

ESSAY

LOPEZ, MORRISON, AND RAICH: FEDERALISM IN THE REHNQUIST COURT

LINO A. GRAGLIA*

I. FEDERALISM: VALUABLE, BUT NOT NECESSARILY JUDICIALLY ENFORCEABLE

Federalism, as distinguished from pure nationalism, is an attempt to create a form of government that has the advantages, at least in part, of both centralization and local autonomy. The advantages of each are obvious. Centralization creates economies of scale; defense and scientific research, for example, can be provided more efficiently and at lower cost by a central government than by several separate governments. Centralization can also solve collective action problems. It allows the country as a whole to achieve a goal like environmental protection that would be prohibitively costly for individual states to pursue unilaterally. Finally, centralization has the advantage of uniformity, reducing conflicts and increasing simplicity and predictability. The disadvantages of centralization, however, are generally the obverse of its advantages. The virtues of uniformity, for example, preclude the virtues of diversity, such as the ability to adjust rules to meet local circumstances.¹

Local autonomy, on the other hand, provides the great advantage of keeping government close to the individual. Decision making in smaller units means that fewer persons will be frustrated in their policy preferences. In a political unit of 1,000 people, for example, a vote could go 501 for policy A and 499 for policy B. If broken into two units, the vote could go 301 to 199 for A in one unit and 300 to 200 for B in the other, depriv-

* A. Dalton Cross Professor of Law, University of Texas School of Law.

1. See generally DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995).

ing only 399 people rather than 499 of their preference.² A likely consequence of smaller political units is that the people will be more involved with their government and that government will be more responsive to the people. A multiplicity of units with free movement by the people among them makes for competition among the units themselves. This in turn can result in a welcome diversity of policy choices among the smaller units, and can also encourage experiments that will eventually lead to policy improvements.³

It is clear that, at least in some circumstances, the advantages of decentralized policy making outweigh its costs. That does not mean, however, that federalism can usefully be instituted and maintained as a matter of constitutional law enforceable by courts. Discussions of federalism often focus on the national and state governments being assigned separate "spheres" of power by the Constitution, with each being supreme in its own sphere. The reality, however, is that divided supremacy is an oxymoron.⁴ Policy making power is not a physical object that can be divided into non-overlapping parts. Virtually everything in the real world has some connection to or impact upon everything else. The federal government cannot have full power over interstate trade, for example, if the states have full power over intrastate trade, which competes with and otherwise affects interstate trade. The Constitution deals with this problem by providing that when federal and state regulations conflict, as they often and inevitably do, the federal regulation prevails.⁵ It is the federal government, therefore, that is the true sovereign, and, as American history amply illustrates, the scope of its ultimately unchecked sovereignty has consistently

2. See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1494 (1987).

3. For a thorough and enthusiastic review of the virtues of federalism, see Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752 (1995).

4. Alexander Hamilton said of proponents of a system with both federal and state sovereignty: "They seem still to aim at things repugnant and irreconcilable; at an augmentation of federal authority without a diminution of state authority . . . They still, in fine, seem to cherish with blind devotion the political monster of an *imperium in imperio*." THE FEDERALIST NO. 15, at 103 (Alexander Hamilton) (Clinton Rossiter & Charles R. Kesler eds., 1999).

5. U.S. CONST. art. VI, cl. 2 (stating that the Constitution, laws, and treaties of the United States "shall be the supreme Law of the Land").

expanded over time and will almost certainly continue to do so in the future.

II. FEDERALISM IN THE SUPREME COURT BEFORE LOPEZ

With few exceptions,⁶ the Supreme Court largely facilitated and validated⁷ the expansion of federal power until its short-lived attempt to prevent the massive centralization of policy making required by President Franklin Roosevelt's New Deal.⁸ The Court's attempt to stop the New Deal, however, was doomed to failure in the face of overwhelming popular support for President Roosevelt's vision. In the end, President Roosevelt did not even need to make good on his "court packing" threat to win over the support of the Court, as his landslide reelection in 1936 apparently convinced Justice Owen Roberts, the swing vote in most of the New Deal cases, that he could not save the country from a centralization of power from which it did not want to be saved.

Since President Roosevelt's appointment of several new Justices during his second term in office, the Court has never again seriously questioned the constitutional basis for New Deal-type legislation, illustrating nicely how little the Constitution itself has to do with constitutional law. The Court, in a trilogy of decisions in 1937, appeared completely and permanently to abandon all attempts to limit national legislative power on federalism grounds,⁹ and subsequent decisions reinforced this conclusion.¹⁰ In 1964, the Court announced a "rational basis" test for determining the validity of Commerce Clause legislation.¹¹ It was not necessary for the Court to find

6. The principal examples prior to the New Deal (both of which were soon ignored by the Court) are *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and *United States v. E. C. Knight Co.*, 156 U.S. 1, 11 (1895).

7. See *The Lottery Case*, 188 U.S. 321, 354-55 (1903); see also *The Shreveport Rate Cases*, 234 U.S. 342, 350-51 (1914); *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 565 (1870).

8. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936); *United States v. Butler*, 297 U.S. 1, 62-63 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528-29 (1935).

9. *NLRB v. Freidman-Harry Marks Clothing Co.*, 301 U.S. 58, 75 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49, 57 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

10. *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941).

11. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

that a regulated activity actually affected interstate commerce; it was enough, the Justices said, to find that Congress could rationally think that it did. Given that virtually everything can rationally be said to affect interstate commerce to some degree, almost no legislation could fail this test. In the 1985 case of *Garcia v. San Antonio Metropolitan Transit Authority*,¹² the Court, in upholding the application of the Fair Labor Standards Act to employees of a municipal transit facility, seemed to indicate explicitly that the judiciary would no longer protect federalism through constitutional limits on federal power, declaring that "[s]tate sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."¹³

Garcia, however, turned out not to be the final word on the Court's role in protecting federalism. In its 1995 decision in *United States v. Lopez*,¹⁴ the Court shocked constitutional observers by asserting a judicially-enforceable limit on the power of Congress to regulate interstate commerce.

The earliest indication of an interest by the more conservative members of the Court, led by then-Justice Rehnquist, in finding a limit on the commerce power came in 1976 in *National League of Cities v. Usery*.¹⁵ In *Usery*, the Court invalidated the application of a federal wage control law to state employees. The Court did so, however, not on the ground that the law was an invalid exercise of the commerce power, but rather because the exercise was subject to a supposed state immunity from direct federal regulation.¹⁶ Justice Brennan, with every reason to be confident that the era of judicial interference with federal power was long past, could hardly control his rage in a dissent joined by two of his colleagues.¹⁷

The decision in *Usery* was made possible only because Justice Blackmun unexpectedly voted with the conservatives in a

12. 469 U.S. 528 (1985).

13. *Id.* at 552.

14. 514 U.S. 549 (1995).

15. 426 U.S. 833 (1976).

16. *Id.* at 854-55.

17. *Id.* at 856-57 (Brennan, J., dissenting).

separate opinion.¹⁸ Yet, Justice Blackmun would not permit the decision to be applied in any other case.¹⁹ Indeed, writing for the majority in *Garcia*, he invoked the Court's failure to apply the principle of state immunity as a reason to overrule *Usery* and seemingly renounce virtually all judicial enforcement of federalism.²⁰ It was now the conservatives' turn to dissent, in an opinion written by Justice Powell and joined by Chief Justice Burger and Justices Rehnquist and O'Connor.²¹ In separate opinions, Justice Rehnquist predicted that his view would "in time again command the support of a majority of this Court,"²² and Justice O'Connor indicated that she shared Justice Rehnquist's belief.²³

Chief Justice Rehnquist and Justice O'Connor made good on this prediction, at least to some extent, in 1991 in *Gregory v. Ashcroft*.²⁴ In a five-to-four decision, the Court imposed on Congress the mild restraint of a "plain statement" requirement where Congress seeks to limit a state's power when the state's "political functions" are involved.²⁵ The following year, in *New York v. United States*,²⁶ another five-member majority went a step further, holding that Congress could not require the States to implement a federal program.²⁷ Finally, in *United States v. Lopez*,²⁸ the Court actually invalidated a law as not authorized by the commerce power. *Lopez* seemingly presented to the Justices seeking to limit federal power a unique opportunity too tempting to resist.

Lopez involved a challenge to the Gun-Free School Zones Act of 1990, which made it a crime "knowingly to possess a fire-

18. *Id.* at 856 (Blackmun, J., concurring) (stating that he joins the majority opinion on the belief that the Court "adopts a balancing approach [that] does not outlaw federal power in areas . . . where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential").

19. *See, e.g., Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

20. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530-31 (1985).

21. *Id.* at 557 (Powell, J., dissenting).

22. *Id.* at 580 (Rehnquist, J., dissenting).

23. *Id.* at 589 (O'Connor, J., dissenting).

24. 501 U.S. 452 (1991).

25. *Id.* at 463-70.

26. 505 U.S. 144 (1992).

27. *Id.* at 171-77.

28. 514 U.S. 549 (1995).

arm"²⁹ in a school zone, defined as "a distance of 1,000 feet from the grounds of a public, parochial or private school."³⁰ Because the Act made no reference to taxing or a federal grant, it ostensibly could only have been based on the commerce power, which Congress certainly had reason to believe was unencumbered by any judicially-enforceable limit. Such a case might not have been expected to arise again, because in this instance Congress carelessly failed to make any reference to the commerce power, either in the Act or its legislative history. Still, the district court judge dutifully upheld the Act, finding that Congress has the "well-defined power to regulate activities in an[d] affecting commerce, and [that] the 'business' of elementary, middle and high schools . . . affects interstate commerce."³¹

To the government's misfortune, the Act then came before a panel of the Fifth Circuit Court of Appeals led by one of the most able, conservative, and independent-minded of federal judges, Judge William Garwood, who was joined by two colleagues willing to go along for the ride.³² Judge Garwood made clear that if Congress had simply mentioned interstate commerce, there would have been no question as to the Act's constitutionality: "Where Congress has made findings, formal or informal, that regulated activity substantially affects interstate commerce, the courts must defer [to them] 'if there is any rational basis for' the finding."³³ "Practically speaking," the court continued, "such findings almost always end the matter."³⁴ But here Congress had "not taken the steps necessary to demonstrate that such an exercise of power is within the scope of the Commerce Clause."³⁵ No sensible person could doubt that Congress's use of the Commerce Clause to do indirectly what it supposedly had no power to do directly had long ago become a charade, but it was offensive to the dignity of the court for Congress to refuse even to play the game to which the judiciary

29. *United States v. Lopez*, 514 U.S. 549, 551 (1995) (quoting 18 U.S.C. § 922 (q)(1)(A) (Supp. V 1988)).

30. *Id.* at 551 n.1 (quoting 18 U.S.C. § 921(a)(25) (Supp. V. 1988)).

31. *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993).

32. The two other members of the panel were Judges Thomas M. Reavley and Carolyn Dineen King.

33. *Lopez*, 2 F.3d at 1363 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981)).

34. *Id.*

35. *Id.* at 1365-66.

had tacitly assented. But for the incredible sloppiness of Congress's bill drafting and Judge Garwood's willingness to take advantage of it, this exciting event would not have occurred.

The Supreme Court granted a writ of certiorari, and in an opinion by Chief Justice Rehnquist, affirmed the Fifth Circuit's decision.³⁶ Justice Kennedy joined the majority opinion but added a separate concurrence, joined by Justice O'Connor. Justice Thomas also joined Chief Justice Rehnquist's opinion and wrote a separate concurrence. Justice Breyer wrote a dissenting opinion joined by Justices Stevens, Souter, and Ginsburg. Justices Stevens and Souter also wrote separate dissents.

In contrast to the Fifth Circuit, the Court declined to hold that it could not apply the rational basis test in the absence of congressional findings.³⁷ After all, it is usually the role of the Solicitor General, not Congress, to find a rational basis for Congress's supposed Commerce Clause statutes. Adopting a statement made in an earlier case, the Court found that Congress may regulate three "broad categories of activity"³⁸ on the basis of the Commerce Clause. First, it may "regulate the use of the channels of interstate commerce,"³⁹ prohibiting or placing conditions on the movement of things or persons across state lines. Second, it may "regulate and protect the instrumentalities of interstate commerce."⁴⁰ Finally, it may "regulate those activities having a substantial relation to interstate commerce."⁴¹ Because the operations of the instrumentalities of interstate commerce clearly affect the commerce itself, the second category is really part of the third, and all modern litigated cases involve only the third. After briefly reviewing its past cases and purporting not to overrule any of them, the Court concluded that Congress can regulate only activities that "substantially affect" interstate commerce.⁴²

In perhaps the most significant aspect of *Lopez*, the Court effectively rejected, while purporting to accept, the "rational basis"

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

37. *Id.* at 557.

38. *Id.* at 558.

39. *Id.*

40. *Id.*

41. *Id.* at 558-59.

42. *Id.* at 559.

test that was first explicitly stated in *Katzenbach v. McClung*⁴³ in 1964 and followed in all subsequent cases. Instead of confining the role of the Court to testing the rationality of a supposed congressional finding of the regulated activity's effect on interstate commerce, Chief Justice Rehnquist referred to the test in passing, as if it required the Court itself to make the finding of "substantial effect" independently.⁴⁴ Thus, the Court substituted a "substantiality" test for the rational basis test. However, the *Lopez* majority's invalidation of the Act was not based, as one might expect, on a finding that the effect of guns around schools on interstate commerce did not meet the Court's new substantiality test. Rather, it was based primarily on a finding that the regulated activity "has nothing to do with 'commerce' or any sort of economic enterprise" and "is not an essential part of a larger regulation of economic activity."⁴⁵

Also important, if not dispositive, was that the Act "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession [alleged in each prosecution under the Act actually] affects interstate commerce."⁴⁶ Finally, the Court noted that although "Congress normally is not required to make formal findings" as to the effect of the regulated activity on interstate commerce, the absence of findings in this case rendered the Court unable "to evaluate the legislative judgment" that it has a sufficient effect.⁴⁷ After the passage of the Act, Congress did in fact purport to make the necessary findings, but the government's attorney, for some reason, stated, "[w]e're not relying on them in the strict sense of the word."⁴⁸ The Court, therefore, felt free to ignore the "findings," which did not, in any event, add anything to the effects relied on by the United States.

The government argued that the Court could find the required effect on the grounds that violent crime has substantial costs that are spread by insurance throughout the population,

43. 379 U.S. 294, 303-04 (1964).

44. See *Lopez*, 514 U.S. at 557 ("[T]he Court has heeded that warning [not to obliterate the distinction between what is local and what is national] and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.").

45. *Id.* at 561.

46. *Id.*

47. *Id.* at 562-63.

48. *Id.* at 563 n.4.

that violent crime reduces the willingness of people to travel to areas seen as unsafe, and that violent crime hampers the "educational process," which "will result in a less productive citizenry," and therefore less interstate commerce.⁴⁹ It is difficult to disagree with Chief Justice Rehnquist's conclusion that these arguments make a farce of the idea of a central government of limited powers. If Congress can regulate the possession of guns around schools because it affects education, which in turn affects productivity, Congress obviously could directly regulate education itself. The result would be, as Chief Justice Rehnquist pointed out, to obliterate the federal-state distinction.⁵⁰ The problem that the United States (and the dissent) faced was the need to insist, in the face of this clear contrary fact, that the result would not obliterate the distinction. Employing his lawyerly immunity from embarrassment, Justice Breyer undertook to do just that in a lengthy dissent.⁵¹

If the difficulty with the dissent is that its position would make a farce of federalism, the difficulty with the majority's position is that the Court had already made a farce of federalism long ago, and the majority, with the possible exception of Justice Thomas, was clearly unwilling to do anything about it. It required no less an immunity from embarrassment for Chief Justice Rehnquist to claim that for the Court to uphold the Act "would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."⁵² It is as if he had never heard of the *Lottery Case*⁵³ upholding federal regulation of gambling, the many Pure Food and Drug Acts regulating in the interest of health, the Mann Act, regulating sexual immorality, and the many federal statutes regulating gambling, kidnapping, arson, auto theft, and so on. Mr. Caminetti, who was convicted of a federal crime after he traveled from California to Nevada with his lady friend and engaged in sexual activity, would have been surprised to learn that the federal government does not possess the police power.⁵⁴

49. *Id.* at 563–64.

50. *Id.* at 567–68.

51. *Id.* at 615–31 (Breyer, J., dissenting).

52. *Id.* at 567 (majority opinion).

53. 188 U.S. 321 (1903).

54. See *Caminetti v. United States*, 242 U.S. 470 (1917).

It is true that most of these cases were decided under the "prohibit commerce" ("channels") theory rather than the "affects commerce" theory of the commerce power, but that should make no difference. In any event, the Court had also previously upheld under the "affects theory" several pieces of legislation that fell within the police power umbrella of health, safety, and welfare. For example, in *Heart of Atlanta Motel v. United States*,⁵⁵ the Court upheld a federal prohibition on race discrimination in restaurants,⁵⁶ and in *Perez v. United States*,⁵⁷ it upheld a federal law against loan sharking.⁵⁸

The *Lopez* Court made clear that it had no intention of challenging Congress's use of the power to prohibit commerce to achieve police power objectives, pointing out that "there is no indication that [the defendant] had recently moved in interstate commerce, and there is no requirement [in the Act] that his possession of the firearm have any concrete tie to interstate commerce."⁵⁹ But *Lopez*, his gun, or both having once crossed a state line (and the gun, at least, almost surely had), would not make the challenged statute any less a police power measure or more a *bona fide* regulation of commerce. The Court had to ignore not only Mr. Caminetti's case, but also other cases seemingly directly on point, such as *Scarborough v. United States*,⁶⁰ which held that Congress's criminalizing a man's in-state, non-commercial possession of a gun was a regulation of interstate commerce because the gun had once crossed a state line.⁶¹

Equally ludicrous was the Court's statement that findings by Congress would have helped it "evaluate the legislative judgment that the activity in question substantially affected interstate commerce."⁶² It is highly unlikely that Congress made any such judgment or even considered the matter. Congress was obviously simply responding to an insistent public concern about the apparently very serious problem of violence in schools. According to studies cited by Justice Breyer, "12 per-

55. 379 U.S. 241 (1964).

56. *Id.* at 242.

57. 402 U.S. 146 (1971).

58. *Id.* at 156-57.

59. *United States v. Lopez*, 514 U.S. 549, 567 (1995).

60. 431 U.S. 563 (1977).

61. *Id.* at 570-71.

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

cent of urban high school students have had guns fired at them" and "20 percent . . . have been threatened with guns."⁶³ Under our unusual and complicated system of government, Congress lacks legislative authority to deal with such problems directly. Congress can deal with them, however—except for *Lopez*—provided it is simply willing to pretend, or more realistically, have the Solicitor General pretend, that it is actually regulating interstate commerce.

In short, American federalism has largely degenerated into little more than a requirement of dishonesty. The current concept of federalism is not that there are some things Congress cannot do, but rather that there are some things Congress can do only in an indirect and underhanded manner. Officially, Congress has no power to prohibit activities such as gambling, prostitution, drug use, or non-state race discrimination. This does not mean, however, that we have no federal laws prohibiting those things; it merely means that the laws must purport to be something they are obviously not—typically, an exercise of the commerce power.

Law students in the United States begin their studies by learning that the practice of constitutional law, at least as far as federalism is concerned, requires the ability to assert patent fictions with a straight face. The study teaches them early the great advantage of a high threshold of embarrassment. When people complain of the ability of lawyers to assert fictions as truth, they should be made aware that it is not an inborn skill, but the result, at least in part, of training provided by professors in required constitutional law courses. This training complicates, no doubt, the task of professors in legal profession courses—another required part of the legal curriculum—to teach obligations of candor and openness.

Justice Kennedy's concurring opinion in *Lopez*, joined by Justice O'Connor, seems to be nothing more than a lengthy apology for voting to invalidate the statute. He urged the Court to exercise "great restraint" on this issue and gave assurance that no earlier Commerce Clause decision was "called in question . . . today."⁶⁴ *Lopez*'s distinguishing feature, according to Justice Kennedy, was that in no other case had the Court held

63. *Id.* at 619 (Breyer, J., dissenting).

64. *Id.* at 568, 574 (Kennedy, J., concurring).

that the "commerce power may reach so far."⁶⁵ He later admitted, however, that "the intrusion on state sovereignty [in *Lopez*] may not be as severe" as in some of the Court's recent Tenth Amendment cases in which Congress's power was upheld.⁶⁶

Justice Thomas also submitted a lengthy concurring opinion, arguing for a strict definition of "commerce" (in accordance with his view of original understanding) as essentially limited to trade and transportation, and seemingly urging total rejection of the "substantially affects" doctrine.⁶⁷ This left him with the difficult task of explaining away Chief Justice Marshall's statement in the seminal case of *Gibbons v. Ogden*,⁶⁸ defining as interstate all commerce that "concerns more States than one" and excluding only commerce that does not "affect other States,"⁶⁹ which he did not succeed in doing.⁷⁰ Justice Thomas's view would result in a drastic reduction of the commerce power, limiting Congress's ability to regulate even economic and business affairs of national import, such as monopolistic mergers or cartels among manufacturers. Justice Thomas, like Chief Justice Rehnquist, was concerned that the affects doctrine could result in granting Congress the police power, but, like the Chief Justice, failed to note that Congress had already been granted that power on the basis of the Commerce Clause at least since the 1903 *Lottery Case*.

Justice Stevens would have upheld the Act based partly upon the argument that commerce "is vitally dependent on the character of the education of our children."⁷¹ As already noted, under this premise, Congress could regulate education directly, thereby bringing an end to any pretense of a national government with limited powers. Instead of candidly addressing that concern, Justice Stevens joined Justice Breyer's opinion denying that the adoption of his view would have such profound consequences.

Justice Souter's lengthy dissent added the unflattering accusation that the Court's prior decisions finding limits to the commerce power were not based on a concern with federalism,

65. *Id.* at 580.

66. *Id.* at 583.

67. *Id.* at 585 (Thomas, J., concurring).

68. 22 U.S. (9 Wheat.) 1 (1824).

69. *Id.* at 194.

70. See *Lopez*, 514 U.S. at 593-96 (Thomas, J., concurring).

71. *Id.* at 602 (Stevens, J., dissenting).

but—like the decisions of the economic substantive due process era—on a commitment to *laissez-faire* economics.⁷² He did not try to explain why the famous *Schechter Poultry*⁷³ decision, which limited the commerce power, was joined by Justices Brandeis, Stone, and Cardozo, all of whom were staunch opponents of the concept of economic substantive due process.

Justice Breyer attached to his dissenting opinion a lengthy appendix documenting the seriousness of violence in schools,⁷⁴ as if the seriousness of a problem gave Congress the power to regulate it under the Commerce Clause. Instead of openly espousing this position and arguing that the Court therefore has no role in maintaining federalism, Justice Breyer undertook the heroic task of showing that upholding the Gun-Free School Zones Act as a regulation of interstate commerce was not the practical equivalent of upholding Congress's regulation of virtually any activity. Justice Breyer argued that upholding the Act would not mean, as the majority claimed, that Congress would be able to "regulate any activity that it found was related to the economic productivity of individual citizens."⁷⁵ This was because the Act, he explained, dealt with a "particularly acute threat to the educational process," and because of the "immediacy of the connection between education and the national economic well-being."⁷⁶

Justice Breyer did not address the fact that the power to regulate a threat to education entails the power to regulate education itself; nor did he meet Chief Justice Rehnquist's challenge to identify a putative use of the commerce power that he would not uphold. The position of the dissenters was, in essence, that the Court should continue to pretend to review Congress's purported exercises of its commerce power, as it had since 1937, although it would in practice uphold and thereby legitimize each and every purported exercise.

Lopez could have been viewed as a very important precedent, establishing definitively, after sixty years of contrary indications, that the power of Congress to legislate under the Commerce Clause *would* be subject to judicial limitation. Alterna-

72. *Id.* at 605–06 (Souter, J., dissenting).

73. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

74. *Lopez*, 514 U.S. at 631 (Breyer, J., dissenting).

75. *Id.* at 624.

76. *Id.*

tively, it could have been viewed as an aberration, unlikely to have any progeny. This aberrational view would clearly be the better initial reaction to *Lopez* if one believed, with Justice Kennedy, that the decision did not "call in question the essential principles"⁷⁷ of prior cases, but was based instead on Congress's careless failure to connect the regulated act to (or even mention) interstate commerce. Perhaps the Court was simply pointing out to Congress the unseemliness of failing to at least insert the words "interstate commerce" somewhere in a purported exercise of its commerce power. If hypocrisy is the tribute vice pays to virtue, Congress should pay the tribute by at least mentioning commerce instead of leaving it to the courts to concoct a commerce theory. Five years later, however, it appeared that *Lopez* would not be so narrowly confined.

III. UNITED STATES V. MORRISON: LOPEZ AFFIRMED AND STRENGTHENED

*United States v. Morrison*⁷⁸ involved a challenge to the Violence Against Women Act of 1994, which provided a civil remedy to "victims of gender-motivated violence."⁷⁹ The victim of an alleged rape by two college football players brought suit under the Act against the school and the players. Relying on *Lopez*, the Fourth Circuit, sitting en banc, upheld the defendants' contention that the Act was unconstitutional.⁸⁰ The Supreme Court, again in an opinion by Chief Justice Rehnquist, affirmed, with Justice Thomas writing a separate concurring opinion,⁸¹ and, as in *Lopez*, the four liberal Justices dissenting.⁸²

Chief Justice Rehnquist began his discussion of the applicable law by carefully and helpfully explicating his opinion in *Lopez* as resting on four "significant considerations."⁸³ First, the criminal statute had "nothing to do with 'commerce' or any sort of economic enterprise."⁸⁴ Second, the statute contained

77. *Id.* at 574 (Kennedy, J., concurring).

78. 529 U.S. 598 (2000).

79. *Id.* at 602.

80. *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 889 (4th Cir. 1999) (en banc).

81. *Morrison*, 529 U.S. at 627 (Thomas, J., concurring).

82. *Id.* at 628 (Souter, J., dissenting).

83. *Id.* at 609 (majority opinion).

84. *Id.* at 610 (quoting *Lopez*, 514 U.S. at 561).

"no express jurisdictional element which might limit its reach" to instances of the regulated conduct that "have an explicit connection with or effect on interstate commerce."⁸⁵ Third, the legislative history of the statute contained no "express congressional findings regarding the effects" of the regulated activity on interstate commerce.⁸⁶ Finally, "the link between gun possession and a substantial effect on interstate commerce was attenuated."⁸⁷

The Violence Against Women Act similarly regulated conduct that was non-economic, had no express jurisdictional element (in that it applied to all gender-motivated violence against women), and had an attenuated connection with interstate commerce. Surely the most significant aspect of *Morrison*, distinguishing it from *Lopez*, was that this time Congress played the game of pretending to be concerned with interstate commerce. Congress held extensive hearings about the effects of gender-motivated violence against women on interstate commerce and found that such violence affects interstate commerce "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, . . . diminishing national productivity, increasing medical and other costs, and decreasing the supply of and demand for interstate products."⁸⁸ These findings did not save the statute, however, because the asserted effects were too "attenuated."⁸⁹ Were such findings—of diminishing national productivity, for example—accepted as sufficient, Chief Justice Rehnquist pointed out, Congress could "regulate any crime" so long as the nationwide, aggregated impact of that crime has substantial effects on "employment, production, transit, or consumption."⁹⁰ Congress would even be able to regulate family law and other areas of traditional state regulation.⁹¹

Because Congress explicitly relied on its commerce power in the Violence Against Women Act, purporting to make findings about the effects of the regulated activity on interstate commerce, the *Morrison* Court's departure from earlier law was

85. *Id.* at 611–12 (quoting *Lopez*, 514 U.S. at 562).

86. *Id.* at 612 (quoting *Lopez*, 514 U.S. at 562).

87. *Id.* (quoting *Lopez*, 514 U.S. at 563–67).

88. *Id.* at 615 (citing H.R. REP. NO. 103-711, at 385 (1994) (Conf. Rep.)).

89. *Id.*

90. *Id.*

91. *Id.*

clear. "[T]he existence of congressional findings is not sufficient, by itself," the Court said, "to sustain the constitutionality of Commerce Clause legislation."⁹² In earlier cases, congressional findings had effectively been sufficient, because the only question was whether Congress could rationally think that the regulated activity substantially affected interstate commerce, as virtually all activities do.⁹³ It was hardly imaginable that the Court would ever find that Congress's belief was not rational. After *Morrison*, however, whether an activity's effects on interstate commerce are sufficient to sustain a statute enacted under the Commerce Clause became "ultimately a judicial rather than a legislative question."⁹⁴ The quotation is from Justice Black's concurring opinion in *Heart of Atlanta Motel*,⁹⁵ not from the majority opinion, which actually limited the Court's role to determining Congress's rationality. Chief Justice Rehnquist had earlier quoted the statement in a footnote in *Lopez*;⁹⁶ now he fully endorsed it by re-quoting it in the text, effectively overruling *Heart of Atlanta Motel* on the issue.

The Court was now to determine for itself the sufficiency of effects in Commerce Clause cases. Perhaps even more important is that in some cases, effects, even if substantial, simply do not count. Although Congress may regulate *economic* activity that "substantially affects interstate commerce" when the effects are aggregated, as noted in *Lopez*,⁹⁷ it may not regulate "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."⁹⁸

Justice Thomas's concurring opinion reiterated his view that the "substantial effects" theory of Commerce Clause regulation is "inconsistent with the original understanding of Congress's

92. *Id.* at 614.

93. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) ("The only question [is] whether Congress had a rational basis for finding that racial discrimination by motels affected commerce . . ."); *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964) ("[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.").

94. *Morrison*, 529 U.S. at 614 (quoting *Heart of Atlanta Motel*, 379 U.S. at 273 (Black, J., concurring)).

95. *Heart of Atlanta Motel*, 379 U.S. at 273 (Black, J., concurring).

96. *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995).

97. *Id.* at 560.

98. *Morrison*, 529 U.S. at 617.

powers and with this Court's early Commerce Clause cases."⁹⁹ Justice Souter's dissenting opinion, joined by Justices Stevens, Ginsburg and Breyer, correctly pointed out that the Court had "supplant[ed] rational basis scrutiny with a new criterion of review."¹⁰⁰ The Court would now determine the sufficiency of the effects, and it would no longer be determined by their "cumulative effects."¹⁰¹

IV. THE "CONSERVATIVE" REHNQUIST COURT

Lopez and *Morrison* may be seen as the defining decisions of the Rehnquist Court—the acme of its federalism jurisprudence and the most prominent example of the influence of the supposedly conservative Justices. The Rehnquist Court was almost uniformly characterized (and deplored) by constitutional law professors and the liberal media as a conservative Court guilty of right-wing activism.¹⁰² It was indeed activist, like its immediate predecessors (the Warren and Burger Courts), but its activism—that is, its rulings of unconstitutionality not clearly required by the Constitution—was, like that of its predecessors, overwhelmingly in the service of liberal causes.¹⁰³

The Rehnquist Court did, however, provide some examples of conservative activism, giving conservatives victories on policy issues that they were unable to obtain through the ordinary political process. Of these, its federalism decisions, seeking to protect or restore a degree of state autonomy, were probably the most important, or at least the most prominent. Two other areas were its "affirmative action" decisions, invalidating some official uses of racial preferences,¹⁰⁴ and its "regulatory takings"

99. *Id.* at 627 (Thomas, J., concurring).

100. *Id.* at 637 (Souter, J., dissenting).

101. *Id.*

102. See Lino A. Graglia, *Constitutional Law without the Constitution: The Supreme Court's Remaking of America*, in "A COUNTRY I DO NOT RECOGNIZE": THE LEGAL ASSAULT ON AMERICAN VALUES 1, 32 (Robert H. Bork ed., 2005).

103. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (homosexuality); *United States v. Virginia*, 518 U.S. 515 (1996) (sex discrimination); *Lee v. Weisman*, 505 U.S. 577 (1992) (school prayer); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (term limits).

104. The Rehnquist Court apparently gave conservatives an important victory when it held that the "strict scrutiny" test applies to laws granting preferences to blacks as well as to laws discriminating against blacks. If the rational basis test is one that can hardly be failed, the strict scrutiny test was thought to be one that can

decisions, requiring compensation to property owners for losses caused by certain governmental regulations that decreased property values even though the government did not formally "take" the property by eminent domain.¹⁰⁵ In each of these latter two areas, the victories proved to be very limited and probably short-lived. The same is likely to prove true, if it has not already been so proven, in the third major area of conservative victories, federalism.

The Rehnquist Court's "federalism" decisions undertook to protect state autonomy in three ways. First, in two cases the Court held that Congress may not "commandeer" the resources of a state by requiring it to enforce or aid in enforcing or implementing a federal program.¹⁰⁶ The issue is not likely to arise frequently—the latter of the two cases was decided more than a decade ago—or to be very important. In any event, Congress can ordinarily obtain state cooperation in federal programs through

hardly be passed. Applying the test, the Court in three cases held the use of racial preferences favoring blacks to be unconstitutional. *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94, 505–06 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279–84 (1986) (plurality opinion). The era of racially preferential "affirmative action," it seemed, was finally over. Liberal constitutional law scholars protested mightily and considered this result so unacceptable that they began to question the value of judicial review. See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 154, 172–73 (1999). The whole point of leaving the final decision on basic social policy issues to the Supreme Court, in their view, was to produce a more, not less, liberal outcome than obtained in the ordinary political process. *Id.* Their fear that the Court would abolish "affirmative action" proved to be unfounded when, in 2003, thanks to a switch by Justice O'Connor, the Court upheld the use of racial preferences in law school admissions. *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003).

105. In a fifteen-year period between 1987 and 2001, the Court upheld regulatory takings claims in five cases. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). The principal result of these decisions was a rule that a regulation that deprives land of "all economically beneficial use" constitutes a taking and that the government must compensate owners even for temporary takings. Like the other conservative victories, however, the decisions were by narrow five-to-four or six-to-three votes, with the liberal Justices usually in dissent. In 2002, joined by the "moderates," Justices O'Connor and Kennedy, the liberals prevailed. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002). The result was to overrule the "all economically beneficial" rule in all but name, and to undo most, if not all, of the little that the conservatives had been able to accomplish.

106. *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

conditional spending, and other decisions indicate that the non-commandeering cases give the States very limited protection.¹⁰⁷

The second way in which the Rehnquist Court undertook to protect state autonomy was to hold in a series of cases, beginning in 1996, that the Eleventh Amendment limits the power of Congress to create causes of action against the States.¹⁰⁸ One of the Court's most recent decisions on the issue, however, indicates that, as with the regulatory taking and racial preference issues, this development has likely been brought to an end, if not actually reversed.¹⁰⁹

The third and most important way in which the Court attempted to protect state autonomy was by holding in *Lopez* and *Morrison* that there really are judicially-enforceable limits to Congress's commerce power, contrary to all indications of the previous sixty years. The question is how far this development will go. As with the other Rehnquist Court efforts to advance conservative causes, the prospects are bleak. The Court has not invalidated a federal statute on Commerce Clause grounds since *Morrison* in 2000. The Court cited *Lopez* in two cases as providing a reason to interpret a Commerce Clause statute narrowly and to avoid the constitutional question raised by *Lopez* about the extent of the commerce power.¹¹⁰ In both cases, the interpretation that the Court adopted seemed, in any event, to be the more reasonable one. More important, the Court's next decision on the Commerce Clause power found the four liberals in the majority and three of the conservatives in dissent.

107. See *Reno v. Condon*, 528 U.S. 141 (2000) (unanimously upholding a federal law controlling a state commercial operation).

108. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

109. See *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (upholding, by a six-to-three vote, a federal cause of action against a state under the Family and Medical Leave Act).

110. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (holding that a small, non-navigable intrastate pond was not covered by the Clean Water Act, despite periodic use of the pond by migratory birds that cross state lines); *Jones v. United States*, 529 U.S. 848 (2000) (holding that a private dwelling was not "used in" interstate commerce despite its consumption of natural gas obtained out-of-state).

V. GONZALES V. RAICH: THE LOPEZ REVOLUTION HALTED,
IF NOT REVERSED

The Court's most recent decision on the commerce power indicates that the reach of *Lopez* and *Morrison* is likely to be limited. The Court upheld a federal statute in the face of a seemingly substantial challenge on Commerce Clause grounds.¹¹¹ Justice Stevens, a dissenter in *Lopez* and *Morrison*, now wrote for a majority of the Court, joined by the other three former dissenters. Three members of the majority in those cases now wrote in dissent—a strong indication in itself that a change in direction, if not a reversal of position, had taken place.

Gonzales v. Raich involved a challenge to an application of the Controlled Substances Act (CSA), a part of the Comprehensive Drug Abuse and Prevention Act of 1970 (CDAPA), which prohibits the manufacture, distribution, or possession of a "controlled substance," including marijuana.¹¹² California law generally prohibits the possession and use of marijuana, but the state's Compassionate Use Act of 1996 permits its use for medicinal purposes by "seriously ill" residents with the approval of a physician.¹¹³ Two seriously ill California residents used locally grown marijuana for medicinal purposes on their physicians' recommendations.¹¹⁴ Relying on *Lopez* and *Morrison*, they argued that the CSA could not constitutionally apply to the intrastate possession and use of marijuana for medicinal purposes in accordance with state law.¹¹⁵ The Ninth Circuit agreed,¹¹⁶ but the Supreme Court reversed.¹¹⁷

The Court, unsurprisingly, maintained that the case was governed by *Wickard v. Filburn*,¹¹⁸ which involved a challenge to the 1938 Agricultural Adjustment Act (AAA), a statute that sought to control the price of wheat in the national market by restricting supply. The *Wickard* Court held that the AAA could constitutionally be applied to the portion of a wheat farmer's

111. *Gonzales v. Raich*, 545 U.S. 1 (2005).

112. *Id.* at 7, 12–14.

113. *Id.* at 5–6.

114. *Id.* at 6–7.

115. *Id.* at 7–8.

116. *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003).

117. *Raich*, 545 U.S. at 9.

118. 317 U.S. 111 (1942).

crop that he raised solely for home consumption.¹¹⁹ Congress could prohibit the growing of such wheat, the Court reasoned, because it might find its way into the interstate market, thereby increasing supply, and in any event, its consumption reduced demand.¹²⁰ In *Raich*, Congress sought to eliminate the interstate market in marijuana, as it clearly could, for the power to regulate interstate commerce includes the power to prohibit such commerce, as first established in the *Lottery Case*.¹²¹ As in *Wickard*, Congress could therefore prohibit intrastate production intended for home use, because such production might enter the interstate market and thereby implicate Congress's power to regulate.¹²²

Wickard established the commonsense rule that, when the activities of a class of actors substantially affects interstate commerce in the aggregate, Congress can regulate all members of the class, even though the activity of an individual member of the class might have only a trivial effect.¹²³ In *Raich*, as in *Wickard*, the Court held that the relevant class was the producers of a product for home consumption that Congress sought to keep from entering the interstate market.¹²⁴ The Court refused to limit the relevant class further, as the dissenters urged, to producers of marijuana for home consumption for medicinal purposes pursuant to a physician's recommendation and in accordance with state law.¹²⁵

In *Lopez* and *Morrison*, Chief Justice Rehnquist sought to weaken, indeed to reject, the rational basis test, but he was unable to do so explicitly as that probably would have cost him Justice Kennedy's vote. It was legitimate, therefore, for the liberals, back in the saddle in *Raich*, to reinstate and apply the rational basis test without mention of *Lopez* and *Morrison* on this point. Because Congress had a rational basis for determining that the relevant class of activities (production for home consumption) would, in the aggregate, have a substantial effect on

119. *Id.* at 128–29.

120. *Id.*

121. *The Lottery Case*, 188 U.S. 321 (1903).

122. *Id.* at 345–48.

123. *See Wickard*, 317 U.S. at 127–28.

124. *Raich*, 545 U.S. at 32–33.

125. *Id.* at 28; *id.* at 53 (O'Connor, J., dissenting) (defining the relevant class narrowly); *id.* at 72 (Thomas, J., dissenting) (same).

interstate commerce, application of the CSA to the plaintiffs in *Raich* was a valid exercise of the commerce power.¹²⁶

The Court distinguished *Lopez* and *Morrison*, in which the Court had refused to apply the *Wickard* aggregate effects test, on the ground that the regulated activity in those cases was non-economic and not part of a larger regulatory scheme.¹²⁷ The production of goods, however—the activity involved in *Raich*—is, according to a standard dictionary, part of the definition of “economics.”¹²⁸ Furthermore, growing marijuana is not only an economic activity itself, but its regulation by the CSA was part of a larger scheme of economic regulation, the CDAPA, which was meant to suppress the interstate market in dangerous drugs. The foregoing considerations were sufficient to distinguish *Raich* from *Lopez* and *Morrison*, and to uphold the constitutionality of the challenged regulation.¹²⁹

Not only did Justice Kennedy switch to the side of the liberals, but so did Justice Scalia, who concurred in the judgment but did not join the majority opinion.¹³⁰ Justice Scalia insisted that Congress’s power to regulate activities that affect interstate commerce or that must be regulated to make the regulation of interstate commerce effective comes not from the Commerce Clause alone, but from both the Commerce and the Necessary and Proper Clauses.¹³¹ The majority seemed not to disagree, stating that the “question presented” was not whether the regulation involved was within Congress’s power to regulate interstate commerce, but whether it was within Congress’s power to “make all Laws which shall be necessary and proper for carrying into Execution” the power to regulate interstate commerce.¹³² Justice Scalia apparently believed that the majority did not sufficiently emphasize the distinction, however, which he found very important. Although the simple possession of marijuana prohibited by the CSA is, in Justice Scalia’s view, a non-economic activity (which the majority did not concede),

126. *Id.* at 32 (majority opinion).

127. *Id.* at 25–27.

128. *Id.* at 25–26 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

129. *Id.* at 26–28.

130. *Id.* at 33 (Scalia, J., concurring in the judgment).

131. *Id.* at 34.

132. *Id.* at 5 (majority opinion) (quoting U.S. CONST. art. I, § 8).

Congress may still regulate it because the regulation of possession is "an essential part of a larger regulation of economic activity," namely, the effort to extinguish the interstate market in controlled substances.¹³³

Justice O'Connor, joined in part by Chief Justice Rehnquist and Justice Thomas, dissented.¹³⁴ Although she doubted that "[t]he homegrown cultivation and personal possession and use of marijuana for medicinal purposes" was economic activity,¹³⁵ she wrote that even if it were, there was no "proof that [it had] a substantial effect on interstate commerce and [was] therefore an appropriate subject of federal regulation" under the Commerce Clause, even in conjunction with the Necessary and Proper Clause.¹³⁶ Here, as in *Lopez* and *Morrison*, she said, there was no "express jurisdictional requirement" connecting the regulated activity to interstate commerce, and its alleged effects on interstate commerce were "attenuated."¹³⁷ Justice O'Connor would have distinguished homegrown medicinal marijuana from other marijuana, and, applying the approach of *Lopez* and *Morrison*, would not have found that this marijuana had "a discernable, let alone substantial, impact on the national illicit drug market."¹³⁸ Furthermore, that the regulated local activity was part of a larger regulatory scheme did not show "that it [was] essential to that scheme."¹³⁹ The present case, Justice O'Connor therefore concluded, was indistinguishable from *Lopez* and *Morrison*.¹⁴⁰

In a separate dissenting opinion, Justice Thomas reiterated the view he expressed in *Lopez* that the commerce power applies only to interstate commerce, which means traffic and trade, and does not apply to things that merely affect interstate commerce.¹⁴¹ Nor could the Necessary and Proper Clause sustain the application of the CSA in this case, because the government did not show that "banning medical marijuana use

133. *Id.* at 42 (Scalia, J., concurring in the judgment) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

134. *Id.* at 42 (O'Connor, J., dissenting).

135. *Id.* at 50.

136. *Id.* at 43.

137. *Id.* at 44.

138. *Id.* at 53.

139. *Id.* at 46.

140. *Id.*

141. *Id.* at 58-59 (Thomas, J., dissenting).

[was] necessary" to control the interstate drug market.¹⁴² Even if it were "necessary," Justice Thomas would have found that it was not "proper" because it unjustifiably encroached on the traditional police powers of the States.¹⁴³

If the dissenters in *Raich* are correct that *Lopez* and *Morrison* have been effectively overruled, the Rehnquist Court's attempt to establish a judicially-enforceable limit on Congress's commerce power has come to an end, meeting the same fate as the two other major victories—on racial preferences and regulatory takings—that the Court seemed to grant to conservatives. It appears, however, that the *Raich* dissenters attempted to find in *Lopez* and *Morrison* more than was really ever there. The central factor of the *Lopez-Morrison* approach was that the regulated activity was not commercial or economic. The conduct regulated in *Raich*, the production and even the mere possession of a good, seems clearly more economic or related to economics, despite the dissenters' doubts, than the conduct regulated in *Lopez* and *Morrison*. Therefore, by rejecting the rational basis and aggregation of effects tests even for the regulation of economic or quasi-economic activity, the dissenters would have expanded, not merely maintained, the holdings of *Lopez* and *Morrison*.

Potentially the most significant aspect of *Lopez* and *Morrison* was the statement that the sufficiency of a regulated activity's effects on interstate commerce is a judicial question,¹⁴⁴ effectively repudiating the well-established rational basis test that made the sufficiency of effects a question for Congress, with the Court merely passing on the rationality of Congress's determination. In *Raich*, the Court strongly reasserted and applied the rational basis test, ignoring *Lopez* and *Morrison*'s pronouncements on the issue,¹⁴⁵ and drawing no complaint from either Justice Kennedy or Justice Scalia. The result is that rational basis is again the test of purported exercises of the commerce power with a possible de facto, even if not de jure, exception for cases involving the regulation of clearly non-economic conduct that is not part of a larger regulatory

142. *Id.* at 64.

143. *See id.* at 64–66.

144. *See United States v. Morrison*, 529 U.S. 598, 614 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995)).

145. *See Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

scheme. With this narrow exception, *Raich* indicates a return to the Court's practice since 1937 of reviewing purported exercises of the commerce power in name only, which makes judicial review a means of validation rather than a limitation.

It is hard to view the Court's, and particularly Justice Scalia's, insistence on the importance of the Necessary and Proper Clause as more than formalistic and semantic. When the so-called Anti-Federalists made the Clause a major basis for their opposition to the Constitution, Alexander Hamilton and James Madison responded that it did not add to the powers of Congress but merely made explicit what was clearly implied: a grant of legislative power necessarily includes the means to make it effective.¹⁴⁶ In *McCulloch v. Maryland*,¹⁴⁷ when Maryland tried to make the Necessary and Proper Clause serve as a limit on the enumerated powers, Chief Justice Marshall responded, in agreement with Hamilton and Madison, that it was essentially a redundancy.¹⁴⁸ Although the Necessary and Proper Clause may add useful rhetorical force to an opinion, it seems unlikely that without it the Court would have come to a different conclusion about Congress's power.

VI. THE COURT SHOULD WITHDRAW FROM COMMERCE CLAUSE REVIEW

It does not seem that the power of Congress would have been construed less broadly without the Necessary and Proper Clause. It simply makes sense for the country to have, and the people apparently want it to have, a "normal" national government, able to deal with whatever it sees as a national problem, like other national governments. The best course for the Court to take in Commerce Clause cases (in fact, in all cases challenging

146. See THE FEDERALIST NO. 33, at 170 (Alexander Hamilton) (Clinton Rossiter & Charles R. Kesler eds., 1999) ("[I]t may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same if these clauses were entirely obliterated . . ."); THE FEDERALIST NO. 44, at 253 (James Madison) (Clinton Rossiter & Charles R. Kesler eds., 1999) ("Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government by unavoidable implication.").

147. 17 U.S. (4 Wheat.) 316 (1819).

148. *Id.* at 419 ("To waste time and argument in proving that, without [the Necessary and Proper Clause], Congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun.").

Congress's legislative authority as distinguished from cases alleging a violation of a constitutional prohibition on a use of that authority), therefore, would be to withdraw explicitly from review, treating the scope of the commerce power as a non-justiciable "political question." Chief Justice Marshall came very close to adopting this position in *Gibbons v. Ogden*.¹⁴⁹ Defining the power so broadly as to be potentially without limit—extending to all "commerce which concerns more States than one," "plenary," and "vested in Congress as absolutely as it would be in a single government"—did not mean, he said, that there was a need for the Court to limit it.¹⁵⁰

The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.¹⁵¹

Among the many reasons for the Court to withdraw from Commerce Clause review, the most basic is that the Constitution does not provide a clear basis for such review; that is, it does not sufficiently define the scope of the power to make review the application of a rule of law rather than simply a policy decision. It is true that the Constitution purports to create a national government limited to its enumerated powers,¹⁵² but those powers include the most important powers, to tax, to regulate commerce, and to declare war, very broadly stated.¹⁵³ The power to regulate interstate commerce, for example, could have been limited, but was not, to the power to prevent state discrimination against interstate commerce, which was thought to be its primary purpose.

Common usage may define "commerce" as business or economic transactions or activity, but "[c]ommerce . . . among the several States"¹⁵⁴ is more difficult to define. One could define it very narrowly as the transportation of things (goods, people,

149. 22 U.S. (9 Wheat.) 1 (1824).

150. *Id.* at 194, 197.

151. *Id.* at 197.

152. See U.S. CONST. amend. X.

153. See U.S. CONST. art. I, § 8.

154. U.S. CONST. art. I, § 8, cl. 3.

information, and so on) across a state line, but to be effective, the power to regulate such transportation must include the power to regulate intrastate activities that are a part of or an impediment to interstate transportation, or which otherwise affect such transportation or its regulation. Congress cannot regulate interstate railroad rates, for example, without the power to regulate competing intrastate rates.¹⁵⁵ The difficulty is that all intrastate activity, even guns around schools and gender-motivated violence against women, affects interstate commerce in some way, as the dissenters in *Lopez* and *Morrison* illustrated.¹⁵⁶ Thus, the commerce power is potentially *all* power, which cannot be right.

To make the commerce power all encompassing would be to eliminate the enumerated powers limitation on federal authority. It is necessary, therefore, to draw a line. That it is difficult to do this as a matter of principle rather than by *ad hoc* policy judgments, however, makes it more appropriate to leave the matter to Congress than to the Court. Delineating divisions of power between governments is certainly not part of the ordinary judicial function. The Court attempted to deal with the problem in *United States v. E. C. Knight Co.*¹⁵⁷ by narrowly defining "commerce" as trade and transportation but not including manufacturing.¹⁵⁸ This did provide a rule, but it was not an acceptable one, for it deprived Congress of the power to deal with a national manufacturing monopoly that very much affected interstate commerce, without enhancing or protecting state power to do so.

Lopez and *Morrison* are based on a similar, though even broader, definitional approach to the problem, defining "commerce" as confined not to trade or transportation, but to business and economic affairs. That too may provide a fairly clear and administrable rule, but it is not clear that it will prove to be a useful one. It is doubtful that it can or will be applied consistently to important legislation, such as the Endangered Species

155. See *The Shreveport Rates Cases*, 234 U.S. 342, 351–52 (1914).

156. See *United States v. Morrison*, 529 U.S. 598, 628–34 (2000) (Souter, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 620–23 (1995) (Breyer, J., dissenting).

157. 156 U.S. 1 (1845).

158. See *id.* at 13.

Act,¹⁵⁹ and even more doubtful that either the States or the people would want it so applied.

Even if the Court could find a principled way to limit Congress's legislative authority, it should not strain to do so. It now appears that a national government of limited legislative authority is neither a workable arrangement, nor what the American public actually wants. Federalism remains an American ideal favored by everyone in principle, but defended by practically no one when it presents an obstacle to national action to further some favored interest. President Reagan, for example, although an ardent supporter of federalism in principle, signed a federal statute requiring states to impose a minimum drinking age of twenty-one years or lose a portion of their federal highway funds.¹⁶⁰ Highway safety, President Reagan believed, was more important than federalism. This easy trumping of federalism reflects the view of most congressmen and most people that, as a practical matter, Congress can and should be able to address any problem. The people apparently approved of the New Deal's massive centralization of legislative authority by reelecting President Roosevelt three times. The Hurricane Katrina disaster that struck New Orleans seemed to produce an almost uniform reaction that the federal government, not Louisiana, should have done more, and acted more quickly.

Another reason that the Court should explicitly withdraw from Commerce Clause review is its inability to limit the power of the federal government, even when it consistently tries to do so. One could not expect the Court, an arm of the federal government, to limit the power of the federal government in order to protect the power of the States; the umpire is a member of one of the teams. Throughout its history, the Court's decisions have served more to validate than to restrict federal power. The Court's most important decision to that effect was probably the *Lottery Case*,¹⁶¹ which upheld a federal statute that sought to suppress gambling by prohibiting the interstate shipment of lottery tickets. The issue was important

159. See, e.g., *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

160. See *South Dakota v. Dole*, 483 U.S. 203, 205 (1987).

161. 188 U.S. 321 (1903).

and difficult enough to warrant argument three times before the matter was decided by a five-to-four vote.¹⁶²

Despite Chief Justice Marshall's warning in *McCulloch* that the Court would not uphold a "pretext" use¹⁶³ of Congress's powers, the *Lottery Case* Court held that the power to regulate interstate commerce includes the power to prohibit it to achieve general legislative (that is, "police power") ends, such as prohibiting gambling, that it could not achieve directly.¹⁶⁴ After all, to prohibit is to regulate, even though it prevents rather than facilitates interstate commerce, and to prohibit goods from crossing a state line is therefore to regulate interstate commerce, even though the objective is non-commercial.¹⁶⁵ This argument is perfectly logical, but as the dissenters pointed out, it represents a triumph of form over substance.¹⁶⁶

If the commerce power enables Congress to prohibit anyone or anything (including electromagnetic waves and polluted air) from crossing a state line for any reason, American federalism has become largely a matter of sleight-of-hand; Congress can regulate virtually anything by simply pretending to be regulating interstate commerce.¹⁶⁷ In addition, if Congress can use this technique to regulate conduct not only in the state of origin (for example, by requiring payment of a minimum wage) but, less logically, also in the state of destination (for example, by prohibiting sexual conduct by people who have crossed a state line to engage in that conduct or restricting the behavior of those who have a connection with goods that have crossed a state line), as the Court has held,¹⁶⁸ then Congress's police power is complete. Chief Justice Rehnquist's expression of concern in *Lopez* that an attenuated "affects" doctrine might allow Congress to exercise the police power is therefore farcical. There would have been no problem in *Lopez*, apparently, if the statute applied only to guns

162. *See id.* at 325; *id.* at 364 (Fuller, C.J., dissenting).

163. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

164. *The Lottery Case*, 188 U.S. at 356-57 (majority opinion). The Court has also upheld pretextual uses of the tax power. *See, e.g., McCray v. United States*, 195 U.S. 27 (1904).

165. *The Lottery Case*, 188 U.S. at 363-64.

166. *Id.* at 371 (Fuller, C.J., dissenting).

167. *See, e.g., United States v. Darby*, 312 U.S. 100 (1941).

168. *See, e.g., United States v. Sullivan*, 332 U.S. 689 (1948) (holding that Congress can regulate a retail druggist's relabeling of a package containing pills that have crossed a state line).

that, like nearly all guns, had crossed a state line.¹⁶⁹ Congress's exercise of the police power, not only by prohibiting interstate shipment or movement, but also by regulating any activity involving goods that have crossed a state line, is no longer viewed as even raising a constitutional question.¹⁷⁰

There is nothing to be gained from requiring Congress to achieve its police power objectives by use of the "prohibit" rather than the "affects" theory of commerce. In fact, there is much to be lost, because the prohibit device is even more obviously dishonest than the alternative; indeed, it amounts to little more than a semantic trick. The Court will uphold a statute as a regulation of interstate commerce even though that was no part of Congress's purpose, as in the 1964 Civil Rights Act's prohibition of race discrimination in public accommodations.¹⁷¹ A certain amount of trickiness and deception is inherent in law, essential to maintaining the illusion that rules are dictating legal decisions, but the law should not flaunt its dishonesty. A mature system of law should seek to minimize fictions; adults, even lawyers, should be spared the embarrassment of having to declare in public things that are obviously untrue.

From 1937 to 1995, judicial review of Congress's power under the Commerce Clause was fictional review, a virtually automatic rubberstamping of the challenged statute. Despite *Lopez* and *Morrison*, this reality, as *Raich* indicates, is not likely to change significantly. The result is the worst of all possible worlds. Congress excuses itself from paying serious attention to the constitutional question of the scope of its commerce power, instead insisting that dealing with such questions is the job of the Supreme Court. The Court, applying the rational basis test that it reinstated in *Raich*, then defers to a congressional judgment of constitutionality that Congress never made and hardly even considered relevant. All putative Commerce Clause legislation, then, is validated by the two-part formula providing that the commerce power is "plenary" and that Congress had a "rational basis" for determining that the regulated activ-

169. See *United States v. Lopez*, 514 U.S. 549, 567 (1995) (noting that "there is no requirement that [Lopez's] possession of the firearm have any concrete tie to interstate commerce").

170. See, e.g., *Scarborough v. United States*, 431 U.S. 563 (1977) (upholding a federal law making it a crime for a felon to possess a gun that has moved in interstate commerce).

171. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

ity affects interstate commerce. The principle of federalism is lost in the shuffle.

Another reason that efforts by the Court to limit the "affects" theory of the commerce power will prove pointless is Congress's possession of the perhaps even more potent power to tax and spend. Finding a principled basis for preventing an unlimited power to tax from developing into an all-encompassing power to regulate is difficult enough;¹⁷² to do so when the power to tax is combined, as it must be, with the power to spend is an even greater challenge. Congress can discourage conduct it does not want by penalizing it with a tax and encourage conduct it does want by fostering it with a subsidy. What, if anything, Congress cannot command it can almost always purchase. This "spending power" might be thought to be limited by the fact that the need to spend money for Congress to get its way can generate political resistance. In fact, however, Congress pours endless subsidies into the States, and all it must do to get the States to comply with a policy that Congress supposedly cannot implement directly is threaten to withhold a subsidy related to that policy.¹⁷³

This explains why, for example, although we do not have a national law prohibiting the sale of alcoholic beverages to persons under twenty-one years of age, that is nonetheless the law of the land. It is the law because all states that had a lower minimum drinking age "voluntarily" enacted the prohibition to avoid a reduction in the receipt of federal funds. There is no reasonable possibility that the Court will or can limit the spending power, which it has come close to calling a "political question,"¹⁷⁴ as it would be entirely inappropriate for the Court to override Congress's conception of the "general welfare." Again, it would be better if Congress could achieve directly what it now can achieve only indirectly, if it did not have in effect to bribe or coerce states to enact the laws it is supposedly unable to enact itself.

172. See *Bailey v. Drexel Furniture Co.* (Child Labor Tax Case), 259 U.S. 20 (1922).

173. School social segregation, for example, did not end as a result of *Brown v. Board of Education*, 347 U.S. 483 (1954), but of Title VI of the Civil Rights Act of 1964, which provided for the withdrawal of federal school subsidies from school districts that did not desegregate.

174. *Id.* at 207 n.2 ("[T]he Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction [on the spending power] at all.").

VII. THE COURT IS THE ENEMY, NOT THE PROTECTOR,
OF FEDERALISM

It is always problematic in a system of self-government to have constitutional limitations on policy choices, which amount, as President Jefferson pointed out, to the rule of the living by the dead. Probably the best justification is that a constitutional limitation may sometimes actually serve to further rather than frustrate democracy by correcting a supposed defect in the democratic political system. For example, the justification offered for a balanced budget amendment is that special interests have an advantage in obtaining federal expenditures because the benefits go to those who will work intensely to obtain them (the few), while the cost is spread among the general public (the many). The consequence might be a higher level of expenditures (and taxation) than the majority favors, which a constitutional cap on spending could prevent. Similarly, the justification for term limits must be that the advantage of incumbency prevents other candidates from competing effectively, even when their positions are preferred by the people.

Perhaps a similar justification exists for judicial enforcement of federalism to protect a degree of state autonomy. A group seeking federal involvement in some cause, for example, prohibiting guns around schools or violence against women, is usually able to defeat the federalist argument that such matters are best left to the States. Because it is difficult to defeat specific, concrete interests with a general principle, the federalism interest almost always loses in the political process. The result may be less federalism—and therefore less local autonomy—than the public favors. Thus, for the Court to step in to invalidate national legislation in the interest of federalism could, unlike most of the Court's rulings of unconstitutionality, actually advance democracy. It does not seem, however, that the public wants a high degree of federalism or limited national legislative authority. The public seems to prefer to invest national elected officials with the legislative authority to do whatever they feel needs to be done. In any event, it does not appear, for the several reasons stated—most basically that divided sovereignty is an oxymoron—that it is appropriate or feasible for the Court to attempt to limit Congress's legislative authority.

The conclusive reason that the Court should not protect federalism is that a Court with the power to disallow policy

choices by the national government on federalism grounds will necessarily have power to disallow them on other grounds, as well as to disallow policy choices by the States. The Court itself is the greatest enemy of federalism. The principal assault on state sovereignty since the middle of the twentieth century has come not from Congress, but from the Court. It is the Court that has taken from the States the right to make policy on abortion, capital punishment, criminal procedure, pornography, prayer in the schools, vagrancy control, street demonstrations, term limits, sexual morality, distinctions on the basis of sex, illegitimacy, alienage, and so on almost without end. The power of the Court to disallow in the name of the Constitution any policy choice it disagrees with has reduced the States to supplicants before the Court, pleading to be allowed to continue to make policy choices in some areas.

The power to limit the authority of the national legislature is the most impressive example of the Court's power. Allowing the Justices to do that makes it easy for them to believe they can do anything. It then becomes futile to complain that they have arrogated to themselves the final word on all controversial policy issues. The power to control Congress means that the Court is, by definition, the most powerful institution of American government. In light of that reality, it is no surprise that the Court has become the source of all major innovations in domestic social policy. We cannot plead with the Justices to protect us from our elected representatives in Congress in some cases and then object that they consider themselves authorized to "protect" us from our elected state representatives in others.

If we wish to preserve any element of federalism, as well as of democracy, our greatest need is not protection from Congress by the Court, but protection from the Court by Congress.