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Taking Federalism Seriously: *Lopez* and the Partial-Birth Abortion Ban Act

DAVID B. KOPEL* & GLENN H. REYNOLDS**

As has been the case for decades, the issue of abortion continues to inspire political battles and proposals for legislative and constitutional change. But the ritualized debate over the subject has missed an important development: since the Supreme Court's landmark decision in *United States v. Lopez*,¹ it is now reasonable to ask where Congress might get the power to regulate abortion in the first place. *Lopez*, after all, underscored the point that our federal government is a limited one, restricted to those powers enumerated under the Constitution. Under the plain logic of *Lopez*, the argument for a congressional power to regulate abortion under the Interstate Commerce Clause seems dubious at best.

That the question of congressional power has not been asked—much less answered—raises important questions about the seriousness of those in Congress (chiefly, but not exclusively, Republicans) who have promised a return to principles of limited government, but who nonetheless endorsed the Partial-Birth Abortion Ban Act.² Perhaps their commitment to limited government is less deep than it seems. Just as surprisingly, the fiercest opponents of the Partial-Birth Abortion

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1. 514 U.S. 549 (1995).

2. H.R. 1833, 104th Cong. (1996). [Editor's Note: In October 1997, the Partial-Birth Abortion Ban Act was passed by the House of Representatives and again vetoed by President Clinton. The House overrode the veto, and as of the time of publication, the Senate had not yet voted.]

Ban Act have not raised what may be a winning Constitutional issue, but have instead fought the issue exclusively on policy grounds.³ Perhaps there is a reluctance to address the scope of congressional power in this context because the opponents of the law are, on most other issues, advocates of greatly expanded federal power.

In this Article, we take up the issue that lies ignored: whether the Partial-Birth Abortion Ban Act falls within the constitutional powers of Congress. The analysis of congressional power to use the Commerce Clause to outlaw partial-birth abortion has, however, implications far beyond the prohibition of a single type of abortion procedure. The analysis is directly applicable to almost any other form of congressional restriction on abortion. And the analysis also bears on congressional power to enact various other prohibitions, such as the 1986 prohibition on simple possession of machine guns.

We assume that the *Lopez* case is not an aberration: rather, *Lopez* stands for the principle that the Constitutional grant to Congress of the power to "regulate Commerce . . . among the several States" was not the same as a grant of power to Congress "to regulate on any subject it chooses," and enforcement of this provision of the Constitution is just as much a proper duty of the courts as enforcing any other provision of the Constitution.⁴ After all, even the greatest advocate of national power in the founding era, Alexander Hamilton, insisted that the judicial branch should declare unconstitutional the exercise of ungranted

3. For example, some Partial-Birth Abortion Ban Act opponents have claimed the fetus is rendered unconscious by the application of anesthesia to the mother. See, e.g., 141 CONG. REC. H11611 (daily ed. Nov. 1, 1995) (statement of Rep. Jackson-Lee). No anesthesiologists supported this statement, and several prominent ones contradicted it. See Frederica Mathewes-Green, *They Make It Sound So Ugly*, HETERODOXY, May/June 1996, at 12 (Robert White, Dir. of Neurosurgery and Brain Research at Case Western Reserve School of Medicine; Prof. Jean Wright, Assoc. Prof. of Pediatrics and Anesthesia, Emory School of Medicine). When President Clinton vetoed the Partial-Birth Abortion Ban Act because it did not include an exception for health-related abortions, he surrounded himself with women who had undergone third trimester abortions for plainly legitimate health reasons; but it later turned out that none of these women may have undergone a type of abortion that would be controlled by the Partial-Birth Abortion Ban Act. See *id.* at 15.

4. But see Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 769-71 (1996). Graglia argues that there is no judicially enforceable practical limit to congressional power; state autonomy should instead be protected by overturning allegedly overbroad readings of the Fourteenth Amendment which interfere with state autonomy. One limitation of Graglia's reasoning is that it treats the limitation of congressional power as a concern solely relevant to states' rights. To the contrary, limitations on federal power are also important protectors of fundamental liberties. See, e.g., *Lopez*, 514 U.S. at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

powers by the legislative branch.⁵

Our focus here is primarily on *Lopez* and the post-*Lopez* cases, since, as Justice Stephen Breyer noted in his *Lopez* dissent, the majority's opinion is inconsistent with prior Commerce Clause jurisprudence, even if *Lopez* did not formally overrule any prior case.⁶ Also in dissent, Justice John Paul Stevens was not entirely out of bounds to characterize the *Lopez* holding as "radical."⁷ At the same time, we do not attempt to make *Lopez* more than it currently is; if *Lopez* marks the first battle of a coming judicial revolution, we will evaluate the proposed law in light of the Constitutional territory that has been demarcated so far, not in light of territory still to be contested, although we do discuss where the boundary should be drawn in the future.

We do not address other issues that may also be relevant to the constitutionality of the Partial-Birth Abortion Ban Act: whether section five of the Fourteenth Amendment may grant Congress power to enact such a law;⁸ whether the Tenth Amendment reserves control over medical procedures to the states;⁹ whether the arguably vague language of

5. Hamilton insisted that:

If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. . . . It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

6. See *Lopez*, 514 U.S. at 625 (Breyer, J., dissenting). See also Bennett L. Gershman, *Judicial 'Conservatism'*, N.Y. L.J., June 21, 1995 ("In *Lopez*, the Court may have uprooted nearly 60 years of Commerce Clause jurisprudence.")

7. See *Lopez*, 514 U.S. at 602 (Stevens, J., dissenting).

8. In light of the Court's recent decision that Congress may not expand the boundaries of the Fourteenth Amendment, the issue of whether the Partial-Birth Abortion Ban Act is a valid exercise of congressional powers under section five of the Fourteenth Amendment is the same as whether the Partial-Birth Abortion Ban Act violates the Supreme Court's guarantees of a right to abortion. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997) (Congress exceeded scope of its enforcement power under section five of the Fourteenth Amendment in enacting the Religious Freedom Restoration Act of 1993 (RFRA)). But see *Katzenbach v. Morgan*, 384 U.S. 641, 646-47 (1966) (section 4(e) of the Voting Rights Act of 1965 is appropriate congressional legislation under the Enforcement Clause of the Fourteenth Amendment).

9. The Tenth Amendment is indirectly implicated in the Kennedy-O'Connor *Lopez* concur-

the Partial-Birth Abortion Ban Act could cover many ordinary second trimester abortions, and thereby violate *Roe v. Wade*;¹⁰ whether the Partial-Birth Abortion Ban Act would be void under *Roe v. Wade* because it bars abortion procedures that a woman's doctor believes to be the best way to protect her health;¹¹ and whether there is a rational basis for outlawing a single method of late-term abortion which may be less likely than a still-legal method to produce sterility or death in the mother.¹²

Our inquiry examines the Partial-Birth Abortion Ban Act from the perspectives of the Court's majority opinion, Justice Kennedy's concurrence, and Justice Thomas's concurrence. We then turn to the lower court decisions implementing *Lopez*. While some scholars have predicted that *Lopez* would have little effect in the lower courts,¹³ *Lopez* has

rence. See text *infra* note 54.

10. See 141 CONG. REC. H11611 (daily ed. Nov. 1, 1995) (statement of Rep. Schroeder, submitting into the record a statement by Dr. Bruce Ferguson of the New Mexico Medical Group, Albuquerque, N.M.); Warren M. Hern, *Abortion Bill Skips the Fine Print*, N.Y. TIMES, May 24, 1997, at A19 (expert in late-term abortions details how the Partial-Birth Abortion Ban Act leaves the legal status of many types of abortion unclear). Cf. *Planned Parenthood v. Danforth*, 428 U.S. 52, 77-78 (1976) (ban on saline amniocentesis for abortion during second trimester is unconstitutional, because alternative methods are relatively unavailable). But see *Planned Parenthood v. Casey*, 505 U.S. 833, 876-79 (1992) (upholding various abortion restrictions as long as they do not impose an "undue burden" on the right to abortion).

11. The fetus dies anyway if another abortion method is chosen, and the physicians performing partial-birth abortions believe that the procedure is the best alternative for maternal health in the circumstances. (If they did not, they would be guilty of malpractice.) See generally Angela Bonavoglia, *Separating Fact from Fiction*, MS., May/June 1997, at 54. Other physicians argue that such abortions are never medically necessary. See 141 CONG. REC. H11606 (daily ed. Nov. 1, 1995) (statement of Rep. Canady); Mathewes-Green, *supra* note 3, at 15 (statements of Dr. Pamela Smith, director of medical education at Mt. Sinai Hospital, Chicago; Dr. Warren Hern, Boulder, Colorado, "would dispute any statement that this is the safest procedure to use").

12. The standard alternative is to give the fetus a lethal injection, and then deliver it dead. In some cases, the fetus may be removed via a caesarean section (hysterotomy). See Eric Zorn, *Identifying Issues in Abortion Debate Points to a Trap*, CHI. TRIB., June 13, 1996, at 1. A C-section creates a uterine scar, which increases the risk of uterine rupture during a future pregnancy or delivery. See generally 141 CONG. REC. H11610 (daily ed. Nov. 1, 1995) (statement of Rep. Schroeder) (reading statements of physicians).

According to the National Abortion Federation, partial-birth abortion also reduces maternal blood loss; reduces the risk of cervical or uterine damage (thereby allowing the mother the possibility of a future healthy pregnancy); and allows removal of an intact fetus so that geneticists, pathologists, and perinatologists can study the fetus's problems, and thereby offer more accurate advice to the mother about future pregnancies and how to prevent future fetal development problems. "Further, it allows the family to have a more complete grieving process for the loss of a wanted pregnancy, by being able to hold their baby and say goodbye." Robert Bitonte, *Medical Issues—Intact Dilation and Evacuation* (visited Mar. 28, 1997), <<http://www.prochoice.org/naf/map.map>>.

13. See Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 692 (1995) (recent post-

led to serious questioning and, in some cases, overturning of federal laws by the lower courts. We explore these lower court decisions in detail, to see how far the *Lopez* revolution has already gone, and where it might lead.

Before turning to *Lopez* and its implications, however, let us first set forth the relevant provisions of the proposed Partial-Birth Abortion Ban Act.

The introductory clause of the first sentence of the proposed law is: "Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion"¹⁴ The bill goes on to specify criminal and civil penalties, and to define "partial-birth abortion."¹⁵ The focus of this Article is whether, under existing Constitutional doctrine, the introductory clause sets up an impossible condition: After *Lopez*, can a court legitimately hold that a particular abortion procedure, performed at a clinic in a single state, is "in or affecting" interstate commerce?

The various factual disputes concerning partial-birth abortion, such as whether the fetus feels pain, or whether a significant number of such abortions are procured for trivial reasons,¹⁶ are not relevant to answering the interstate commerce question, and will be ignored for this Article.¹⁷ About 5,000 partial birth abortions may be performed each year in the United States, usually after the twentieth week of pregnancy.¹⁸

Lopez federal court decisions "confirm my prediction that *Lopez* rests on a combination of unusual circumstances that will lead to the judicial invalidation of few statutes").

14. H.R. 1833, 104th Cong. § 2(a) (1996).

15. *Id.*

16. The Partial-Birth Abortion Ban Act covers abortions in the second and third trimesters. Almost all abortions performed in the third trimester are because of serious health risks to the mother, or severe fetal abnormality. Many late second-trimester abortions are for emotional or other reasons not related to maternal or fetal physical health. See 141 CONG. REC. H11606 (daily ed. Nov. 1, 1995) (statement of Rep. Canady).

17. Abortion providers commonly refer to the procedure as an "intact dilation and evacuation" (IDE). "D&X" is an alternative shorthand. In most abortions, the fetus is "broken" while inside the uterus, and then removed through a dilated cervix. In an IDE, the fetus is left intact, and partially brought through the cervix, feet-first. Because the head is too large to pass through the cervix, a needle is inserted in the fetus's head, and cerebrospinal fluid is removed, in order to shrink the head sufficiently to allow it to pass through the cervix.

We do not use the IDE term in this Article, because the Partial-Birth Abortion Ban Act bans most but not all IDEs. In some IDEs, the fetus may be killed (or may die) in utero, and then can be removed through the IDE procedure. The Partial-Birth Abortion Ban Act does not cover such procedures. See generally National Right to Life Committee, *Is There a More 'Objective' Term for the Procedure than 'Partial-Birth Abortion'* (visited Oct. 13, 1997) <<http://www.nrlc.org/abortion/pbafact14.html>>.

18. See Carol Byrne, *Comments on Late Term Abortions Reverberate*, (MINNEAPOLIS) STAR-

Thus, partial-birth abortions account for a small fraction of the hundreds of thousands of abortions performed annually in the United States.

We will first sketch the analytical framework created by *Lopez*. We will then apply that framework, together with later lower court cases applying *Lopez*, to determine whether the Partial-Birth Abortion Ban Act is a legitimate exercise of the interstate commerce power. We conclude with some thoughts regarding legitimacy, at both the legislative and judicial level.

I. THE *LOPEZ* OPINION

A. *The Opinion of the Court*

In the majority opinion, Chief Justice Rehnquist explained that when using the interstate commerce power, Congress can regulate three different fields:

1. Use of channels of interstate commerce (e.g., preventing “immoral” objects from being shipped interstate);
2. Instrumentalities of interstate commerce, including persons or things in interstate commerce (e.g., imposing safety regulations on aircraft);
3. Activities that substantially affect interstate commerce.¹⁹

The *Lopez* case involved simple possession of a firearm within the 1000-foot federally designated “Gun-Free School Zone.” Since all parties agreed that the first and second forms of the interstate commerce power were irrelevant to the case at hand, the Court analyzed the law regarding “substantial effects.”

1. *Substantial Effects*

Although some cases had stated that a slight effect, or a possible effect, of something on interstate commerce would be sufficient for Congress to be able to use the interstate commerce power, the majority

TRIB., Mar. 1, 1997, at 1A (discussing statement by Ron Fitzsimmons, executive director of the National Coalition of Abortion Providers, claiming there are 5,000 partial-birth abortions per year). *But see* Franklin Foer, *Abortion Apostate*, SLATE (last modified March 8, 1997) <<http://www.slate.com/HeyWait/97-03-08/HeyWait.asp>> (no one really knows how many partial-birth abortions are performed).

19. *See* United States v. Lopez, 514 U.S. 549, 558-59 (1995).

held that other cases, requiring that the object of legislation must “substantially” affect interstate commerce, set the proper standard.²⁰ Quoting *NLRB v. Jones & Laughlin Steel Corp.*,²¹ the Court reiterated that

the scope of the interstate commerce power “must be considered in the light of our dual system of government and may not be extended so to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.”²²

The majority then identified three problems with the federal Gun-Free School Zones Act, all of which contributed to the majority’s holding that the Act was not a proper exercise of the interstate commerce power. It should be noted that the Court did not state that these three defects were the only three possible defects, or that the three defects were elements in a three-part test.

First, gun possession in a school zone “has nothing to do with ‘commerce’ or any sort of economic enterprise.”²³ The Court quoted Chief Justice Marshall’s expansive definition of commerce in *Gibbons v. Ogden*,²⁴ the first case to allow use of the interstate commerce power to regulate intrastate activity with a substantial effect on interstate commerce: “Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”²⁵

At first glance, it would seem that abortion clinics are a “commercial enterprise,” since they provide services in exchange for money. (One of the pre-*Lopez* cases found that “commerce” includes medical services to members of a health cooperative.)²⁶

On the other hand, private schools (which were included under the

20. See *id.* at 559.

21. 301 U.S. 1 (1937).

22. *Lopez*, 514 U.S. at 557. Cf. *Jones Meritt*, *supra* note 13, at 679 (“substantial effect” standard is similar to “proximate cause” in tort law).

23. *Lopez*, 514 U.S. at 561.

24. 22 U.S. (9 Wheat.) 1 (1824).

25. *Lopez*, 514 U.S. at 553.

26. See *American Med. Ass’n v. United States*, 317 U.S. 519, 528-29 (1943) (antitrust suit under section three of the Sherman Act; Court held that the services of a medical cooperative placed it under the Sherman Act’s understanding of “commerce”).

federal "Gun Free School Zones" law) are certainly businesses; they provide a service for which they charge a fee, and compete among themselves for customers.²⁷ Indeed, the district court decision upholding the school zone law stated that "the 'business' of elementary, middle and high schools . . . affects interstate commerce."²⁸ We will return to the "commercial/non-commercial" analysis later, following the discussion of post-*Lopez* lower court decisions.

In contrast to the other two defects identified in the Gun-Free School Zones Act, the "non-commercial" defect is fatal. If an activity is non-commercial, then it cannot pass the "substantial effects" test, since that test is limited only to intrastate commercial activities.²⁹ "The 'affecting commerce' test was developed . . . to define the extent of Congress's power over purely intrastate commercial activities that nonetheless have substantial interstate effects."³⁰

The Court acknowledged that the commercial/non-commercial distinction "may in some cases result in legal uncertainty,"³¹ and the distinction has been criticized as incoherent by some commentators.³² Our main purpose in this Article, however, is not to improve *Lopez*, but to test its implications for the Partial-Birth Abortion Ban Act.

The second defect in the Gun-Free School Zones Act was that there was "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."³³ The Partial-Birth Abortion Ban Act has no such defect. It explicitly requires that the abortion in question be "in or affecting interstate commerce."³⁴ The *Lopez* majority decision contrasted the Gun-Free School Zones Act with the Gun Control Act of 1968, whose language banning firearms possession by convicted felons has jurisdic-

27. Some analysts would also classify the government schools as a business, albeit a business which enjoys numerous competitive advantages resulting from quasi-monopoly status. For purposes of this Article, we need not enter that debate, since private schools are so obviously a business.

28. *United States v. Lopez*, 2 F.3d 1342, 1366 (5th Cir. 1993) (citing the district court decision).

29. *See Lopez*, 514 U.S. at 561.

30. *United States v. Robertson*, 115 S. Ct. 1732, 1733 (1995).

31. *Lopez*, 514 U.S. at 566.

32. *See, e.g.*, Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 564-65 (1995).

33. *Lopez*, 514 U.S. at 561. "[T]here is no indication that he [Lopez] had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce." *Id.* at 567.

34. H.R. 1833, 104th Cong. § 2(a) (1996).

tional language similar to the jurisdictional language in the Partial-Birth Abortion Ban Act.³⁵

The final defect of the Gun-Free School Zones Act was that there was no legislative history or finding about the relationship of conduct to interstate commerce. Although congressional findings are not mandatory, the Court observed that "to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."³⁶

The Partial-Birth Abortion Ban Act contains no such findings, nor do committee reports on the bill. When the House of Representatives debated the bill, not one proponent of the bill even uttered the words "interstate commerce," let alone offered any rationale connecting the bill with the congressional power to regulate commerce among the several states.³⁷ Although courts must uphold a congressional determination about substantial effects on interstate commerce if there is a "rational basis,"³⁸ the test is no longer a free pass.³⁹ As the *Lopez* majority stated, "[S]imply because Congress may conclude a particular activity substantially effects interstate commerce does not necessarily make it so."⁴⁰ For "[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."⁴¹

2. General Principles from *Lopez*

Several important analytical rules were established in *Lopez*. First,

35. See 18 U.S.C. § 922(g) (1994). Section 922(g) states: "It shall be unlawful [for certain specified persons] . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

36. *Lopez*, 514 U.S. at 563.

37. See 141 CONG. REC. H11604-18 (daily ed. Nov. 1, 1995).

38. See *United States v. Lopez*, 2 F.3d 1342, 1363 (5th Cir. 1993).

39. See, e.g., *Romer v. Evans*, 116 S. Ct. 1620 (1996) (holding state prohibition on local gay rights ordinances lacks a rational basis); *Bowen v. American Hosp. Ass'n*, 476 U.S. 610 (1986) (deciding federal regulations to require non-discriminatory treatment of handicapped newborns lack a rational basis); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (finding no rational basis for zoning decision).

40. *Lopez*, 514 U.S. at 557 n.2 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring)).

41. *Id.* (quoting *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring)).

adding up every instance of an activity that has no or little effect on interstate commerce, and concluding that the aggregation has a "substantial effect," and therefore that the individual instances can be regulated under the interstate commerce power, is no longer sufficient. The aggregation of individual effects into a "substantial" whole "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government."⁴² The interstate commerce impact of the aggregate activity must genuinely be substantial, for Congress may not "use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."⁴³

Aggregation had been allowed in the Depression era case of *Wickard v. Filburn*,⁴⁴ (characterized by the *Lopez* majority as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity"),⁴⁵ which involved a federal plan to set up agricultural cartels. A farmer's growing of wheat for home consumption was held to be within the scope of the interstate commerce power, since the sum of all crops grown for home consumption had a major effect on interstate demand for wheat.⁴⁶ (Wheat crops such as Mr. Wickard's, grown for home consumption, constituted twenty percent of the national wheat crop.)⁴⁷ Control of gun possession, wrote Chief Justice Rehnquist, is unlike control of wheat production, for it "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."⁴⁸

By implication, then, if Congress in the *Wickard* case had banned the cultivation of wheat for personal consumption, while leaving un-

42. *Id.* at 557 (quoting *NRLB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

43. *Id.* at 558 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)).

44. 317 U.S. 111 (1942).

45. *Lopez*, 514 U.S. at 560.

46. *See Wickard*, 317 U.S. at 112.

47. *See id.* at 127. *See generally* BOB DYLAN, *Union Sundown, on INFIDELS* (Columbia Records 1983) ("I can see the day coming when even your home garden is gonna be against the law").

48. *Lopez*, 514 U.S. at 561; *see also* *Garcia v. San Antonio Metro. Transit Author.*, 469 U.S. 528, 584-85 (1985) (O'Connor, J., dissenting) (regulation of intrastate commerce allowed only to extent that it is "necessary and proper" to regulation of interstate commerce); Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 768-71 (1997) (elaborating application of "necessary and proper" clause to interstate commerce issues).

touched all sales of wheat, including sales in interstate commerce, the law would have been unconstitutional. The control of Mr. Wickard's food, rather than being a part of a larger scheme to control interstate commerce, would have stood alone as a prohibition on simple intrastate activity. The *Lopez* majority's explication of *Wickard* casts serious doubt on the Partial-Birth Abortion Ban Act. The Act is not part of general regulation of interstate medical services, but instead a prohibition on a single type of medical procedure.

The second analytic principle that *Lopez* offers is one this Article calls the "non-infinity principle." In other words, for a Commerce Clause rationale to be acceptable under *Lopez*, it must not be a rationale that would allow Congress to legislate on everything. In a sense, this principle is a restatement of the holding of *Lopez*, since the case holds that the commerce power is not unbounded.⁴⁹ As Deborah Jones Merritt notes, the *Lopez* majority opinion is an explicit rebuke to the previous conventional wisdom regarding the Commerce Clause. Merritt points out that the intellectual gyrations that the Supreme Court had performed in upholding congressional power since the New Deal had seriously damaged the credibility of the Constitution and the Court:

[T]he Commerce Clause had become an intellectual joke among academics and attorneys. A Constitution that is subject to ridicule, however, serves no one's interests. No one will take the Constitution seriously if Congress and the Courts refuse to do so. For these reasons, the Supreme Court concluded in *Lopez* that rationales expounding congressional power under the Commerce Clause must have some limit.⁵⁰

The "non-infinity principle" was applied by the majority to reject the government's rationale that the cost of crime, in the aggregate, has a substantial effect on interstate commerce, or that poor quality education (caused, in theory, by guns coming within 1,000 feet of a school) reduces economic productivity:

We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime"

49. The principle is not novel to *Lopez*. As Justice Frankfurter stated in a majority opinion, "[s]cholastic reasoning may prove that no activity is isolated within the boundaries of a single state, but that cannot justify absorption of legislation power by the United States over every activity." *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 650 (1944).

50. Jones Merritt, *supra* note 13, at 691. Notably, the dissent agrees with this core holding that the commerce power is finite. See *Lopez*, 514 U.S. at 623 (Breyer, J., dissenting).

reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. See Tr. of Oral Arg. 8-9. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.

Although Justice Breyer argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not. Justice Breyer posits that there might be some limitations on Congress' commerce power such as family law or certain aspects of education. *Post*, at 1661-62. These suggested limitations, when viewed in light of the dissent's expansive analysis, are devoid of substance.⁵¹

The majority's "non-infinity principle" suggests that the Partial-Birth Abortion Ban Act may have severe problems under *Lopez*. If a ban on one particular type of medical procedure is valid, then it is surely within the power of Congress to outlaw chiropractic, acupuncture, rolfing, or any other medical procedure.⁵² Or conversely, to mandate that those procedures be used instead of more conventional medical procedures.⁵³

B. *Justice Kennedy's Concurrence*

Justices Kennedy, O'Connor, and Thomas all joined in the majority

51. *Lopez*, 514 U.S. at 564-65.

52. There may a Ninth or Fourteenth Amendment argument to be made about the right to choose one's own form of medical treatment.

53. The extent to which abortion in general or partial-birth abortion in particular may be said to be significantly more interstate in character than other medical procedures is discussed in Part II.A.5.

opinion, which, of course, sets the legal standard to be applied. In addition, Justices Thomas and Kennedy each wrote a concurrence, with Justice O'Connor joining the latter. Each concurrence raised important questions, which we now summarize and address.

1. *Areas of the Traditional State Concern*

Raising concerns that might have been better discussed in the context of the Tenth Amendment, rather than the Commerce Clause, Justice Kennedy explained that the role of the Court is to "inquire whether the exercise of national power intrudes upon an area of traditional state concern."⁵⁴ In the case of the Gun-Free School Zones Act, "it is well established that education is a traditional concern of the States."⁵⁵ Likewise, despite the much decried modern trend toward federalizing criminal law, crime control is an area of traditional state concern.⁵⁶ The *Lopez* majority stated that Congress cannot legislate against purely local crime.⁵⁷ The *Lopez* majority likewise stated that law enforcement and education were areas "where States traditionally have been sovereign," and that Commerce Clause interpretations that allowed federal control were *ipso jure* wrong.⁵⁸

Even Justice Breyer in dissent acknowledged that there are some issues, traditionally associated with state control, that are beyond the scope of the interstate commerce power; the commerce power does not permit the Federal Government to regulate "marriage, divorce and child custody."⁵⁹ This determination was, in fact, a unanimous conclusion of the entire Court, for the majority pointedly rejected the government's

54. *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring). The concurrence is consistent with the Court's decision in *United States v. Butler*, 297 U.S. 1 (1936), which held that an otherwise valid exercise of federal power is void under the Tenth Amendment if it intrudes into an area of traditional state concern. See *id.* at 3.

55. *Lopez*, 514 U.S. at 580.

56. Even before *Lopez*, the Court had emphasized that criminal law is a traditional state issue. See *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982) ("The States possess primary power for defining and enforcing the criminal law")); *United States v. Emmons*, 410 U.S. 396, 411-12 (1973) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971) (finding federal criminalization effects a "change in the sensitive relation between state and federal criminal jurisdiction")); *Screws v. United States*, 325 U.S. 91 (1945) (reversing judgment affirming federal conviction of local law enforcement officers).

57. See *Lopez*, 514 U.S. at 563.

58. See *id.* Cf. William G. Scott, Comment, *Federal Jurisdiction Under the Hobbs Act Satisfied by Showing Potential Effect on Commerce*, 28 VAND. L. REV. 1348, 1359 (1975) ("full commerce power in a criminal context historically has never been commensurate with the wider scope of commerce power in the economic realm").

59. *Lopez*, 514 U.S. at 624 (Breyer, J., dissenting).

economic productivity rationale for the Gun-Free School Zones Act, since that rationale could allow federal control of “family law (including marriage, divorce, and child custody).”⁶⁰

Lopez does not, however, provide a framework for deciding whether a particular topic falls within “an area of traditional concern.” Whatever it takes for an area to qualify as one of “traditional state concern,” the prerequisite is not a near-complete absence of prior federal activity (as is the case with divorce law). The federal government spends billions of dollars per year on aid to local education, runs a Department of Education, and uses the spending power to coerce local schools into following rigid federal standards regarding disciplinary policies and other day-to-day operational issues. In the criminal field, there are literally thousands of federal criminal laws, reaching down to standards for who may own what type of drug, and criminalizing simple possession of tiny quantities of controlled substances. Nevertheless, the Kennedy/O’Connor concurrence and majority both stated that education and crime were areas of traditional state concern.

In the field of medicine, the federal Medicaid and Medicare programs impose extensive controls on patients and doctors who participate in these programs, including detailed regulation of data collection and reporting; the federal government also heavily subsidizes medical education, and some federal laws impose quality standards on some lab tests or other procedures. But it is difficult to argue that all the federal intrusions into local medical policy are *greater* than intrusions into local education or local crime control.

With the unanimous Court agreeing that family law is a traditional area of state concern over which the interstate commerce power cannot extend, the way is certainly open for the Partial-Birth Abortion Ban Act to be questioned as an illegitimate federal effort to control traditional state issues of medical care and family law.⁶¹

2. *Stability and Reliance*

The Kennedy concurrence, in words quoted by many lower federal courts striving to uphold various federal laws post-*Lopez*, states that “the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as

60. *Id.* at 564.

61. *Cf.* 141 CONG. REC. H11597 (1995) (statement of Rep. Conyers) (“How else can we explain a bill that would—for the very first time—federalize the regulation of abortion, a matter traditionally left to the discretion of the States?”).

it has evolved to this point."⁶² Justice Kennedy's concerns are misplaced, however, for the interest in stable Commerce Clause jurisprudence is far less than in other fields in which the Court has not hesitated to reverse wrongly decided precedent. Although one need not take the interstate commerce power back to 1936 in order to find serious problems with the Partial-Birth Abortion Ban Act, it is worth exploring the stability issue, because it plays so large a role in lower court under-enforcement of *Lopez*.

Stability is of little value in constitutional jurisprudence, if stability requires a continuation of errors from a previous era. The relative unimportance of stability is taught to most law students before they even take their first Constitutional Law class; no more than a few weeks of law school have passed for most first-year law students before they learn in Civil Procedure that in *Erie Railroad Co. v. Tompkins*,⁶³ the Court obliterated a century's worth of "federal common law" which had become deeply embedded in the American legal system. As Justice Brandeis wrote for the *Erie* majority, "no lapse of time" should make the Court "hesitate to correct" what is recognized to be "an unconstitutional assumption of power."⁶⁴ Similarly, in *INS v. Chadha*,⁶⁵ the Court was willing to overturn over a hundred federal statutes in a single stroke, when the Court vindicated the separation of powers by finding the legislative veto unconstitutional.

In *Chadha*, the Court determined that the stability of over a hundred laws was less important than the fundamental constitutional principle of inter-branch separation of powers. Separation of powers between the federal and state governments is no less important than separation of powers within the federal government, *Erie* teaches. If a hundred laws must fall to maintain the separation, then the laws should fall, *Chadha* teaches.

If previous Courts have failed to enforce rigorously various protections of Constitutional freedom, then the duty of the current Court is to adhere to the Constitution, and overturn the erroneous precedents, not to adhere to error in the name of stability. The Warren Court recognized as much when it began to enforce the long-neglected

62. *Lopez*, 514 U.S. at 574. Similarly, would-be Justice Bork, who has proposed reversing much of the Court's jurisprudence of the last half-century, stated in his confirmation hearings that he would not question existing Court doctrine on the interstate commerce power.

63. 304 U.S. 64 (1938).

64. *Id.* at 79 (finding federal courts must apply state law, not federal common law).

65. 462 U.S. 919 (1983).

criminal procedure provisions of the Constitution.⁶⁶

Undoing sixty years of wrongly decided cases (and a few from prior years) regarding the interstate commerce power is just as legitimate as the Court's earlier undoing of many decades' worth of wrongly decided equal protection cases. It is true that there has been substantial reliance, especially by the Congress, on the mistaken Commerce Clause cases. But the Court has already stated that "no one acquires a vested or protected right in violation of the Constitution by long use."⁶⁷

The federal government's over-involvement in non-federal affairs is far less solidified than was the encrustation of Jim Crow which had been permitted by the erroneous Fourteenth Amendment cases.⁶⁸ Many thousands of school buildings and other facilities had been built, in reliance on long-established Supreme Court precedent, with separate "white" and "colored" sections. Segregation at school and in many other areas was deeply ingrained in the South, and many other parts of the United States. When the Court, in *Brown v. Board of Education*,⁶⁹ destabilized its equal protection jurisprudence, the consequences were immense. A furious white backlash drove Southern white moderates out of politics; fanning the hottest levels of white anger became the surest path to political success in the South.⁷⁰ Affection for racial segregation (having been sanctioned by, among other things, decades of federal judicial tolerance for it) was deeply embedded in the characters of tens of millions of Americans. For years and years after *Brown*, state and local governments proudly announced their intention to use every possible means to defy the Court's decision. Within a few years of *Brown*, presidents were finding it necessary to federalize the National Guard, and even call out regular Army troops, in order to enforce the Court's decision against the wishes of large, violent, angry mobs.⁷¹

66. Philip Kurland observes that "[t]he list of opinions destroyed by the Warren Court reads like a table of contents from an old constitutional law casebook." PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 90-91 (1970).

67. *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970). "[S]quatter sovereignty certainly does not run against the sovereign people," observes Raoul Berger. "[R]epetition does not legitimate usurpation." Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 *TEX. L. REV.* 695, 715 (1996).

68. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Board of Educ.*, 347 U.S. 483 (1954).

69. 347 U.S. 483 (1954).

70. See Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 *J. AM. HIST.* 81 (1994).

71. See, e.g., Proclamation No. 3497, 27 *Fed. Reg.* 9681 (1962); Exec. Order No. 11,053, 27 *Fed. Reg.* 9693 (1962) (authorizing use of military to enforce school desegregation in Mis-

For all the dislocation, even a decade after *Brown*, three quarters of Southern districts were still segregated.⁷² It took decades of effort for the entire federal court system finally to enforce *Brown* and its progeny; federal judges faced death threats, and other citizens died in the effort to make *Brown* the real law of the land. Yet today, even the minority of Constitutional scholars who believe that *Brown* was wrongly decided do not argue that the Court's mistake was in destabilizing existing precedent.

Contrast the dislocation in *Brown* with a hypothetical Supreme Court decision which made Justice Thomas's concurrence the law; the power "[t]o regulate Commerce . . . among the several States" would be interpreted to cover only what the Constitution literally says: the power to regulate commerce (buying and selling things) across state lines. If such a decision were implemented all at once, like *Chadha* or *Erie*, hundreds of federal laws would fall. Undoubtedly a significant political movement would arise to amend the Constitution, to give Congress the enumerated power to enact some or all of the laws that had been stricken.

But there would be no angry mobs to be put down by federal troops. The fabric of life would not change all that much for most people. While many whites had an intense emotional and intellectual stake in racism, it is doubtful that today's federal government sprawl inspires such devotion. Restrictions on congressional power over interstate commerce would not produce the fear and hatred that accompanied compulsory integration. Angry citizens would not festoon their cars with "Impeach William Rehnquist" bumper stickers.⁷³ As Steven Calabresi observes, *Lopez* has produced "much gnashing of teeth among law professors but barely a ripple of protest among the public at large."⁷⁴

In the long run, as Raoul Berger observes, stability would be enhanced by the Court returning Commerce Clause interpretation to the text of the Constitution. Since the text does not change (except through amendment), Commerce Clause jurisprudence would become

Mississippi).

72. See HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* 441 (1980).

73. "Impeach Earl Warren" bumper stickers were popular in the 1960s, and several impeachment resolutions were actually introduced. See ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN* (1997).

74. Steven G. Calabresi, *A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 827 (1995).

much more predictable.⁷⁵ If the topic of the legislation does not involve buying and selling something across state lines, then the commerce power is not involved.

At any rate, to whatever extent previously-enacted over-reaching statutes may be protected by some version of Constitutional adverse possession, no legislation enacted after *Lopez* can claim a reliance interest on the theory that the commerce power is unbounded. If Congress enacts legislation with as potentially weak an interstate commerce predicate as the Partial-Birth Abortion Ban Act, Congress cannot claim it was surprised if the Act is declared void under *Lopez*.

C. *The Thomas Concurrence*

Although Justice Thomas joined the majority, he also wrote a concurring opinion which, in effect, announced that the emperor was unclad. While the majority opinion stated that Commerce Clause-based statutes must deal with subjects that “substantially affect” interstate commerce, rather than merely “affect” it, Justice Thomas suggested that the whole “effects” debate was off the point. The power to regulate “Commerce . . . among the several States” means exactly what it says: the power to regulate the interstate buying and selling of goods. “Commerce” means buying and selling things—not manufacturing, and not simply “any form of economic activity.”⁷⁶ The Constitution did not grant Congress power to regulate activities which merely affect (even in a substantial way) interstate commerce. After all, there is no “effects” prong to the post office power; Congress cannot use the postal power to regulate activities (such as faxes, which reduce the demand for mail) just because the activity “affects” the post office.⁷⁷ Further, if the

75. See Berger, *supra* note 67, at 700. As Justice Scalia wrote for a six-member majority in another separation of powers decision, categorically invalidating all legislated invalidation of judicial judgment:

[T]he doctrine of separation of powers is a structural safeguard rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judicial judgments is assuredly one) it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict Separation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors.

Plaut v. Spendthrift, Inc., 514 U.S. 211, 239-40 (1995).

76. United States v. Lopez, 514 U.S. 549, 586 (1995) (Thomas, J., concurring).

77. See *id.* at 588.

interstate commerce power included power over actions or things which "substantially affect" interstate commerce, then other enumerated congressional powers, such as the power to establish uniform rules of bankruptcy, are superfluous.⁷⁸ When the founders wanted to add an "effect" penumbra to a Constitutional provision, they knew how to do so, as when they prohibited amendments that "shall in any manner affect" certain slavery provisions in Article I.⁷⁹

As a matter of textual interpretation and original intent, Justice Thomas is clearly correct, as Raoul Berger explicates.⁸⁰ Had the state ratifying conventions foreseen how the interstate commerce power would be expanded far beyond actual interstate commerce, the proposed Constitution, which was ratified by very narrow margins in several states, would almost certainly have been rejected. Even the Constitution's most ardent defenders and the greatest advocates of national power, such as Hamilton and Madison, repeatedly emphasized the narrow scope of the interstate commerce power, and stressed that state control of almost all policy issues would remain undisturbed.⁸¹

78. *See id.* at 589.

79. *See* U.S. CONST. art. V, cl. 1; *Lopez*, 514 U.S. at 588 (Thomas, J., concurring).

80. *See* Berger, *supra* note 67.

81. *See id.*; *see also* Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528, 583 (1985) (O'Connor, J., dissenting) (summarizing Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941): "The Framers perceived the interstate commerce power to be important but limited, and expected that it would be used primarily if not exclusively to remove interstate tariffs and to regulate maritime affairs and large-scale mercantile enterprise.").

As to the intended narrow scope of federal criminal authority, *see generally* THOMAS JEFFERSON, *THE KENTUCKY AND VIRGINIA RESOLUTIONS* (1798):

That the Constitution of the United States having delegated to Congress a power to punish treason, counterfeiting the securities and current coin of the United States, piracies and felonies committed on the high seas, and offences against the laws of the nation, and no other crimes whatever, and it being true as general principle, and one of the amendments to the Constitution also having so declared, "that 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"; therefore, also the same act of Congress, passed on the 14th day of July, 1798, and entitled "An act in addition to the act entitled 'an act for the punishment of certain crimes against the United States,' as also an act passed by them on the 27th day of June, 1798, entitled, 'An act to punish frauds committed on the Bank of the United States,'" (and all other their acts which assume to create, define, or punish crimes other than those enumerated in the Constitution,) are altogether void and of no force, and that the power to create, define, and punish such other crimes is reserved, and of right appertains solely and exclusively, to the respective States, each within its own territory.

The Kentucky and Virginia Resolutions are valid sources for late 20th-century constitutional interpretation, including for issues of federalism and the validity of federal criminal laws. *See, e.g.,* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 284 (1990) (Brennan, J., dissenting);

If Justice Thomas's opinion were the position of the Court, the Partial-Birth Abortion Ban Act case would not even rise to the level of an easy case. It would border on the frivolous for an attorney to assert that the Partial-Birth Abortion Ban Act was a regulation of the interstate buying and selling of goods.

At the present, we do not know the long-term fate of the Thomas concurrence. It may wind up, like Justice Jackson's concurrence in the Steel Seizure Case,⁸² as one of those historic concurrences that become the true holding of the case. Or it may wind up, like most concurring opinions, as mere fodder for discussion notes in law school casebooks.

II. LOWER FEDERAL COURTS

Although it has not been very long, as the legal system goes, since *Lopez* was decided, there has been time for some lower courts to apply *Lopez* here and there. We do not discuss the post-*Lopez* cases to prove that a particular result is inevitable when the Partial-Birth Abortion Ban Act is challenged (as the Act certainly will be, if it becomes law). Rather, the cases illustrate the types of reasoning being used by courts in analyzing *Lopez* issues. In sum, the cases offer a court analyzing the Partial-Birth Abortion Ban Act enough running-room to decide the issue either way. Of course, lower courts can be wrong: *Lopez* resolved a split between the Fifth and Ninth Circuits in favor of the Fifth.⁸³ In this survey, we move from areas for which congressional power has been most strongly sustained, to areas for which it has been most strongly questioned.

A. "Bad" Objects: Firearms and Drugs

The two fields of criminal law for which Congress has interjected itself at the most minute levels are firearms and drugs. Most of the firearms laws enacted under the interstate commerce power date back to the Gun Control Act ("GCA") of 1968, while the drug laws come mostly from the Nixon administration's Comprehensive Drug Abuse

EEOC v. Wyoming, 460 U.S. 226, 271 (1983) (Powell, J., dissenting); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); Bell v. Maryland, 378 U.S. 226, 342 n.41 (1964) (Black, J., dissenting); New York Times Co. v. Sullivan, 376 U.S. 254, 274, 275 n.15 (1964); Johnson v. Eisentrager, 339 U.S. 763, 774 n.6 (1950).

82. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

83. See United States v. Evans, 928 F.2d 858 (9th Cir. 1991).

Prevention and Control Act.⁸⁴ Since *Lopez*, lower courts have almost always upheld these laws, illustrating, perhaps, that Justice Kennedy's concern about the stability of prior jurisprudence upholding federal interstate commerce power is widely shared among the lower federal courts.

1. *Guns*

Careful construction can be—and has been—used to avoid potential *Lopez* problems in the firearms context. For example, the statute imposing a sentence enhancement for use of a firearm in a robbery was read so as to require commission of a federally prosecutable crime, with its own distinct Commerce Clause predicate. Thus, when a defendant violated the federal law against robbing a financial institution, the court readily applied the sentence enhancement for use of a firearm.⁸⁵

Since the 1930s, all gun dealers in the United States have been required to obtain a federal firearms license ("FFL"). Thus, a statute criminalizing the theft from a Federal Firearms Licensee of a firearm that has been shipped in interstate commerce presented no *Lopez* problem.⁸⁶ (We should note that the stolen gun's movement in interstate commerce would not be a remote event; the FFL would likely have received the gun from an out-of-state wholesaler, or the wholesaler would have received the gun from an out-of-state manufacturer.)

The much more important line of cases, however, simply involved statutes under which a convicted felon (who is prohibited by federal law from possessing a firearm) was prosecuted for possessing a firearm. Without exception, the courts have found a simple line-crossing basis was sufficient; as long as the firearm was shown, at some point, to have been transferred across state boundaries, the exercise of power under the Commerce Clause was legitimate. Courts handling such cases have zeroed in on the *Lopez* majority's observation that the Gun-Free School Zones Act did not have a jurisdictional predicate.⁸⁷

84. 21 U.S.C. § 801 (1994).

85. See, e.g., *United States v. Fryer*, 896 F. Supp. 763, 764 (N.D. Ill. 1995).

86. See *United States v. Snow*, 82 F.3d 935 (10th Cir. 1996).

87. See *United States v. Bates*, 77 F.3d 1101, 1104 (8th Cir. 1996) (holding ban on possession of firearm with obliterated serial number is lawful, because of specific jurisdictional requirement that firearm itself must have been shipped in interstate or foreign commerce). For simple unlawful possession cases, see *United States v. Wells*, 98 F.3d 808 (4th Cir. 1996); *United States v. Gateward*, 84 F.3d 670 (3d Cir. 1996); *United States v. Sorrentino*, 72 F.3d 294 (2d Cir. 1995); *United States v. Bell*, 70 F.3d 495 (7th Cir. 1995); *United States v. Bolton*, 68 F.3d 396, 400 (10th Cir. 1995); *United States v. Shelton*, 66 F.3d 991 (8th Cir.

In the context of firearms cases, some courts have strained particularly hard to find an interstate commerce nexus. For example, the Eighth Circuit upheld a conviction for possession of ammunition—which had been manufactured in the defendant's home state—on the grounds that components of the ammunition had been imported by the manufacturing company.⁸⁸

Two pre-*Lopez* Supreme Court precedents are repeatedly cited by the lower courts in upholding the federal bans on simple gun possession by persons with criminal convictions. In *United States v. Bass*,⁸⁹ the Court's major case interpreting the then-new GCA, the Court was faced with a congressional statute which made it illegal for a felon to receive, transport, or possess any firearms "in commerce or affecting commerce." The prosecution had shown that Bass was a felon and that he possessed a firearm, but no other interstate commerce nexus had been demonstrated. Although the *Bass* Court could, theoretically, have upheld Bass's conviction on the theory that gun crime substantially affects the interstate economy, and banning gun possession by ex-felons is a rational way for Congress to reduce such harm to the interstate economy, the Court did not do so. Instead, the Court reversed Bass's conviction. The *Bass* majority reasoned that the statute was ambiguous; if the statute were interpreted as a ban on simple possession, the 1968 GCA would "have significantly changed the federal state balance."⁹⁰ After discussing *Bass* in a long paragraph, the *Lopez* Court explained that *Bass*'s interpreting the statute to require a specific interstate commerce nexus to possession was proper, since a contrary interpretation would "require[] decision of serious constitutional questions."⁹¹

After *Bass*, prosecutors enforcing the 1968 GCA made sure to prove that the particular gun the felon had possessed had been transported across state lines. Years later, in *Scarborough v United States*,⁹² the Court held that Congress had only intended to require a minimal nexus with interstate commerce. As long as the gun had crossed state lines, even if the crossing were years before the felon's conviction, and

1995); *United States v. Edwards*, 894 F. Supp. 340 (E.D. Wis. 1995); *United States v. Brown*, 893 F. Supp. 11 (M.D.N.C. 1995).

88. See *United States v. Mosby*, 60 F.3d 454 (8th Cir. 1995).

89. 404 U.S. 336 (1971).

90. *Bass*, 404 U.S. at 349. Cf. *United States v. Frega*, 933 F. Supp. 1536, 1540 (S.D. Cal. 1996) (citing *Bass* as reason to narrowly construe application of ambiguous federal bribery statute to state officials).

91. *United States v. Lopez*, 514 U.S. 549, 561 (1995).

92. 431 U.S. 563 (1977).

even if the felon had nothing to do with the interstate crossing, the GCA of 1968 still applied. In contrast to *Bass*, *Scarborough* was not cited or discussed by the *Lopez* Court, and appropriately so; *Scarborough* was purely a statutory construction case, and the defendant apparently never raised the issue of whether the government's interpretation of the GCA of 1968 would mean that the GCA exceeded congressional powers over interstate commerce.

Thus, technically speaking, lower courts are free to examine the outer boundaries of the GCA to determine if they are consistent with *Lopez*. But for courts disinclined to challenge the charging decisions of United States Attorneys in gun prosecutions, *Scarborough* offers a citation which, for the lower court's purpose, can be used to sidestep the issue. Yet as currently interpreted, the federal gun possession laws raise precisely the kind of "areas of traditional state concern" issues which were raised in the Kennedy/O'Connor concurrence in *Lopez*. Control of gun possession has traditionally been a state issue. The federal ban applies to all felony convictions (including non-violent convictions in the distant past), and all guns.⁹³ In contrast, many state laws against possession of guns by ex-criminals apply only to violent felonies, or apply only for a period of years following the conviction, or apply only to handguns. If Colorado decides to allow a person who was convicted of income tax evasion thirty-five years ago to possess a .22 rifle for squirrel hunting, why should the federal government override that decision?⁹⁴

93. In 1996, the ban was expanded to domestic violence misdemeanors. See 18 U.S.C. § 922(g)(8) (1997). As with felonies, the ban applied to persons whose convictions had occurred many years before the ban became law.

94. Cf. *Lopez*, 514 U.S. at 561 n.3 (criticizing Gun-Free School Zones Act based on government's admission that the Act "displace[s] state policy choices in . . . that its prohibitions apply even in states that have not chosen to outlaw the conduct in question"); Carlo D'Angelo, Note, *The Impact of United States v. Lopez Upon Selected Firearms Provisions of Title 18 U.S.C. § 922*, 8 ST. THOMAS L. REV. 571 (1996) (suggesting that under *Lopez*, the following statutes are unconstitutional: 18 U.S.C. § 922(g) (possession of a firearm by an ex-felon), 18 U.S.C. § 924(c) (carrying or using a firearm with intent to commit a violent or drug crime), 18 U.S.C. § 922(k) (possessing a firearm with an obliterated serial number), 18 U.S.C. § 922(o) (possession of machine guns)).

In an Indiana case, a man named David Eubank who had served a prison sentence for robbery was released, and put on probation. He went straight, and checked in regularly with his parole officer. He asked the officer if it was alright to get a .22 rifle for hunting, and the probation officer said yes. The probation officer was correct under Indiana law, which allows ex-felons to own long guns, but was incorrect under federal law, which does not distinguish long guns from handguns.

A while later, Indiana police and federal officials raided Eubank's home, searching for

Even more constitutionally problematic is the 1986 federal law banning possession of new machine guns by anyone.⁹⁵ In contrast to the felon-in-possession laws, the machine gun ban contains no jurisdictional predicate. Nor were there any legislative findings—or even hearings—regarding an effect on interstate commerce. Instead, the ban was attached as a hastily-drafted floor amendment to another firearms bill in the House of Representatives.⁹⁶ The entire legislative history consists of the sponsor of the ban, former Representative Bill Hughes (D-N.J.), saying that he cannot understand why anyone would want to own a machine gun. The federal ban on the possession of machine guns manufactured after May 19, 1986 has been upheld on the basis of congressional findings about interstate commerce in earlier laws regulating machine gun purchases.⁹⁷ Or, it has been argued, possession of a machine gun must necessarily involve a transfer, and a transfer is commerce, and banning possession is how Congress can best ban interstate transfers.⁹⁸

evidence that he was committing robberies again. They found no such evidence, but they did find a .22 rifle. Eubank was then prosecuted for possession of the rifle. Ironically, he faced a longer term for possessing the gun (a 15 year mandatory minimum)—after his probation officer told him it was alright—than he would have served if he actually perpetrated more robberies. Eubank went to trial, and, apparently in an act of jury nullification, was acquitted. He had already served several months in jail, while he was held awaiting trial.

An El Paso case had a different result. Bill Keagle, who had committed burglaries in 1978, went straight after release from prison, and, unaware of the federal act, took the .22 rifle and a shotgun he owned down to a pawnshop and sold them. As part of the sale, he filled out the federal gun registration document, Form 4473. Since Keagle had sold the guns, and had been willing to fill out a registration form when he did so, he obviously was not planning to use the guns in a crime.

But after the El Paso police inspected the pawnshop and found the 4473 form, the federal prosecutor joined the case. In exchange for dropping charges which would have led to the 15 year mandatory minimum, Keagle was forced to accept an eight year prison sentence. See Dennis Cauchon, *Trapped by the Law*, USA TODAY, July 6, 1992, at 3A.

95. See 18 U.S.C. § 922(o) (1994).

96. The amendment did not even receive a recorded vote. Rep. Mario Biaggi (later forced to leave the House as a result of a felony conviction) was presiding over the House that day; he declared that the proponents of the amendment had prevailed in a voice vote—even though the voices appeared to be evenly divided—and violated the rules of the House by ignoring requests for a recorded vote.

97. See *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995). See also *United States v. Kenney*, 91 F.3d 884, 890-91 (7th Cir. 1996).

98. See *United States v. Rambo*, 74 F.3d 948, 952 (9th Cir. 1996). This plainly goes too far. The Mann Act prohibits the movement of a person in interstate commerce for purposes of prostitution. See 36 Stat. 825, ch. 395 (1910), upheld in *Hoke v. United States*, 227 U.S. 308 (1913). It is not suggested that congressional power to ban the movement of a prostitute from Los Angeles to Seattle can be enforced by a ban on purely intra-state prostitution, including in areas where prostitution is legal, such as certain counties in Nevada. Cf. *Mortensen v. United*

After the ban was stricken by a district court in Mississippi,⁹⁹ the Fifth Circuit upheld the ban by a 2-1 vote. In dissent, Judge Edith Jones suggested that Congress lacks the power to prohibit possession of a machine gun under the commerce power. Rejecting the majority's theory that a ban on possession is a permissible exercise of the power to ban interstate commerce in an item, Judge Jones argued:

The statute is not limited to possession in or even affecting interstate commerce, or to possession of a firearm that has traveled in interstate commerce. Rather, it criminalizes the mere private possession of a machine gun. The majority infer from the fact that Section 922(o) prohibits "transfer" as well as "possession" that channels or things in commerce were intended to be regulated. This inference seems unwarranted for two reasons. First, transfer as well as possession of a thing can be of a wholly intrastate character. Second, when the government criminalizes conduct in the disjunctive, it may prosecute separately each type of conduct disjunctively named. Thus, as in this case, possession alone is criminalized independent of any transfer of a machine gun.¹⁰⁰

Judge Jones concluded her analysis by pointing out that:

Lopez reminds us forcefully that Congress's enumerated power over commerce must have some limits in order to maintain our federal system of government and preserve the states' traditional exercise of the police power. Section 922(o) is a purely criminal law, without any nexus to commercial activity, and its enforcement would intrude the federal police power into every village and remote enclave of this vast and diverse nation.¹⁰¹

Since the Jones dissent, the federal machine gun ban has suffered some close calls. The Fifth Circuit reheard the case en banc, and split eight-to-eight, thereby leaving the original decision intact.¹⁰² In the

States, 322 U.S. 369 (1944) (holding Mann Act inapplicable to defendants who took Nebraska prostitutes on a non-sexual vacation trip to Utah).

99. See *United States v. Bownds*, 860 F. Supp. 336 (S.D. Miss. 1994). See also *United States v. Gambill*, 912 F. Supp. 287, 290 (S.D. Ohio 1996) ("mere possession of a machine gun may not implicate interstate commerce").

100. *United States v. Kirk*, 70 F.3d 791, 799 (5th Cir. 1996) (Jones, J., dissenting).

101. *Id.* at 802. Although some states have outlawed machine gun possession, most have not, and thus the federal law overrides policy decisions of many states.

102. See *United States v. Kirk*, 105 F.3d 997 (5th Cir. 1997). Eight judges voted to affirm

Third and Sixth Circuits, the ban again was upheld, but by two-to-one split decisions.¹⁰³ Issues similar to the machine gun ban are raised by the new federal ban on so-called "assault weapons" and magazines

per curiam. Three of them joined a lengthy opinion by Judge Higginbotham which (like Justice Breyer's dissent in *Lopez*) stitched together excerpts from various popular magazine articles which allegedly showed that machine guns were sometimes used in crime; repeatedly asserted how dangerous machine guns are; said that machine guns have no social utility, and claimed that while Congress would not ban mere possession of ordinary guns, machine guns were on a different plane, and could be banned. *See id.* The dissenters, led by Judge Jones, replied that the ban on possession could not be justified as carrying out a ban on commercial transfer (since one could acquire a machine gun through a non-commercial transfer, such as a bequest; or a malfunctioning semi-automatic might fire two bullets with a single trigger press, and thereby be classified as a machine gun by federal law). *See id.*

Regarding the post-hoc efforts of various courts to conclude that Congress—while remaining utterly silent on the subject—had somehow determined that machine guns burden interstate commerce:

The suggestion that Congress secretly made such a finding is just as speculative as it would be to suggest that Congress secretly thought such firearms to be a burden on raising armies, collecting taxes, coining money, establishing post offices, punishing piracies on the high seas, or other subjects of Congress's enumerated powers in Article I, Section 8 of the Constitution.

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Later, a three-judge panel of the Fifth Circuit heard a different machine gun case, and upheld the statute, thereby resolving the issue that had been left unresolved by the en banc panel's even division. *See United States v. Knutson*, 113 F.3d 27 (5th Cir. 1997).

103. *See United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996), *cert. denied*, 118 S. Ct. 46 (1997). The majority argued that although section 922(o) had no legislative history or findings about interstate commerce, the legislative history of other portions of the Gun Control Act—which had been enacted in different years and which said nothing about machine guns—supplied sufficient findings about interstate commerce. *See id.* at 279-80. The dissent pointed out that not all cases of possession in violation of 922(o) involve an illegal transfer (the owner could have converted a semiautomatic to automatic, for example), nor is every illegal transfer an *interstate* transfer. *See id.* at 288. Further, the possession of a machine gun on one's property has no more genuine connection with interstate commerce or commerce of any sort than does possession of a gun within a school zone. *See id.* at 291. Neither Congress nor the government attorneys defending 922(o) have produced any evidence that the occasional intrastate possession of machine guns by interstate criminals (e.g. controlled substance merchants, racketeers) has a substantial effect on interstate commerce. *See id.* at 292.

See also United States v. Kenney, 91 F.3d 884 (7th Cir. 1996) (upholding 922(o) because of alleged "substantial" effect on interstate commerce of machine gun possession); *United States v. Beuckelaere*, 91 F.3d 781 (6th Cir. 1996) (ban on possession is proper as regulation of the "channels" of interstate commerce; ban also proper because machine guns are "things in interstate commerce"); *United States v. Rambo*, 74 F.3d 946 (9th Cir. 1995), *cert. denied*, 117 S. Ct. 791 (1996) (channels theory); *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995) (machine guns are "bound up with interstate attributes"). The *Rybar* dissent pointed out the weakness of the arguments from the Sixth, Ninth, and Tenth Circuits: there is no evidence that Congress passed the machine gun ban in order to protect interstate commerce. And the ban on simple intrastate possession cannot plausibly be claimed as regulation of the channels of interstate commerce. *See Rybar*, 103 F.3d at 289-90 (Alto, J., dissenting).

holding more than ten rounds,¹⁰⁴ and on possession of handguns by juveniles; the latter statute so far has been upheld by one appellate court.¹⁰⁵ In a legal world ruled purely by logic, invalidating the machine gun ban would be a straightforward application of *Lopez*. (Indeed, it was not all that long ago that federal officials acknowledged that legislation similar to 922(o) would be unconstitutional.)¹⁰⁵ But not all federal judges are inclined to apply *Lopez* as written, nor is the Supreme Court necessarily willing to expend its finite political capital on a topic as politically incorrect as machine guns.

Although lower courts have not yet mustered the votes to find any federal gun laws unconstitutional, Justice Thomas recently suggested that perhaps they should. In *Printz v. United States*,¹⁰⁷ the Court's majority held that Congress did have the power to order state and local

104. See 18 U.S.C. § 922(v) & (w) (1994). For an argument that the law cannot survive a meaningful application of the rational basis test, see David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. CONTEMP. L. 381 (1994).

105. See 18 U.S.C. § 922(x) (1994), upheld in *United States v. Michael R.*, 90 F.3d 340, 344 (9th Cir. 1996) (mere possession of a handgun by a juvenile "could have a substantial effect on interstate commerce").

The juvenile handgun ban is a perfect example of the foolishness of writing law in Washington for application to a diverse nation. The law allows juveniles to possess handguns while ranching or farming, or engaged in lawful target shooting or hunting. But even then, the juvenile must have prior written permission from her parents, and must carry that permission at all times with her while in possession of the handgun.

Only in Washington, D.C., could a sane person believe that teenagers helping on their parents' ranches and farms in Montana are actually complying with this silly statute. On the ranch, they do not carry around prior written permission. Off the ranch, they may carry a handgun in their pickup truck for protection while driving on isolated rural roads at night, as people in their family have for many generations. It is doubtful that most farmers and ranchers even know of the federal statute.

Apparently determined to prove that there is no foolish action which Congress can undertake that cannot be topped by a future Congress, Senators Diane Feinstein and Orrin Hatch have proposed a mandatory one-year federal prison sentence for violation of the federal ban. See S. 54, 105th Cong. § 7 (1997).

106. During the debate over the legislation that eventually became the Gun Control Act of 1968, there was a proposal to ban the possession of any National Firearms Act firearm (machine gun, short shotgun, short rifle) by any person under the age of twenty-one. Although the Johnson administration was pushing hard for federal gun control, Fred B. Smith, the General Counsel of the Treasury Department, told Congress:

It seems doubtful that the . . . provision can be justified under the taxing or commerce powers, or under any other power enumerated in the Constitution for Federal enactment. Consequently, the Department questions the advisability of including in the bill a measure which could be construed as a usurpation of the [police] power reserved to the states by Article X of the United States Constitutional Amendments.

Federal Firearms Act: Hearings before the Subcomm. to Investigate Juvenile Delinquency, Judiciary Comm., 90th Cong. 1088, 1089 (1967), quoted in HALBROOK, *supra* note 102, at 5-3 n.5. 107. 117 S. Ct. 2365 (1997).

law enforcement officials to perform background checks on retail handgun buyers. Concurring, Justice Thomas briefly addressed an issue which had not been raised by the plaintiffs, who were sheriffs (rather than prospective gun buyers): whether the Brady Act's regulation of retail gun sales¹⁰⁸ was constitutional. Justice Thomas suggested it was not: "the Federal Government's authority under the Commerce Clause, which merely allocates to Congress the power 'to regulate Commerce . . . among the several states,' does not extend to the regulation of wholly intrastate, point of sale transactions."¹⁰⁹

2. *Drugs*

Federal drug laws go even further than most of the federal gun laws, since there is no requirement that the drugs in question have ever been transferred in interstate commerce. Federal law also criminalizes simple possession, and requires no nexus of the drugs with interstate commerce. Here, the courts have relied on extensive congressional findings of a national market in illegal drugs which substantially affects interstate commerce, and which can only be controlled by federal law reaching all the way to simple possession of a single marijuana plant grown for personal consumption.¹¹⁰

Given that drugs per se are considered within the commerce power, courts have found no problem with sentence enhancements for activity which is, by itself, unrelated to the commerce power. For example, a sentence enhancement for possession of a firearm (regardless of whether the firearm ever moved in interstate commerce) while trafficking in drugs is legitimate, since the drugs themselves supply all the interstate

108. See 18 U.S.C. § 922(s) & (t) (1994).

109. *Printz*, 117 S. Ct. at 2385 (Thomas, J., concurring). Justice Thomas also suggested that the Brady Act, even if within the commerce power, might violate the Second Amendment. See *id.* He observed that while the Court has said little about the Second Amendment in the last sixty decades, there has been a great deal of scholarly discussion of the issue, almost all of which finds the Second Amendment to guarantee an individual right.

110. See *United States v. Dortch*, 98 F.3d 1364, 1369 (D.C. Cir. 1996). See also *United States v. Genao*, 79 F.3d 1333 (2d Cir. 1996); *United States v. Wacker*, 72 F.3d 1453, 1474-75 (10th Cir. 1995); *United States v. Leshuk*, 65 F.3d 1105, 1111-12 (4th Cir. 1995); *Guzman-Rivera v. United States*, 933 F. Supp. 138, 141 (D.P.R. 1996); *United States v. Walker*, 910 F. Supp. 837 (N.D.N.Y. 1995); *United States v. Kremetis*, 903 F. Supp. 250 (D.N.H. 1995); *United States v. Salmiento*, 898 F. Supp. 45 (D.P.R. 1995) (sale of drugs in school zone); *United States v. Gonzalez*, 893 F. Supp. 935 (S.D. Cal. 1995). Although the 1988 law banning simple possession of crack cocaine had no jurisdictional predicate, and no congressional findings, the 1970 findings about the interstate commerce impact of drugs in general was allowed to carry forward for the crack ban. See *United States v. Watson*, 942 F. Supp. 1378, 1383-86 (D. Kan. 1996).

commerce nexus that is necessary.¹¹¹ Likewise, a sentence enhancement for sale of drugs in a "school zone" is lawful, since drugs substantially affect commerce, whether or not they are in a school zone.¹¹²

While the federal gun and drug statutes go immensely beyond the powers that People of the United States thought they were granting the Congress in Article I, and while many of these cases are tortuously reasoned, we need not dissect the cases further in the context of this article. In each of the gun and drug cases, either the object itself moved in interstate commerce (the gun), or the object is often sold interstate (drugs), and Congress has made explicit, detailed findings about the interstate commerce effect of local commerce in the object. In contrast, regarding partial-birth abortions, the equipment used to perform the abortion is not being regulated. What is being banned is an action, not the possession or transfer of a valuable.

B. *Other Criminal Statutes*

Unlike the challenges to the gun and drug laws (both involving objects which, we suspect, many federal judges loathe),¹¹³ *Lopez* challenges to other federal laws have often resulted in the law's being declared unconstitutional, or have at least yielded a vigorous dissent suggesting that the law should have been stricken.

1. *Hobbs Act*

The Hobbs Act is a 1945 statute setting penalties for "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by robbery or extortion"¹¹⁴ Although the underlying motive of the sponsors was apparently labor racketeering, the statute was written in broad terms so as to deflect charges (which were made anyway) that the Act was an anti-labor bill, which it was.¹¹⁵

The post-*Lopez* Hobbs Act cases split. The Eleventh Circuit held that even though a city council used an out-of-state contractor and bought goods from interstate commerce, there was no evidence that the

111. See *United States v. Brown*, 72 F.3d 96 (8th Cir. 1995).

112. See *United States v. Medina*, 901 F. Supp. 59 (D.P.R. 1995).

113. See generally Brannon Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961 (1996).

114. 18 U.S.C. § 1951(a).

115. See, e.g., *United States v. Culbert*, 435 U.S. 371 (1978) (discussing legislative history).

attempt to blackmail one city council member into resigning "would have impacted the continuing business of th[e] governing body in such a manner as to constitute a violation of the federal statute."¹¹⁶ The court argued that even the pre-*Lopez* Hobbs Act cases suggested that there was no interstate commerce jurisdiction, and there was certainly no jurisdiction post-*Lopez*.¹¹⁷

But according to the Tenth Circuit, robbery and extortion are activities that through repetition can substantially affect interstate commerce. Therefore the interstate commerce power could properly be exercised to prosecute a defendant who robbed two restaurants, one bar, a scrap metal business, and an individual, all in the state of Kansas.¹¹⁸

The difference between the two circuits (other than the Tenth Circuit's failure so far to find *any* federal statute in conflict with *Lopez*) is whether to employ *Wickard*-style aggregation: can the defendant's criminal act, which does not have a substantial effect on interstate commerce, be aggregated with all similar criminal acts, and the interstate commerce power applied because in the aggregate there is a substantial effect? According to *Lopez*, aggregation is only permissible when the acts in question are themselves commercial.¹¹⁹

This aggregation issue is directly relevant to the Partial-Birth Abortion Ban Act. Should a court look at the lowest level of generality (how to perform an abortion) or the highest (the abortion business as a whole)?

2. *Transportation and Carjacking*

In 1995, Congress preempted state regulation of intrastate trucking. The preemption was upheld as a legitimate exercise of the interstate commerce power, based on express congressional findings that state

116. *United States v. Frost*, 77 F.3d 1319, 1320 (11th Cir. 1996). While some pre-*Lopez* cases had construed the Hobbs Act narrowly, the greater line of cases pushed the language to its furthest extremes.

117. *See id.* *See also* *United States v. Yokley*, 542 F.2d 300, 304 (6th Cir. 1976) (applying Hobbs Act to armed robbery of a single victim would be "an unprecedented incursion into the criminal jurisdiction of the States").

118. *See* *United States v. Bolton*, 68 F.3d 396, 398 (10th Cir. 1995). *See also* *United States v. Harrington*, 108 F.3d 1460 (D.C. Cir. 1997) (majority holds that restaurant robbery violates Hobbs Act, since restaurant would have used some of the stolen money to buy goods from interstate commerce); *United States v. Stillo*, 57 F.3d 553, 558 n.2 (7th Cir. 1995); *United States v. Pettiford*, 934 F. Supp. 479, 481-82 (D. Mass. 1996) (under "depletion of assets" theory, robbery victim had less money to spend on goods in interstate commerce; therefore, Hobbs Act jurisdiction existed).

119. *See* *United States v. Lopez*, 514 U.S. 549, 561 (1995).

regulation has "imposed an unreasonable burden on interstate commerce," as well as extensive additional findings about the substantial effects of intrastate regulation on interstate commerce.¹²⁰

While the trucking industry is readily seen as one of the channels of interstate commerce, the status of automobiles has not been so clear. The post-*Lopez* appellate case that is best suited for classroom study¹²¹ is *United States v. Bishop*,¹²² a Third Circuit case in which two of the three judges voted to uphold the federal carjacking statute. The majority reasoned that the statute relates to road safety and the interstate and foreign markets for stolen car parts. Likewise, car theft affects insurance prices.¹²³ Not only does carjacking "substantially affect" interstate commerce, cars themselves are "instrumentalities" of interstate commerce.¹²⁴ The majority pointed to extensive congressional findings about the interstate problem of car theft, and noted with approval that the statute requires that the car must have been "transported, shipped, or received" through interstate commerce (although the crime itself need have no particular relation to interstate commerce, such as taking the carjacked vehicle across state lines).¹²⁵

Judge Edward Becker's dissent countered as follows: auto theft in general may be an economic activity, but carjacking is a crime of violence. When enacting the carjacking statute, Congress was not concerned with the interstate market in stolen car parts, but instead with the violence of the carjacking itself. The anecdotal evidence from newspapers, cited in the majority opinion, was insufficient to prove a substantial effect on interstate commerce; courts must see whether "adequate data, available by way of Congressional findings or otherwise, establish that the proscribed non-commercial activity has a sufficient

120. *Kelley v. United States*, 69 F.3d 1503, 1507-08 (10th Cir. 1995). See also *Harris County Wrecker Owners for Equal Opportunity v. Houston*, 943 F. Supp. 711, 733 (S.D. Tex. 1996). Cf. *CSX Transp. v. Georgia Pub. Serv. Comm.*, 944 F. Supp. 1573, 1585-86 (N.D. Geo. 1996) (similar analysis of federal preemption of state regulation of intrastate railroads).

121. An appellate case in which the majority and dissenting opinions are vigorously argued in detail, and in which the two sides respond to each other's arguments. For another case upholding the carjack statute, see *United States v. Hutchinson*, 75 F.3d 626 (11th Cir. 1996).

122. 66 F.3d 569 (3d Cir. 1995).

123. Cf. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 182 (1868) ("Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity These contracts are not articles of commerce in any proper meaning of the word They are not commodities to be shipped or forwarded from one state to another and put up for sale."), *overruled by United States v. South Eastern Underwriters Assoc.*, 322 U.S. 533 (1944).

124. *Bishop*, 66 F.3d at 578-81, 588.

125. See *id.* at 585.

relationship to interstate commerce."¹²⁶

Congress, in fact, made no findings about carjacking's effect on interstate commerce.¹²⁷ Moreover, Congress could not rationally conclude that carjackings are an important part of interstate sale of stolen auto parts, because carjacking is only two percent of auto thefts.¹²⁸

As for the assertion that all automobiles are instrumentalities of interstate commerce, such a claim would allow Congress to enact a national seatbelt law, or to ban right turns on red.¹²⁹ Further applying what we call the "non-infinity principle," the dissent argued that the majority argument proves too much, since it would allow federalization of nearly all crime.¹³⁰

Finally, the dissent argued that the presence of a jurisdictional element in the statute is not sufficient by itself. The statute must still fit under one of the three elements of commerce power.¹³¹ *Scarborough* was not to the contrary, since it was a pure statutory interpretation case, and a Commerce Clause analysis was not raised.¹³² Again using the "non-infinity principle," the dissent argued that the majority's suggestion that a mere border-crossing conveys jurisdiction would allow Congress to require students in private schools to read their homework assignments, if the books came from out of state.¹³³

3. *Child Support*

In 1994, Congress enacted the federal Child Support Recovery Act (CSRA),¹³⁴ which makes it a federal crime for a person to fail to adhere to a child support order if the delinquent parent and the child live in different states. Given that all nine Justices in *Lopez* agreed that family law was beyond the reach of the interstate commerce power,

126. *Id.* at 591 (Becker, J., concurring in part and dissenting in part).

127. *See id.* at 600.

128. *See id.* at 603. This latter point suggests that a "substantial effect" must be more than a non-trivial effect. Two percent is certainly tangible, but, arguably non-substantial. Compare this with *Wickard*, where wheat grown for home consumption constituted twenty percent of the wheat crop. It seems entirely reasonable to conclude, as both *Wickard* and the *Bishop* dissent imply, that a "substantial effect" must comprise somewhere between three and twenty percent of a given interstate commerce issue.

129. *See id.* at 599. *But see* *Kowalczyk v. United States*, 936 F. Supp. 1127, 1144-45 (E.D.N.Y. 1996) (federal law barring alteration of vehicle identification numbers is constitutional, because cars are instrumentalities of interstate commerce).

130. *See Bishop*, 66 F.3d at 591-92 (Becker, J., concurring in part and dissenting in part).

131. *See id.* at 593-94.

132. *See id.* at 595.

133. *See id.* at 596.

134. 18 U.S.C. § 228 (1994).

and that the majority announced that any argument which could allow assertion of interstate commerce power over "child support" was automatically defective, one would expect the CSRA to run into some problems in court.

The courts that have upheld the CSRA have relied on the CSRA's requirement that the child live in a different state from the delinquent parent.¹³⁵ One of the courts specifically noted that if Congress had attempted to apply the CSRA to intrastate delinquencies, the statute would be unconstitutional, as an intrusion upon the traditional state issue of family law.¹³⁶ Of course this dictum militates against the Partial-Birth Abortion Ban Act, since the Act applies to a purely intrastate medical procedure and, as noted previously, implicates family law.

One court analogized the CSRA to a federal statute that criminalizes fleeing a state to avoid being prosecuted or compelled to testify.¹³⁷ In *United States v. Mussari*,¹³⁸ the court attacked this analogy due to the "lack of any requirement in the CSRA for the non-paying parent to flee the jurisdiction," much less leave in order to avoid enforcement of the support order, and held that the CSRA is unconstitutional.¹³⁹ Three other district courts have also found the CSRA to be unconstitutional in spite of the two-state requirement.¹⁴⁰ Three of these courts argued that, although child support involves money, the mere collection of delinquent child support payments is not commerce.¹⁴¹

135. See, e.g., *United States v. Sage*, 92 F.3d 101 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 784 (1997); *United States v. Johnson*, 940 F. Supp. 911, 913-914 (E.D. Va. 1996); *United States v. Lewis*, 936 F. Supp. 1093, 1097-1100 (D.R.I. 1996); *United States v. Sims*, 936 F. Supp. 817, 819-820 (N.D. Okla. 1996); *United States v. Ganaposki*, 930 F. Supp. 1076, 1083 (M.D. Pa. 1996); *United States v. Nichols*, 928 F. Supp. 302, 310-15 (S.D.N.Y. 1996); *United States v. Collins*, 921 F. Supp. 1028, 1035-36 (W.D.N.Y. 1996); *United States v. Kegel*, 916 F. Supp. 1233, 1237-39 (M.D. Fla. 1996); *United States v. Hopper*, 899 F. Supp. 389, 392-93 (S.D. Ind. 1995); *United States v. Hampshire*, 892 F. Supp. 1327, 1329-30 (D. Kan. 1995) *aff'd*, 95 F.3d 999 (10th cir. 1996), *cert. denied*, 117 S. Ct. 753 (1997).

136. See *Hampshire*, 892 F. Supp. at 1330.

137. See *United States v. Murphy*, 893 F. Supp. 614, 616 (W.D. Va. 1995) (referring to 18 U.S.C. § 1073), *vacated on other grounds*, 934 F. Supp. 736 (W.D. Va. 1996), *rev'd*, 117 F.3d 137 (4th Cir. 1997).

138. 912 F. Supp. 1248 (D. Ariz. 1995), *rev'd*, 95 F.3d 787 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1567 (1997).

139. *Id.* at 1252.

140. See *United States v. Parker*, 911 F. Supp. 830 (E.D. Pa. 1995); *United States v. Bailey*, 902 F. Supp. 727 (W.D. Tex. 1995), *rev'd*, 115 F.3d 1222 (5th Cir. 1997); *United States v. Schroeder*, 894 F. Supp. 360 (D. Ariz. 1995), *rev'd*, 95 F.3d 787 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1567 (1997).

141. See *Mussari*, 912 F. Supp. at 1336; *Schroeder*, 894 F. Supp. at 367; *Parker*, 911 F. Supp. at 835 (holding that the failure to pay child support does not "substantially affect[] inter-

Next, the “non-infinity principle” also came into play. According to the *Mussari* court, allowing exercise of the interstate commerce power simply because two people live in different states is wrong, because “[w]ere this court to find that Congress can pass criminal legislation in every instance where a citizen exercised his or her constitutional right to travel to a new state to live, Congress would essentially have unlimited, unchecked authority to legislate as to *any* area of an individual’s life.”¹⁴²

In another application of the non-infinity principle, the *Parker* court rejected the government’s argument that families that are deprived of child support will sometimes lack the “basic necessities,” go on welfare, and become a burden to the federal government, because:

Under the “basic necessities” theory, Congress would have power to enact a criminal offense prohibiting any crime that deprives another person of money. Congress, under this scenario, could punish embezzlers, con artists, and muggers—even if their activity was solely intrastate—because the proceeds of the crimes likely would have helped the victim afford food, housing, medical care, or other goods and services. If the court were to follow this reasoning, it would be converting traditionally state-enforced, common-law crimes of theft into federal crimes, thus derogating the constitutionally critical “distinction between what is truly national and what is truly local.”¹⁴³

Various findings of fact by Congress about the economic effect of child support non-payment were rejected as not constituting a rational basis for Congress to have found substantial effects on interstate commerce.¹⁴⁴

Finally, the “traditional areas of state concern” doctrine applied with special force, since federal courts have long applied a voluntary “domestic relations exception” to avoid hearing diversity cases dealing with domestic relations.¹⁴⁵ Although granted diversity jurisdiction by Con-

state commerce”).

142. *Mussari*, 912 F. Supp. at 1256.

143. *Parker*, 911 F. Supp. at 838 (quoting *United States v. Lopez*, 514 U.S. 549, 567-68 (1995)).

144. *See id.* at 836-37.

145. *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992).

The domestic relations exception raises issues about the constitutionality of the new federal ban on possession of a firearm by anyone subject to a domestic relations restraining order, or by anyone ever convicted (including convictions long before the date of the ban) of a misdemeanor involving domestic violence. *See* 18 U.S.C. § 922(g)(8) (1997).

gress, federal courts refuse to exercise it in domestic relations cases out of deference to federalism. The *Mussari* court held that this exception was applicable to the CSRA, since a federal court would have to determine the validity of a state court support order.¹⁴⁶

4. *Arson and Explosives*

As Justice Breyer warned in his *Lopez* dissent, the *Lopez* decision has caused trouble for the federal arson statute, which punishes arson of buildings that are "used in activity affecting interstate commerce."¹⁴⁷ One case upholding and applying the arson statute pointed to the specific jurisdictional requirement that the building be used in interstate commerce.¹⁴⁸ In the case at bar, noted the Sixth Circuit, the college dormitory which had been burned held mostly out-of-state students, and the college purchased many supplies from out-of-state vendors.¹⁴⁹

In a decision not inconsistent with the Sixth Circuit's holding, the Ninth Circuit found that arson of a private residence (even when perpetrated for insurance fraud) "is not commercial or economic in nature."¹⁵⁰

[W]here Congress seeks to regulate a purely intrastate noncommercial activity that has traditionally been subject to exclusive regulation by state or local government, and where the connection of the regulated activity as a whole to interstate commerce is neither readily apparent nor illuminated by express congressional findings, the government must satisfy the jurisdictional requirement by pointing to a "substantial" effect on or connec-

146. See *Mussari*, 912 F. Supp. at 1254-55. See also *United States v. Bailey*, 902 F. Supp. 727, 729 (1995) (citing the *Mussari* court argument with approval).

It might be noted that child support across state boundaries is not an area in which states are incapable of acting. Many states have enacted the Uniform Interstate Child Support Act, to give expedited judicial enforcement to child support orders from other states. See, e.g., COLO. REV. STAT. §§ 14-5-101 to -1007 (Supp. 1996).

147. 18 U.S.C. § 844(i) (1994).

148. See *United States v. Sherlin*, 67 F.3d 1208, 1212-14 (6th Cir. 1995), cert. denied, 116 S. Ct. 795 (1996).

149. See *id.* at 1213. See also *United States v. Corona*, 934 F. Supp. 740, 743-44 (E.D. La. 1996) (upholding jury determination that property under renovation for use as rental property or a youth hostel was "being used in interstate commerce or in an activity which substantially affected interstate commerce," and that the defendants were guilty under the federal arson statute), modified on another issue, 108 F.3d 565 (5th Cir. 1997). Cf. *Reedy v. United States*, 934 F. Supp. 184, 187 (W.D. Va. 1996) (asserting that 18 U.S.C. § 844(i), the federal arson statute, can be constitutionally applied to all business property).

150. *United States v. Pappadopoulos*, 64 F.3d 522, 526 (9th Cir. 1995).

tion to interstate commerce.¹⁵¹

That the home "received a supply of natural gas from a company that obtained some of that gas from outside the state," did not create a substantial connection between the arson and interstate commerce.¹⁵² "Unlike a firearm or a car, both of which can readily move in interstate commerce, a house has a particularly local rather than interstate character."¹⁵³ Therefore the court reversed the defendant's 18 U.S.C. § 844(i) conviction for lack of federal jurisdiction.¹⁵⁴

Surprisingly, a decision with very broad implications for restraining overuse of the interstate commerce power may have emerged in a case in which the decision did the defendant no good. Timothy McVeigh and Terry Nichols were charged with, among other things, violating 18 U.S.C. § 2332a by using "a weapon of mass destruction" (a truck bomb) to injure persons or damage property in the United States.¹⁵⁵ In a pretrial ruling, Chief Judge Richard Matsch noted that the statute suffered the same infirmity as the statute declared unconstitutional in *Lopez*: no jurisdictional predicate, and no congressional findings regarding interstate commerce.¹⁵⁶ But, Judge Matsch continued, he could only declare the statute unconstitutional if it were unconstitutional as applied to the case at bar.¹⁵⁷ Judge Matsch then refused to dismiss the two counts charging violations of section 2332a, explaining he would instruct the jury that the existence of a "substantial effect" on interstate commerce was an essential element of the offense charged.¹⁵⁸ Given that the murder of 168 people and the destruction of a large office building could easily be said to have a substantial effect on interstate commerce, the jury had no trouble convicting McVeigh of the offense. It seems doubtful that the judge's instruction will help Nichols at trial.

151. *Id.* at 527.

152. *Id.* at 526-27.

153. *Id.* at 527-28.

In the Eleventh Circuit, prosecution of arson of a private residence was likewise held to be beyond the scope of the commerce power, even though the residence contained a home office at which the homeowner worked on matters of international commerce. See *United States v. Denalli*, 73 F.3d 328 (11th Cir.), *modified*, 90 F.3d 444 (11th Cir. 1996). The court ruled that "the evidence did not prove any impact of" the homeowner's work at home on his employer's contract with a foreign government, under which the homeowner/employee worked on projects. *Id.* at 330-31.

154. See *Pappadopoulos*, 64 F.3d at 527-28.

155. *United States v. McVeigh*, 940 F. Supp. 1571, 1575 (D. Colo. 1996).

156. See *id.* at 1576.

157. See *id.*

158. See *id.* at 1578.

But the McVeigh instructions create a very significant precedent in other cases. For a defendant charged with mere possession of a gun, or with perpetrating one robbery of a small store, many juries might find that the defendant's isolated crime did not have a "substantial effect" on interstate commerce.

5. *Abortion and Other Medical Services*

Another new federal criminal statute is the Freedom of Access to Clinic Entrances Act ("FACE").¹⁵⁹ The Seventh Circuit's *United States v. Wilson* split decision upholding FACE (after the district court had declared it unconstitutional) is an excellent example of the kinds of arguments that can be employed on each side of post-*Lopez* cases.¹⁶⁰

The majority was persuaded by congressional findings that the presence of blockades forces patients to travel to other states, and interferes with "the interstate commercial activities of health care providers, including the purchase and lease of facilities and equipment . . . employment of personnel and . . . purchase of . . . supplies from other states."¹⁶¹ Significantly, abortion patients are a type of consumer quite likely to travel interstate. For example, at a Virginia clinic, between twenty and thirty percent of the patients were from other states, and at one Maryland clinic, over half the patients were from out of state.¹⁶² The majority argued, in effect, that FACE passed the non-infinity test, because abortion clinics were an especially interstate form of business, and thus interference with access to clinics had a "substantial effect" on interstate commerce that would not be present in cases of interference with access to other facilities that were far less connected to interstate commerce, such as bowling alleys or campgrounds.¹⁶³

159. 18 U.S.C. § 248 (1994).

160. See *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995), *cert. denied*, 117 S. Ct. 47 (1996). See generally Amy H. Nemko, Note, *Saving FACE: Clinic Access under a New Commerce Clause*, 106 YALE L.J. 525 (1996) (reviewing the 7th Circuit's *Wilson* decision). For post-*Lopez* FACE cases adopting reasoning similar to the *Wilson* majority, see also *Cheffer v. Reno*, 55 F.3d 1517, 1519-21 (11th Cir. 1995). Cf. *United States v. White*, 893 F. Supp. 1423, 1425-28, 1432-34 (C.D. Cal. 1995).

161. *Wilson*, 73 F.3d at 680-81 (quoting H.R. REP. NO. 103-306, at 6, 7 (1993), reprinted in 1994 U.S.C.C.A.N. 699, 724).

162. See *Wilson*, 73 F.3d at 681 (citing *Bray v. Alexandria's Women's Health Clinic*, 506 U.S. 263, 312 (1993) (Stevens, J., dissenting)).

163. See *Wilson*, 73 F.3d at 681-84. See also *Terry v. Reno*, 101 F.3d 1412, 1418 (D.C. Cir. 1996) (noting that while the Gun-Free School Zones Act was based on a lengthy causal chain—gun possession near schools leads to gun crime which harms education which affects interstate commerce—the FACE law had only one causal step: obstructive activity outside clinics affects interstate commerce in abortion services).

Although FACE, like the Gun-Free School Zones Act, lacked any interstate commerce jurisdictional element, the majority did not think this omission necessarily rendered the statute void.¹⁶⁴

The *Wilson* majority also relied, somewhat improperly, on a post-*Lopez* Supreme Court case. Less than a week after *Lopez*, the Court, per curiam, decided a racketeering case involving a drug dealer who laundered his profits by operating a gold mine in Alaska.¹⁶⁵ The Court held that it did not have to decide if the mine's operations met the requirement of "substantially affecting" interstate commerce.¹⁶⁶ Instead, the gold mine met the alternative jurisdictional basis of actually being "engaged in . . . interstate or foreign commerce."¹⁶⁷

The Court explained that the mine operators had personally paid to transport out-of-state employees to the mine.¹⁶⁸ Further, the Court found it extremely significant that some of the supplies for the mine had been purchased in other states and brought to Alaska by the operators:

For example, the Government proved that Robertson purchased at least \$100,000 worth of equipment and supplies for use in the mine. Contrary to the Court of Appeals' suggestion, all of those items were not purchased locally ("drawn generally from the stream of interstate commerce," 15 F.3d, at 869 (internal quotation marks omitted)); the Government proved that some of them were purchased in California and transported to Alaska for use in the mine's operations. Cf. *United States v. American Building Maintenance Industries*, 422 U.S. 271, 285 (1975) (allegation that company had made *local* purchases of equipment and supplies that were merely *manufactured* out of state was insufficient to show that company was "engaged in commerce" within the meaning of § 7 of the Clayton Act). The Government also proved that, on more than one occasion, Robertson sought workers from out of state and brought them to Alaska to work in the mine. Cf. *id.*, at 274. Furthermore, Robertson, the mine's sole proprietor, took \$30,000 worth of gold, or 15% of the mine's total output, with him out of the

164. See *id.* at 685.

165. See *United States v. Robertson*, 514 U.S. 669 (1995).

166. See *id.* at 671.

167. *Id.* at 672.

168. See *id.* at 671.

State.

Whether or not these activities met (and whether or not, to bring the gold mine within the "affecting commerce" provision of RICO, they would *have* to meet) the requirement of substantially affecting interstate commerce, they assuredly brought the gold mine within § 1962(a)'s alternative criterion of "any enterprise . . . engaged in . . . interstate or foreign commerce." As we said in *American Building Maintenance*, a corporation is generally "engaged 'in commerce'" when it is itself "directly engaged in the production, distribution, or acquisition of goods and services in interstate commerce."¹⁶⁹

Robertson left no ambiguity: the local purchase of goods which were originally manufactured out-of-state is not being "in commerce." Whether the local purchase of goods originally manufactured from out-of-state could be sufficient large to substantially affect commerce was a question that the Court specifically left unresolved.

In the abortion clinic case, there was no evidence before the court that the operators of the clinic in question had bought goods in another state and brought them across state lines to the clinic in Wisconsin. Yet because an abortion clinic will inevitably make local purchases of goods that once moved in interstate commerce, the *Wilson* court asserted that clinics are "in commerce" and cited *Robertson* for support.¹⁷⁰ This is misleading jurisprudence.¹⁷¹

In dissent, Judge Coffey pointed to the lack of interstate commerce jurisdictional language in FACE. When Congress is not regulating economic activity, a jurisdictional requirement should be essential.¹⁷² In the case at bar, there was no evidence that any patient, doctor, or protester had traveled interstate.¹⁷³ While abortion clinics are commercial enterprises, FACE is not aimed at clinics; it is aimed at protesters, and

169. *Id.* at 671-72.

170. *See* *United States v. Wilson*, 73 F.3d 675, 680 (7th Cir. 1995), *cert. denied*, 117 S. Ct. 47 (1996).

171. The *Wilson* opinion is also somewhat sloppy. It refers to "Justice Thomas's *Lopez* dissent." *Wilson*, 73 F.3d at 684 n.10. The *Wilson* majority chides the *Wilson* dissent for quoting James Madison as a source of authority for the dissent's position, since the understanding of the Commerce Clause has changed since Madison's time. *See id.* But the Madison quote used by the *Wilson* dissent was also used by the *Lopez* majority, and therefore is a useful guide to what the Commerce Clause presently means. *See* *United States v. Lopez*, 514 U.S. 549, 552 (1995).

172. *See Wilson*, 73 F.3d at 694.

173. *See id.* at 689.

protest is a non-commercial activity.¹⁷⁴ “A federal statute that thus regulates purely non-commercial activity, while at the same time absent jurisdictional language, is unprecedented.”¹⁷⁵ (Actually, the unconstitutional Gun-Free School Zones Act appears to be a precedent for such a combination.) The dissent declined to address what it characterized as “dicta” about abortion clinics being “in commerce.”

As for the congressional findings about the heavy use of interstate travel for abortions, these amounted to “selective[]” use of “anecdotal evidence” from a few clinics.¹⁷⁶ Congress had offered nothing to distinguish abortion clinics from schools, churches, houses of prostitution, and private homes, all of which purchase goods that were once sold across state lines. FACE failed the non-infinity principle, since it would allow Congress to ban picketing at schools, brothels, churches, and private homes. Statistics from Congress itself showed that there are approximately 1.25 violent acts per state per year at abortion clinics. “I do not understand how slightly more than one act of violence per state each year provides a rational basis for concluding that interstate commerce is ‘substantially affected,’ especially since the conduct outlawed and prosecuted in this case was non-violent.”¹⁷⁷ While there was evidence that some abortion patients in the United States have been harassed, there was no evidence that the number of abortions performed actually declined.¹⁷⁸

One other post-*Lopez* medical case is worth noting. In a case arising in the district court in Maine, a dentist violated the Americans with Disabilities Act (ADA) by insisting that he would only fill the tooth of an HIV-positive patient at a hospital, and not in the dentist’s office.¹⁷⁹ The court found the ADA’s exercise of interstate commerce power over the defendant easily justifiable. The activities of all dentists similarly situated to defendant, in the aggregate, substantially affect interstate commerce, because they buy interstate supplies, process claims to out-of-state insurance companies, and attend classes and conferences out of state.¹⁸⁰ Although the dentist had argued that his decision about *where*

174. *See id.* at 692.

175. *Id.*

176. *See id.* at 696.

177. *Id.* at 697.

178. *See id.* at 698.

179. *See Abbott v. Bragdon*, 912 F. Supp. 580 (D. Me. 1995), *aff’d*, 107 F.3d 934 (1st Cir. 1997). At trial, experts offered conflicting opinions over whether the hospital-only procedure was a sensible medical precaution. *See id.* at 588-89.

180. *See id.* at 593.

to fill a cavity was not a commercial act, the court replied that "the way in which he fills cavities . . . constitutes one of the core economic activities of any dental office."¹⁸¹

This determination is of crucial importance to the Partial-Birth Abortion Ban Act: while an abortion clinic may be a commercial enterprise, is the doctor's deciding which abortion procedure is safer for the patient a commercial act?¹⁸²

6. *Violence Against Women Act*

In 1994, Congress enacted the Violence Against Women Act (VAWA),¹⁸³ which creates a federal civil cause of action for various violent and property crimes, if motivated by gender animus. While the statute invokes the commerce power, there is no jurisdictional predicate. There were, however, specific findings about an interstate commerce effect.¹⁸⁴

Upholding the statute, a Connecticut district court compared VAWA to the statute in *Wickard*: just as the cumulative impact of home-grown wheat had a substantial effect on interstate wheat sales, the cumulative effect of women withdrawing from the labor market or producing less, as a result of violence against them, has a significant effect on interstate commerce.¹⁸⁵ This reasoning could also support the partial-birth abortion ban: the cumulative effect of 5,000 fetuses not being born every year, and thus not participating in the economy, could be said to have a substantial effect on interstate commerce. Moreover, even if the ban on one method of abortion simply led to another method being used in most cases, the change in abortion method would result in different supplies being ordered from interstate medical suppliers, different amounts of money being spent by insurance companies, and so on.

181. *Id.*

182. Even pre-*Lopez*, at least one federal court was unwilling to allow the interstate commerce power be used to control intrastate medicine. In 1983, the federal Food and Drug Administration sought an order to prevent Texas physician Stanislaw Burzynski from treating cancer patients with "antineoplastons," an unapproved cancer therapy created by Dr. Burzynski. A federal district court granted most of the order, but expressly permitted Dr. Burzynski to continue the treatments within the state of Texas. See *United States v. Burzynski Cancer Research Inst.*, 819 F.2d 1301, 1304-05 (5th Cir. 1987).

183. 42 U.S.C. § 1398 (1994).

184. See H.R. REP. NO. 103-711, at 385 (1994), reprinted in 1994 U.S.C.C.A.N. 1801, 1853.

185. See *Doe v. Doe*, 929 F. Supp. 608, 616 (D. Conn. 1996). See also *Doe v. Hartz*, 970 F. Supp. 1375 (N.D. Iowa 1997) (upholding VAWA, and relying heavily on congressional findings). But see Clayton Act, ch. 323, § 6, 38 Stat. 731 (1914) (codified as amended as 15 U.S.C. § 17) ("the labor of a human being is not a commodity or article of commerce").

But in another VAWA case, *Bryzonkala v. Virginia Polytechnic & State University*,¹⁸⁶ the court pointed out that *Wickard*-style aggregation is, after *Lopez*, permissible only when the thing being aggregated is commercial activity.¹⁸⁷ Rape and other interpersonal violence is not a commercial activity. The *Bryzonkala* court rejected as irrelevant the plaintiff's claim that the chain of causation leading to a substantial impact on interstate commerce was shorter in her case than in *Lopez*. "In the end, the important issue is the proximity of the regulated activity to commerce, not the number of steps," and rape was simply too remote from interstate commerce.¹⁸⁸ Finally, the rationale implicit in VAWA violated the non-infinity principle.¹⁸⁹

Bryzonkala involved VAWA's creation of a federal tort, which contained no requirement that the tortious conduct involve interstate conduct. VAWA also contains criminal provisions which require some kind of state border crossing as an element of the offense. In *United States v. Gluzman*,¹⁹⁰ a New York City federal district court upheld the VAWA provision making it a crime to cross state lines to commit domestic violence. Contrasting this provision with the tort liability provision of VAWA, which applies to purely intrastate activity, the court relied on congressional authority to keep the "channels" of interstate commerce free from injurious traffic.¹⁹¹

But a Nebraska court declared unconstitutional VAWA's provision making it a federal crime to violate a domestic violence protective order if the perpetrator crosses a state line to commit a violation, or the victim crosses a state line as a result of the violation.¹⁹² Regarding the "channels" theory, "the court notes that there is a large analytical leap between crossing state lines with *things* in interstate commerce (such as

186. 935 F. Supp. 779 (W.D. Va. 1996).

187. See *id.* at 791.

188. *Id.* at 790-91.

189. See *id.* at 792-93. See also Chris A. Rauschl, Note, *Bryzonkala v. Virginia Polytechnic and State University: Violence Against Women, Commerce, and the Fourteenth Amendment—Defining Constitutional Limits*, 81 MINN. L. REV. 1601 (1997) (maintaining that VAWA statute is very similar to the unconstitutional Gun Free School Zones Act; the only difference is that one involved an actual violent crime, and the other a potential violent crime. While indefensible under the Commerce Clause, VAWA should be upheld under the Fourteenth Amendment.).

A third VAWA case "reluctantly" upheld VAWA because the court said any congressional exercise of the commerce power must be upheld if Congress has articulated a rational basis. See *Seaton v. Seaton*, 971 F. Supp. 1188 (E.D. Tenn. 1997).

190. 953 F. Supp. 84 (S.D.N.Y. 1997).

191. See *id.* at 89.

192. See 18 U.S.C. § 2262; *United States v. Wright*, 965 F. Supp. 1307 (D. Neb. 1997).

falsely made dentures or cattle), and simply traveling across state lines."¹⁹³ The "substantial effects" basis for exercise of the interstate commerce power could not save the statute, because there was no legislative history showing that Congress was concerned about the effects on interstate commerce of border crossings related to violations of protection orders.¹⁹⁴ Contrasting VAWA with various statutes that had been cited in *Gluzman*, the court noted that each of those statutes required actual movement in interstate commerce; in contrast, the VAWA statute required only a border crossing, and it is possible to cross a state border without moving in interstate commerce.¹⁹⁵

The VAWA, CSRA, and FACE cases, considered in conjunction with the Partial-Birth Abortion Ban Act, highlight one of the virtues of taking federalism seriously: it is value-neutral. The judicial opinions that would strike down three of the recent legislative triumphs of feminism—FACE, CSRA, and VAWA—are precisely the opinions which would serve as the strongest authority for a legal challenge to a major legislative defeat of feminism—the enactment of the Partial-Birth Abortion Ban Act.

7. CERCLA

Although the focus of this Article is on the use of the interstate commerce power to cover intrastate crimes, one non-criminal federal law has come under fire after *Lopez*: CERCLA, the federal Superfund law.¹⁹⁶ That law sets procedures and standards for cleanups of polluted sites throughout the United States. What makes CERCLA particularly vulnerable to jurisdictional challenge is that it applies to landfills, industrial sites, and other places, the pollution from which is confined entirely within a single state.¹⁹⁷ Thus far, one district court has held CERCLA not to be a valid exercise of the interstate commerce power. That decision, *United States v. Olin Corp.*,¹⁹⁸ was reversed on appeal, and all other courts have sided with the appellate court.¹⁹⁹

193. *Wright*, 965 F. Supp. at 1307.

194. *See id.* at 1312-13.

195. *See id.* at 1313-14. For example, one could simply walk across the border. Unless driving an automobile is *per se* interstate commerce, which seems dubious, then driving across a state border would not necessarily involve interstate commerce.

196. 42 U.S.C. §§ 9601-9675.

197. *See id.*

198. 927 F. Supp. 1502 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th. Cir. 1997).

199. *See Nova Chems., Inc. v. GAF Corp.*, 945 F. Supp. 1098, 1105 (E.D. Tenn. 1996) (CERCLA does not violate the Commerce Clause); *United States v. Alcan Aluminum Corp.*,

In *Olin*, a district court in Alabama found that CERCLA could not constitutionally be applied to the site at issue in the particular case. The contaminated industrial facility was no longer active, and thus no longer engaged in commerce.²⁰⁰ Further, the regulation of real property was (like education and criminal justice, in *Lopez*) “traditionally a local matter falling under the police power of the states.”²⁰¹ Finally, CERCLA lacked a jurisdictional predicate.²⁰²

The courts which have upheld CERCLA have pointed out that the statute, among the many things it does, protects groundwater. Although the contamination from a CERCLA site is often confined to the site’s boundaries, rarely is found more than a few miles beyond the site’s boundaries, and virtually never crosses a state boundary, courts have held that groundwater is among the “things in interstate commerce” which Congress can regulate.²⁰³ The proposition that groundwater is a thing in interstate commerce is often supported by a citation to the Supreme Court’s *Sporhase v. Nebraska*.²⁰⁴ That case involved a successful challenge, under the dormant Commerce Clause, to a Nebraska statute requiring a permit to export groundwater outside the state.²⁰⁵

The *Sporhase* Court rejected Nebraska’s argument that because the state of Nebraska legally owned all the groundwater in the state, groundwater was not an article of commerce. The Court explained that adopting Nebraska’s view would not only exempt Nebraska’s actions from dormant Commerce Clause review, but would also preclude congressional regulation of groundwater:

The multistate character of the Ogallala aquifer—underlying appellants’ tracts of land in Colorado and Nebraska, as well as parts of Texas, New Mexico, Oklahoma, and Kansas [footnote omitted]—confirms the view that there is a significant federal interest in conservation as well as in fair allocation of this

Nos. 87-CV-920, 91-CV-1332, 1996 WL 637559, at *5 (N.D.N.Y. Oct. 28, 1996) (CERCLA does not exceed Congress’s power under Commerce Clause); *Cooper Indus., Inc. v. Agway, Inc.*, 92-CV-0748, 1996 WL 550128, at *9 (N.D.N.Y. Sept. 23, 1996); *United States v. NL Indus. Inc.*, 936 F. Supp. 545, 563 (S.D. Ill. 1996) (under the Commerce Clause, Congress has the power to regulate improper disposal of hazardous waste under CERCLA).

200. *See Olin*, 927 F. Supp. at 1532-33.

201. *Id.* at 1533.

202. *See id.* at 1532.

203. *See, e.g., Nova Chems.*, 945 F. Supp. at 1105 (the Supreme Court has expressly recognized groundwater as an article of commerce); *NL Indus.*, 936 F. Supp. at 557-58.

204. 458 U.S. 941 (1982).

205. *See generally id.*

diminishing resource . . . [Nebraska's theory] would also curtail the affirmative power of Congress to implement its own policies concerning such regulation Ground water overdraft is a national problem and Congress has the power to deal with it on that scale.²⁰⁶

A dissent by Justice Rehnquist, joined by Justice O'Connor, argued that the majority's discussion of hypothetical congressional power to use the interstate Commerce Clause to control multistate groundwater depletion was unnecessary to the resolution of the case.²⁰⁷

Sporhase certainly supports the proposition that Congress can use the interstate commerce power to deal with the depletion of a large interstate aquifer such as the Ogallala aquifer. But recognizing that groundwater, when transferred interstate, can be an article of interstate commerce does not mean that every drop of groundwater, anywhere in the United States, is an article of interstate commerce. In the context of CERCLA, the groundwater at issue is often unconnected to a major aquifer, and of no commercial interest. Intellectually, citations to *Sporhase* are hardly an adequate basis for finding CERCLA's control of intrastate pollution to actually involve interstate commerce. But like *Scarborough*,²⁰⁸ *Sporhase* provides a simple cite that allows result-oriented courts to avoid complex constitutional questions.²⁰⁹

In addition to the groundwater rationale, courts have defended CERCLA under the theory that the pollution was created by an economic activity (typically, as a by-product of manufacturing), and that pollution, in the *Wickard* aggregate, substantially affects interstate commerce.²¹⁰ This raises an issue not specifically addressed by the *Lopez* Court: is aggregation allowed only for commercial activities, or also for the effects of commercial activities? At least implicitly, the *Lopez* opinion suggests the former answer. After all, the possession of guns near schools is a result of the commercial activity of firearms sales; nevertheless, it was not permissible to aggregate gun possession near

206. *Id.* at 953-54.

207. *See id.* at 961-62 (Rehnquist, J., dissenting).

208. *Scarborough v. United States*, 431 U.S. 563 (1977).

209. *Cf. Denning, supra* note 113 (some lower federal courts cite the Supreme Court's leading Second Amendment case for the principle that there is no individual right to keep and bear arms, even though the case said no such thing).

210. *See Nova Chems., Inc. v. GAF Corp.*, 945 F. Supp. 1098, 1106 (E.D. Tenn. 1996) (the release of hazardous waste is an economic activity which impacts interstate commerce); *United States v. NL Indus. Inc.*, 936 F. Supp. 545, 563 (S.D. Ill. 1996).

schools in order to find a "substantial" effect on interstate commerce.²¹¹

III. IS THE ABORTION BAN CONSTITUTIONAL?

Taken together, the majority and concurring opinions in *Lopez*, coupled with lower court decisions interpreting *Lopez*, suggest that the Partial-Birth Abortion Ban Act should be declared unconstitutional. Nevertheless, a court that wants to uphold the Partial-Birth Abortion Ban Act would probably be able to cobble together an opinion doing so. Much of the case would turn on the level of generality used by the court. While abortion clinics are commercial enterprises with, in the aggregate, a substantial effect on interstate commerce, the several thousand partial-birth abortions performed annually probably do not substantially affect interstate commerce, especially since many abortion patients do not cross state lines specifically to obtain a partial-birth abortion. While the Partial-Birth Abortion Ban Act does have a jurisdictional element, it is a weak one. Jurisdiction is not limited to cases where patients cross state lines. In the gun possession cases, the courts were able to interpret vague jurisdictional language so as to distinguish interstate commerce cases from non-interstate commerce cases. For example, the federal gun statute would only apply to cases in which the possessed gun had crossed states lines. But what rule of jurisdictional construction could be implemented for the Partial-Birth Abortion Ban Act? What makes one partial-birth abortion more related to interstate commerce than another? (The obvious answer is: where a patient has crossed state lines—but that is not the statute that Congress has passed.)

A decision upholding the Partial-Birth Abortion Ban Act would likely say something like this:

Abortion clinics are commercial enterprises, since they charge a fee for services, and a doctor's choice of abortion method is likewise commercial, since abortion is the service for which he is paid. Abortion clinics buy some supplies from out-of-state, transact with out-of-state insurance companies, and some patients travel across state lines. Interstate patient travel is especially common for patients seeking partial birth abortions. Thus, Congress could rationally conclude that abortion clinics substantially effect interstate commerce. Because the statute has

211. See *United States v. Lopez*, 514 U.S. 549, 561 (1995).

a jurisdictional element (the abortion must be "in or affecting interstate commerce") the Partial-Birth Abortion Ban Act is plainly constitutional.

A decision striking the Act might proceed as follows:

While abortion clinics may be commercial enterprises, a doctor's decision about which abortion method to use is not commerce. The relatively small number of partial-birth abortions performed in the United States every year do not have a substantial effect on interstate commerce, even in the aggregate (and aggregation would only be allowed if the decision about which type of abortion to perform were commercial). The women who travel interstate each year to obtain a partial-birth abortion do not have a substantial effect on interstate commerce, and Congress could not rationally conclude that they do. Moreover, medical regulation and family law are both areas of traditional state concern into which the interstate commerce power cannot extend. To uphold this statute would be to authorize federal control of all other medical procedures.

It could be argued that the above demonstrates that there is no definitive answer to how a Partial-Birth Abortion Ban Act statute would fare in a court challenge. Jesse Choper suggests that the uncertain nature of the boundaries of federal powers is one reason why courts should avoid enforcing limitations on federal powers, and should instead concentrate exclusively on protecting enumerated rights.²¹² But saying that there is no definitive answer as to how the Act *would* fare is not the same as saying that there is no definitive answer as to how the Act *should* fare. Despite some blurriness, the line drawn by *Lopez*

212. See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); Jesse H. Choper, *The Scope of the National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1621 (1977) (the Court should reject judicial review over States' rights). See also D. Bruce LaPierre, *Political Accountability in the National Political Process: The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 623 (1985) (the Court should not decide whether specific state activities should be protected from federal intervention); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954) ("the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the States"). Cf. Tom Stacy, *What's Wrong with Lopez*, 44 U. KAN. L. REV. 243, 258-59 (1996) (federalism's only purpose is to empower political majorities; since majorities are adequately represented at both the state and federal levels of government, courts should not enforce federalism).

does not seem to place federal regulation of abortion within the commerce power.

As Chief Justice Rehnquist noted in *Lopez*, indeterminacy is inevitable in any line drawing. Enforcement of the boundaries of the interstate commerce power is no more intellectually difficult than enforcing the dormant Commerce Clause (which requires a judgment about whether a state regulation imposes significant negative out-of-state externalities) as courts have done throughout American history.²¹³ In any case, if judicial line-drawing were the key problem, the simplest answer is to draw the line according to the text of the Constitution: at interstate buying and selling of goods. If that is done, the Partial-Birth Abortion Ban Act, which addresses nothing of the sort, clearly fails.

As Donald Regan notes, there are passages in the majority opinion in *Lopez* which suggest that the Gun-Free School Zones Act could have been saved by "devious" draftsmanship.²¹⁴ In particular, Congress could have included specific findings that guns in school zones substantially affect interstate commerce.²¹⁵ Or, the Court could have added the requirement that the gun which was possessed must have, at some point, crossed state lines. Would such drafting have saved the Gun-Free School Zones Act?²¹⁶ Would similar drafting (i.e., a ban on per-

213. See Calabresi, *supra* note 74, at 804.

The dormant Commerce Clause, interestingly, is one of the few provisions of the Constitution which has never fallen out of judicial favor. While courts at various times have ignored many of the limits of Article I, § 8 (during most of the 20th century), or left the Bill of Rights generally unenforced (during most of the 19th century), the dormant Commerce Clause has developed a reasonably coherent, uncontroversial jurisprudence. Donald Regan, in his 200 page Megillah on the dormant Commerce Clause, describes it as the most boring topic in all of Constitutional law. See Donald H. Regan, *The Supreme Court And State Protectionism: Making Sense of The Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986). Perhaps the clause's drab nature helps protect it from the political predators who attack other parts of the Constitution.

214. See Regan, *supra* note 32, at 567-68.

215. Congress actually did so for the Gun-Free School Zones Act in 1994, see 18 U.S.C. § 922(q) (1994), but the Court found these findings of no use in rescuing a statute that had been enacted in 1990. See *Lopez*, 514 U.S. at 563 n.4.

216. An answer to this question may be forthcoming. In September 1996, Congress (or more particularly, a small number of legislative leaders who were cutting deals over a massive Continuing Resolution for federal spending), included in an omnibus spending bill a new version of the Gun-Free School Zones Act. The new Act requires that the gun must have moved in or otherwise "affect" interstate commerce. The Act is accompanied by a series of platitudes and assertions about education, violence, and the economy, which are labeled as "findings." See 104 CONG. REC. H11743 (daily ed. Sept. 28, 1996) (discussion regarding H.R. 3610, 104th Cong. § 657 (1996) and H.R. 4278, 104th Cong. § 657 (1996)).

There were no congressional hearings on the revised Act, and many congresspersons had no idea that the Act was even contained in the Continuing Resolution, until after the CR had

forming partial-birth abortions with any equipment that has crossed a state border) insulate the Partial-Birth Abortion Ban Act?

Regan suggests that the proper answer is "no." A pack of congressional findings, coupled with the requirement for an "interstate" gun, would not have changed the fundamental circumstances of the Gun-Free School Zones Act. In the Act, Congress was overriding state decisions in two separate areas of traditional state concern (education and crime), was legislating a national solution where no such solution was required, and was regulating something which had only the slimmest genuine connection to interstate commerce.

There are at least some signs that "devious" drafting may no longer be enough to save a statute that does not deserve to be saved. While congressional findings about interstate commerce are evaluated on the rational basis test, the test has grown much more robust in the 1980s and 1990s. The most recent vigorous rational basis case, *Romer v. Evans*,²¹⁷ threw out a state constitutional amendment which prohibited local governments and the state from enacting gay rights laws.²¹⁸ This was struck down neither because gays are a protected class, nor because the law gave state sanction to private bias and diminished the ability of gay rights advocates to participate in the political process.²¹⁹ Rather, the law was found to lack a rational basis. The State of Colorado, in defending the law, had offered a dozen rationales which the State argued constituted not only a rational basis, but a compelling state interest. That not a single one of these were found to constitute even a rational basis suggests that the rational basis test has become much more meaningful, at least when courts want it to be.²²⁰ Certainly some judges on the lower courts have taken the Supreme Court's new vigor

passed, and calls from irate gunowners began to come in.

217. 116 S. Ct. 1620 (1996).

218. Of course gay rights advocates could still gather petitions to place an amendment on the ballot to repeal Amendment 2, or to enact gay rights law by constitutional amendment.

219. The second theory had been used by the district court in Colorado in striking down the amendment, while the third theory had been used by the Colorado Supreme Court.

220. Our point in this Article is not to evaluate whether the *Romer* majority was right about each one of the proffered bases for the law. Our point is that if a state Attorney General can offer twelve compelling state interests, and the Supreme Court can find that not even one of them rises to the level of a rational basis, the rational basis test has some real teeth. See also Rauschl, *supra* note 189, at 1611 (noting *Lopez's* introduction of a heightened rational basis test); Eric W. Hagen, Note, *United States v. Lopez: Artificial Respiration for the Tenth Amendment*, 23 PEPP. L. REV. 1363, 1385-86 (1996) (also observing change to a stricter test). For an example of such a "rational-basis-with teeth" test at the state level, see *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996) (striking down state anti-sodomy law as irrational).

about rational basis to heart and have carefully scrutinized governmental assertions about interstate commerce to ensure that they actually *are* rational.²²¹

What about the second "devious" amendment to the Gun-Free School Zones Act or the Partial-Birth Abortion Ban Act: a requirement that something involved must once have crossed a state line? Of course, a court that wants to uphold the law can just cite *Scarborough*,²²² and be done with it, if at a certain cost to the court's self-esteem. But, as the *Bishop* dissent points out, *Scarborough* interprets a statute, not the Commerce Clause.²²³

More fundamentally, merely asking for an irrelevant state line crossing and nothing more (except for some dubious "findings") is to do precisely what the *Lopez* majority says Congress cannot do: turn the Commerce Clause into a general police power. We hope that *Lopez* was based on more than Congress's failure to announce a legal fiction. "Simon Says" is a game for children, not a jurisprudence.

Moreover, even if *Scarborough* had been a Commerce Clause case, it does not stand for the proposition that *any* line crossing is sufficient. No one suggests that the federal gun possession statute would be upheld if it were based on a requirement that while possessing the gun the defendant was wearing clothes which had been shipped in interstate commerce. This is true even though the wearing of the interstate clothes is, for all practical purposes, a condition precedent to actually possessing the gun. Clothes are necessary to hide the gun, and people who are not wearing clothes are unlikely to leave their homes, or to deal with most other persons. Thus, it is only when clothed that most gun criminals present any kind of threat to public safety. Further, as the Ninth Circuit observed when striking the application of the federal arson statute to a residential insurance fraud arson, simply because an item has once been shipped in interstate commerce, Congress cannot regulate it for eternity.²²⁴

221. See *supra* text accompanying notes 122-33, 172-75 & 186-89.

222. See *supra* text accompanying notes 92-94.

223. See *supra* text accompanying note 132.

224. See *United States v. Pappadopoulos*, 64 F.3d 522, 527 (9th Cir. 1995) (citing *United States v. Nukida*, 8 F.3d 665, 671 (9th Cir. 1993)). See also *United States v. Cortner*, 834 F. Supp. 242, 243 (M.D. Tenn. 1993), *rev'd sub nom. United States v. Osteen*, 30 F.3d 135 (6th Cir. 1994) ("To say . . . that because something once traveled interstate it remains in interstate commerce after coming to rest in a given state, is sheer sophistry. This Court, at one time, owned a 1932 Ford which was manufactured in Detroit in the year 1931 and transported to the state of Tennessee. It remained in Tennessee thereafter. Now if this car were hijacked today,

Despite what certain post-*Lopez* cases have done, the fact that one can go into a building and find inside important objects that were once transported across state lines does not mean that the interstate commerce power can extend to every activity in the building. For example, when the federal government tried to impose the Fair Labor Standards Act on a battered women's shelter, the government argued that the shelter gave the battered women donated goods that had previously traveled in interstate commerce.²²⁵ The district court in North Carolina, however, held that the shelter was not engaged in "commerce or production of goods for commerce" nor was the shelter "connected with a commercial transaction which substantially affects interstate commerce."²²⁶ As *Lopez* announces,

The mere presence of a jurisdictional element, however, does not in and of itself insulate a statute from judicial scrutiny under the Commerce Clause, or render it per se constitutional. To the contrary, courts must inquire further to determine whether the jurisdictional element has the requisite nexus with interstate commerce.²²⁷

So although the *Lopez* Court pointed to the absence of a jurisdictional requirement and legislative findings in the Gun-Free School Zones Act, it is not at all clear that devious drafting would have saved the statute. Gun possession is still not commercial, and any rationale for guns within a thousand feet of schools having a substantial effect on commerce is a rationale for federal control over all education and all criminal law.

Regan suggests that the power to "regulate commerce among the several states" be read as a broad grant of power to Congress to regulate on any issue of national concern for which the states are individually incompetent.²²⁸ As Regan concedes, this is very far from a "literal" reading of the interstate commerce power.²²⁹ Such a broad power, had it actually been included in the Constitution, would have aroused furious objections by Anti-Federalists. Considering the narrow margins

some sixty years later, is it still in interstate commerce?").

225. See *Murray v. Reach of Jackson County, Inc.*, 908 F. Supp. 337, 340 (W.D.N.C. 1995).

226. *Id.* Since the shelter was non-commercial, the court properly did not aggregate all battered women's shelters in the United States together, to see if they had a substantial effect on interstate commerce. See *id.*; *United States v. Lopez*, 514 U.S. 549, 561 (1995) (aggregation only permissible for commercial activities).

227. *Lopez*, 514 U.S. at 561.

228. See Regan, *supra* note 32, at 577.

229. See *id.* at 571.

of ratification in several states, it is possible that, had the state conventions foreseen that the commerce power would grow into Regan's "national necessity" power, the entire Constitution would have been rejected. Broad as Regan's theory is, it is actually much *narrower* than some pre-*Lopez* interpretations of the commerce power. Consistent with the *Lopez* holding, Regan's theory also means that one cannot defend congressional legislation merely by pointing out that the problem is "national" in the sense of taking place all over the nation, or that the problem has large economic consequences.²³⁰

As applied to the Partial-Birth Abortion Ban Act, Regan's theory would find the Act unconstitutional. States are not at all incompetent to regulate partial-birth abortions; *Roe v. Wade* left state power over third-trimester abortions undisturbed, so long as a third-trimester law includes exceptions for the life or health of the mother.²³¹ If, one day, 48 states have enacted partial-birth abortion bans that pass constitutional muster, while Colorado and Hawaii (for example) run a thriving abortion business providing legal partial-birth abortions to women from the other 48 states, Regan's theory would make it legitimate for the Congress to act.²³²

As this Article is written, a minority of states have banned such abortions;²³³ two of the bans have been blocked by federal courts, since the bans provided no exception for maternal health or life, and since the bans imposed major restrictions on second-trimester abortions, con-

230. In a decision holding unconstitutional the Violence Against Women Act (which was defended precisely on the basis that violence occurs against women all over the country, and such violence has large economic consequences), the court wrote:

Plaintiff uses "effects on the national economy" interchangeably with "effects on interstate commerce." This is wrong. Undoubtedly effects on the national economy in turn affect interstate commerce. Such a chain of causation alone, however, is insufficient to bring an act within the purview of the commerce power. If such a chain of causation existed, Congress's power would extend to an unbounded extreme. Defendants point out that facts show that insomnia costs the United States \$15 billion a year (citing 2 Nat'l Comm'n on Sleep Disorders Research, *Wake Up America: A National Sleep Alert* (submitted to the U.S. Congress and the Secretary of Health and Human Services), 125-33 (1994)). This is as much as the yearly cost of domestic abuse.

Bronkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779, 792-93 (W.D. Va. 1996).

231. See *Roe v. Wade*, 410 U.S. 113, 163-64 (1973).

232. The example Regan discusses involves lottery tickets, but the similar analysis would apply to abortion. See Regan, *supra* note 32, at 576.

233. The states with bans are: Alaska, Arizona, Arkansas, Georgia, Michigan, Mississippi, Montana, Ohio, South Carolina, South Dakota, and Utah. See Katharine Q. Seelye, *States Out-law Late Abortions as a Federal Ban Faces a Veto*, N.Y. TIMES, May 5, 1997, at A1; H.R. 5889 (Mich. 1996); H.R. 135 (Ohio 1995).

stituting an "undue burden" on the right to abortion.²³⁴ The statutes in the other states appear vulnerable to similar challenges.

As Steven Calabresi notes, federalism makes a substantial contribution to domestic tranquility in the United States by assuring that many contentious, divisive moral issues may have a multiplicity of resolutions, rather than a winner-take-all decision at the national level.²³⁵ This is certainly true on abortion, the hottest of hot buttons in American politics. It is also true on gun control, medical marijuana, and many other emotional issues. The legitimate concerns raised by Justices Kennedy and O'Connor about stability are, in the long run, best addressed by vigorous judicial enforcement of federalism, which will avoid the destabilizing effects of imposing a single national answer to fractious questions.

CONCLUSION

To any person not familiar with the Commerce Clause sophistries of twentieth century jurisprudence, the proposed Partial-Birth Abortion Ban Act begins with an oxymoron: "[a]ny physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion" Unless a physician is operating a mobile abortion clinic on the Metroliner, it is not really possible to perform an abortion "in or affecting interstate or foreign commerce."

Some cynics suggest that limitations on federal power (or enforcement of states' rights, the other side of the coin) are invoked by individuals and groups "only when a national program seems to them harmful to their interests."²³⁶ If there is a lesson to be had from a review of the Commerce Clause aspects of federal abortion legislation, it may be that consistency in constitutional argument is an underappreciated, and underpracticed, virtue. At least the silence of pro-choice forces is intellectually consistent: believing in general that

234. See *Evans v. Kelly*, No. 97-CV71246-DT, 1997 WL 471906 (E.D. Mich. July 31, 1997); *Women's Med. Prof. Corp. v. Voinovich*, 911 F. Supp. 1051, 1059-60 (S.D. Ohio, 1995).

235. See Calabresi, *supra* note 74, at 768-69.

236. RICHARD H. LEACH, *AMERICAN FEDERALISM* 38 (1970).

As authors, we perhaps should note that taking *Lopez* seriously probably prohibits at least one item of federal legislation which, as a substantive matter, we wholeheartedly support: a new version of the Religious Freedom Restoration Act ("RFRA") grounded on the interstate commerce power. (The RFRA was originally enacted under section five of the Fourteenth Amendment, a basis which was recently found unconstitutional. See *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997)).

the federal government is restricted only by the Bill of Rights and by doctrines, like the right of privacy, that are derived from the Bill of Rights, pro-choice advocates have for the most part ignored potentially useful arguments based on limited federal power.²³⁷ Indeed, the idea that Congress might not have the power (subject to Bill of Rights limits) to regulate important personal choices by women and physicians everywhere in the United States does not seem to have even occurred to most pro-choice legislators and activists. Those to whom it may have occurred may also have simply assumed that because limited government is championed (verbally at least) by the right, it must somehow tend to produce "right wing" results. Indeed, it would not be intellectually consistent to use *Lopez* to get rid of the Partial-Birth Abortion Ban Act, while continuing to use limitless commerce power rationales to defend other, more politically correct legislation, including FACE and VAWA. Thus, in the case of the Partial-Birth Abortion Ban Act, zealous advocacy has apparently taken a back seat, as abortion advocates decline to use what might be their strongest argument.

Such intellectual consistency is certainly absent from some of the most prominent advocates on the other side of the debate. Representative Henry Hyde of Illinois, one of the Partial Birth Abortion Ban Act's most vigorous supporters, was also co-sponsor of the Shadegg-Pombo "Enumerated Powers Act," which seeks to limit the federal government to its constitutionally defined role.²³⁸ Inconsistently, Rep. Hyde dismisses state authority arguments as "a debating point," ranking at two in importance on a scale of one to ten. "You gotta do what you gotta do," he added.²³⁹ And the Senate counterpart to the Shadegg bill, the "Tenth Amendment Enforcement Act of 1996"²⁴⁰ was co-spon-

237. *But see* 141 CONG. REC. H11612 (statement of Rep. Frank) ("It says this only involves abortions as crimes which are in or affect interstate or foreign commerce. How does a woman know she is in foreign commerce or interstate commerce? Is her head in Canada and her feet in Detroit? What kind of nonsense are we talking about?").

238. *See* H.R. 292, 105th Cong. (1997); H.R. 2270, 104th Cong. (1995). Rep. Hyde co-sponsored the 1995 bill, but has not signed on as a co-sponsor of the 1997 bill. The bill requires that each act of Congress include a clause specifying the constitutional authority for the act. In January 1997, the U.S. House of Representatives adopted a rule requiring the report for each bill to cite the bill's constitutional authority. *See* Kerry Jackson, *Making the Questionable Constitutional*, FYI, May 16, 1997, at 13.

The Partial-Birth Abortion Ban Act, while it does not have an authority clause, does have a jurisdictional clause that demonstrates which congressional power is being used. But the Partial-Birth Abortion Ban Act certainly violates the spirit of the Enumerated Powers Act, since if the Partial-Birth Abortion Ban Act is valid, then there are no real limitations on "enumerated" congressional powers.

239. Adam Clymer, *Switching Sides on States' Rights*, N.Y. TIMES, June 1, 1997, at IV:1.

240. S. 1629, 104th Cong. (1996). The bill requires legislation to cite the specific constitu-

sored by Robert Dole—famous for his constant invocation of the Partial Birth Abortion Ban Act on the Presidential campaign circuit, where he has also took to pulling the Tenth Amendment out of his shirt pocket (as if he were Justice Black, who carried the Constitution around in his front pocket at all times).²⁴¹

Of course, not all congressional advocates of the Partial-Birth Abortion ban are intellectually inconsistent. Some have never objected in principle to federalizing everything that Congress wants to federalize. Other legislators may recognize that the Partial-Birth Abortion Ban Act is indefensible under its stated basis, the Interstate Commerce Clause, but vote for the bill anyway, because they believe such legislation is within congressional power under Section 5 of the Fourteenth Amendment.²⁴²

But generally speaking, it is hardly consistent for legislators to proclaim their affection for the doctrine of enumerated powers in general, and *Lopez* in particular, and then to turn around and push legislation which violates the spirit and the letter of both. Such behavior certainly undermines Republicans' claim that they are serious about restoring the federal government to its constitutional role.

There is little in the way of final authority in constitutional debate,²⁴³ but it is not asking too much that arguments at least be consistent. Some of the most prominent defenders of limited federal government, however, have shown themselves to be utterly *inconsistent*, trumpeting the virtues of enumerated powers and the Tenth Amendment when it suits their purposes, then asserting effectively unlimited federal powers when that suits their purposes better. One might be tempted to respond by giving up on the notion of limited federal government entirely. Yet that has its own perils.

It has been suggested elsewhere that limited government at the

tional authority on which it is based; to include specific findings as to why Congress has greater institutional competence than the states regarding the subject matter of the legislation; and to include a specific statement of congressional intent if the bill is to preempt state or local law. As far as we can discover, no congressional proponent of the Partial-Birth Abortion Ban Act has suggested any reason why Congress has greater competence to regulate abortion than do the states.

241. See Morton J. Horowitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 10-11 (1993) ("An evangelical Baptist who was outside of the mainstream of sophisticated eastern establishment legal thought, Black carried the Constitution in his pocket the way his Baptist forbearers carried the Bible in their pockets.")

242. Rep. Bob Schaffer (D-Colo.) so stated at a July 1996 congressional candidates debate in Golden, Colorado, in response to a question from David Kopel.

243. See Glenn H. Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110, 114 (1991).

federal level plays an important role in protecting against the rise of special interest power.²⁴⁴ And the growth of special interest power poses a significant threat to individual liberties—and to governmental legitimacy—as an unlimited federal government is both more attractive for special interests to lobby, and more dangerous to freedoms. The case which did the most to expand the interstate commerce power (*Jones & Laughlin Steel*) and the case which reminds us that the power is not infinite (*Lopez*) both instruct us that the Interstate Commerce Clause may not be interpreted so as to allow “a completely centralized government.”²⁴⁵ In a determination to prevent “a completely centralized government,” the two cases are entirely consistent with the text of the Constitution and its original intent. The Framers, after all, certainly considered the limited nature of the federal government to be the primary protector of individual freedom; the Bill of Rights was merely a back-up system. We have now reached the point at which the back-up system is virtually all that is left of the original liberty-protecting scheme. And as NASA engineers say, once you start relying on the back-ups, you’re already in trouble.²⁴⁶

Even more important, an overweening federal government stretched beyond its constitutional limitations lacks fundamental legitimacy. Legitimacy, after all, comes not from the possession of the badges of office, but from the rightful possession of the office and the rightful use of its authority. It has not escaped the attention of many Americans that the federal government has exceeded its constitutional bounds, and that realization plays a major part in the widespread hostility toward the federal government that is manifest today.²⁴⁷ The Partial-Birth Abortion Ban Act, if passed into law, would simply be another act of illegitimate power, undertaken for political reasons. Those affected by it would likely regard it as such.

While we have used the partial-birth abortion issue as an exemplar, most of the same points apply to most other proposed federal regulations of abortion. Such restrictions, even if enacted by Congress and upheld by sophistic judicial reasoning, are illegitimate. The details of

244. See Glenn H. Reynolds, *Is Democracy Like Sex?*, 48 VAND. L. REV. 1635, 1651-54 (1995).

245. See *United States v. Lopez*, 514 U.S. 549, 555-57 (1995) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

246. Reynolds' personal conversation with a NASA engineer.

247. See Randy E. Barnett, *Guns, Militias, and Oklahoma City*, 62 TENN. L. REV. 443, 457-59 (1995) (describing growth of federal government beyond constitutional bounds and consequent loss of legitimacy).

how a woman in one state obtains an abortion in that same state are not properly the subject of congressional power to regulate interstate commerce. Nor is the simple possession of a machine gun. Nor are congressional laws on other subjects, such as the intrastate possession of drugs or guns, the perpetration of non-commercial crimes against women or men, child support enforcement, or the picketing of abortion clinics.²⁴⁸

The sponsorship of the Partial-Birth Abortion Ban Act, as well as many other criminal laws about intrastate conduct, by "limited government" advocates also suggests that constitutional theories that rely on the political branches to police themselves are unrealistic.²⁴⁹ At one time, courts policed congressional usurpation of power, by striking down actions that exceeded Congress's finite authority.²⁵⁰ In 1985, a five-four majority of the Supreme Court said that the Court should get out of the business of enforcing the boundaries of federalism.²⁵¹ The political process would enforce these boundaries of its own accord, supposedly.²⁵² In dissent, Justice O'Connor remarked at the foolishness of relying on Congress's "underdeveloped capacity for self-restraint."²⁵³ Justice O'Connor's dissent predicted "that this Court will in time again assume its constitutional responsibility,"²⁵⁴ and her prediction has proven correct. Again and again in the last several terms, the Court has handed down decisions limiting the reach of the interstate Commerce Clause and protecting the state/federal separation of powers.²⁵⁵ Thus, even in

248. Nor are gambling and tobacco, which happen to be two major targets for federalization by over-enthusiastic prohibitionists.

249. See generally CHOPER, *supra* note 212.

250. See, e.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (unanimously striking down law comprehensively regulating wages and prices); *In re Heff*, 197 U.S. 488 (1905) (voiding ban on intrastate sale of liquor to Indians), *overruled by* *United States v. Nice*, 241 U.S. 591 (1916); *United States v. Steffens*, 100 U.S. 82, 89 (1878) (trademark statute void because it attempted to control purely intrastate commercial transactions); *United States v. DeWitt*, 76 U.S. 41, 44 (1870) (invalidating nationwide ban on certain fuels; the interstate Commerce Clause "has always been understood as limited solely to its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate states").

251. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (applying the Fair Labor Standards Act to state employees is not destructive of state sovereignty or violative of any constitutional provision).

252. See *id.* at 547-55.

253. *Id.* at 588 (O'Connor, J., dissenting).

254. *Id.* at 589.

255. See, e.g., *Printz v. United States*, 117 S. Ct. 2365 (1997) (Congress may not force local law enforcement to perform federal checks on handgun buyers); *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996) (Eleventh Amendment limit on commerce power); *New York v. United States*, 505 U.S. 144 (1992) (Congress may not force states to participate in nuclear

first-year Constitutional law classes, it has become respectable to suggest that federal power is finite, and the Court has a role in keeping it that way.

In Conan Doyle's famous story, it was the fact that the dog didn't bark that allowed Sherlock Holmes to solve the mystery.²⁵⁶ The dog that hasn't barked in the debate over the Partial Birth Abortion Ban Act is the limited power of the federal government to pass legislation based primarily on one group's moral views. What mystery does this silence solve? Alas, in our case it is no mystery at all. The dog has not barked because the political classes, on both the left and the right, have no interest in limiting the power of the federal government when limitations might constrain their own actions.

That would not have surprised the Framers of our Constitution, who knew about the tendency of ruling classes to view their own power expansively. As Founding Mother Abigail Adams observed, "power, whether vested in many or a few, is ever grasping, and, like the grave, cries 'Give, give!'"²⁵⁷ What might have surprised the Framers is that such an expansive view of federal power could obtain such wide currency among the courts. *Lopez* suggests that some courts, including the United States Supreme Court, are beginning to recognize that limited federal power is an important part of our constitutional scheme, and an important protector of freedom. Whatever one thinks about abortion, this is a salutary development for liberty.

waste handling system).

256. Sherlock Holmes explained:

Before deciding that question I had grasped the significance of the silence of the dog, for one true inference invariably suggests others. The Simpson incident had shown me that a dog was kept in the stables, and yet, though someone had been in and had fetched out a horse, he had not barked enough to arouse the two lads in the loft. Obviously the midnight visitor was someone whom the dog knew well.

Arthur Conan Doyle, *Silver Blaze*, in MEMOIRS OF SHERLOCK HOLMES, available at <<http://www.literature.org/Works/Arthur-Conan-Doyle/silver.blaze.html>>.

257. Letter from Abigail Adams to John Adams (Nov. 27, 1775), in L.H. BUTTERFIELD, THE BOOK OF ABIGAIL AND JOHN: SELECTED LETTERS OF THE ADAMS FAMILY, 1762-1784, at 113 (1975).