

ENFORCING FEDERALISM AFTER *UNITED STATES v. LOPEZ*

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INTRODUCTION

In 1995, the Supreme Court alarmed its observers by shaking off the cobwebs of sixty years of inaction and invalidating a federal statute as a violation of the Commerce Clause.¹ While it is easy enough to see the shortcomings of the statute – the Gun-Free School Zones Act of 1990² – the long practice of judicial restraint made what ought to have been a modest and unremarkable decision into the stuff of symposia. The Court began its long inertia in 1937, without formal announcement: it simply began to uphold statutes instead of striking them down.³ Yielding to popular support for the legislation of the New Deal, the Court deflected criticism and political attack. Eventually, the Court got around to articulating a doctrine of restraint: it would no longer analyze whether a statute fell within the Commerce Clause, but only whether Congress had a “rational basis” to think that the statute fell within the Commerce Clause.

The new tradition of restraint paid off in the 1960’s, by minimizing the amount of doctrinal maneuvering needed to uphold the Civil Rights Act of 1964 as a proper exercise of the commerce power.⁴ The demonstrable political value of restraint in that particular case seemed to confirm the wisdom of restraint, as a general matter. And, in the last few decades, we have, consequently, witnessed a Court calcified into a practice of such supine inaction that it routinely rubber-stamped congressional work product without regard to how little these statutes had to do with the regulation of interstate commerce, how little positive value they purchased at the cost of state autonomy, and how little need there was to burden the federal courts with these cases.

In Part I of this article, I consider the *Lopez* case, paying particular attention to ideas about judicial restraint and the basic pragmatism present in *all* of the Justices’ opinions. Part II examines whether *Lopez* represents a return to the kind of protection of “traditional” state functions that the Court abandoned *794 as unworkable a decade ago. Finding new themes in the *Lopez* case, I go on, in Part III, to lay groundwork for fresh

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¹ See *United States v. Lopez*, 115 S.Ct. 1624 (1995).

² 18 U.S.C. § 922(q)(2)(A) (Supp. V 1988).

³ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

⁴ See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

debate about the comparative value of federal legislation and state autonomy and the role of the federal courts in preserving the desirable aspects of federalism.⁵ I emphasize the importance of overcoming the exaggerated restraint of the past and avoiding new formalisms. Accordingly, I argue for a pragmatic assessment of the positive value of state and local government, the best uses of federal power, and the ideal allocation of cases between the state and federal courts.

I. THE CASE OF *UNITED STATES V. LOPEZ*

A. “First Principles” and “substantial effects”

In narrating the underlying incident in this case – the arrest of a high school boy for carrying a gun to school – the Chief Justice forefronts the role of local authorities. They were not federal officials who uncovered the nefarious behavior of Alfonso Lopez, but “school authorities.”⁶ He is originally arrested and charged with a violation of state law. Texas, quite predictably, criminalizes the possession of a gun on school premises.⁷ State authorities bowed out, however, when federal agents brought charges under the Gun-Free School Zones Act of 1990.⁸

Writing for a majority of the Supreme Court, Chief Justice Rehnquist, after his brief narration of the facts and the proceedings below,⁹ begins his *795 reasoning with the

⁵ For useful discussions of what course the post-Lopez enforcement should take, see Jenna Bednar & William N. Eskridge, *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447 (1995); Emerson H. Tiller, *Putting Politics Into the Positive Theory of Federalism: A Comment on Bednar and Eskridge*, 68 S. CAL. L. REV. 1493 (1995); Charles Fried, *Forward: Revolutions?*, 109 HARV. L. REV. 13 (1995); Judge Louis H. Pollak, *Symposium: Reflections on United States v. Lopez: Foreword*, 94 MICH. L. REV. 533 (1995); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554 (1995); Deborah J. Merritt, *Commerce!*, 94 MICH. L. REV. 674 (1995); Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995); Stephen M. McJohn, *The Impact of United States v. Lopez: The New Hybrid Commerce Clause*, 34 DUQ. L. REV. 1 (1995); Charles B. Schweitzer, *Street Crime, Interstate Commerce, and the Federal Docket: The Impact of United States v. Lopez*, 34 DUQ. L. REV. 71 (1995). For pre-Lopez discussions, see William M. Eskridge & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355 (1994); Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555 (1994); Deborah J. Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563 (1994).

⁶ *United States v. Lopez*, 115 S.Ct. 1624, 1626 (1995).

⁷ *Id.* (citing Tex. Penal Code Ann. § 46.03(a)(1) (West Supp. 1994)).

⁸ *Id.* (citing 18 U.S.C. § 922(q)(1)(A) (Supp. V 1988)). The Act penalizes the knowing possession of a firearm “at a place that the individual knows, or has reasonable cause to believe, is a school zone.” A “school zone” is “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.* at n.1 (citing 18 U.S.C. § 921(a)(25) (Supp. V 1988)).

⁹ In an opinion similar to Justice Breyer’s dissenting opinion in the Supreme Court, noting the effect of schooling on interstate commerce, the district judge rejected Lopez’s argument that the statute violated the Commerce Clause. The Court of Appeals for the Fifth Circuit reversed, emphasizing the lack of findings in the legislative history. During the oral argument in the Supreme Court, it became apparent that the lack of legislative findings was not the primary concern of the Justices. See *Constitutionality of Federal Gun-Free School Zones Act Debated Before Justices*, U.S.L.W.—Daily Edition, Nov. 21 1994, available in LEXIS, Nexis library, CURNWS file. In the final opinion, this issue had become quite minor. All of the opinions that took the position that the statute was unconstitutional stated that the presence of findings would not have changed the outcome. In dissent, Justice Breyer wrote that findings might justify extra deference to Congress, but that extra deference was not necessary in this case and many others. Justice Souter thought findings are important and to be encouraged, but only to save the courts the work of developing the information themselves. Whoever does the work, the result should be the same: either a rational basis for finding a substantial effect on commerce exists or it does not. So, unless one were to think that Congress deliberately legislates where it knows it lacks power, Souter reasoned, findings do not change the outcome. None of the Justices placed importance on Congress’ reenactment of the statute with an incantation of findings. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320904, 108 Stat. 1796 (1994), which includes the statement:

invocation of “first principles”: “[t]he powers delegated ... to the federal government are few and defined,”¹⁰ the powers reserved to the states “are numerous and indefinite,”¹¹ the Framers designed this structure “to ensure protection of our fundamental liberties,”¹² and a federalism consisting of “a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”¹³

Thus, the structure of federalism comes first, and the power of Congress is a component of that structure, notable for its constrained quality, in contrast to the vast powers of the states. That those “few and defined” powers of Congress have received extremely expansive interpretation over the years is secondary. The Chief Justice recounts this history of broad interpretation, but, at every step, notes the limitations.¹⁴ The language of Chief Justice Marshall’s *Gibbons v. Ogden*¹⁵ should daunt readers hoping to rein in Congress. According to Marshall, the commerce power “is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”¹⁶ But there is limitation here too, the Chief Justice points out. Marshall wrote that the power does not “comprehend that commerce, which is completely internal ... and does not extend to or affect other states.”¹⁷

Later case law picks up on this notion of effect on commerce and opens vistas of federal power. With the emergence of a national economy, the potential for affecting commerce grew – yet not to the point of including everything. “[E]ven these modern-era precedents,” Chief Justice Rehnquist writes, “confirm that this power is subject to outer limits.”¹⁸ The *Jones & Laughlin* case¹⁹ adverted to “our dual system of government,” and denied that the commerce power could be so broad that it would “effectually obliterate the distinction between what is national and what is local and create a completely centralized government.”²⁰ The case law had come to express this need to preserve separately functioning states by demanding that the effect on interstate commerce be “substantial.”²¹

The occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country; ... this decline ... has an adverse impact on interstate commerce and the foreign commerce of the United States; ... Congress has power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation’s schools by enactment of this subsection.

¹⁰ 115 S.Ct. at 1626 (quoting THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

¹¹ Id.

¹² Id. (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

¹³ Id.

¹⁴ Id. at 1626-29.

¹⁵ 22 U.S. 1, 9 (1824).

¹⁶ Id. at 196.

¹⁷ Id. at 194.

¹⁸ *Lopez*, 115 S.Ct. at 1628.

¹⁹ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

²⁰ Id. at 37, quoted in 115 S.Ct. at 1628-29.

²¹ See, e.g., *United States v. Darby*, 312 U.S. 100, 119-20 (1941); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). Justice Breyer, in dissent in *Lopez*, argued that the proper standard is “significant effect,” a lower standard than “substantial effect,” though it would not make a difference in the outcome of *Lopez*. 115 S.Ct. at 1658 (Breyer, J., dissenting).

If the practice of the Supreme Court since 1937 has been to uphold federal legislation challenged under the Commerce Clause, according to the Chief Justice, it is not because the New Deal cases obliterated all limits, it is because Congress has “heeded [the] warning” and has considered whether there was a “substantial effect” on interstate commerce.²² Cases that may have seemed to authorize Congress to regulate activities that have only a trivial effect on interstate commerce are, in the Chief Justice’s view, no such thing. Take the well-known *Wickard v. Filburn*²³ case, for example. One might think that it takes a good deal of imaginative stretching to see a substantial effect on interstate commerce in a farmer’s planting an extra 12 acres of wheat to feed his own livestock. But aggregating numerous instances of this behavior reveals a substantial effect on the very matter Congress had sought to control: market prices. Those who grow their own wheat undercut demand by staying out of the market.

Chief Justice Rehnquist was more concerned with whether the regulated activity is “commercial” than whether it has interstate effect. *Filburn*, even if he did not sell the wheat he grew, was nevertheless conducting the commercial enterprise of farming. *Lopez* was simply carrying a gun, not attempting to buy or sell it or to use it to conduct some sort of commercial activity.²⁴ The Gun-Free School Zones Act is not an attempt to regulate economic activities at all, the Chief Justice emphasizes.²⁵ It is aimed at ordinary violence, unconnected to *797 commercial transactions of any kind. Not only does that make the activity less consistent with the notion of commerce power, it brings it more squarely within an area traditionally regulated by the states. It “displace[s] state policy choices,” as the Government admitted in its brief.²⁶

The Government tried to argue that guns in school zones, taken in the aggregate, have a substantial effect on interstate commerce. Gun possession in school zones can lead to violence, and violence can affect the economy. First, it may result in increased costs of insurance, which are spread throughout the economy. Second, it may deter people from traveling (travel had been connected to commerce in upholding federal law that banned

²² 115 S.Ct. at 1629. This point was made at oral argument by Solicitor General Drew S. Days III, arguing in favor of the statute’s constitutionality. When pressed by Justice Kennedy to admit that his defense of the statute suggested that the Court had no role in enforcing the Commerce Clause and that he might as well argue that the Commerce Clause falls within the political question doctrine, the Solicitor General stated: “The fact that the court has not seen fit to rein in Congress’ exercise of the commerce power simply shows that Congress has legislated responsibly and rationally.” *Constitutionality of Federal Gun-Free School Zones Act Debated Before Justices*, supra note 9.

²³ 317 U.S. 111 (1942).

²⁴ 115 S.Ct. at 1626. The Chief Justice’s opinion states the facts of the case in a more limited way than the Fifth Circuit did. By the Fifth Circuit’s account, *Lopez* had accepted a \$40 payment in exchange for his services in delivering the gun in question to a certain “Jason” for use in a “gang war.” See *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993). Thus, *Lopez*’s possession of the gun was in fact a commercial transaction, however small-scale and local.

²⁵ 115 S.Ct. at 1633-34. Justice Breyer, dissenting, rejected this distinction and argued that the test should be simply how much the regulated activity affects commerce, not whether it is commerce. Like Justice Souter, he thought that the line between commercial and noncommercial would be too hard to draw. Covering all the bases, he contended that schools actually belonged on the commercial side of the commercial-noncommercial line, pointing to the amount of money spent on schooling, the magnitude of “the business of schooling” (providing “transportation, food and custodial services, books, and teachers’ salaries”), and their character as “commercial investments” (noting that “Congress has often analyzed school expenditure as if it were a commercial investment, closely analyzing whether schools are efficient, whether they justify the significant resources they spend, and whether they can be restructured to achieve greater returns.”). *Id.* at 1663-64.

²⁶ *Id.* at 1631 (quoting Brief for United States at 29 n.18). President Bush, who signed the law, criticized it for “inappropriately overrid[ing] legitimate state firearms laws with a new and unnecessary federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed upon the States by Congress.” *Id.* at 1631 (quoting Statement of President George Bush on Signing the Crime Control Act of 1990, 26 Weekly Comp. Pres. Doc. 1944, 1945 (Nov. 29, 1990)).

discrimination in public accommodations²⁷). And lastly, violence in schools can degrade public education, and worse-educated children may grow up to be less productive workers in the national economy. The long history of upholding laws challenged under the Commerce Clause made it seem that the formal ritual of articulating a causal chain between the regulated activity and interstate commerce would suffice. But relying on the presumed security of the aggregation approach to the “substantial effects” test offended the majority’s “first principles.”

The Government’s logic was powerful indeed. Justice Breyer’s dissenting opinion amplified the importance of schools. He cited “[n]umerous reports and studies” to conclude that Congress could find that violence in schools affects education and, indirectly, interstate commerce. Educating children, in this equation, becomes “investment in ‘human capital.’”²⁸

The strength of this argument, aimed at satisfying the “substantial effects” test, however, worked *against* the constitutionality of the act, when viewed from the perspective of federalism principles. If arguments like this were accepted, what would remain for the states? If federalism depends on a “healthy balance,” with each side able to stem the abuses of the other, how can Congress’ power extend the full length of every articulable causal chain? If Congress can regulate guns because of their effect on education and education’s effect on the economy, Congress can regulate virtually anything else about education. Congress could prescribe a national curriculum for schoolchildren.²⁹ If Congress can regulate any institution that nurtures children – that is, future workers – Congress can displace the states’ traditional control over family law. In the words of the Chief Justice:

Under the theories that the Government presents ..., it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been *798 sovereign. Thus, if we were to accept the Government’s arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.³⁰

In short, the Government’s arguments would leverage the commerce power into a general police power. But this result would flout the majority’s first principles by doing away with the structure of enumerated and reserved powers. There had to be a line, then, between the local and the national.

Justice Breyer, in dissent, seemed to agree that this line should exist, but denied that the power to enact the Gun-Free School Zones Act would also extend to family law and all aspects of education. “[T]his statute is aimed at curbing a particularly acute threat to the education process,” he writes.³¹ The “empirical evidence” shows the “substantial

²⁷ See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253 (1964).

²⁸ *Lopez*, 115 S.Ct. at 1659-60 (Breyer, J., dissenting).

²⁹ *Id.* at 1633.

³⁰ *Id.* at 1632.

³¹ *Id.* at 1661 (Breyer, J., dissenting).

effect” on interstate commerce in a “special way.”³² Thus, Breyer did not embrace complete judicial restraint, but characterized this particular statute as grounded on especially strong proof of connection to interstate commerce. The long appendix to Breyer’s opinion displays his emphasis on proof, as if the sheer number of publications about the problem of violence in schools and the importance of education to the economy would prove the point.³³ He left room – at least theoretically – for attacks on other statutes lacking equivalent documentation. But this theoretical room did not satisfy the Chief Justice, who called attention to Breyer’s inability to “to identify any activity that the States may regulate but Congress may not.”³⁴ Justice Breyer suggested that perhaps family law or “certain aspects of education,” might fall into this nonfederal category, but to the Chief Justice, “[t]hese suggested limitations, when viewed in light of the dissent’s expansive analysis, are devoid of substance.”³⁵

B. Uncertainty and “the Nature of Things”

One may well agree with Chief Justice Rehnquist that the concept of enumerated powers demands that there be something Congress may not do, that the commerce power cannot be regarded as a general police power, and nevertheless question whether the *courts* ought to be in the business of deciding exactly where that line is. Justice Souter, in his dissenting opinion, pressed that point.³⁶ The majority’s attempt to define a workable standard is doomed: the notion of commercial character suffers from “hopeless porosity.”³⁷ It represents a “backward glance at ... old pitfalls,”³⁸ “a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago.”³⁹ Souter would have the Court refrain from deciding whether the regulated activity substantially affects commerce and merely ask whether it is “within the *799 realm of reason”⁴⁰ to decide that it does. The Court should remember its “most chastening experiences”⁴¹ the last time it indulged in Commerce Clause activism, and, with due penance, perform the ritual of restraint: the deference to Congress known as “rational basis” review. The “rational basis” standard, which initially emerged in substantive due process cases,⁴² was long implied in the substantial effects test,⁴³ and explicitly adopted

³² *Id.*

³³ See *id.* at 1665-70 (Breyer, J., dissenting). It should be noted that Justice Breyer does not contend that the drafters of the Gun-Free School Zones Act actually consulted or considered all of these materials. Indeed, most of the list consists of books and articles about either schools and violence or education and the economy that are merely “readily available.” *Id.* at 1667.

³⁴ *Id.* at 1632.

³⁵ *Id.*

³⁶ *Id.* at 1651-57.

³⁷ *Id.* at 1654.

³⁸ *Id.* at 1653.

³⁹ *Id.* at 1654.

⁴⁰ *Id.* at 1656.

⁴¹ *Id.* at 1651. Justice Breyer also raised this criticism, noting the interest in leaving the case law in its salutary “well settled” state. The Chief Justice and Justice Kennedy, voting against the statute, also expended many words assuring readers of the stability of the case law. Even Justice Thomas, who viewed the post-1937 case law as misguided, admitted that he would “not necessarily require a wholesale abandonment of our more recent opinions.” *Id.* at 1650 (Thomas, J., concurring). In a footnote, he added that he “might be willing to return to the original understanding,” but he “recognize[d] that many believe that it is too late in the day to undertake a fundamental reexamination” and that “[c]onsideration[s] of stare decisis and reliance interests may convince us that we cannot wipe the slate clean.” *Id.* at n.8.

⁴² The “substantial effects” test, combined with the aggregation approach worked so well in enabling the Court to deflect Commerce Clause challenges that the Court did not need to rely on the “rational basis” concept.

in *Katzenbach v. McClung*:⁴⁴ “[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.”⁴⁵

What had become of the rational basis test in the majority’s opinion? The Chief Justice mentioned it, and did not explicitly disavow it, but he never *used* the standard in analyzing whether guns in school zones met the substantial effects test.⁴⁶ Justice Kennedy’s opinion did not even mention “rational basis.” Indeed, during oral argument, at one point, Justice Kennedy asked whether the Government was in actuality attempting to apply the political question doctrine to the Commerce Clause.⁴⁷ One can easily see why he asked. If deference goes far enough, there is simply no judicial enforcement at all. If the Court is really applying a standard that Congress can never fail, it might be more honest to categorize the clause as presenting only a political question, not amenable to judicial definition at all, but entirely committed to the decision making of the legislative branch.

To put the issue this way is to express displeasure with excessive restraint. The Chief Justice’s “first principles” entail judicial enforcement of the enumerated powers and, consequently, the necessity for a judge-drawn line separating congressional power from plenary police power. Both Rehnquist and Kennedy cite *Marbury v. Madison*.⁴⁸ While it may be difficult for courts to *800 draw lines, such as the line between permissible commerce power and impermissible “general police power,” between the “truly national” and the “truly local,”⁴⁹ it is nonetheless mandatory, in the Chief Justice’s regime of first principles. The lack of “precise formulations” inheres “in the nature of things,”⁵⁰ but courts must do their work anyway.⁵¹ In any event, the instant case, involving a “local student at a local school,” who had not “recently moved in interstate commerce,” and whose gun possession was “in no sense an economic activity,” is easy: Congress had crossed the line into the impermissible area left to the states.⁵²

C. Judicial Pragmatism

1. Justice Thomas

⁴³ 115 S.Ct. at 1653 (Souter, J., dissenting).

⁴⁴ 379 U.S. 294 (1964) (the Commerce Clause empowers Congress to bar discrimination even in a local restaurant).

⁴⁵ *Id.* at 303-04.

⁴⁶ *Lopez*, 115 S.Ct. at 1629, 1651, 1653-54.

⁴⁷ See *Constitutionality of Federal Gun-Free School Zones Act Debated Before Justices*, supra note 9. The political question doctrine identifies issues that the Constitution shields from judicial review and leaves entirely to the political branches. See *Nixon v. United States*, 113 S.Ct. 732 (1993).

⁴⁸ 115 S.Ct. at 1624, 1633, 1638-39 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). Justice Kennedy cites *Marbury* twice. Both Justices cite *Marbury* for the proposition that the courts have a duty to articulate the meaning of the provisions of the Constitution. None of the other Justices cites *Marbury*, unfortunately. One would have liked to hear the more liberal side of the Court deal with the court’s duty “to say what the law is,” a duty so important in rights enforcement cases.

⁴⁹ *Id.* at 1634.

⁵⁰ *Id.* at 1633.

⁵¹ This is a proposition often relied upon by the liberal side of the Court in rights enforcement cases. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962).

⁵² 115 S.Ct. at 1634.

Justice Thomas, concurring, had a different take on the uncertainty problem discussed in the preceding section. The line the Chief Justice would struggle to draw really cannot be drawn. But that does not lead Thomas, like Souter, to resort to judicial restraint. Justice Thomas would openly admit that the substantial effects test leads inexorably to a conclusion that Congress has a general police power.⁵³ The aggregation principle has “no stopping point,”⁵⁴ even though the Chief Justice and Justice Breyer both contended that there is such a line. Thomas, thus far unheeded, urged the Court to see the error of its ways and to rebuild a Commerce Clause jurisprudence consistent with constitutional text and history.⁵⁵ While many observers of the Court may agree that the words “substantial effect” cannot really determine outcomes, relatively few will agree with Thomas that the Court made its wrong turn in 1937. Recognition of the meaninglessness of the substantial effects test in a modern economy is far more likely to lead the legal analyst to embrace pure judicial restraint, like Justice Souter, or just to make the best of ad hoc decision making, like the rest of the Court. Indeed, even Thomas concedes that the force of stare decisis might outweigh the benefits of “wip[ing] the slate clean.”⁵⁶ At the close of his opinion, he indicates that the real purpose behind his “extended discussion” of the original meaning of the Commerce Clause is “not necessarily” to demand a return to the pre-1937 interpretation: “It simply reveals that our substantial effects test is far removed from both the Constitution and from our early case law and that the Court’s opinion should not be viewed as ‘radical’ or another ‘wrong turn’ that must be corrected in the future.”⁵⁷

Justice Thomas’s opinion should fire speculation about his niche on the Court. Readers will surely note his weighty and confident use of a scholarly and historical style of constitutional interpretation, both here and in the *Term *801 Limits* case.⁵⁸ Observations that he follows particular other Justices⁵⁹ or is uncomfortable with his role on the Court⁶⁰ ought to end. But it is also important to note that Thomas has articulated an extreme position which even he might decline to adopt. With no other Justices concurring in his opinion, he seemed to enjoy the scholar’s luxury of following ideas where they lead, without having to worry about the prospect of those ideas becoming reality. Moreover, Thomas all but concedes in his concluding paragraphs that, for all his originalism, he did have a political motivation after all: to make the Chief Justice’s opinion appear moderate by comparison.

⁵³ Id. at 1642.

⁵⁴ Id. at 1650.

⁵⁵ Id. at 1650-51.

⁵⁶ Id. at 1650 n.8

⁵⁷ Id. at 1650.

⁵⁸ U.S. Term Limits, Inc. v. Thornton, 115 S.Ct. 1842 (1995).

⁵⁹ See, e.g., David M. O'Brien, *Holding the Center: As Thomas and Scalia Stake Out the Far Right, O'Connor Takes the Moral High Ground*, L.A. TIMES, Mar. 8, 1992, at M1 (“What is striking about Thomas’ opinions is not that Scalia joined them but that they are largely gratuitous, offering no original analysis. They rehash arguments Scalia has advanced and the court has rejected.... For now, Thomas plays into Scalia’s hands.”).

⁶⁰ See, e.g., Greenhouse, *Parting Snapshots for the Supreme Court Yearbook*, N.Y. TIMES, July 8, 1994, at B7 (“Term’s Unhappiest Camper: Justice Thomas, who spoke hardly at all from the bench and who, during many arguments, looked as if he wished he were somewhere else.”); Andrew Ferguson, *Trust Us*, WASHINGTONIAN, February, 1994 (“Thomas is famously silent.”); David G. Savage, *The High Court, Jousting in a Search for Justice*, L.A. TIMES, Dec. 25, 1993, at A1 (“Thomas has yet to ask a question this term. Last year, on a few occasions, he spoke in a halting voice to pose what sounded like prepared questions. He looked and sounded uneasy.”).

Perhaps, recognizing that the majority's opinion stood open to criticism – why impose new line drawing when the old line drawing failed? – he wanted to offer an alternate way of enforcing the Commerce Clause that would prove so threatening to the majority's opponents that they would withhold their criticisms. Thomas's alternative is capable of providing the principle and coherence that critics can easily say the Chief Justice's opinion lacks. Behind that principle and coherence lies, one might guess, a pragmatic strategy.

2. Justice Kennedy

Justice Kennedy,⁶¹ reviewing the history of Commerce Clause interpretation, frequently used the expression “the practical conception of the commerce power.”⁶² In the prescient *Gibbons v. Ogden*⁶³ case, the Court recognized that conceptualistic distinctions precisely propounded by courts would not work. Chief Justice Marshall deferred to the legislature: “[T]he Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise.”⁶⁴ Later cases, according to Justice Kennedy, struggled when they tried to define formal categories, and fared well when they used “a more sustainable and practical approach.”⁶⁵ Kennedy *802 approves of *Swift & Co. v. United States*⁶⁶ because of its recognition of a “practical conception of the commerce power.” There, the Court wrote that “commerce among the States is not a technical legal conception, but a practical one.”⁶⁷ He also notes *Stafford v. Wallace*,⁶⁸ which eschews “nice and technical inquiry.”⁶⁹ In Justice Kennedy's historical analysis, what happened in the New Deal era was “the Court's definitive commitment to the practical conception of the commerce power.”⁷⁰ The Court abandoned “mathematical or rigid formulas,”⁷¹ and embraced the “practical conception of commercial regulation.”⁷² Rather than react to the lessons of 1937 with complete restraint, as Justice Souter would have it, Kennedy would see only a transformation in the style of constitutional interpretation, from formal categories and distinctions, to practical analysis.

Justice Kennedy, like the dissenting Justice Souter, embraced the New Deal era cases and their progeny. Judicial restraint and deference to congressional judgment must still

⁶¹ It is important to note Justice O'Connor's concurrence in the Kennedy opinion. Kennedy and O'Connor have clearly become the swing votes between the liberal and conservative factions on the Court. In the other important federalism decision of the Court's last term, *U.S. Term Limits, Inc. v. Thornton*, 115 S.Ct. 1842 (1995), Justice Kennedy joined the four Justices who dissented in *Lopez*, and produced a decision denying power to the states. Thus, efforts at predicting the path of future Supreme Court decisions in the area of federalism will do well to focus on Justice Kennedy's analysis.

⁶² *United States v. Lopez*, 115 S.Ct. 1624, 1636 (1995).

⁶³ 22 U.S. 1 (1824).

⁶⁴ *Id.* at 1634.

⁶⁵ *Id.* at 1636 (citing the *Minnesota Rate Cases*, 230 U.S. 352 (1913) (noting congressional power to regulate intrastate railroad rates that “substantially affect” interstate commerce); *Shreveport Rate Cases*, 234 U.S. 342 (1914) (same)).

⁶⁶ 196 U.S. 375 (1905).

⁶⁷ *Id.* at 398.

⁶⁸ 258 U.S. 495 (1922).

⁶⁹ *Id.* at 519.

⁷⁰ *United States v. Lopez*, 115 S.Ct. 1624, 1626 (1995) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

⁷¹ *Id.* at 1637 (quoting *Wickard v. Filburn*, 317 U.S. 111 (1942)).

⁷² *Id.* at 1636.

prevail, not only because there is an interest in protecting the “stability” of constitutional interpretation, but because the case law reflects an entirely appropriate “evol[ution]” in response to the modern, national economy.⁷³ The trend he perceives in the case law accords with his own interpretive preference. In his analysis of the courts’ “place in the design of the Government,” Kennedy’s basic pragmatism leads him to search for “workable standards” connected to the normative value of federalism.⁷⁴

He conceptualizes the problems in terms of balancing. Federalism should be “a healthy balance” between state and federal power.⁷⁵ For the most part, “the balance ... is entrusted ... to the political process,”⁷⁶ and “Congress has substantial discretion and control over the federal balance.”⁷⁷ Congresses do their work of “confront[ing] the great questions of the proper federal balance,” but they may also “forget” to “maintain[] the federal balance.”⁷⁸ The “federal balance is too essential” to leave entirely to legislatures.⁷⁹ Courts must intervene when “[g]overnment has tipped the scales too far.”⁸⁰ Conceding the difficulty of deciding cases without “bright and clear lines,”⁸¹ Justice Kennedy opines that *803 The Gun-Free School Zones Act “upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power.”⁸²

It is certainly clear that the metaphor of choice is the balancing scales. When the things to be weighed do not have real weights, there is plenty of room to maneuver toward whatever answer feels right. We are given some guidelines, however. What the formalist would use as the basis for categories and lines of distinction, the pragmatist Kennedy serves up as flexible factors: the “commercial character” of the action regulated, the intrusion into “an area of traditional state concern,” and the positive potential for the states to serve “as laboratories of democracy” in dealing with the problem.⁸³

Justice Kennedy seems to have consciously tried to position his analysis between the Chief Justice’s categories⁸⁴ and the virtual nonenforcement the dissenters would accept. One can easily criticize Kennedy’s approach as hopelessly vague, manipulable, or

⁷³ Id. at 1637.

⁷⁴ Id. at 1638. He cites *Gregory v. Ashcroft* and *New York v. United States* for their discussion of the normative value of federalism: “a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front,” *Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991); “[T]he Constitution divides authority between federal and state governments for the protection of individuals.” *New York v. United States*, 505 U.S. 144, 181 (1992). For a pre-*Lopez* analysis of the normative federalism theory of *Gregory* and *New York*, see Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979 (1993).

⁷⁵ 115 S.Ct. at 1638.

⁷⁶ Id. at 1639.

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id. at 1640.

⁸² Id.

⁸³ Deborah Merritt has argued – quite intriguingly – for expressing the way courts appear to balance multiple, flexible factors in terms of fuzzy logic. See Deborah J. Merritt, *supra* note 5, at 739-50. One might question whether fuzzy logic – impressive in calculating multiple ranges of measurements to design accurately functioning machines – does anything more than provide a new metaphor for legal reasoning, replacing the less mystifying image of the balancing scales. Yet Merritt’s explanation does seem to describe something about the way the human mind makes decisions. It is not so much that fuzzy logic offers a new technique for analysis as that it reassures those who would rely on the natural tendency of the mind toward practical reasoning.

⁸⁴ See *United States v. Lopez*, 115 S.Ct. 1624, 1624 (1995).

unpredictable. How “practical” is it to have a test of such uncertainty? Indeed, a paradox of pragmatism is that having formal categories – like commercial and noncommercial – despite their indeterminacy, may be a practical way of providing some structure to legal argument, and that talking about a multitude of flexible factors – though refreshingly frank – may make judicial work more intractable.

On the other hand, judge-created uncertainties may put useful pressure on Congress. The ideal resolution of the federalism problem is for Congress to live up to its obligations and to maintain the healthy balance of federalism, as some Congresses in the past have done.⁸⁵ A little uncertainty about whether the Court might strike down a statute gives Congress an incentive to perform this role, to enforce federalism even more than the courts are willing to do, in order to steer clear of constitutional problems. The judicial analysis prescribed by Justice Kennedy may be murky, arduous, and unpredictable, but the point of *Lopez* may be to revive the “political safeguards of federalism”⁸⁶ with a stimulating threat of court action. If the threat works, the courts will not need to perform any further difficult analysis. They will be able to return to their old habits of deference valued by the dissenters and Justice Kennedy as well.

Justice Kennedy recognized the Court’s limitations: “The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights....”⁸⁷ Indeed, Kennedy even conceded that *804 “democratic liberty and the federalism that secures it” can only survive if the political branches of government protect it.⁸⁸ But unlike some academic commentators⁸⁹ and Justice Souter in dissent, Justice Kennedy does not stop his analysis once he has seen that the Court’s ability is impaired.⁹⁰ Congress may be better able to protect the balance of federalism, but Congress may also lose track of its need to perform this role and may enact statutes far outside the range that can be said to reflect the interests of federalism. At some point, it becomes possible to see that that Congress has neglected its role to such an extent that the Court, for all its limitations, must be seen as the superior decision maker. To make an enforceable Commerce Clause standard is to identify that point.⁹¹

If federalism were only historical artifact or vestige in the constitutional text, Justice Kennedy might not have taken this position. He justified the Court’s role by describing the normative value of federalism: federalism is not mere deference to the states, but a protection for the citizens of the states. Having two governments to appeal to provides

⁸⁵ Id.

⁸⁶ The notion that Congress protects state interests – “the political safeguards of federalism” – was a key assumption in the Court’s decision in 1985 to end its short-lived effort at enforcing federalism. See *infra* notes 111-14 and accompanying text.

⁸⁷ 115 S.Ct. at 1640.

⁸⁸ Id. at 1639.

⁸⁹ E.g., Jesse H. Choper, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980).

⁹⁰ See generally Neil K. Komesar, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1995) (urging institutional analysis that compares the capacities of each institution).

⁹¹ Kennedy also notes that the Court has enforced federalism in various areas, notably in dealing with federal jurisdiction issues like habeas corpus and abstention. Indeed the Commerce Clause itself, in its “dormant” form, which limits the permissible reach of state law, has been fairly actively enforced over the years. See 115 S.Ct. at 1624.

citizens with a “double security” for their rights.⁹² Keeping these governments distinct makes it possible for citizens to “[discern the] lines of political accountability.”⁹³ Thus, federalism has important value and needs to be preserved. That Congress may have a political interest in blurring the lines of accountability also tends to demonstrate why it cannot be left as the sole enforcer of federalism, even if it will be, by far, the primary enforcer of federalism.

3. Justice Breyer

Justice Breyer’s dissenting opinion also relied on pragmatism, though it was closer to the majority’s in tone than Souter’s. (Justice Thomas seemed to take particular delight in repeatedly calling Breyer’s dissent the “principal dissent,”⁹⁴ discussing it in detail, while relegating his attack on Souter to a footnote.⁹⁵) Validating the statute, Justice Breyer wrote,

would permit Congress to act in terms of economic ... realities, would interpret the commerce power as an affirmative power commensurate with the national needs, and would acknowledge that the commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy.⁹⁶ *805

With these words, he concedes that he is interpreting the Commerce Clause to mean what it should mean and that his disagreement with Justice Kennedy is in reality a disagreement about what is the greater good: federal power to impose uniform rules or state independence to define local solutions.

4. Chief Justice Rehnquist

The Chief Justice’s position, despite its creation of the commercial/noncommercial distinction, is still far from the formalism of earlier Commerce Clause-enforcing Courts, who would ask whether the matter to be regulated is or is not “commerce.” Even though he would usher in a new jurisprudence of labeling, he does concede that “these are not precise formulations, and in the nature of things they cannot be.”⁹⁷ He does not possess the sort of judicial mind that would produce a statement like “No distinction is more popular to the common mind ... than that between manufactur[e] and commerce.”⁹⁸ The Chief Justice acknowledges that there will be a difficult gray area between the obviously commercial and the obviously noncommercial, but finding the case at hand easily on the noncommercial side, he left the problems of dealing with the gray area for another day, perhaps with the pragmatic hope that that day would never come, because *Lopez* alone would have prompted Congress to rein itself in.

⁹² Id. at 1638.

⁹³ Id.

⁹⁴ Id. at 1642.

⁹⁵ Id. at 1650 n.9.

⁹⁶ Id. at 1662.

⁹⁷ Id. at 1634.

⁹⁸ See *Kidd v. Pearson*, 128 U.S. 1, 20 (1888).

5. Justice Souter

As described above, Justice Souter made judicial restraint the centerpiece of his analysis. Souter recounts the difficulties of trying to interpret the Commerce Clause and the troubles encountered prior to 1937 and prescribes restraint as the cure. Judicial restraint through deference to Congress is a device to keep the Court out of political or policy-oriented decision making. Deciding to remove the Court from the fray is a pragmatic choice.

6. Justice Stevens

Justice Stevens wrote only the most minimal opinion, and explicitly concurred with both Souter and Breyer, so his susceptibility to pragmatic thinking is shown by the discussion of those two Justices, above. But Stevens added one key point of his own. (Like Thomas, he wrote without allies.) According to Stevens:

Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity. In my judgment, Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use; it necessarily follows that Congress may also prohibit their possession in particular markets.⁹⁹ *806

It is hard to see why the fact that an object used in a disfavored act had once been part of a commercial activity makes it a proper matter for federal regulation. This connection to interstate commerce demands to be seen as merely a commerce "hook": the search for hooks comes *after* one's need to hang something on it. The desire to control the problem of violence in schools, or at least to score political points by appearing to do something about the problem, motivated Congress to pass the statute. It may well have passed the statute without pausing to consider whether constitutional power existed. The minority of the Court that voted to uphold the statute either approved of the statute for the same reasons or approved of Congress' power to make its own choices about what to regulate. Justice Breyer's opinion is aimed at tying Congress' actual motivation to plausible Commerce Clause rhetoric. Justice Souter's opinion explains the reasons for leaving the decision making to Congress. Justice Stevens' opinion simply creates a handy hook.

⁹⁹ 115 S.Ct. 1651. Stevens' discussion is important for the future because Congress responded to the Lopez decision by amending the Gun-Free School Zones Act to add a "jurisdictional element." The amendment limited the reach of the statute to cases in which the gun "has moved in or otherwise affects interstate or foreign commerce." See Gun-Free School Zones Act of 1995, S. 890, 104th Cong., 1st Sess. (1995); H.R. 1608, 104th Cong., 1st Sess. (1995). Though Stevens was willing to assume this would be true of any gun, the newly amended statute requires proof as an element of the crime. No other Justice joined Stevens or even mentioned this point, so it is odd that Congress would arrive at the conclusion that the addition of this element would solve the problems raised by the Court. Professor Merritt writes: "It is unclear whether a jurisdictional element alone or a jurisdictional element combined with more explicit congressional findings will resurrect the constitutionality of the Gun-Free School Zones act. There is no doubt, however, that omission of a jurisdictional element was an important factor in its demise." Merritt, *supra* note 5, at 697. The point seems to be that the lack of a jurisdictional element made the statute a more conspicuous target. But once the Court has hit the target, it is too late to try to make it inconspicuous. It would clearly be inconsistent with the majority's conception of the Commerce Clause in Lopez for the jurisdictional device to work. The noncommercial quality of the behavior remains the same as does the attempt to move into an area of local law enforcement traditionally left to the states.

II. A THROWBACK TO *NATIONAL LEAGUE OF CITIES*?

In *Lopez*, the Chief Justice sought to find a way to preserve a line between what Congress can and cannot do. The commerce power could not merge entirely with the “general police power,” even though the overlap between the two concepts has increased dramatically over the years. The Government’s demonstration of a connection between guns in schools and the future contribution of schoolchildren to the national economy brought an unintended reaction: if reasoning of that kind would suffice, there would be no limit to Congress’s power. Though the Chief Justice’s opinion emphasized the potential for line drawing between commercial and noncommercial activities, he connected this concern to caution about reaching matters traditionally left to the states:

[U]nder the Government’s “national productivity” reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government’s arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.¹⁰⁰ *807

Justice Kennedy wrote:

Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.¹⁰¹

Like the Chief Justice, Kennedy invoked tradition in connection with the commercial/noncommercial distinction, but rather than refer to the need to draw a line in order to retain the concept of enumerated powers, he spoke in the normative, functional terms developed by Justice O’Connor, in earlier cases.¹⁰² Accountability to the people in a democracy takes on central importance. Linedrawing is needed to enable voters to see whom to hold responsible. That is a somewhat puzzling concept. Unless one holds state and federal power mutually exclusive – an entirely unworkable concept abandoned in the nineteenth century¹⁰³ – large areas of shared power exist. When there are problems in these areas of power, voters can blame both their state and national governments.

¹⁰⁰ 115 S.Ct. at 1632.

¹⁰¹ Id. at 1638-39 (citing *New York v. United States*, 505 U.S. 144, 154-64 (1992); *FERC v. Mississippi*, 456 U.S. 742, 787 (1982) (O’Connor, concurring in judgment in part and dissenting in part omitted from the quotation above).

¹⁰² See id. Justice O’Connor’s influence on Kennedy’s opinion, in which she concurred, should be noted.

¹⁰³ See, e.g., *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851).

Presumably, as the second sentence in the excerpt above indicates, Justice Kennedy meant only to say that *some* power must remain exclusively within the domain of state regulation so that voters would know that, at least for these matters of traditional state concern, they would have to look to the state alone. Why is this exclusivity of remedy presented as a benefit to the citizen? While it certainly seems plausible that people given the choice would opt for more, rather than fewer, paths toward relief, Justices Kennedy and O'Connor apparently know what is better: if there is one source of relief, people will of necessity concentrate their efforts there, thus invigorating the democratic process.¹⁰⁴

According to Justice Kennedy, courts must ask “whether the exercise of national power seeks to intrude upon an area of traditional state concern.”¹⁰⁵ *808 This notion of traditional state concerns may raise suspicions that the Court is attempting to resurrect *National League of Cities v. Usery*,¹⁰⁶ an effort at guaranteeing the states an enclave of immunity from federal power, which the Court soon abandoned as unworkable.

In *National League*, the Court, in an opinion written by then-Associate Justice Rehnquist, invalidated an exercise of power under the Commerce Clause.¹⁰⁷ The commerce power, standing alone, would apply to the state in its role as employer, but according to the majority of the Court, the Constitution contained affirmative limitations on the exercise of the commerce power, found either in the Tenth Amendment or in ideas about federalism implicit in the structure of the whole document.¹⁰⁸ Regardless of the substantiality of the effect on interstate commerce, Congress could not regulate what the Court called the states’ “traditional governmental functions.”¹⁰⁹

National League did not survive a decade. The tenuous five-to-four majority gave way when Justice Blackmun shifted his vote in *Garcia v. San Antonio Metropolitan Transit Authority*.¹¹⁰ Justice Blackmun wrote an opinion for the new five-to-four majority that emphasized two things. First, similar to Justice Souter’s dissenting opinion in *Lopez*, he disparaged the capacity of judges to draw lines. What was a “traditional governmental function” after all? The short experience of judging in the wake of *National League* had

¹⁰⁴ 115 S.Ct. 1624, 1634 (1995).

¹⁰⁵ *Id.* at 1640. Justice Kennedy immediately offers up weighty originalist evidence against his own thesis. James Madison wrote in *The Federalist* that “the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due.” *Id.* at 1639 (citing *THE FEDERALIST* No. 46, at 295 (James Madison) (Clinton Rossiter ed., 1961)). According to Kennedy, Madison assumed, even as he wrote these words, that the enumeration of powers would serve to limit Congress’ power, thus depriving the people the power to determine which level of government to trust. Of course, precedent has eroded most of that assumption. Now, as Kennedy concedes, Congress has “substantial discretion and control over the federal balance.” Notice that both Madison and twentieth-century precedent leaves to the political process the determination of what level of government will respond to the needs of the people. But Madison’s political process consisted of the people themselves determining whom to trust. Kennedy’s political solution leave the choice to Congress. One may well ask why, if federalism is important, we would want Congress to decide what level of government ought to act. Once precedent established that Congress ought to have the work of making this choice, though, we ought to go on to ask: Why shouldn’t this deference to Congress become complete? What is to be gained by reviving a judicial role at some point? Much seems to hinge on the notion that there must be something that remains to the states. One way of making this point is used by the Chief Justice: something must remain or the concept of enumerated powers makes no sense. But if we engage in the political, functional style of reasoning favored by Justice Kennedy, we should feel unsatisfied: why must something remain?

¹⁰⁶ 426 U.S. 833 (1976).

¹⁰⁷ *Id.* (citing the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974) (codified at 29 U.S.C. §§ 201-216 (Supp. IV 1970))). Congress had extended the Fair Labor Standards Act to the state and local government employees.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 852.

¹¹⁰ 469 U.S. 528 (1985).

undermined confidence in the ability of courts to make a positive contribution by policing the boundaries of the states' enclave of immunity from federal law. Confusion, wasteful litigation, contradictory decisions, and unjustifiable distinctions had characterized *National League's* progeny. Second, the courts could withdraw from this area of institutional weakness, because Congress could properly take care of the concerns of the states. Supposedly, as Congress pursues its regulatory agenda, it will quite naturally take state interests into account.¹¹¹ Since the states are represented in Congress, the theory went, they do not need recourse to the courts. This belief in "the political safeguards of federalism"¹¹² drew scorn from the dissenting justices, who predicted that the Court would return to its proper role of enforcing federalism.¹¹³ *809

National League and *Garcia* show the Court reeling from one extreme to the other (tipped by the weight of Justice Blackmun's shifting opinion). *Garcia's* untenability matches the unworkability of *National League of Cities*. The brief history of *National League* stands as testimony to the incomplete competence of courts. *Garcia* turned our gaze to Congress, the supposed protector of state interests,¹¹⁴ and we are confronted again with the incomplete competence: this time the legislature's. It is perhaps not surprising that the Court, given the choice of which institution's shortcomings to leave exposed, chose Congress. It is the happy lot of courts that they can cloak such a self-serving choice in the rhetoric of restraint. But since this is not a private dispute between Congress and the Supreme Court – the people of the different states must feel the effect of these choices – we cannot settle back and approve of the Court's humility. Further examination is due.

Judicial solicitude for traditional state functions did revive soon enough. *In Gregory v. Ashcroft*,¹¹⁵ the Court, in an opinion written by Justice O'Connor, used the device of a clear statement rule to protect states in areas "traditionally" left to the states. Instead of barring congressional regulation – the *National League* approach of preserving an inviolable enclave for the states – it merely required an explicit reference to the states before a statute would apply to these areas.¹¹⁶ Indeed, one could characterize *Gregory* as an extension of *Garcia's* reliance on the political safeguards of federalism: demanding a clear statement makes it more likely that Congress will actually go through the process of taking the states interests into account.

¹¹¹ Id.

¹¹² This expression is taken from Herbert Wechsler's article, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 1001 (1965), upon which the *National League* dissenters and the *Garcia* majority had relied. The *Garcia* majority restricted the courts' role in protecting the states to examining the political process in Congress, and reserved the potential for attacks on intrusions on the states premised on political dysfunction:

[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985).

¹¹³ *Garcia*, 469 U.S. at 565.

¹¹⁴ For a criticism of the belief in the "political safeguards of federalism" as "hopelessly out of touch with the realities of the modern political process," see Calabresi, *supra* note 5, at 794.

¹¹⁵ 501 U.S. 452 (1991).

¹¹⁶ Id. at 452. Thus, in that case, the federal Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1990 & Supp. 1996)), did not extend to state judges, because even though the act explicitly referred to state employees, it also included an exception for persons appointed "on a policymaking level." Since it was arguable that judges are "on a policymaking level" and judging lies within "traditional state functions," the ambiguity was resolved in favor of the state, validating the state's mandatory requirement age for judges.

A year later, Justice O'Connor wrote about federalism once again. *New York v. United States*,¹¹⁷ unlike *Gregory*, was not about pushing Congress to perform its role as protector of the states with greater vigilance. More like *National League*, *New York v. United States* placed something off-limits to Congress. Beyond *Garcia*'s deference to Congress and *Gregory*'s statutory interpretation gambit, *New York* found a federal statute to be an unconstitutional intrusion on the states. The offending statute had commanded the states to designate sites for the disposal of low-level radioactive waste: it "commandeer[ed] the legislative processes of the States."¹¹⁸ The state legislative function, perhaps the most fundamental "traditional governmental function," is now, after *New York v. United States*, protected from the reach of federal *810 legislation. This is scarcely a complete return to *National League* – the new immune enclave is much smaller and easy to identify – but it is a recognition of the Court's role in enforcing the federalism values expressed in the Tenth Amendment and the structure of the Constitution as a whole.¹¹⁹

National League referred to "traditional governmental functions," areas where the state itself was the actor whose behavior had become the subject of federal law. *National League* immunized, for example, the state in its role as employer, placing state employees beyond the reach of labor laws that protected employees of private business. *Lopez* is concerned with the behavior of private parties that was traditionally subject to regulation only at the state or local level. The creative articulation of a long causal chain could logically tie this behavior to interstate commerce, but that logic would be employed as a device to extend the grasp of Congress to a matter traditionally left to the states. Indeed, the careful reader will note that there is only one citation to *National League* in all of the opinions – and that one is completely inconsequential.¹²⁰ Not only did Justice Kennedy omit any connection between "traditional state concerns" and *National League*'s "traditional governmental functions," none of the dissenting opinions, for all their vigor, invoked *National League* by name.

Justice Souter, in dissent, analyzed the majority's use of tradition to limit the commerce power:

[A]nd as for the notion that the commerce power diminishes the closer it gets to customary state concerns, that idea has been flatly rejected, and not long ago.¹²¹ The suggestion is ... that the commerce power is simply weaker when it touches subjects on which the States have historically been the primary legislators.¹²²

¹¹⁷ 112 S.Ct. 2408 (1992).

¹¹⁸ *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981).

¹¹⁹ For negative commentary on O'Connor's new federalism, see H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

¹²⁰ *United States v. Lopez*, 115 S.Ct. 1624, 1629 (1995). The Chief Justice cites *Maryland v. Wirtz*, 392 U.S. 183 (1968) as he recounts the history of broad Commerce Clause interpretation, which demands required the notation that it was "overruled on other grounds" by *National League* (whose own overrule status is duly noted). Justice Souter does cite *Garcia* for the proposition that the commerce power is "plenary." See *id.* at 1654-55.

¹²¹ *Id.* at 1654.

¹²² *Id.*

Stare decisis disposes of the suggestion handily, in Souter's view. *Gregory's* clear statement rule does not limit Congress' power because of traditional state functions, it merely creates a presumption about what Congress intended to do, irrelevant in the fact of an explicit statute like the Gun-Free School Zones Act. Most important to Justice Souter, allowing traditional state functions into the Commerce Clause analysis "would inevitably degenerate into the sort of substantive policy review that the Court found indefensible 60 years ago."¹²³ Judicial restraint is the definitive solution to the Court's long and rocky history of Commerce Clause analysis. It should be noted, however, that in backing away from what he calls "substantive policy review," Justice Souter scarcely retreats to a higher ground away from the impugned "policy" analysis. There is just as much real-world, pragmatic balancing behind deferring to Congress as there is in protecting the independent functioning of the states. For *811 all of this strenuous opposition to the majority, however, neither Souter nor the other dissenters cite *National League*.

Indeed, *Lopez* is not a revival of *National League's* affirmative limitation on the commerce power.¹²⁴ It is consistent with *Garcia's* view that the Tenth Amendment adds nothing to the enumeration of powers in Article I. *Lopez* simply limits the Article I power. Yet one could say the *Garcia* position – that the only question is the extent of Congress' power – implies that there is no real limit to that power. *Garcia's* trust that Congress will protect the interests of the states undercuts assertions that there is room for any substantive judicial role.¹²⁵ In this regard, *Lopez* is different from *Garcia*. *Lopez* resembles *National League of Cities* in that it accepts a judicial role in the enforcement of federalism. By limiting the reach of the commerce power, *Lopez* has the effect of preserving areas of state activity that are free from federal interference. There is an important difference, however. *National League* concerned direct federal regulation of the states, for example, imposing the requirement that they pay their employees minimum wage. *Lopez* works to exclude national regulation of certain matters traditionally left to the states. The states are insulated from some federal intrusions in an indirect manner: the states will now have judicially enforceable autonomy to legislate in certain areas.¹²⁶ Thus, state policy choices are no longer subject to preemption or overlapping regulation by Congress.

The fundamental question, then, is whether there is more good to be achieved in protecting the independence of the states or in allowing Congress to make the decisions. Justice Souter seems to be answering this question entirely with reference to the Court's poor performance in the years before 1937. But where is the consideration of Congress' performance?¹²⁷ Should the Court invariably defer to an institution that so willingly overlooks the role of the states with crude attempts to score political points off of the

¹²³ Id. at 1655.

¹²⁴ For expressions of concern about reviving *National League*, see McJohn, *supra* note 5, at 14-32.

¹²⁵ *Garcia* does imply a process role for the courts. In that sense *Garcia* is consistent with *Gregory*, which promotes process to promote congressional consideration of the states' interests. See text accompanying *supra* notes 115-16.

¹²⁶ Note that the party asserting federalism interests in cases following *Lopez* will not be the state or local government, but a private entity or person, such as Alfonso Lopez, seeking to avoid the reach of a legal duty or penalty.

¹²⁷ For a helpful discussion of comparative institutional analysis, see Komesar, *supra* note 90.

voters' fear of crime? At some point – and the Gun-Free School Zones Act falls beyond that point – the Court's imperfect capacity outstrips Congress'.¹²⁸ *812

Anyone as dedicated to institutional analysis as Justice Souter must remain open to this line of argument. Indeed Justice Souter – though he dwells one-sidedly on the Court's limitations – admits as much when he writes: “nothing about the judiciary as an institution made it a superior source of policy on the subject Congress dealt with” in the now-disfavored cases of the past.¹²⁹ But instead of doing a new comparative analysis, he backs off: “There is no reason to expect the lesson would be different another time.”¹³⁰

III. BEYOND JUDICIAL RESTRAINT

A. The False Virtue of Restraint

Freestanding notions of judicial restraint should not foreclose inquiry into whether courts will enforce federalism values. The tradition of judicial restraint and deference to Congress emerged along with normative and pragmatic reasons for supporting it. Moreover, Justices who endorsed judicial restraint in Commerce Clause cases have not been proponents of judicial restraint in all cases: when individual rights were asserted, vigorous activism has won approval. Rare are the Justices who make judicial restraint the starting point for all legal analysis. In any event, such a position contravenes the basic duty of the judiciary “to say what the law is.”¹³¹

The deference to Congress that grew out of the New Deal experience was not an abstract and absolute conclusion that courts should always defer to the legislature. It was a pragmatic response to valuable and necessary legislation that brought a national solution to problems that needed a uniform response. Pragmatic responses remain open to reevaluation in light of changed conditions. We are no longer considering the work of a New Deal Congress struggling with the nation's economic problems, or a Civil Rights Era Congress taking the lead in mitigating local prejudice. The Gun-Free School Zones

¹²⁸ Concern that Congress might not provide the “political safeguards of federalism” turned up in another place in the Court's 1994 Term. In *U.S. Term Limits, Inc. v. Thornton*, 115 S.Ct. 1842 (1995), the dissenting Justices from *Lopez*, with the addition of Justice Kennedy, held that the states could not constitutionally impose term limits on members of Congress. While the proponents of state power may have lost, the majority's opinion, written by Justice Stevens, demonstrates that the side of the Court that does not favor judicial enforcement of federalism also – incongruously – does not believe the *Garcia* dogma about the representation of the states' interests in Congress. In response to the argument that the states ought to be allowed to control the qualifications of their own representatives, Stevens countered that once in Washington, members of Congress become part of the national government, representing the nation as a whole:

The Constitution thus creates a uniform national body representing the interests of a single people. Permitting individual States to formulate diverse qualifications for their representatives would result in a patchwork of state qualifications, undermining the uniformity and the national character that the Framers envisioned and sought to ensure. Cf. *McCulloch v. Maryland*, (4 Wheat.) at 428-429 (1819) (“Those means are not given by the people of a particular State, not given by the constituents of the legislature,...but by the people of all the States. They are given by all, for the benefit of all – and upon theory should be subjected to that government only which belongs to all”). Such a patchwork would also sever the direct link that the Framers found so critical between the National Government and the people of the United States.

Id. at 1864. This passage accords well with the arguments of the *Garcia* dissenters. Professor Deborah Merritt has also noted the connection between *Term Limits* and *Garcia*. See Merritt, *supra* note 5, at 731 n.258.

¹²⁹ *United States v. Lopez*, 115 S.Ct. 1624, 1655 (1995).

¹³⁰ *Id.*

¹³¹ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Act is the work of a Congress making a politically popular gesture at crime without regard for the traditional and possibly superior work of the states in this area. It is not surprising, then, that the majority of the Court cast aside its longstanding restraint. When the states have the capacity to tailor regulation to local conditions and preferences, and when Congress, with little or no consideration for the role of the states, displaces their careful work with a uniform law where *813 uniformity is in no way an improvement over the states' diverse solutions, there is ample justification for rejecting judicial restraint.

The *Lopez* dissenters tried to use the Court's history to generate fears that the Court would veer into excessive enforcement of the Commerce Clause and prevent crucially needed legislation. But acknowledgment that courts can and have taken their enforcement of the Commerce Clause too far can scarcely conclude our analysis. Justice Souter worried that even modest efforts to impose some limit on the commerce power in areas of traditional state interest would "inevitably degenerate into the sort of substantive policy review that the Court found indefensible 60 years ago."¹³² Notice the irony here: the proponent of judicial restraint seems to have no confidence at all in the capacity of judges to restrain themselves. If they were to take on the task of carving out some sensible, normative independent role for the states, they would "inevitably" fall headlong into the wrong sort of judgment.

If courts employed restraint solely on their own behalf, we might ignore this exaggerated humility and view it as an eccentric quirk. But if the people of the states have a valuable interest in local self-government, we need to recognize the importance of the Court's role. The courts are needed to fend off an overreaching Congress on behalf of the people of the states. There is something perverse about characterizing an agency of the national government – the Supreme Court – as restrained when its inaction empowers another branch of the national government. If the discerning capacities of judges are really so prone to "degenerat[ion]," one ought to wonder why we trust them with any sort of decision.

Courts can moderate their activism, particularly once they have recognized the dangers of excessive enforcement. Moreover, Congress can go too far. Rather than engage in the penance of self-restraint to atone for mistakes half a century old, the Court needs to consider whether its role is so detrimental and Congress' judgment such a positive force and so in need of freedom from even the threat of judicial interference that no enforcement really does work best. Unless the answer to this inquiry is "yes" the Court needs to confront the direct question: what level of judicial enforcement of limitations on Congress will work best to achieve an good balance of power between the states and the national government? This is the essential question the Court decided to address in *Lopez*. Though I sense that *Lopez* may amount to nothing more than a citation for the commercial/noncommercial distinction and the general proposition that the courts do have at least some role, however minimal, in limiting Congress to its enumerated powers, I would hope that *Lopez* will provide courts and commentators with an

¹³² 115 S.Ct. at 1655.

opportunity to think deeply about the value of federalism¹³³ and the proper use of the federal courts.

B. Federal Courts as a Scarce Resource

The federal courts are the scarcer judicial resource, far outnumbered by state courts. Shifting work from the state courts to the federal imposes more of *814 a burden on the individual federal judge than it spares the state judges.¹³⁴ Moreover, unlike state judges, who specialize in either criminal or civil cases, federal district judges must handle a general docket, comprising civil and criminal cases. The right to a speedy trial compels the judge to expedite the handling of criminal cases, forcing civil cases to languish in a separate queue. It is important, in this light, to ask why we have a federal court system. There is no permanent Constitution-based answer to this question – Article III only provides for the existence of federal courts at the option of Congress, and case law establishes that Congress will decide what use these courts will have.¹³⁵ Not only do jurisdiction statutes represent decisions on how to use those courts, expansion of federal substantive law implicates expansion of the use of the federal courts. When Congress creates a new federal crime, it imposes new burdens on those courts.¹³⁶

We have seen that Congress may very easily fail to consider the effects on the states when it “federalizes”¹³⁷ a crime: it should also be seen that Congress may ignore the effects on the federal courts. Scholars have frequently considered the problem of Congress’ cutting back on the federal courts’ jurisdiction to deprive them of the opportunity to enforce constitutional rights.¹³⁸ This problem is nearly entirely

¹³³ For particularly useful articles fleshing out the value of federalism, see Regan, supra note 5; Calabresi, supra note 5.

¹³⁴ Cf. Alvin B. Rubin, *An Idea Whose Time Has Gone*, 70 June A.B.A. J. 16 (1984). Writing in 1984, Judge Rubin noted that if federal court diversity jurisdiction were eliminated, it would reduce the federal court docket by 21.6%, while increasing the state courts’ dockets by an average of 1.03%. Considering the special burdens of handling criminal cases in a mixed docket of criminal and civil cases, eliminating the prosecution of federal crimes would produce an even greater benefit to federal courts in contrast to new burdens on state courts.

¹³⁵ See *Sheldon v. Sill*, 49 U.S. 441 (1850).

¹³⁶ See Lorie Hearn, *Trying Times Are Ahead Justice O’Connor Says Federalization of Crime Could Overwhelm the Courts*, SAN DIEGO UNION-TRIBUNE, Aug. 17, 1994, at 1; Wendy Kaminer, *Crime and Community*, ATLANTIC, May 1994, pt. 1, at 111; Henry J. Reske, *Long-Range Plan Would Cut Federal Cases: Draft report warns of a ‘nightmare’ future if recommendations ignored*, 81 A.B.A.J. 22(1995); J. Clifford Wallace, *Tackling the Caseload Crisis: Legislators and Judges Should Weigh the Impact of Federalizing Crimes*, 80 A.B.A.J. 88 (1994); But see Schweitzer, supra note 5 (“Lopez can ... be seen as an unprincipled usurpation of the legislative process that does nothing to address the ‘crisis’ currently inundating the federal courts.”); Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029 (1995) (“Federal legislative or enforcement policies based on an expansive concept of the ‘dignity’ of federal courts are unprincipled, founded on unarticulated and disputable premises, and ignore too large a portion of our existing criminal justice system: talented and struggling state courts. There is an implied elitist and self-protectionist component of this message that seems entirely illegitimate.”).

¹³⁷ Note that the expression “the federalization of crime” implies the prior existence of criminal law proscribing the same behavior. Federal criminal statutes are often defended by pointing out that the federal prosecutors will not select every violation for prosecution, since they can leave the cases for prosecution at the state level. This presents several problems. First, state officials accuse federal prosecutors of “cherry picking,” looking for personal gain by choosing the cases most likely to end in prominent and popular victories. (This criticism was raised by an audience member during a panel discussion at the 1995 meeting of the National Conference of State Legislators in response to Assistant U.S. Attorney Harry Litman’s defense of the dissenting position in *Lopez*.) Second, civil rights lawyers question whether cases are selected for prosecution on discriminatory grounds. Though the Supreme Court recently rejected a claim that federal prosecutors selected black defendants accused of dealing crack for prosecution under federal criminal statutes which provide for much longer sentences, *United States v. Armstrong*, 116 S.Ct. 1480 (1996) (requiring more proof than statistical disparity), this harm (or destructive appearance of harm) presents a serious problem that only exists when Congress creates a federal crime that duplicates existing state law.

¹³⁸ See, e.g., Akhil R. Amar, *Taking Article III Seriously: A Reply to Professor Friedman*, 85 NW. U. L. REV. 442 (1990); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990); Mark V.

hypothetical: bills are proposed to cut *815 back jurisdiction, but they have not passed. The real threat to the role of the federal courts in enforcing rights comes not from deprivations of jurisdiction, but from burdening them with too many cases, particularly criminal cases.

Not only do criminal cases demand expediting, they also may harden the judges to the rights of the individual. Consider the classic argument for the importance of federal habeas review of state court decisions: the state judges who consider constitutional rights in the context of criminal proceedings routinely face the stark realities of violence and the pain of its victims; federal habeas corpus isolates issues of constitutional rights from the complexities of trial and places them in the more contemplative environment of federal courts. The classic argument formed the basis for the famous thesis embraced by Robert Cover and Alexander Aleinikoff in *Dialectical Federalism: Habeas Corpus and the Court*.¹³⁹ They praised habeas corpus because it provided a dialogue between judges in different positions: the realistic, pragmatic state criminal trial judge, and the scholarly, idealistic federal judge. In their view, the process of articulating the meaning of constitutional rights would flourish with a balanced contribution from both perspectives. But if federal judges have their dockets crammed with demanding criminal cases, particularly cases dealing with crimes of ordinary violence (as opposed to the complex “white collar” crimes traditionally handled in federal court) they will become more and more like the state criminal court judges. The habeas cases and other civil rights cases may remain on their dockets, but they will no longer receive consideration by a judge with special ability to preserve constitutional rights.

There should be careful consideration of the use of the federal courts that takes into account the existence and greater abundance of state courts. What is the best way to allocate cases? If one thinks about the federal courts as a limited resource, the Commerce Clause enforcement issue should not take the standard liberal-conservative split exemplified by the voting pattern in *United States v. Lopez*. While it is true that New Deal Era liberals agonized over judicial activism and wanted to see deference to Congress as it enacted progressive legislation, Warren Era liberals advocated greater activism and wanted to see the federal courts vigorously enforce constitutional rights.¹⁴⁰ One might say that this suggests the ideal liberal solution: the work of enforcing rights should be allocated to the scarcer judicial resource and attempts to enforce the values of federalism should be avoided.¹⁴¹ One can reject this solution on the ground that courts cannot somehow save up political capital by selectively enforcing constitutional provisions.¹⁴² But even assuming they could, the problem of expansive federalization of crime destroys the logic of this resource allocation *816 argument. The effort of striking

Tushnet, *The Law, Politics, and Theory of Federal Courts: A Comment*, 85 NW. U. L. REV. 454 (1990); Michael L. Wells, *Congress' Paramount Role in Setting the Scope of Federal Jurisdiction*, 85 NW. U. L. REV. 465 (1990).

¹³⁹ 86 YALE L.J. 1035 (1977).

¹⁴⁰ See, e.g., Larry Yackle, *RECLAIMING THE FEDERAL COURTS* (1995).

¹⁴¹ See, e.g., Choper, *supra* note 90.

¹⁴² It can be argued, quite persuasively, that the best way for the courts to preserve their political capital is to address all portions of the Constitution in a neutral manner, so that the court avoids the appearance of making any political choice. Another argument, made by Professor Calabresi, is that the Court has taken the law of individual rights beyond the area of its institutional competence, and that it has the institutional competence to go further in the direction of enforcing the limits implicit in the structure of enumerated powers. See Calabresi, *supra* note 5, at 809-26.

down a federal statute (and paying whatever political cost results) pales by comparison to the work of handling the day-to-day prosecutions that result when the laws are left intact (and Congress is given no incentive to stop the further federalization of crime). To the extent that federal courts are consumed with these cases, the nonenforcement of federalism has decreased their capacity to deal with the rights claims that the Warren Era liberal views as the best use of the federal courts. The federalization of crime issue thus demands that those straining to preserve the liberal judicial tradition make a choice between the rights enforcement model and the deference to Congress model.

What can motivate adherents to the liberal tradition to choose deference to Congress over rights enforcement? Only the fear of a recurrence of the New Deal Era problem of judicial invalidation of needed progressive legislation. But how reasonable is this fear? First, the economic reforms of the New Deal Era have already taken place. The new federal laws, imposing harsh criminal penalties for street crimes, do not embody similar values. Second, any revitalized Commerce Clause analysis will undoubtedly account for the need for the sort of legislation the Court invalidated before 1937, as the Court's commercial/noncommercial distinction shows. Finally, the Court has its history to look back upon. It can see that excessive limitations premised on ideas of federalism presented serious problems, led to harsh criticisms, and forced the Court to reverse its path. The potential for a recurrence of the same mistakes is low indeed. By contrast, the problem of undercutting the federal courts' ability to handle the cases with the strongest claim to a federal forum is quite real.

The conservative side of the argument in favor of Commerce Clause enforcement is well known and well described in *Lopez* and in the scholarly literature. To those who think the Warren Court went too far in expanding and enforcing constitutional rights, I do not mean to suggest that they ought to favor the wasteful consumption of federal judicial enterprise. Questions about the proper scope of constitutional rights ought to be resolved through the careful use of appropriate methods of constitutional interpretation, not by keeping judges so busy they have no time for their civil cases.

C. The New Commerce Clause Analysis

If we are to favor renewed Commerce Clause enforcement, how should the Court go about this work? I doubt if many will be satisfied with the commercial/noncommercial distinction. The Court itself concedes the shortcomings of this distinction as it announces it. The first suggestion of the distinction that I have located appears in the oral argument in *Lopez*. Justice Scalia challenged Solicitor General Days' reliance on precedent by asking: "Which of our cases involved non-commercial activity? What holdings stand in the way of our imposing stricter review of regulation of non-commercial activity under the Commerce Clause?"¹⁴³ Days' response indicates the questions took him by surprise: "Under the court's prior holdings in this area, the question in this case is not whether the possession of a firearm near a school is interstate commerce, but whether it impacts on interstate commerce. As for *817 your question, I don't believe the issue has ever been

¹⁴³ Constitutionality of Federal Gun-Free School Zones Act Debated Before Justices, *supra* note 9.

squarely presented.”¹⁴⁴ It appears that Scalia was looking for leverage out of the case law, not offering the distinction as the new test in its entirety. And, in the Chief Justice’s opinion in *Lopez*, the commercial/noncommercial distinction seems secondary to the proposition that there must be a line between what is enumerated and what is not.

It is, I would think, too soon to accept the new Commerce Clause jurisprudence as a mere commercial/noncommercial distinction. The first time I taught *Lopez* in my Constitutional Law class, I was eager to explore its conceptual puzzles and found myself confronted with vocal students who wanted very much to resolve the case into a mere exercise in labeling the activity commercial or noncommercial. I understand their feelings: it was getting close to exam time and a little black letter law would be more digestible than attempts to discern the proper meaning of federalism. But the Court and the academic community should not stop here. The distinction leads to endless discussions about what is really commercial. One need only read Justice Breyer’s spirited description of the commercial nature of schools to foresee the difficulties inherent in a new Commerce Clause analysis of this kind.¹⁴⁵ What is more, the distinction threatens to foreclose a truly valuable and needed inquiry into the meaning of federalism.

We should begin a reconstruction of Commerce Clause jurisprudence that looks deeply into why it is good for some matters to be governed by a uniform federal standard, why it is good for some things to remain under the control of the various states, and what effect these choices will have on the federal courts. In the hope of promoting such a substantive debate, I will go on to discuss two general sorts of cases in which national legislation is important: 1) When there is a national market or other system or organization that causes harm at a national level; and 2) When moving from state to state is used as a way of inflicting harm. I hasten to say that I do not offer what follows as a definitive structure for Commerce Clause analysis, but as the beginning of an exploration into its meaning.

1. Harm at the National Level

I have often seen lawyers refer to the facts of *Wickard v. Filburn* with a knowing smirk. The Court seems to bend over backwards to approve of Congress’ power. Why take the rhetoric seriously at all? It simply means Congress can do whatever it wants. *Wickard v. Filburn* had come to represent the extreme notion that one could recite a logical causal chain to connect virtually any behavior, however trivial, private, and local, to interstate commerce. In *Lopez*, Chief Justice Rehnquist cuts *Wickard* down to size, stripping it of its mythical proportions: Filburn was a farmer and engaged in a commercial activity, even when he did not sell his wheat.

I would agree that *Wickard v. Filburn* was correctly decided, but not because we can label farming as a commercial activity. It is correct because *818 Filburn’s production of

¹⁴⁴ Id.

¹⁴⁵ See *United States v. Lopez*, 115 S.Ct. 1624, 1659-62 (1995). Compare the somewhat analogous attempt to enforce federalism in *National League of Cities* by creating the category of traditional state functions. The category proved so difficult to define that it led (in part) to the overruling of the case. See *supra* text accompanying notes 103-11.

wheat for home use kept him out of the national market for wheat which Congress had determined needed to be regulated. *Filburn* was part of a system of human activity. His behavior, however confined to his farm, had an effect on that system. The effect of his behavior was trivial, but that should not lead us to assume that the commerce power can reach things no matter how trivial. Rather his behavior was part of a system of behavior that comprised a multitude of trivial actions and produced a single problem at the national level.

Wickard involved a problem with excessive supplies of wheat in the national market, a problem that inherently demanded a national solution. Though local and small-scale, the individual behavior regulated really did contribute to an interstate phenomenon, which states could not address on an individual basis. Indeed, high levels of production by local businesses were unlikely even to be perceived as problems at the local level. The problem existed only in the aggregate, thus demonstrating the national character of the problem.¹⁴⁶ The point was not – despite subsequent complacent assumptions by Court-watchers – that anything could be connected to interstate commerce, but that *Filburn*'s behavior genuinely was a component in a national problem susceptible only to a national solution. Seen this way, the regulation upheld in *Wickard v. Filburn* lies at the core, not the fringe, of the commerce power.

In contrast, the kind of activity involved in *Lopez* was not only susceptible to local regulation, states had traditionally assumed responsibility in this area and were in all likelihood better suited to handle it. A violence problem in one school in one state does not contribute to a violence problem at another school in another state. While violence may be widespread, it does not interlock at the national level like a market. Even though the problem of violence in schools has become a subject of concern to the nation as a whole, the instances of violence criminalized by the statute are localized and unconnected in a system of cause and effect.

Indeed, a federal law is only passed because a problem has engaged the attention of the national legislature: in that sense all federal law addresses concerns that exist at the national level. But an important distinction should be made. Many matters that absorb Congress today do not represent any sort of considered analysis about whether a national *solution* is needed. Indeed, the practice of deferring to the judgment of Congress as to what affects interstate commerce is flawed for this very reason: members of Congress, inclined to pursue their personal political goals, commonly resort to legislative gestures designed to appeal to the passions of the electorate. The expansive federalization of criminal law shows this force in action. Anti-crime bills make good press, those who pass them for their own political gain need not consider whether they are useful or effective. These laws may pass even when they will undercut superior solutions arrived at by the states and will squelch the kind of further state interest in the problem that might lead to creative and desirable solutions in the future.

Uniformity is frequently a good thing, necessary to the solution of the kinds of problems involved in *Wickard v. Filburn*. Individual states cannot impose production

¹⁴⁶ See Regan, *supra* note 5, at 583-86.

caps or price controls without damaging the interests of *819 their citizens in their commercial activities. But individualized state and local solutions to the problem of violence in schools do not have that dysfunctional quality. Laws of this kind do not create opportunities for states to seek their own advantage at the expense of other states or to sabotage the efforts of other states. If one locality declines to send gun-carrying schoolchildren to prison, it does not undercut the harsh sentencing policies of the next state. In fact, as Justice Kennedy noted in his opinion, the states had already produced an array of varied solutions tailored to local conditions and preferences.¹⁴⁷ Although the federal statute did not preempt this state law, it interfered with the states' control of local policy.

Justice Breyer, in spite of his support for the Gun-Free School Zones Act, offered statistics that bolstered the argument *against* uniformity. He wrote, "four percent of American high school students (and six percent of inner-city high school students) carry guns to school at least occasionally,"¹⁴⁸ that "12 percent of urban high school students have had guns fired at them,"¹⁴⁹ and that 20 percent of urban high school students "have been threatened with guns."¹⁵⁰ He does not mention the prevalence of guns at small town or rural high schools: as is well known, the violence problem is greater in city schools. Unintentionally, the justification he offered for recognizing congressional power revealed the value of diversity, which only the states and localities can provide. Justice Breyer, in noting the importance of educating future workers, wrote that "more than 20 States have recently passed educational reforms to attract new business, and that business magazines have begun to rank cities according to the quality of their schools."¹⁵¹ These facts, while offered to show the substantial effect of education on interstate commerce, also reflect the traditional involvement of the states and localities in working to improve their schools. Not only is uniformity in the solution to this problem unnecessary, then, it is not even desirable. The uniform national rule does not provide any important interstate coordination, it merely interferes with nonconforming state policies. Since these policies may be tailored to the severity and manageability of the local problem and the preferences of the local electorate, the uniform rule is a serious intrusion on the interests of the people of the different states. If the states were attempting to maintain policies that offended federal rights or important federal policies designed to protect political minorities, these local preferences would invite interference. But nothing of the kind happens when ordinary crimes of violence are federalized. The federal solution embodied in *820 the Gun-Free School Zones Act is an unusually harsh response to violence, perhaps equivalent to what some states would choose, but to the citizens of other states, an intrusive overreaction and a destructive way to respond to juveniles.

¹⁴⁷ 115 S.Ct. at 1641. Justice Kennedy identifies the following diverse approaches to school violence: inducements to inform on violators where the information leads to arrests or confiscation of the guns, programs to encourage the voluntary surrender of guns with some provision for amnesty, penalties imposed on parents or guardians for failure to supervise the child, laws providing for suspension or expulsion of gun-toting students, [and] programs for expulsion with assignment to special facilities.

Id. (citations omitted).

For an extremely valuable, detailed demonstration of regional diversity in the United States, see Daniel J. Elazar, *THE AMERICAN MOSAIC/THE IMPACT OF SPACE, TIME AND CULTURE ON AMERICAN POLITICS* (1994).

¹⁴⁸ 115 S.Ct. at 1659.

¹⁴⁹ Id.

¹⁵⁰ Id.

¹⁵¹ Id. at 1661.

2. Harm Achieved by Means of Crossing State Lines

A second sort of activity that clearly justifies legislation at the national level entails harm caused by means of crossing state lines. Consider the Child Support Recovery Act (CSRA) of 1992.¹⁵² Congress heard testimony about parents who moved from state to state as a method of avoiding the enforcement proceedings of individual states. Witnesses described parents who owed child support and would move to a new state just as their state of residence began to proceed against them. Some even engaged in a number of successive moves, evading one state after another.¹⁵³ This evidence showed a need for federal legislation to enforce child support obligations. The states individually lack the capacity to deal with the problem. It is not so much that a uniform rule is needed to coordinate a system of activity – for each deadbeat parent acts independently and does not affect other families with child support problems – it is that there is a need for a governmental power capable of responding to behavior that involves more than one state.

Nevertheless, at least three federal district judges have held the CSRA unconstitutional.¹⁵⁴ Their reasoning reveals a deficiency in the commercial/noncommercial analysis recommended by *Lopez*. While it is ***821** possible to view a parent's failure to pay child support as commercial – or at least “economic,” since it involves the payment of money – the transferring of money between family members is not a business, and, moreover, family matters are traditionally seen as especially noncommercial and within the area most likely to be seen as traditionally left for the states to regulate.¹⁵⁵ As one judge put it, quoting *Lopez*, child support “has nothing to do with commerce or any sort of economic enterprise, however broadly one might define

¹⁵² Section 2 of the Child Support Recovery Act of 1992 (CSRA), 18 U.S.C.A. § 228 provides:

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

(b) Punishment. -- The punishment for an offense under this section is --

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

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

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

(d) Definitions. -- As used in this section--

(1) The term 'past due support obligation' means any amount--

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

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

18 U.S.C.A. § 228 (West 1996).

¹⁵³ H.R. REP. No. 771, 102d Cong., 2d Sess. 5 (1992); 138 CONG. REC. H11, 071 (daily ed. Oct. 3, 1992); 138 CONG. REC. S14,095 (daily ed. Sept. 18, 1992). Notably Senator Kohl (sponsor of the Gun-Free School Zones Act) spoke in more general terms, tracking the language of the statute. He noted that the law "makes it a Federal offense for noncustodial parents who live in another State to evade their child support obligations." 138 CONG. REC. S17,131 (daily ed. Oct. 7, 1992).

¹⁵⁴ See *United States v. Mussari*, 894 F.Supp. 1360 (D. Ariz. 1995) (Rosenblatt); *United States v. Schroeder*, 894 F.Supp. 360 (D. Ariz. 1995) (Rosenblatt); *United States v. Parker*, 1995 U.S. Dist. LEXIS 17193 (E.D. Pa. Oct. 30, 1995) (Bechtle); *United States v. Bailey*, 902 F.Supp. 727 (W.D. Tex. 1995) (Biery).

¹⁵⁵ See *Bailey*, 902 F.Supp. at 727; *Parker*, 1995 U.S. Dist. LEXIS at 1. But see *United States v. Sage*, 906 F.Supp. 84 (D. Conn. 1995). In *Sage*, Judge Squatrito, finding the CRSA constitutional, considered whether Congress had a rational basis to find that the activity substantially affects commerce. Unlike the guns in *Lopez*, he wrote, the payments reached by the CRSA have "a substantial effect on the national economy" and are therefore "economic." This seems to misstate *Lopez*: the activity needed to be commercial. Justice Breyer showed that violence in the schools had a substantial effect on the economy, and the Chief Justice's response was that the activity of carrying a gun to school was not in itself a commercial activity. Thus, to follow *Lopez*, one cannot use the effect on commerce to characterize the activity as commercial.

those terms.”¹⁵⁶ He noted that “a debt arising from a state court divorce decree” does not involve “[a]rm’s-length commercial actors,” affect the “marketplace for goods and services and prices of commodities,” or form “part of a greater economic network or enterprise.”¹⁵⁷ *Lopez* also precluded arguments that relied on an extended causal chain to connect childhood poverty to inferior workers in the marketplace of the future or to connect the child’s lack of money with the market effect of lower spending on necessities like food, clothes, and housing. Moreover, the statute intruded into an area of traditional state regulation, where the states have taken a variety of different approaches to the problem, both criminal and civil remedies. In logic clearly influenced by *Lopez*, one judge faulted the CRSA for adopting a uniform criminal sanction, on the ground that this would “usurp the authority of those States which have chosen specifically not to criminalize the failure to pay child support payments.”¹⁵⁸

Despite all of these problems generated by *Lopez*, there was an important distinction. The statute addresses the problem of parents who take advantage of the existence of different states to inflict the harm of avoiding their debts. It only criminalizes the failure to pay child support when the parent lives in a different state from the child.¹⁵⁹ Unfortunately, this wording is broad enough to sweep in parents who had left the state for any reason or who had remained in the same state while the child had moved away.¹⁶⁰ One of the judges who *822 invalidated the statute laid particular stress on this deficiency.¹⁶¹ But let us assume a narrowed statute directed only at parents who left a state after that state had begun an enforcement proceeding of some kind. This narrowing would precisely target the problem in need of a national level solution.¹⁶² At least one of the two judges who have invalidated the CSRA would still find the statute wanting. The Pennsylvania district judge wrote, “the fact that the states are experiencing difficulty in fulfilling their expectations in the exercise of their power here does not somehow produce a form of chameleonic conversion of this activity from a state power to a federal one.”¹⁶³

¹⁵⁶ Parker, 1995 U.S. Dist. LEXIS, at *10 (citing *Lopez*, 115 S.Ct. at 1630-31).

¹⁵⁷ Id. at *12.

¹⁵⁸ Schroeder, 894 F.Supp. at 364.

¹⁵⁹ Courts upholding the CSRA have distinguished it from the Gun-Free School Zones Act by pointing to this provision as the so-called “jurisdictional element.” See *United States v. Hopper*, 899 F.Supp. 389 (S.D. Ind. 1995); *United States v. Hampshire*, 892 F.Supp. 1327 (D. Kan. 1995); *United States v. Murphy*, 893 F.Supp. 614 (W.D. Va. 1995), vacated by *Murphy v. United States*, 1996 WL 396144 (W.D. Va., July 9, 1996). Note that in the wake of *Lopez*, Congress amended the Gun-Free School Zones Act to add a “jurisdictional element.” See *supra* text accompanying note 99. As discussed above, it would be inconsistent with the reasoning of *Lopez* to view this change as a cure to the constitutional problem.

¹⁶⁰ In *United States v. Hopper*, Magistrate Judge Hussmann noted that it was “interesting” that the CSRA could be used against a parent who had not been the one to leave the state. Even though the defendant Hopper had not left the state, the judge still refused to dismiss the case. *United States v. Hopper*, 899 F.Supp. 389, 394 (S.D. Ind. 1995). His was not a case in which the state needed help enforcing its order, for he was subject to jurisdiction in Indiana courts to enforce an Indiana court order.

In *United States v. Schroeder*, 912 F.Supp. 1240 (D. Ariz. 1995), Judge Rosenblatt, reconsidered his conclusions in light of the decisions of later courts upholding the statute, and reached the same result. He rejected Hopper, particularly noting the problem that the defendant in that case had not been the one to leave the state. While the magistrate in Hopper had called this an “interesting issue,” Judge Rosenblatt, stated, “it goes to the heart of the constitutionality of the CSRA.” Id. at 1242.

¹⁶¹ See *United States v. Mussari*, 894 F.Supp. 1360 (D. Ariz. 1995) (Rosenblatt); *United States v. Schroeder*, 894 F.Supp. 360 (D. Ariz. 1995) (Rosenblatt).

¹⁶² One might still argue that a single move could be dealt with by the action of the second state and that perhaps the national level problem only arises after a series of moves, demonstrating an intent to use state lines to avoid enforcement, but it would seem that a single escape across a state line brings us close enough to the problem that evades the individual states to justify a national solution.

¹⁶³ *United States v. Parker*, 911 F.Supp. 830 (E.D. Pa. 1995) (Bechtle).

Why not? A test focusing on precisely this point would express a rational conception of federalism, justified by both original intent – the founders devised the federalism structure of the Constitution in order to rescue the states from the problems that arise because there are different states, acting independently¹⁶⁴ – and present day normative values and structural reasoning. Even a strictly limited Commerce Clause analysis should locate statutes aimed at harms caused by crossing from one state to another at the very core of Congress' power.

CONCLUSION

If we value the contribution that states can make, experimenting with different solutions to problems and tailoring legislation to local preferences, then the Court needs to act and enforce federalism through the Commerce Clause. Its vaunted judicial restraint needs to be seen as a passive way to further federal power. The Court's activism, on the other hand, is not so much a taking of power for itself as it is a preserving of power for the states. Indeed, to the extent that federal criminal statutes are invalidated, the active enforcement of the Commerce Clause reduces the role of the federal courts in American life.

The memorable retreat from Commerce Clause enforcement that took place in 1937 set the Court on a path that had not been seriously reassessed in nearly sixty years. The importance of upholding civil rights legislation in 1964 added momentum to the Court's progression along that path. But in the years preceding *Lopez*, the Court had displayed blind deference to a Congress that passed statutes bereft of the moral force of the Civil Rights Act and the exigency of the New Deal. The excess of federal statutory law that has overburdened the federal courts and sapped the states of their vitality invites a ***823** new look, unclouded by the sentiment justifiably felt for the New Deal and Civil Rights periods.

Lopez has broken the stranglehold of the recent past. Perhaps it will stand in isolation, functioning to warn Congress away from further excesses.¹⁶⁵ But I would rather see it provide an opening for a new, well- considered Commerce Clause analysis, that takes into account the positive value of state and local government, the best uses of federal power, and the ideal allocation of cases between the state and federal courts.

¹⁶⁴ See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)).

¹⁶⁵ In a second case decided in the 1994 Term, the Court wrote a brief per curiam easily deflecting a Commerce Clause challenge to a federal criminal statute as it applied to a localized business. *United States v. Robertson*, 115 S.Ct. 1732 (1995).