1-1-1996

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George W. O'Reilly

Robert Drizin

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ARTICLES

UNITED STATES V. LOPEZ: REINVIGORATING THE FEDERAL BALANCE
BY MAINTAINING THE STATES' ROLE AS THE “IMMEDIATE AND VISIBLE GUARDIANS” OF SECURITY

Gregory W. O'Reilly
Robert Drizin*

INTRODUCTION

In United States v. Lopez, the United States Supreme Court kicked off a wide-ranging debate about the proper division of power between the federal government and the states when it held—for the first time since 1936—that Congress had exceeded the power granted to it by the Constitution to regulate interstate commerce. The case began when Texas prosecutors charged Alfonso Lopez, Jr. with violating a Texas law prohibiting the possession of firearms on school grounds. State charges were dismissed the next day, however, when federal prosecutors charged Lopez with violating a federal law prohibiting the same conduct. In an opinion authored by Chief Justice Rehnquist, the Court held that Congress had exceeded its authority under the Commerce Clause by enacting the federal “Gun-Free School Zones Act of 1990,” because it was “a criminal statute that by its terms has nothing to do with ‘commerce’ or any other sort of economic enterprise, however broadly one might define those terms.”

* Criminal Justice Counsel, Office of the Cook County Public Defender; J.D., Loyola University School of Law, 1984; M.A., Loyola University, Chicago, 1985. Assistant Public Defender, Office of the Cook County Public Defender; J.D., Northwestern University School of Law, 1985.

3. Lopez, 115 S. Ct. 1624.
5. Lopez, 115 S. Ct. at 1630-31 (footnote omitted). The majority also rejected the government’s contention that the possession of firearms in a local school zone substantially affected interstate commerce by increasing the costs of crime, inhibiting travel, and decreasing productivity as a consequence.
Justice Breyer’s dissent, joined by three others, warned that the majority opinion injected uncertainty into a number of other federal criminal laws. To some commentators, the opinion created an even broader uncertainty over a range of federal laws far beyond the criminal context, because the Court gave lower courts “no principle . . . [to] distinguish between proper and improper congressional power.” Because the Commerce Clause serves as the constitutional foundation for many federal laws, some commentators viewed Lopez as potentially the start of a new era of states’ rights and limited federal government, an era which could include limits on federal laws banning assault weapons and violence at abortion clinics, removal of federal restrictions on land use, cut-backs in environmental and civil rights laws, and a curtailment of the federal regulatory state through new restrictions on Congress’s ability to delegate power to executive agencies.

Lopez, however, may not herald such a broad revision of Commerce Clause jurisprudence. Rather, it is more likely the Court is attempting to redress a federal intrusion into the enforcement of criminal laws, an area traditionally reserved to the states. As Justice Rehnquist noted in the majority opinion, this intrusion tips the fragile balance of power between the federal government and the states, undermining the federal structure of American government. The assertion of federal power in this area is especially dangerous because, as Alexander Hamilton noted in The Federalist, it touches on the states’ key role as the “immediate and visible guardians of life and property.” Moreover, as Justice Rehnquist has repeatedly pointed out in his capacity as head of the Judicial Conference of the United States, federal encroachment into criminal law threatens to inundate the federal courts with criminal cases, thereby diluting or destroying their effectiveness. In addressing these concerns, the majority has sent the Lopez case, and potentially thousands of similar cases, back to where they started—state court.

I. THE STATE—FEDERAL BALANCE AND INDIVIDUAL LIBERTY

Lopez is about how our federal system protects individual liberty. As crafted by the Framers, this liberty is assured through structural limits on American government. According to Alexis DeTocqueville, the federal government provides the nation with strength, unity, power, and prestige. In The Federalist, Hamilton noted that the nation’s powers are suited to the regulation of “[c]ommerce, finance, negotiation of a diminished educational environment. If the law was upheld, the Court concluded that such tenuous influences on interstate commerce would justify the federal government in exerting a broad police power over virtually any activity.

6. Id. at 1665.
13. 1 ALEXIS DETOCQUEVILLE, DEMOCRACY IN AMERICA 168 (1945).
The federal government, however, is by its very nature limited, for its powers are only those specifically enumerated by the United States Constitution. These powers granted by the people are chained by structural mechanisms such as the separation of powers, checks and balances, and judicial review.

Unlike the federal government, the states retain "numerous and indefinite" powers. Possessing this reserve of powers, the states are able to balance the power of the federal government. Such a balance is necessary because "government must be constructed in such a way as to control the passions and encourage virtue. This could only be accomplished through balancing each of the powers of government against others, and basing government itself on the impartial rule of law." As James Madison pointed out, the states therefore check the potentially dominant power of the federal government. Two governments thus secure liberty more effectively than one. Like the separation of powers within the federal government, the "healthy balance of power between the states and the federal government will reduce the risk of tyranny and abuse from either front."

The doctrine of balance mirrored the actual arrangement of powers between the Parliament and the early colonial legislatures. The doctrine developed fully and explicitly in the years leading up to the Revolution, as England attempted to centralize powers which had become dispersed. The ensuing great debate over "the nature and location of sovereignty" proved a major cause of the Revolutionary War. In the new nation, the formal division of sovereignty between the states and the federal government was a radical departure in political structure.

Until the Revolutionary era, the power of government had been considered theoretically indivisible. As Blackstone noted in his Commentaries, "there is and must be in all [forms of government] a supreme, irresistible, absolute, uncontrolled authority, in which the jura summi imperii, or the rights of sovereignty, reside . . . ." In England, this absolute power has resided in Parliament since the early 1600's. Because this body was neither one nor few, equal and proportionable in its makeup, containing all the states," its power was "not dangerous and need not be restrained." Parliament, believing that it had the authority to tax the colonies, exercised this sovereign power which helped foster the Revolution.

However, Parliamentary supremacy was not enforced on the colonies. There,
government was decentralized and the people enjoyed a healthy degree of local autonomy. In fact, governmental authority had already been divided in practice generations before it was conceivable as a doctrine. During the Colonial era, Parliament exercised control over foreign affairs, trade, commerce and navigation, the postal system, and naturalization. It had the power to make governmental appointments, to legalize or annul the actions of colonial legislatures, and to regulate the wild lands in the west. The colonies, however, maintained an "area of residual authority, constituting the 'internal police' of the community, [which] included most of the substance of everyday life. It had in fact been American agencies that effectively created and maintained law and order, for there had been no imperial constabulary . . . ." The Colonial authorities maintained the common law courts, administered justice, and crafted laws governing the colonists' personal conduct.

This practical division in power in the colonies was upset in the decade preceding the Revolution by Parliament's attempt to assert centralized sovereign power through actions such as the Townshend Duties, the Sugar Act, the Stamp Act, and various strict customs and navigation laws. More than a decade of debate in response to this effort produced arguments which caught up with the reality of divided power and set the framework for the doctrine of federalism. As early as 1765, Dulany argued that there were areas where "the authority of the superior can't properly interpose," because of the limits presented "by the powers vested in the inferior . . . ." Two years later, in his Letters From a Farmer in Pennsylvania, John Dickinson argued that a sovereign body need not exercise supreme power over all matters in its territory, but that it could allow lesser bodies to exercise power within specified areas. By 1774, James Iredell was describing "independent legislatures each engaged within a separate scale and employed about different objects." From here it was no great leap to design the doctrine of federalism embodied in the new nation, in which sovereignty rested with the people, who found it beneficial "to divide and distribute the attributes of governmental sovereignty among different levels of institutions . . . . [and to thereby] keep the central government from amassing 'a degree of energy, in order to sustain itself, dangerous to the liberties of the people.'" Following these precepts, the Framers' Constitution granted the federal government only those powers which it specifically enumerated, limited those powers by structural mechanisms—the separation of powers, checks and balances, and judicial

28. Id. at 203.
29. Id.
30. Id. at 204.
31. Id. at 102-03. See also id. at 209 n. 51 (referring to the thesis that America's federal organization was "largely the product of the practices of the old British empire as it existed before 1764.") (quoting Andrew McLaughlin, The Background of American Federalism, 12 Am. Pol. Sci. Rev. 215 (1918)); See also Bailyn, supra note 21, at 212-14 (referring to the Stamp Act).
32. Id. at 208-14.
33. Id. at 215. (quoting Daniel Dulany, Considerations On The Propriety Of Imposing Taxes 15 (Annapolis 1765)).
34. Id. at 216 (citing John Dickinson, Letters From A Farmer In Pennsylvania 20-24 (Philadelphia 1768)).
35. Id. at 225 (quoting James Iredell, To The Inhabitants Of Great Britain, In Life And Correspondence Of James Iredell 205, 2189 (photo. reprint 1949) (Griffith J. McRee ed., 1857).
36. Id. at 228-29 (quoting Jedediah Morse, Annals Of The American Revolution 394 (photo reprint 1968) (1824)).
review,\textsuperscript{38} and balanced those powers against the “numerous and indefinite” powers retained by the states.\textsuperscript{39} The Constitution granted few powers to the federal government in the enforcement of criminal law, and these were in matters of federal concern—crimes such as piracy, felonies committed on the high seas, counterfeiting, treason, and offenses against the law of nations.\textsuperscript{40}

The states’ control over ordinary law enforcement and the criminal law was an important power in this division or balance between the federal government and the states. Indeed, Hamilton believed that, in checking federal power, the states possessed one “transcendent advantage.”\textsuperscript{41} They would command the allegiance and the trust of their citizens as the “immediate and visible guardians of life and property.”\textsuperscript{42} In Hamilton’s eyes, the federal government posed no threat of usurping this role because the “regulation of the mere domestic police” held no allure for federal ambitions.\textsuperscript{43} At the time, Anti-Federalists such as George Mason, Patrick Henry, and the commentator Brutus, doubted the benign character of the federal government. Brutus warned that the “federal government, like the British government before 1776 . . . empowered by the ‘Necessary and Proper’ and the ‘supreme law of the land’ clauses, ‘would totally destroy all the powers of the individual states.’”\textsuperscript{44}

II. FEDERAL ENCROACHMENT

Time has shown Hamilton wrong and Brutus right. The “regulation of the mere domestic police” has held an ongoing allure for federal ambitions. Few issues are more highly charged than crime, few issues gain more popular or press attention, and few issues have been as hotly debated—or manipulated—in political campaigns.\textsuperscript{45} Using both the “Necessary and Proper” Clause and the Commerce Clause, the federal government has extended its power into criminal law, a realm traditionally occupied by the states, and it has thereby begun to usurp the states’ role as the “immediate and visible guardians of life and property.”

Congress began slowly to expand the number of federal crimes based on its power to make laws “necessary and proper” to carry out its constitutionally-enumerated powers. Early federal offenses concerned acts harmful to the central government, such as customs offenses, crimes committed in federal enclaves, and crimes involving interference with the federal courts.\textsuperscript{46} The serious federal encroachment into criminal law began in 1872, when Congress protected its postal power by creating federal laws against mail fraud. These laws could be construed as efforts to protect the specifically-
enumerated federal postal power and to fall within the scope of traditional federal power, as the British government had controlled the postal power during the Colonial era. Nonetheless, these laws were aimed at general frauds which might have been adequately covered by similar state regulation.

Around the turn of the century, Congress created more federal offenses, justifying its exercise of power through the Commerce Clause. Early statutes included the Lottery Act, banning the interstate transportation of lottery tickets, and the Mann Act, named after its sponsor Congressman James Mann (R-IL). The Mann Act, formally known as "The White Slave Traffic Act of 1910," prohibited the interstate transportation of a woman for the purpose of causing her to engage in an immoral practice. According to Congressman Mann, the law was needed to prevent "vampires and parasites" from taking advantage of "some blue-eyed girl and immersing her in dens of infamy." Concerns about federalism were swept aside by more emotional arguments. Congressman Thetus Sims (D-TN), for instance, argued: "How any man can haggle and higgle over a constitutional provision in the face of such abominations is more than I can comprehend."

Throughout this century, Congress has steadily expanded federal crimes, using the need to protect the channels of interstate commerce as its justification. The Supreme Court has been a willing ally in this expansion, upholding jurisdiction over activities "affecting" interstate commerce. Thus, Congress has been able to create federal offenses by merely adding an interstate element to state crimes such as kidnapping, theft, transportation of stolen vehicles, flight to avoid prosecution, sexual exploitation of children, firearms offenses, gambling, credit card counterfeiting, and the theft of over $10,000 in livestock. This reasoning has increased federal jurisdiction to allow the federal courts to reach local robbery offenses under the Hobbes Act, local extortion under the Extortionate Credit Transaction Act, a wide array of conduct if any interstate travel is involved aiding "unlawful activity" under the Travel Act, and a range of offenses covered under state law under the Racketeer Influenced and Corrupt Organization Act. Every horrendous state crime which gains wide media coverage now becomes the potential source of yet another federal criminal law. For example, after a brutal 1992 murder during the theft of a car in Maryland, Congress made armed carjacking a federal crime if the car had "been transported, shipped or received in interstate or foreign commerce." While this bill allowed Congress to sound "tough on crime," it was unnecessary, for this conduct was already prohibited by state armed

47. BAILYN, supra note 21, at 202-05. The power to "establish Post Offices" is also specifically enumerated. U.S. CONST., art. I, § 8.
48. The statute was aimed at frauds "which are mostly gotten up in the large cities . . . by thieves, forgers, and rascallions generally, for the purpose of deceiving and fleecing the innocent people of this country." (quoting 45 CONG. GLOBE, 41st Cong. 3d Sess. 35 (1870) (remarks of Sen. Farnsworth)).
49. Miner, supra note 46, at 18.
50. H. Scott Wallace, The Drive to Federalize Is a Road to Ruin, CRIM. JUST., Fall 1993 at 8, 10 (quoting 45 CONG. REC. 551 (1910)).
51. Id. (quoting 45 Cong. Rec. 811 (1910)).
52. See Presault v. I.C.C., 494 U.S. 1, 17 (1990) (stating that Congress may regulate activities when it has a rational basis for finding that they affect interstate commerce); But see Maryland v. Wirtz, 392 U.S. 183, 196 n. 27 (1968) (stating that more than a trivial impact on commerce is needed to permit Congress to broadly regulate state or private activities).
53. Miner, supra note 46, at 18.
54. 18 U.S.C § 2119 (Supp. V. 1993).
robbbery and murder laws, and both perpetrators had been sentenced by Maryland courts to life in prison. In 1994, Congress stepped up its federalization efforts, creating new federal offenses, including acts of domestic violence which cross state lines, gang offenses, drug offenses, federal "three-strikes-you're-out" provisions, and a number of federal death penalty offenses.

Proposals to federalize state offenses committed with firearms resurface yearly. In 1991, Sen. Alphonse D'Amato (R-NY) proposed making almost all firearm-related offenses federal offenses subject to mandatory minimum sentences. Echoes of Congressman Sims' comments on the Mann Act could be heard in Sen. D'Amato's argument against weighing concerns over tilting the fragile balance of federalism. D'Amato did not "care two hoots and a holler" about such concerns, and questioned, "When a woman gets shot and killed and loses three babies, you're telling me I should be worried about whether the courts should take on additional cases?"

Not two months after the Court issued the Lopez opinion, the House Judiciary Committee approved legislation making all firearm offenses, except those committed for personal monetary gain, subject to federal prosecution as a terrorist act. In supporting the measure, Committee Chairman Rep. Henry Hyde (R-IL), like Sen. D'Amato, argued that a federal law was needed to protect women in jeopardy. He cited the example of a man who had been "betrayed by his wife and had a gun and 'lunges through the living-room window' [as] an act that 'sounds pretty terroristic to me.'"

The greatest federal encroachment on the states' traditional criminal law power has been in narcotics laws. The roots of this federal expansion date back to the Harrison Narcotics Act of 1914, a statute aimed at regulating drug importation, manufacture, and distribution. The Act required persons engaged in those activities to register with the Collector of Internal Revenue, pay taxes and keep detailed records. In 1919, the Act became a key vehicle for outlawing narcotics when the Treasury Department, in its role as the Act's enforcing agency, ruled that doctors could not prescribe drugs for addicts. This trend continued in 1922, when Congress passed the Narcotics Drug Import and Export Act, setting penalties for illegally importing, distributing, selling, or possessing drugs. The serious expansion of federal narcotics laws began when Congress passed the Controlled Substance Act of 1965, which based federal jurisdiction on the Commerce Clause. Under the similar Controlled Substances Act of 1970, federal jurisdiction over narcotics is claimed because, as all drugs look alike, it is not feasible to attempt to distinguish between those which crossed state lines and those which did.
not. In addition, Congress found that even if narcotics did not cross state lines, federal jurisdiction was warranted because intrastate narcotics activity contributes to interstate traffic.\textsuperscript{65} Since passage of this Act, federal prosecution of drug crime has skyrocketed, and now constitutes one-fifth of all federal criminal cases.\textsuperscript{66}

\section*{III. THE EFFECTS OF FEDERAL ENCROACHMENT}

\subsection*{A. Eroding the federal-state balance}

As the federal government assumes the states’ role in controlling crime, it simultaneously becomes the focus of citizen demands for political responses to perceived crime problems and problems in the administration of criminal justice. The response is predictable: more federal laws, more federal funds, and a more federal system. In this federalized system, the federal government will assume the states’ role as the “immediate and visible guardians of life and property,”\textsuperscript{67} and as a consequence, it will be the federal government which comes to command the primary allegiance and trust of their citizens. So much for Hamilton’s view of the states’ one “transcendent advantage”\textsuperscript{68} in checking federal power.

Such a federal system would begin to close the fifty laboratories of democracy and thereby centralize America’s criminal justice system. Today, the states provide manageable units of government adaptable to the changing needs of the local population. They test new laws and law enforcement policies, target local problems, and enforce local community standards. Successful experiments can be imitated and mistakes can be avoided; when one state’s experiment fails, we avoid repeating the same mistake nation-wide. By their nature, states are also more accountable,\textsuperscript{69} responsive and flexible than the federal government. Unlike the federal government, they can quickly pass laws and readily adjust or end policies which do not work. By nationalizing criminal justice, we shift from these flexible and diverse laboratories to the monolithic federal government, and sacrifice creativity and adaptability for centralization.\textsuperscript{70} Under such a system, controversial experiments like the federal sentencing guidelines might be effectively imposed on the states. Instead of dealing with a disastrous, but contained policy effecting thousands of cases in one or a few states, a federalized system would, in one unified push, impose potentially catastrophic policies on millions of criminal cases.

\begin{thebibliography}{99}
\bibitem{65} Id. at 12 (citing 21 U.S.C. 801(2), (4) and (5)).
\bibitem{66} Miner, \textit{supra} note 46, at 18.
\bibitem{67} \textit{THE FEDERALIST} No. 17, at 157 (Alexander Hamilton) (Isaac Kramnick ed., 1987).
\bibitem{68} Id.
\bibitem{69} Id.
\bibitem{70} Id. at 339. Bermann also discusses the relationship between subsidiarity and political liberty: “The framers of the U.S. Constitution acted on the basic belief that individual freedom would be advanced by preventing the undue concentration of power in the same governing hands.” Id. at 341.
\end{thebibliography}
B. The federal caseload crisis

In 1989, Judge Roger J. Miner of the U.S. Court of Appeals for the Second Circuit warned against the continuing federalization of crimes, noting that “[t]he most obvious consequence is the overloading of federal courts.”71 As Justice Rehnquist noted in a speech before the American Bar Association House of Delegates in 1992, this increase in federal caseloads runs contrary to the Framers’ intention that the federal courts were to “complement state court systems, not supplant them.”72 The risk posed by the wave of federalization is not merely that the Framers’ intentions will be violated; it is, as Justice Rehnquist has warned, that federalization will dilute or destroy the effectiveness of the federal courts.73

The federal courts have filled a unique function, quite distinct from that of the state courts. In his A.B.A. speech, Justice Rehnquist recalled that the Framers intended the federal courts to be:

a distinctive judicial forum, performing tasks that state systems, because of political or structural reasons, could not perform. Throughout the two-hundred year history of the federal courts, they have maintained their special qualities, handling complex cases, protecting individual liberties, and adjudicating important national concerns. These are the jobs they do best—not those better suited to other forums.74

Congress, however, has ignored the judiciary’s warnings about inundating the federal courts with the criminal cases traditionally left to the states, and has instead continued to expand federal criminal jurisdiction with no boundaries in sight. The potential scale of this trend is staggering. For instance, the thirty thousand felony cases filed in federal courts in 1991 were dwarfed by the twelve million criminal cases filed in state courts in that year.75

Large numbers of cases which could have been competently handled in state courts have already migrated to the federal courts. Broad federal drug laws allow prosecutors to select cases involving only minor amounts of drugs for federal prosecution. The extent of the federalization of drug offenses is dramatic. In 1980, 25% of federal inmates were drug offenders; by 1997, 72% percent of inmates are projected to be drug offenders.76 As Justice Rehnquist noted in his 1994 Year-End Report, one-quarter of all federal criminal cases are now drug cases.77

In his 1992 A.B.A. speech, Justice Rehnquist warned that this 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”

71. Id. at 18.
74. Rehnquist, supra note 72, at 11.
75. According to the National Center for State Courts, in 1991, 12,430,910 cases were filed. In 1991, 32,130 federal felony cases were filed, according to the Administrative Office of the U.S. Courts.
76. Wallace, supra note 50, at 12 (citing the Federal Courts Study Committee (1990)); Rehnquist, supra note 72, at 12.
cases, and "increased bureaucratization and management strictures will leave judges
greater freedom to exercise personal judgment," decreasing judges' "sense of personal
responsibility and accountability." As a consequence, the "high quality of justice" will
be degraded. Rehnquist also warned that expanding the number of federal judges
would dilute the judiciary's quality, and lead to an "unmanageable number of circuits," or "appeal courts of unmanageable size," "an increasingly incoherent body of federal
law," and "a Supreme Court incapable of maintaining uniformity in federal law."78
Already the increase in criminal cases has slowed the progress of civil cases tradition-
ally litigated in federal court, as judges push criminal cases to the front of their docket
in order to comply with the speedy trial requirements of criminal cases.79

Shifting cases from state to federal courts is also wasteful, for federal courts
forced to take on the burden of litigating cases competently handled by the states,
simply duplicate state and local expenditures for police, prosecutors, judges, and jails.
As Judge Miner observed, "It seems almost unnecessary to observe that two laws on
the same subject lead to duplication—duplication in investigation, duplication in prose-
cution and duplication in punishment."80

The Committee on Long-Range Planning of the Judicial Conference of the Unit-
ed States has already recognized this problem and has examined methods of reducing
access to the federal courts. The Committee has suggested placing limits on federal
litigation in some employment discrimination matters, on disputes over social security,
health and welfare benefits, and has even examined removing the federal courts' diver-
sity jurisdiction altogether.81

C. Discretionary double jeopardy

The concept of double jeopardy "is that the State with all its resources and pow-
er should not be allowed to make repeated attempts to convict an individual for an al-
leged offense."82 The current proliferation of federal criminal statutes that virtually
overlap almost identical state offenses will eviscerate the constitutional double jeopardy
protection by allowing state and federal prosecution for the same conduct. The excep-
tion to double jeopardy—the doctrine of dual sovereignty—which generally allows
prosecution for the same conduct in both state and federal courts on the theory that the
state and federal governments are two separate sovereigns entitled to enforce its own
laws, makes such successive prosecutions possible.83 But ceding this relatively new,
judicially-created power to the government runs contrary to the history, practice, and
policy behind the bar against placing one in jeopardy twice.

The principle of double jeopardy has deep historical roots. In the Jewish Talmud,
the prohibition dates back to the second century of the Common Era:84 "A party stood
his trial and was found not guilty, he must not again be brought in jeopardy for the

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78. Rehnquist, supra note 72, at 9-10.
79. Wallace, supra note 50, at 12.
80. Miner, supra note 46, at 39.
82. Benton v. Maryland, 395 U.S. 784, 796 (1969) (double jeopardy bar applies to states) (quot-
ing Green v. United States, 355 U.S. 184, 187 (1957)).
83. Abbate v. United States, 359 U.S. 187 (1959); Petite v. United States, 361 U.S. 529 (1960);
84. SANHEDRN, Ch. V, Mishnah 40(a).
same offense. In Roman law, the guarantee can be found in the Code of Justinian (533 C.E.). In Anglo-American jurisprudence, the concept can be found in Blackstone’s explanation of the common law plea of autrefoits acquit or former acquittal: “that no man ought to be twice brought in danger of his life for one and the same crime.”

This concept was recognized in the colonies as early as 1641 by the Massachusetts Body of Liberties. Mirroring Blackstone’s language, the Framers included it in the Fifth Amendment of the Bill of Rights: “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.” The prohibition serves a number of desirable ends. It supports the balance of individual rights against the power of government, provides fundamental fairness to those charged with offenses, cuts down on the potential for prosecutorial abuse, and affords finality to criminal proceedings.

Traditional analysis of double jeopardy comes from an era when federal criminal jurisdiction was limited, as was the potential for subsequent state-federal prosecutions. In Blockburger v. United States, the Supreme Court concluded that where the two offenses for which the defendant is either prosecuted or punished have the “same elements,” the prohibition against double jeopardy prohibits the subsequent action. The Blockburger test focuses on “whether each offense contains an element not contained in the other; if not, they are the “same offense” and double jeopardy bars additional punishment and successive prosecution.

In 1990, through Grady v. Corbin, the Court briefly experimented with a more demanding “same conduct” test under which subsequent prosecution would be barred “if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.” Three years later, however, in United States v. Dixon, the Court readopted the Blockburger “same elements” test and overruled the Grady “same conduct” test.

By retreating from its more exacting standard of Grady, the Court opened the door for the successive prosecution of persons under marginally different statutes. Justice Souter seized upon this potential problem in his dissent, noting:

If a separate prosecution were permitted for every offense arising out of the same conduct, the government could manipulate distinctions among them permitting a

85. SANHEDRIN, 32(b)-33(b) cited in S. MENDELSON, THE CRIMINAL JURISPRUDENCE OF ANCIENT HEBREWS 151, n. 358 (1968).
87. 4 WILLIAM BLACKSTONE, COMMENTARIES 331 (University of Chicago Ed., 1979).
88. LEONARD LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION, 142 (1988); U.S. CONST. amend. V.
89. PAUL H. ROBINSON, CRIMINAL LAW DEFENSES, § 526(a), at 103 (1984).
92. United States v. Grady, 495 U.S. 508, 510 (1990) (The Court affirmed a reversal of conviction for criminal contempt of court for violating court orders that prohibited engaging in conduct which was later the subject of a criminal prosecution. The subsequent criminal prosecutions were barred.)
93. Dixon, 113 S. Ct. at 2860. (Grady was overruled because it “lack[ed] constitutional roots” and was “wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy.”)
zealous prosecutor to try a person again and again for essentially the same con-
duct. This problem is magnified by the possibility that persons may first be subject to prose-
cution under traditional state criminal laws, and later be subject to prosecution under a wide range of new parallel federal offenses. These federal offenses may be only marginally different from the state offense—perhaps differing only by as little as a single element requiring a federal nexus. Indeed, soon after Lopez was published, Sen. Kohl (D-WI) introduced a bill to allow federal prosecution of the conduct at issue in Lopez by adding the federal interstate commerce element to what was essentially the state offense, a proposal which could open the door to the dangers Justice Souter warned against.

Under such a system, one might “wonder whether the double jeopardy clause provides any real check on legislative power.” Nothing would bar, for example, federal prosecutors who are unhappy over defendants’ state court acquittals from routinely prosecuting the same conduct in federal court. The threat of such successive prosecutions might even be used to coerce guilty pleas in state court. The potential for successive prosecutions could also impede the processing of cases in state courts, and make that system unworkably complex because state court defendants and their attor-
neys would weigh the possible federal consequences of a plea of guilty in state court which could later become a sworn, in-court admission of guilt to be used in a subsequent federal prosecution. The bar against double jeopardy would not remain a constit-
tutional protection, but would become a policy enforced at the will of prosecutors. Such practices may not be barred by current case law, but they surely violate both the letter and the spirit of the prohibition against double jeopardy. This trend could be reversed, however, if Lopez proves to be a limit on the federalization of state criminal laws.

IV. MAINTAINING THE BALANCE

Many commentators have warned that Lopez is the first step in a broad revision of Commerce Clause jurisprudence which will result in a significant roll-back of feder-
al programs. Justice Souter’s dissent, for instance, hinted that the Court could be re-
newing substantive due process analysis. More likely, the case signals both the Court’s commitment to maintain the balance between the federal government and the states by retaining the states’ primary role in the enforcement of criminal laws, and the Court’s concern about maintaining the viability of the federal courts as an institution. Chief Justice Rehnquist’s opinion begins by focusing on the central issue: whether, in its exercise of power claimed under the Commerce Clause, Congress has exceeded the proper limits of its authority and tipped “the balance of power between the States and

94. Dixon, 113 S. Ct. at 2883.
95. 141 CONG. REC. S7920 (daily ed. June 7, 1995) (applies to a “... firearm that has moved in or that otherwise affects interstate or foreign commerce ...” (quoting S. 890, 104th Cong., 1st Sess. § 2, 2(A) (1995)).
97. Wallace, supra note 50, at 52.
98. Stewart, supra note 96, at 50.
the federal government." Rehnquist reaffirms the Court's role in maintaining the balance, noting that, while the power of Congress to regulate commerce is broad, it has limits which the Court has "ample power" to enforce. Rehnquist's test is whether the conduct regulated is not just activity—but economic activity—which substantially affects interstate commerce. Rehnquist's analysis is clearly a departure from or gloss on precedent in two respects. First, it more carefully scrutinizes the validity of the federal assertion of power by requiring that the activity in question must be economic. Second, Rehnquist resolves ambiguity in precedent by ruling that, for Congress to have power to regulate under the Commerce Clause, an activity must not merely affect interstate commerce; the affect must be substantial.

Applying the test, Rehnquist found the law "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." In reaching this conclusion, he contrasted Wickard v. Filburn, which he characterized as "perhaps the most far reaching example of Commerce Clause authority . . ." with the case at hand. In Wickard, the Court had found that even homegrown wheat had a substantial effect on interstate commerce. While Filburn's wheat never left his farm, his consumption of that wheat, "taken together with that of many others similarly situated, is far from trivial." According to Justice Rehnquist, however, Wickard "involved economic activity in a way that the possession of a gun in a school zone does not." This was also the conclusion of Justice Kennedy's concurrence, joined by Justice O'Connor, which found the statute regulating "beyond the realm of commerce in the ordinary and usual sense of that term." Moreover, Justice Thomas's concurring opinion traced how far the conduct covered by the statute differed from the meaning of "commerce" as understood by the Framers.

Less clear is the weight to be given the effects of the federal government's assertion of power on the states, which rest on the other side of the fulcrum. Justice Rehnquist notes that the scope of Congress's power to regulate interstate commerce must be considered in light of the state-federal balance—the "dual system"—and federal power must not be extended over effects of interstate commerce "so indirect and remote that to embrace them . . . would effectively obliterate the distinction between what is national and local and create a completely centralized government." In po-

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100. Id. at 1626 (citing Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).
101. Id. at 1629 (citing Maryland v. Wirtz, 392 U.S. 183, 196 (1968)).
102. Id. at 1630.
103. Lopez, 115 S. Ct. at 1630. In his dissent, Justice Breyer argued that the Court should only require a significant effect, thus broadening the scope of Congressional power. Id. at 1657. (Breyer, J. dissenting).
104. Id. at 1630-31.
106. Lopez, 115 S. Ct. at 1630.
107. Id. at 1628 (citing Wickard v. Filburn, 317 U.S. at 125). In contrast to Wickard, Rehnquist noted that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect interstate commerce." Id. at 1634.
108. Lopez, 115 S. Ct. at 1630.
109. Id. at 1641 (Kennedy, J., concurring).
110. Id. at 1642-51.
111. See infra note 116.
112. Lopez, 115 S. Ct. at 1628-29 (citing N.L.R.B. v. Jones and Laughlin Steel, 301 U.S. 1, 37 (1937)).
licensing this distinction and maintaining this balance between the federal and state spheres, the Court must decide if federal power has encroached upon state power. The Court must then strike down such federal encroachments in order to maintain the balance.

This consideration could be viewed as included within the determination of whether the activity is commerce or something else, which falls on the states' side of the fulcrum. Indeed, in the sentence in which Justice Rehnquist holds that Lopez did not concern commerce, he finds that it involves a "criminal statute." He clarifies that finding in a footnote highlighting that the "states possess primary authority for defining and enforcing the criminal law" and that "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it affects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" This focus on areas of state power was also noted by Justice Kennedy in his concurrence, where he suggested that given the potential for Congress to vastly expand federal jurisdiction under the Commerce Clause, the Court "must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern."

Justice Breyer's dissent, by contrast, does not focus on the effect of federal power on the state-federal balance or on the federal law's impact on areas of traditional state concern. This is reflected in his test for the validity of federal power under the Commerce Clause, which examines whether Congress had a rational basis for concluding that an activity has a significant effect on interstate commerce. To Justice Rehnquist, this test provides virtually no limit on assertions of "federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign." In his concurrence, Justice Kennedy pointed to the same problem: "[i]n a sense, any conduct in this interdependent world of ours has an ultimate commercial origin or consequence . . . ."

To assess the effect of Lopez on future cases, the decision must first be placed in context. Congress may regulate the following three categories of activity under the Commerce Clause: the use of the channels of interstate commerce, the instrumentalities of interstate commerce or persons or things in interstate commerce, and commercial activities which may be intrastate, which have a substantial effect on interstate commerce. As Lopez sets limits on only the last category of "substantial effects", statutes relying on the first two categories are not explicitly affected. For instance, in

113. Lopez, 115 S. Ct. at 1631 n. 3 (citing Brecht v. Abrahamson, 113 S. Ct. 1710, 1720 (1993)).
114. Id. at 1631 (citing U.S. v. Enmons, 410 U.S. 396, 411-12 (1973)).
115. Id. at 1640. Justice Kennedy also discusses how the statute tends to "displace some regulation in areas of traditional state concern." Id. at 1641 (Kennedy, J., concurring). Ten years earlier the Court rejected "as unsound in principle and unworkable in practice," a rule of state immunity from federal regulation based on a judicial appraisal of whether a governmental function is 'integral' or 'traditional.' Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546-47 (1985) (holding that minimum wage and overtime provisions apply to the states).
117. Id. at 1632.
118. Id. at 1640 (Kennedy, J. concurring). Justice Thomas pointed to the problem with Wickard's aggregate effect test stating that, "the aggregation principle is clever, but has no stopping point." Id. at 1650. (Thomas, J., concurring).
119. Id. at 1628-29. "The 'affecting commerce' test was developed in our jurisprudence to define the extent of Congress's power over purely intrastate commercial activities that nonetheless have substantial interstate effects." U.S. v. Robertson, 115 S. Ct. 1732, 1733 (1995).
United States v. Robertson,120 a per curium opinion issued just six days after Lopez, the Court upheld Commerce Clause jurisdiction in the federal RICO prosecution of an Alaskan gold mine in which the proceeds of narcotics transactions had been invested. The Court did not consider the "substantial effects" test because the corporation was "directly engaged in the production, distribution, or acquisition of goods and services in interstate commerce." Moreover, within this third, or "substantial effects" category, Justice Rehnquist left open the possibility for Congress to regulate if the statute includes a jurisdictional element, by which courts could determine on a case-by-case basis whether interstate commerce was substantially effected.122

The following final factor is critical in assessing the impact of Lopez and predicting its consequences: Chief Justice Rehnquist’s goal of maintaining the viability of the federal courts in the face of Congress’s seemingly limitless ability to create federal crimes. In his 1994 Year-End Report on the Federal Judiciary, and other similar reports in past years, Rehnquist has warned that the crushing numbers of new federal criminal cases threatens the integrity of the federal courts.123 In his A.B.A. speech, Justice Rehnquist previewed many of the themes of Lopez. He highlighted the theme of balance, quoting Chief Justice Earl Warren’s admonition on the importance of achieving a “proper jurisdictional balance between the federal and state court systems, assigning to each system those cases most appropriate.”124 Rehnquist has also warned against a policy which would “shift large numbers of cases presently being decided in the state courts to the federal courts for reasons which are largely symbolic.”125 He cautioned Congress to “avoid adding new federal causes of action unless critical to meeting important national interests which cannot otherwise be satisfied through non-judicial forums . . . . or state courts.”126 Finally, Rehnquist questioned “whether the state courts presently deal, and deal with reasonable effectiveness, with these same matters.”127

While Lopez circumscribes federal regulatory power, the Court set clear limits on the decision’s scope. For instance, Lopez clearly left intact the precedent of civil rights cases such as Katzenback v. McClung128 and Heart of Atlanta Motel, Inc. v. U.S.129 The activities which gave rise to federal authority in both cases were characterized as

121. As mining equipment and supplies were purchased in California and transported to Alaska, the Court concluded that the mine was engaged in interstate commerce, Id. at 1733. The Court relied on United States v. American Building Maintenance Industries, 422 U.S. 271, 283 (1975) (allegation that company made local purchases of equipment and supplies that were merely manufactured out of state was insufficient to show that company was “engaged in commerce” within the meaning of § 7 of the Clayton Act) (emphasis in original).
125. Id. at 14. In Sandin v. Conner, Justice Rehnquist echoed these concerns in condemning “the involvement of the federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone.” 115 S. Ct. 2293, 2299 (1995). See also Linda Greenhouse, High Court Makes it Harder for Prisoners to Sue, N.Y. TIMES, June 20, 1995, at A11.
127. Id. at 13-14.
commercial—restaurants utilizing interstate supplies and inns and hotels catering to interstate guests. Indeed, Rehnquist cited these cases as examples of economic activity substantially affecting interstate commerce. In his concurrence, Justice Kennedy pointed to these cases where “commercial transactions were the subject of regulations . . . and are not called into question by our opinion today.”

Lopez clearly raises questions about other federal statutes, especially those covering the same conduct as criminal laws traditionally enforced by the states. These questions are apparent in the federal “carjacking” statute—the Anticar Theft Act of 1992—which prohibits using a weapon to steal a car which has “been transported, shipped, or received in interstate or foreign commerce.” They may also be present in Sen. Kohl’s legislation to reverse the effect of Lopez; it applies to a “firearm that has moved in or that otherwise affects interstate or foreign commerce . . . .” First, the activity of using a gun to steal a car is plainly distinguishable from commercial activity such as operating a restaurant or a hotel which has a substantial effect on interstate commerce, or from operating a mine which is engaged in interstate commerce. Second, if carjacking has the requisite Commerce Clause connection, “virtually all thefts—right down to shoplifting can be federal offenses.” Such limitless federal jurisdiction is exactly the threat to the viability of the federal courts of which Justice Rehnquist warns. Third, the ordinary criminal laws traditionally left to the states cover the same conduct; it is conduct with which the states “presently deal, and deal with reasonable effectiveness.” Finally, upholding such an expansion of federal jurisdiction would be far from the Framers’ intent. As a federal district court noted in rejecting the interstate commerce basis for federal jurisdiction over carjacking:

If anything that will take you across a state line is an “instrumentality of commerce,” then there is justification for Congress to regulate anything done on a bicycle or, for that matter, on foot. The Framers traveled to Philadelphia on horseback or by horse and carriage. Can it be imagined that in constructing the Commerce Clause they intended to regulate and punish horse stealing?

CONCLUSION

In Lopez, the Court has reinvigorated the balance of power between the states and the federal government by clarifying the limits of Commerce Clause jurisdiction and reversing federal encroachment into the states’ traditional powers over criminal laws. As Justice Rehnquist pointed out from the bench, in speeches, and in reports, this intrusion has threatened to tip the fragile balance of power between the federal government and the states and to inundate the federal courts with criminal cases, diluting or destroying their effectiveness. This federalization of state crimes also violates both the letter and the spirit of the ban against double jeopardy, and threatens to turn that time-tested constitutional limit on government power into a policy enforced at the will of the people.
Predictions of a new era of states' rights and limited federal government are overblown. *Lopez* reaffirms a distinction which had developed during Colonial times and which took root in the Constitution: the states' play the key role in enforcing criminal law as the "immediate and visible guardians of life and property," while the federal government takes the lead in regulating interstate commerce. In affirming this distinction, the Court has sent the *Lopez* case and potentially thousands of similar cases, back where they belong—the state courts, which "presently deal, and deal with reasonable effectiveness" with the enforcement of criminal laws.\(^\text{138}\)

