup> As such, Justice Stevens argued that the Commerce Clause empowered Congress to regulate these articles because “the power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use. . . .”<sup>424</sup>

The Court has long recognized that Congress has the power to regulate articles of commerce.<sup>425</sup> Initially, the Court conceded that the power to regulate articles within the stream of commerce included noxious articles.<sup>426</sup> In the 1940s, the Court rejected the argument that Congress could not exclude certain articles from interstate commerce where its purpose was to regulate the wages and hours of employees engaged in production.<sup>427</sup> The Court in *Darby* recognized that Congress may prohibit from commerce any articles that Congress perceived to be “injurious to the public health, morals or welfare.”<sup>428</sup> As

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418. See *supra* notes 411-14 and accompanying text; *Lopez*, 115 S. Ct. at 1656-57 (Souter, J., dissenting).

419. *Lopez*, 115 S. Ct. at 1651 (Stevens, J., dissenting).

420. *Id.* at 1630.

421. See *Lopez*, 115 S. Ct. at 1630.

422. *Id.* at 1651 (Stevens, J., dissenting).

423. *Id.* (Stevens, J., dissenting).

424. *Id.* (Stevens, J., dissenting).

425. See *supra* notes 131-202 and accompanying text.

426. *Darby*, 312 U.S. at 113 (citations omitted).

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

428. *Id.* at 114.

the Court held in *Darby*, "the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution," and today it is beyond question that the modern court still adheres to these principles.<sup>429</sup>

In *Lopez*, the Court could have upheld the prohibition on firearm possession because guns are articles of commerce.<sup>430</sup> For example, in *United States v. Wilks*,<sup>431</sup> the United States Court of Appeals for the Tenth Circuit upheld the constitutionality of 18 U.S.C. § 922(o) ("§ 922(o)"), which prohibited possession of a machine gun, because the statute "embodies a proper exercise of Congress' power to regulate 'things in interstate commerce.'"<sup>432</sup> The Tenth Circuit acknowledged the United States Supreme Court's holding in *Lopez*, but the Tenth Circuit distinguished the two decisions on the grounds that *Lopez* involved the regulation of an intrastate activity with a purported effect on interstate commerce, whereas § 922(o) involved the regulation of an article of commerce.<sup>433</sup> As §§ 922(q) and 922(o) both prohibit the possession of some type of firearm, a justification upholding the validity of one statute should suffice for the other.<sup>434</sup> The Supreme Court could have reasoned, as the Tenth Circuit did, that a prohibition on the possession of firearms was a permissible exercise of the commerce power because the regulation involved an article of commerce.<sup>435</sup> As the power to regulate commerce "is complete in itself" and "may be exercised to its utmost extent," this power surely extends to prohibitions on firearms within 1,000 feet of a school zone.<sup>436</sup>

## CONCLUSION

In *United States v. Lopez*,<sup>437</sup> the United States Supreme Court held that Congress could not use its commerce power to criminalize the possession of a firearm on school property.<sup>438</sup> In striking down the Gun-Free School Zones Act ("§ 922(q)"), the Supreme Court characterized its holding as consistent with prior Court cases involving federal

429. *Id.* at 116. ROTUNDA & NOWAK, *supra* note 99, at 402-05.

430. *See supra* notes 425-29 and accompanying text.

431. 58 F.3d 1518 (10th Cir. 1995).

432. *United States v. Wilks*, 58 F.3d 1518, 1521 (10th Cir. 1995).

433. *Wilks*, 58 F.3d at 1521.

434. *Compare* 18 U.S.C. § 922(o)(1) (1988 Supp. V) (stating that "it shall be unlawful for any person to transfer or possess a machine gun") with 18 U.S.C. § 922(q)(1)(A) (1988 Supp. V) (stating that "it shall be 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").

435. *See supra* notes 431-33 and accompanying text.

436. *Gibbons*, 22 U.S. at 196; *see supra* notes 419-35 and accompanying text.

437. 115 S. Ct. 1624 (1995).

438. *United States v. Lopez*, 115 S. Ct. 1624, 1630-31 (1995).

regulations of intrastate activities.<sup>439</sup> However, very little about the holding in *Lopez* can be viewed as consistent with past Court decisions over the last sixty years. Rather, the vast majority of the Court's statements in *Lopez* convey an utter disregard for stare decisis, because these statements suggest that the commerce power has lost its plenary nature and has been subordinated to the interests and whims of the states.

First, Congress alone may determine whether an intrastate activity has a substantial effect upon interstate commerce.<sup>440</sup> When Congress finds that such an activity exists, Congress may regulate that activity regardless of whether the activity has a noncommercial character.<sup>441</sup> Once Congress has reached this conclusion, the Court should determine only whether Congress' means were rationally related to the end of protecting commerce.<sup>442</sup> Second, any limits on Congress' authority to regulate commerce must stem from provisions of the Constitution, and, to date, the Court has not interpreted the Constitution to preclude Congress from regulating areas of traditional state concern.<sup>443</sup> Third, congressional findings demonstrating a regulated activity's effect on interstate commerce are not necessary to the validity of federal regulations of intrastate activities because, not only does the language of the statute indicate that Congress has already reached this conclusion, but also congressional findings do not assist a court in determining whether there existed a rational basis for the statute.<sup>444</sup> Finally, a statute that prohibits the possession of an article of commerce is also a regulation of an article of commerce, and, thus, Congress is free to exclude it from the stream of commerce.

In all likelihood, the decision in *Lopez* will be interpreted narrowly so as to have little effect upon federal statutes or future Commerce Clause cases. In light of the Court's unsupported statements, the Supreme Court and other inferior courts should have little difficulty distinguishing the regulated activity in *Lopez* from other regulations of intrastate activities. However, the danger still lurks. As Justice David Souter concluded in his dissent, "Not every epochal case has come in epochal trappings. *Jones & Laughlin* did not reject the

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439. *Lopez*, 115 S. Ct. at 1630-31.

440. *United States v. Darby*, 312 U.S. 100, 120-21 (1941). See *supra* notes 275-311 and accompanying text.

441. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). See *supra* notes 312-61 and accompanying text.

442. *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964). See *supra* notes 275-311 and accompanying text.

443. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985). See *supra* notes 362-402 and accompanying text.

444. *McClung*, 379 U.S. 294, 299, 304 (1964). See *supra* notes 403-18 and accompanying text.

direct-indirect standard in so many words; it just said the relation of the regulated subject matter to commerce was direct enough. But we know what happened.”<sup>445</sup>

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445. *Lopez*, 115 S. Ct. at 1657 (Souter, J., dissenting).

