

# What's Wrong with *Lopez*

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## I. INTRODUCTION

*United States v. Lopez*<sup>1</sup> is a dramatic decision. For the first time in almost sixty years, the Court invalidated federal regulation of private activity as beyond Congress's power to regulate interstate commerce.<sup>2</sup> Departing from legal doctrine in place since the demise of the *Lochner* Court,<sup>3</sup> a five Justice majority invalidated the Gun-Free School Zones Act of 1992.<sup>4</sup> Although the scope of its decision is uncertain,<sup>5</sup> the Court appears to have qualified prior doctrine with a rule that precludes congressional regulation of "noncommercial" intrastate activity in areas

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1. 115 S. Ct. 1624 (1995).

2. For another case, one has to go back to *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

3. "*Lochner* Court" refers to the Court between the late Nineteenth century and 1936. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905). During that period, the Court took a very narrow view of Congress's constitutional regulatory powers. For a brief description of the transition from the *Lochner* era to the modern, Post-New Deal era, see *infra* note 15.

4. 18 U.S.C. § 922(q) (1994). The Act made 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." 18 U.S.C. § 922(q)(2)(A). It defined "school zone" as "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1,000 feet from the grounds" of such a school. 18 U.S.C. § 921(a)(25).

5. Some indications in the Court's opinion suggest a narrow reading. For instance, the Court mentioned that Congress had made no findings regarding the link between the activity it sought to regulate and the national economy. *Lopez*, 115 S. Ct. at 1631-32. The Court also emphasized that the statute did not include a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* at 1631. If *Lopez* requires only that Congress make express findings in some circumstances or include a case-by-case jurisdictional link to interstate commerce, then the importance of the decision is largely symbolic. See *id.* at 1634 (Kennedy & O'Connor, JJ., concurring) (describing the Court's holding as "necessary though limited").

If, however, the Court is truly serious about imposing constitutional limits on Congress's regulatory authority, then *Lopez* may have broad implications. The Court's opinion suggests at least a strong presumption against federal regulation of noncommercial activities in areas of traditional state regulation. These categories cast a shadow over much federal criminal law as well as federal regulation touching on education, child support, and tort reform. Indeed, a serious commitment to the limited nature of the federal government's powers would seem to extend beyond the commerce power to conditional exercises of Congress's spending power. Unless the Court wishes for limits on congressional authority to be matters of form rather than substance, it should be skeptical of the broad regulatory effects Congress achieves by attaching conditions to the funds it appropriates.

of “traditional” state regulation. The four dissenting Justices sought to follow prior doctrine,<sup>6</sup> which accords Congress essentially unlimited authority to regulate private conduct under the Commerce Clause.

Although the Justices can be congratulated for raising a fundamental issue that deserves rethinking, their reasoning is profoundly unsatisfying. The doctrinal categories of “noncommercial activities” and “areas of traditional state regulation” constructed by the majority resurrect the mindless formalism of the *Lochner* Court. These categories enforce a blindness to the obvious national economic consequences of education, family structure, and tort liability, and otherwise disregard federalism’s underlying values. The dissent, for its part, disingenuously pretended that prior doctrine preserves judicially enforced limits on Congress’s commerce power. It offered no justification at all for leaving the scope of Congress’s commerce power to the national political process, which is just what the doctrine it embraced effectively does.

As Part I of this Essay will show, these deficiencies symptomize the Justices’ collective failure to confront the central issue of modern federalism. The modern world has thrown federalism’s two first principles into conflict. Yet the majority and the dissent each refused to acknowledge the conflict’s existence by championing one of these principles and ignoring the other. The majority and the dissent simply champion and ignore a different principle.

Part II argues that the proper response to the conflict between federalism’s first principles is to leave the scope of Congress’s regulatory authority to the national political process. Federalism’s underlying values are better served by the trial and error of the national political process than by *Lopez*’s doctrinal constructs or any fixed rules that the judiciary might read into the Constitution. A political process rationale also supports a political resolution. This is not because, as the standard argument for a political resolution asserts, state governments are adequately represented in the national political process. Rather than protecting interests of state government for its own sake, federalism ultimately seeks to protect the interests of the People by empowering political majorities, sometimes on the state level and sometimes on the national level. State majorities and national majorities are both adequately represented in the national political process.

## II. *LOPEZ* AND FEDERALISM’S CONFLICTING FIRST PRINCIPLES

The Constitution’s understanding of federalism is structured by two basic principles that the modern world has thrown into conflict. One principle, the one that animates the Commerce Clause, seeks to give

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6. *Id.* at 1657 (Breyer, J., dissenting).

Congress regulatory authority to protect and foster a national economic market. The other principle, which derives from the structure of Article I and is made even more explicit in the Tenth Amendment, seeks to limit Congress's authority in a way that leaves a substantial regulatory domain exclusively to the states. These two principles, although fully compatible in the radically more localized world of late Eighteenth century America, now conflict. The central issue of modern constitutional federalism concerns the appropriate response to this conflict.

Part I of this Essay will show that the Justices in *Lopez* evaded modern federalism's central issue by ignoring the conflict between federalism's two first principles. Consequently, the competing views of federalism found in *Lopez* are, at best, radically incomplete and, at worst, disingenuous.

#### A. *The Majority and Concurring Opinions*

In striking down the Gun-Free School Zones Act,<sup>7</sup> the majority and concurring Justices relied upon the principle of limited federal authority.<sup>8</sup> From this premise, the majority reasoned that Congress's power to regulate interstate commerce must have limits.<sup>9</sup> The Court concluded that the Act in question had to be invalidated, otherwise Congress's commerce authority would have no meaningful limits.<sup>10</sup>

The majority's premise, that the Constitution envisions a sphere of private activity in which states alone may regulate, is indisputably correct. This is an inevitable corollary of the principle of limited federal legislative power, which is expressed in the text of Article I<sup>11</sup> and even more clearly in the Tenth Amendment.<sup>12</sup>

The problem is that the majority's premises are incomplete, for the Constitution also envisions Congressional regulatory authority over activity impeding an effective interstate economy.<sup>13</sup> The Commerce Clause, as well as other powers enumerated in Article I,<sup>14</sup> can be seen

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7. 18 U.S.C. § 922(q).

8. 115 S. Ct. at 1626, 1628-29, 1633.

9. *See id.* at 1633-34.

10. *See id.* at 1632-34.

11. The very first sentence in Article I states that: "All legislative Powers *herein granted* shall be vested in a Congress of the United States . . ." U.S. CONST., art. I, § 1 (emphasis added). The Article proceeds to enumerate certain subjects on which Congress has power to legislate. *See id.* art. I, § 8.

12. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.* amend. X.

13. *See id.* art. I, § 8, cl. 3.

14. The Commerce Clause provides that "Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States . . ." *Id.* art. I, § 8, cl. 3. Other

to reflect three judgments: (1) that a well functioning interstate economy is in the common interest, (2) that state governments cannot always be relied upon to further that end, and (3) that Congress should thus have regulatory authority. These judgments imply the existence of congressional regulatory authority over activity having a significant adverse impact on the functioning of the national economy. Any lesser degree of Congressional authority would be inadequate to the goal of a well functioning interstate economy. The Court's cases have embraced this view of Congress's commerce power ever since "the switch in time that saved the nine."<sup>15</sup>

Only Justice Thomas's lonely concurrence even attempted to dispute that the Constitution was meant to give Congress authority to address intrastate activity that substantially affects the interstate economy.<sup>16</sup> Justice Thomas, who purports himself an "originalist," correctly observed that such a broad view of Congress's authority gives Congress vastly more regulatory authority than the founders anticipated.<sup>17</sup> But his rejection of such a view simply does not follow.

Justice Thomas, whose opinion remarkably made no mention of the radical economic transformations that have occurred since the late Eighteenth century, confuses changes in historical circumstances with changes in constitutional principle. The unanticipated broad scope of Congress's regulatory authority can be readily traced to radical changes in the circumstances in which the Commerce Clause's underlying principle is applied, rather than to alteration of that principle itself. The founders expected that the commerce power "would be used primarily if not exclusively to remove interstate tariffs and to regulate maritime affairs and large-scale mercantile enterprise."<sup>18</sup> This expectation was not because the founders meant forever to limit the commerce power to such activities. Rather, it was because such activities then were perceived as the ones having a significant impact on the interstate

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clauses in Article I give Congress authority to establish post offices and post roads, *id.* art. I, § 8, cl. 7, grant patents and copyrights, *id.* art. I, § 8, cl. 8, establish uniform bankruptcy rules, *id.* art. I, § 8, cl. 4, and coin money, *id.* art. I, §§ 8, cl. 5, 10, cl. 1. These various other powers can be viewed, at least in part, as sharing with the Commerce Clause the common purpose of facilitating the development of an interstate economy.

15. The phrase refers to Justice Roberts's switch of allegiances in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which simultaneously marked the end of the *Lochner* Court, helped defeat President Roosevelt's so-called Court packing plan, and inaugurated the broad view of federal authority that characterizes the modern era of constitutional law. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 181 (2d ed. 1991).

16. See *United States v. Lopez*, 115 S. Ct. 1624, 1645-46 (1995).

17. *Id.*

18. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 583 (1985) (O'Connor, Powell, & Rehnquist, JJ., dissenting).

economy. The range of such activities has expanded greatly, however, due to the radically greater interdependence of economic life precipitated by modern modes of transportation, communication, and production. The principle itself has not changed but, as a result of drastic changes in historical circumstances, the class of activity it covers has.<sup>19</sup>

Whereas Justice Thomas at least squarely confronted the principle that Congress may address activity substantially threatening to the national economy, the majority opinion evaded it. In his dissent, Justice Breyer cited more than 150 academic and governmental sources supporting the conclusions that (1) the problem of guns in and around schools is widespread and has a significant adverse effect on the quality of education, (2) the quality of education exerts a very significant influence upon interstate and foreign commerce, and (3) the adverse effects on the quality of education attributable to gun-related violence near the classroom have a significant impact on interstate and foreign commerce.<sup>20</sup> The majority did not really deny the existence of such an impact. The Court complained that the dissenters had “pile[d] inference

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19. Justice Thomas’s textual and historical arguments also fail to acknowledge the distinction between changes in historical circumstance and of constitutional principle.

As for the text, he maintains that if the commerce power gives Congress authority to address activity substantially affecting the national economy, then Congress’s other enumerated powers, such as the bankruptcy power, would be surplusage because they too affect the national economy. *Lopez*, 115 S. Ct. at 1644 (Thomas, J., concurring). It is certainly true that in today’s integrated national economy, bankruptcies substantially affect interstate commerce, and so a separate grant of authority today would be unnecessary. Article I, however, was drafted in the late Eighteenth century when the overwhelming bulk of economic life, including bankruptcies, had no connection with a national economy. The more plausible inference is not, as Justice Thomas maintains, that the Constitution enumerates powers because the founders thought that such powers concern matters substantially affecting interstate commerce and understood that Congress would otherwise lack authority to regulate such matters. *See id.* It is rather that the Constitution enumerates powers, such as the bankruptcy power, because those plenary grants of authority in substantial part concern matters that in the late Eighteenth century did not greatly affect interstate commerce, and the founders thus understood that the Commerce Clause did not encompass such matters, or at least not clearly so.

As for history, Justice Thomas appears to argue that because the founders thought agriculture to be a state concern, the commerce power now does not embrace the power to regulate agriculture. *Id.* at 1645 (Thomas, J., concurring). The conclusion does not follow. In Eighteenth century America, before the advent of high speed transport and refrigeration, the overwhelming bulk of agriculture had no connection with the interstate economy. An understanding that the commerce power does not extend to agriculture in these circumstances does not imply that Congress may not reach agriculture in the dramatically different circumstances of today.

20. *Lopez*, 115 S. Ct. at 1659-61, 1665-70 app. (Breyer, J., dissenting).

upon inference,"<sup>21</sup> but, tellingly, did not even attempt to dispute any of these inferences.

Instead of implausibly denying either the national economic consequences of the presence of guns in and around schools or Congress's authority to regulate substantial impediments to the national economy, the majority merely reiterated the principle that the Constitution envisions limits on Congress's regulatory authority. The majority opinion maintained that if the adverse economic effects Justice Breyer identified constitute a sufficient basis for congressional regulation, then Congress's commerce power would have no meaningful limits.<sup>22</sup> Such an all-encompassing commerce power, the majority reasoned, would enable Congress to regulate education and domestic relations and would undermine the principle of limited federal power.<sup>23</sup> In response, the majority erected a presumption against federal regulation of noncommercial activities in areas of traditional state regulation.<sup>24</sup>

While the majority correctly perceived that prior doctrine conflicts with the principle of limited federal power, it failed to acknowledge that the doctrine it constructed *also* infringes on one of federalism's fundamental principles. By treating Congress's commerce power as all-encompassing, prior doctrine undermines the principle of limited federal power. Prior doctrine does imply that Congress may, if it so chooses, regulate education, criminal law, and domestic relations.<sup>25</sup> But in a modern "national economy in which virtually every activity occurring within the borders of a State plays a part,"<sup>26</sup> this is an inevitable consequence of the principle that Congress has authority to address significant impediments to an effective national economy. Yet the majority pretended that Congress's authority can be limited without compromising Congress's authority to address national economic problems. By ignoring the conflict between federalism's two first principles, the *Lopez* majority was able to subordinate one to another without offering any reason for doing so.

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21. *Id.* at 1634. The Court could not have meant to suggest seriously that the chain of economic causation Justice Breyer traced out is untrue or illusory *because* it "piles inference upon inference." Due to the almost overwhelming complexity of the national economy, any effort to isolate the effect of one causal factor will pile inference upon inference. Indeed, widely accepted and sophisticated techniques of social and economic analysis, such as multivariate regression analysis, are premised on the notion that causal arguments that pile inference upon inference often do have merit.

22. *Id.* at 1632, 1633.

23. *Id.* at 1633.

24. *See id.* at 1631-33.

25. *See id.* at 1633 (discussing arguments that imply such power).

26. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 583 (1985) (O'Connor, J., dissenting).

### B. *The Dissent*

Like the majority, the dissent<sup>27</sup> relied upon one of federalism's first principles and ignored the other. The dissent merely honored the principle the majority had ignored and ignored the principle on which the majority had relied. The dissent organized its analysis around the principle that Congress was meant to have authority to address significant obstructions to an effective national economy.<sup>28</sup> The dissent pointed out that there are very good reasons to believe that activity the Gun-Free School Zones Act regulates—the presence of guns in and near schools—significantly interferes with an effective national economy.

The dissent's analysis, like that of the majority, was correct as far as it went, but it also suffers from radical incompleteness. The dissent effectively ignored—as did the majority—one of federalism's first principles. Justice Breyer tried to deny that the doctrinal framework in place since 1937 and applied in his opinion violates the principle of limited federal power.<sup>29</sup> But the denial was unpersuasive and disingenuous.<sup>30</sup> Justice Breyer thus left himself open to the majority's charge that

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27. Unless otherwise specified, references to the "dissent" are to Justice Breyer's principal dissenting opinion, in which Justices Stevens, Souter, and Ginsburg joined. *Lopez*, 115 S. Ct. at 1657 (Breyer, J., dissenting). Justices Stevens, *id.* at 1651 (Stevens, J., dissenting), and Souter, *id.* at 1651 (Souter, J., dissenting), each filed a separate dissenting opinion in which no other Justice joined.

28. *Id.* at 1657 (Breyer, J., dissenting).

29. *Id.* at 1661-62.

30. Under modern doctrine, Congress may regulate any activity so long as it has a rational basis for concluding that the broader class of which that activity is a part might have a substantial and harmful economic effect on interstate commerce if left unregulated. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964).

Two features of this test operate to give Congress all-encompassing authority. First, the so-called cumulation principle requires the Court to determine whether the regulated activity substantially affects commerce by considering the entire class of activity. *See Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942). The Court may not "excise, as trivial, individual instances" of such a class. *Perez v. United States*, 402 U.S. 146, 154 (1971) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)). The power of the cumulation principle is further enlarged by the fact that the Court has deferred to Congress's definition of the class of regulated activity. *See Perez*, 402 U.S. at 147; *Heart of Atlanta Motel, Inc.*, 379 U.S. at 246-47; *Katzenbach*, 379 U.S. at 304. As Justice Thomas observed, "[O]ne always can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce." *Lopez*, 115 S. Ct. at 1650.

Second, rather than making its own independent evaluation of whether the regulated activity substantially affects interstate commerce, the Court applies the deferential rational basis test. It asks, in essence, whether Congress would be beyond the bounds of rationality to conclude that the class of regulated activity would, left to its own devices, have a substantial adverse effect on interstate commerce. *E.g., Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264.

“[Justice Breyer] is unable to identify any activity that the States may regulate but Congress may not.”<sup>31</sup>

Just as the majority did not squarely confront the principle on which the dissent based its analysis, the dissent failed to address forthrightly the principle on which the majority based its analysis. Instead of confronting the principle of limited federal power head-on, the dissent merely reiterated the principle that Congress may regulate substantial impediments to a vigorous national economy.<sup>32</sup> It is true, as the dissent pointed out, that the imposition of limits on Congress’s commerce power compromises Congress’s authority to address national economic problems and that Congress was meant to have such authority. It is also true, as the majority observed, that giving Congress authority to address activity significantly interfering with the national economy removes all limits on federal authority and that the Constitution envisions such limits.

### C. *The Conflict Between Federalism’s First Principles*

The debate between the majority and the dissent is one that no one can win. The principles relied upon by the majority and the dissent are both compellingly supported by constitutional text and history. It will not do to ignore one or the other principle, as did both the majority and the dissent in *Lopez*. Analysis instead must begin with the frank recognition that the modern world has brought these two fundamental principles into conflict.

In the highly localized world of the late Eighteenth century, the founders could give Congress authority to address significant impediments to the interstate economy while at the same time preserving a sphere of private activity in which states alone may regulate. As Justice O’Connor explained, “In an era when interstate commerce represented a tiny fraction of economic activity and most goods and services were produced and consumed close to home, the interstate commerce power left a broad range of activities beyond the reach of Congress.”<sup>33</sup>

The economic landscape, however, has changed dramatically. Developments in communication, transportation, and production have transformed the largely agrarian and localized economy of the late

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276-77 (1981). In light of the interdependence of the modern American economy, this is a test that Congress cannot possibly flunk.

31. *Lopez*, 115 S. Ct. at 1632.

32. The dissent accused the majority of inconsistency with the unbroken lines of cases over the last sixty years recognizing Congress’s authority to address national economic problems under the Commerce Clause. *Id.* at 1662-64.

33. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 583 (1985) (O’Connor, Powell, & Rehnquist, JJ., dissenting).

Eighteenth century into an ubiquitous and integrated national economy. As Justice O'Connor further explained: "In the decades since ratification of the Constitution, interstate economic activity has steadily expanded. Industrialization, coupled with advances in transportation and communications, *has created a national economy in which virtually every activity occurring within the borders of a State plays a part.*"<sup>34</sup> No longer is there a sphere of purely local activity which is not inextricably intertwined with the national economy.

The founders could have their cake and eat it too, but we in the modern world cannot: Federalism's two first principles now conflict unalterably.

To give the states a significant regulatory sphere all their own compromises Congress's authority to address national economic problems. It blinks reality to suggest, as the majority implicitly did, that aspects of family life and education do not have a very considerable impact on the national economy.<sup>35</sup> In the political realm, conservatives attribute grave national economic consequences to deteriorations in family life, the removal of traditional values from education, and excessive tort liability. It is not a little ironic that legal conservatives should draw formalistic doctrinal lines enforcing blindness to the possibility of such effects.

The problem is that giving Congress authority to address national economic problems denies the states a significant sphere in which they alone may regulate. It also blinks reality to suggest, as the dissent implicitly did, that upholding Congress's full authority to regulate national economic problems preserves judicially enforced limits on Congress's power.

### III. RESPONDING TO THE CONFLICT

The most pressing issue in modern constitutional federalism centers on the proper response to the conflict between federalism's first principles. Because the conflict did not exist in the founders' world, the Constitution's text and history furnish no real answer. This Part addresses how the Court should respond to the conflict in light of the inadequacy of such traditional sources of constitutional meaning. It first catalogues some problems with Professor McAllister's "pragmatic" defense of *Lopez*.<sup>36</sup> It then offers two arguments for leaving the scope of Congress's regulatory authority to the voters and their elected

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34. *Id.* (emphasis added).

35. *Lopez*, 115 S. Ct. at 1632-33.

36. See Stephen R. McAllister, *Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause?*, 44 KAN. L. REV. 217, 225 (1995).

representatives in the national political process. One argument focuses on substance, the other on process.

#### A. Professor McAllister's Pragmatism

In defending *Lopez*, Professor McAllister favors a "pragmatic" approach that "attempts to consider many factors—both 'legal' and empirical—that could bear upon the appropriate resolution of a legal question."<sup>37</sup> Even if pragmatism is a useful general approach,<sup>38</sup> the specific considerations Professor McAllister identifies support neither the result in *Lopez* nor its doctrinal rules.

First, in arguing that the constitutional text undercuts the dissent's position and supports judicially-imposed limits on Congress's regulatory authority, Professor McAllister falls into the same trap as the majority. Like the majority, he correctly points out that the doctrine embraced by the dissent is inconsistent "with constitutional text or structure"<sup>39</sup> because it violates the principle of limited federal power by making Congress's regulatory authority all-encompassing. But, again like the majority, he fails to acknowledge that in the modern world the imposition of limits on Congress's authority *also* conflicts with constitutional text or structure by compromising Congress's authority to address significant national economic problems.<sup>40</sup> The Constitution's

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37. *Id.* at 226.

38. Professor McAllister's brief discussion raises some legitimate questions about the definition and justification of his approach. Professor McAllister maintains that a pragmatic approach avoids the subjectivity and countermajoritarian nature of a moralistic approach. *Id.* at 225-26. Yet pragmatism is itself one type of moral theory. *E.g.*, 2 ENCYCLOPEDIA OF ETHICS 1002 (Lawrence C. Becker & Charlotte B. Becker eds., 1992). That theory has been criticized precisely because it is more malleable, ill-defined, and subjective than other moral theories. *E.g.*, Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, in PRAGMATISM IN LAW & SOCIETY 359, 370-71 (Michael Brint & William Weaver eds., 1991). On one level, it is hard to disagree with the pragmatic insistence on the moral and legal relevance of the consequences of the various alternative courses of action. But subjectivity and malleability arise from the pragmatist's proclivity for evaluating those consequences based on atheoretical judgments about what "works" rather than on a considered set of theoretical principles. A pragmatic approach to the resolution of constitutional questions would thus seem to allow unelected judges to take into account whatever factors they deem relevant and weight each factor as they see fit. Such an apparently standardless approach, while perhaps defensible on other grounds, seems to compound the very problems of subjectivity and countermajoritarianism that Professor McAllister seeks to combat.

39. McAllister, *supra* note 36, at 228.

40. Like the Court, Professor McAllister uses the terms "not commercial" and "social" to describe the presence of guns in and around schools. *Id.* at 238. These conclusory labels, however, do not deny the activity's impact on the national economy. Like the Court, Professor McAllister does not dispute any of the analytical steps, outlined in Justice Breyer's dissent, leading to the conclusion that the presence of guns in and around schools has significant effects on the national economy.

text cannot responsibly be read to strike a balance between constitutional principles and purposes that were not in conflict when the text was drafted.<sup>41</sup>

Second, the burden that federal regulation imposes on the federal courts<sup>42</sup> does not serve to justify *Lopez's* formalistic categories. Because virtually all regulation imposes a burden on the courts, this across-the-board consideration obviously cannot justify a presumption against federal regulation in only certain areas, such as in areas of noncommercial activities and traditional state regulation. Further, while the burden on courts is clearly relevant to the question of whether to regulate, constitutional federalism does not seek to decide the desirability of regulation. The burden seems irrelevant to the question that constitutional federalism seeks to decide: The allocation of regulatory authority between the state and federal governments. If regulation of a given matter is desirable, then federalism does not favor imposition of the regulatory burden on state rather than federal courts. Indeed, if one conceives of federalism as especially solicitous of state interests, as the Court sometimes does, federalism argues in favor of having federal courts shoulder—or at least share—the regulatory burden.

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Perhaps the terms not commercial and social are meant to refer to Congress's motives in enacting the Gun-Free School Zones Act. Yet any judicial test that purports to distinguish between commercial and not commercial legislative motives encounters the problem of ascertaining the collective motive of multimember bodies such as the House and the Senate. In addition, as civil rights legislation illustrates, national economic problems inevitably have both economic and noneconomic dimensions. The inevitable presence of mixed economic and noneconomic motives, and the ease with which illicit motives are disguised and licit ones highlighted, further compound the difficulties a motive test would raise. Finally, the very distinction between economic and moral motives is a misleading artifice. Economic views are, at bottom, moral. In deciding whether and how to regulate, Congress must decide how to reconcile the competing economic interests of individuals and groups. In reconciling these economic interests, Richard Posner would emphasize wealth maximization; Richard Epstein, property rights; John Rawls, equality; Thomas Jefferson, self-sufficiency; and so on. The choice among these criteria is ultimately moral. For all of these reasons, a motive test threatens to be either a meaningless charade or, as with the *Lochner* Court, a vehicle for the Court to overturn legislation based upon its own disguised and undefended moral judgments. See *supra* note 3.

41. One cannot tease out of the text *Lopez's* narrow definition of commercial activities. A fundamental tenet of legal interpretation holds that words should be read so as to effectuate their purposes. It is true that the principle of limited federal power would support a narrow definition of commercial activity. But such a narrow reading would be divorced from the animating purpose of the Commerce Clause, which is to facilitate an effective interstate economy. Given the overriding purpose of the Commerce Clause and the impact of the presence of guns in and near schools on the interstate economy, one should want to include this activity in the definition of commercial. Even if the term commercial had a settled meaning that could not plausibly encompass such activity, Congress should be able to reach it under the Necessary and Proper Clause.

42. See *McAllister*, *supra* note 36, at 233.

Finally, the doctrinal lines drawn in *Lopez* cannot be defended persuasively as advancing the cause of personal liberty. Professor McAllister maintains that “[b]y limiting congressional regulation of activities that are not obviously commercial in nature and which the states traditionally have regulated, the Court carved out several categories of conduct that typically involve personal liberty for heightened judicial protection.”<sup>43</sup> Yet the history of the Civil Rights movement, the Fourteenth Amendment, and James Madison’s views<sup>44</sup> all cast serious doubt on any contention that state governments are better guarantors of personal liberty than the federal government.<sup>45</sup>

Even if one indulges the assumption that state authority does promote individual liberty better than federal authority, this would not make judicial review of asserted federal incursions on state authority either necessary or appropriate. Unlike constitutional civil liberties, state authority does not serve the cause of individual liberty by protecting members of discrete and insular minorities who are unable to protect themselves in the political process and who thus stand in need of countermajoritarian judicial protection. If state authority enhances individual liberty, it does so through the mechanism of empowering state majorities. The fact that state majorities are well represented in the national political process suggests the appropriateness of letting that process decide the limits on national authority. In short, the relationship between state authority and the protection of individual liberty seems questionable and, therefore, justifies neither a judicial resolution of federalism questions generally nor the doctrinal lines enunciated in *Lopez*.<sup>46</sup>

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43. *Id.* at 241.

44. Madison’s famous argument that the federal government will better protect liberty is set forth in THE FEDERALIST NO. 10.

45. See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 250-54 (1980); D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 629 (1985). It is hard to understand how the result in *Lopez* advances the cause of personal liberty. The Gun-Free School Zones Act was designed to enhance the liberty of school children. It cannot plausibly be viewed as a serious infringement upon liberty. Even if it could, the fact that some 40 states have enacted essentially the same law hardly suggests that states are better guarantors of personal liberty.

46. The doctrinal categories laid down in *Lopez* cannot be defended on the ground that it facilitates state and federal governments “act[ing] as a counter to each other, in just the fashion Madison and other Framers may have desired.” McAllister, *supra* note 36, at 241. Madison favored a general federal veto power over state legislation. See Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 485-86 (1941). Madison’s idea, and the strategy the Constitution employs respecting the separation of powers, both suggest that the ability of state and federal governments to check one another depends on overlapping and concurrent authority. *Lopez*, however, creates a zone of

### B. A Substantive Argument

In deciding how to resolve the modern conflict between federalism's first principles, one can try to draw guidance from federalism's underlying values. This Section contends that *Lopez* is remarkably insensitive to these values, in terms of both the result it reaches and the doctrinal categories it erects. This Section also maintains that federalism's underlying values are best advanced by leaving the appropriate mix of federal and state authority to the voters and their elected representatives in the national political process.

The principal virtues associated with vesting regulatory authority in the states include a greater responsiveness to local conditions and values, a greater degree of regulatory experimentation, the promotion of a sometimes desirable competition among governmental units for taxpayers, a greater opportunity for citizens to participate in government, and a greater accountability of smaller units of government to individual voters.<sup>47</sup>

The principal virtues associated with federal regulatory authority include the possibility of uniform nationwide standards, a larger base of expertise on which to draw, avoidance of the "externalities" problem of state or local governments benefitting insiders at the expense of outsiders, and avoidance of "the race to the bottom" in which state and local governments compete for large taxpayers by foregoing desirable regulation or taxation.<sup>48</sup>

In the modern world, the interaction of these underlying values is quite complex. In the founders' world, the absence of an activity's tie to the national economy was a conclusive indicator that the values of federalism clearly favored exclusive state regulation.<sup>49</sup> Thus, the primary question for courts was whether there was a colorable basis for a federal regulatory role. The primary question for the courts today is quite different. Because all activity is tied in some way to the national

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exclusive state authority in which the federal and state governments cannot possibly check one another.

47. For useful discussions, see Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1488 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)); Erwin Chemerinsky, *Rehabilitating Federalism*, 92 MICH. L. REV. 1333, 1341-42 (1994) (reviewing SAMUEL H. BEER, *HOW TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* (1993)); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 380-414.

48. McConnell, *supra* note 47, at 1499-1500.

49. The absence of an activity's connection with the interstate economy meant that there was no real need for uniformity, no danger of states benefitting insiders at the expense of outsiders, and no prospect of a disastrous race to the bottom as a result of competition to attract out-of-state taxpayers. Once these concerns are eliminated, the benefits of satisfying local preferences and furthering participation become decisive.

economy, there is *always* a colorable basis for a federal regulatory role. The question now is this: Given that there is a *colorable* basis for federal regulatory authority, do federalism's values, *on balance*, favor a federal regulatory role? The answer to this question entails a complex balancing of federalism's underlying values.

### 1. The Insensitivity of *Lopez* to Federalism's Underlying Values

*Lopez* erects at least a strong presumption against any federal regulatory role respecting noncommercial activities in areas of traditional state regulation. The relationship between these fixed and formalistic lines and the complex interaction of federalism's underlying values is at best coincidental.

The Court's categories at least presumptively preclude any federal authority over activities having very significant national economic consequences. Education, domestic relations, criminal activity, and tort liability all have a very substantial impact on the national economy. Given that the text of the Commerce Clause focuses on the national economy, an activity's impact on the national economy furnishes a strong indication that at least one of federalism's underlying values favors a regulatory role. The Court's categories, however, seek to deny the federal government even concurrent authority over such matters.

A more explicit focus on federalism's values highlights the insensitive formalism of the Court's doctrinal categories. Based on those values, one can construct a strong argument for some federal regulatory role in education, for example. The interstate mobility of students and graduates produces a need for uniformity as well as spillover consequences and free-rider problems that may require interstate attention. On the other side of the balance, the interests in promoting experimentation and satisfying diverse preferences point toward the desirability of state regulation. Whether and to what extent federalism's values, on balance, support a federal regulatory role is a difficult question that has no obvious answer. The *Lopez* Court's doctrinal constructs, however, at least presumptively prohibit any federal regulatory role. They are impervious not only to an activity's impact on the national economy, but also to the complex interaction of federalism's underlying values and the balancing required to determine their net effect.

Federalism's underlying values also do not offer any strong support for the result in *Lopez*. Exclusive state or federal regulatory authority is not the only option. As the Medicaid program and anti-drug laws indicate, joint or concurrent federal and state regulation is also a possibility. The Gun-Free School Zones Act is an area in which federalism's underlying values offer considerable support for joint federal and state regulation. Those values, in fact, do not offer any

support for exclusive state regulatory authority. Given that “over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds,”<sup>50</sup> exclusive state regulatory authority is not needed to accommodate diverse values that vary significantly from state to state. Nor is exclusive state authority needed to foster experimentation. The Gun-Free School Zones Act did not preempt the states from trying any of the alternative regulatory measures Justice Kennedy identified in his concurrence.<sup>51</sup>

While federalism’s underlying values offer no real support for exclusive state authority over the activity at stake in *Lopez*, some of those values favor a concurrent federal role. The impact of the regulated activity—gun proliferation in schools—on the national economy<sup>52</sup> suggests that federalism’s values colorably support a federal role. Furthermore, the strength of voter preferences, as evidenced by the number of states having such a law,<sup>53</sup> suggests the desirability of joint federal and state efforts. As with the enforcement of anti-drug laws, the addition of federal regulatory authority brings considerable additional resources to bear on a problem that voters evidently regard as important. Thus, *Lopez* did not invalidate an exercise of federal power that is clearly contrary to federalism’s underlying values. Indeed, there were no good reasons for favoring exclusive state authority. *Lopez* arbitrarily precluded voters from deploying the joint federal and state resources to address a social, moral, and economic problem they evidently regard as acute.

It misses the point to complain, as do Professor McAllister and others, that the Gun-Free School Zones Act was purely an exercise in political symbolism.<sup>54</sup> The Constitution gives judges no general license to strike down laws they think silly. Even if it did, one wonders how the assertedly empty symbolism of the Gun-Free School Zones Act favors exclusive state authority. Over 40 states have enacted essentially the same law.<sup>55</sup>

## 2. The Desirability of a Political Resolution

Although the argument in this Essay has only centered on the failures of one judicial approach, any judicial approach is likely to be deficient

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50. *United States v. Lopez*, 115 S. Ct. 1624, 1641 (1995) (Kennedy, J., concurring).

51. *Id.* Although the Act obviously preempted the states from using alternative schemes to displace the one adopted in the Act, it did not preempt the states from employing alternatives in addition to the Act’s scheme.

52. *See supra* notes 20-21 and accompanying text.

53. *See supra* note 50 and accompanying text.

54. McAllister, *supra* note 36, at 230.

55. *See supra* note 50 and accompanying text.

in realizing federalism's underlying values. The only analytical framework that seems sufficiently sensitive to the complex and context dependent interaction of federalism's underlying values is a balancing test that explicitly weighs the various factors.<sup>56</sup> In combination, three considerations comfortably support leaving such balancing to the national political process rather than the federal judiciary.

First, federalism aims to empower political majorities on the state and national levels<sup>57</sup> and such majorities are presumably better able than the federal judiciary to gauge their own interests. Because both types of majorities are effectively represented in the national political process, the outcome of the national political process would seem to furnish a reliable indicator of those interests.

Second, because the net effect of federalism's underlying values depends on a host of contestable and revisable judgments of policy and prediction, it is better determined by the trial and error of the political process. In part, an assessment of the overall import of federalism's values depends on which regulatory goals are desirable.<sup>58</sup> In part, the balancing of federalism's values depends on contestable empirical judgments and predictions.<sup>59</sup> It is for good reason that judgments of policy and prediction such as these are typically left to the legislative

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56. As an alternative to a balancing approach, the Court could draw a constitutional line between state and federal authority based on the degree to which the activity in question affects the national economy. Such a test, however, raises problems of definition and judicial competence. More fundamentally, it is not sufficiently sensitive to federalism's underlying values. The degree of an activity's impact on the national economy does not determine the mix of federal-state authority that federalism's values, on balance, favors. For instance, education exerts a very strong impact on the national economy. *See supra* text accompanying notes 20-21. Notwithstanding the strength of this effect, however, some of federalism's underlying values strongly point toward state authority.

57. *See infra* text accompanying notes 63-64.

58. For example, if regulatory goals that work to redistribute resources from the more to the less affluent are deemed desirable, state authority risks precipitating a race to the bottom. If nonredistributivist goals are deemed desirable, then competition among state and local governments for large taxpayers might produce desirable consequences. *See McConnell, supra* note 47, at 1499-1500.

59. For example, one relevant factor is the extent of an activity's impact on the national economy. Given the complexity of the national economy and the absence of conclusive empirical studies this factor always will be the subject of reasonable disagreement. In addition, there is empirical evidence casting doubt on the degree to which state authority facilitates experimentation and promotes political participation and democratic governance. Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594 (1980); *see* D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 631 n.310 (1985) ("Most modern studies of state and local governments demonstrate that voter participation in state and local elections is even lower than in national elections and that these subnational governments are more likely to be controlled by one political party and responsive to the demands of special interest groups."). That this evidence is debatable is precisely the point.

process. The relevant considerations ultimately resolve themselves into an all-things-considered judgment about what mix of state and federal authority "works best." It makes little sense for federal judges to freeze an ever-increasing set of answers to this question into the Constitution. The flexibility of the political process is better suited to the contestable, revisable, and evolving nature of such answers.

Third, as the 1994 congressional elections illustrate, federalism's underlying values do play an important role in the national political process. National political debate does not revolve solely around the question of whether and how to regulate. The question of which level of government, state or federal, should regulate receives considerable attention and, indeed, furnishes a main point of division between the two major political parties.

Professor McAllister and others express skepticism about Congress's sensitivity to federalism's underlying values.<sup>60</sup> Professor McAllister observes that members of Congress engage in political grandstanding and are subject to undue influence by organized interest groups, that there are no formal mechanisms requiring members of Congress to consider the impact of their actions on state and local autonomy, that the newly elected Republican Congress did not repeal the Gun-Free School Zones Act, and that the Republican Congress seeks to federalize tort law to some degree.<sup>61</sup>

What is missing from Professor McAllister's observations, however, is a recognition that members of Congress are accountable to the electorate. If the voters believe that members of Congress or the President do not strike the right balance between federal and state authority, then they can vote them out of office. Federalism seeks to achieve its aims not by shielding politically powerless minorities from all adverse governmental action, but rather by empowering state and national political majorities. Both sets of majorities are adequately represented in the national political process. A battery of contestable empirical and policy judgments is required to determine the net effect of federalism's interacting values. These constitute good reasons for letting the electorate decide the appropriate mix of state and federal authority.

### *C. A Process Argument*

According to one major strain of constitutional thought, the object of judicial review is to redress defects in the political process rather than

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60. McAllister, *supra* note 36, at 230.

61. *Id.*

to implement substantive values.<sup>62</sup> On such an account, for instance, the judiciary needs to interpret and enforce constitutional civil liberties because those guarantees protect discrete and insular minorities who are unable to protect their interests in the political process. This Section argues that in the context of asserted federal incursions on state authority, there is no process defect for the judiciary to cure, no discrete and insular minority or other politically powerless group standing in need of judicial protection.

The standard political process analysis of federalism focuses on whether the interests of *state governments* are adequately represented in the national process.<sup>63</sup> Commentators and the Justices alike have intensely debated this question. In focusing on and attaching priority to state governments rather than political majorities, the standard analysis asks the wrong question. It is the People, and not state governments or the federal government, who have ultimate sovereignty in our constitutional system.<sup>64</sup> Of course, the Constitution treats state governments as one of the institutional voices of the People. State governments are not ends in themselves, however; they exist as a means to the end of serving the People. It is for precisely this reason that James Madison wrote in the Federalist Papers that the People should be able to decide the appropriate mix of state and federal authority in the national political process.<sup>65</sup> The sovereignty of the People implies that political majorities ultimately constitute the appropriate institutional voice of the People. In the event of conflict between state government and state political majorities, the latter should prevail. The overriding question, then, should be whether state political majorities, rather than

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62. *E.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

63. CHOPER, *supra* note 45, at 171-259 (1980); HERBERT WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 49-82 (1961).

64. *E.g.*, THE FEDERALIST NO. 46, at 315 (James Madison) (Jacob E. Cooke ed., 1961); SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 244-307 (1993) (federalists rejected the view of the Constitution as a compact among states in favor of popular sovereignty); Chemerinsky, *supra* note 47, at 1340.

65. THE FEDERALIST NO. 46, *supra* note 64, at 317. After stressing that ultimate sovereignty rests with the People and that the legitimacy of both state and federal government springs from this source, Madison declared that if the People come to favor the federal government over state governments, they "ought not surely to be precluded from giving most of their confidence where they may discover it to be most due . . ." *Id.* Madison thought it highly likely that the People would remain partial to state government "because it is only within a certain sphere, that the federal power can, in the nature of things, be advantageously administered." *Id.* Nonetheless, Madison thought that the People ought to be free to follow their judgment regarding the "proofs of a better administration . . ." *Id.*

Madison wrote this, of course, before the modern world had thrown federalism's first principles into conflict. The existence of this conflict and the necessity of making contestable empirical and policy judgments to resolve it further strengthens Madison's already powerful point.

state governments, are adequately represented in the national political process.

It is easy to conclude that state political majorities are adequately represented in the national political process. State majorities, or subdivisions thereof, elect Representatives to the House. State majorities are represented equally in the Senate. In combination, state majorities elect the President through the popular vote and also through the electoral college.

A political process view thus affords no basis whatever for judicial review of Congress's asserted incursions into state regulatory authority. The state political majorities that constitutional principles of federalism ultimately seek to empower are well-represented in the national political process. Interestingly, a political process rationale justifies judicial intervention only in the converse situation of asserted state incursions into federal regulatory authority. The national majorities whose interests the principles of federalism seek to protect are obviously not represented in the political process of any state.

It is of course true that the national political process suffers from serious deficiencies that impede its ability to reflect the will of political majorities or, for that matter, to effectuate federalism's underlying values. For instance, the undue influence of organized interest groups impedes the ability of the national political process to reflect the electorate's desires generally, including their desires regarding the appropriate balance of state and federal authority.

The existence of such defects, however, does not supply a rationale for the drawing of judicial lines between state and federal authority. Such lines do not respond to such defects in the national political process, which sometimes afflict state political processes to an even greater degree. It makes little sense for the Justices to draw a line giving certain matters to a defective national political process and other matters to defective state political processes. Defects in the national and state political processes that distort or muffle the electorate's voice should be confronted directly rather than through judicially adopted rules that do not address such defects and, in fact, leave them intact.

#### IV. CONCLUSION

The Constitution embraces two fundamental tenets concerning the distribution of regulatory authority between the federal and state governments. It contemplates both a federal government with limited powers and a federal government with enough power to address significant impediments to an effective interstate economy. Although compatible in the founders' world, these two bedrock principles conflict in today's pervasive and integrated national economy. The proper

response to this conflict is to leave the distribution of authority between the federal and state governments to the national political process. The need to effectuate federalism's underlying values and the political process theory both support such a resolution.

*Lopez* is profoundly lacking as a response to the conflict between federalism's fundamental tenets. The majority and the dissent in *Lopez* both ignore the conflict, implicitly subordinating one tenet to another without offering any reason at all for doing so. The majority's approach pretends that matters such as education, domestic relations, and crime have no significant national economic consequences, that federalism's underlying values furnish no colorable support for federal regulation over such matters, and that no analysis is needed to determine the net effect of those often conflicting values. The dissent's approach pretends that the post-*Lochner* doctrine preserves judicial limits on Congress's commerce power. It offers no justification for dispensing with such limits and leaving the matter to the national political process. The Justices can and should do better.