

# GREAT EXPECTATIONS: THE ILLUSION OF FEDERALISM AFTER *UNITED STATES v. LOPEZ*

One might reasonably expect . . . that if the Supreme Court affirms the Fifth Circuit in *Lopez*, it will do so primarily to emphasize that congressional findings of a link to interstate commerce are necessary when Congress seeks to criminalize predominantly intrastate activity. If that is so, the lesson Congress will derive from *Lopez* is that 'federalization' of state crime can continue without constitutional limit so long as there are legislative findings like those found in *Perez v. United States*.<sup>1</sup>

## I. INTRODUCTION

For Tenth Amendment<sup>2</sup> worshippers, *United States v. Lopez*<sup>3</sup> was manna from heaven. The Supreme Court's 5-4 resuscitation of federalism rekindled a question as old as the United States Constitution: what are the limits of federal power? Hoping to join the federalism frenzy, articles quickly emerged dubbing *Lopez* the "most significant case" in recent years.<sup>4</sup> To be sure, *Lopez* represents, at least superficially, a significant paradigm shift in American jurisprudence. But is *Lopez* the vanguard of the new revolution, destined to "rein in the commerce clause,"<sup>5</sup> or just the "one time in twenty years that the Court will find a statute unconstitutional[?]"<sup>6</sup> It is early, but "the reports of [the demise of centralization seem] greatly exaggerated."

Avoiding the presumptuous, this Article does not seek to persuade the reader on the proper constitutional scope of federal criminal jurisdiction; it neither advocates nor criticizes the arguments for and against broad federal power. Rather, this Article examines the social, economic, and political history that envelops federalism—a history that is essential in evaluating the present. Holmes once argued that "the rational study of

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1. Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 Kan. L. Rev. 503, 512 (1995) Mengler wrote this article after the Supreme Court heard oral arguments on *United States v. Lopez* but before their decision was announced. Mengler's words are particularly interesting since the Court did, in fact, affirm the decision of the Fifth Circuit; what Congress learned from the Court's decision in *Lopez* was both the center of Mengler's prediction and the primary purpose of this Article.

2. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

3. 115 S. Ct. 1624 (1995).

4. Richard Lacayo, *The Soul of a New Majority: In Most of the Supreme Court's Important Rulings This Year, the Combination was Five Right, Four Left*, TIME, July 10, 1995, at 46; see also Douglas W. Kmiec, *Wising Up: Supreme Court Restores the Constitutional Structure*, CHI. TRIB., May 2, 1995, at 17.

5. Wilfred M. McClay, *A More Perfect Union? Toward a New Federalism*, COMMENTARY, Sept. 1995, at 31.

6. Pete Du Pont, *Pleading the Tenth: With the Demise of Liberalism, Can Federalism be Brought Back to Life?*, NAT'L REV., Nov. 27, 1995, at 51 (quoting Mark Tushnet).

7. Mark Twain, Cable from London to the Associated Press (1897), in JOHN BARTLETT, FAMILIAR QUOTATIONS 625 (1980).

law . . . is the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know."<sup>8</sup> Absent context, "we see [*Lopez*] through a glass, darkly,"<sup>9</sup> and are incapable of gauging its impact or longevity. Thus, a rudimentary appreciation for history is essential in determining whether *Lopez* draws a fresh line in dual-sovereign sand or whether its anachronistic language is a mere "false dawn."<sup>10</sup>

Though this discussion requires some review of relevant constitutional history, that review is only necessary insofar as it facilitates the aforementioned principle aim of this Article.<sup>11</sup> Divorced of social context, Court decisions that expand<sup>12</sup> or contract federal power are textually incoherent. An appreciation for early American history, for example, makes colonial America's stiff resistance to British centralization cognizable; London left indelible marks on the American attitude toward federalism. Thus, Part II of this Article begins with antebellum context.

Part III views the expansion of federal power after the Civil War. A host of factors, from the Great Depression to the Civil Rights Movement, contributed to the augmentation of federal criminal jurisdiction.<sup>13</sup> Whether America's taste for central authority changed during this period or whether taste gave way to exigency is of secondary concern; here, cause is greater than effect. Thereafter, Part III leads the reader through recent history and key factors giving rise to our contemporary crossroad.

Part IV discusses the content of *Lopez* and the legal and extra-legal language of its principal exponents: Chief Justice William Rehnquist and Justice Clarence Thomas. Finally, by examining both what *Lopez* did *and did not do*, Part V concludes by answering the central question: what is the effect of *Lopez*?

## II. ANTEBELLUM FEDERALISM

### A. Overview

"The proper balance of state and national powers in the American federal system . . . is not a matter that can be settled 'by the opinion of any one generation.'"<sup>14</sup>

8. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 83, 96 (1897).

9. 1 *Corinthians* 13:12.

10. Du Pont, *supra* note 6, at 51.

11. The authors assume that anyone willing, or forced, to read this Article already has sufficient knowledge of constitutional law (or knows where to go to find it) to appreciate and follow this relatively straightforward discussion. For certain key cases, textual information is provided. Additionally, the text of *Lopez* itself, both in the majority and the dissenting opinions, thoroughly summarizes (with the expected conservative and liberal biases) the relevant history of the Commerce Clause as a vehicle for federal jurisdiction. Thus, constitutional history, as often as possible, will be relegated to footnotes.

12. The federal government has several sources of power (e.g., territorial, federal enclaves, nationality, and universal jurisdiction). Most are relatively sedentary; that is, federal expansion under such sources is relatively uncommon. However, federal power often expands via the Necessary and Proper Clause when that clause is coupled with an enumerated power (most often the Commerce Clause). The limitations of power under this latter combination are vague and, thus, ripe for abuse. Many of the statutes using this jurisdictional justification can be found in U.S.C. Title 18.

13. This Article makes no attempt to provide a comprehensive history of federal criminal jurisdiction or the Commerce Clause. The books and articles already covering these topics are legion; however, a review of certain key points in American history is essential in the assessment and evaluation of *Lopez*.

14. Harry N. Scheiber, *Federalism*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE

That proper balance, whatever it may be, is shaped by social, political, and economic forces too numerous and complex for generalization. Even so, wide snapshots measure the general pulse of a given population; that pulse is remarkably accurate in measuring a population's tolerance (and perhaps desire) for centralized power. Because each generation faces unique challenges, "each successive generation . . . [must] treat federal-state relationships as a 'new question,' subject to full and searching reappraisal."<sup>15</sup>

An argument that external forces shape the demarcation of federal power is not an argument of deconstruction. Justice Thomas states that the *text* of the Constitution supports a fixed, coherent understanding that constitutional enumerations are a principle of limitation.<sup>16</sup> "[N]o one disputes [this] proposition . . ."<sup>17</sup> The Constitution, as Thomas writes, unequivocally supports an original "understanding of the limited nature of federal power."<sup>18</sup> Moreover, that we have "drifted far from the original understanding of the Commerce Clause,"<sup>19</sup> is a conclusion that is reachable with or without the aid of extra-textual sources. However, even those wary of straying too far from the text acknowledge that an "original understanding of constitutional words is informed by the *historical and social context* in which they were used . . ."<sup>20</sup> Likewise, for our purposes, an understanding of *why* federal jurisdiction shrinks or expands is informed by the historical and social context surrounding that augmentation or diminution.

## B. Colonial Context

In the oft-quoted Federalist number 45, Madison asserts that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."<sup>21</sup>

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UNITED STATES 278 (1992) (emphasis added) (quoting Woodrow Wilson).

15. *Id.*

16. Justice Thomas is correct, but the debate does not end there. The Constitution does present a clear textual picture that the federal government is (or, as some say, was) a government of limited powers. However, *early* in America's history we see expressions of concern over verbal and syntactical ambiguities in the text of the Constitution. The ratification debates left the Court, and others, unclear as to the actual strengths and limitations of the federal government. Justice Thomas, though faithful to the Framers' undeniable desire for limited power, over simplifies the debate. Acknowledging the Framers' understanding that the federal government was to be a government of limited powers is one thing; understanding exactly what those limitations were (or whether such limitations should continue to exist) is quite another.

17. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

18. *United States v. Lopez*, 115 S. Ct. 1624, 1650 (1995) (Thomas, J., concurring). "Unless the dissenting Justices are willing to repudiate our long-held understanding of the limited nature of federal power, I would think that they too must be willing to reconsider the substantial effects test in a future case." *Id.*

19. *Id.* at 1642.

20. DOUGLAS KMEC, *THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT* 21 (1992) (emphasis added). Kmiec went on to say, however, that "the most important clue as to meaning are the words themselves. These are not hard to find. The importance of relying upon the text—even over the subjective intentions of the principal founding actors—was made clear by Hamilton who noted that 'whatever may have been the intention of the framers of a constitution . . . that intention is to be sought for in the instrument itself.'" *Id.* (quoting Alexander Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank*, reprinted in 8 PAPERS OF ALEXANDER HAMILTON 97, 111 (H. Syrett ed. 1965)).

21. THE FEDERALIST No. 45, at 252 (James Madison) (Michael L. Chadwick ed., 1987).

While the federal government's powers "will be exercised principally on external objects . . . [t]he powers reserved to the several States will extend to all the objects which . . . concern the lives, liberties, and properties of the people . . ."<sup>22</sup> Though Madison's words do not mirror modern America, they ring true to colonial ears.

"Before the Civil War the United States exercised jurisdiction over *only* a narrow class of cases . . ."<sup>23</sup> The absence of federal police powers prevented the federal government from exercising any power not expressly provided for in Article I. Thus, with the exception of counterfeiting,<sup>24</sup> treason,<sup>25</sup> piracy and felonies on the high seas,<sup>26</sup> and crimes against the law of nations,<sup>27</sup> the federal government lacked jurisdictional grounds to "define and prosecute crime."<sup>28</sup> All other power to define and enforce criminal law was left, necessarily, with the states. The textual limitations governing the federal government's criminal powers were not the product of careless drafting; rather, those limitations were the tangible representation of the will of the people—a people hardened by the ill-effects of central authority.

By 1765, the *London Chronicle* regularly received and published reports of "colonial resentment of the Sugar Act and indignation at the proposed Stamp act."<sup>29</sup> Though still beset by folly, Parliament was getting the message—slowly. Though taxation without real representation was central to much of colonial resentment, there was a growing sense that, in many ways, Parliament had crossed the proverbial line one too many times. Massachusetts, New York, Connecticut, Virginia, Rhode Island, and Pennsylvania all "[e]mphatic[ally] protest[ed]"<sup>30</sup> the Stamp Act and the general flexing of parliamentary muscle.

London's addiction to centralized authority had both short and long-term side-effects; an increased irritability in infant America marked the immediate but curable reaction. Chronic colonial symptoms, however, soon emerged; principally, Americans were stricken with an incurable consolidation phobia. Two hundred years later, despite dissipation, the phobia lingers. Early signs of colonial decentralization were omnipresent. For example, that formal protestations to London very often flowed from the colonies individually, as opposed to collective declarations from "America," was an early manifestation of this side-effect. America's disdain for centralization is properly diagnosed as congenital, for by formal birth, 1776, the states already had an acute loathing for central authority and a marked sense of local identity.

The debate over "the nature and location of sovereignty" was an incontrovertible factor in the colonial break with England;<sup>31</sup> that it played an enormous role in the formation of a government of enumerated powers is equally transparent. The federal government's powers were few and defined because centralized authority could not be trusted. Despite verbal, syntactical, and contextual ambiguities in the language of the

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22. *Id.*

23. Sara S. Beale, *Federal Criminal Jurisdiction*, in 2 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 775 (1983).

24. U.S. CONST. art. I, § 8, cl. 6.

25. U.S. CONST. art. III, § 3.

26. U.S. CONST. art. I, § 8, cl. 10.

27. *Id.*

28. Beale, *supra* note 23, at 775.

29. BARBARA W. TUCHMAN, *THE MARCH OF FOLLY, FROM TROY TO VIETNAM* 150 (1984).

30. *Id.*

31. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 198 (1992).

Constitution, and notable Federalist victories,<sup>32</sup> this disdain for and distrust of centralization carried the Court well through the Civil War era.

### C. Beyond Politics

Former Justice Felix Frankfurter commented that, until the death of Chief Justice Waite in 1888, "relatively little emerge[ed] . . . regarding the Court's attitude towards the commerce clause . . . ."<sup>33</sup> Indeed, during the Constitutional Convention "there was no significant debate on the concept of enumerated powers or on the seemingly sweeping powers that the commerce clause . . . granted."<sup>34</sup> In retrospect, this was unconscionable. The Commerce Clause declares that "Congress shall have Power [t]o . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]"<sup>35</sup> The simplicity of this clause "belies the fact that its interpretation has played a significant role in shaping the concepts of federalism and the permissible uses of national power throughout our history."<sup>36</sup>

At the 1787 Convention, there was general agreement that the federal government needed *some* control over foreign and interstate commerce. Regulation of commerce under the Articles of Confederation had been disastrous.<sup>37</sup> Inter-state squabbles were fought economically: a high import tax here—a closed port there. With the federal government watching from the sidelines, the union, though only an infant, was slowly dissolving.<sup>38</sup> Though Southern States<sup>39</sup> and antifederalists loathed any increase in federal power, the commerce enumeration was inevitable. In political-*quid pro quo* fashion, Southern sensibilities were soothed and the federal government got its coveted enumeration.

Although much of the antebellum judicial reticence regarding the Commerce Clause can be attributed to the aforementioned economic and revolutionary factors,

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32. It is inaccurate to suggest that antifederalists dominated politics throughout this period. Contrariwise, the Federalists enjoyed significant political success, moving forward virtually unchecked in their efforts at establishing the federal courts, a national bank, and several other objectives. Most of these expansions, however, had nothing to do with the Commerce Clause or the expansion of federal criminal jurisdiction and, thus, are beyond the scope of this Article. Moreover, always checked by Jefferson and other antifederalists, Hamilton's victories, though significant, never approached anything as broad and sweeping as contemporary federal jurisdiction.

33. FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 7 (1937).

34. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 3.1 (5th ed. 1995) (emphasis added).

35. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

36. NOWAK & ROTUNDA, *supra* note 34, § 4.1 at 131 (emphasis added).

37. This was due, in part, to the strict commerce limitations placed upon the Continental Congress by the Articles of Confederation. "The United States in Congress assembled, shall have the sole and exclusive right and power of . . . entering into treaties and alliances, *provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of good or commodities whatsoever . . .*" ARTICLES OF CONFEDERATION, art. IX, para. 1 (emphasis added).

38. See CLAUDE L. HEATHCOCK, *THE UNITED STATES CONSTITUTION IN PERSPECTIVE* 20 (1972).

39. As early as 1787, the issue of slavery began to split the North and the South. Southern states, fearful that the government would curb the slave trade, opposed federal supremacy. As America's conscience grew more sensitive to the issue of slavery, so did the South's animosity toward centralized authority.

additional reasons (reasons so simple they are often overlooked) demand attention. Unlike any other period in American history, "the [states during the] antebellum era . . . were manifestly competent — as a practical matter — to perform a wide range of governmental functions whose effective pursuit in latter eras would require much greater centralization of authority and governmental effort."<sup>40</sup>

In a letter to George Washington in February, 1791, Thomas Jefferson wrote that the "tak[ing][of] a single step beyond the boundaries specially drawn around the powers of Congress is [the taking] of the possession of a boundless field of power, no longer susceptible to definition."<sup>41</sup> Undoubtedly, antifederalist sentiment like Jefferson's played a major role in the restriction of federal power. However, America's agrarian nature, relative immobility, and technological immaturity made centralization, practically speaking, unnecessary.

After the Judiciary Act of 1789,<sup>42</sup> "which established the exclusive jurisdiction of the federal courts in the adjudication of federal criminal cases, Congress faced urgent demands to restrict federal judicial power over crimes and to remit to the state courts concurrent jurisdiction over several classes of federal criminal prosecutions."<sup>43</sup> These demands came not only from the ever-present cries of the antifederalists, but from those simply "troubled by the *geographical inconvenience* of prosecuting federal crimes exclusively in federal courts."<sup>44</sup> It was a different America. Federal courts did not dot the landscape and people, absent great sacrifice, were incapable of traveling long distances. The limitations of federal power were due as much to practical, day-to-day considerations as they were to the abstract resistance to centralized authority. Until the dawning of a more industrialized era, the states were both "competent" and content to govern themselves.

In *Hudson and Goodwin v. United States*,<sup>45</sup> the Court held that federal courts

40. SCHEIBER, *supra* note 14, at 280.

41. Letter from Thomas Jefferson to George Washington (Feb. 1791), in WILLARD S. RANDALL, THOMAS JEFFERSON: A LIFE 493 (1993).

42. 1 Stat. 73. The Constitution vests the judicial power of the United States in "one [S]upreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art III, § 1. The First Congress established such inferior federal courts under the Act of 1789. *See United States v. Holliday*, 707 U.S. (3 Wall.) 407 (1865). Other federal jurisdictional statutes likewise expanded federal jurisdiction. *See* Judiciary Act of 1875 (granting federal question jurisdiction); the Judiciary Act of 1889 (Evarts Act) (creating the circuit courts of appeal); Act of 1925 (Judges' Bill) (narrowing the scope of discretionary review by certiorari of the Supreme Court).

43. Mengler, *supra* note 1, at 509. Concerns over the "burdens [associated with] being required to travel long distances to attend federal trials, led to legislation like the License Tax on Wines and Spirits Act in 1794. In that Act, Congress provided that when any case arose 'more than fifty miles distance from the nearest place by law established for the holding of a district court,' suit could be brought in any state court within the district." *Id.* *See also* ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 549-50 (1987).

44. Mengler, *supra* note 1, at 509 (emphasis added).

45. 11 U.S. (7 Cranch) 32 (1812). Hudson and codefendant Goodwin were indicted in federal court for common-law seditious libel. The libel stemmed from accusations that Thomas Jefferson had conspired with Napoleon Bonaparte. There were no recorded dissents in *Hudson & Goodwin*, but it was clear that one dissenting vote was Justice Story. Story, one of the Court's most aggressive advocates of federal jurisdiction, pressured his Supreme Court colleagues to rethink the reasoning of *Hudson & Goodwin*. The Court did just that in *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816). However, much to his disappointment, the Court rejected Justice Story's reasoning, clinging to the *Hudson & Goodwin* rule that the federal government does not have common-law jurisdiction in matters of criminal law. More recently, the Court affirmed the doctrine of no federal common law crimes. It declared that the "definitions of the elements of a criminal offense [are] entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statutes." *United States v.*

had no power to create *or enforce* common law crimes. Because each state, as a separate entity, had embraced or adopted English common law there remained the question of whether the federal government could engage in common-law crimes. *Hudson* put the protracted dispute to rest. It reaffirmed the Republican (antifederalist) position: the federal government had no power save that expressly granted by the Constitution.<sup>46</sup> For the time being, Republicans were safe with their view of enumerations: if it wasn't express, it didn't exist. Significant change, however, was on the horizon.

#### D. The Sweeping Clause<sup>47</sup>

Jefferson believed that the "system of the [federal] government was to seize all doubtful ground."<sup>48</sup> For this reason, Jefferson encouraged the states to "scramble" for their rights or they would end up with nothing. "It is of immense consequence," Jefferson wrote, "that the States retain as complete authority as possible over their own citizens."<sup>49</sup> True to Jefferson's prediction, the federal government seized upon ambiguities. By liberally defining the "Commerce Clause, the federal government . . . extended its power[s] [immensely] . . . in the [area] of criminal law."<sup>50</sup> Ironically, the jurisdictional might of the Commerce Clause found root in a non-commerce Supreme Court decision.

In a case Justice Frankfurter considered the most important of its era,<sup>51</sup> the Court in *McCulloch v. Maryland*,<sup>52</sup> created (or, arguably, acknowledged) implied powers under the Constitution's "Necessary and Proper Clause."<sup>53</sup> In delivering the opinion, Chief Justice Marshall reasoned that the federal government's power was not limited to the express enumerations of Article I.

Liparota, 471 U.S. 419, 423 (1985) (emphasis added). It is worth mentioning that after his defeat in *Coolidge*, Justice Story, assisted by Daniel Webster, drafted a federal criminal code that was enacted in 1825, otherwise known as the Crimes Act of 1825.

46. *Hudson* remains good law despite the fact that courts, on occasion, create *de facto* common-law crimes by judicially expanding or narrowing statutes.

47. The Necessary and Proper Clause, for reasons that are self-evident, is often referred to as the "Sweeping Clause."

48. Letter from Thomas Jefferson to James Monroe, Sept. 7, 1797, in WILLARD S. RANDALL, THOMAS JEFFERSON: A LIFE 526 (1993).

49. *Id.*

50. Gregory W. O'Reilly & Robert Drizin, *United States v. Lopez: Reinvigorating the Federal Balance by Maintaining the States' Role as the "Immediate and Visible Guardians" of Security*, 22 J. LEGIS. 5 (1996).

51. See Felix Frankfurter, *John Marshall and the Judicial Function*, 69 Harv. L. Rev. 217, 219 (1955).

52. 17 U.S. (4 Wheat.) 316 (1819). In *McCulloch*, the Supreme Court held a Maryland tax invalid. The tax law required any bank *not* chartered by the state (here, a bank established and chartered by the federal government) to pay a \$15,000 annual tax or, alternatively, pay a tax on "stamped" paper that resulted in a 2% tax on notes. The invalidity of the statute hinged upon the validity of Congress' actions in chartering a bank. Nothing in the Constitution gave Congress the express power to charter a bank. Nevertheless, Chief Justice Marshall held that the federal government's enumerated powers, when coupled with the Necessary and Proper Clause, gave Congress the implied constitutional power to charter a bank.

53. U.S. CONST. art. I, § 8, cl. 18. The relevant portion of clause 18 gives Congress the power "[t]o make *all laws* which shall be *necessary and proper* for carrying into [e]xecution the" enumerated powers. *Id.* (emphasis added).

In an oft-quoted passage from *McCulloch*, Marshall wrote: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."<sup>54</sup> This was an attempt at constitutional clarification; however, Marshall's maxim only mildly disambiguated the language of the Necessary and Proper Clause. Indeed, there "remained a grave anxiety over the indeterminate language" contained therein.<sup>55</sup>

Notwithstanding this indeterminacy (or if you accept the Jeffersonian position *because* of the indeterminacy), the federal government, propelled by *McCulloch* and its progeny, moved inexorably toward a liberal, sweeping<sup>56</sup> interpretation of the Commerce Clause and steadily toward the expansion of power.

### E. *Gibbons v. Ogden*

In *Lopez*, Chief Justice Rehnquist remarked that the Court "first defined the nature of commerce"<sup>57</sup> in the landmark decision *Gibbons v. Ogden*.<sup>58</sup> In *Gibbons*, Chief Justice Marshall stated: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."<sup>59</sup> Though the majority and dissent in *Lopez* argued over the boundaries in *Gibbons*,<sup>60</sup> both sides acknowledged that it was the genesis of commerce jurisprudence. Antifederalists deemed *Gibbons* an unconstitutional usurpation of local power. From the view of Marshall, *Gibbons* offered only what the Constitution already gave: congressional power to regulate "commerce which concerns more states than one."<sup>61</sup>

If *Gibbons* did anything, however, it defined commerce broadly enough to leave precious few commercial transactions beyond the reach of federal criminal jurisdiction. Unlike *McCulloch* which relied on an implication, Marshall held that the commerce power, because of its express provision, was "complete in itself [and] may be exer-

54. *McCulloch*, 17 U.S. (4 Wheat.) at 421.

55. NOWAK & ROTUNDA, *supra* note 34, § 3.2 (emphasis added) (quoting C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 500 (rev. ed. 1926)).

56. For a good discussion on the broad and "sweeping" effects of the Necessary and Proper Clause see William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effects of "the Sweeping Clause,"* 36 Ohio St. L.J. 788 (1975).

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

58. 22 U.S. (9 Wheat.) 1 (1824). *Gibbons* examined whether a federal ship licensing law trumped a New York law that granted a monopoly to Robert Livingston and Robert Fulton to navigate the waters of New York. The Court held that the federal law *did* preempt the New York law because commerce includes navigation.

59. *Id.* at 189-90.

60. The Chief Justice remarks that "[t]he *Gibbons* Court . . . acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause." *Lopez*, 115 S. Ct. at 1627. Contrarily, Justice Souter prefers to discuss the "recognition of broad commerce power in *Gibbons*." *Id.* at 1652. Both are right. Marshall did stress the broad power of the Commerce Clause, but he also suggested that "internal" commerce might be beyond the power of Congress to regulate. There was no clear definition, however, of what "internal" powers were. With enough manipulation, *Gibbons* offers almost anything to a reader seeking textual support.

61. *Gibbons*, 22 U.S. (9 Wheat.) at 189.



cised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."<sup>62</sup>

The historical importance of *Gibbons*, however, is its aftermath. Despite its breadth, the Supreme Court "disregarded the basis of Marshall's ruling"<sup>63</sup> and resisted its expansive language and the general augmentation of federal power for several years. The country faced several internal challenges not the least of which were Southern concerns over the slave trade. Whether states-rights concessions were made to quell anxiety or whether Republican ideology still imbued the Court is difficult to say. It is likely that both politics and ideology played a role. Though the post-*Gibbons* period was seen only as the silence before the inevitable federal storm, the "why" behind the silence is relevant in understanding the evolution.

#### F. Taney and the Aftermath of Gibbons

After asserting the strength of the Commerce Clause, Chief Justice Marshall suggested that states still had significant power under the Commerce Clause vis-a-vis internal powers.<sup>64</sup> These powers, Marshall wrote, are not to be "surrendered to the general government"<sup>65</sup>. This caveat language served antinationalists well for many years after *Gibbons*, holding back the full effect of Marshall's otherwise pro-centralization language. Indeed, other than geographic jurisdiction (e.g., maritime), federal criminal law "did not reach crimes against private individuals, which were the exclusive concern of the states" during this era.<sup>66</sup> Thus, notwithstanding Marshall's *Gibbons* and the expansionist language in *Cohens v. Virginia*,<sup>67</sup> *Martin v. Hunter's Lessee*,<sup>68</sup> and *Fletcher v. Peck*,<sup>69</sup> antifederalism was alive and well. More and more, however, the life-blood of decentralization was the threat of Southern secession.

The impact of the slave-trade on American jurisprudence was significant. "In the latter part of the antebellum era, from 1836 until the Civil War, the Court significantly

62. *Id.* at 196.

63. NOWAK & ROTUNDA, *supra* note 34, § 4.4.

64. See *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829) (upholding a Delaware statute which authorized construction of a dam across a navigable creek). Chief Justice Marshall reasoned that the act did not violate the federal commerce power because the state had a right, under its general police powers, to protect its citizens. *Id.* at 251.

65. *Gibbons*, 22 U.S. (9 Wheat.) at 203. Marshall was referring to the police powers of the states. These police powers include "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State and those which respect turnpike roads, ferries, etc." *Id.*

66. Beale, *supra* note 23, at 776.

67. 19 U.S. (6 Wheat.) 264 (1821) (establishing that the Supreme Court has power to review federal questions that arise in state criminal cases).

68. 14 U.S. (1 Wheat.) 304 (1816) (upholding the constitutionality of section 25 of the Judiciary Act of 1789, which gave the Supreme Court appellate jurisdiction over certain state court appellate decisions). The Court believed that "state prejudices, state jealousies, and state interests, might sometimes obstruct, or control . . . the regular administration of justice . . . [and, thus,] parties, under the authority of Congress, [should] have [certain] controversies heard, tried and determined before the national tribunals." *Id.* at 347.

69. 10 U.S. (6 Cranch) 87 (1810) (finding the Georgia statute at issue in violation of "general principles which are common to our free institutions or by the particular provisions of the Constitution of the United States . . .") *Id.* at 139. For an in depth discussion of *Fletcher* and federalism cases during this time period see David P. Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, U. CHI. L. REV. 887, 889 (1982).

altered its posture with regard to the juridical nature of American federalism."<sup>70</sup> In part, this shift was the result of the Court's change in leadership: Marshall to Taney.<sup>71</sup> "When Jackson announced Taney as his choice for chief justice, [Daniel] Webster is said to have proclaimed, 'The Constitution is gone.'"<sup>72</sup> Even from Webster's perspective, such language smacks of hyperbole; however, Taney did represent a dramatic shift in the Court's jurisprudence.<sup>73</sup>

Under new direction, the Court reaffirmed the position of the states as dual sovereigns. The Tenth Amendment reemerged as a viable weapon in the battle over federal-state relations, and Marshall's reasoning was forced to retreat. While the Taney Court curiously yielded to the proponents of centralization in some key situations,<sup>74</sup> it "never voted to strike down state legislation under the commerce clause."<sup>75</sup>

In *Charles River Bridge v. Warren Bridge*,<sup>76</sup> the Taney Court assured the states that the "rights" reserved to them by the Constitution—"the power over their own internal policy and improvement, which is so necessary to their well being and prosperity"—would not be circumvented by federal hands.<sup>77</sup> While the language of *Warren Bridge* suggests an undying devotion to decentralization, the Taney Court appeared more concerned about the brewing concerns in the South than any abstract view of federalism. Indeed, pre-Civil War federalism is understood, not by analyzing political rhetoric, but by understanding historical context.

In *Dred Scott v. Sandford*,<sup>78</sup> Chief Justice Taney argued, *inter alia*, that Congress lacked the power to interfere with ownership rights in a slave. In isolation, *Dred Scott* was a victory for non-nationalists—an objective, detached promulgation of federalism.<sup>79</sup> However, historical context suggests otherwise. That slavery and secession were foremost in Taney's mind (as opposed to an unwavering allegiance to decentralization) is evidenced by the post-*Scott* opinion of *Ableman v. Booth*.<sup>80</sup> In *Ableman*,

70. SCHEIBER, *supra* note 14, at 280.

71. Roger Brooke Taney was one of America's most enigmatic legal figures. Though beginning his Maryland political career as a member of the Federalist party, Taney's political persuasion shifted during his later life. After the demise of the Federalist party, Taney became an ardent supporter of Andrew Jackson and the Democrats, serving as the United States attorney general for Jackson's administration. Taney became Chief Justice on March 15, 1836, filling the seat of Chief Justice John Marshall. Though he is most remembered (or reviled) for the infamous *Dred Scott* decision, Taney played a major role in the evolution of federal-state relations during the antebellum period. He served as the Chief Justice of the United States until his death on October 12, 1864. For more on the life of Chief Justice Taney, see BERNARD C. STEINER, *LIFE OF ROGER BROOKE TANEY* (1922); see also William L. Ransom, *Roger Brooke Taney: Chief Justice of the Supreme Court of the United States (1836-1864)*, 24 GEO. L.J. 809 (1936).

72. LEE EPSTEIN & THOMAS G. WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS* 493 (1995).

73. See Michael S. Ariens, *Constitutional Law and the Myth of the Great Judge*, 25 ST. MARY'S L.J. 303, 307 (1993).

74. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) (establishing the freedom of the federal courts to follow principles of general commercial law even when such laws are contrary to judicial laws in the state where the federal court sits).

75. NOWAK & ROTUNDA, *supra* note 34, § 4.4 n.21 (emphasis added).

76. 36 U.S. (11 Pet.) 420 (1837).

77. *Id.* at 552.

78. 60 U.S. (19 How.) 393 (1857). The Supreme Court struck down federal legislation on only two occasions prior to the Civil War. The first was *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The second was *Dred Scott*.

79. See also *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841); FRANKFURTER, *supra* note 33, at 65.

80. 62 U.S. (21 How.) 506 (1858). *Ableman* involved the recapturing of a runaway slave. Benja-

Taney upheld the Fugitive Slave Act of 1850<sup>81</sup> in order to secure the recapture of a runaway slave. In justification for his decision, Taney stated that the federal act in question was "in all of its provisions, fully authorized by the Constitution of the United States."<sup>82</sup> This time, Taney satisfied the South by upholding, rather than invalidating, powerful, centralized law. The irony is thick indeed.

Juxtaposed with *Scott*, *Ableman* suggests that academic influence over the division of federal-state power, though important, is ancillary to more tangible, blood and guts factors. That is to say, the expansion or diminution of federal power is more the result of actual problems facing a nation than the intellectual probings, however convincing, of its political scientists. When American blood began spilling in 1861, academic concerns over federal-state relationships yielded, quite willingly, to more practical concerns over the division of power.

In *The Federalist*, Hamilton argued that the "government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals; and to attract to its support those passions which have the strongest influence upon the human heart. It must, in short, possess all the means, and have a right to resort to all the methods, of executing the powers with which it is intrusted [sic] . . . ."<sup>83</sup> Fear, justified or not, plays a considerable role in the expansion of federal power. When in fear, individuals are more willing to pawn away local control in return for greater protection. It is a reasoned choice but one made by the people. The Civil War was just such a time of fear; and *during* that time, questions regarding federalism were answered by armies, not politicians.

### III. POST CIVIL WAR FEDERALISM

#### A. Civil Rights

Central to the debate over the division of federal-state power is the question of constitutional relationships. "The Framers looked at the Constitution as a contract, but a contract between whom? Some . . . argue[d] that it specif[ied] the relationship between the *people* and the national government . . . . Others suggest[ed] that the con-

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min Garland, a slave owner from Missouri, traveled to Wisconsin to recapture his slave. The slave, Joshua Glover, had successfully escaped two years prior and was working in a mill. Garland invoked the Fugitive Slave Act of 1850. Glover was arrested, bound, and taken to Milwaukee. The federal authorities refused to hand over Glover to state authorities because he was in custody pursuant to valid federal law. Not to be beaten, local abolitionists stormed the jail and secured the release of Glover who was never recaptured. Chief Justice Taney condemned the Wisconsin judges' actions and upheld the validity of the Fugitive Slave Act—an act, ironically, with significant federal power. *Ableman* illustrates that Taney was more interested in Southern concerns than abstract federalism.

81. The Fugitive Slave Act of 1850 rested "solely upon the implied power of Congress to enforce the master's rights . . . . They placed at the disposal of the master seeking to recover his fugitive slave, substantially the whole power of the nation . . . . Without going into the details of [the] act, it is sufficient to say that Congress omitted from it nothing which the utmost ingenuity could suggest as essential to the successful enforcement of the master's claim to recover his fugitive slave." *United States v. Stanley*, 109 U.S. 3, 30 (1883).

82. *Ableman*, 62 U.S. (21 How.) at 561. See also *United States v. Reese*, 92 U.S. (2 Otto.) 214 (1875).

83. *THE FEDERALIST* No. 16, at 84 (Alexander Hamilton) (Michael L. Chadwick ed., 1987).

tract [was] between the states and the nation."<sup>84</sup> Accepting the latter view, Southern states considered any laws that interfered with state sovereignty a breach of that federal-state contract. Thus, the passage of a key tariff act in 1832 was not just an unconstitutional act (from the perspective of South Carolina) but a breach of contract, rendering all other contractual terms null and void. After the Civil War, this perspective changed. More and more the contract was seen as existing between "the people" and the federal government, *not* as between the states and the federal government; and the linking verb mutated from *are* to *is*.<sup>85</sup>

"If ever the Court was faced with federal-state relationships as a new question, it was [during] the Civil War and Reconstruction years."<sup>86</sup> Some saw federalism as a clean slate, free from the scribbling of the past; if this metaphor is accurate, the government made the most of the tabula rasa. "Not until after the Civil War did federal criminal law make its first substantial ventures beyond the punishment of acts directly injurious to the federal government or its narrowly defined national interests."<sup>87</sup>

At roughly the same time as the post-Civil War amendments<sup>88</sup> emerged, Congress enacted ambitious federal legislation<sup>89</sup> aimed at safeguarding the rights of United States citizens. "Reconstruction legislation, however, not only implemented the new prohibitions against unconstitutional state action, but also purported to extend federal jurisdiction to reach private conduct clearly within the realm of the states' traditional police powers."<sup>90</sup> The venture into areas traditionally under the umbrella of the states' police powers was not warmly welcomed. Although few took issue with the end desired, the expansion was met with stiff resistance as states resented any usurpation of local power.

"The Supreme Court promptly nullified many of the key provisions of the legislation, holding that the civil rights amendment had given Congress no new authority to criminalize the acts of one private citizen against another . . . ."<sup>91</sup> Much like the expansive language of *Gibbons*, however, the setback was only temporary. Reconstruction legislation would later resurface—extending the federal government's power to criminalize the acts of the individual.

84. EPSTEIN & WALKER, *supra* note 72, at 276.

85. In contrasting America's attitudinal difference between the antebellum and the post-civil war eras, it is worth examining the difference between the linking verbs that were often used to reference the nation. To wit, before the Civil War, one would be understood if she said: "The United States *are* entering into a contract with country X." Today, however, anything other than "The United States *is* entering into a contract with country X" would prompt a puzzled expression from all listeners.

86. Scheiber, *supra* note 14, at 282.

87. Mengler, *supra* note 1, at 510.

88. See U.S. CONST. amend. XIII (abolishing slavery and involuntary servitude); U.S. CONST. amend. XIV (defining United States citizens as "all persons born or naturalized in the United States" and prohibiting the states from violating the rights, privileges, and immunities of United States citizens); U.S. CONST. amend. XV (prohibiting the federal or state governments from denying United States citizens the right to vote on "account of race, color, or previous condition of servitude").

89. Although the civil rights legislation in question was enacted during the 1870s, relevant sections have been amended. See, e.g., 18 U.S.C. § 241 (1988) (criminalizing any conspiracy to abridge the civil rights of a citizen of the United States); 18 U.S.C. § 242 (1988) (making criminal any deprivation of the civil rights of another while acting under color of law); 18 U.S.C. § 243 (1988) (disallowing the exclusion of jurors on account of race or color).

90. Beale, *supra* note 23, at 776.

91. *Id.*

## B. The Industrialization of America

"The regulation of commerce by the federal government did not become a major item on the Supreme Court's agenda until the latter half of the nineteenth century."<sup>92</sup> Business was booming; railroads criss-crossed the country; industry expanded; the country prospered. But growth and prosperity did not come without baggage. With expansion came "horrendous social problems. Unsafe working conditions, sweat shops, child labor, and low wages plagued employees . . ."<sup>93</sup> Federal expansion of power during this period was not without prompting. The Interstate Commerce Act of 1887, the Sherman Anti-Trust Act of 1890, and the establishment of the Interstate Commerce Commission were all federal attempts to manage (and regulate) growth in an era of unprecedented expansion.

For several years the Court ebbed and flowed between its laissez-faire jurisprudential inclinations<sup>94</sup> and the inevitable move toward greater federal control. Concerned with monopolies but uneasy about over-involvement, the Court vacillated in the area of antitrust legislation. While *United States v. E. C. Knight Co.*<sup>95</sup> interpreted anti-trust legislation narrowly, *Addyston Pipe & Steel Co. v. United States*<sup>96</sup> and *Northern Securities Co. v. United States*<sup>97</sup> deemed such legislation within federal commerce power. In 1905, Holmes' opinion in *Swift & Co. v. United States*<sup>98</sup> appeared to settle the matter: federal expansion in this realm was here to stay.

Even a glance at history, however, explains the expansion. Justice Thomas writes that there are "real limits to federal power."<sup>99</sup> The industrial-related problems facing post Civil War America, however, were likewise real, and insoluble in the hands of state government. To view an industrialized America through an agrarian lens is to ignore the complexities of modern economy.

In harmony with the federal government's growing interest in the individual, various laws during this period were passed that facilitated the punishment of activities considered dangerous or anti-social. Not all regulation, however, came easily.<sup>100</sup> These new laws were widely used to "punish . . . conduct of primarily local [i.e., state] concern, often conduct with which the local police [were] *unable or unwilling* to

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92. EPSTEIN & WALKER, *supra* note 72, at 346.

93. *Id.*

94. See *Lochner v. New York* 198 U.S. 45 (1905) (invalidating a state law that limited the amount of hours a baker could work during a week).

95. 156 U.S. 1 (1895). The Court in *Knight* held that the Sherman Antitrust Act did not apply to sugar refineries. The Court argued that regulation of manufacturing was beyond the scope of the federal commerce power because manufacturing had only an indirect, not a direct, effect upon commerce. See also *Hopkins v. United States*, 171 U.S. 578 (1898); *Anderson v. United States*, 171 U.S. 604 (1898).

96. 175 U.S. 211 (1899) (holding that antitrust legislation applied to price fixing in the iron pipe manufacturing industry).

97. 193 U.S. 197 (1904) (holding that stock transactions creating a merger of railways were subject to the Sherman Act).

98. 196 U.S. 375 (1905) (upholding the Sherman Act and creating the "stream" or "flow" of commerce metaphor).

99. *United States v. Lopez*, 115 S.Ct. 1624, 1643 (1995) (Thomas, J., concurring).

100. See *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding that there were limitations on Congress' ability to regulate child labor laws). But see *United States v. Darby* 312 U.S. 100 (1941) (overruling *Hammer* and giving the Congress broad control over the regulation of child labor laws).

cope."<sup>101</sup> Unlike Jefferson's America, an industrialized nation faced challenges more national in scope. The growth and expansion of the nation led, quite naturally, to the growth and expansion of the criminal law. Crimes, with much greater ease, stretched beyond the four corners of a state, affecting multiple parties in several states and draining local resources.

As technology made interstate travel, shipping, and business more common, states became increasingly "unable" to enforce many of their own criminal laws. The federal government filled the gap by assuming the role of the nation's regulator. Within a relatively short period of time, the federal government was overseeing "various aspects of public welfare [such as] interstate transportation, communication, wholesomeness of food, marketing of securities, wages and hours of labor."<sup>102</sup> The demise of federalism was as much about invention, progress, and industrialization than about ideology.<sup>103</sup>

The federal government's ever-augmenting role of regulator demanded jurisdictional justification. "The first significant step in this direction was the adoption of criminal penalties for the misuse of the mails—facilities provided by the government—to effectuate fraudulent schemes or to distribute lottery circulars and obscene publications."<sup>104</sup> The mail-fraud statute of 1872<sup>105</sup> offered enormous jurisdictional might to the federal government—virtually ensuring federal jurisdiction if the defendant used the mail system during the commission of a fraudulent act. Thus, even if crime X was committed entirely within the bounds of Nebraska, the licking of a stamp might very well bring the defendant into federal court.

The strength of the mail-fraud statute was intended to afford the federal government the power to cure the ills of an increasingly complex America. Much like the Commerce Clause, however, its strength was itself the source of numerous federalism infections. Principally, its power was, and is, prone to abuse.<sup>106</sup> Without reasoned

101. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 2.8 (2d ed. 1986) (emphasis added).

102. *Id.* n.35.

103. See, e.g., National Motor Vehicle Act, ch. 89, 41 Stat. 324 (1919) (amended and codified at 18 U.S.C. §§ 2311-13 (1988)). The National Motor Vehicle Act made it a federal crime to "transport[] in interstate . . . commerce a motor vehicle or aircraft, knowing the same to be stolen . . ." *Id.* at 2312. This is a perfect example of how technology encouraged the expansion of federal power. We are safe in assuming that the interstate transportation of stolen motorized vehicles was not on the mind of the Framers.

104. BEALE, *supra* note 23, at 776.

105. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323 (amended and codified at 18 U.S.C. § 1341 (1994)). Section 1341 is a broad and powerful tool of the federal government. It criminalizes the actions of anyone who has "devised or intend[s] to devise any scheme or artifice to defraud . . . [and thereafter] places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon . . ." *Id.* (emphasis added). The 1994 amendment to the mail-fraud statute enlarged its already broad nature by extending it to private carriers. Thus, someone can be in violation of section 1341 for improperly shipping with FEDEX. The original constitutional jurisdiction for the statute was clear: the Postal Service is an arm of the federal government. With the commercial carrier extension, however, the jurisdictional justification is more tenuous. Although the Commerce Clause justifies federal jurisdiction when a FEDEX is shipped interstate, it is less clear how this jurisdictional requirement is met if the FEDEX is shipped intrastate; presumably, it is because FEDEX ships other packages interstate and holds itself out as an interstate carrier.

106. See Peter J. Henning, *Maybe it Should Just be Called Federal Fraud: The Changing Nature*

prosecutorial discretion,<sup>107</sup> federal criminal jurisdiction under 18 U.S.C. 1341 is virtually unlimited. Broad power blurs good intentions. The post Civil War expansion of federal power illustrated the government's difficulty in "knowing when to say when."

### C. Regulating Morals

"It is interesting to study the growth of the American people; to observe the progress of the ideas on which the government rests . . . ."<sup>108</sup> Some have argued that post Civil War America was more socially and morally introspective than it was before the guns fired at Fort Sumter. What is certain is that the federal government assumed a new role in this period, a role of regulating *and protecting* the social and moral health of its citizens.

Whether it was obscene materials, lotteries, or scam by mail, the federal government was quickly enacting laws to regulate and enforce a host of actions and behaviors. The rise in regulation resurrected, little by little, the language of *Gibbons*.<sup>109</sup> The Mann Act of 1910,<sup>110</sup> criminalized "[t]he use of interstate commerce for the purposes of [facilitating] commercialized sex . . . ."<sup>111</sup> The Court in *Hoke v. United States*,<sup>112</sup> upheld the validity of the Mann Act despite protestations that Congress was merely regulating "indecent and immoral"<sup>113</sup> activity. Though federal control of prostitution had relatively few (vocal) objectors, the same cannot be said of federal attempts to control lotteries.

State lotteries<sup>114</sup> were one example of the federal government using its broadened power to regulate behavior it deemed improper. "For many years after the lottery began to prevail it was *not* regarded at all as a kind of gambling; the most reputable citizens were engaged in these lotteries, either as selected managers or as liberal subscribers."<sup>115</sup> Attitudes toward the lottery eventually changed. For a variety of reasons, some the result of a metamorphosis of morals, and others purely economical, lotteries

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of the Mail Fraud Statute, 36 B.C. L. REV. 435 (1995).

107. See G. Robert Blakey, *Federal Criminal Law: The Need Not for Revised Constitutional Theory or New Congressional Statutes, but the Exercise of Responsible Prosecutive Discretion*, 46 HASTINGS L.J. 1175 (1995).

108. Theodore Parker, *Hildreth's United States*, reprinted in GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 77 (1992).

109. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

110. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-24 (1988)). The statute, in pertinent part, makes it a federal crime for any person to "knowingly transport[] any individual . . . in interstate commerce, with the intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense . . . ."

111. *Caminetti v. United States*, 242 U.S. 470 (1917) (applying the statute to non-commercial vice); *Cleveland v. United States*, 329 U.S. 14, 18 (1946), *reh'g denied*, 329 U.S. 830 (1946) (including within the statute the transportation of plural wives across state lines by Mormons).

112. 227 U.S. 308 (1913).

113. *Id.* at 323.

114. Though often relegated to a mere paragraph or footnote, the legal history of state lotteries is a lengthy, interesting topic. Unfortunately, this Article, likewise, gives little attention to the detail necessary in fully understanding the constitutional and legal history of the lottery. For a more in-depth examination, see G. Robert Blakey & Harold A. Kurland, *The Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923 (1978).

115. Blakey, *supra* note 107, at 1221 (emphasis added).

came under the broad reach of federal criminal jurisdiction and became the subject of great concern for the advocates of limited federal power.

Though there were early attempts at regulating lotteries,<sup>116</sup> the most celebrated (and controversial) case was *Champion v. Ames*.<sup>117</sup> The modern era in the use of the commerce power for criminal jurisdiction purposes may be deemed to have begun with the decision[] in *Champion v. Ames*.<sup>118</sup> *Champion's* upholding of a federal lottery statute inflamed those opposed to federal expansion. The Court's dissenting voice argued that the majority's decision "breaks down all the differences between that which is, and that which is not . . . [and] is a long step in the direction of wiping out all traces of state lines, and the creation of a centralized government."<sup>119</sup>

The Court non-surreptitiously reasoned that the regulation of morals *was* within the power of the federal government. Justice Harlan stated: "But surely it will not be said to be a part of any one's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the states an element that will be confessedly injurious to the public morals."<sup>120</sup> For better or for worse, the federal government was in the business of regulating morals, and the American community appeared willing to embrace the government's new role.

In keeping with its new-found moral role, the federal government, through the ratification of the Eighteenth Amendment,<sup>121</sup> dramatically increased the number of federal criminal prosecutions. "Prohibition cases accounted for more than one-half of all federal prosecutions every year between 1922 and 1933."<sup>122</sup> Post-Prohibition, however, did not offer the hoped-for relief from the increasing federal caseload. "Between 1932 and 1935, thirteen major federal statutes in the field of criminal law and procedure were added to Title 18 of the United States Code."<sup>123</sup> Most, like the Kidnaping Act of 1932,<sup>124</sup> and the Anti-Racketeering Act of 1934,<sup>125</sup> were seen as illegal activities exacerbated by modernized economy and, thus, in need of federal enforcement.

116. See *Ex parte Jackson*, 96 U.S. (6 Otto) 727 (1878). *Jackson* was an early attempt to regulate lotteries via the mail system; the law in question made it a crime to circulate any materials relating to lotteries.

117. 188 U.S. 321 (1903). Known as the "Lottery Case," *Champion* challenged the constitutionality of an 1895 statute created to suppress "lottery traffic through national and interstate commerce." *Id.* at 321. The majority focused on whether the tickets were proper subjects of the Commerce Clause and what the scope of federal commerce power was. Despite the minority's Tenth Amendment concerns, the Court held the statute constitutional.

118. NORMAN ABRAMS & SARA S. BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 17 (2d ed. 1993) (emphasis added).

119. *Champion*, 188 U.S. at 371 (Fuller, C.J., dissenting).

120. *Id.* at 357.

121. U.S. CONST. amend. XVIII. The Eighteenth Amendment outlawed the "manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes . . . ." *Id.* at § 1.

122. Beale, *supra* note 23, at 778.

123. Norman Abrams, *Federal Criminal Law Enforcement*, in *ENCYCLOPEDIA OF CRIME AND JUSTICE* 779 (1983).

124. 18 U.S.C. § 1201 (1995) (making it a federal crime if anyone "unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person . . . when (1) [that] person is willfully transported in interstate or foreign commerce[.]"). *Id.*

125. 18 U.S.C. § 1951 (1995) (making it a federal crime to "obstruct, delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempt[ing] or conspir[ing] so to do . . ."). *Id.*



#### D. Post-1937

In *McCulloch v. Maryland*,<sup>126</sup> Chief Justice Marshall reasoned that the "constitution [was] intended to endure for ages to come, and consequently, [must] be adapted to the various crises of human affairs."<sup>127</sup> On October 29, 1929, the New York Stock Exchange crashed; the nation had its crisis. "For the next two years, the stock market continued to tumble, with the Standard and Poor's Industrial Averages falling 75 percent. The gross national product declined 27 percent over three years, and the unemployment rate rose from a healthy 3.2 percent in 1929 to a catastrophic 24.9 percent in 1933."<sup>128</sup> Notwithstanding the conservative nature of the Supreme Court, the looming economic crisis eclipsed any abstract concern over federal-state relationships; "having looked to the government for bread,"<sup>129</sup> the people yielded. Though early attempts to buttress the floundering economy were invalidated by the Court,<sup>130</sup> the Four Horsemen<sup>131</sup> eventually lost a critical swing-vote,<sup>132</sup> and Roosevelt found his majority. Thus, a new era began.

#### E. Unlimited Power

The importance of post-37 constitutional law on federal criminal jurisdiction cannot be overstated. America was no longer seen as a patchwork of micro economies but one national economy,<sup>133</sup> necessarily under the watchful eye of the federal government, and crime mirrored the economy. Transactions, licit or illicit, benefited from the mobility, sophistication, and maturity that modernity provided. Economic interde-

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126. 17 U.S. (4 Wheat.) 316, (1819).

127. *Id.* at 415.

128. EPSTEIN & WALKER, *supra* note 72, at 355.

129. Edmund Burke, *Reflections on the Revolution in France*, reprinted in BARTLETT'S FAMILIAR QUOTATIONS 372 (1980).

130. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (invalidating portions of the National Industrial Recovery Act because the Act did not set adequate constitutional standards for when the president could prohibit the shipment of products); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down portions of the National Industrial Recovery Act, specifically the regulation of wages and hours, because it exceeded the federal government's commerce powers); *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935) (invalidating the Railroad Retirement Act of 1934, which imposed a compulsory federal retirement and pension system, because it exceeded the government's commerce powers); *United States v. Butler*, 297 U.S. 1 (1936) (invalidating the Agricultural Adjustment Act of 1933); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating the Bituminous Coal Conservation Act because its regulation of wages and hours was deemed outside the federal commerce powers).

131. See *Revelation* 6:12. Because of their opposition to New Deal reform, the core opposing justices (two were Democrats) became known as the Four Horsemen of the Apocalypse. The justices so labeled were: George Sutherland, Republican from Utah (1922-38); Willis Van Devanter, Republican from Wyoming (1910-37); James Clark McReynolds, Democrat from Tennessee (1914-41); Pierce Butler, Democrat from Minnesota (1922-39).

132. Justice Carter shifted his loyalty and joined those justices more friendly to New Deal reform, namely, Hughes, Brandeis, Stone, and Cordozo.

133. See Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645 (1946).

pendency no longer permitted the "left hand not know[ing] what the right hand was doing."<sup>134</sup> Jefferson's country had transformed.

The transformation obfuscated jurisdictional boundaries. Soon, congressional commerce power was without visible limitation, and the Tenth Amendment, once a clear demarcation of federal power, was severely weakened.<sup>135</sup> *NLRB v. Jones & Laughlin Steel Corp.*,<sup>136</sup> illustrated the Court's new approach to the Commerce Clause: an "abandonment, for practical purposes, of [any] formalistic distinctions between direct and indirect effects."<sup>137</sup> *United States v. Darby*<sup>138</sup> overruled *Hammer v. Dagenhart*<sup>139</sup> and formally jettisoned the "direct-indirect" test of *Carter v. Carter Coal Co.*<sup>140</sup> Justice Stone, in *Darby*, said that the "motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the Courts are given no control."<sup>141</sup> Lest there were lingering federal jurisdictional questions, the Court offered *Wickard v. Filburn*,<sup>142</sup> making the Commerce Clause the crown jewel of federal power. The Court would later argue that Congress need only declare that an activity "affects" commerce and the full jurisdictional breadth of the Commerce Clause would be within its power.<sup>143</sup>

## F. Modern Federal Criminal Jurisdiction

"In the 1950s, a wholesale expansion of federal criminal laws began."<sup>144</sup> Congress drafted new statutes to combat gambling, guns, and vices linked to labor unions. "Significantly, too, during this period, Congress enacted several innovative statutes aimed particularly at organized crime . . ."<sup>145</sup> The most important of these laws was and is the Racketeer Influenced and Corrupt Organizations (RICO) Act of 1970.<sup>146</sup> Complex in nature,<sup>147</sup> RICO, according to many law-enforcement officials, is responsible for the "decline of mafia influence" in America.<sup>148</sup> The public, justified or not, feared organized crime; and the federal government responded.

134. *Matthew* 6:3.

135. See *Mulford v. Smith*, 307 U.S. 38 (1939); *Curring v. Wallace*, 306 U.S. 379 (1939); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940).

136. 301 U.S. 1 (1937) (upholding the National Labor Relations Act and redefining the Commerce Clause in modern jurisprudence).

137. *United States v. Lopez*, 115 S. Ct. 1624, 1653 (1995) (Souter, J., dissenting).

138. 312 U.S. 100 (1941).

139. 247 U.S. 251 (1918).

140. 298 U.S. 238 (1936).

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

142. 317 U.S. 111 (1942) (holding that a marketing quota could be constitutionally applied via the Commerce Clause to a farmer who grew a small amount of wheat on his own farm even when that wheat was to be consumed largely on the farm and any amount remaining was to be sold locally).

143. See *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963).

144. ABRAMS, *supra* note 123, at 782.

145. *Id.*

146. 18 U.S.C. §§ 1961-68 (1995).

147. Craig M. Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837 (1980).

148. Selwyn Raab, *A Battered and Ailing Mafia is Losing Its Grip on America*, N.Y. TIMES, Oct. 22, 1990 at A12.

"That the commerce clause jurisprudence remained settled until *Lopez* is testament to how far federal power could reach. But *Lopez* is not so inexplicable if one considers the ascendance of conservative jurisprudence" and the force of the Reagan-Rehnquist era.<sup>149</sup> Federal criminal jurisdiction rode the wave of New Deal jurisprudence, making no apologies for its expansion. The "high-water mark"<sup>150</sup> was *Perez v. United States*,<sup>151</sup> where the Supreme Court held that Congress had the power under the Commerce Clause to enforce a provision under the Consumer Credit Protection Act<sup>152</sup> even without showing that the particular transaction itself had any effect on interstate commerce. *Perez* is critical in the assessment of *Lopez*. The *Perez* Court relied upon language in *Maryland v. Wirtz*<sup>153</sup> which stated that "[w]here a class of activities is regulated and that class is within the reach of federal power, the courts have no power to 'excise' as trivial, individual instances" within that class.<sup>154</sup>

The reasoning in *Perez* was clear: if Congress finds that a particular class of activities has the requisite effect on commerce, there is no need to look beyond the class. Thus, "[E]xtortionate credit transactions, *though purely intrastate*, may in the judgment of Congress affect interstate commerce."<sup>155</sup> Because Congress had pre-determined that there was a "tie-in between local loan sharks and interstate crime,"<sup>156</sup> *Perez*, *ipso facto*, fell within the broad reach of federal criminal jurisdiction. Since most classes of crime have significant economic impact on interstate commerce, *Perez* gave most anticentralists "reason to fear an enlargement of federal criminal law enforcement authority . . . ."<sup>157</sup> Those fears eventually surfaced.

Prior to the decision in *Lopez*, there were ample warning signs that the Rehnquist Court disliked the liberal reach of the Commerce Clause and the no-limits attitude of Congress. Language in *New York v. United States*<sup>158</sup> echoed disapproval of the coercive nature of the federal government in its dealings with the states, and grumblings

149. Charles B. Schweitzer, *Street Crime, Interstate Commerce, and the Federal Docket: The Impact of United States v. Lopez*, 34 DUQ. L. REV. 92 (1995).

150. Mengler, *supra* note 1, at 511.

151. 402 U.S. 146 (1971).

152. 18 U.S.C. §§ 891-96 (1988). Section 891 defines an extortionate extension of credit as "any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person." *Id.*

153. 392 U.S. 183 (1968), *overruled by* Garcia v. San Antonio Metro. Transit. Auth., 469 U.S. 528 (1985).

154. Justice Thomas noted in *Lopez* that under the "so-called 'class of activities' statutes, Congress can regulate whole categories of activities that are not themselves either 'interstate' or 'commerce.' In applying the effects test, we ask whether the class of activities as a *whole* substantially affects interstate commerce, not whether any specific activity within that class has such effects when considered in isolation . . . . The aggregation principle is clever, but has no stopping point." *United States v. Lopez*, 115 S. Ct. 1624, 1650 (1995).

155. *Perez*, 402 U.S. at 154.

156. *Id.* at 155.

157. ABRAMS & BEALE, *supra* note 118, at 33.

158. 505 U.S. 144 (1992). In *New York*, the Court held that Congress could not order a state to pass legislation regulating the storage of low-level radioactive waste when the only other alternative offered to the state was for them to take ownership and possession of the waste. *New York*, however did not restrict the post-1937 federal commerce power. The Court held: "the Constitution enables the Federal Government to pre-empt state regulation contrary to federal interest, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders." *Id.* at 149.

over the federal case-load crescendoed. Yet few noticed. Perhaps, like Robert Bork, most assumed that federal power under the Commerce Clause "ha[d] . . . expanded so much [that] it [could not] be cut back."<sup>159</sup>

#### IV. REHNQUIST, THOMAS, AND THE LANGUAGE OF *LOPEZ*

##### A. Beyond the Bench

The position of the Chief Justice on the expansion of the federal docket is clear: he doesn't like it. "In his 1992 A.B.A. speech, Justice Rehnquist warned that [the] onslaught of federal cases threatens to erode the ability of the federal courts to fulfill their unique functions. With huge caseloads, federal 'judges will have less time to spend on marginal' cases, and 'increased bureaucratization . . . will leave judges less freedom to exercise personal judgment.'"<sup>160</sup> Recently, much has been written on the "federalization of crime."<sup>161</sup> It is argued that the "[e]xpansion in recent years by Congress and the Executive Branch into the areas of criminal law enforcement that previously were reserved to the states has overwhelmed the federal court's dockets."<sup>162</sup> Others argue that the "increasing criminal caseload threatens to impair the quality of the justice meted out in criminal cases and significantly impairs federal judges' ability to perform their core constitutional functions in civil cases."<sup>163</sup> The lamentations continue.

Though the number of federalized crimes is rising, there is debate over how much the federal docket expansion is the result of federal criminal laws. The irony in this flood of fear is that the statistics do not add up. Indeed, even among those joined by shared belief, the statistics are alarmingly disparate. Moreover, there is evidence that suggests that the fear over an ever-increasing federal criminal caseload is misleading.<sup>164</sup> Settling the docket debate, however, is not important here. That there is a *perceived* threat of federal criminal overload is enough, for it is this fear that Rehnquist brought to the table in *Lopez*.

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159. *Nomination of Robert H. Bork to be an Associate Justice of the Supreme Court: Hearings Before the Senate Judiciary*, 100th Cong., 1st Sess. 664 (1987).

160. O'Reilly & Drizin, *supra* note 50, at 9 (quoting Chief Justice William H. Rehnquist, *Remarks Before the House of Delegates at the American Bar Association's Mid-Year Meeting*, ABA Feb. 4, 1992 at 11). For additional reading see William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1 (1993); William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1657 (1992).

161. See Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029 (1995).

162. Mengler, *supra* note 1, at 539.

163. Sara S. Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 983 (1995).

164. See Blakey, *supra* note 107, at 1177 n.5. Blakey states that "while criminal filings have remained relatively stable, district court judgeships have increased from 245 in 1960 to 649 in 1993, an 165% increase." *Id.*

## B. *United States v. Lopez*

President Woodrow Wilson wrote: "Congress must wantonly go very far outside of the plain and unquestionable meaning of the Constitution, must bump its head directly against all right *and precedent*, must kick against the very pricks of all *well-established rulings* and interpretations, before the Supreme Court will offer its distinct rebuke."<sup>165</sup> *Lopez* would puzzle Wilson.

In the Gun-Free School Zones Act of 1990 (hereinafter the "Act"),<sup>166</sup> Congress made it a federal crime "for any individual knowingly to possess a firearm at a place that the individual knows or has reasonable cause to believe, is a school zone."<sup>167</sup> Alfonso Lopez, Jr., of San Antonio, Texas, was indicted under the Act for carrying a concealed .38 caliber handgun while attending Edison High School. The district court found Lopez guilty and sentenced him to six months imprisonment. The Act was nothing new, a mere stitch in the post-37 commerce clause fabric.

Lopez appealed from the district court on the grounds that his conviction was unconstitutional because § 922(q) "exceeded Congress' power to legislate under the Commerce Clause."<sup>168</sup> The argument was a long shot as the Court had not invalidated or restricted any legislation under the Commerce Clause in decades. Nevertheless, and to the surprise of all, the Fifth Circuit agreed and reversed. The Fifth Circuit claimed that there were "insufficient congressional findings and legislative history"<sup>169</sup> to support the broad nature of the Act. That is to say, Congress, in § 922, did not demonstrate the necessary relationship between school gun zones and their effect upon commerce—an essential nexus, without which, there is no federal jurisdiction. The Supreme Court granted certiorari and affirmed.

After "treat[ing] the disjointed and jarring judicial history of the Commerce Clause [as if it were] part of a seamless web that contains no troublesome inconsistencies,"<sup>170</sup> Chief Justice Rehnquist then argued that Congress had not demonstrated that § 922 has anything "to do with commerce or any sort of economic enterprise, however broadly one might define those terms."<sup>171</sup> Moreover, unlike *United States v. Perez*,<sup>172</sup> "§ 922 is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."<sup>173</sup> Thus, Rehnquist reasoned, "[§ 922] cannot . . . be sustained under cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."<sup>174</sup>

165. WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 36-37 (1925) (emphasis added).

166. 18 U.S.C. § 922 (1988 ed., Supp. V).

167. 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V).

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

169. *Id.*

170. Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 169 (1996).

171. *Lopez*, 115 S. Ct. at 1630-31 (footnote omitted).

172. 402 U.S. 146 (1971).

173. *Lopez*, 115 S. Ct. at 1631.

174. *Id.*

The Chief Justice's reasoning can be summarized thus: Congress did not prove the necessary commerce nexus with the activity in question and § 922 is not an essential part of a larger economic activity that falls within the jurisdictional power of the Commerce Clause. The absence of the necessary nexus left federal power under § 922 without any "perceived limitations."<sup>175</sup> Thus, to "uphold the Government's contentions . . . [the Court] would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power."<sup>176</sup> And this, Rehnquist writes, "we are unwilling to do."<sup>177</sup>

### C. Justice Thomas

Justice Thomas was content, for the time being, with the holding in *Lopez*. He made it clear, however, that at an "appropriate" time the Court "must further reconsider [the] 'substantial effects' test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause . . . ."<sup>178</sup> After an exhaustive review of the history of the Commerce Clause, Thomas wrote: "These cases all establish a simple point: from the time of the ratification of the Constitution to the mid-1930's, it was widely understood that the Constitution granted Congress only limited powers, notwithstanding the Commerce clause . . . . If [there was a] 'wrong turn' it was the Court's dramatic departure in the 1930's from a century and a half of precedent."<sup>179</sup>

Justice Thomas concluded with the following: "If we wish to be true to the Constitution that does not cede a police power to the Federal Government, our Commerce Clause's boundaries simply cannot be 'defined' as being 'commensurate with the national needs' . . . . Such a formulation of federal power is not a test at all: it is a blank check."<sup>180</sup> Justice Thomas wanted two things that Rehnquist was unwilling to give: a rethinking of the "substantial effects" test and a rejection of the "class of activities" statutes.<sup>181</sup> Both, he reasoned, have "no stopping point."<sup>182</sup>

## V. THE MOUSE THAT ROARED: THE IMPACT OF *LOPEZ*

### A. Congressional Aftermath: Or Don't Forget to Say Please

Some Supreme Court observers, frustrated by Justice Thomas' aggressive concurrence, have concluded that the best thing to do is simply "ignore" him.<sup>183</sup> When assessing the impact of *Lopez* it is easy to get sidetracked by the broad and sweeping language of Justice Thomas, particularly when it is clear from a historical perspective that he is correct.<sup>184</sup> Whether right or wrong, however, Thomas was only a concur-

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175. *Id.* at 1632.

176. *Id.* at 1634.

177. *Id.*

178. *Id.* at 1643 (Thomas, J., concurring).

179. *Id.* at 1649.

180. *Id.* at 1650-51 (quoting *North American Co. v. SEC*, 327 U.S. 686, 705 (1946)).

181. *Id.* at 1650.

182. *Id.*

183. See Tony Mauro, *Should We Just Ignore Thomas?*, LEGAL TIMES, Dec. 4, 1995, at 11.

184. See Epstein, *supra* note 170, at 169. Epstein writes that Justice Thomas' "ample documenta-

rence. "Whether the high Court upholds these [federal criminal jurisdiction] cutbacks depends, [not on the vote of Thomas], [but] on the ability of the revolutionary trioka—Rehnquist, Thomas, and Scalia—to hold on to the votes of Kennedy and O'Connor . . . ." <sup>185</sup> Therein lies the dilemma for the Chief Justice.

Given the relatively narrow <sup>186</sup> holding announced by the Chief Justice, real Congressional limitations after *Lopez* are few—so far. While the "Supreme Court's decision . . . has spawned a revival of Commerce Clause jurisprudence in the lower federal courts," <sup>187</sup> Congress is not yet suffering from a sudden loss of power. Thomas Mengler observantly noted two things about the Gun-Free School Act (*before* the Court's decision) that are worth noting. First, "Congress not only made no findings [in § 922], formal or informal, that the regulated activity substantially affects interstate commerce, but it failed even to mention the Commerce Clause." <sup>188</sup> Second, the message that the Supreme Court will send to Congress is that "'federalization' of state crime can continue without constitutional limit so long as there are legislative findings like those found in *Perez v. United States*." <sup>189</sup> While some have argued that *Lopez* was a "retreat" (although not a wholesale rejection) of *Perez*, <sup>190</sup> it appears that Mengler is correct: Congress need only support future legislation with appropriate legislative findings.

Congress wasted little time in heeding the advice of the Chief Justice and reworking the language of the Gun-Free School Zones Act. While fans of *Lopez* were still cheering, Congress quietly added a preface to its original legislation. Section 922(q)(1) now reads:

The Congress finds and declares that — (A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem; (B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs; (C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools; (D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce; . . . (F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country; (G) *this decline in quality of education has an adverse impact on interstate commerce . . .* <sup>191</sup>

Congress, after the *Lopez* scolding, remembered to ask the Court *before* partaking of the Commerce power—and this time they remembered to say please. What Thomas wanted and Rehnquist was unwilling to give may prove to be the demise of any faint hope for federalism. Because the "substantial effects" test is alive and well and be-

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tion makes it clear that commerce and trade were synonymous . . . ." *Id.*

185. David A. Kaplan & Bruce Shenitz, *This Court's Not on T.V.*, NEWSWEEK, Oct. 9, 1995, at 64.

186. As compared to that proposed in the concurring opinion of Justice Thomas.

187. James Podgers, *Rethinking the Commerce Clause: Arson Rulings Illustrate Lower Court Quandary Over Congressional Power*, 81 DEC. A.B.A. J. 44 (1995).

188. Mengler, *supra* note 1, at 512.

189. *Id.*

190. Epstein, *supra* note 170, at 175.

191. 18 U.S.C. § 922(q)(1)(A)-(G)(1995) (emphasis added).

cause the Chief Justice refused to overrule *United States v. Perez*,<sup>192</sup> *Lopez* is toothless, and Mengler's prediction holds true: Congress has no substantive limitation.

In order to preserve its power, Congress need only "*Perez*" an activity (i.e., state that the activity in general has an effect upon commerce). Rehnquist acknowledged in *Lopez* that the Court "consider[s] legislative findings . . . indeed even congressional committee findings regarding [an] activity's [a]ffect on interstate commerce."<sup>193</sup> While it is true that the Chief Justice did not say the Court was "bound" by such findings, it seems unlikely that the Court would overrule Congress in this manner. Justice Thomas argues that while *Perez* and the "substantial effects" test are alive, virtually anything, as long as the magic words are used, is "constitutional."<sup>194</sup> He may be right. The Commerce Clause is not a real obstacle but an obligatory hoop.

## B. Conclusion

Whatever "a page of history is worth,"<sup>195</sup> "we cannot escape [that] history."<sup>196</sup> Some have argued that the *Lopez* revival of federalism is not about federalism at all but is an "attempt by the Rehnquist Court to address the 'crisis' facing the federal courts as Congress has continued to expand the reach of federal criminal law."<sup>197</sup> Whatever the Court's motive in *Lopez*, direct or oblique, (and it really doesn't matter), its effort to create limiting language is too late; history has spoken, and the question of federalism, notwithstanding *Lopez*, has been decided. When its own history is recorded, *Lopez* will be "seen as only a misstep,"<sup>198</sup> without a marked effect on the Commerce Clause and federal criminal history.<sup>199</sup>

One must wonder, though, why the Court (minus Justice Thomas) was not willing to go further with *Lopez* than it did. For all its inaugural noise, the Rehnquist rebuke was tepid indeed. The Chief Justice knew that failure to overrule *Perez* was failure to give *Lopez* a realistic chance of survival. Perhaps the votes of Kennedy and O'Connor would not have been there had the Chief Justice pushed for greater restriction of the Commerce Clause; or, perhaps, with a greater appreciation for history than we give him credit, the Chief Justice peered over the edge of the federalism abyss and didn't like what he saw.

The collective force of history behind present Commerce Clause jurisprudence is overwhelming. In modern America, for better or for worse, federalism is an illusion. That we live in a different world than the one envisioned by the Framers is incontrovertible. The wants, needs, and mind-set of America only vaguely resemble those of

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192. 402 U.S. 146 (1971).

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

194. *Id.* at 1650.

195. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). Holmes writes the following: "Upon this point a page of history is worth a volume of logic." *Id.*

196. Abraham Lincoln, *Message to Congress*, Dec. 1, 1862, reprinted in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 523 (1980).

197. Schweitzer, *supra* note 149, at 73 (footnote omitted).

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

199. *But see Seminole Tribe of Florida v. Florida*, No. 94-12, 1996, U.S. LEXIS 2165. In *Seminole Tribe* the Court cited *Lopez* and suggested that the question of the demarcation of federal power is far from solved. However, *Seminole Tribe* is a civil case and, thus, does not disrupt this Article's assertion that *Lopez* will have little impact on federal criminal law.



our colonial cousins. This does not mean that Justice Thomas' reasoning should be "ignored," or that the Tenth Amendment is without meaning. It does mean, however, that arguments over our "drifting far from . . . original understanding"<sup>200</sup> must be cross-checked with the history giving birth to such change. Regardless of whether the Court took a "wrong turn"<sup>201</sup> or a step in the right direction, history will not yield easily; it will take much more than *Lopez* to revive federalism.

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200. *Lopez*, 115 S. Ct. at 1642 (Thomas, J., concurring).

201. *Id.* at 1649.

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