

Cato Institute Policy Analysis No. 216: Kids, Guns, and the Commerce Clause: Is the Court Ready for Constitutional Government?

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Executive Summary

On November 8, election day, the Supreme Court will hear one of the most important and unusual cases to come before it in a long time, a case that raises fundamental questions about the power of Congress to legislate as it has for nearly 60 years. In that case, *United States v. Lopez*, the Court of Appeals for the Fifth Circuit struck down the 1990 Gun-Free School Zones Act, finding it beyond the power of Congress to enact. Such a finding is all but unheard of in the post-New Deal era.

As written and originally understood, the Constitution limits the federal government primarily by enumerating its powers, which the Tenth Amendment confirms by declaring that those powers not delegated to the federal government are reserved to the states or to the people. For a century and a half, the Supreme Court enforced those restraints. But with the New Deal and Roosevelt's "Court-packing" scheme, the Court retreated from its traditional role, enabling Congress to indulge an ever-expanding array of powers. Today, under the Court's boundless reading of the Commerce Clause, which gives Congress power to regulate commerce among the states, the doctrine of enumerated powers is all but dead. Yet that doctrine was meant by the Framers to be the centerpiece of the Constitution, the principal restraint on federal power.

At bottom, then, *Lopez* is not about gun control or even about federal-state relations but about whether the Court is ready to hold Congress to its constitutional limits. The Court should. For if the enumerated powers doctrine is in fact dead, other constitutional protections are in jeopardy as well.

Introduction and Background:

The Lopez Case and Enumerated Powers in the 1990s

In September 1993 an unusual legal event took place: a U.S. Court of Appeals struck down a federal law as unconstitutional because, it said, Congress had no constitutional authority to pass the law. The case, *United States v. Lopez*,^[1] involved a challenge to the Gun-Free School Zones Act, part of the 1990 crime bill.^[2] The court held the act unconstitutional because Congress, in drafting it, had referred to no source of constitutional authority and because the most plausible source, the power of Congress to regulate commerce among the states, would be unavailable in this case, there being no commerce at issue.

Under the Constitution as originally written and understood, the *Lopez* case would have been a routine "dog bites man" story--a case of a court striking down an obviously unconstitutional piece of federal legislation. Today, however,

the case is a novelty because federal courts since the New Deal have largely given up policing the boundaries of federal legislative power.[3] As a result, that power has become all but unlimited. Because the U.S. Supreme Court has agreed to review the appeals court's decision in *Lopez*,[4] the stage is now set for two possibilities: either a revitalization of the doctrine of enumerated federal powers, the bedrock of the Framers' plan for limited government, or the judicial interment of that doctrine.

To review those issues and set the stage for the coming Supreme Court arguments, I will first discuss the doctrine of enumerated powers, which was meant to be our principal protection against the expansion of federal power and the possibility of tyranny, then show how the Court has allowed the commerce power to expand over the past 50 years or more to virtually swallow the enumerated powers doctrine. I will then discuss the *Lopez* case, what the Court should do with it, and why it matters, not just as a matter of constitutional theory but as a matter of practical day-to-day government.

Enumerated Powers and Limited Government

At the time of the Constitution's framing, there was no real dispute over whether the federal government was to have limited, rather than general, powers. As James Madison wrote:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.[5]

Both the Federalists, who supported the Constitution (which of course included the Constitution's principal draftsman, Madison), and their opponents, the Anti-Federalists, believed that the federal government should have limited jurisdiction. The dispute between them was over just how limited that jurisdiction should be.

The scheme that grew out of their debates was deceptively simple. The federal government would be supreme within its sphere, but that sphere would be sharply limited. The federal government's powers were to be exercised only in pursuit of certain national ends, as outlined in the Constitution. As James Iredell said, the Constitution was conceived as

a declaration of particular powers by the people to their representatives, for particular purposes. It may be considered as a great power of attorney, under which no power can be exercised but what is expressly given.[6]

Since most of the powers were congressional, most of them were outlined in article I, section 8, of the Constitution, which sets out legislative powers.

The powers outlined in article I, section 8, are important; they include the power to lay and collect taxes, the power to declare war, the power to coin money, the power to promote science and invention by granting patents and copyrights, and the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." But important as those powers are, there was no doubt in the minds of the Framers that they were to be limited, not general.

The enumeration itself makes that clear: if the federal government were intended to be a government of general powers, no such enumeration would have been necessary; and if the enumeration were merely illustrative, it is unlikely that it would have carefully distinguished between, say, the power to "raise and support Armies" and the power to "provide and maintain a Navy" or would have provided for such relatively minor items as the power to "fix the Standard of Weights and Measures," the power to punish counterfeiters, or the power to "Establish Post Offices and Post Roads." Such powers would be assumed were the government one of general powers.

Further evidence of the scheme of enumerated powers is provided by the Bill of Rights, in the form of the Tenth Amendment, which provides that

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Tenth Amendment thus makes clear that the federal government may exercise only those powers delegated to it by the Constitution--and ultimately, as a careful reading of the Preamble indicates, by and from the people. All other powers are reserved to the states, or to the people.

The Tenth Amendment's narrow view of governmental power stands in sharp counterpoint to the other "limited government" provision of the Bill of Rights, the Ninth Amendment, which provides that

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

The juxtaposition of those two amendments, at the conclusion of the Bill of Rights, makes it clear that the powers of the federal government are to be narrowly and strictly construed, while the rights retained by the people are to be given the broadest possible construction so as to ensure that no rights are denied or disparaged. Unfortunately, over the intervening two centuries, that view has been essentially reversed.[7]

For the first century and more of the nation's existence, the principle of limited national government remained largely intact, as demonstrated by the interpretation of the Constitution by early Congresses and executives. Although it may be hard for modern readers to understand--or believe--much time in Congress during those years was taken up with debates over whether the national government was constitutionally empowered to address certain admittedly pressing problems, or whether such problems had instead to be addressed, if at all, by state governments or private individuals.

Thus, a 1794 proposal appropriating \$15,000 for the relief of French refugees of an insurrection in Santo Domingo had to be withdrawn after it drew the comment from Madison that he could not "undertake to lay his finger on that article of the Federal Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents." [8] A similar bill was defeated two years later on the same ground. [9] The debate over Congress's power to establish a national bank is well known. (10) And as late as 1887, President Grover Cleveland vetoed a seed-distribution bill, saying, "I can find no warrant for such an appropriation in the Constitution." (11)

There is thus little room for doubt on the question of whether the Constitution was intended to create a federal government of limited powers. And, in fact, there are few who would dispute that. Nonetheless, the federal government's powers have grown in ways that the Framers never intended--in fact, they have grown in ways that the Framers quite explicitly intended to prevent. (12) Although there are many aspects to that growth, the single most important source of governmental expansion has been the Commerce Clause.

The Federal Commerce Power

Among the enumerated powers granted the federal government was the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The need for commercial regulation at the national level was one of the key reasons for the adoption of the Constitution. Under the Articles of Confederation, a weak federal government had been powerless to prevent self-serving and protectionist commercial legislation by the states, with ruinous economic consequences. In his Commentaries on the Constitution of the United States, the leading constitutional treatise of the early 19th century, Justice Joseph Story spelled out those consequences:

[T]he want of any power in congress to regulate foreign or domestic commerce was deemed a leading defect in the confederation. This evil was felt in a comparatively slight degree during the war. But when the return of peace restored the country to its ordinary commercial relations, the want of some uniform system to regulate them was early perceived; and the calamities, which followed our shipping and navigation, our domestic, as well as our foreign trade, convinced the reflecting, that ruin impended upon these and other vital interests, unless a national remedy could be devised. . . . Measures of a commercial nature, which were adopted in one state from a sense of its own interests, would often be countervailed, or rejected by other states from similar motives. . . . These evils were aggravated by the situation of our foreign commerce. . . . Our trade in our own ships with foreign nations was depressed in an equal degree, for it was loaded with heavy restrictions in their ports. While, for instance, British ships with their commodities had free admission into our ports, American ships and exports were loaded with heavy

exactions, or prohibited from entry into British ports. We were, therefore, the victims of our own imbecility. . . . It was further pressed upon us, with a truth equally humiliating and undeniable, that congress possessed no effectual power to guaranty the faithful observance of any commercial regulations; and there must in such cases be reciprocal obligations.(13)

The federal commerce power was designed to remedy those evils by allowing the federal government sufficient power to police and preempt self-serving state regulation and to treat with other sovereign nations on an equal basis--which meant, among other things, the power to make international trade agreements stick. The term "regulate" was thus meant in its contemporary sense, "to make regular," as distinct from its more common modern meaning, "to control."(14) Early Commerce Clause cases, even those that took a fairly expansive view of federal power, made that point clear. The most important such case was the famous "steamboat monopoly" case of *Gibbons v. Ogden*.(15)

Gibbons v. Ogden and Limits on Federal Power

The Supreme Court's opinion in *Gibbons v. Ogden* (1824) should be familiar to all readers as a classic opinion establishing the supremacy of federal commerce regulation over inconsistent state law. What is less well known is that the case was also argued, at some length, as a patent case, although the patent issue was never reached, and indeed was barely mentioned, in Chief Justice John Marshall's opinion. A short history follows.

In recognition of their invention of the steamboat, the State of New York granted Robert Livingston and Robert Fulton the exclusive right of navigation of all waters within the State of New York by fire and steam for a term of 30 years beginning in 1808. Acting under that state-granted monopoly, Livingston and Fulton granted a license to Aaron Ogden, bestowing the exclusive right to navigate by steam the waters between New Jersey and the city of New York. Thomas Gibbons, owner of two steam vessels, held a federal coasting license and competed with Ogden on that route. After Ogden brought suit against Gibbons in the courts of New York, which granted him an injunction against Gibbons, Gibbons appealed to the Supreme Court of the United States.(16)

On its face, *Gibbons* looks like a standard patent case. Inventors, in recognition of their achievement, receive the exclusive right to use their invention for a term of years. Here, the invention was licensed to another, who brought an infringement suit against a competitor using the same technology, which led to an injunction against further infringement. Had Livingston and Fulton received their exclusive rights from the federal government under a U.S. patent statute, that would have been the end of the matter. Instead, their exclusive rights came from the State of New York, raising important federalism issues.

The case was argued on two questions: whether the New York law violated Congress's constitutional power to regulate commerce, and whether the New York law was inconsistent with Congress's constitutional power to grant patents.(17) Both issues were argued before the Supreme Court by counsel opposing the New York monopoly: Daniel Webster, representing Gibbons, and William Wirt, the U.S. attorney general, who also entered the case in opposition to the New York law.

Although *Gibbons* was argued in part as a patent case, it was decided purely on Commerce Clause grounds. In brief, Marshall concluded that Gibbons's possession of a federal coasting license, authorizing him to carry on the coasting trade throughout the United States, necessarily invalidated any state law that would prohibit his operations. As Marshall stated:

This act demonstrates the opinion of Congress that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters, and entering ports which are free to such vessels, than if they were wafted on their voyage by the agency of winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a state inhibiting the use of either to any vessel having a license under the act of Congress comes, we think, in direct collision with that Act.(18)

Marshall then went on to dismiss the patent issue entirely, having decided the issue on Commerce Clause grounds:

As this decides the case, it is unnecessary to enter in an examination of that part of the constitution which empowers

Congress to promote the progress of science and the useful arts.(19)

Marshall's dismissal is unfortunate, as treatment of the patent issue might have done much to answer questions about state-federal relations.

Gibbons has thus come to stand for the proposition that states may not obstruct interstate commerce with parochial or self-serving legislation, a proposition with which there can be little disagreement. But Gibbons has been especially important for its definition of what constitutes "commerce among the states." New York had argued that the navigation of its territorial waters was intrastate commerce and thus could not constitute commerce among the states, regardless of the origin of the vessel involved. According to Marshall:

Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State.(20)

Although some commentators have characterized Marshall's definition of "commerce among the states" as extraordinarily broad to the point of prefiguring more modern case law,(21) that is not an accurate characterization, as further examination of what Marshall actually said will demonstrate.(22) Commerce, says Marshall, is "intercourse." (23) Marshall's definition of commerce encompasses trade among states in a way that allows the federal government to police protectionist measures--such as New York's steamboat monopoly--even when the measures take effect only within the territory of one state. But it is also a definition that has limits: regulation is restricted to "commerce which concerns more states than one."

Marshall notes that had the power been intended to reach all commerce, it would not have been enumerated as "Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Indeed, the Constitution most certainly would not have been ratified had the commerce power been understood as general and not limited, since such a power would have allowed Congress to outlaw slavery, something that the southern states would never have permitted. There can be little doubt, therefore, that the commerce power was intended to be limited to commerce that concerned more than one state, and in a fairly direct way.

Case law during the next century underscores that understanding, for it includes a number of cases striking down federal legislation aimed at socially popular ends, such as antitrust law and child labor law. Despite the political popularity of such legislation, the Court nonetheless found its enactment outside the commerce power.

In *United States v. E. C. Knight Co.*,(24) for example, the Supreme Court invalidated the application of antitrust laws to a cartel of sugar producers on the ground that "manufacture" was not a part of "commerce." "Commerce," the Court held, constituted the buying and selling of goods, not their manufacture. "Commerce succeeds to manufacture, and is not a part of it," stated the Court.(25) That definition is consistent with the notion of commerce as transactional and is rooted in the Framers' view--as interpreted in *Gibbons*--that the chief purpose of the Commerce Clause is the policing of protectionist activity on the part of states, and the facilitation of commerce among the states.

The Expansion of Federal Power

There is another way of reading "commerce among the states," of course. Instead of being interpreted as referring to transactions between buyers and sellers across state lines, the clause might be read as referring to "any activity with an

economic effect in more than one state." There are two problems with the second interpretation. The first is structural, that it undercuts the entire idea and point of enumerated powers: if Congress is free to regulate any activity that may have an economic effect in more than one state, then Congress is free to regulate just about any activity. The second problem with the more sweeping interpretation is historical: it was adopted by the Court only recently, without benefit of any change to the Constitution itself that would warrant such a switch.

Perhaps tiring of being blamed for frustrating progressive social legislation, perhaps intimidated by Franklin Roosevelt's Court-packing scheme,(26) since the New Deal the Supreme Court has for whatever reason pretty much abandoned its role of policing the boundaries of legislative power-- and of the commerce power in particular. Beginning in 1937 with *Jones & Laughlin Steel*,(27) the Court adopted (usually by narrow five-to-four margins) a definition of "commerce" that stressed not "commerce among the states"--or "intercourse" across state lines--but rather the interconnected nature of the national economy.

Jones & Laughlin Steel came just one year after *Carter v. Carter Coal Co.*,(28) in which the Supreme Court had upheld the definition of "commerce" it had first set forth in *Gibbons* more than a century before. Stating that "the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade,'" (29) the *Carter* Court struck down application of the National Labor Relations Act to striking coal miners, since coal mining was not "commerce." As the Court put it:

Extraction of coal from the mine is the aim and the completed result of local activities. Commerce in the coal mined is not brought into being by force of these activities, but by negotiations, agreements, and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence. Commerce disposes of it.(30)

Just one year later, however, the *Jones & Laughlin* Court retreated from that holding. Applying the same statute to the subject of manufacturing, the Court stressed the interrelated nature of the enterprise's various parts. Although coal mining might not be commerce, *Jones & Laughlin Steel* was a far-flung enterprise, vertically integrated.

With its subsidiaries--nineteen in number--it is a completely integrated enterprise, owning and operating ore, coal, and limestone properties, lake and river transportation facilities, and terminal railroads located at its manufacturing plants. . . Summarizing these operations, the Labor Board concluded that the works in Pittsburgh and Aliquippa [where the strikes took place] "might be likened to the heart of a self-contained, highly integrated body. They draw in the raw materials from Michigan, Minnesota, West Virginia, Pennsylvania in part through arteries and by means controlled by the respondent; they transform the materials and then pump them out to all parts of the nation through the vast mechanism which the respondent has elaborated."(31)

In short, *Jones & Laughlin Steel* was a large corporation doing business in many states.

Those facts should make no real difference in the legal analysis, of course: if *Jones & Laughlin* had been merely a steel milling company, contracting at arms length with independent barge lines, railroads, and distributors for the transport and sale of its product and raw materials, the effect of labor unrest at its plant would have been the same. It is thus difficult to see any meaningful reason-- other than fear of or sympathy with President Roosevelt--for a different finding in *Jones & Laughlin* than in *Carter*. Put another way, having decided in *Jones & Laughlin* to treat labor disputes at manufacturing facilities as though they involved "commerce among the states," there seems little way to avoid treating similar enterprises as being engaged in such commerce even absent the kind of integration enjoyed by the *Jones & Laughlin Steel Corporation*, which the Court stressed in its opinion. Indeed, the Court made no effort to limit its holding.

That became clear four years later in the next case of significance, *United States v. Darby*.(32) *Darby* was charged with violating the Fair Labor Standards Act of 1938, which prohibited the shipment in interstate commerce of goods manufactured by employees who were paid less than the minimum wage or worked more than the maximum permitted hours. Although the district court struck down the act as unconstitutional, since manufacturing did not constitute "interstate commerce," the Supreme Court reversed. Congress, the Court stated, had the power to regulate interstate commerce. That power included the power to prohibit interstate commerce if Congress saw fit. The Court would not interfere with Congress's judgment about what commerce should be prohibited; the only restraints on that judgment, the Court said, were political, not constitutional.

Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. . . .

Our conclusion is unaffected by the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The amendment states but a truism that all is retained which has not been surrendered.(33)

But if Congress had the power to "regulate" commerce by excluding items from interstate commerce that were manufactured without adherence to federal standards, surely by this point the federal commerce power had found its outer limits. Items manufactured, sold, and consumed all within a single state were surely part of the "purely internal commerce" of a state (to use Marshall's phrase) and beyond the scope of federal regulation, however broadly conceived.

So one might have thought, but that misconception would not have lasted long. Just one year later, the Supreme Court decided *Wickard v. Filburn*,⁽³⁴⁾ a case that still, over 50 years later, elicits surprise, puzzlement, and occasionally outrage from first-year law students. *Wickard* made clear to even the most obtuse that the Supreme Court had given up any real effort to police the boundaries of federal power in favor of nearly total deference to the political branches.

Filburn was an Ohio dairy farmer who also grew a little wheat on the side. Under the New Deal's Agricultural Adjustment Act, economic planners in the Department of Agriculture established quotas for wheat production that were intended to keep prices up by ensuring that supply did not exceed demand. Filburn's quota (the term was "allotment") was 222 bushels, but he actually harvested 461 bushels. The amount in excess of his quota was used by his family and livestock, right on the farm where it was grown. When Filburn was fined \$117 for his excess harvest, he sued the secretary of agriculture to block enforcement of the penalty. He won in the lower court, which regarded the restriction as outside the scope of Congress's power to regulate "commerce among the states," since the excess wheat never left the farm. The Supreme Court reversed.

According to the Court, although Filburn's production and consumption of wheat may not have been part of "commerce among the states," it could nonetheless be regulated by Congress because its presence might frustrate congressional efforts to manage the national economy.

That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. . . . But even if appellee's activity be local and though it may 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, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect." . . .

That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial. It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat, and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. . . . [I]f we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce.(35)

Thus, the Court found that regulation of commerce "among the states" extended to forbidding farmers to grow wheat for their own consumption, because that activity "affects" the market. The Court gets to that point by employing two new tests: an "affecting commerce" test, whereby Congress is entitled to regulate not merely commerce but anything that "affects" commerce, and an "aggregation" test, by which even trivial effects on interstate commerce may be summed to justify congressional regulation.

It is difficult to conceive of a transaction that would not permit regulation by Congress under that approach. Virtually

every activity has some effect on commerce, and virtually every activity is engaged in by enough people to permit an assertion that its cumulative effect is more than trivial. Thus, the commerce power could be read to permit regulation of virtually any activity, down to the wearing of hats. After all, although it has only a trivial effect on commerce when one individual wears or does not wear a hat, the impact could be magnified by the behavior of large numbers of individuals. A requirement to wear hats could be justified by arguing that it would boost hat sales and help prop up the flagging American hat industry, and (if hat wearing can plausibly be asserted to prevent colds) that it might even help control skyrocketing health care costs and reduce worker absenteeism--all effects with implications for the national economy and hence, in the Wickard sense, for "commerce."

That hypothetical example may seem far-fetched, but it is only a modest exaggeration of what has been done with the Commerce Clause since Wickard. This study will pass over the various cases extending coverage of the civil rights laws to local activities based on Commerce Clause authority.⁽³⁶⁾ Although such cases may have lent respectability to the expansion that Wickard illustrated, other cases, too, illustrate that expansion. Thus, in *Perez v. United States*,⁽³⁷⁾ the Supreme Court found that federal legislation outlawing the practice of "loan sharking" was within the commerce power. As it had previously, the Court combined the "affecting commerce" and "aggregation" tests. According to the Court, all that was needed to uphold the statute was a finding by Congress that many loan sharks were affiliated with interstate organized crime. Since Congress could regulate a class of interstate activities, and since petitioner was a member of the class engaged in extortionate credit activities as defined by Congress, the Court held that Congress could punish the petitioner for "loan sharking" without any evidence that he was engaged in, or affected, interstate commerce. The stretch that this required did not pass unnoticed. In dissent, Justice Potter Stewart noted that

[i]n order to sustain this law we would, in my view, have to be able at least to say that Congress could rationally have concluded that loan sharking is an activity with interstate attributes that distinguish it in some substantial respect from other local crime. But it is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets. Because I am unable to discern any rational distinction between loan sharking and other local crime, I cannot escape the conclusion that this statute was beyond the power of Congress to enact. The definition and prosecution of local intrastate crime are reserved to the States under the Ninth and Tenth Amendments.⁽³⁸⁾

Justice Stewart's concerns had been presaged by Representative Eckhardt of Texas, who had said during debate on the bill that

[s]hould it become law, the amendment would take a long stride by the Federal Government toward occupying the field of general criminal law and toward exercising a general Federal police power; and it would permit prosecution in Federal as well as State courts of a typically State offense. . . .⁽³⁹⁾

Unfortunately, as persistent efforts to involve the federal government in general crime-related matters demonstrate, the warnings of Stewart and Eckhardt fell on deaf ears. The Framers' principle of limited government, restrained within enumerated powers, has fallen out of public (and congressional) favor and receives very little attention.

The doctrine of enumerated powers has not been entirely abandoned by the courts, however. In *Maryland v. Wirtz*,⁽⁴⁰⁾ for example, the Court noted:

This Court has always recognized that the power to regulate commerce, though broad indeed, has limits. Mr. Chief Justice Marshall paused to recognize those limits in the course of the opinion that first staked out the vast expanse of federal authority over the economic life of the new Nation.⁽⁴¹⁾

Writing for the Court, Justice John Marshall Harlan went on to note that "[n]either here nor in Wickard has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."⁽⁴²⁾

And in the same year as *Perez*, the Court did draw a line of sorts by refusing to uphold a statute prohibiting the mere possession of a firearm by felons without proof that the gun had been possessed "in commerce or affecting commerce."

The case was *United States v. Bass*,⁽⁴³⁾ and the Court made its decision based on two canons of statutory construction:

[First, ambiguity] concerning the ambit of criminal statutes should be resolved in favor of lenity. . . .

[Second,] unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision. . . . [T]he broad construction urged by the Government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources. Absent proof of some interstate commerce nexus in each case, [the law] dramatically intrudes upon traditional state criminal jurisdiction. [Its] legislative history provides scanty basis for concluding that Congress faced these serious questions and meant to affect the federal-state balance in the way now claimed by the Government. Absent a clearer statement of intention from Congress than is present here, we do not interpret [it] to reach the "mere possession" of firearms.⁽⁴⁴⁾

The Court noted that it did "not reach the question whether, upon appropriate findings, Congress can constitutionally punish the 'mere possession' of firearms."⁽⁴⁵⁾ However, in the later case of *Scarborough v. United States*,⁽⁴⁶⁾ the Court found that the necessary commerce nexus could be shown by demonstrating that the firearm had been, at some time, in interstate commerce. Not a very demanding test, but one that cannot be met in *Lopez*, to which we now turn.

The Lopez Case

Facts of the Case

On March 10, 1992, Alfonso Lopez, Jr., a 12th-grade student at Edison High School in San Antonio, Texas, brought a .38 caliber handgun to school. The gun was unloaded, but concealed, and Lopez was also carrying five bullets on his person. Lopez was apparently making a delivery to another student who planned to use the gun in a "gang war." He was to be paid \$40 for his delivery services.⁽⁴⁷⁾

Lopez's action was illegal under Texas law, which makes transport of weapons onto school premises a third-degree felony.⁽⁴⁸⁾ He was initially charged under Texas law, but the state charges were dropped when he was charged instead with violating the federal Gun-Free School Zones Act of 1990, part of the Crime Control Act of 1990. That charge was the only count in the indictment. Lopez waived a jury trial and was tried before the bench on stipulated evidence, then convicted and sentenced to six months' imprisonment and two years' probation. Neither the indictment nor the government's case at trial alleged that Lopez's conduct had been in or affected interstate commerce. Lopez appealed to the U.S. Court of Appeals for the Fifth Circuit on the ground that the statute under which he was convicted was unconstitutional because beyond the power of Congress to enact.

The Gun-Free School Zones Act provides, "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."⁽⁴⁹⁾ It defines "school zone" as "in, or on the grounds of, a public, parochial or private school"⁽⁵⁰⁾ or "within a distance of 1000 feet from the grounds of a public, parochial or private school."⁽⁵¹⁾ A "school" is defined as "a school which provides elementary or secondary education under State law."⁽⁵²⁾

Nowhere does the act require that the possession of the gun affect interstate commerce or that the gun have moved in interstate commerce. In fact, the act invokes no delegated power of Congress for its authority. The government argued at appeal, however, that the act was constitutional as an exercise of the commerce power.

The Lopez Opinion

The court of appeals concluded that the statute was outside the commerce power of Congress. It began its analysis with a look at the Tenth Amendment, which declares that powers not delegated to the federal government are reserved to the states or to the people. The court quoted *New York v. United States*⁽⁵³⁾ to the effect that

[i]n a case like this one, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other.(54)

The Fifth Circuit said that that meant that even if Lopez was right in claiming that the Gun-Free School Zones Act intruded upon a domain traditionally left to the states (as it clearly did), the act was constitutional if it fell within the commerce power. But the Fifth Circuit continued:

This is not to say, however, that the Tenth Amendment is irrelevant to a Commerce Clause analysis. Our understanding of the breadth of Congress' commerce power is related to the degree to which its enactments raise Tenth Amendment concerns, that is concerns for the meaningful jurisdiction reserved to the states. At a more textual level, the Tenth Amendment, though it does not purport to define the limits of the commerce power, obviously proceeds on the assumption that the reach of that power is not unlimited, else there would be nothing on which the Tenth Amendment could operate.(55)

The Fifth Circuit briefly reviewed the Bass and Scarborough cases mentioned above, concluding that they did not answer the question of whether Congress had the power to outlaw possession of firearms within school zones. It then reviewed the history of federal firearms legislation at great length before addressing the commerce power question.

The Fifth Circuit opened its Commerce Clause analysis by noting, "We are, of course, fully cognizant and respect ful of the great scope of the commerce power."(56) But the court also noted, "Broad as the commerce power is, its scope is not unlimited, particularly where intrastate activities are concerned."(57) After reviewing the case law from *Gibbons v. Ogden* to *Wickard v. Filburn*, the court concluded that Congress could regulate intrastate activity only if that activity exerted a "substantial economic effect on interstate commerce."(58) Quoting Justice Harlan in *Maryland v. Wirtz*, the court noted that a "relatively trivial impact on commerce" could not be used as "an excuse for broad general regulation of state or private activities."(59) "Indeed," the court continued,

it could not be otherwise as the chain of causation is virtually infinite, and hence there is no private activity, no matter how local and insignificant, the ripple effect from which is not in some theoretical measure ultimately felt beyond the borders of the state in which it took place. Hence, if the reach of the commerce power to local activity that merely affects interstate commerce or its regulation is not understood as being limited by some concept such as "substantially" affects, then, contrary to *Gibbons v. Ogden*, the scope of the Commerce Clause would be unlimited, it would extend "to every description" of commerce and there would be no "exclusively internal commerce of a state" the existence of which the Commerce Clause itself "presupposes" and the regulation of which it "reserved for the state itself."(60)

Although the Fifth Circuit noted that courts have generally deferred in great measure to Congress's determinations on when particular practices "substantially" affect interstate commerce--at least where, as is almost always the case, there is some "rational basis" for those determinations--it also noted that there was no such determination in the case before it. "Courts cannot properly perform their duty to determine if there is any rational basis for a Congressional finding if neither the legislative history nor the statute itself reveals any such relevant finding." Indeed, the court noted, "in this case, there is no substantial indication that the commerce power was even invoked."(61)

Noting that the act "extends to criminalize any person's carrying of any unloaded shotgun, in an unlocked pickup truck gun rack, while driving on a county road that at one turn happens to come within 950 feet of a one-room church kindergarten located on the other side of a river, even during the summer when the kindergarten is not in session,"(62) the court found it difficult to understand the requisite "substantial" effect on interstate commerce--in fact, it seemed at a loss to find any effect at all. As the court said:

We are unwilling to [sic] ourselves to simply assume that the concededly intrastate conduct of mere possession by any person of any firearm substantially affects interstate commerce, or the regulation thereof, whenever it occurs, or even most of the time that it occurs, within 1000 feet of the grounds of any public or private school, whether or not then in session. If Congress can thus bar firearms possession because of such a nexus to the grounds of any public or private school, and can do so without supportive findings or legislative history, on the theory that education affects commerce, then it could also similarly ban lead pencils, "sneakers," Game Boys or Slide Rules.(63)

Accordingly, because Congress had no constitutional authority to enact it, the statute was declared unconstitutional.

The question remaining is whether the Supreme Court will affirm that entirely sensible decision. If it does, it will underscore, in a small way, that ours is still a limited government of enumerated powers. If it does not, it will end all pretense to that effect and will inter at last the Framers' grand design.

What the Supreme Court Should Do

The Supreme Court finds itself in an interesting situation. On one hand it has gone over 50 years without taking significant action to enforce the boundaries of the commerce power, producing a situation in which a standard law-student definition of the modern commerce power is, "Congress can do whatever it wants." On the other hand the Court has been careful never to actually say that the power is unlimited. Now, however, it finds itself confronted with an opinion in which the issue is joined, with no easy escape apparent.(64)

What the Court should do, of course, is seize this opportunity to assert and underscore that our federal government remains today a limited government, constrained to exercise only those powers enumerated in the Constitution. Even the harshest critics of the New Deal admit that it is probably too late to undo entirely the changes of the New Deal era,(65) and such undoing is even less likely to occur at a stroke. Nonetheless, there are many things that the Court could do in *Lopez* that would help restore constitutional government.

First, the Court should uphold the lower court's opinion. To do otherwise would be to affirm the cynical law-student view of the commerce power and to bring down the final curtain on our constitutional system of limited government through enumerated federal powers. But the Court should go beyond simply affirming the lower court's opinion, which takes the narrow and cautious line that is appropriate for an intermediate appellate court.

The Supreme Court can go further. It can and should underscore that the "affecting commerce" test was not intended to allow Congress to find some incidental contact with interstate commerce (for example, that a gun or automobile was manufactured out of state), claim authority, and then extend federal power to everything in sight. When Congress outlaws possession of guns that have at some time been in interstate commerce, as in *Scarborough*, everyone knows that Congress is not trying to regulate commerce--it is trying to regulate the possession and use of guns.

The Court should cut through that ruse. If it must for now stick with an "affects commerce" test, it should at least raise the standard to "substantially affects commerce," reflecting Justice Marshall's usage in *Gibbons*, where there was no doubt about the effect of the New York law on interstate commerce. Under today's minimal standard, Congress is able to regulate activities not enumerated in the Constitution, for which the regulation of commerce serves merely as an excuse, which the Court has allowed to pass. Congress passed the Gun-Free School Zones Act not to regulate commerce but to regulate gun possession, using the regulation of commerce as a constitutional pretext. The Court should no longer permit such pretexts.

In raising the standard, moreover, the Court should also make clear that although it may grant some deference to congressional determinations of whether a particular practice "substantially affects" commerce among the states, that deference will not be blind. Where it is obvious that Congress is merely using (in Justice Harlan's words) "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities,"(66) the Court should not hesitate to find the statute in question unconstitutional.

The deeper issue, however, which the Court may not be ready to face, is the pretense that even a "substantially affects commerce" test permits. For when it is not "commerce among the states" that Congress is regulating but something else, for which the regulation of interstate commerce is the pretext, the Constitution stands on its head. By virtue of its having been enumerated, after all, the commerce power was part of a scheme to limit government, not to expand it. Yet when the regulation of commerce becomes not an enumerated end of federal government but a means to some other unenumerated end, the original scheme is turned upside down: what was meant to be a brake becomes an accelerator. And indeed, that is just what has happened. At bottom, therefore, the Court should ask not whether the regulated activity "affects" interstate commerce--for again, as *Wickard* shows, at some level virtually any activity meets that test--but whether it is interstate commerce. If not, then absent authority from some other part of the Constitution, Congress has no authority to regulate it.(67)

But to recognize that the commerce power, when treated as a means, is virtually unlimited is to arrive at what surely is

the heart of the problem. For the power to regulate commerce can never be anything but a means. Congress, after all, does not regulate commerce for its own sake, but rather for the sake of some other end. The dilemma, then, is this: if Congress can regulate interstate commerce for any end, then the commerce power is essentially boundless and the doctrine of enumerated powers is empty--indeed, was empty right from the start. That reading cannot be right, for it would eviscerate the very theory of the Constitution--and the core of the Federalist Papers, which were written in large part to explain the theory.

Accordingly, we are driven by the logic of the situation--which history supports--to the conclusion that the commerce power was not meant to be boundless but was meant instead to serve a quite specific function, namely, to ensure the free flow of goods and services among the newly united states. It was meant, that is, as a kind of negative--as in Gibbons--by which Congress could strike down or supersede efforts by states that impeded interstate commerce. Indeed, had they chosen their words more carefully, and used italics, the Framers might have written "Congress shall have power to make regular commerce among the states." Thus, the "positive" side of the commerce power, congressional authority to legislate, should be understood as closely related to the "negative" or "dormant" side of the commerce power, which the Supreme Court has consistently held to prohibit state laws interfering with the free flow of goods in the national economy.

Were the Court to take such an approach, thus adhering to the original design of the Constitution, the implications would be far-reaching, of course, for a vast array of statutes passed "under" the commerce power, but having nothing to do with ensuring the free flow of commerce, would have to go. Moreover, many of those statutes are politically popular, regardless of their constitutionality. One does not maintain constitutional principles, however, by reference to what the people want at the moment, as the Framers realized.

The Gun-Free School Zones Act is a case in point: passed as part of what has become a biannual ritual of passing crime legislation shortly before congressional elections, it merely federalized what was already a state crime. It did so not because there was any uniquely federal role in keeping guns out of schools, or because states lacked the power to deal with the problem--much less because states had impeded commerce--but rather because of a desire on the part of federal legislators to look like they were taking action on what was seen as an important social question.

If the Court strikes down the Gun-Free School Zones Act, it will no doubt be accused of hamstringing federal efforts to deal with a national problem in the name of outdated constitutional theory. Supreme Court justices are given life tenure in order to help them withstand such criticism and to ensure that they will care more about the Constitution than about their critics. Surely, a Court that has withstood enormous abuse over decisions on questions ranging from school desegregation to flag burning can withstand the criticism that will follow its overturning the statute in *Lopez*.

The Court may also be accused of "judicial activism" in the event that it upholds *Lopez*, but such an accusation would be demonstrably false. Although definitions of "judicial activism" seem to vary with the political predilections of the accusers, the charge of unwarranted activism cannot plausibly be raised when a court is merely following the language and plan of the Constitution. The Framers' plan of enumerated powers and limited federal government is quite explicitly spelled out in the Constitution. That plan was reinforced and underscored by the Ninth and Tenth Amendments--which, like the rest of the Bill of Rights, are designed to be enforced by courts.

As James Madison himself said about the provisions of the Bill of Rights, "If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive."(68) The power of judicial review, through which the Supreme Court may invalidate laws that are beyond Congress's power to enact, is a fundamental part of our constitutional scheme; its proper exercise is not judicial "activism" but a judicial duty. When the Court strikes down laws that violate the Constitution, it is merely doing what it is charged to do. By contrast, when the Court invents new grounds for legislative power that are not within the Constitution, it is practicing judicial activism. *Lopez* offers an opportunity to set things right.

Nor is it too late to do so. Some people may find the New Deal already receding into the mists of time, but judicially abetted federal power is in fact less than 60 years old. That is about the same amount of time that passed between the Supreme Court's endorsement of "separate but equal" in *Plessy v. Ferguson*(69) and its recognition of the error of that

approach in *Brown v. Board of Education*.⁽⁷⁰⁾ In view of the difficulty of amending the Constitution, the Supreme Court must be, and traditionally has been, open to the need for reversing its own opinions where they turn out to have been in error. Once again, *Lopez* presents an opportunity to correct past errors.

Why It Matters

If the only issue presented by *Lopez* were fidelity to a constitutional scheme more than 200 years old, many people might regard the case as of merely academic interest. But there is more at issue.

In popular discussion we are often told that the Framers "liked" limited government in the same way they "liked" knee breeches or Madeira wines--and we, by implication, like active government (although that is rapidly changing). When such tastes are held up to bar action to address contemporary problems, it is no surprise that the Framers' design loses. Yet the interest of the Framers in limited government, far from being merely aesthetic, was based on a sophisticated political theory, the abandonment of which has brought us the problems of "gridlock," "demosclerosis," and special-interest domination, as the Framers themselves foresaw might happen. It is that practical aspect of the Framers' design, and the consequences of abandoning the design, that must be understood when considering the *Lopez* case and the role of limited government.

By dividing responsibilities between a federal government of limited jurisdiction and state governments of more general jurisdiction,⁽⁷¹⁾ the Framers established a system that was intended to resist special-interest pressures. State governments would address local concerns such as crime. Their actions would be policed in two ways. First, the national government could in many cases directly intervene--either through the existence of a national judiciary criminatory or unjust state government action,⁽⁷²⁾ or through national regulation of commerce, as in *Gibbons*.⁽⁷³⁾ Second, the free movement of individuals and capital among the states, a right guaranteed under the Constitution, would provide a second form of discipline: states that overtaxed, discriminated, or overregulated would lose citizens and businesses to states that did not. The national government, meanwhile, would be protected from special-interest pressures, in no small part by its limited jurisdiction. A government that can do few things is less attractive to lobbyists than one that can do many. Furthermore, political accountability--enforced by the anti-delegation doctrine until it, too, was effectively abandoned by the Supreme Court⁽⁷⁴⁾--made caving in to special interests harder and policing the boundaries of enumerated powers less difficult.

The expansion of federal power that has resulted from abandoning the Constitution's built-in limits has, of course, made it far more attractive to lobby the federal government. A government that can regulate wages attracts the attention of lobbyists for trade unions and manufacturers; a government that can pass "crime" bills attracts the attention of police unions, local governments, gun-control activists and opponents, and so on. That should come as no surprise, but many commentators have so far failed to make the connection.

The growth of special-interest lobbying has led to many of the problems we face today. Economist Mancur Olson has called the ability of special interests to frustrate change the major problem of democracies. Over time, special-interest groups accumulate. This "web of special interests" produces stagnation, cynicism, and economic decline,⁽⁷⁵⁾ a phenomenon writer Jonathan Rauch calls "demosclerosis."⁽⁷⁶⁾ According to Rauch, interest-group domination took off about the time of World War II⁽⁷⁷⁾--or, as we have seen, about the time of the *Darby* and *Wickard* decisions. The growth in the membership of the American Society of Association Executives may give an indication of the increase in the number of lobbying groups. That society had about 400 members in the late 1920s, by 1950 it had over 2,000, and today it has almost 25,000.⁽⁷⁸⁾ As a result of interest-group influence, it is very hard for government to actually do something--and even harder for it to stop doing something, since every program is someone's pet project. As Rauch notes, although democracies have done well in competition with dictatorships, the real problem lies

in the democratic public's tendency to form ever more groups clamoring for ever more goodies and perks and then defending them to the death. Free and stable societies, it seems, tend to drift toward economic cannibalism and governmental calcification, unless they make a positive effort to fight the current. *Demosclerosis* may now represent the most serious single challenge to the long-term vitality of democratic government.⁽⁷⁹⁾

But why has it gotten worse in the past 50 or 60 years? Technology, which allows computer mailing lists and telephone trees, is certainly part of the reason. But the biggest reason, according to Rauch (and common sense) is that

there is more money involved.

Like the bank robber Willie Sutton, Americans look for cash where the money is. . . .

Never before has organizing groups to lobby for benefits been as potentially lucrative as it is today; never have the sums available been as large or the paths to them as plentiful.(80)

As Rauch notes, the federal budget was about 3 percent of the American economy in 1929, and only about 10 percent at the peak of the New Deal. Now it is over 25 percent.(81) And with it raining federal soup, it is no surprise that interest groups have rushed out with buckets. But each new program creates a new lobby.

Indeed, a built-in side effect of new government programs is their tendency to summon into being new constituencies--which, in turn, often lobby for yet other new programs, keeping the whole cycle going.

Fifty years ago the elderly were a demographic category. Today they are a lobby.(82)

The problem is not new; all democracies run the risk of being overrun by factions that seek to manipulate government to their own ends, a tendency that was no mystery to the Framers of our Constitution.(83) The reason the problem has grown worse in recent decades is that the safeguards the Framers put in place have been removed. With those safeguards gone, it is no surprise that the tendencies they guarded against have grown--any more than it is a surprise when someone whose immune system has been suppressed develops infections.

Nor are the problems purely financial or economic. As the federal government has become paralyzed by special-interest demands on public resources, and citizens have grown to expect a federal response to any social problem that seems pressing, we have seen more and more federal criminal laws aimed at responding to special-interest demands through symbolic action--laws making flag burning a federal crime, for example. The Gun-Free School Zones Act is another such law, and more are likely to come if that act is not overturned in *Lopez*. The addition of new federal crimes is a "free good" to members of Congress; and as are all free goods, it tends to be overused. As more and more federal crimes are added to the books for political and symbolic reasons, the power of the federal government over its citizens' daily lives will steadily increase. That trend may not necessarily end in a police state, but it is certainly corrosive of liberty and political responsibility.

Lopez offers an opportunity to reverse that trend. Despite all the political changes that have taken place in this century, the dismantling of our constitutional immune system has been largely a judicial project. By removing or ignoring the barriers erected through the doctrine of enumerated powers, the federal judiciary has exposed the federal government to a flood of political parasites. Having been converted to a national city council, the national government behaves like a city council. The result, not surprisingly, is that the federal government has grown bloated and immobile, as the lifeblood of the citizens goes to nourish thousands of special interests.

That problem was caused in large part by judicial action, and it can be remedied by judicial action. The constitutional safeguards should be restored. The first step toward doing so would be an affirmance in *United States v. Lopez*, with a strong statement that the Supreme Court will henceforth return to its traditional role of policing the boundaries of federal power as the Framers intended.

If the Supreme Court fails to do so, it will be ringing the death knell for the Constitution's system of enumerated powers and limited federal government. That in turn would promote still further growth of federal responsibilities, of special-interest domination, and of governmental bloat and calcification. But that is only part of what will eventually follow.

With the demise of the doctrine of enumerated powers as a restraint on federal power, the only protection remaining for the liberties of citizens not sheltered by powerful lobbying groups is that provided by the positive limitations on government embodied in the Bill of Rights. Those provisions were inserted by pessimists who did not believe--rightly, as it turns out--that the doctrine of enumerated powers would be enough to restrain the federal government over the long term. There is no reason to believe, however, that the Bill of Rights itself will survive over the long term if the rest of the plan is abandoned. As National Aeronautics and Space Administration engineers say, once you start

relying on the backup systems, you are already in trouble. To take one current example, the pressure to ignore enumerated rights brought about by increased federal responsibilities can already be seen in the calls for "sweeps" of federally funded public housing projects, sweeps that surely violate Fourth Amendment rights.(84)

What rights will be next? A federal government with unlimited responsibilities is likely to demand unlimited power to discharge them and is unlikely to be restrained for long by the Bill of Rights. The Framers knew that. We should remember it.

Notes

[1] *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), rehearing and rehearing en banc denied, 9 F.3d 105 (1993).

[2] 18 U.S.C. 922(q). The act became law on November 29, 1990, as 1702 of the Crime Control Act of 1990, Pub. L. 101-647, 101st Cong. 2d sess., 104 Stat. 4789, 4844-45. Its effective date was 60 days later.

[3] For example, when Judge Thomas Wiseman, a U.S. district judge in Nashville, refused to apply a federal criminal statute to what he deemed a case of purely intrastate auto theft, it was fodder for nationwide attention. It was also quickly reversed by the U.S. Court of Appeals for the Sixth Circuit. See *United States v. Cortner*, 834 F. Supp. 242

(M.D. Tenn. 1993), rev'd and remanded sub nom. *United States v. Osteen*, 1994 US App LEXIS 19221 (6th Cir. 1994). See also James J. Kilpatrick, "Principle Still Valid: Fans of Federalism Can Take Heart at Judge's Common Sense Opinion," *Atlanta Journal and Constitution*, March 10, 1994, p. A15.

[4] Cert. granted, 128 L.Ed.2d 189, 114 S.Ct. 1536, 62 U.S.L.W. 3690 (1994). Although it is always risky to draw inferences from the Supreme Court's decision on whether or not to hear a case, many experts believe that the Court's failure to simply affirm without an opinion means that it intends to do something significant with the case.

[5] *Federalist* no. 45.

[6] Quoted in Gordon Wood, *The Creation of the American Republic 1776-1787* (Chapel Hill: University of North Carolina Press, 1969), p. 600.

[7] See Roger Pilon, "The Forgotten Ninth and Tenth Amendments," *Cato Policy Report* 13, no. 5 (1991); and Randy Barnett, *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* (Washington: Cato Institute, 1989).

[8] *Annals of Congress* 4 (1794): 179. For a general discussion of early Congresses and their view of governmental powers, see Roger Pilon, "Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles" *Notre Dame Law Review* 68 (1993): 507.

[9] *Annals of Congress* 6 (1796): 1727.

[10] See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

[11] *Congressional Record* 18 (1887): 1895.

[12] Franklin Roosevelt's "Brain Trust" Rexford Tugwell has admitted as much. Tugwell notes that the Constitution was intended "to protect citizens from their government, not to define its duties to them or theirs to it"; and the Supreme Court decisions needed to uphold the New Deal expansions of government authority were "tortured interpretations of a document intended to prevent them." Rexford G. Tugwell, "Rewriting the Constitution: A Center Report," *Center Magazine*, March, 1968, pp. 18-19.

[13] Joseph Story, *Commentaries on the Constitution of the United States*, abridged, ed. R. Rotunda and D. Nowak (1833; Durham, N.C.: Carolina Academic Press, 1987), pp. 99-101.

[14] On this point, see Pilon, "Freedom, Responsibility, and the Constitution," p. 534; and Donald Regan, "The

Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause," *Michigan Law Review* 84 (1986): 1125.

[15] *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

(16) *Ibid.* at 1-3, 7.

[17] *Ibid.* at 186.

[18] *Ibid.* at 221.

[19] *Ibid.*

(20) *Ibid.* at 194-95.

[21] See, for example, Laurence H. Tribe, *American Constitutional Law* (New York: Foundation Press, 1988), pp. 305-7.

[22] For a much fuller demonstration of this point, see Richard A. Epstein, "The Proper Scope of the Commerce Power," *Virginia Law Review* 73 (1987): 1387.

[23] 22 U.S. at 189.

[24] *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

[25] *Ibid.* at 12.

[26] See William E. Leuchtenberg, "The Origins of Franklin D. Roosevelt's Court-Packing Plan," *Supreme Court Review* (1966): 347.

[27] *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

[28] *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

[29] *Ibid.* at 298 (quoting *Gibbons*).

[30] *Ibid.* at 303-4.

[31] 301 U.S. at 26.

[32] *United States v. Darby*, 312 U.S. 100 (1941).

[33] *Ibid.* at 121, 123-24.

[34] *Wickard v. Filburn*, 317 U.S. 111 (1942).

[35] *Ibid.* at 124-28 (citations omitted, emphasis added).

[36] See, for example, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (sustaining application of Title II of the 1964 Civil Rights Act, which forbade discrimination in public accommodations, to a motel based on "affecting commerce" principle); and *Katzenbach v. McClung*, 379 U.S. 294 (1964) (sustaining application of Title II of the 1964 Civil Rights Act to Ollie's Barbecue in Birmingham, Alabama, on an "affecting commerce" principle). Those extensions of the Commerce Clause were not without principled opposition. In a letter to the Justice Department just before congressional hearings on the Civil Rights Act, for example, constitutional scholar Gerald Gunther wrote, "It would, I think, pervert the meaning and purpose of the commerce clause to invoke it as the basis for this legislation." Letter of Gerald Gunther, reprinted in Gerald Gunther, *Constitutional Law*, 11th ed. (Westbury, N.Y.: Foundation

Press 1985), p. 163.

[37] *Perez v. United States*, 402 U.S. 146 (1971).

[38] *Ibid.* at 157-58 (Stewart, J., dissenting).

[39] Quoted in *ibid.* at 149.

[40] *Maryland v. Wirtz*, 392 U.S. 193 (1968).

[41] *Ibid.* at 196.

[42] *Ibid.* at 197n. 27.

[43] *United States v. Bass*, 404 U.S. 336 (1971).

[44] *Ibid.* at 347, 349-50.

[45] *Ibid.* at 350.

[46] *Scarborough v. United States*, 431 U.S. 563 (1977).

[47] This factual account is taken from the opinion of the U.S. Court of Appeals for the 5th Circuit, 2 F.3d 1342 (1993).

[48] Texas Penal Code 46.04(a), 46.04(c).

[49] 18 U.S.C. 922(q)(1)(A).

[50] 18 U.S.C. 921(a)(25).

[51] *Ibid.*

[52] 18 U.S.C. 921(a)(26).

[53] *New York v. United States*, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

[54] *Ibid.* at 2417.

[55] 2 F.3d at 1347.

[56] *Ibid.* at 1360.

[57] *Ibid.* at 1361.

[58] *Ibid.* at 1361 (citations omitted).

[59] *Ibid.*

[60] *Ibid.* at 1362 (quoting *Gibbons v. Ogden*).

[61] The court did not address any Second Amendment issues, stating that

"Lopez does not raise the Second Amendment and thus we do not now consider it. Nevertheless, this orphan of the Bill of Rights may be something of a brooding omnipresence here. For an argument that the Second Amendment should be taken seriously, see Levinson, 'The Embarrassing Second Amendment,' 99 Yale L.J. 637 (1989).

2 F.3d at 1364n. 46.

There is a burgeoning literature from constitutional scholars arguing that the Second Amendment, which protects the right to keep and bear arms, does in fact create an individual right to own firearms. For examples, see William Van Alstyne, "The Second Amendment and the Personal Right to Arms," *Duke Law Journal* 43 (1994): 1236; Robert Cottrol and Ray Diamond, "The Second Amendment: Toward an Afro-Americanist Reconsideration," *Georgetown Law Journal* 80 (1991): 309; and Don B. Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," *Michigan Law Review* 82 (1983): 203. However, as Lopez was a minor, and the right to bear arms traditionally extends only to adults, Lopez was unable to assert it as a defense. This point has been underscored in a brief filed in the Supreme Court in this case by Academics for the Second Amendment.

[62] 2 F.3d at 1366.

[63] *Ibid.* at 1366-67.

[64] The easy escape--for the Court to declare simply that Congress needs to invoke explicitly the magic words "Commerce Clause"--does not seem available as a matter of simple credibility. It is hard to believe that the Court would have agreed to hear the case, with all that entails, just to do that, although the Court recently has taken on cases only to later declare that certiorari had been granted "improvidently." See, for example, *PFZ Properties v. Rodriguez*, 112 S.Ct. 1151, 117 L. Ed.2d 400 (1992).

[65] See, for example, Richard A. Epstein, "The Mistakes of 1937," *George Mason University Law Review* 11 (1988): 5.

[66] Quoted in 2 F.3d at 1361.

[67] Although it would certainly not be an answer to the issues in *Lopez*, one interesting tool for encouraging congressional observation of enumerated-power limits might be for the Court to require that Congress specifically identify which constitutional powers it is invoking at the time that legislation is passed. Although the Court has never required that Congress do that, it has become far more willing to require explicit statements by Congress in other contexts (abrogation of state sovereign immunity under Congress's Fourteenth Amendment powers, for example). See, for example, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985). So there certainly could be no objection to such a practice based on notions of judicial restraint or separation of powers. And a requirement that Congress explicitly make such an identification as a part of every bill passed would accomplish two important ends. First, it would force Congress, and by extension the electorate, to think about the nature of enumerated powers and perhaps even promote public debate on the subject. Second, it would mean that the Court could assess the constitutionality of statutes on the basis of what Congress understood it was doing at the time, rather than--as in *Lopez*--on government lawyers' post hoc characterizations.

[68] James Madison, *The Papers of James Madison*, vol. 12, ed. Charles Hobson and Robert Rutland (Charlottesville: University Press of Virginia, 1989), pp. 206-7.

[69] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[70] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[71] Note, however, that the Tenth Amendment's express language says that powers are also reserved to the people--that is, not lodged in any government.

[72] The Contracts Clause of article I, section 10, for example, forbids states from taking action that would impair the obligation of contracts and is enforceable by the federal courts; the same section also bars states' passing ex post facto laws and bills of attainder and from granting titles of nobility. In addition, the Privileges and Immunities Clause of article IV, section 2, protects citizens of one state against discrimination by other states. Early on, in *Corfield v. Coryell*, 6 Fed. CAs. 546, 551-52 (no. 3230) (C.C.E.D.Pa. 1823) (on circuit), Supreme Court Justice Bushrod Washington indicated that this clause did more than offer protection against "interstate alienage," suggesting that it

went so far as to guarantee judicially enforceable natural rights. In addition, Justice Joseph Story, who is widely accepted as an authority on original intent, argued in his Commentaries on the Constitution that the "nature of republican and free governments" imposes judicially enforceable limitations on legislative power at both the state and federal levels. Story, pp. 510-11. For more on Story's views on the subject, see Glenn H. Reynolds, "Sex, Lies and Jurisprudence: Robert Bork, Griswold, and the Philosophy of Original Understanding," *Georgia Law Review* 24 (1990): 1045. Whether or not such limitations were part of the Framers' design, the Supreme Court has not adopted this approach.

[73] Such "national regulation" could consist either of judicial invalidation of state action inconsistent with federal laws, as in *Gibbons*, or of direct legislative overruling of state laws or practices deemed inconsistent with a national system of commerce. In addition, of course, it may be argued that the federal judiciary was intended to police the dormant side of the Commerce Clause directly, by striking down protectionist state laws even where Congress did nothing. Certainly, the federal courts have done so with considerable vigor, enforcing the Commerce Clause's limitations against state government action far more vigorously than they have enforced the Commerce Clause as a limitation on federal power. See, for example, *Quill Corp. v. North Dakota*, 112 S. Ct. 1904 (1992) (striking down state requirement that out-of-state direct mail merchants collect state sales taxes on sales to state residents).

A discussion of national powers to intervene when states deny constitutional rights would be incomplete without a discussion of another largely neglected part of the Constitution. Article IV, section 4, provides that the "United States shall guarantee to every State in this Union a Republican Form of Government." That provision, known as the Guaranty Clause, is regarded as essentially meaningless by most lawyers today, but there seems no doubt that the Framers intended it to grant the national government power to act in the event that a state government became tyrannical. It is, of course, poor lawyering as a general matter to argue that any part of the Constitution is without meaning, nor is there a basis for such an assertion in the context of the Guaranty Clause. The case generally cited for the proposition that the Guaranty Clause is a nullity is *Luther v. Borden*, 48 U.S. 1 (1849). That case, however, merely stated that the clause is not susceptible of direct judicial enforcement, something made clear in *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912). Such a holding is not at all inconsistent with the notion that the federal government has power under the Guaranty Clause--it merely indicates that such power is held by Congress, or the executive, not by the judiciary.

[74] See David Schoenbrod, *Power without Responsibility: How Congress Abuses the People through Delegation* (New Haven, Conn.: Yale University Press, 1993), arguing that the demise of the anti-delegation doctrine has promoted special-interest domination.

[75] Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities* (New Haven, Conn.: Yale University Press, 1982). For a clear and insightful review of Olson's work, see Peter Schuck, "The Politics of Economic Growth," *Yale Law & Policy Review* 2 (1984): 359. For a discussion of how courts--especially the Supreme Court--can play a role in countering the tendencies that Olson describes, see Glenn Reynolds, "Chaos and the Court," *Columbia Law Review* 91 (1991): 110, 114-16.

[76] Jonathan Rauch, *Demosclerosis: The Silent Killer of American Government* (New York: Time Books, 1994).

[77] *Ibid.*, pp. 38-44.

[78] *Ibid.*, p. 43.

[79] *Ibid.*, pp. 19-20.

[80] *Ibid.*, pp. 50, 54.

[81] *Ibid.*, pp. 54, 56.

[82] *Ibid.*, pp. 57.

(83) See *Federalist* no. 10 (Madison), discussing the problem of "factions," and the Constitution's structural means for

dealing with them through federalism.

[84] See Tracey Maclin, "Warrantless Sweeps Are an Erosion of Freedom," *Houston Chronicle*, April 22, 1994, p. A33.