Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause?

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I. INTRODUCTION

In United States v. Lopez, the Supreme Court of the United States, for the first time in a long time, held that Congress had exceeded its constitutional authority under the Commerce Clause when it enacted the Gun-Free School Zones Act of 1990. In particular, the Court invalidated a statutory provision making 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." The Court's decision in Lopez has garnered considerable attention from the media, legal scholars, and public policymakers.

In the Lopez case, Antonio Lopez, a senior at a high school in San Antonio, Texas, was arrested and charged with violations of Texas law when he was discovered with a firearm on school premises. The state charges against Lopez were dismissed the next day after federal prosecutors charged him with violating the Gun-Free School Zones Act.
Act. After being convicted in a bench trial, Lopez appealed to the United States Court of Appeals for the Fifth Circuit, contending that the federal statute was unconstitutional because it was not within Congress’s power under the Commerce Clause. The Fifth Circuit agreed with Lopez and reversed his conviction.

The Supreme Court granted certiorari and affirmed by a 5-4 vote. Writing for the majority, Chief Justice Rehnquist examined the history of the Court’s Commerce Clause jurisprudence and concluded that congressional power to regulate commerce falls into three broad categories: (1) regulation of the channels of interstate commerce; (2) regulation of the instrumentalities of or persons or items moving in interstate commerce; and (3) regulation of activities having a substantial effect on interstate commerce. The Court determined that the Gun-Free School Zones Act could be upheld, if at all, only under the third category because it did not involve the regulation of the channels or instrumentalities of interstate commerce. The Court held that the Act was not justified under the third category because the mere act of possessing a gun in a school zone neither has a substantial effect on interstate commerce nor involves a commercial activity.

Justice Kennedy filed a concurring opinion, joined by Justice O’Connor, in which he examined the text, structure, and history of the Constitution, the Court’s historical and modern Commerce Clause jurisprudence, political theory, and the difficulty of formulating judicial standards for enforcing federalism. He concluded that the Court had a constitutional role to play in determining the scope of Congress’s Commerce Clause power, and he explained why, in his view, Congress had exceeded its constitutional authority when it enacted the Gun-Free School Zones Act. Justice Thomas concurred to admonish the Court for not adhering to an originalist and historical understanding of the

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6. Id.
7. Id.
10. Id. at 1629-30.
11. Id. at 1630.
12. Id. at 1630-34. One federal district judge in Kansas reached the same result last year, although for somewhat different reasons. See United States v. Trigg, 842 F. Supp. 450, 453 (D. Kan. 1994) (Belot, J.) (finding the Gun-Free School Zones Act to be unconstitutional because there were no congressional findings or legislative history supporting a connection between the regulated conduct and interstate commerce); contra United States v. Glover, 842 F. Supp. 1327, 1336 (D. Kan. 1994) (Kelly, C.J.) (rejecting constitutional challenge to Gun-Free School Zones Act), rev’d, 57 F.3d 1081 (10th Cir. 1995).
14. Id.
Commerce Clause, and he suggested that such an approach be considered in a future case. Justice Stevens and Souter filed individual dissenting opinions and Justice Breyer filed a dissenting opinion joined by Justices Stevens, Souter, and Ginsburg. The thrusts of the dissents were that the possession of guns in school zones does have a significant effect on interstate commerce and that the determination of the proper scope of Congress's power under the Commerce Clause is primarily, if not exclusively, a political question to be decided by Congress rather than enforced by the courts.

*United States v. Lopez* presents a refreshing opportunity to reexamine and reconsider "first principles" of our constitutional system of government. The case directly raises questions regarding the nature of congressional authority and American federalism. This Essay analyzes some of the ideas and arguments addressed in the Court's opinions in *Lopez* and in the commentary which followed. In so doing, the Essay advocates a pragmatic approach to the problems of constitutional power and federalism. Ultimately, it concludes that Justice Kennedy's concurring opinion offers the most pragmatic—and therefore the most desirable—approach to these important, fascinating, and difficult issues, at least in the context presented in *Lopez*.

Putting aside for a moment the question whether the Supreme Court correctly decided *United States v. Lopez*, it does not appear that the Court's decision worked any revolutionary curtailment of congressional power. The economic and technological homogenization of the nation

15. *Id.* at 1642-51 (Thomas, J., concurring).
16. *Id.* at 1651 (Stevens, J., dissenting); *Id.* at 1651-57 (Souter, J., dissenting).
17. *Id.* at 1657-65 (Breyer, J., dissenting).
18. *Id.* at 1626.
20. Subsequent actions of the Court itself clearly demonstrate that pronouncements that *Lopez* signals a radical departure from precedent and a new era in Commerce Clause jurisprudence are at this time unwarranted and vastly overblown. See, e.g., United States v. Robertson, 115 S. Ct. 1732, 1733 (1995) (per curiam) (affirming RICO conviction of defendant who invested unlawfully obtained funds in a gold mine in Alaska, concluding that, because the mine purchased some supplies from outside Alaska and employed workers who came in from out of state, it was directly engaged in interstate commerce and, therefore, was within the reach of the RICO statute). Compare Edwards v. United States, 13 F.3d 291 (9th Cir. 1993), vacated and remanded, 115 S. Ct. 1819 (1995) (mem.) (Gun-Free School Zones Act case granted, vacated and remanded for reconsideration in light of *Lopez*) with Moore v. United States, 25 F.3d 1042 (4th Cir. 1994) (per curiam) (upholding a federal arson statute conviction for burning a house in South Carolina that was connected to interstate gas and telephone lines), cert. denied, 115 S. Ct. 1838 (1995) (mem.) (Scalia, J., dissenting: "Justice SCALIA would grant the petition, vacate the judgment and remand the case" for reconsideration in light of *Lopez* and Ramey v. United States, 24 F.3d 602 (4th Cir. 1994), cert. denied, 115 S. Ct. 1838 (1995) (mem.) (upholding a federal arson statute conviction
during this century leaves relatively few activities without some substantial nexus to interstate commerce. Indeed, many, if not most, activities regulated by Congress fall within the first two categories identified by the Lopez majority and are unaffected by the Court's decision. Thus, the true impact of Lopez is not practical but philosophical. The Supreme Court understandably reminded Congress that it is not the sole arbiter of its own constitutional power. Perhaps most importantly, Lopez reaffirms that the Supreme Court is serious about the concept of federalism.

II. A BRIEF HISTORY

A. Early History

The original form of national government adopted in this country under the Articles of Confederation was too decentralized and gave the national government too little authority to be effective. In less than ten years, the citizens of this country recognized that government under the Articles of Confederation was unworkable and unsatisfactory. Thus, a distinguished group of white male citizens gathered in Philadelphia in 1787 to draft a constitution which would create a new form of national government.

A few general observations about the convention and the constitution which emerged are essential. First, through the Constitution, the Framers clearly intended to expand federal (i.e., national) power. One of the critical problems with the Articles of Confederation is that they failed to give the federal government sufficient authority to address matters of national concern or even to raise revenues for the operation

for burning a trailer in West Virginia that received electricity through an interstate power grid) (Scalia, J., dissenting: "Justice SCALIA would grant the petition, vacate the judgment and remand the case" for reconsideration in light of Lopez). Even Laurence Tribe, the well-known liberal constitutional scholar from Harvard Law School, says the importance of Lopez has been "massively overblown." Stuart Taylor, Jr., Judging with Pinpoint Accuracy: The Supreme Court's Decision that Congress Couldn't Ban Guns in Schools was Ill-Timed in Light of the Oklahoma City Tragedy, but the Court's Reading of the Commerce Clause Seems Correct, THE RECORDER, May 8, 1995, at 10. See also David O. Stewart, Back to the Commerce Clause: The Supreme Court has Yet to Reveal the True Significance of Lopez, 64 A.B.A. J. 46, 48 (July 1995) (suggesting that the Court's decision in Robertson indicates that the Commerce Clause revolution "was over as quickly as it began.").


22. One noted commentator observed recently that, although it is difficult to agree on the Framers' intent and understanding with respect to many issues, "there does seem to have been wide consensus on a few issues, among them that the powers of the national government were to be limited and that courts would play a role in policing the limits." Larry Kramer, Understanding Federalism, 47 VAND. L. REV. 1485, 1495 (1994).
of the government. Several of the Framers, for example, hoped to reduce state governments to mere “planets” orbiting the federal “sun.”\footnote{See, e.g., \textit{Irving Brant, James Madison: Father of the Constitution} 1787-1800, at 36-38 (1950) (discussing the Framers’ use of this “astronomical comparison”).} Indeed, Hamilton proposed that state governors be appointed by the President,\footnote{See, e.g., \textit{The Origins of the American Constitution} 38 (Michael Kammen ed., 1986).} and Madison wanted Congress to have a veto power over state laws.\footnote{See, e.g., 1 \textit{Records of the Federal Convention of 1787}, at 449 (Max Farrand ed., 1911); \textit{Brant, supra} note 23, at 36; \textit{Merrill Jensen, The Making of the Constitution} 67, 95 (1979).}

Second, notwithstanding the first proposition, most of the Framers believed that the Constitution granted limited powers to the federal Congress, primarily those enumerated in Article I, section 8 of the Constitution. “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”\footnote{\textit{The Federalist} No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961); see also Kramer, \textit{supra} note 22, at 1495 n.18 (“Certainly the argument that Congress was given limited power is uncontroversial. This was, after all, one of the critical compromises that made the Constitution possible.”).}

Third, the Framers created a “federal” system by giving the national government certain powers while permitting state and local governments to retain control over many matters. This aspect of our government “was the unique contribution of the Framers to political science and political theory.”\footnote{United States v. Lopez, 115 S. Ct. 1624, 1638 (1995) (Kennedy, J., concurring).} The difficult question that the \textit{Lopez} decision addresses is how to implement federalism. The historical evidence does not provide any clear answer as to how the Framers intended the federal-state relationship to be defined,\footnote{Moreover, it may not be a question to which the answer is the same in all contexts. See, e.g., Kramer, \textit{supra} note 22, at 1486 (suggesting “that what federalism ‘is,’ what it ‘means,’ looks different depending on the area examined and the question asked”).} nor is there necessarily an obvious or logical answer to the question. Thus, \textit{Lopez} is a difficult case.

Madison believed that the federal and state governments were to control each other,\footnote{\textit{The Federalist} No. 51 (James Madison).} and that they would hold each other in check by competing for the affections of the people.\footnote{\textit{The Federalist} No. 46 (James Madison).} Indeed, there is historical support for the proposition that the Framers intended the federalism balance of power to be determined solely by political processes. “[T]he people ought not surely to be precluded from giving most of their
confidence where they may discover it to be most due.” 31 On the other hand, Madison himself made declarations which support a contrary conclusion that the Constitution requires the Supreme Court to enforce a federalism balance. “[T]he State governments could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered.” 32

The ratification debates provide a further mixed bag of evidence that can be used either to support or to undermine the proposition that the federalism balance should be determined by the courts or solely by the political processes. Perhaps complicating matters in this context is the Tenth Amendment, which provides that “[t]he 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.” 33 Arguably, the Tenth Amendment serves to emphasize further that the Constitution, as originally understood, did not create a national government of unlimited powers. Again, however, there is contrary evidence, in that the first Congress considered but (at Madison’s urging) rejected a proposal to modify the language of the Tenth Amendment to limit the federal government’s powers to those “expressly” granted it by the Constitution. 34 Thus, the Tenth Amendment and its history, although frequently relied upon as evidence of the original understanding of states’ rights, is far from conclusive on the question.

B. The Supreme Court’s First 150 Years

Relatively early in its history, the Supreme Court addressed the scope of congressional power under the Commerce Clause. Chief Justice John Marshall gave the Commerce Clause its first extensive consideration in Gibbons v. Ogden. 35 Chief Justice Marshall observed that “[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, . . . . and is regulated by prescribing rules for carrying on that intercourse.” 36 Importantly, he declared that Congress’s commerce power “is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in
Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. He cautioned, however, that "[c]omprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one."

For the remainder of the Nineteenth century, the Supreme Court dealt rarely with the scope of Congress's Commerce Clause powers. Most of the Court's Commerce Clause decisions addressed the limits the "dormant" Commerce Clause placed on state legislation that discriminated against or interfered with interstate commerce. Then, in the late Nineteenth and early Twentieth centuries, following the passage of the Interstate Commerce Act of 1887 and the Sherman Antitrust Act in 1890, the Court held that Congress could not regulate activities such as "production," "manufacturing," and "mining" because they did not involve "commerce," the "intercourse" between states described by John Marshall in Gibbons v. Ogden. These cases relied upon what most people today would consider untenable distinctions. In a related line of cases, the Court also drew a distinction between activities which had a "direct" effect on interstate commerce (and thus could be regulated by Congress) and those which had only an "indirect" effect (and which Congress could not reach). Again, given the realities of our modern, sophisticated national economy, this distinction may seem untenable to many.

C. The Modern Era

Beginning in 1937, with its decision in NLRB v. Jones & Laughlin Steel Corp., the Court started to move away from a restrictive, historical definition of "commerce" and the direct versus indirect distinction. In Jones & Laughlin Steel Corp. the Court held that intrastate activities which "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" are within the power of Congress to regulate. That trend continued in several

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37. Id. at 9.
38. Id. at 7.
40. See, e.g., id. (citing cases).
41. 22 U.S. (9 Wheat.) at 4-5.
42. See, e.g., A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935) (striking down federal regulations that fixed the hours and wages of individuals employed by an intrastate business because the activity affected interstate commerce only indirectly).
43. 301 U.S. 1 (1937).
44. Id. at 37.
subsequent cases, culminating in what may rightly be considered the case representing the commerce power at its zenith—*Wickard v. Filburn*.

In *Wickard*, the Court upheld a federal law that regulated the production and consumption of homegrown wheat by a small farmer who raised wheat for his own use on his own farm. The Court expressly rejected the distinction between direct and indirect effects on interstate commerce, and held that it did not matter that Filburn had a minimal effect, if any, on interstate commerce, because his activity, "taken together with that of many others similarly situated, [was] far from trivial." *Wickard* ushered in the concept that Congress could regulate—under its Commerce Clause authority—any activities, even though individually de minimis or trivial, which cumulatively could be argued to have an effect on interstate commerce.

Until *Lopez*, *Wickard* represented the modern conception of Congress’s commerce powers. But, at least standing alone, it may be an inadequate baseline against which to measure and evaluate *Lopez*. Before one attributes the shift in the direction of the Court’s Commerce Clause jurisprudence during the New Deal era solely to newfound wisdom on the part of the Supreme Court or to a modern, enlightened approach to the realities of modern day commerce, it is worth remembering and recognizing the context in which that jurisprudential shift occurred. The Court’s change of heart occurred only after President Roosevelt threatened to make a mockery of the Court as an independent, apolitical institution by drastically expanding its membership and packing the Court with his cronies. Whether the Supreme Court would have altered its course as quickly or at all, or in the same fashion, absent the unjustified political pressure that President Roosevelt brought to bear on the Justices, is a fair and debatable question.

**D. Congressional Expansion of the Commerce Power**

Since *Wickard*, Congress has often invoked its commerce authority to support and justify federal legislation addressing not only commercial activities, but social problems. For example, the Commerce Clause, not the Fourteenth Amendment, was deemed the primary source of constitutional authority supporting the major civil rights statutes of the

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46. 317 U.S. 111 (1942).
47. Id. at 133.
48. Id. at 125.
49. Id. at 127-28.
50. See generally, POSNER, OVERCOMING LAW, supra note 19, at 215-28.
1960s.\textsuperscript{51} In some important respects that notion appears completely justifiable and, indeed, there may be other sources of constitutional authority on which Congress successfully could have relied in passing such legislation. Other social problems addressed by Congress, however, have less obvious connections to interstate commerce or any other authority granted by the Constitution. Indeed, many modern statutes appear to represent little more than political grandstanding by Congress, with no thought or attention paid to their actual connection to interstate commerce. Recent examples of such federal legislation include statutes criminalizing carjacking,\textsuperscript{52} domestic violence,\textsuperscript{53} arson,\textsuperscript{54} the failure to pay child support,\textsuperscript{55} and the liberation of research animals.\textsuperscript{56} Examples of civil regulatory programs based on an expansive view of the commerce power include prohibitions on wetlands destruction\textsuperscript{57} and potentially some aspects of the current tort reform efforts.\textsuperscript{58}

III. A PRAGMATIC APPROACH TO FEDERALISM

The most plausible methodology to employ when interpreting the Constitution, in particular, is some form of pragmatism. The limits of an originalist approach are manifest in a case such as Lopez, where the

\textsuperscript{51} Indeed, it was Wickard and its rationale on which the Court expressly relied in upholding important non-discrimination provisions in the Civil Rights Act of 1964. See e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257-58 (1964); Katzenbach v. McClung, 379 U.S. 294, 300-02 (1964).


\textsuperscript{54} 18 U.S.C. § 844(i) (1994) (making it a federal crime to destroy by fire property used in interstate commerce). The Supreme Court denied certiorari in two such cases upholding federal arson convictions immediately following its decision in Lopez. See supra note 20.


original intent regarding the scope of Congress’s commerce power is quite unclear and, indeed, much of the evidence is contradictory. Moreover, the realities of a modern economy, which the Framers could not possibly have foreseen, probably would make such an interpretation-al approach unacceptable even were original intent crystal clear. Similarly, a purely moralistic or individual rights approach often may not provide much guidance in dealing with structural problems such as federalism or the separation of powers. Moreover, any approach grounded in moral considerations is fraught with a level of subjectivity that is unacceptable to many and often has a tendency to result in significant infringement on democratic processes.

As this Essay views the term, a “pragmatist” attempts to consider the many factors—both “legal” and empirical—that could bear upon the appropriate resolution of a legal question. Thus, in evaluating the Court’s decision in *Lopez*, this Essay considers: (1) the text and structure of relevant constitutional provisions, including historical evidence relating to those provisions, (2) the realities of the modern American economy, (3) political realities, (4) the effect of congressional utilization of an expansive commerce power on the federal courts, (5) the difficulty of formulating judicial standards to enforce the concept of federalism, and (6) the values of federalism. Some may criticize this pragmatic approach as no methodology at all, but, from this author’s experience, at least in the hands of a capable and open-minded judge, this approach comes closest to acknowledging that judging is a very human process which frequently involves the weighing and balancing of complex and substantial competing interests.

A. Text, Structure and History

Probably the most persuasive textual/structural argument in favor of the *Lopez* decision is that the Constitution created a federal government of enumerated powers. Exactly what those powers are is obviously a question subject to serious debate and one which probably will never be resolved. That the Constitution contemplates some limits on federal power, and that the Court long has so interpreted that document, is indisputable. For example, Article I itself lists several powers granted expressly to Congress. Likewise, the Tenth Amendment reserves powers not granted to Congress to the States. If the Constitution bestowed upon Congress an unlimited police power, in the guise of commerce powers or otherwise, there would be no need for Article I to

59. As a member of the United Methodist Church, I often hear remarks that Methodists do not really believe in anything because they are not known for highly publicized, unbending stances on sensitive social issues, unlike some other denominations.
list specific powers granted to Congress, nor would there be any powers for the Tenth Amendment to reserve to the states. The historical evidence tends to support the foregoing propositions, at least at a general level.\textsuperscript{60}

Although John Marshall long ago declared 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,\textsuperscript{61} the Commerce Clause, if expansively interpreted and combined with the Necessary and Proper Clause, indeed renders "many of Congress' other enumerated powers under Art. I, § 8 . . . wholly superfluous.\textsuperscript{62} An expansive interpretation of the commerce power, in this day and age, essentially confers upon Congress a general police power of the type historically thought reserved to the states. The grant of such authority to Congress, however, is not directly responsive to the Framers' concerns regarding interstate commerce,\textsuperscript{63} even if it is

\begin{itemize}
  \item \textsuperscript{60} See e.g. \textit{The Federalist No. 45}, at 292-93 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 415, 421 (1819) (Marshall, C.J.) ("The [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 7-8 (1824) (Marshall, C.J.) ("The enumeration presupposes something not enumerated . . . .").
  \item \textsuperscript{61} \textit{Gibbons}, 22 U.S. (9 Wheat.) at 9.
  \item \textsuperscript{62} United States v. Lopez, 115 S. Ct. 1624, 1644 (Thomas, J., concurring) (listing as examples of unnecessary Article I powers in light of an expansive commerce power the following: (1) the power to regulate bankruptcy, U.S. CONST. art. I, § 8, cl. 4; (2) the power to coin money and fix standards of weights and measures, id. art. 1, § 8, cl. 5; (3) the authority to punish counterfeiters, id. art. 1, § 8, cl. 6; (4) the power to establish post offices and post roads, id. art. 1, § 8, cl. 7; (5) the authority to regulate patents and copyrights, id. art. 1, § 8, cl. 8; and (6) the power to punish crimes on the high seas, id. art. 1, § 8, cl. 10). Thus, Justice Thomas concluded that "much if not all of Art. I, § 8 . . . would be surplusage if Congress had been given authority over" all matters that "affect interstate commerce." \textit{Lopez}, 115 S. Ct. at 1644 (Thomas, J., concurring).
  \item \textsuperscript{63} With respect to the commerce powers of the federal government, Madison, one of the strongest proponents of federal power, appears to have been concerned primarily with the inability under the Articles of Confederation to implement national economic policies that would protect American commerce against foreign interests and the meddling of the states, not with giving Congress the ability to legislate regarding social problems in the guise of its commerce power. See e.g. James Madison, \textit{Preface to Debates in the Convention of 1787, in 3 The Records of the Federal Convention of 1787}, at 547 (Max Farrand ed., 1911). \textit{reprinted in 2 The Founders' Constitution} 483 (Philip B. Kurland & Ralph Lerner eds., 1987). Madison stated:

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The want of authy. in Congs. to regulate Commerce had produced in Foreign nations particularly G. B. a monopolizing policy injurious to the trade of the U. S. and destructive to their navigation; the imbecility and anticipated dissolution of the Confederacy extinguishg. all apprehensions of a Countervailing policy on the part of the U. States.
\end{quote}
\end{itemize}
desirable in some respects. Nor is it consistent with the Constitution’s express recognition that plenary authority resides in Congress with respect to the District of Columbia and the United States territories.64 These constitutional provisions surely suggest that “Congress was not ceded plenary authority over the whole Nation.”65 Indeed, in stark contrast to the proliferation of federal criminal statutes, the Constitution expressly authorizes Congress to punish crimes in only four contexts.66

The Tenth Amendment also merits consideration. It is true that the Supreme Court generally has not interpreted the Tenth Amendment as imposing significant or rigid independent limitations upon the authority of the federal government. Rather, the Court has, by and large, adopted a pragmatic approach to the Tenth Amendment. For example, the Court recently recognized that “[t]he Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government’s role.”67 Nonetheless, it is at least arguable that an expansive Commerce Clause jurisprudence comes “close to turning the Tenth Amendment on its head,” by “reserv[ing] to the United States all powers not expressly prohibited by the Constitution.”68 Again, even if such a result is desirable, it is not consistent with constitutional text or structure.

A major difficulty with the dissents in Lopez is that the dissenting justices fail to take these textual and structural considerations into account. Nowhere in the dissenting opinions do the dissenting Justices overtly grapple with Article I or the Tenth Amendment, nor do they

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64. See U.S. Const. art. I, § 8, cl. 17 (“The Congress shall have the Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . .”); id. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .”).

65. Lopez, 115 S. Ct. at 1644 n.3 (Thomas, J., concurring).

66. See U.S. Const. art. I, § 8, cl. 6 (counterfeiting); id. art I., § 8, cl. 10 (piracy and felonies on the high seas); id. art. I, § 8, cl. 17 (crimes on federal property); id. art. III, § 3 (treason).


68. Lopez, 115 S. Ct. at 1645 (Thomas, J., concurring).
expressly address constitutional structure in this context. Rather, by contending that the federalism balance should be left to the political process, the dissenters tacitly endorse giving Congress the opportunity to transform the federal government from a government of enumerated powers into a government of general police powers. In essence, the dissenters give no meaning to most of Article I, section 8 or the Tenth Amendment. Instead, they apparently would allow Congress to interpret or ignore those constitutional provisions as it sees fit.

B. Economic Reality

The global nature of the modern American economy probably exceeds any expectations the Framers might have harbored, and it is unlikely that any of them could have foreseen such a complex and intertwined set of economic relationships. Thus, except under perhaps an originalist approach to interpreting the Constitution, a rigid or narrow view of congressional commerce power probably is unwarranted, unrealistic, and unacceptable.69 Indeed, as Justice Kennedy correctly observed, "[T]he Court as an institution and the legal system as a whole have an immense stake in the stability of [the Court's] Commerce Clause jurisprudence as it has evolved to this point . . . . That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy."70 The majority in Lopez correctly recognizes modern economic realities and the importance of acknowledging congressional power to regulate matters truly involving or affecting interstate commerce.71 Lopez properly does not affect congressional regulation of either the channels of interstate commerce or the goods or persons that move in or are the instrumentalities of interstate commerce.72 Rather, Lopez comes into play only when Congress seeks to regulate activities that have no such connection to commerce and which traditionally have been regulated by the states.

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69. A good example of the anomaly of such an approach is Justice Holmes's opinion for the Court in Federal Baseball Club v. National League of Professional Baseball Clubs, 259 U.S. 200, 208-09 (1922), in which he concluded that professional baseball games do not affect interstate commerce, and therefore are not within the reach of the federal antitrust laws, because the game itself is the essential thing and a game takes place solely within one state. Almost seventy-five years later, the ramifications of that anachronistic holding are still being felt in the professional baseball industry.
70. Lopez, 115 S. Ct. at 1637 (Kennedy, J., concurring).
71. See id. at 1629-30.
C. Political Reality

Perhaps the most difficult inquiry to resolve in evaluating the Lopez decision is the question whether the states’ interests in local autonomy are adequately represented in Congress. The proposition that they are is the basis for the dissenters’ conclusion that the federalism balance should be left to the political process.73 The proposition that they are not is strong justification for the majority’s conclusion that judicial oversight is essential.

Does Congress represent the interests of the states as states? It does not, at least not consistently so. This observation holds true whether Congress is controlled by the Democrats or the Republicans. It is true, at the least, that there are no formal congressional mechanisms or procedures requiring members of Congress to consider the impact their actions will have on state and local autonomy. In this regard, Justice Kennedy declared that “the absence of structural mechanisms to require [congressional] officials to undertake [the] principled task [of maintaining the federal balance], and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role.”74 He is not the first Justice to observe that Congress has an “underdeveloped capacity for self-restraint.”75

This view of Congress is not necessarily unflattering; it is simply realistic. Modern congressional figures often are lobbied by and receive substantial funding from numerous national interest groups. Members of Congress develop independent constituencies among groups such as farmers, the poor, environmentalists, the elderly, minorities, laborers, gun owners, and business, each of which has its own national agenda and often supports or opposes particular national initiatives. This identification, coupled with the substantial financial resources these groups provide to members of Congress, undoubtedly causes at least some members of Congress to identify less with state interests and the positions of state officials than with national constituencies.

The detachment of members of Congress from their state governments is in part an understandable, and perhaps even desirable, result of direct popular elections and the weakening of political parties. State officials have much less influence over the outcome of congressional elections than they once had. The availability of national funding and resources often gives members of Congress a distinct financial advantage in elections against opponents who are truly local and who

73. See Lopez, 115 S. Ct. at 1657-58 (Breyer, J., dissenting).
74. Lopez, 115 S. Ct. at 1639 (Kennedy, J., concurring).
do not have ready access to national constituencies. Moreover, the national media also creates incentives for members of Congress to cater to the demands of national constituencies. A politician with a national reputation and national resources may not need the assistance of state officials in order to be re-elected term after term.

The sense that members of Congress are not responsive to concerns of state and local autonomy may well be a primary motivating force behind the recent term limits movement in this country. Although the Supreme Court dealt that movement a constitutional knockout—at least for the time being\(^{76}\)—the importance of that movement as evidence for the proposition that members of Congress have not always been, or at least are not perceived to be, sensitive to the interests of the states as states should not be discounted.

Nor does the election of 1994 appear likely to have altered the fundamental nature of congressional politics in this respect. Certainly, that election proves that voters are capable of replacing large numbers of representatives in Congress if the voters are dissatisfied with those officials' performances. What the election of 1994 fails to demonstrate, however, is that the nature of congressional debate—including Congress's ability to engage in self-restraint—has been altered in any fundamental way. It is true that the Republicans now in control of Congress have introduced several pieces of legislation that they claim are designed to get the federal government off the states' backs. Close examination, however, of the proposed legislation and the rhetoric accompanying it reveals that, at bottom, much of the dispute is over social programs and social policy in general, and not simply whether certain matters are to be regulated by the states rather than by the federal government.

Moreover, the Republicans themselves have demonstrated a marked responsiveness to the same types of national interest groups that typically have influenced Democratic congressional politics. For instance, if the Republicans were truly loyal to the concept of federalism, it is not at all clear why they would support the federalization of state tort law, a major portion of their overall "reform" package. Tort law always has been the province of the states — even the Federal Tort Claims Act simply borrows state tort law for its rules of decision — and an argument can be made that much of the conduct that tort law addresses simply is not commercial in character. Thus, like Antonio Lopez's conduct in possessing a firearm on school property, much of the conduct typically regulated by state tort law arguably falls within

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the third category the Court identified in *Lopez.* 77 Nonetheless, the Republicans, at the behest of corporate interests, are eager to impose a significant and restrictive layer of federal regulation over existing state tort law.

Another political aspect of the federalism problem is the effect that nationalizing law has on local responsibility and accountability. The Supreme Court has suggested that "[f]ederalism serves to assign political responsibility, not to obscure it." 78 Of course, one way to assign responsibility would be to make the federal government generally responsible for everything. For a variety of reasons, however, that is unlikely to happen and, thus, the question remains, for what problems are each of the two layers of our federal system of government responsible? If Congress simply picks and chooses the situations in which it desires to step in and effectively override state autonomy (i.e., by exercising a general police power in response to political expediencies, as appears to have been the situation in *Lopez,* or by attaching federal conditions to federal monies, which it does routinely), then the relationship between federal and state authority is blurred and may result in ineffective as well as inefficient government. State officials may become either reluctant to act (fearing to address problems when there is a significant possibility that the national government will soon step in) or complacent (preferring to leave politically sensitive and costly problems to the national government), or both. The net effect of nationalization is not completely clear, but it is at least plausible to suggest, as Justice Kennedy did, that "[w]here the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." 79

Another difficulty with the proposition that the federalism balance should be left solely to the political process is that there is no logical stopping point to the scope of congressional power under the Commerce Clause. The dissenting justices in *Lopez* do not offer a single example of when Congress might exceed its Commerce Clause authority. Nor could the Solicitor General of the United States offer one when specifically asked for an example during the oral argument of the case. 80 Thus, if defining the concept of federalism is to be left to the political processes, one legitimately may inquire whether there is any constitu-

77. See supra text accompanying note 10.
79. *Lopez,* 115 S. Ct. at 1638 (Kennedy, J., concurring).
80. See United States v. Lopez, No. 93-1260, 1994 WL 758950, at *5-6, Tr. of Oral Arg. (Nov. 8, 1994).
tional reason why Congress could not regulate school curricula, family
law, or virtually any other conduct of which one can conceive. In fact,
the practical reality is that, once Congress regulates conduct by enacting
a law, political inertia makes it very difficult to ever remove that layer
of federal regulation by repealing a federal statute. Even if the Republic-
cans are more interested than the Democrats in returning power to the
states, a proposition that certainly is debatable, they did not appear in
the least interested in repealing the Gun-Free School Zones Act
following their rise to power in the election of 1994. As a matter of
political reality, leaving the determination of the scope of the commerce
power solely in the hands of Congress is, in at least many instances,
likely to work as a one-way ratchet in the direction of ever-increasing
federal regulation.

D. The Effect on the Operation and Efficiency of the Federal Courts

The interests of the federal courts, which must adjudicate cases
arising under statutes such as the Gun-Free School Zones Act, necessar-
ily will be considered in determining what activities Congress may
appropriately regulate. Perhaps such considerations should be legally
irrelevant and, indeed, no Justice in Lopez mentions this factor.
Nonetheless, it is plausible to suggest that the Justices were thinking in
these terms, and it is unrealistic to think that judges deciding cases can
be completely prevented from considering the courts’ own interests.

There is no dispute that federal court dockets have increased vastly
in terms of the number of cases filed during the past two decades.
Much, if not most, of that increase has been due to the increased
federalization of criminal law, particularly drug and firearms offenses. 81

The almost overwhelming increase in federal criminal cases, at least
in some jurisdictions, has had several potentially deleterious effects on
the operation of the federal courts. First, the sheer number of such
cases virtually ensures that federal judges will not have as much time
as they formerly did to consider and decide important civil rights cases
or important civil disputes involving commercial or other matters.
Second, speedy trial requirements put criminal cases on the fast track
and push them ahead of civil cases for trial time, making it extremely
difficult in some jurisdictions to obtain a trial in a civil case in anything
remotely approaching a timely and efficient fashion. Third, the tedium
of presiding over dozens of criminal drug cases per year and mechani-

81. See, e.g., Stephen Chippendale, Note, More Harm Than Good: Assessing Federalization
sources indicating that the federal courts’ criminal docket grew seventy percent from 1980 to 1990,
and that criminal cases now consume at least half of federal judges’ time).
cally applying the Sentencing Guidelines, while having little time for other types of cases, undoubtedly takes an intellectual toll on bright and motivated judges, some of whom have given up the life tenure of a federal judgeship at a relatively young age in order to return to the private sector.

An unarticulated but undoubtedly substantial concern of the Justices in Lopez must have been the effect of statutes such as the Gun-Free School Zones Act on the role and work of the federal courts. Not too long ago, when Congress considered, but fortunately did not enact, a proposal to make any offense involving a firearm a federal crime, the federal judges went on record as opposing such legislation because it could have overwhelmed some federal district courts with criminal cases. How the federal courts should spend their time is an important question to ask and consider when defining the concept of federalism because the courts are, after all, an important part of the federal system. Is the country better served by a federal judiciary that spends the majority of its time dealing with routine criminal matters, or with a federal judiciary that has ample time for civil litigation, including civil rights, federal regulatory and substantial commercial cases?

Moreover, some federal statutes require federal intervention in situations that the federal government realistically is not equipped to handle, even if there were more judges and caseloads were not so heavy. These same statutes often require the duplicative expenditure of federal and state resources without regard to whether there is a commensurate benefit. The Gun-Free School Zones Act is a perfect example. Given the nature of the offense the statute created—possessing a firearm in a school zone—it was likely, if not probable, that most offenders would be juveniles (almost all public school students, except for some high school seniors or a few students who have repeated grades, are under the age of 18). But the federal government’s criminal justice system at this time is not equipped to deal with juvenile offenders. And why should it be? Juvenile offenses traditionally have been the almost exclusive province of the states and, indeed, in the Lopez case, the State of Texas already had made Antonio Lopez’s conduct a criminal offense. The federal prison system, unlike the Texas

system, generally does not include juvenile detention centers, and federal statutes generally do not establish procedures for juvenile offenders. Furthermore, and not surprisingly, Congress provided no resources for the enforcement of the Gun-Free School Zones Act. No money was appropriated for additional law enforcement agents, prosecutors, or judges, nor was money provided for juvenile detention facilities.

Indeed, federal regulation of the possession of firearms in the schools seems completely unnecessary. The fact that more than forty states already had laws criminalizing such conduct undermines the argument that any layer of federal regulation was necessary. Nor is there any plausible argument that federal authorities had either additional resources or superior expertise that would make federal prosecution of such offenses preferable to state prosecution. The reality is quite the contrary. Texas filed the first charges against Antonio Lopez but the federal government effectively forced state prosecutors out of the picture, perhaps for political reasons. Congress allocated no money earmarked for enforcement of the Gun-Free School Zones Act, nor was the offense likely to involve some sort of interstate conspiracy or other characteristics that traditionally have signaled a need for federal law enforcement.

These considerations may sound, at least in part, like an argument that the Gun-Free School Zones Act was foolish legislation, which it was. Interpretation of the Commerce Clause to give Congress broad power to nationalize areas of law traditionally left to the states, however, seriously impacts the operation of the federal courts. Realistically, one cannot expect the judges to ignore such considerations, nor should they necessarily, unless the proposition that the federal courts have limited jurisdiction is to be abandoned altogether. Given the reality of human judging, it is difficult—if not impossible—to expect the judges not to be aware of such considerations, even if they do not articulate them expressly in their opinions, as appears to have been the case in *Lopez*.

**E. The Difficulty of Developing Judicially Enforceable Standards**

1. **To Intervene or Not to Intervene?**

Another aspect of a pragmatic evaluation of *Lopez* is the question whether there are any feasible and practicable standards that the judiciary can apply in enforcing the concept of federalism. "Of the various structural elements in the Constitution, separation of powers, checks and balances, judicial review, and federalism, only concerning the last does there seem to be much uncertainty respecting the exis-
tence, and the content, of standards that allow the judiciary to play a significant role in maintaining the design contemplated by the Framers.\textsuperscript{85} Thus, as all of the opinions in the \textit{Lopez} case recognize, the fundamental inquiry for the Supreme Court is whether it has a role to play in defining the concept of federalism. Although the proper answer to that inquiry is debatable, as Justice Kennedy wisely noted, "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the Court] to admit inability to intervene when one or the other level of Government has tipped the scales too far."\textsuperscript{86} Even Justice Breyer, in dissent, admitted that "I recognize that we must judge this matter independently."\textsuperscript{87} Thus, the real question perhaps is not whether the judiciary has the obligation to enforce any limits on Congress's power under the Commerce Clause, but how it should go about doing so. On the other hand, the questions of whether to assume a role and what standard to apply in enforcing the concept of federalism may essentially be one and the same. Judicial review with no teeth, requiring complete deference to the political processes, as the dissenters would have the Court do, is little different than no judicial review at all.

The difficult and important question is whether the courts can identify, develop, and apply standards of review of congressional legislation in this context in a meaningful and consistent way. As Justice Kennedy pointed out, the Supreme Court previously has created judicial standards for several situations involving federalism concerns, including but not necessarily limited to: (a) abstention, (b) diversity jurisdiction (the \textit{Erie} doctrine), (c) the adequate and independent state ground doctrine, (d) preemption doctrine, and (e) federal habeas corpus jurisprudence.\textsuperscript{88} The Commerce Clause, admittedly, perhaps is more difficult for the Court to administer, as the Court's own past experience demonstrates beyond little doubt. Nonetheless, interpreting the clause does not seem an impossible task and difficulties inherent in doing so might be viewed simply as justification for adopting a cautious approach to the question of congressional power rather than supporting the complete abdication of a judicial role. Other examples of active federal judicial intervention in state affairs in the absence of express constitutional authorization or guidance include the Court's dormant Commerce Clause jurisprudence\textsuperscript{89} and the Court's capital punishment

\textsuperscript{86} Id. at 1639 (Kennedy, J., concurring).
\textsuperscript{87} Id. at 1658 (Breyer, J., dissenting).
\textsuperscript{88} See id. at 1639 (Kennedy, J., concurring).
\textsuperscript{89} The dormant Commerce Clause is the Court's recognition of an implicit constitutional limit—derived by implication from the Commerce Clause itself—on the states' ability to regulate
jurisprudence under the Eighth Amendment, both areas in which the Court has created a plethora of constitutional rules largely without strong grounding in constitutional text, structure, or history.

Similarly, it is not a convincing answer to respond that the situation presented in Lopez was too complex, as an empirical matter, for the federal courts to intervene, unless one is willing to support judicial abdication of constitutional responsibility for resolving many problematic social issues. Indisputably, the empirical questions surrounding the appropriate mix of federal and state regulation in order to achieve an efficient or optimal utilization of resources are complex. The argument that they are too complex for the federal courts to resolve, however, faces at least two substantial objections. First, it does not seem realistic to think that Congress will either consciously resolve federalism issues in proposing and enacting federal legislation or that it will rely upon any sort of empirical inquiry into the effects of federal versus state versus shared regulatory authority. Second, and perhaps more fundamentally, the argument suggests that any question which involves complex empirical factors that may not be susceptible to ready or concrete determination should be placed outside the sphere of the federal courts’ authority. That proposition may well be defensible, but it suggests that, for instance, the federal courts have no competency to decide issues such as whether a woman has a constitutional right to have an abortion (which necessarily involves complex subsidiary issues regarding the status of the fetus from both a medical and ethical standpoint) or whether a person should have the right to choose to terminate life support systems. Although the arguments on both sides are substantial, the Constitution may well have something to say about these issues, and the federal courts thus must have some responsibility in resolving such questions.

Assumption of an obligation to interpret the scope of the Commerce Clause in a meaningful way does not require judicial second-guessing of congressional policy judgments, nor will it necessarily require judicial “activism” in any meaningful or threatening sense. The dissenters’ assertion that Lopez signals a return to the sort of judicial activism exemplified by Lochner v. New York, a judicial activism long abandoned by the Court and widely discredited by scholars and

commerce. Although that jurisprudence has no strong basis in the text of the Constitution, it is faithful to the Framers’ concerns regarding state interference with commerce. Thus, the Court’s dormant Commerce Clause jurisprudence arguably is more legitimate than its modern commerce power jurisprudence, at least when viewed solely from a historical perspective.

91. 198 U.S. 45 (1905).
commentators, is simply incorrect. In *Lopez*, the Court is not addressing whether the problem of guns in the schools is serious or whether the means Congress chose to address the problem (making possession on school grounds a federal criminal offense) is rational or otherwise appropriate. Instead, the Court inquired whether the activity Congress sought to regulate, an activity which has no obvious connection to interstate commerce, nonetheless has a substantial effect on interstate commerce justifying the federal exercise of Commerce Clause power.\textsuperscript{92} *Lopez* by no means must be read as a signal that the Supreme Court is generally or inappropriately interested in second-guessing the wisdom of congressional policy judgments.\textsuperscript{93}

2. What Standard?

The remaining question, even assuming the federal courts are ready and willing to play a role in enforcing federalism, is by what standard the courts should evaluate the scope of Congress’s power under the Commerce Clause. Justice Kennedy’s concurring opinion in *Lopez* proposes standards that are most consistent with a pragmatic approach to answering this question. Justice Kennedy makes a legitimate attempt to reconcile the competing considerations, giving Congress considerable leeway in its regulation of matters involving interstate commerce while at the same time retaining a meaningful role for the judiciary in enforcing the limits of congressional power.

Essentially, Justice Kennedy proposes a rational basis review unless “neither the actors nor their conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus.”\textsuperscript{94} When the regulated conduct is not obviously commercial in character, the next step would be to “inquire whether the exercise of national power seeks to intrude upon an area of traditional

\textsuperscript{92} Cf. *Lopez*, 115 S. Ct. at 1650 n.9 (Thomas, J., concurring) (stating that the Court was merely determining whether the Gun-Free School Zones Act exceeded congressional authority as defined by the Constitution).

\textsuperscript{93} Several commentators, including some not-so-conservative ones, acknowledge that the Gun-Free School Zones Act was unnecessary at best. See, e.g., Herman Schwartz, United States v. *Lopez*: The Feds Lose a Piece of their Rock: Court Tries to Patrol a Political Line, LEGAL TIMES, May 8, 1995, at 25, 28 (Congress’s intrusion into local criminal law enforcement “is foolish and destructive”); Taylor, supra note 20, at 10 (the statute “was neither a good law nor a necessary one”); George F. Will, Rethinking 1937, NEWSWEEK, May 15, 1995, at 70 (the statute was the result of one of Congress’s “frequent fits of grandstanding about crime”). That observation, however, is as much related to the concerns that Congress has made an unwarranted intrusion into an area of sovereignty traditionally exercised by the states and that Congress was attempting to regulate an activity that was not obviously commercial in nature as it is related to any concern about the wisdom of the statute.

\textsuperscript{94} *Lopez*, 115 S. Ct. at 1640 (Kennedy, J., concurring).
Thus, for example, congressional legislation of conduct that is not commercial in character and which involves fields such as education, family law, possibly tort law, and perhaps even some aspects of criminal law such as juvenile offenses, would be suspect under *Lopez* and receive heightened judicial scrutiny. This hardly reflects a radical and unwarranted departure from the Court's jurisprudence of the past sixty years.

Only if a court determined that a congressional enactment satisfied the foregoing two requirements—(1) no obvious commerce connection and (2) an area of traditional state concern—would there be a serious question regarding the constitutionality of the legislation under the Commerce Clause. At that point, Justice Kennedy proposes that the Court answer a determinative question that is essentially pragmatic in nature: Is a single, national solution to the problem necessary? He suggests that this inquiry be made by pursuing several related sub-questions. First, is there one indisputably best approach to the problem, or is the appropriate response to the problem debatable and subject to experimentation? Second, have the States already addressed the problem? Third, will the federal enactment legally or effectively "foreclose[] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise"? Justice Louis Brandeis, a revered liberal justice, long ago recognized that "[d]enial of the right [of states] to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." 

Applying the foregoing standards to the Gun-Free School Zones Act, it is fairly clear, although not beyond dispute, that the statute exceeded congressional power under the Commerce Clause. The Gun-Free School Zones Act is an example of federal legislation which both (1)

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95. *Id.*
96. The Supreme Court has long recognized, for example, that Congress has "no general right to punish murder committed within any of the States," and "Congress cannot punish felonies generally ...." *Cohen v. Virginia*, 19 U.S. (6 Wheat.) 82, 113, 114 (1821) (Marshall, C.J.).
97. *Lopez*, 115 S. Ct. at 1641 (Kennedy, J., concurring).
98. "While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Id.* (Kennedy, J., concurring).
99. *Id.*
regulated activity that was not obviously commercial in nature and (2) intruded upon an area of the law traditionally controlled by the states. Without the presence of those two preconditions, heightened judicial review and the consequentially increased likelihood of the invalidation of federal legislation under the Commerce Clause simply is not warranted. The Lopez dissenters argued that the majority's standards create legal uncertainty regarding the scope of Congress's power under the Commerce Clause. Undoubtedly that is true, but it hardly seems a compelling argument. The dissenters would remove uncertainty by ceding to Congress the authority to determine the scope of its own power under the Constitution. Judging, particularly good judging, recognizes the uncertainties inherent in the law and makes an honest effort to grapple with the problematic issues. "[S]o long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty.'"101

F. The Values of Federalism

A factor that will strongly influence thinking about the appropriate division or allocation of state and national authority is the question of what values federalism serves or should serve. One federalism value could be to maximize governmental efficiency by placing responsibility for various matters in the government that has the most expertise or that is in the best position to resolve any problematic issues with the least expenditure of resources. Yet another value could be to maximize personal liberty by diffusing sovereign power for the protection of individual freedom. These are legitimate federalism values, and there undoubtedly are others.

In identifying which, if any, of the foregoing values ought to guide federalism jurisprudence, constitutional history is relevant and useful. This is not simply because it is history, i.e., the point is not that an originalist approach is determinative, but because history and the Framers' thinking may help illuminate reasons for federalism. As noted previously, the Framers desired a central government that had adequate power to govern the states as a nation but they clearly feared the threat that they believed centralized power posed to individual liberties. Out of this concern the Bill of Rights was born.

The subsequent history of this country illustrates that a mix of federal and state power probably best serves the interests of liberty. For example, while many states were busy depriving individual citizens of

101. Lopez, 115 S. Ct. at 1633 (citation omitted).
their rights and liberties during the 1950s and 1960s, Congress and the Warren Court utilized federal power to override and eliminate many of those state abuses. On the other hand, as later Congresses have sometimes narrowed or eliminated federal funding or protection of individual liberties, and the Burger and Rehnquist Courts sometimes have narrowed the scope of federal constitutional protections of individual liberties, many state legislatures and state courts have rediscovered and revived individual rights protections contained in their own state constitutions. The point is not that either the federal or the state governments are better protectors of individual liberty, but that the two often act as a counter to each other, in just the fashion Madison and other Framers may have desired.

Examining the value of personal liberty in the context of *Lopez*, it is not difficult to argue that the Court’s approach serves to protect rather than to impede traditional individual liberties. By 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. For instance, other areas that may fall within the scope of the *Lopez* rule include the family, education, and tort law. Federal intervention in these areas—perhaps by virtue of imposing uniform federal standards—may well intrude into the liberties traditionally associated with the formation and raising of a family, the education of children, and rights to bodily integrity. Or it may not. The point is that *Lopez* provides for heightened judicial scrutiny only when there is perhaps the greatest likelihood that such a threat is lurking.

IV. CONCLUSION

It is unlikely that *United States v. Lopez* represents a sea change in the Supreme Court’s Commerce Clause and federalism jurisprudence. On the other hand, there is no disputing that the current Court is more interested than any Court in recent history in reexamining and reconsidering “first principles” under the Constitution. The Court in *Lopez* understandably and reasonably delivered the message to Congress that, even with respect to the commerce power, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”

Certainly, reasonable people can disagree on how to define congressional power under the Commerce Clause, but it is difficult to argue that

103. “These are not precise formulations, and in the nature of things they cannot be.” *Lopez*, 115 S. Ct. at 1634.
there is no limit to such power or that the federal courts have no role in determining the limit, unless one is willing to disregard completely constitutional text, structure, and history, as well as pragmatic considerations such as the impact of congressional activity on the work of the federal courts and the consequences of federal versus state control. In some respects, that is what United States v. Lopez is all about.

Noneetheless, a judge who acknowledges a meaningful role for the judiciary in defining the concept of federalism still must wrestle with the difficult questions that arise in defining the concept of federalism and identifying the limits of national and state authority. The solution is to apply a pragmatic analysis along the lines suggested by Justice Kennedy in his concurring opinion. In our modern, complex, international economy, a pragmatist is unlikely to invalidate many congressional enactments on the ground that they exceed the scope of Congress's authority under the Commerce Clause. A pragmatist is, however, likely to focus on and evaluate the consequences of federal intervention versus state autonomy. That the resulting lines drawn by the judiciary probably will be neither rigid nor necessarily bright should be neither surprising nor threatening. Judging is an extremely human process. Performed honestly and pragmatically, it is an admirable, if difficult, endeavor. Although the views of the dissenters and Justice Thomas in his concurring opinion may represent the polar extremes in Commerce Clause jurisprudence, the outcome in Lopez and Justice Kennedy's concurring opinion are eminently pragmatic. Those who favor democracy and federalism, as well as those who do not, should find nothing substantial to fear in United States v. Lopez.

104. "This [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it... is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 415, 421 (1819) (Marshall, C.J.) (emphasis added).


106. See supra text accompanying note 101.