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Propter Honoris Respectum

Constitutional Faith and the Commerce Clause

Richard A. Epstein*

Years ago in high school, I recall having read a skeptical history of the early religions of the western world which defined faith as "believin' what you know ain't true." Paradox drips from this proposition for at least since Plato's *Theaetetus*,¹ true belief has been regarded as a minimum condition for knowledge. Human psychology, however, often tolerates substantial internal dissonance, especially on matters so vital to political well-being as constitutional law. Exhibit A for the resilience of this brand of constitutional faith is the Commerce Clause, which in its New Deal incarnation expanded the powers of the federal government far beyond any level that it had previously held. But for the first time in nearly sixty years this once impregnable faith shows signs of fraying at the edges before a set of legal and intellectual challenges that could not have been mounted even a decade ago. *United States v. Lopez*² may turn out to be a flash in the pan, or it may usher in a new age of constitutional restraint. Either way, it stands as the most important Commerce Clause decision since the civil rights cases of thirty years ago, and for one reason. At long last, the federal government has *lost* a case that challenged its power to regulate under the Commerce Clause.

Pursuant to its ostensible powers under the Commerce Clause, Congress in 1990 passed the Gun-Free School Zones Act of 1990³ that makes it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."⁴ Carrying a weapon on school grounds was already an of-

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1 THE DIALOGUES OF PLATO 143 (B. Jowett trans. 1937).

2 115 S. Ct. 1624 (1995).

3 18 U.S.C. § 922(q) (1994).

4 *Id.* § 922(q)(2)(A). In *Lopez*, the Court refers to § 922(q)(1)(A) which is where the quoted language was codified when the case arose. On September 13, 1994, President Clinton signed into law the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, which amended § 922(q) and altered the location of the code sections at issue in *Lopez*. This Article will cite the more current codification.

fense under Texas law,⁵ and no one doubts that the state could have made it a separate offense to carry the handgun within 1000 feet of the school as well.⁶ Lopez was a twelfth grade student who was apprehended with a .38 caliber handgun while on school premises. As a sign of the times, the original criminal charges were brought in Texas state court only to be dropped when federal charges were brought under the Gun-Free School Zones Act. Lopez knew that he was on school grounds and knew that it was illegal to carry a gun. The case offered, therefore, an ideal vehicle for constitutional purposes because the substantive elements of criminal responsibility were so clearly established in the record.

Lopez's challenge that the statute exceeded the power of Congress under the Commerce Clause fell on deaf ears in the District Court,⁷ but it was accepted in a somewhat surprising decision by the Fifth Circuit.⁸ The simple fact that the Supreme Court granted certiorari⁹ was Delphic in the extreme. It could have been interpreted as a sign that the Court was prepared to slap down the Fifth Circuit for straying so far from accepted doctrine of unyielding deference to Congress. Or it could have been read for the alternative view, that at least four of the Justices were, so to speak, themselves gunning for the established Commerce Clause doctrine. Lo and behold, the statute was declared, this time for real, unconstitutional as beyond the power of Congress to regulate under the Commerce Clause. This one abrupt departure from established practice has turned a safe stronghold into a new battleground for constitutional litigation.

So dramatic an about-face requires prompt and serious attention, the main focus of which must be Chief Justice Rehnquist's majority opinion in which the four other conservative Justices joined. Yet all was not unity, for Justice Thomas expressed a desire to turn the majority's prudent retreat from the Commerce Clause into more of a rout.¹⁰ The dissents of Justice Stevens, Justice Souter and Justice Breyer are conspicuous for their evident passion and their abiding commitment to the idea that judicial deference toward congressional action should remain under that lodestar of Commerce Clause interpretation, the rational basis test.

The battle lines are thus fairly drawn, and it is quite clear that while the opening shot has been fired, the war is far from over. This examination of *Lopez* takes place in five parts. Part I looks at the history of Commerce Clause doctrine through the eyes of the Chief Justice. Part II then applies this analysis to the particular statute at hand. Part III then extends the analysis to the Senate Bill directed towards the revitalization of the Act.

5 TEX. PENAL CODE ANN. § 46.03(a)(1) (West 1994).

6 *Lopez*, 115 S. Ct. at 1641 (Kennedy, J., concurring). Justice Kennedy notes as well the conflicts in the different approaches in dealing with the problem by the federal and state governments. Thus a state government could not impose an amnesty for guns voluntarily turned over if the federal government would prosecute those who participated in the program. *Id.*

7 *Lopez*, 115 S. Ct. at 1626 (summarizing the procedure below).

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

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

10 *Lopez*, 115 S. Ct. at 1642-51 (Thomas, J., concurring). "At an appropriate juncture, I think we must modify our Commerce Clause jurisprudence. Today, it is easy enough to say that the Clause certainly does not empower Congress to ban gun possession within 1,000 feet of a school." *Id.* at 1651.

Part IV gives a brief overview of the two concurring opinions by Justice Kennedy and Justice Thomas. Part V then takes on the dissenting view and challenges the three pillars on which its expansive view of the Commerce Clause rests: the indirect effects test, the cumulative effects test, and the rational basis standard of review. None of these judicial tests jibe with the original constitutional balance created between the federal and state governments. Part VI then makes a brief plea for a prompt return to the pre-1937 view of the Commerce Clause by arguing that no reliance interest—and no appeal to the doctrine of changed social circumstances—justify the continuation of the near-omnipotent federal government that remains in place even after *Lopez*.

I. A TOO-SERENE HISTORY OF THE COMMERCE CLAUSE

Chief Justice Rehnquist's dissection of the Gun-Free statute is perhaps most notable for its ecumenical tranquillity. He treats the disjointed and jarring judicial history of the Commerce Clause as part of a seamless web that contains no troublesome inconsistencies, let alone unacceptable discontinuities. Unlike Justice Thomas, who has deep reservations about the whole modern structure,¹¹ Rehnquist's apparent strategy is not to defy the precedents but to domesticate them by writing as a proponent of the now-regnant tradition and not as its enemy. The techniques of judicial conservatism in thought and style are thus pressed into a cause more radical than Rehnquist's rhetoric lets on. To many, his ability to introduce change under the mantle of continuity might be regarded as a tribute to his deft skills in maintaining a coalition and in preserving the public reputation of the Court: after all, he did secure a clear majority of five for his position. But for these purposes I am concerned more with the power of his arguments and less with their political salience. On this score his decision conceals more than it reveals.

To his credit, Rehnquist gives one clear sign that something major is afoot. Right after he summarizes the brief procedural history of the case he veers off into a discussion of interpretation of the Commerce Clause. "We start," he says, "with first principles"¹²—that is with principles that have been neglected for a good long time. He then set outs the sensible observation that the federal government has only limited and enumerated powers, a conclusion that is supported not only by the basic enumeration of powers found in Article I, but also by the contemporary understandings as expressed in *The Federalist* papers.¹³ On this issue, however, he does not really drive the point home as does Justice Thomas, whose ample documentation makes it clear that commerce and trade were synonymous, and that both were used in contradistinction to manufacture and agriculture.¹⁴ Nor does Chief Justice Rehnquist try to retrofit the modern understandings

11 *Lopez*, 115 S. Ct. at 1642-51 (Thomas, J., concurring). His views are very close to my own, for which see Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

12 *Lopez*, 115 S. Ct. at 1626.

13 *Id.* (quoting THE FEDERALIST No. 45 (James Madison)).

14 *Lopez*, 115 S. Ct. at 1643 (Thomas, J., concurring).

against the earlier political history. For example, his interpretation of the Commerce Clause would have allowed Congress in 1820 to abolish slavery in the Old South, a conclusion that escaped the Northern majorities of that time. In sum, the Chief Justice makes some of the right arguments, but he does not push them to their logical conclusions, for to do so would discredit the entire rickety post-1937 artifice. However determined the Chief Justice is to rock the boat, he is equally determined not to topple it.

Having addressed the text, Rehnquist then moves on to *Gibbons v. Ogden* which sets out the original constitutional design.¹⁵ Navigation and trade across state lines were part of interstate commerce, but that commerce "completely internal" to any given state was not. But Rehnquist pulls his punches and does not set out the examples that Marshall used to delineate the two distinct spheres of control. Nor does he quote, as does Justice Thomas, that "[i]nspection laws, quarantine laws, health laws of every description, as well as law for regulating the internal commerce of a State" were but a small part "of that immense mass of legislation . . . not surrendered to a general government."¹⁶ Once again Rehnquist does not wish to highlight the tension between the original Marshall decision and the extravagant interpretation placed on it by Justice Jackson in *Wickard v. Filburn*.¹⁷ Instead, Rehnquist is content to note the flip-side of *Gibbons*: the states were free to regulate internal matters without interference from the federal government, and the scope of such permissible state regulation included the creation of a local steamboat monopoly before the Civil War,¹⁸ and a prohibition on the manufacture of intoxicating liquor after it.¹⁹ The cases make abundantly clear that the scope of purely internal commerce was large. Their necessary correlative limits the scope of congressional power. The language of these cases leaves no room for doubt or ambiguity. To give but one example of the earlier view:

No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce.²⁰

....

... [I]t does not follow that, because the products of a domestic manufacture may ultimately become the subjects of interstate commerce, at the pleasure of the manufacturer, the legislation of the State respecting such manufacture is an attempted exercise of the power to regulate commerce exclusively conferred upon Congress. Can it be said that a refusal of a State to allow articles to be manufactured within her borders (for export) any more directly or materially affects her external commerce than does her action in forbidding the retail within her borders of the same articles after they have left the hands of the importers? That the

15 22 U.S. (9 Wheat.) 1, 189-95 (1824).

16 *Id.* at 203. See *Lopez*, 115 S. Ct. at 1647 (Thomas, J., concurring).

17 317 U.S. 111 (1942). For my critique see Epstein, *supra* note 11, at 1401-08.

18 *Veazie v. Moor*, 55 U.S. (14 How.) 568 (1852).

19 *Kidd v. Pearson*, 128 U.S. 1 (1888).

20 *Id.* at 20.

latter could be done was decided years ago; and we think there is no practical difference in principle between the two cases.²¹

Chief Justice Rehnquist's tour then moves on to a quick discussion of the Interstate Commerce Act of 1887 and the Sherman Antitrust Act of 1890, both of which contemplated a level of federal regulation far vaster than anything that had been undertaken before. As he notes, *United States v. E.C. Knight Co.*²² limited prosecution under the Sherman Act and thus supported the basic distinction between manufacture and commerce from the other side, by denying the federal government the power to regulate the manufacture of various goods *precisely because* that activity fell within the exclusive domain of the states. Yet since that time it has become clear that a conspiracy to restrain the price of articles of sales in many jurisdictions does pertain to their interstate sale and distribution, and thus properly falls within the scope of the commerce power.²³

Shortly after the early decisions outlining the reach of the Sherman Act, the Court upheld the regulation of interstate transportation on the rails in the *Shreveport Rate Cases*.²⁴ In fact, this decision marks the first substantive departure from the structure of *Gibbons*, but Chief Justice Rehnquist simply treats the decision as consistent with the original design under the Commerce Clause and with the prior decisional law. There was of course no doubt that the decision was correct insofar as the Commerce Clause allowed the Congress to regulate the interstate runs, but the decision went beyond this comfortable stopping point by holding, in Chief Justice Rehnquist's words, "where the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation."²⁵

It is with this argument that the Supreme Court's interpretation of the Commerce Clause veered off track in 1914.²⁶ The *Shreveport Rate Cases* held that the ICC could regulate any wholly intrastate run that was in direct competition with an interstate run. The regulation that was contemplated under the decision did not arise because the commerce from the two forms of rail transportation were so intermingled that one common system of regulation was required, as happened with safety regulation on trains where some cars were directed toward interstate transportation and others were not.²⁷ Quite the opposite, the regulation was extended over a separate and self-contained line solely to reduce the sting of federal regulation on a carrier that was clearly in intrastate commerce. To be sure, the regulated carriers were allowed to restore parity either by raising their intrastate

21 *Id.* at 22-23.

22 156 U.S. 1, 14 (1895) (quoting from *Kidd*).

23 *Swift & Co. v. United States*, 196 U.S. 375 (1905), cited in *Lopez*, 115 S. Ct. at 1636 (Kennedy, J., concurring).

24 *Houston, E. & W. Tex. Ry. v. United States (Shreveport Rate Cases)*, 234 U.S. 342 (1914).

25 *Lopez*, 115 S. Ct. at 1627.

26 For a more detailed account of this case see Epstein, *supra* note 11, at 1415-19. Such is the power of ideas that this article was not cited or referred to by any of the judges who voted to strike down the gun statute in *Lopez*.

27 See *The Employers' Liability Cases*, 207 U.S. 463 (1908), where the regulation of interstate commerce was struck down because it extended to the regulation of intrastate operations as well.

rates or lowering their interstate rates, so that the ICC issued no direct order to disobey the rate ceilings set by the Texas Railroad Commission. But the ICC did give the railroads protection if they defied the Texas Commission. The *Shreveport Rate Cases*, therefore, undermined the previous parity between state and federal governments that had left each dominant within its own sphere. At the same time, however, the decision left untouched that portion of *E. C. Knight* that refused to extend federal power to manufacture and agriculture, so that much of the *Gibbons* edifice still remained. Chief Justice Rehnquist, however, sees none of the ambiguity or difficulty with the case, and summarily begs the essential questions by treating the regulation as "incidental" and the justification for that regulation the "mingling" of interstate and intrastate activity. He fails to give due weight to its large transitional role in the shift from the original constitutional design to its New Deal substitute.

This benevolent stance to earlier decisions defines Rehnquist's overall strategy of nonconfrontation with the unruly historical materials. Right after he polishes off the *Shreveport Rate Cases* in one sentence, he turns to *A.L.A. Schechter Poultry Corp. v. United States*,²⁸ which held that Congress went beyond the scope of the commerce power when it set the hours and wages of intrastate businesses. Congress could not set wages and hours for local businesses solely because of their indirect effects on interstate commerce. *Schechter* marks a reaffirmation of the prior consistent line of cases which (apart from the substantial erosion in the area of transportation) sought not to tip the scales in favor of either state or federal power.

Yet Chief Justice Rehnquist did not miss so much as a beat in his recitation of the history. In his hands, *NLRB v. Jones & Laughlin Steel Corp.*²⁹ is neither the repudiation of the original constitutional scheme nor the long overdue recognition of federal power. Rather, it is a "watershed" of constitutional interpretation which just happens to eradicate the line between direct and indirect effects on commerce and adopts the modern "protective" principle of Commerce Clause interpretation by extending congressional power to those intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" that it would otherwise face.³⁰ The imposition of federal regulation was thus presumed to "promote," rather than to retard, the operation of commerce. Congress could decide whether market competition or federal regulation is needed in local labor markets.

The critical question of what counts as a "substantial relation" to interstate commerce was quickly answered: just about anything. *Wickard v. Filburn*³¹ showed how the economic principles of supply and demand

28 295 U.S. 495 (1935).

29 301 U.S. 1 (1937).

30 *Id.* at 37.

31 317 U.S. 111 (1942). The decision relied extensively on *United States v. Darby*, 312 U.S. 100 (1941); *United States v. Wrightwood Dairy*, 315 U.S. 110 (1942) (allowing the setting of minimum prices for milk produced and consumed within a single state). For criticism see Epstein, *supra* note 11, at 1447-54. It is worth noting that I ended my examination of the cases here because I thought (and still think) that if these cases are law, the rest is window-dressing, including the subsequent cases discussed here with renewed urgency.

facilitated unlimited expansion of the scope of the commerce power: all wheat that was consumed on the farm on which it was grown was wheat that was not shipped in interstate commerce, so that the prices charged in the one market are influenced by the patterns of sale and consumption in another. The decision cannot pass the "giggle test." Describe the holding to a neutral audience not versed in constitutional law, and it snickers at the ingenuity of judges.

And the gigglers are right. The level of commercial interpenetration solemnly noted in *Wickard* has been apparent in agricultural markets from the beginning of the Republic, and certainly during the post-Civil War period when American farms became the breadbasket to the world. The transportation of farm goods across country became the focal point of one of the most bitter struggles in the era between 1865 and 1914, which also marked the greatest mass overseas immigration into the United States. Yet Rehnquist's opinion makes it appear as though the "novelty" of interstate (and international) commerce justified in some sense the expansion of the commerce power: "Enterprises that had once been local or at most regional in nature had become national in scope."³² But these "enterprises" (i.e., small family farms) are national in scope only by judicial decree, not by their individual patterns of consumption. Even those firms that themselves did not engage in interstate activities could get caught in the web of federal regulation. The impact on interstate commerce was not determined by the size of the individual enterprise, but by the "class of activities" of which the individual case was a part,³³ as if it somehow mattered whether one farmer or a hundred fed his own grain to his own cows. But once this aggregation was allowed, then its cumulative impact was always found sufficient, given that the entire nation was subject to the same, uniform federal statute.

The proof of the pudding, it is said, is in the eating: even with the language of substantial impact on interstate commerce, *no* subject worthy enough to attract Congress's attention failed to win the Court's blessing under the Commerce Clause. The civil rights cases were perhaps the most conspicuous illustration of the application of federal power to a local diner which buys supplies interstate or to a motel that has some out-of-state customers.³⁴ But even when the question of congressional power was disentangled from the civil rights movement, the broad interpretation of the Commerce Clause remained unchallenged, aided in large measure by the insistence that the deferential standard of the rational basis test be imported to examine the justifications that Congress advanced to assert its regulatory power.³⁵ *Maryland v. Wirtz*³⁶ made it clear that the wage and hour requirements of the Fair Labor Standards Acts could be applied

³² *Lopez*, 115 S. Ct. at 1628.

³³ See, e.g., *Perez v. United States*, 402 U.S. 146, 152-53 (1971). In *Perez*, the Court noted that by earlier decisions, "a class of activities was held properly regulated by Congress without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce." *Id.* at 152.

³⁴ *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

³⁵ See *Lopez*, 115 S. Ct. at 1651 (Souter, J., dissenting); see also *id.* at 1658 (Breyer, J., dissenting).

under the Commerce Clause to state governments, hospitals and (for *Lopez* more ominously) school districts. The case thus marked the dominance of federal power not only over local private activities, but also over the instrumentalities of state government, again with a powerful boost from the rational basis test.³⁷

To complete the picture, *Perez v. United States*³⁸ sustained a federal conviction for "loansharking" under the Consumer Credit Protection Act. *Hodel v. Virginia Surface Mining and Reclamation Association* sustained the power of the federal government to regulate surface coal mining by an appeal to the rational basis principle:³⁹ no one could say that land, the ultimate of immobile assets, was not in interstate commerce given the magic of indirect effects.

II. ON TO *LOPEZ*

Chief Justice Rehnquist's historical review carefully sets up his treatment of *Lopez* proper. After his examination of the Commerce Clause history, Chief Justice Rehnquist could assure the reader that only three categories of cases fall within the scope of the Commerce Clause: (1) those that regulate the channels of interstate commerce; (2) those that protect the instrumentalities of commerce from "threats" that come from purely interstate activities, as with the *Shreveport Rate Cases*; and, (3) those cases that bear a substantial relationship to interstate commerce under the indirect effects test.⁴⁰ Putting the doctrine in this tidy form makes it appear that at the very least some category four lies outside the scope of the commerce power. Accordingly, Chief Justice Rehnquist takes little time to dispose of categories one and two as possible candidates to support the gun-control statute. Everything thus turns on category three whose constraints are effectively rehabilitated. *Wickard* becomes a case in which price stabilization (a bad in the case of agricultural commodities when quantities vary enormously) is thought to be achievable only by regulating the amount of wheat available in the market. It is of no matter that private contracts for future sales might actually work to reduce the peaks and troughs of production by holding wheat off the market until prices start to rise.

So now that *Wickard* stands for the importance of federal regulation in a world of interdependent economic activities, Rehnquist has set up the examination to prove that carrying a gun within 1000 feet of a school does not meet that same (exacting) standard. He is surely helped in that task by *United States v. Bass*,⁴¹ which reserved the question of whether the Commerce Clause extended to regulation of the mere possession of a firearm

36 392 U.S. 183 (1968). (*Wirtz* was overruled by *National League of Cities v. Usery*, 426 U.S. 833 (1976), but was later revived when *National League* was overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)).

37 *Wirtz*, 392 U.S. at 190.

38 402 U.S. 146 (1971).

39 452 U.S. 264, 276 (1981).

40 *Lopez*, 115 S. Ct. at 1629-30.

41 404 U.S. 336 (1971).

without showing the weapon was "in commerce or affecting commerce."⁴² And with that lead-in, he then draws the conclusion that the statute "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."⁴³ Already there is a retreat from *Perez* because the question he asks is not whether the possession of guns in the aggregate influences interstate activities, but whether that determination could be made case-by-case.

This shift in emphasis then brings us to a new twist in Commerce Clause jurisprudence, for Rehnquist now switches field to ask whether the legislative findings are sufficient to support the assertion of jurisdiction, given his own doubts on the scope of federal power. Since the original statute was passed in an era of constitutional complacency, it is hardly surprising that his eye detects no findings sufficient to ease his doubts on the question of federal power. Nor does the Solicitor General fill the gap by arguing that increased crime leads to an increased cost of doing business and to a reduction in the amount of travel in interstate commerce,⁴⁴—the same formulaic arguments that were a smash success for the United States in *Wickard*. Only in *Lopez* the well runs dry for two reasons. First, the Chief Justice notes that if the possession of guns is subject to regulation under the Commerce Clause, then everything in education, or for that matter, marriage and divorce, may be regulated as well, so that no activity falls outside the scope of the commerce power. What a surprise! After all, the realist thought *Wickard* achieved that state of constitutional bliss when the consumption of home grown wheat was solemnly found to be part of commerce among the several states. The older and obvious objection that enumerated powers presuppose that some areas lie outside Congress's power had been brushed aside in all the earlier cases. Those cases first defined the scope of the Commerce Clause (with its indirect effects test) and thereafter concluded that the Tenth Amendment reserved to the states only those powers that the Commerce Clause did not take from them, namely, none at all.⁴⁵

So Chief Justice Rehnquist skirts a long-standing constitutional taboo: he demands that the broad interpretation of the third head of the Commerce Clause leave something, anything, within the exclusive province of the States, which of course the earlier received wisdom does not. The words "substantial effects" have thus become less code and more English, with the consequent change in result.

Chief Justice Rehnquist develops yet another way to distinguish *Wickard*: "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially

⁴² In *Bass*, the Court interpreted the Omnibus Crime Control and Safe Streets Act of 1968, which covers any person "who receives, possesses, or transports in commerce or affecting commerce . . . any firearm." 18 U.S.C.App. § 1202(a). The Court held quite sensibly that the clause, "in commerce or affecting commerce" modified receipt, possession and transportation, not just the last. Therefore, it did not have to address the constitutionality of the statute under the alternative construction. *Bass*, 404 U.S. at 339 n.4.

⁴³ *Lopez*, 115 S. Ct. at 1631.

⁴⁴ *Id.* at 1632.

⁴⁵ See *United States v. Darby*, 312 U.S. 100, 124 (1941). The Tenth Amendment was reduced to a "truism."

affect any sort of interstate commerce."⁴⁶ Really? Ever since Gary Becker wrote his analysis of crime and punishment,⁴⁷ scholars have undertaken a massive effort to trace the economic antecedents and consequences of the criminal law. Crime to education to commerce may not be as inexorable as Tinker to Evers to Chance, but it is a close race, especially if each category is accorded its appropriate level of Platonic universality. So long as one could show that the education levels influence crime levels, it is odd to say that *Lopez* is correct because gun-toting is not an economic activity. The only intended meaning is that carrying a gun is not a commercial transaction like buying and selling goods. The evident switch in emphasis now creates a partial exemption from the scope of the commerce power. The earlier understanding was that any activity that had a substantial effect on commerce was within reach of the federal power: now it appears that it is only some class of activities that fall under that test, and that those have to be close to the commercial—as opposed to the criminal, family or educational—zones. Can it be the case that we are about to enter an age in which there are extensive limits on the ability of the federal government to enact criminal law statutes?⁴⁸

At this juncture there are now two ways to read *Lopez*. One is to treat the decision as importing something akin to the "fair notice" requirement into congressional statutes. It does not matter what Congress does so long as it goes through the obligatory steps to state purposes that resonate with the *Wickard* view of the world. On this view, what is needed is a beefed-up set of congressional findings, not a reduced level of congressional ambition. Once beaten, then twice wise. The protocols for enacting a statute, the witnesses who are called to testify, the investigations made may have become more exacting, but all these obstacles can be overcome, so that the scope of congressional power remains undiminished. Supporters of the old order can find some comfort in Rehnquist's prose:

Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce, the Government concedes that "[n]either the stat-

46 *Lopez*, 115 S. Ct. at 1634.

47 Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 217-47 (4th ed. 1992) (giving a general account of the economics of crime); *Lopez*, 115 S. Ct. at 1665-71 (appendix to Justice Breyer's dissent listing all the relevant authorities).

48 Perhaps not. In *United States v. Robertson*, 115 S. Ct. 1732 (1995), the Supreme Court upheld a RICO prosecution when the proceeds of unlawful activities were invested in an Alaskan gold mine by the defendant who operated in Arizona. The RICO statute makes it illegal to invest the proceeds of unlawful activities in the "acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(a) (1994). The decision first gave an explicit nod to *Wickard*, but then veered away from any examination of RICO's requirement that the investments "affect" interstate commerce noting that some of Robertson's activities were in interstate commerce, that is, shipping equipment to Alaska and removing some of the gold out of state. The decision is an implicit commentary on the limits of *Lopez* because it upheld the conviction even though none of the illegal activities themselves touched interstate commerce, and all the activities in interstate commerce were themselves legal. The extravagant view of these connections still remains. Note that *Robertson* was a short per curiam opinion that did not cite, let alone discuss, *Lopez*.

ute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." Brief for United States 5-6. We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. ("Congress need [not] make particularized findings in order to legislate"). But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.⁴⁹

Yet this first approach should not work for the government as the second reading of *Lopez* better captures its intellectual drift. As befits the movement from rational basis (back) to intermediate scrutiny, we know that the question of justification for government action is not simply a question of gilding the lily. Here, Rehnquist says that "we consider" legislative findings. He does not say that "we" are bound by them. And in the parallel areas of individual rights, the new harder look doctrine often treats legislative findings at the center of the controversy and not as its solution. For example, Justice Scalia in *Lucas v. South Carolina Coastal Council*⁵⁰ delivered a sermon that the needed findings require more than clever draftsmanship, so that the government cannot avoid its duty to compensate by hiring competent staff to find compelling reasons for state action.⁵¹ The same approach presumably applies to issues of congressional power: for if rational basis has teeth, then skillful drafting is not a substitute for good substantive reasons. But in this context, the key question is not whether staff is incompetent. Rather it is whether staff is more resourceful than an exasperated Justice Breyer who summons forth every argument imaginable to demonstrate that education and crime both have substantial impacts on the level of interstate commerce: they influence the training and preparedness of a national workforce, and they shape entrepreneurial decisions on business structure. Chief Justice Rehnquist and the majority are utterly unmoved by his outpouring largely because Justice Breyer's argu-

49 *Lopez*, 115 S. Ct. at 1631-32 (citations omitted). Footnote four, which immediately follows the quoted passage, reads:

We note that on September 13, 1994, President Clinton signed into law the Violent Crime Control and Law Enforcement Act of 1994 [that] amends § 922(q) to include congressional findings regarding the effects of firearm possession in and around schools upon interstate and foreign commerce. The Government does not rely upon these subsequent findings as a substitute for the absence of findings in the first instance. Tr. of Oral Arg. 25 ("[W]e're not relying on them in the strict sense of the word, but we think that at a very minimum they indicate that reasons can be identified for why Congress wanted to regulate this particular activity").

Id. at 1632 n.4 (citations omitted).

50 112 S. Ct. 2886 (1992).

51 Justice Scalia wrote:

In Justice BLACKMUN's view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

Id. at 2898 n.12 (citations omitted).

ments negate the possibility of any practical limits on federal power. Indeed, Breyer's own plaintive efforts to explain why there could be no federal law of marriage and divorce,⁵² may, if anything, come back to haunt him, for it would take his enterprising law clerks little time to construct an equally impressive bibliography on the connections between the breakdown of the family, the crisis in illegitimacy and the decline of productivity in the American workforce.⁵³

III. A CONGRESSIONAL REPRISÉ

The question here is not one of idle speculation. The test case may soon come our way, for the skill of the drafters has been put on display in the proposed revision of the fallen statute of *Lopez*, The Gun-Free School Zones Act of 1995.⁵⁴ A quick glance at the Bill reveals that the Congress has not budged one inch in its substantive commitments, for, just as in *Lopez*, the Bill makes it unlawful "for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone."⁵⁵

The question is whether the nine individual findings made by Congress are sufficient to make the much sought-after federal case after *Lopez*. Here every avenue is pursued for all that it is worth. There is no question that (A) "crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem."⁵⁶ But this alarum has the vice of bringing too much under the federal umbrella. Taken alone, why stop at the use of guns within 1000 feet of a school? Any use of guns anywhere comes within the federal power. To shrink from an assertion of universal coverage, more has to be said as to why a prohibition on guns near schools occupies a privileged position.

The same objection can be raised toward (B) "crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal[s]."⁵⁷ True, but this rationale has a close resemblance to the two arguments that had been rejected in *Lopez* proper, namely, that crime spreads the increased costs of insurance throughout the population and reduces the willingness to travel. The issue is not whether what happens in interstate commerce has an effect on local issues. It is whether the use of guns near schools is in interstate commerce.

The third rationale stresses (C) that "firearms and ammunition move easily in interstate commerce and have been found in increasing numbers

52 *Lopez*, 115 S. Ct. at 1661-62 (Breyer, J., dissenting).

53 See, e.g., RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 177-90 (1994).

54 S. 890, 104th Cong., 1st Sess. (1995). This Bill seeks to re-enact verbatim that portion of section 922(q) struck down in *Lopez*, as well as the congressional findings that were enacted to justify the statute in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796 (discussed *supra* at note 49). Citation here and below is made directly to the Bill since it has not yet been enacted, but the language is identical to that found in 18 U.S.C. § 922(q)(1)-(4) (1994).

55 S. 890, 104th Cong., 1st Sess. § 2(q)(2)(A) (1995).

56 *Id.* § 2(q)(1)(A).

57 *Id.* § 2(q)(1)(B).

in and around schools.”⁵⁸ And the fourth (D) notes that component parts and their raw materials also move in interstate commerce.⁵⁹ True enough, but there is no question about the power of the federal government to stop the problem of interstate movement directly, nor the power of Texas to stop the use of guns in schools. There is no gap in sovereign power, and a clear role for the federal government. But there is no explanation as to why federal law should create gun-free school zones.

It is not only guns and ammunition that move, but also people, so in (E) the Bill observes that “ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their child to school for the same reason.”⁶⁰ Once again true. But the federal government can certainly protect citizens and foreign travelers while they are in interstate travel, and state governments can protect them once they reach their destination. So where is the case for Commerce Clause power in the federal government?

The list then continues by noting (F) that “the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country.”⁶¹ But it does not mention that the rise in violence takes place contemporaneously with the rise of federal involvement in education, which may well have had the same effect. Nor does it explain why there are grounds for federal regulation of guns simply because (G) “this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States.”⁶² Almost forlornly, the statute tracks the grounds urged in the Breyer dissent and rejected in the Rehnquist opinion. If the argument has been considered once, it is doubtful that it will prove decisive the second time.

Finding (H) raises the more knotty question of coordination: “States, localities, and school systems find it almost impossible to handle gun-related crime by themselves; even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures.”⁶³ Initially it seems odd to say that state and local efforts are “unavailing,” as if nothing useful can be done without federal assistance. The same argument could be used to convert the entire criminal code into part of the United States Code.

But even if this claim is read to imply only that federal resources can improve local enforcement, the causal nature of the claim is, if anything, backwards. There is initially no explanation as to why the effective enforcement in one area is undermined by the ineffective enforcement in another. That argument was urged (unsuccessfully) in the child labor cases that

58 *Id.* § 2(q)(1)(G).

59 *Id.* § 2(q)(1)(D).

60 *Id.* § 2(q)(1)(E).

61 *Id.* § 2(q)(1)(F).

62 *Id.* § 2(q)(1)(G).

63 *Id.* § 2(q)(1)(H).

reached the Court before the 1937 revolution.⁶⁴ In those cases the United States rightly observed that competition between the states under federalism made it difficult for one state to raise the minimum working age under its child labor laws while other states adhered to a lower age limit or had none at all.⁶⁵ But even here the political equilibrium was such that states did have child labor statutes, albeit those which allowed children to work at a younger age than some of the federal reformers allowed.

The odd point here is that the federalism question cuts the opposite way when crime prevention is at issue. Here the state that engages in successful enforcement activities will *benefit* if other states do not follow suit. Just as burglars pass by houses with alarm systems, so too criminals will tend at the margin to migrate from states with strong enforcement programs to those with weaker ones. It therefore follows that each individual state has a strong incentive to prevent local crime, knowing that it could go elsewhere, even if other states do nothing. It is, in a word, vastly different when state regulation drives out unwanted crime instead of wanted business. The real Commerce Clause issue is that states may spend too much on local crime prevention, which is hardly the rhetorical position that the United States can adopt here. But the coordination problem it does mention offers no reason for the assertion of federal power, even if we acknowledge the need for overarching regulation to handle the adverse effects of competition in a federalist system.

So that only leaves point (I), that "Congress has power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection."⁶⁶ But this provision is pure puff which assumes that the loftiness of the ends justifies the assertion of power. And it is noteworthy that while it mentions "other provisions" of the Constitution, it does nothing to point out what those are and why they matter. With only a little work, the entire edifice comes tumbling down as the nine points mentioned in the proposed legislation only restate the grounds that were already canvassed in *Lopez*, coupled with the assertion that Congress wants to do this very much. If the original *Lopez* decision stands, then this statutory paste up job has to fall.

IV. THE TWO CONCURRENCES

Thus far I have concentrated solely on the Rehnquist opinion, both for its internal logic and its treatment of the Gun-Free School Zones Act. But while his opinion did command a clear majority of the Court, it was only one of *six* opinions filed in the case. The three dissenting decisions all defended with enthusiasm the earlier understandings of unlimited federal power, and I will deal with their conceptual foundations in the next section. For the sake of completeness, it is necessary to draw at least some

64 See *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Child Labor Tax Case*, 259 U.S. 20 (1922). For my views on these cases see Epstein, *supra* note 11, at 1427-32; RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE*, 146-50 (1993).

65 E.g., *Hammer*, 247 U.S. at 256-57 (argument of appellant).

66 S. 890, 104th Cong., 1st Sess. § 2(q)(1)(I) (1995).

brief attention to the separate concurrences of Justice Kennedy (for himself and Justice O'Connor) and Justice Thomas, because they reveal instantly the very wide differences of opinion on the scope of the commerce power even among the five Justices who voted to strike down the Act.

Justice Kennedy goes out of his way to give his own history of the Commerce Clause, and it is a history that shows a somewhat greater respect for the scope of the federal power than does that offered by Chief Justice Rehnquist. He gives a broader reading of *Gibbons* than does the Chief Justice,⁶⁷ and he is critical of the Court's decision in *E.C. Knight* because of the ostensible limitations that it placed on the potential scope of antitrust enforcement.⁶⁸ In addition, he takes great pains to note that a sound understanding of the Commerce Clause must do away with any lingering attachment to the "direct effects/indirect effects" tests and adopt without reservation a "practical" construction of commerce instead of one which is purely "technical and legal."⁶⁹ Kennedy's mission here is perfectly clear: he is quite willing to strike down this statute because he thinks it interferes with the ability of state and local governments to craft local solutions to the problem of guns in schools.⁷⁰ But he is equally determined to make sure that this decision does not mark the first stage in any incipient revolution that upsets the authority of those cases that allow for national labor, national agricultural and national civil rights policy, indeed a national regulation of the national economy. *Jones & Laughlin*, *Wickard*, and *Heart of Atlanta Motel* are explicitly spared from overruling by any revisionist history.⁷¹ In essence, Justice Kennedy believes that some issues are indeed local; that this form of crime control is one of them; and that any question of economic regulation is not.

Justice Thomas takes a much more critical view of the Court's prior Commerce Clause jurisprudence. Unlike Justice Kennedy, he chafes at the prospect of legitimating the New Deal synthesis on the scope of the Commerce Clause. Armed with eighteenth century dictionaries and contemporary commentaries, including *The Federalist* papers, he reiterates the classical distinction between commerce and manufacture, arguing that the power to regulate the first does not carry with it the power to regulate the other.⁷² He bolsters those sources by noting that treating manufacturing as commerce results in absurdities within the text.⁷³ *Gibbons* is given a far narrower reading than that offered by Justice Kennedy, and the entire ef-

67 *Lopez*, 115 S. Ct. at 1634 (Kennedy, J., concurring). "Chief Justice Marshall announced that the national authority reaches 'that commerce which concerns more States than one' and that the commerce power 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.'" *Id.* Note, however, that the verb "reaches" is substituted in by Justice Kennedy for the words "restricted to" which appeared in the original opinion, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824), thus giving a very different weight to the words.

68 *Lopez*, 115 S. Ct. at 1635 (Kennedy, J., concurring).

69 *Id.* at 1636.

70 *Id.* at 1640-42.

71 *Id.* at 1637.

72 *Id.* at 1643-45 (Thomas, J., concurring).

73 "[O]ne cannot replace 'commerce' with a different type of enterprise, such as manufacturing. When a manufacturer produces a car, assembly cannot take place 'with a foreign nation' or 'with the Indian Tribes.'" *Id.* at 1643.

fort to adopt any form of indirect effects test is ridiculed as inconsistent with the basic constitutional design. "The Commerce Clause does not state that Congress may 'regulate matters that substantially affect commerce with foreign Nations, and among the several States, and with the Indian Tribes.'" ⁷⁴ For him the textual case is so clear that it does not warrant prolonged discussion. His only qualm is not in what direction to move, but how fast to go. I have virtually nothing to say in opposition to Justice Thomas, since his views are so close to my own. As for Justice Kennedy, his views differ from those of the dissent only insofar as he is not prepared to turn somersaults in order to uphold federal power against what he conceives to be the clear weight of the evidence. But his decision also has a good deal in common with the dissenters for he too accepts the fundamental legitimacy of the New Deal revolution. Much of what I shall say in opposition to them also applies (with caution) to his decision as well. So with that said, it is time to undertake a detailed examination of the pillars of the traditional Commerce Clause as developed in the dissenting decisions.

V. THREE ENGINES OF THE EXPANDED COMMERCE CLAUSE: INDIRECT EFFECTS, AGGREGATE EFFECTS AND RATIONAL BASIS

With this brief detour, discussion of *Lopez* thus far has largely focused on Chief Justice Rehnquist's efforts to show that the Gun-Free School Zones Act falls outside the scope of federal power under the Commerce Clause. However sound his substantive conclusion, it seems clear that he fails to come to grips with the scope and sweep of the earlier case law, and thus reads the earlier precedents in a way that ignores their overall direction and intensity. To the extent, therefore, that Justice Souter and Justice Breyer in dissent chastise the Court for denying coverage under established provisions, they have the better of the argument. Even if the Chief Justice can point to some snippets of language that pay lip service to some operative limits on the scope of the Commerce Clause,⁷⁵ there are gobs of evidence that cut in the opposite direction.

Indicative of the previous constitutional balance, Rehnquist's opinion ignores two larger and more salient truths. The first is outcome: before *Lopez*, no case actually held that Congress had gone too far in its assertion of federal power. No realist engaged in politics will look first to words when he can look to an unbroken skein of results. The rule matters and the dutiful verbal qualifications are so much piffle. Second, he attaches insufficient weight to the three major interpretive props for the pre-*Lopez* doctrine: the extension of the commerce power to indirect effects, the cumulative effects doctrine and the use of the rational basis test. The best way to defend the outcome in *Lopez* is to break out of the post-1937 mold

⁷⁴ *Id.* at 1644.

⁷⁵ The sentence that he quotes with greatest effect reads: "Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968), quoted in *Lopez*, 115 S. Ct. at 1629. The next sentence takes back much of what was conceded. "The Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Wirtz*, 392 U.S. at 197 n.27, quoted in *Lopez*, 115 S. Ct. at 1629 (emphasis added in *Lopez*).

and to ask the more fundamental question: Why do any of these doctrines belong in the kit of tools used to unlock the secrets of the Commerce Clause? The proper response to the dissent therefore is to attack the basic premises of their analysis, and not to locate this case on the borderline of received doctrine. The stakes here are high because, as the dissents point out, the questions of federal power under the Commerce Clause raise many of the identical issues that are found in dealing with the status of individual rights under various clauses of the Constitution. Justice Stevens, therefore, could point in a brief dissent to the close analogy between the earlier, pre-1937 views of the Commerce Clause, and the standards of review of economic regulation in "the discredited, pre-Depression version of substantive due process."⁷⁶ Justice Souter is able to hurl the ultimate epithet by insisting that the revival of substantive limitations under the Commerce Clause is to commit once again the unpardonable sins of the bygone *Lochner* era.⁷⁷

Both Justice Stevens and Justice Souter are correct to note that the key questions of interpretation under the Commerce Clause do invoke a notion of limited federal power that harkens back to a pre-1937 version of economic liberties. But they do little to demonstrate that a return to earlier doctrine is a return to the bad old days when it would constitute a welcome if belated return to the principles of limited government in the modern age. Yet here my purpose is not to argue again that the New Deal is unconstitutional, which it is.⁷⁸ Rather it is to argue that the standard underpinnings of the post-1937 understanding are all intellectually flawed. On this point it is easy to join issue, for Justice Breyer has neatly set out the three basic pillars of the modern constitutional structure that could sustain the Gun-Free School Zones Act.⁷⁹ The first is that anything that indirectly affects interstate commerce is subject to regulation under the commerce power. The second is that aggregate and not individual effects should be taken into account. And the third is that a deferential standard of review should be used to evaluate congressional action. Each offers an unreliable guide to construction of the Commerce Clause because each fails to preserve the delicate balance of power between federal and state governments so central to the original constitutional design. I shall consider the points in order.

A. *Indirect Effects*

The modern commerce doctrine obliterates the distinction between the direct and indirect effects of local actions on interstate commerce. Chief Justice Rehnquist dutifully notes the transition, but understates the expansion of federal power ushered in by the rejection of the older distinc-

⁷⁶ *Lopez*, 115 S. Ct. at 1651 (Stevens, J., dissenting).

⁷⁷ *Id.* at 1653 (Souter, J., dissenting).

⁷⁸ See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 281 (1985). "The New Deal is inconsistent with the principles of limited government and with the constitutional provisions designed to secure that end." I think that the excesses of the past ten years have only added urgency to that statement.

⁷⁹ *Lopez*, 115 S. Ct. at 1657-58 (Breyer, J., dissenting).

tion. One can see how striking the newer doctrine is by running the argument in reverse.

The original language of Article I speaks of those powers "delegated" to Congress. It seems sensible to argue that the powers delegated to a party have to be restrained in order to preserve the retained powers of the delegating parties, in this instance the states. That preservation could be achieved by setting all presumptions against the exercise of the delegated power where it conflicts with the retained power of the delegator. Applied to this context, one could say that the regulation of wages and hours for workers engaged in interstate commerce is beyond the power of Congress under the Commerce Clause because it adversely affects the power of the states to regulate their own local economies. Even the outcome in *Gibbons* becomes questionable in that federal power could be asserted only when some paramount federal interest overrode the claims of any state: e.g., a need to protect interstate travel from violence. This extravagant position could spell the end of federal power over interstate commerce, and should for that reason be rejected by anyone who is interested in preserving a stable balance between the two levels of government.

If, however, this reverse "indirect effects" argument should not be used to cripple federal power, then turnabout should be fair play. The protective principle should not allow the federal government to regulate local affairs because of their indirect effect on federal ones. The original balance struck both in *Kidd* and *E.C. Knight* was correct, and cases like *Schechter* constituted a faithful, if futile, effort to prevent Congress from usurping a role that was left to others under our constitutional scheme.

Two other observations help explain why indirect effects arguments always prove too much. First, it is instructive to ask how a doctrine of indirect effects would operate in connection with jurisdictional boundaries between neighboring states. Here the basic principle is surely one of territoriality. Individuals vote only in their own state elections even though activities in neighboring states may have an enormous impact on their economic and social welfare: one need only think of the impact of New York's activities on Connecticut and New Jersey, and perhaps the reverse. But it is generally understood that any effort to extend the franchise to individuals who live out of state complicates local governance, so that one class of indirect effects, these negative spillovers in local voting, are routinely tolerated.

What is true of voting is also true of political power. New York might object to the low levels of minimum wage in North Carolina but acting by itself it cannot alter the balance no matter how powerful the indirect effect. That position is even more evident when the question is the loss of jobs to the low wage countries of southeast Asia, or when the consequences of European economic policy influence the ability to buy and sell goods both here and abroad. Once again the competitive impacts offer (dubious) justification for a program of tariffs or inspections, but they hardly justify intervention. Indeed, the Europeans bitterly resent our own efforts to use the indirect effects tests to subject their nationals to our antitrust laws for agreements entered into in their own territories. Generally, a showing that effects are substantial and indirect does not necessarily translate into a

showing that coequal sovereigns can govern each other's affairs. National and state governments exercise control over the same territory, so the boundary between them is by function and not by metes and bounds. But once again, an effort to preserve both spheres simultaneously precludes the use of an indirect effects test to expand power in either direction.

The same point can be made with individual disputes between neighbors. The kind of business or residence I have on my property will influence the value of yours and vice versa, but it hardly follows that I can enjoin as a nuisance, for example, anything that you do or that you have such a privilege to enjoin me. The sphere of interaction is limited to invasive behaviors that are close to trespass and to a limited set of reciprocal obligations at the boundary, such as lateral support. In many cases competition between neighbors is a social good; even where it is not, the costs of coordination may be higher than the gains from any collective action. So here, too, the presence of substantial indirect effects is no automatic warrant for common regulation.

Now a federalist nation surely differs from disputes between neighboring states or neighboring individuals, for it offers a single forum capable of taking all interests into account at once. But that difference hardly carries the day. As a matter of political design, the comprehensive legislative solution could yield collective outcomes that hurt minorities far more than they help majorities, for, pace Madison in *The Federalist*,⁸⁰ the vagaries of political process are hardly eliminated by moving complex issues from local to national levels. Oftentimes, the larger group could be downright destructive, as when it institutes anticompetitive measures that detract from overall consumer welfare. Even where the federal government is needed as a counterweight to state power, it hardly follows that additional heads of independent federal legislative power should be created. A quick look at Section Five of the Fourteenth Amendment shows that it is possible to confer on the federal government the power to insure that state governments obey the restrictions contained in the Fourteenth Amendment, without giving the federal government new independent powers of its own. One therefore needs to have a normative conception of why the overall gains from federal power justify its unlimited expansion. That showing cannot just be presumed on the strength of some argument that equates more with better. Many national problems are made worse by national solutions, of which the agricultural price controls at issue in *Wickard* are only one.

These structural complications, of course, are not decisive in themselves, but only an aid to constitutional interpretation. But for these purposes the words, "Congress shall regulate commerce among the several states" go against the use of the indirect effects test which is no part of the original text and is incompatible with its place in the constitutional structure. If the overall social evaluation is so complex, general statements about interdependence in a national economy are not sufficient to work a transformation of our constitutional scheme. In light of the clouded history, there is no sense in reading into the Commerce Clause a distribution of power that gives the federal government the whip hand over the states.

80 THE FEDERALIST No. 10 (James Madison).

The doctrine of indirect effects is no small bump on the overall structure of Commerce Clause jurisprudence. It throws the entire constitutional scheme out of whack.

B. *Cumulative Effects*

The second feature of the modern synthesis is directed to the question of cumulative effects. The indirect effects on commerce are not to be measured from the vantage point of one lonely individual subject to regulation, but by the class of similar individuals or similar behaviors subject to that uniform regulation. Indeed, once the aggregation principle is embraced, as it is by Justice Breyer,⁸¹ all general statutes necessarily regulate substantial activities. After all, if there were no substantial effect on interstate commerce, why would Congress stoop to pass the legislation? All that is necessary, therefore, to secure congressional power is to bulk up any class of individuals or behaviors targeted by particular statutes. If guns do not have sufficient adverse effects on commerce, then we can graduate quickly to weapons, or even to all forms of dangerous substances.⁸² From there it is but a short step to conclude that categories like crime, education, health care and drugs fall within the federal power wholly without regard to the particular transaction which may be as innocuous as feeding wheat to one's own cows.

Yet once again the argument contains a serious structural flaw. The aggregation takes place solely in order to increase the ostensible size of the federal stake. But the question here is surely one of *relative* stakes of federal and state interests. So once cumulation takes place on the federal side of the ledger, then it should take place on the state side as well. Education, crime, drugs and health are issues that have enormous impacts on local economies. Yet that aggregation is *never* allowed as an offset to the use of federal power. In any system of parity cumulation has to take place on both sides simultaneously. So the claim for Commerce Clause power is increased only if the cumulation works differently on the two sides of the ledger. But there is no explanation as to why that should be the case. After all, if the possession of a single gun within 1000 yards of a school is predominately local, then the possession of a thousand such weapons should be predominately local. If $S > F$, then $nS > nF$. (If the state interest in one case is greater than the federal interest, then the state interest in n cases is also greater than the federal interest.)

C. *Rational Basis*

The third salient feature of Commerce Clause jurisprudence is the importation of the "rational basis" test from the law of individual rights. Words do matter after all when they track or predict the results of the decided cases. Rational basis was originally conceived as a standard of review for property rights cases that did not merit some special judicial protection

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

82 As duly noted by Justice Thomas, *id.* at 1650 (Thomas, J., concurring).

under footnote four of *United States v. Carolene Products Co.*⁸³ To the uninitiated, however, the term rational basis suggests some high standard of review, for what is more demanding than a proof of rationality which invokes ideas of logical symmetry and certainty. But in the area of individual rights, the rational basis test opens the royal road for government regulation, for few proposed schemes do not have at least some benefits to commend them. No legislative measure could gain sufficient support for passage if it generated no benefits to any segment of the population. So it is a simple matter to conclude that the same advantages that propelled the passage of a statute now insulate it from constitutional attack. Rational basis review is rightly regarded as a *de facto* death knell to a constitutional challenge that seeks to vindicate individual rights against government regulation.

The opposite extreme of strict scrutiny delivers the stern review at which the words "rational basis" hint. Strict in principle is usually fatal in fact, except perhaps in the troubled waters of affirmative action.⁸⁴ At this point the fear of government misconduct is so great that the Court is prepared to throw out the baby to prevent contamination of the bath water. The errors of underenforcement of legitimate state norms (e.g., the prevention of defamation) yield before some higher truth (e.g., the promotion of full and robust debate).⁸⁵ The prior restraint that could prevent deception is itself prohibited lest it be invoked to prevent full-fledged debate.

My purpose here is not to explore the matching between the standard of review and the substantive categories of cases, much less to enter the muddy waters of intermediate scrutiny that lie between the two extremes. But I do want to note the unmistakable migration of the rational basis test to its new home in connection with the Commerce Clause. "This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the States."⁸⁶ And the next sentence predictably begins with, "But . . ." Nonetheless, Chief Justice Rehnquist stoutly puts the best light on the frequent appeals to the rational basis test: "Since that time [of *Jones & Laughlin* and *Wickard*], the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce."⁸⁷ He lays little stress that the challenged statute survived that examination in every case.

More to the point, the Chief Justice does not address the more fundamental question of why the rational basis test is adopted to determine the scope of federal power. The use of any test presupposes some error rate in the application of general principles to particular cases. In a world of perfect enforcement, we do not need any "tests," for we can rely on simple deduction or perfect correlation. But once we recognize the slippage between general rules and particular cases, then some test must be used to fill the gap: after all, the best test of an idea is its ability to be accepted in the

83 304 U.S. 144, 152 n.4 (1938).

84 *Adarand Constr. Co. v. Peña*, 115 S. Ct. 2097 (1995).

85 *New York Times v. Sullivan*, 376 U.S. 254 (1964).

86 *Maryland v. Wirtz*, 392 U.S. 183, 198 (1968).

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

marketplace of ideas—which does not mean that there are no marketplace errors. It only means that the error rate is lower than one would expect with government censors.

The errors in question can come in one of two directions: false positives or false negatives. In the context of the commerce power, the false positive expands federal power to arenas where it *does not* belong. Similarly, the false negative withholds federal power where it *does* belong. The question posed for all tests is how to assign weights to the two types of error. The single most powerful protocols set one type of error equal to zero. Yet that heroic result can be achieved only by allowing the exercise of federal power in all cases, or by allowing it in none. In legal terms we no longer speak of tests with results of this form; rather, the appropriate verbal label is the creation of a rule of per se legality or illegality as the case may be, much as price-fixing is sometimes said to be a per se offense under the antitrust laws.

Tests only come into play in earnest when both types of error are greater than zero. At this point the critical ratio is the weight attached to one form of error relative to another. Under the strict scrutiny test, the exercise of government power in an inappropriate setting is thought to carry with it grave consequences, while withholding that power is thought to carry with it only minor inconvenience. Accordingly, the applicable ratio is heavily skewed to reduce one kind of error very close to zero and to allow the other form of error to rise. Since its rate of increase is not linear but exponential, driving one form of error close to zero will produce a far higher increase in the opposing form of error. The desire to reduce the probability of an excessive exercise of government power from five percent to one percent carries with it typically more than a four percent increase in the error from withholding that power. Only where the two types of error are weighted roughly equal—under what lawyers call a test of intermediate scrutiny—is there some chance that the sum of type I (the risk of too little federal regulation) and type II error (the risk of too much federal regulation) will be of equal proportions.

Armed with this terminology, it should become clear that strict scrutiny and rational basis represent the mirror images of each other. With strict scrutiny the error of too much government action receives a high weight; with rational basis it receives a very low rate. The adoption of the rational basis test in the context of the Commerce Clause is tantamount to an assertion that there is little risk to excessive federal action. And the constant vindication of government power is the inverse of the strict scrutiny over restrictions on political speech or in the adoption of explicit racial classifications.

So understood, the rational basis test is ill-suited to organize a response to the original concerns with federalism. The basic design of the Constitution sought to achieve some balance between the powers ceded and the powers retained by the states, such that those necessary for union were transferred while all those needed for local governance were retained. This delicate balance requires that both forms of error have about the same weight, so that the right standard of review under the Commerce

Clause becomes intermediate scrutiny, defined as a rough parity between the two kinds of error costs. Justice Breyer's heated endorsement of the traditional rational basis test is thus inconsistent with the basic constitutional design. Chief Justice Rehnquist's endorsement of the rational basis test certainly constitutes a nod in that direction, but his willingness to make it rational basis with a bite shows that he has started covertly back down the path to intermediate scrutiny. His willingness to push beneath the surface and to demand particular justification is a sign of a new standard of constitutional review, much like the discovery of a new form of quark. There is no reason to be surprised by this development. The ratio between any two numbers can vary continuously, so it was perhaps only a matter of time before some judicial explorer set his flag in the broad territory between rational basis and intermediate scrutiny.

VI. WHERE DO WE GO FROM HERE

In the end, therefore, Justice Breyer's intellectual structure falls of its own weight. None of the arguments that he puts forward can explain why the distribution of powers has shifted so radically from that announced in the original Constitution. Indeed, once it is clear why the Breyer position is wrong as a matter of both constitutional text and structure, it is hard to resist the force of Justice Thomas's position that the entire enterprise of Commerce Clause jurisprudence is fundamentally flawed. At that point in time, we have to ask: If the jurisprudence is flawed, why don't we change it? And, more to the point: Why don't we change it now?

One possible way to deal with this conclusion is to stress, as did Justice Kennedy in his concurrence, the importance of *stare decisis* and changed circumstances. He writes:

[T]he Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. *Stare Decisis* operates with great force in counseling us not to call into question the essential principles now in place with respect to the congressional power to regulate transactions of a commercial nature. That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th century economy, dependent on production and trading practices that changed little over the preceding centuries; it also mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system. Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.⁸⁸

These appeals to the status quo ante and to changed circumstances are by their nature highly controversial, for so much depends not only on the duration of the new legal regime but also on the perceived desirability

88 *Lopez*, 115 S. Ct. at 1637 (Kennedy, J., concurring).

of its continued acceptance. Thus the great achievements of the Court in overcoming the system of segregation and Jim Crow depended on its willingness to cast out the separate but equal doctrine of *Plessy v. Ferguson*,⁸⁹ and to substitute in its place the modern color-blind jurisprudence of *Brown v. Board of Education*.⁹⁰ It seems clear beyond doubt that if the Court had perceived any goodness in the older system of Jim Crow regulations, it might have stayed its hand in striking them down given its general predisposition to give some weight to the reliance interest. By implication, this case is the flip side for Justice Kennedy who is quick to see the good in having a national government regulate a national economy. But now, like the four dissenting Justices, he begs all questions of design and structure, for he never once explains why too little federal power is the source of modern economic problems or plenary economic power their solution.⁹¹ Nor does he explain why things really have changed in any relevant particulars since the eighteenth century. The conceptual distinctions are still as clear today as they were then, unless it makes some deep difference whether we deal with the manufacture of soap or software, which it doesn't.⁹² The question is, will we do better in a national economy with comprehensive regulation of all aspects of commerce than without it. Justice Kennedy fails to explain: (a) why that question has to receive a different answer today than it did in 1787; or, (b) why the answer is in the affirmative for either period, whatever their differences in economic organization. The alternative conception indicates that competition between the states is desirable save when all states must cooperate in interstate communication or transportation. According to this conception, the classical version of the interstate commerce power—which was capacious enough to authorize so much of the mischief of the I.C.C.—covered all the necessary cases of federal regulation. The integrated national economy no more requires federal regulation than the integrated global economy requires a U.N. with teeth.

So what should be done? The most attractive possibility is to roll back the carpet to the original 1787 position. In essence that means to take all the decisions that are regarded as sacrosanct by everyone but Justice Thomas, and overrule them one and all, preferably with a single blow. The problems of transition should hardly be acute, for businesses will do far better in the absence of regulation at the federal level than they can do under its present yoke. And the question of increased state regulation can be met in two ways. First, as was the case before 1937, the competition between jurisdictions will tend to keep regulation (and taxes) lower than they would otherwise be. Second, the Court itself could enforce (with or without congressional assistance) the restrictions on state regulation

89 163 U.S. 537 (1896).

90 347 U.S. 483 (1954).

91 See discussion *supra* Part IV.

92 I have long believed that changed circumstance explanations are usually the sign of intellectual weaknesses, not strengths. See RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 327-31 (1995); Richard A. Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253 (1980).

through the Contracts Clause and the Fourteenth Amendment which have received narrow interpretations for so many years.

This one-two punch should reduce the effective size of government at both levels, and create a more vigorous economy capable of meeting the global challenges of the next millennium. It also shows that the institutions of sound government do not rise and fall with each advance in technology. Instead, they depend in large measure on the creation and enforcement of a strong system of property rights; a judicious use of regulation and condemnation for the provision of public goods; and an abiding awareness that the dangers of self-interest lie as much in ourselves as governors as it does in ourselves as the governed. We do not have to stand pat with a constitutional faith that rests on an incorrect vision of what government is and what it can do. It is better to forge a renewed constitutional faith in the original design that saw limited government not as a partial response to the new challenges of the economic order, but as a complete and adequate architecture for its own time, and for generations to come. What is obsolete is Justice Breyer's fervent, Justice Kennedy's wise, and Chief Justice Rehnquist's resigned acceptance of the large administrative state. The only Justice who has the target of large government squarely in his sights is Justice Thomas. And to him we can only say what would have been impossible even a decade ago: one Justice down, only four more to go.

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