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* The author would like to thank Professor Josephine Potuto who was generous with both her time and advice in helping with this article.
I. INTRODUCTION

In 1776, our Constitution's Framers formulated the concept of federalism as one of the core principles upon which our bifurcated political system is based. At the center of this structure is a federal government whose authority is limited to specific enumerated powers within the Constitution. Among these enumerated powers sits the Commerce Clause. Though the power created by this clause was originally intended to be definite and narrow, it has become the life force of an omnipotent Congress which is now threatening the concept of federalism.

Apart from a brief period in the nineteenth century, the Supreme Court has consistently interpreted the Commerce Clause to grant Congress virtually limitless power. Over the past seventy years, Congress has used this unbridled power to intrude into areas traditionally considered within the exclusive domain of state sovereignty. The enforcement of criminal law is one of these exclusive state provinces. Despite the limited federal criminal jurisdiction envisioned by the Framers, the modern trend of federalizing criminal law is constantly enlarging this "limited" jurisdiction. In its current federalization frenzy, Congress has created more than 3,000 federal criminal statutes. This trend has tainted the traditional principles of federalism upon which this country is founded.

In United States v. Lopez, the Supreme Court deviated from the modern trend in a decision that stunned both the political and legal communities. The Lopez Court struck down § 922(q), also known as the Gun Free School Zones Act of 1990. This decision marked the

1. U.S. CONST. art. I, § 8, cl. 3.
2. See infra part IIA-C.
3. See infra part IIC.
4. See infra note 165.
5. See infra note 166 and accompanying text.
6. There are now more than 3,000 federal crimes on the books and this number is ever-increasing. W. John Moore, The High Price of Good Intentions, Nat'l L.J., May 8, 1993, at 1140.
   (q)(1)(A) It shall be unlawful for any individual knowingly to possess a firearm at a place the individual knows, or has reasonable cause to believe, is a school zone.
   (B) Subparagraph (A) should not apply to the possession of a firearm —
      (i) on private property not part of school grounds;
      (ii) if the individual possessing the firearm is licensed to do so by the State in which the School zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtain such a license, the law enforcement authorities of the State or polit-
first instance since 1936\(^9\) that the Supreme Court invalidated a federal statute based on the Commerce Clause. The *Lopez* Court held that due to the absence of a sufficient nexus between the mere possession of a firearm and interstate commerce, the statute was an unconstitutional exercise of the congressional commerce power.\(^{10}\) Yet, despite an ideal opportunity, the Court bypassed issuing an opinion that could have halted the current federalization trend.

This Note will critically examine the federalization of criminal law and the impact this trend is having on both the federal judicial system and the federalist structure of this country. Initially, this Note will trace the history of the Commerce Clause which laid the foundation for the unfettered modern commerce power. This Note will then analyze the reasoning relied upon in *Lopez* by both the circuit court and the Supreme Court. Additionally, this Note will establish that the *Lopez* Court did indeed recognize the underlying issue of federalism; however, it failed to effectively deal with the issue. Next, this Note will illustrate the various problems that accompany the federalization of criminal law. This Note will also set out the growing national recognition of this trend as a genuine threat to our federal system. Finally, this Note will suggest a possible solution to the impending crisis that faces our federal judiciary. It is the conclusion of this Note that if something is not done to curtail this current trend to federalize criminal law, the principle of federalism upon which this country is founded

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\(^9\) In 1936, the Supreme Court invalidated a federal law prescribing maximum hours for workers in *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936). One year later, the Court issued a landmark decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which became the foundation for the expansive modern commerce power.

II. GENERAL BACKGROUND

Before analyzing the *Lopez* decision, a brief overview of the history of the Commerce Clause and the Supreme Court’s interpretation of the congressional commerce power may be helpful. The Commerce Clause provides that “Congress shall have power . . . [t]o regulate Commerce . . . among the several States . . . .” The Supreme Court has never read this clause so expansively as to grant Congress infinite power to regulate any activity it sees fit. It has consistently recognized that there are limitations. Nonetheless, the Court has historically, given this clause an extremely broad interpretation. It is from this traditionally broad reading that Congress has derived its authority to continually institute new federal crimes, adding to the already congested federal judicial docket.

A. Laying a Broad Foundation

In *Gibbons v. Ogden* the Supreme Court laid the framework for this broad power granted to Congress by the Commerce Clause. The *Gibbons* Court held that a state may not grant an individual exclusive navigation rights because it interferes with the stream of interstate commerce. Speaking for the Court, Chief Justice Marshall formulated a remarkably expansive definition of the word “commerce.” His definition encompassed “every species of commercial intercourse which concern more states than one” and he gave an equally expansive definition to the congressional commerce power. Marshall defined the congressional commerce power as “the power to regulate; that is, to prescribe the rule by which commerce is to be governed.”

11. U.S. Const. art. I, § 8, cl. 3.
12. See sources cited infra notes 21-26, 35, 74-78 and accompanying text.
13. See infra part II.A.C.
15. *Id.* *Gibbons* involved a dispute over navigation rights in New York waters. Gibbons had been granted exclusive rights by New York to transport passengers in his steamboats between New York and New Jersey, effectively excluding out of state competitors. Ogden began travelling the same waters under a 1793 federal statute licensing ships in coastal trade. Gibbons filed suit seeking an injunction. The Court held that a state may not grant exclusive rights that interfere with interstate commerce, and that the federal statute preempted the state statute granting the monopoly.
16. *Id.* at 196.
This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent and acknowledges no limitations, other than are prescribed in the [Constitution]. He stated that, for purposes of the Commerce Clause power, commerce among the states cannot stop at the external boundary line of each State, but may be introduced into the interior.

Despite his broad interpretation, it is unlikely that Marshall envisioned that the commerce power could or would reach the levels that it has today. As the Lopez majority recognized, Marshall acknowledged the existence of inherent limitations within the very language of the Commerce Clause. Marshall noted that:

It is not intended to say that [the words ‘among the several States’] comprehend that type of commerce, which is completely internal, which is carried on between man and man in a State, or between different parts in the same State, and which does not extend to or affect other States. Such a power would be inconvenient and is certainly unnecessary. Comprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description.

It is clear from this excerpt that Marshall did not intend for his interpretation of the Commerce Clause to grant Congress the power to regulate activities that are inherently local in nature. It is highly unlikely that when using such sweeping language to describe the commerce power, Marshall foresaw that it would be interpreted to grant Congress the power to regulate traditionally local activities and become the basis for a federal police power.

B. A Narrowing of Minds

For nearly a century after Gibbons, subsequent interpretations of the Commerce Clause narrowed the broad commerce power established by Marshall and “aggressively protected state sovereignty from federal encroachment.” During this period, the Supreme Court's decisions remained relatively true to the concept of federalism and main-

19. Id.
20. Id. (emphasis added).
tained a distinction between local and national commerce.\textsuperscript{25} The Court developed various categories and distinctions to protect certain activities from federal regulation. It placed beyond the reach of Congress categories of activities, such as production, mining, and manufacturing, which traditionally fell within the exclusive province of the states.\textsuperscript{26} The Court also distinguished between direct and indirect effects and held that only activities directly affecting interstate commerce fell within the scope of federal regulation.\textsuperscript{27} The development of these strict restrictions on Congress’ commerce power led to the invalidation of many key pieces of President Roosevelt’s initial New Deal legislation.\textsuperscript{28}

C. Source of Unfettered Modern Commerce Power

This era of narrow interpretation came to a close around the time of Roosevelt’s infamous court-packing plan.\textsuperscript{29} Although this attempt to influence Court voting by increasing the Court’s membership ended in failure, a drastic shift in Commerce Clause jurisprudence resulted. The Court reverted to a more expansive interpretation of the commerce power, allowing a broader range of activities to fall within Con-

\begin{itemize}
\item \textsuperscript{25} See Carter v. Carter Coal Co., 156 U.S. 1 (1936)(striking down a federal law prescribing maximum hours for workers); A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935)(overturning a federal law prohibiting the sale of sick chickens across state lines); Hammer v. Dagenhart, 247 U.S. 251 (1918)(striking down a federal statute prohibiting the shipment in interstate commerce of goods made by child labor)\textit{overruled by} United States v. Darby, 312 U.S. 100 (1941)); Kidd v. Pearson, 128 U.S. 1, 17, 20-22 (1888)(upholding a state prohibition on the manufacture of intoxicating liquor because the “commerce power does not comprehend the purely domestic commerce of a State . . .”); Veazie v. Moor, 55 U.S. (14 How.) 568, 573-75 (1853) (upholding a state-created steamboat monopoly because it involved regulation of wholly internal commerce).

\item \textsuperscript{26} United States v. E.C. Knight Co., 156 U.S. 1 (1895). The Court articulated a distinction between commerce and manufacturing, mining, and production. It held that Congress lacked authority to regulate these exclusively state domains.\textit{Id.}

\item \textsuperscript{27} See A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 548 (1935). Activities which only affected interstate commerce indirectly were not subject to federal regulation.\textit{Id.} The Court held that the direct/indirect distinction was “a fundamental one, essential to the maintenance of our constitutional system.”\textit{Id.} The \textit{Schecter} Court justified making this distinction because of an existing fear that “otherwise there would be no limit to the federal power and for all practical purposes we should have a completely centralized government.”\textit{Id.}

\item \textsuperscript{28} Chemerinsky, \textit{supra} note 24, at 86.

\item \textsuperscript{29} Due to their consistent invalidation of his New Deal legislation, President Roosevelt grew increasingly frustrated with the Supreme Court. In response, he sought to enact legislation that would allow him to appoint an additional judge for every sitting judge over the age of 70 who had served at least 10 years on a federal court. This would have increased the Court’s membership to fifteen. The result would have been a majority on the Court favorable to President Roosevelt’s political ideology.
gress' grasp. In *NLRB v. Jones & Laughlin Steel Corp.*, the Supreme Court upheld the National Fair Labor Relations Act and ultimately abandoned the dual-federalism structure separating local from national commerce. It abandoned the earlier distinction between manufacturing and commerce, and it also abrogated the earlier direct and indirect distinction. The *Jones* Court formulated a new test when it held that Congress has the power to regulate intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions." Although this "substantial effect" test formed the basis for broad interpretations of the congressional commerce power, the *Jones* Court explicitly acknowledged that this power was not limitless. The Court warned that:

the scope of this power must be considered in light of our dual system of government and 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 effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

Nevertheless, less than five years later, in *United States v. Darby*, the Supreme Court provided further support for the expansive congressional commerce power set out in *Jones*. In *Darby*, the Court upheld the Fair Labor Standards Act. This Act prohibits the "shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to the standards set up by the Act." The rationale behind *Darby* was that the "power of Congress over interstate commerce is not confined to the regulation of commerce among the states" and that Congress has the right to regulate intra-

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30. See Maloney, supra note 23, at 1806-11.
31. 301 U.S. 1 (1937).
32. Id.
33. Id. at 37.
34. Id.
35. Maloney, supra note 23, at 1809. Maloney noted that the "affecting commerce" rationale created by *Jones* would soon take on "a life of its own." Id.
37. Id.
38. 312 U.S. 100 (1941).
39. Id. at 109.
40. Id. The *Darby* Court explicitly overruled *Hammer v. Dagenhart*, 247 U.S. 251 (1918), which struck down a federal statute similar to the Fair Labor Standards Act. The statute at issue in *Hammer* was the National Recovery Act which prohibited the shipment of goods that had been produced by child labor. The *Hammer* Court based its decision on the principle that congressional power to prohibit interstate commerce is limited to articles which themselves have some harmful or evil property. 247 U.S. at 271, 279. *Darby* held that this principle had "long since been abandoned." United States v. *Darby*, 312 U.S. 100, 116 (1941).
state commerce that has a substantial effect on interstate commerce.

This line of precedent broadening the commerce power culminated in the Supreme Court's landmark decision in *Wickard v. Filburn.* In *Wickard,* the Court held that wheat grown by a farmer solely for home consumption fell within the reach of federal regulation under the Commerce Clause. The *Wickard* Court extended the breadth of the substantial effect test with its introduction of the aggregate impact theory. This theory allows Congress to regulate activities that may be trivial in themselves, but when "taken together with that of many others similarly situated, [are] far from trivial." This decision "has had far-reaching consequences in the area of federal criminal legislation" because it gave Congress the authority to regulate activities that do not individually have a substantial effect on interstate commerce. *Wickard* provided an opening for congressmen, overly eager to demonstrate to their constituents that they were tough on crime, to enact federal statutes regulating local criminal activity. *Wickard* articulated an unprecedented view of an expansive congressional commerce power and further enhanced the federal government's power in relation to and at the expense of the states.

After the passage of the Civil Rights Act of 1964 the Court considered two major cases which resulted in the further expansion of the congressional commerce power. Previously, when the Court applied the substantial effects test to federal legislation, the legislation at issue regulated an activity that was commercial or economic in nature. However, the Civil Rights Act of 1964 was social rather than

41. United States v. Darby, 312 U.S. 100, 118 (1941)(emphasis added).
42. *Id.*
43. *Id.* At issue in *Wickard* was the 1941 amendment, 55 Stat. 203, 7 U.S.C. § 1340 (Supp. No. 1), to the Agricultural Adjustment Act of 1938, 7 U.S.C.A. § 1340, 52 Stat. 31 as amended, 7 U.S.C. § 1281 et seq., 7 U.S.C.A. § 1281 et seq. (limiting the amount of particular crops that individuals were allowed to market).
45. Maloney, *supra* note 23, at 1811 (focusing on the interpretations of *Wickard* that permit congressional legislation with social rather than economic aims).
46. *Id.* at 1811 (emphasis added).
49. Prior legislation focused on the regulation of some type of economic or commercial activity. However, the Civil Rights Act of 1964 shifted its focus in order to deal with the national problem of discrimination which is a social problem, not an economic problem. See, e.g., *Wickard v. Filburn,* 317 U.S. 111 (1942)(upholding the Agricultural Adjustment Act); United States v. Darby, 312 U.S. 100 (1941)(upholding the Fair Labor Standards Act); National Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)(upholding the National Labor Relations Act).
economic in both nature and purpose. It provided that "all persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, ... and accommodations of any place of public accommodation ... without discrimination or segregation on the grounds of race, color, religion or national origin."50 Because the Act was aimed at eliminating a social evil, the Court had to establish an even broader interpretation of the congressional commerce power in order to uphold the legislation. In doing so, the Court simply deferred to Congress based on the mere existence of a rational basis for their conclusion that the legislation was necessary.

These civil rights cases are significant for two reasons. First, they "signaled a willingness on the part of the Court to apply the Wickard rationale regarding the 'aggregate effect of trivial instances' to legislation that had as its primary concern not economic concerns, ... but social ones."51 In both Heart of Atlanta Motel, Inc. v. United States52 and Katzenbach v. McClung,53 the Court relied on the aggregate effect that the actions of local proprietors would have on interstate commerce. These decisions have provided Congress a sufficient basis for enacting federal criminal statutes. By simply applying Wickard's aggregate effect test, activities not remotely connected to interstate commerce may be regulated, even when the purpose of the regulation is social in nature.

Second, these cases are significant because they formed the basis for the modern exercise of judicial deference when legislative history and findings are present. For instance, in Heart of Atlanta Motel, the Court based its decision on the "voluminous testimony" in the Act's legislative history linking racial discrimination to interstate commerce.54 The legislative findings indicated that discrimination against blacks in the motel industry would discourage blacks from traveling throughout the country.55 Based on the adverse effect on interstate travel in the aggregate, the Court upheld the Civil Rights Act under the Commerce Clause.56

51. Maloney, supra note 23, at 1813. The discriminatory actions by a local motel or a local restaurant owner, by themselves, would have little impact on interstate commerce. However, in both cases, the Court utilized the Wickard aggregate impact theory and concluded that when the actions of all local proprietors were taken in the aggregate, the effect of their discriminatory conduct would substantially affect interstate commerce. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 241, (1964).
55. Id. at 252-53.
56. Id. at 252-57.
Similarly, in *Katzenbach*, the Court upheld the enforcement of the Civil Rights Act of 1964 against a restaurant owner who refused to serve black patrons.\(^\text{57}\) It based its decision on the legislative findings which indicated that legislators had a rational basis for finding the Civil Rights Act a necessary regulatory scheme for the protection of commerce.\(^\text{58}\) These findings bore substantial similarity to those relied upon by the Court in *Heart of Atlanta Motel*, with the *Katzenbach* Court concluding that in the aggregate, discrimination in restaurants had an adverse effect on interstate commerce.\(^\text{59}\) Thus, it is evident that the Court placed significant import on legislative findings in its decision to defer to Congress.

The Supreme Court dealt specifically with Congress' authority to enact federal criminal legislation based on the commerce power in *Perez v. United States*.\(^\text{60}\) In *Perez*, the defendant was convicted under a federal loansharking statute\(^\text{61}\) and the Court held that this statute was a constitutional exercise of Congress' commerce power.\(^\text{62}\) Although the defendant argued that the statute exceeded the scope of congressional commerce power because the activities were completely intrastate, the Court rejected this assertion.\(^\text{63}\) Instead, the Court held that the constitutionality of the statute hinged merely on a showing that the defendant's activities fell within a class of activities within the reach of federal power.\(^\text{64}\) Similar to Wickard's aggregate impact theory, this "class of activities" approach greatly enhanced Congress' ability to enact federal criminal statutes. When examined within any class of activity, every crime would undoubtedly have some affect on interstate commerce. Therefore, Congress acquired the power to regulate crimes conducted purely at the local level, merely by placing the particular activity into a "class of activities" that had some effect on interstate commerce.\(^\text{65}\)

In addition to establishing the "class of activities" approach, *Perez* has gained notoriety for two other reasons. First, the *Perez* Court explicitly stated that Congress "need [not] make particularized findings in order to legislate".\(^\text{66}\) This statement gave Congress free reign to

\(^{58}\) Id. at 303-04.
\(^{59}\) Id. at 304.
\(^{60}\) 402 U.S. 146 (1971).
\(^{63}\) Id. at 154.
\(^{64}\) Id. The *Perez* Court essentially carried over to the province of criminal law the application of the Wickard aggregate impact test to legislation with social aims as it had done earlier in *Heart of Atlanta Motel* and *Katzenbach*. The Court simply grouped the aggregate impact within a "class of activities." *Id.* at 153-54.
\(^{65}\) Id. at 152-59
\(^{66}\) Id. at 156.
regulate under the Commerce Clause and indicated that the Court would defer to Congress upon the mere statement of a connection between the regulated activity and interstate commerce. *Perez* eliminated the necessity of establishing an interstate nexus and it left open to regulation purely intrastate activities that traditionally fell under only state sovereignty. Second, *Perez* categorized particular activities previously held to fall within the scope of the congressional commerce power. It determined that these activities fell into three categories: 1) the use of channels of interstate or foreign commerce which Congress deems are being misused; 2) protection of the instrumentalities of interstate commerce; and 3) those activities affecting commerce.

Not long after the *Perez* decision, another challenge to a federal criminal statute founded on the Commerce Clause presented itself to the Supreme Court. In *United States v. Bass*, the defendant was convicted of possession of a firearm under a provision of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968. This provision prohibited "any felon from receiv[ing], possess[ing], or transport[ing] in interstate commerce or affecting interstate commerce... any firearm." The key issue was whether the jurisdictional language "in commerce or affecting commerce" applied to "receiv[ing]" and "possess[ing]", as well as to "transport[ing]." Essentially, the *Bass* Court had to determine whether the government was required to prove a connection between the possession of a firearm and interstate commerce. If the *Bass* Court read the statute at issue "to punish mere possession without a commerce nexus... it would intrude upon an area of traditional state authority and would push Congress' commerce power to its limit, if not beyond." Ultimately, the *Bass* Court held that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.... [The Court] will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." Therefore, the jurisdictional element set out in the statutory language applied to all three activities

67. *Id.* at 150.
68. *Id.* As recognized by the *Lopez* majority, § 922(q) falls within the third category. *United States v. Lopez*, 115 S. Ct. 1624, 1630 (1995).
70. Pub. L. No. 90-351, 82 Stat. 197 (1968) (the relevant portions of the act were subsequently repealed, but were originally codified at 18 U.S.C. §§ 1201-1203).
71. *Id.*
and required the prosecutor to prove a sufficient nexus between pos-
session of a firearm and interstate commerce.

Moreover, the *Bass* Court "recognized that criminalizing simple in-
trastate possession may exceed Congress's commerce power."\(^75\) How-
ever, by resting its decision on statutory construction the Court
specifically avoided deciding whether Congress could constitutionally
punish mere intrastate possession under its commerce power.\(^76\) This
issue was ultimately settled in 1995 when the Court decided *United
States v. Lopez*.

III. FACTUAL BACKGROUND

On March 10, 1992, Alfonso Lopez was a twelfth-grade student at-
tending Edison High School in San Antonio, Texas. On that day,
school officials received an anonymous tip that Lopez was carrying a
gun in school. Based on this tip, Lopez was called to the principal's
office and questioned by a school policeman. After he confessed that
he had a gun, a school official searched Lopez and discovered an un-
loaded .38-caliber revolver in his waistband and five cartridges in his
trouser pocket.\(^77\) Lopez explained that in exchange for $40.00 he had
accepted the revolver from "Gilbert" and was to deliver it to "Jason"
who planned to use the gun in a "gang war" after school.\(^78\) Lopez was
initially arrested and charged under a Texas law which makes it a
crime to possess a firearm on school premises.\(^79\) However, the next
day federal charges were filed under the Gun Free School Zones Act of
1990\(^80\) and the state charges were subsequently dismissed.\(^81\) The
Gun Free School Zone Act made it a federal offense for "any individual
to knowingly possess a firearm at a place that the individual knows, or
has reasonable cause to believe, is a school zone."\(^82\)

A grand jury indicted Lopez on one count of knowing possession of
a firearm in a school zone in violation of § 922(q). He pled not guilty
and made a motion to dismiss the indictment on grounds that § 922(q)
was an unconstitutional exercise of federal power over public schools.
This motion was denied by the federal district court which held that
the statute was a constitutional exercise of the congressional com-
merce power.\(^83\) The district judge found Lopez guilty of violating

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\(^{75}\) Maloney, *supra* note 23, at 1816 (citing discussion in *United States v. Bass*, 404
U.S. 336, 345-49 (1971)).


\(^{78}\) *Id.*

\(^{79}\) Tex. Penal Code Ann. § 46.03(a)(1) (West 1994).

\(^{80}\) See *supra* note 8.


\(^{82}\) See *supra* note 8.

§ 922(q) and sentenced him to six months imprisonment, two years supervised release, and a $50 fine.84

Lopez appealed to the Fifth Circuit on the sole ground that § 922(q) was unconstitutional because it exceeded congressional authority to legislate under the Commerce Clause. The Fifth Circuit reversed the district court's conviction and held § 922(q) to be unconstitutional.85 The circuit court began its opinion with a comparative analysis of United States v. Bass.86 The Bass Court required that the government establish a nexus between the possession of a firearm and interstate commerce.87 Accordingly, in Lopez, the Fifth Circuit held that all "federal laws proscribing firearm possession require the government to prove a connection to commerce."88 The court then explicitly noted the total absence of any nexus between § 922(q) and interstate commerce.89

The Fifth Circuit then traced the history of federal firearms legislation and examined the past relationship between such legislation and interstate commerce and the findings upon which that relationship was based.90 The court recognized that, "[w]ith the exception of a few relatively recent, special case provisions, federal laws proscribing firearm possession require the government to prove a connection to commerce, or other federalizing feature, in individual cases."91 Throughout its review of prior firearms legislation, the court distinguished § 922(q) from past statutes which did not explicitly require a connection to interstate commerce.92 The court distinguished 922(q) based on the fact that these statutes dealt with "transfers, not mere possession,"93 "highly destructive, sophisticated weapons,"94 and the inclusion of language regarding airport x-ray machines.95 In light of these distinctions, the court concluded that the constitutionality of § 922(q) could not be based on the existence of prior firearms legislation which lacked a nexus to interstate commerce.96

The circuit court's decision focused on the absence of any legislative findings or history indicating that the mere possession of a fire-

84. Id.
86. Id. (discussing United States v. Bass, 404 U.S. 336 (1971)).
88. United States v. Lopez, 2 F.3d 1342, 1347 (5th Cir. 1993).
89. Id. at 1348.
90. Id. at 1348-60.
91. Id. at 1347.
92. Id. at 1348-60.
93. Id. at 1354.
94. Id. at 1356.
95. Id. at 1357.
96. Id. at 1348-60.
arm on school grounds substantially affected interstate commerce.\textsuperscript{97} It noted that "[w]here Congress has made findings, formal or informal, \ldots the courts must defer 'if there is any rational basis for' the finding."\textsuperscript{98} The Fifth Circuit held that "courts could not properly perform their duty \ldots if neither the legislative history nor the statute itself reveals any such relevant finding."\textsuperscript{99} Although legislative findings are not required, they are regarded as particularly important when dealing with the regulation of education and the control of firearms possession by ordinary citizens which have traditionally been state responsibilities.\textsuperscript{100} Therefore, the court held that, absent any congressional findings or legislative history, "section 922(q), in the full reach of its terms, is invalid as beyond the power granted to Congress under the Commerce Clause."\textsuperscript{101}

Subsequent to the Fifth Circuit’s Lopez decision, a similar case challenging the constitutionality of § 922(q) came before the Ninth Circuit.\textsuperscript{102} In direct contrast to the Fifth Circuit, the Ninth Circuit held § 922(q) was constitutional.\textsuperscript{103} In United States v. Edwards, the defendant, Ray Harold Edwards, III, and three companions were standing in the school parking lot near Edwards’ car. A passing police officer believed the group to be gang members and he called for back-up. Subsequently, four officers and the school security guard approached the group. One of the officers received permission from Edwards to search his car. He then discovered a .22 rifle and a sawed-off bolt-action rifle in the trunk. Edwards was charged with the unlawful possession of a firearm in a school zone, a violation of § 922(q). Edwards filed a motion to dismiss asserting the unconstitutionality of the federal statute; however, the Act was upheld.\textsuperscript{104} The Edwards court based its decision on the idea that “violence created through the possession of firearms adversely affects the national economy;” therefore, a statute regulating the possession of firearms in school zones is a constitutional exercise of congressional commerce power.\textsuperscript{105}

\textsuperscript{97} Id. at 1362-64.  
\textsuperscript{98} Id. at 1363.  
\textsuperscript{99} Id. at 1363-64.  
\textsuperscript{100} Id. at 1364.  
\textsuperscript{101} Id. at 1367-68.  
\textsuperscript{102} United States v. Edwards, 13 F.3d 291 (9th Cir. 1993).  
\textsuperscript{103} Id. at 291.  
\textsuperscript{104} Id.  
\textsuperscript{105} Id. at 293. (citing United States v. Evans, 928 F.2d 858 (9th Cir. 1991) in which the defendant was convicted for possessing an unregistered machine gun in violation of § 922(o)). In Evans, the Ninth Circuit utilized United States v. Perez to guide their determination that it was reasonable for Congress to conclude that possession of firearms represents a “class of activities which affects interstate commerce.” United States v. Evans, 928 F.2d 858, 862 (9th Cir. 1991).
The Ninth Circuit also held that legislative findings regarding a particular activity's effect on commerce were not necessary.\textsuperscript{106} When it issued its holding, the Ninth Circuit expressly recognized that it was creating an intercircuit split due to the Fifth Circuit's holding in \textit{Lopez}.\textsuperscript{107} The existence of this intercircuit split, combined with the importance of the issue, led the Supreme Court to grant certiorari.\textsuperscript{108} The Court ultimately resolved this split when it affirmed the Fifth Circuit decision that § 922(q) was an unconstitutional exercise of congressional commerce power.\textsuperscript{109}

IV. ANALYSIS

On the surface, the Supreme Court's decision in \textit{Lopez} appears to be an abandonment of the traditional Commerce Clause jurisprudence that has dominated American law for over sixty years.\textsuperscript{110} Traditional jurisprudence gave almost unquestioning deference to congressional decisions to legislate under the Commerce Clause.\textsuperscript{111} In \textit{Lopez}, the Supreme Court departed from this stretch of absolute deference to congressional legislation when it held that § 922(q) exceeded congressional commerce power.\textsuperscript{112} However, it is unlikely that the ultimate impact of \textit{Lopez} will truly reverse modern Commerce Clause jurisprudence and bring to a halt the politically charged trend of federalizing criminal law. Despite the ideal opportunity presented in \textit{Lopez}, the Court's decision is not the landmark case it could have been. The \textit{Lopez} Court failed to effectively deal with the underlying issue of federalism and adequately limit the congressional commerce power. A stronger opinion could have clearly restricted Congress' ability to base the formulation of federal criminal legislation on the Commerce Clause.

A. An Economic Activity Analysis

The Supreme Court correctly reasoned that § 922(q) could not be upheld under either the first or second categories of activity set out in \textit{Perez}.\textsuperscript{113} In order for the Act to be constitutional, the Court recognized that it must fall within the final category authorizing Congress to regulate activities which \textit{substantially affect} interstate com-

\begin{itemize}
  \item \textsuperscript{106} Maloney, \textit{supra} note 23, at 1816.
  \item \textsuperscript{107} United States v. Edwards, 13 F.3d 291, 294 (9th Cir. 1993).
  \item \textsuperscript{108} United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993), \textit{cert. granted}, 114 S. Ct. 1536 (1994).
  \item \textsuperscript{109} United States v. Lopez, 115 S. Ct. 1624 (1995).
  \item \textsuperscript{110} \textit{See supra} part II.C.
  \item \textsuperscript{111} \textit{See id.} From 1937 to \textit{Lopez}, not a single federal law based on the Commerce Clause was held unconstitutional.
  \item \textsuperscript{112} United States v. Lopez, 115 S. Ct. 1624 (1995).
  \item \textsuperscript{113} \textit{Id.} at 1631.
\end{itemize}
merce.\textsuperscript{114} The Court examined past case law dealing with Commerce Clause legislation falling within this category and it recognized regulation of an economic activity as a common factor that linked a majority, if not all, of these cases.\textsuperscript{115} Because § 922(q) did not involve the regulation of an economic activity, it failed to meet the formula for constitutionality developed by prior Commerce Clause decisions. The Court described § 922(q) as "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."\textsuperscript{116} Accordingly, the Court concluded that the statute could not be upheld because it lacked the common connection with a commercial transaction, "which viewed in the aggregate, substantially affects interstate commerce."\textsuperscript{117} Despite government attempts to establish this crucial economic factor, the Court recognized that the mere possession of a gun, whether in a school zone or not, is not an economic activity upon which Congress can exercise its commerce power.\textsuperscript{118}

B. Distinguished from \textit{United States v. Bass}

Section 922(q) may be distinguished from the federal criminal statute at issue in \textit{Bass}.\textsuperscript{119} Although the statute in \textit{Bass} did not deal with the regulation of an economic activity, the \textit{Bass} statute contained a jurisdictional element based on the language "in commerce or affecting commerce.\textsuperscript{120} This jurisdictional language required the prosecutor to establish a nexus between the regulated activity and interstate commerce as one of the elements of the crime. The statute in \textit{Lopez} lacked any similar jurisdictional element indirectly allowing for the regulation of a noncommercial activity. Therefore, the Court held the statute was an unconstitutional exercise of power, not only because it did not regulate an economic activity, but also because it contained no jurisdictional requirement that the possession of the firearms have some connection to interstate commerce.\textsuperscript{121}

C. Necessity of Legislative Findings

The Fifth Circuit decision in \textit{Lopez} placed significant weight on the absence of legislative findings, formal or informal, establishing that possession of a gun within a school zone substantially affects inter-

\textsuperscript{114} Id. (emphasis added).
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 1630-31.
\textsuperscript{117} Id. at 1631.
\textsuperscript{118} Id. at 1633.
state commerce.\textsuperscript{122} The Fifth Circuit held that, absent any such findings, it was impossible to determine whether the impact of the activity in question substantially affected interstate commerce - by itself or in the aggregate.\textsuperscript{123} However, the court consciously refrained from analyzing whether the legislation could be sustained if accompanied by adequate legislative findings establishing an interstate commerce nexus.\textsuperscript{124}

Conversely, the Supreme Court's decision in \textit{Lopez} was not rooted in the presence or absence of legislative findings. In fact, the Court explicitly agreed with prior holdings that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."\textsuperscript{125} The Court did note, however, that congressional findings that \textit{could} be utilized in evaluating the statute's constitutionality under the Commerce Clause were lacking.\textsuperscript{126}

In his dissent, Justice Breyer indicated that he did not consider the absence of legislative findings particularly significant.\textsuperscript{127} Breyer maintained that because § 922(q) did not interfere with the exercise of state or local authority no legislative findings were necessary.\textsuperscript{128} In absolute deference to Congress, Breyer determined that Congress' mere conclusion that possession of a firearm on or near a school zone had a substantial effect on interstate commerce was sufficient to uphold the statute.\textsuperscript{129} Any establishment of an interstate commerce nexus appeared to be immaterial to Justice Breyer.

Furthermore, the Supreme Court made no reference to an amendment to § 922(q) that passed as part of the Crime Bill in August 1994.\textsuperscript{130} "This amendment included explicit findings linking gun possession on school grounds to interstate commerce,"\textsuperscript{131} however, the Court elected not to address whether these retroactive findings sufficiently established a satisfactory nexus with interstate commerce. The Court's intentional avoidance of this issue is indicative that the retroactive findings were \textit{not} sufficient to support the statute's consti-

\begin{itemize}
  \item \textsuperscript{122} United States v. Lopez, 2 F.3d 1342, 1359-63 (5th Cir. 1993).
  \item \textsuperscript{123} \textit{Id.} at 1359.
  \item \textsuperscript{124} \textit{Id.} at 1368.
  \item \textsuperscript{125} United States v. Lopez, 115 S. Ct. 1624, 1631 (1995).
  \item \textsuperscript{126} \textit{Id.} at 1632.
  \item \textsuperscript{127} \textit{Id.} at 1658-62 (Breyer J., dissenting).
  \item \textsuperscript{128} \textit{Id.} at 1658.
  \item \textsuperscript{129} \textit{Id.} at 1658-62.
  \item \textsuperscript{130} Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994). Section 320904 of this act amends § 922(q) to include congressional findings regarding the effects of firearm possession in and around schools upon interstate and foreign commerce.
  \item \textsuperscript{131} David S. Gehrig, \textit{The Gun-Free School Zones Act: The Shootout Over Legislative Findings, the Commerce Clause, and Federalism}, 22 \textit{HASTINGS CONST. L.Q.} 179, 208 n.261 (1994).
\end{itemize}
tutionality. Additionally, the Court's deliberate decision not to address the retroactive findings supports the fact that it would have struck down § 922(q) as an unconstitutional extension of congressional commerce power, even if similar legislative findings had originally accompanied the statute.

Yet, absent a clear and explicit statement to this effect, the Court's decision will never have the landmark impact it potentially could have attained. As it stands, subsequent courts have interpreted the Lopez decision narrowly and have maintained that if Congress makes any legislative findings that the activity, even if wholly intrastate, affects interstate commerce, then the judiciary must defer to Congress. This type of narrow interpretation leaves the door open for Congress to continue to federalize almost every aspect of criminal law due to the ease with which Congress can create superficial findings linking criminal activity to interstate commerce.

Although the Lopez Court clearly departed from over seventy years of consistent jurisprudence dealing with the congressional commerce power, it failed to articulate the desired effect its ruling should have on prior Commerce Clause tests and case law. It neither overruled any past cases, nor identified any historical tests that were no longer to be applicable to the evaluation of the constitutionality of federal criminal legislation. This oversight allows lower courts to continue relying on earlier precedents which gave greater deference to Congress in its decisions to regulate under the Commerce Clause. Practically speaking, courts will be able to disregard the Lopez decision and limit its holding to its facts. Thus, the Supreme Court bypassed an ideal opportunity to specifically address the federalization problem and establish a hard and fast rule limiting congressional interference in the traditional state realm of criminal law.

D. Recognition of the Real Issue

Although the Court's decision was not explicit in its dealing with the underlying issue of federalism and the current trend of federalizing criminal law, its rejection of the government's arguments indicates that it does in fact recognize the importance of federalism to our country. In its analysis of the government's case, the Court acknowledged that judicial acceptance of the government's contentions would ulti-


133. See supra part II.B.
mately grant Congress a limitless commerce power. The Court recognized that the government's theory that violent crime adversely affects the national economy and citizens' willingness to travel throughout the country, would allow Congress to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." Ultimately this could lead to the federalization of virtually every crime in the United States. The Court rejected the government's arguments because under its theories "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. Acceptance of these arguments would leave the Court "hard-pressed to posit any activity by an individual that Congress is without power to regulate."

1. An Affront to Federalism

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." The essentially limitless congressional commerce power ultimately sought by Congress is an affront to this concept of Federalism which is one of the cornerstones of the American government. The dual form of government created by the Framers was a unique concept aimed at protecting the fundamental liberties of citizens. It was also intended to be used as a check on abuses of federal government power. More specifically, "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

According to the Constitution, the federal government is one of limited powers. The Tenth Amendment established that "the powers not delegated to the United States, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As stated by James Madison, "the powers delegated... to the federal government

135. Id. at 1632.
136. See Transcript of Oral Arguments, 1994 WL 758950 (U.S.Oral.Arg.). During oral arguments, Justice Scalia observed that under the government's rationale, "all violent crime, if Congress so desired, could be placed under a Federal wing." Id. at 10. Moreover, Solicitor General Days, arguing for the government, conceded that under his rationale there is no limitation "that would preclude [Congress] from reaching any traditional criminal activity." Id. at 13.
138. Id.
140. Id. at 458.
141. Id.
142. Id.
143. U.S. Const. amend. X.
are few and defined. Those which are to remain in the State govern-
ments are numerous and indefinite."\(^{144}\) The congressional commerce
power is one of the specific enumerated powers granted to the federal
government.\(^{145}\) Although this power has historically been established
as a remarkably expansive power, the Supreme Court has repeatedly
recognized that it is not without limits.\(^{146}\) Therefore, legislation cre-
ated under the Commerce Clause must "operate within the framework
of this federal-state balance."\(^{147}\)

\textit{a. Federal Infringement on State Education}

In order to maintain this balance, Congress must respect areas
that are traditionally reserved for the states and refrain from legislat-
ing in them without a truly national purpose. Areas where state au-
thority has traditionally been superior include those that "in the
ordinary course of affairs, concern the lives, liberties, and properties
of the people, and the internal order, improvement, and prosperity of the
State."\(^{148}\) One specific area that has historically been considered a
state responsibility is the management of education.\(^{149}\) Acceptance of
the government's argument that regulation should be allowed of activ-
ities based upon their adverse effect on the educational process would
leave the door open for Congress to directly regulate within this tradi-
tionally state domain.\(^{150}\) The \textit{Lopez} Court recognized that if they ex-
tended the congressional commerce power to include the authority to
enact statutes similar to § 922(q), Congress would then have an im-
plied authority to decide that the school's curriculum has an adverse
affect on classroom learning and hence, significantly affects interstate
commerce.\(^{151}\) Accordingly, Congress would be able to mandate that
states enact a particular school curriculum.\(^{152}\) Such direct federal
control over the educational process would undeniably be an intrusion
into an area where states have historically been sovereign. This intru-
sion would simply not be justifiable under the Commerce Clause.

Apparently, Justice Breyer did not fear Congress' urge to bring al-
most all things American within its Commerce Clause grasp. In his
dissent, he asserted that § 922(q) did not interfere with the exercise of
local or state authority.\(^{153}\) It is unfathomable how Justice Breyer

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45, at 292-293 (James Madison) (Clinton Rossiter ed. 1961)).
\(^{145}\) U.S. Const. art. III, § 8, cl. 3
\(^{146}\) See sources cited supra notes 22-27, 36, 72-76 and accompanying text.
\(^{147}\) Farmer, supra note 17, at 1676.
\(^{149}\) United States v. Lopez, 2 F.3d 1342, 1364 (5th Cir. 1993).
\(^{151}\) Id.
\(^{152}\) Id.
\(^{153}\) Id. at 1658 (Breyer, J., dissenting).
\end{flushleft}
could maintain such a belief that is so clearly contrary to not only the Framers' intentions, but also to years of judicial precedent. Throughout his dissent, Breyer focused on the impact of violence and guns on students in the educational system and the quality of education in the classrooms. 154 Based on his belief that education is "inextricably intertwined with the Nation's economy," he held that Congress' authority to enact § 922(q) is unquestionable because the "economic links" between education and commerce necessitate a finding that interstate commerce is substantially affected by the presence of guns in or near a school zone. 155

Under Breyer's rationale Congress would have the authority to regulate every aspect of the educational system. If the educational system is so "inextricably intertwined with the Nation's economy" even the most remote and trivial aspect of the management and operation of the educational system would have a substantial affect on interstate commerce. 156 Although Breyer argued that not all aspects of education would be subject to regulation under his theory of Commerce Clause jurisprudence, the majority correctly noted that the limitations he articulated were "devoid of substance." 157

Additionally, Breyer argued that the possession of a gun in or near a school zone could reasonably be classified as a commercial activity. 158 He contended that educating children in reading, writing, and other basic skills serves a commercial purpose and thus, § 922(q) is constitutional under the majority's economic/commercial activity theory. 159 Breyer's reasoning that education is a commercial activity stemmed from his notion that businesses are less likely to locate in communities where violence plagues the classroom. 160 From this he inferred that families would not move to these communities "where students carry guns instead of books." 161 He then inferred that "interstate publishers therefore will sell fewer books and other firms would sell fewer school supplies where the threat of violence disrupts learning." 162 In summation, he stated that these local instances "taken together and considered as a whole, create a problem that causes serious human and social harm, but also has nationally significant economic dimensions." 163

154. Id. at 1659-64.
155. Id. at 1659-61.
156. Id. at 1659.
157. Id. at 1632.
158. Id. at 1664.
159. Id.
160. Id. at 1663.
161. Id.
162. Id.
163. Id.
Although Breyer focused on the rational basis standard of review, his compilation of inference upon inference exceeds the boundaries of rationality and logic. Under Breyer's reasoning, congressional authority under the Commerce Clause would have absolutely no limits. If teaching reading and writing in a primary or secondary school is a commercial activity, it is difficult to envision what would not constitute a commercial activity. As the majority noted, Breyer's reasoning would make even regulation of family law a constitutionally permissible concept. It is evident that if § 922(q) had been upheld under Breyer's rationale, federalism and all of the dreams and ideals of this nation's Framers could one day be shattered by an omnipotent Congress that finds its life force in the Commerce Clause.

b. Formulation of a Federal Police State

In addition to education, the enactment of criminal laws is another area which traditionally falls within the realm of state responsibility. The Framers expressly granted the federal government limited criminal jurisdiction over counterfeiting of United States securities and coins, piracies and felonies committed on the high seas, offenses against the Law of Nations, and treason. The limited criminal jurisdiction set out above deals with crimes against the federal government itself and does not indicate that federal jurisdiction was intended to include crimes affecting the local community. Moreover, Chief Justice Marshall explicitly pronounced that it is "clear that Congress cannot punish felonies generally." Thus, based on the principles of our Founding Fathers, a congressional exercise of a federal police power would unequivocally be an unconstitutional intru-

164. Id. at 1633. The majority noted that "[u]nder the dissent's rationale, Congress could just as easily look at child rearing as 'falling on the commercial side of the line' because it provides a 'valuable service — namely, to equip [children] with the skills they need to survive life and, more specifically, in the workplace.'" Id.

165. See Engle v. Isaac, 456 U.S. 107, 128 (1982) (Under our federal system, "[t]he States possess primary authority for defining and enforcing the criminal law."); Screws v. United States, 325 U.S. 91, 109 (1945)(plurality opinion)("Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.").

166. U.S. CONST. art. I, § 8, cls. 6, 8.


168. United States v. Lopez, 115 S. Ct. 1624, 1648 (1995)(quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821)). The Lopez Court concluded from this that "whatever effect ordinary murders, or robbery or gun possession might have on interstate commerce (or on any other subject of federal concern) was irrelevant to the question of congressional power." United States v. Lopez, 115 S. Ct. 1624, 1648 (1995).
sion of the federal government into an area of traditional state sovereignty.

Currently, we are on a road that could logically lead to the creation of a general police power for the United States government.\textsuperscript{169} Congress has expanded the limited federal criminal jurisdiction by enacting statutes to cover such things as the disruption of animal enterprises,\textsuperscript{170} transfer of a firearm to a juvenile,\textsuperscript{171} receipt of firearms by a nonresident,\textsuperscript{172} drive-by shootings,\textsuperscript{173} theft of livestock,\textsuperscript{174} theft of major artwork,\textsuperscript{175} domestic violence,\textsuperscript{176} failure to pay child support\textsuperscript{177} and career criminals.\textsuperscript{178} These statutes do not involve crimes against the federal government itself; rather, they are local in nature and could be dealt with effectively at the state level. If crimes as inherently local as domestic violence can fall within the scope of federal regulation, it is difficult to conceive of any crime that could escape federalization. Although Justice Breyer maintained in his dissent 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."\textsuperscript{179} The majority in \textit{Lopez} noted that the inevitable consequence of accepting the government's contentions would be a federal police state.\textsuperscript{180} The government's arguments directly thwart the intentions of the Framers who deliberately withheld from Congress a plenary police power enabling it to enact comprehensive criminal legislation.\textsuperscript{181} Realizing the Framers' intent, the \textit{Lopez} Court stated that if it:

\begin{quote}
\textit{wished} to be true to a Constitution that does not cede a police power to the Federal Government, our Commerce Clause's boundaries simply cannot be 'defined' as being 'commensurate with the national needs' or self-consciously intended to let the Federal Government 'defend itself against economic forces that Congress decrees inimical or destructive of the national economy.'\textsuperscript{182}
\end{quote}

\textsuperscript{169} See Moore, supra note 6.
\textsuperscript{176} 18 U.S.C.A. § 2261 (West Supp. 1995). This statute defines the offense as crossing a state line (or leaving Indian country) with the intent to injure, harass, or intimidate the person's spouse or intimate partner and causing bodily injury to such spouse or partner. \textit{Id.}
\textsuperscript{180} \textit{Id.} at 1633.
\textsuperscript{181} \textit{Id.}
\textsuperscript{182} \textit{Id.} at 1650-51.
V. PROBLEMS WITH THE FEDERALIZATION OF CRIMINAL LAW

A. Overburdening of the Federal Judiciary

This "federalization trend" and its effect on the federal judiciary has been a recognizable problem since 1925 when "Professor Charles Warren complained of '[t]he present congested condition of the dockets of the Federal Courts and the small prospect of any relief to the heavy burdened Federal Judiciary, so long as Congress continues, every year, to expand the scope of the body of Federal Crimes.'"\(^{183}\) In 1959, when addressing the problem of the ever-increasing federal caseload, Chief Justice Warren reminded Congress that "it is essential that we achieve a proper jurisdictional balance between the federal and state court systems, assigning to each system those cases most appropriate in light of the basic principle of federalism . . . ."\(^{184}\) Although this has clearly been perceived as a problem for over sixty years, Congress consistently ignores the negative impact its actions have on the federal courts and fails to recognize that federal courts are an exhaustible resource designed to play a specialized role in the judicial system.\(^{185}\)

1. Effect on the Federal Docket

While Congress has been federalizing crime after crime in its current "tough-on crime frenzy," the federal judicial system has been paying the price.\(^{186}\) Several commentators\(^{187}\) have noted that the federal judiciary is facing an "impending crisis of docket overload."\(^{188}\) In 1990, the Ninth Circuit's Chief Judge Clifford Wallace and others formed the Committee on Long Range Planning of the Judicial Conference of the United States in hopes of setting a "judiciary wide' agenda for years to come."\(^{189}\) Recently, members of the 1994 Long Range


\(^{184}\) Id.


\(^{186}\) Mengler, supra note 167, at 507.


\(^{188}\) Mengler, supra note 167, at 523.

\(^{189}\) Rory K. Little, Myths and Principles of Federalization, 46 HASTINGS L.J. 1029, 1038, n.39 (1995). "This Committee has a prestigious membership; it is chaired by Judge Otto R. Skopil, Jr., of the Ninth Circuit and has eight other federal judges as members, as well as a full time staff and a number of consultants and contributors." Id.
Planning Committee discussed the "'crisis' caused by the burgeoning workload" and the threat posed to the "core values of the federal judicial system . . . ." Due to the continual creation of new federal crimes, the federal docket has been flooded with additional criminal cases, and as a result the federal criminal caseload has increased from 27,968 cases in 1980 to 44,919 cases in 1994, a 70% increase. Federal judges spend over half of their time deciding these criminal cases and in some districts "criminal trials account for 80% of the caseload.

In addition to overburdening the federal judiciary with an ever-increasing criminal docket, the federal civil docket is also feeling the impact of the federalization trend. As the federal criminal caseload has grown, the federal courts have performed a necessary triage because the Speedy Trial Act requires that courts dispense with criminal cases through trial or dismissal within seventy days. Consequently, the federal criminal docket takes priority over the civil docket and important civil cases are continually delayed while courts are forced to deal with predominately minor local criminal cases. For instance, in 1991, important civil issues dealing with challenges to EPA clean air and water standards and a complex consolidation of 30 cases arising from the collapse of the National Bank of Washington were forced to take a back seat while the court dealt with criminal cases involving local street crime. Recently, the civil docket has become so backlogged that in a case dealing with the constitutionality of the use of a pre-employment urinalysis test, the district court judge recommended that the plaintiff seek a preliminary injunction, which the judge would deny, in order to get the case imme-

191. Mengler, supra note 167, at 505.
192. Chippendale, supra note 187, at 456. See also Sara Sun Beale, Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction, 46 HASTINGS L.J. 979, 984 (1995)(Between 1980 and 1992 the number of defendants prosecuted rose 78%(38,033 to 67,632), the number of drug cases filed in federal court quadrupled from 3,130 cases to 12,833, and firearms prosecutions also quadrupled from 931 to 3,917).
193. See generally Sara Sun Beale, Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law, 46 HASTINGS L.J. 1277, 1289 (1995)("Between 1980 and 1993, the number of civil trials declined by twenty percent, from 13,191 to 10,527.")
194. Beale, supra note 192, at 988.
196. Id.
197. Chippendale, supra note 187, at 473; see also Beale, supra note 193, at 990 (citing as examples of minor local crimes bogging down the federal courts the $20 sale of two rocks of crack cocaine and youth first offenders arrested as couriers).
198. Wallace, supra note 188, at 12.
diately heard in front of the appellate court. Clearly something needs to be done. It is ludicrous for federal courts to spend a majority of their time dispensing with cases that could be handled just as effectively, if not more so, at the local level.

2. Effect on Federal Judicial Resources

Federalizing criminal law has resulted in a snowball effect in that the "enforcement of criminal laws requires resources at every step of the way — police officers to investigate and apprehend suspects, prosecutors to bring them to justice, public defenders to represent the indigent, . . . trial judges to preside over the proceedings . . . [and] appellate judges to hear criminal appeals . . ." Presently, the federal judiciary lacks the necessary resources to handle its constantly growing caseload effectively. "Many federal courts lack the staff and facilities needed for their existing workloads, and judges in many district courts and courts of appeal are working to capacity." Continuation of the current federalization trend will inevitably result in a dramatic change in the structure and character of the federal judiciary. The 1994 Long Range Plan estimated that "more than 4,000 federal judges will be needed by the year 2020 if the federal caseload continues to increase at the same rate . . . ."

Moreover, because a substantial share of federal resources are exhausted on criminal cases duplicative of state court jurisdiction, Congress is not only wasting federal resources, but it is also "risking neglect in the enforcement of exclusively federal crimes, such as tax evasion and government procurement fraud." The federal courts were created to serve the public, but the constant usurpation of traditional state authority through the federalization of criminal law "undermines the capacity of federal courts to meet public expectation and retain public confidence."

If federal courts began exercising the broad range of jurisdiction traditionally allocated to the states, they would lose both their distinctive nature and, due to burgeoning dockets, their ability to resolve fairly and efficiently those cases of clear national import and interest that properly fall within the scope of federal concern. Under that unfortunate scenario, all courts — federal and state — might as well be consolidated into a single system to handle all judicial business.

199. Beale, supra note 192, at 990.
200. See Brickey, supra note 185, at 1146.
201. Schwarzer & Wheeler, supra note 183, at 684.
202. Id.
203. Beale, supra note 192, at 992.
204. Id. Currently the federal judiciary consists of slightly over 800 judges. See Mengers, supra note 168, at 525.
205. Schwarzer & Wheeler, supra note 183, at 684.
206. Id. at 682.
207. Beale, supra note 192, at 992.
It is clear that the federal judiciary cannot take over the "lion's share" of criminal responsibility due to the magnitude of the criminal caseload and the small size of the federal judicial system.\(^{208}\) Congress must reexamine its allocation of federal judicial resources and decide what is *truly* in the nation's best interest.

**B. Experimentation in Local Laboratories**

Sixty years ago, Justice Brandeis was insightful enough to call attention to a state's ability to "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."\(^{209}\) Commentators credit local experimentation as a key source of valuable guidance and insist that "the seeds of a solution for many of our crime problems are more likely to arise through experimentation at the grassroots level."\(^{210}\) Specialized drug courts, community policing, boot camps, and sentencing guidelines are all trends in criminal enforcement that were initially formulated at either the state or local levels.\(^{211}\) However, future solutions to current problems will never be developed if Congress continues to federalize every aspect of criminal law because "federalization inhibits state experimentation and adaption."\(^{212}\) If local experimentation is abandoned, it seems doubtful that the crime problem facing this country will ever be resolved at either the local or national level. Accordingly, Congress should cease federalizing criminal law and allow states to maintain their independent authority.

Additionally, these predominately local problems are more efficiently dealt with through state control because local courts are more attuned to community standards.\(^{213}\) For instance, state and local prosecutors (and some judges) are elected to their offices; therefore, they are responsible to and in touch with their local constituencies.\(^{214}\) This factor facilitates political accountability, forcing local law enforcement officials to give greater thought to their actions because of the direct effect on their constituents. Federal courts are so far removed from the local setting that it is difficult for them to tailor criminal law to fit local circumstances.\(^{215}\) State and local governments are

\(^{208}\) Id.

\(^{209}\) Schwarzer & Wheeler, *supra* note 183, at 666.

\(^{210}\) Mengler, *supra* note 167, at 517.

\(^{211}\) Beale, *supra* note 193, at 1295.

\(^{212}\) Schwarzer & Wheeler, *supra* note 183, at 666.

\(^{213}\) Chippendale, *supra* note 187, at 470. *See also* Bruce Fein, *In Law Enforcement Waltz States, Locals Ought to Lead*, *N.J.L.J.*, June 6, 1991, at 19 (arguing that "state and local prosecutors are more closely attuned to local standards of fairness than their federal counterparts.").

\(^{214}\) Beale, *supra* note 193, at 1294.

\(^{215}\) Chippendale, *supra* note 187, at 470 (recognizing that firearm legislation necessary for New York may not be necessary in Montana).
more adept at applying criminal law in their respective arenas simply because they are "better able to focus on the unique impact that a problem may have on a relatively discrete geographical or socioeconomic region." Also, the federal government lacks local social services and outreach programs that are effective resources in the enforcement of criminal law. Application of federal criminal law to states and local communities is generally less effective because federal courts often lack sensitivity to local concerns due to their focus on the national agenda.

C. Arbitrary and Inefficient Enforcement

Congress' federalization frenzy can be partially attributed to the public's intense desire to wage a war on crime. Increasing pressure is placed on politicians to reverse the escalating crime rate and make the streets safe once again. However, by federalizing criminal law, Congress is not meeting the public's demands; rather, it is "raising law enforcement costs without lowering the crime rate . . . ." Part of the reason for this result rests with the inconsistent application and enforcement of federal criminal law. Decisions to prosecute certain criminals under federal law are not based on solid ground; they are usually grounded in arbitrariness. The majority of the federal criminal statutes are duplicative of state criminal codes; therefore, offenders are often subjected to a "kind of cruel lottery, in which a small minority of the persons who commit a particular offense are selected for federal prosecution and subjected to much harsher sentences . . . ." Due to the arbitrary application of federal criminal laws, it is not uncommon in multi-defendant litigation for codefendants to receive radically different sentences. In United States v. Palmer, the defendant prosecuted in federal court received a ten year sentence, while his codefendant, who was prosecuted at the state level, received no jail time. This type of arbitrary application of federal criminal law "frustrates deterrence and devastates the balance of justice and

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216. Mengler, supra note 167, at 516.
218. Id. at 520.
220. Id.
221. Schwarzer & Wheeler, supra note 183, at 52. One example is the implementation of "Federal Day" in which certain districts sweep all drug and weapons offenders arrested that day into federal court. Id.
222. Beale, supra note 192, at 998. Sentences available in federal prosecutions are often ten to twenty times higher than those available in state court. A defendant subject to a five year mandatory minimum sentence in federal court could receive a sentence of zero to ninety days in state court. Id.
223. 3 F.3d 300 (9th Cir. 1993), cert. denied, 114 S. Ct. 1120 (1994).
224. Id. at 305 n.3.
fairness that citizens have a right to expect in the administration of law."\textsuperscript{225} Federal prosecutions are often utilized merely to set an example for other criminals.\textsuperscript{226} However, this purpose undermines rather than increases the effectiveness of federal criminal law.

VI. RECOGNITION OF A NEED TO HALT FEDERALIZATION

A. National Recognition

Despite the constant increase in the number of federal crimes, there are signs that courts are beginning to reexamine Congress' power to enact criminal legislation under the Commerce Clause. Many professionals within the criminal justice system are beginning to realize that the congressional "federalization trend" must be halted if our federal judiciary is to survive.\textsuperscript{227} The 1990 formulation of the Committee on Long Range Planning of the Judicial Conference was an "unprecedented effort to anticipate and guide the future of the federal courts in the face of an undeniably 'accelerated pace of social change'"\textsuperscript{228} Recently, the Committee's 1994 Long Range Plan recommended that "Congress should review existing federal statutes with the goal of eliminating provisions no longer serving an essential federal interest."\textsuperscript{229} Additionally, a Three-Branch Roundtable on state and federal jurisdiction was conducted and it was "agreed that the time is ripe for a reexamination of the principles used to federalize criminal law."\textsuperscript{230}

Moreover, current members of the United States Supreme Court have publicly acknowledged that this trend is a growing problem and

\textsuperscript{225} Wallace, \textit{supra} note 187, at 52.
\textsuperscript{226} Beale \textit{supra} note 192, at 1000-01. In Pennsylvania, in order to persuade defendants to plead guilty in state court, a press release was issued describing a case in which a small time drug dealer refused to plead guilty to state charges with a four year sentence, and was later sentenced in federal court to life imprisonment without parole. \textit{Id.} at 1001 n.91.
\textsuperscript{227} Chippendale, \textit{supra} note 187, at 465. Professor Richard Epstein has begun to argue for a more restrictive reading of the Commerce Clause. He observes that there is a "powerful tension" between the post-New Deal legacy and the original understanding of the commerce power. He argues that the Commerce Clause is "far narrower in scope than modern courts have held." \textit{Id.} at 465 n.51.
\textsuperscript{228} Little, \textit{supra} note 189, at 1038, n.39.
\textsuperscript{229} \textit{Id.}
\textsuperscript{230} Beale, \textit{supra} note 193, at 1277. The Roundtable focused on two main areas of concern:

(1) the increasing criminal caseload is placing a strain on the federal courts, Bureau of Prisons, and other components of the federal criminal justice system; and (2) the increasing federalization of crime has the potential to cause an unplanned but nonetheless fundamental change in the relationship between the federal government and the states and in the character of the federal courts.

\textit{Id.}
have weighed its impact on the federal judiciary. Chief Justice Rehnquist has noted that society has begun to look more and more to the federal courts to solve the nation's problems due to the federalization of criminal law and, as a result, the court system has become overburdened and clogged.\footnote{Rehnquist, supra note 187, at 1-9.} He warned that something has to be done.\footnote{Id.} Justice Sandra Day O'Connor criticized President Clinton's 1994 crime bill\footnote{Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (to be codified in scattered sections of 18 U.S.C.).} because it would create more federal crimes that would swamp the already overburdened federal courts.\footnote{Harriet Chiang, O'Connor Says Crime Bill Would Overload Federal Courts, S.F. CHRON., Aug. 17, 1994 at A3.} O'Connor cautioned that this trend of "dumping crimes into the federal courts" was dangerous and could have a "drastic effect on the federal bench."\footnote{Id.}

In addition, the fact that lower federal courts are aware of the "impending crisis" is evidenced by lower court opinions.\footnote{See cases cited supra note 132.} Prior to the Supreme Court's \textit{Lopez} decision, several challenges to § 922(q) were brought before courts throughout the nation.\footnote{United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993); United States v. Edwards, 13 F.3d 291 (9th Cir. 1993). See also United States v. Daniels, 874 F. Supp. 1255 (N.D. Ala. 1995)(upholding § 922(q)); United States v. Glover, 842 F. Supp. 1327 (D. Kan. 1994)(striking down § 922(q)); United States v. Ornelas, 841 F. Supp. 1087 (D. Colo. 1994)(striking down § 922(q)); United States v. Trigg, 842 F. Supp. 450 (D. Kan. 1994)(upholding § 922(q)); United States v. Holland, 841 F. Supp. 143 (E.D. Pa. 1993)(upholding § 922(q)); United States v. Morrow, 834 F. Supp. 364 (N.D. Ala. 1993)(striking down § 922(q)).} Even courts which upheld § 922(q) expressed concern over the breadth of Congress' power under the Commerce Clause. In \textit{United States v. Ornelas},\footnote{841 F. Supp. 1087 (D. Colo. 1994).} the court expressed regret at having to rule the way it did because it believed that "Congress' legislative power under the Commerce Clause has become a virtual blank check . . . ."\footnote{Id. at 1092.} In \textit{United States v. Morrow},\footnote{834 F. Supp. 364 (N.D. Ala. 1993).} the court ruled that § 922(q) was constitutional, but observed that Congress has "systematically whittled away at the old idea of the superiority inherent in the local solution of problems . . . ."\footnote{Id. at 365 (emphasis added).} The judiciary has recognized that "political pressures to be perceived as 'tough on crime' are driving Congress to federalize crimes . . . in circumstances where clear-minded objective analysis can dis-
cern no meaningful effect on interstate commerce in the sense intended by the Commerce Clause.”

Recognition of this problem has occurred outside of the judicial system as well. Although President Bush did sign the Crime Control Act of 1990, he recognized that § 922(q) “inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law . . . .” Attorney General Janet Reno has “repeatedly warned against overreliance on federal criminal laws and spoken of a need to develop a rational division of the federal-state responsibilities . . . .” Various politicians, including Senator Joseph Biden, have also spoken out against Congress’ current frenzy to federalize criminal law. The National Sheriffs’ Association has stated that it is beginning to fear the current penchant for the “federal government infringing on the states’ police power . . . and getting closer to a federal police state.” During the Reagan Administration a report was published attacking the Supreme Court’s decision in United States v. Perez for undermining federalism. It is clear that the problem this country faces with the federalization of criminal law is gaining national recognition.

B. Opportunity Declined

In light of the recognition of federalization of criminal law as a nationally pressing problem and the growing desire to halt this trend, the Lopez Court had the perfect opportunity to render a landmark decision drastically limiting congressional authority to initiate federal criminal legislation. Based on the climate of the country, such a landmark decision would likely have received substantial support. The only group that would conceivably have been disconcerted by such a ruling is Congress. Viewing such a ruling as a judicial expression of being soft on crime control, citizens might also have been initially disconcerted. However, the ultimate effect of such a landmark decision would not have been a softening of crime control. On the contrary, it would have led to increased effectiveness in the enforcement of criminal laws. Such a ruling would simply have shifted enforcement from the federal forum to its traditional domain — the local/state forum.
for self-restraint;" therefore, they are not likely to favor any decisions that place limitations on their power to regulate and enact laws.\textsuperscript{250} Despite this apparent willingness to limit congressional commerce power, the Court opted not to utilize \textit{Lopez} to halt the federalization frenzy. Subsequent case law indicates that the language employed by the \textit{Lopez} Court lacked sufficient strength to have a significant impact on the federal judicial system.\textsuperscript{251} In \textit{United States v. Oliver},\textsuperscript{252} the Ninth Circuit faced a constitutional challenge to the federal carjacking statute and explicitly stated that "the recent decision in \textit{United States v. Lopez} [did] not alter [its] view."\textsuperscript{253} Accordingly, the court held the statute was constitutional.\textsuperscript{254} Had the \textit{Lopez} opinion addressed with more force the congressional abuse of its commerce power, \textit{Oliver} might have had a different outcome.

Additionally, if the \textit{Lopez} Court had established more stringent limitations on Congress, many of the lower courts which upheld the constitutionality of the federal carjacking statutes prior to the \textit{Lopez} decision might have had reason to reconsider their holdings. Furthermore, a post-\textit{Lopez} challenge to the Drug Free School Zone Act\textsuperscript{255} was defeated and the court explicitly stated that the \textit{Lopez} decision did not mandate that it rule the statute was unconstitutional.\textsuperscript{256} In many of these post-\textit{Lopez} challenges to federal criminal statutes, the courts might have reached different conclusions had the \textit{Lopez} Court rendered a stronger opinion explicitly limiting Congress' use of its commerce power to enact statutes enlarging the federal criminal jurisdiction.

\textbf{C. Impact on Congressional Restraint}

Although the Court's decision in \textit{Lopez} might have little substantial effect on future Commerce Clause jurisprudence because it failed to create \textit{absolute} limits on the seemingly infinite congressional commerce power, the \textit{Lopez} decision might have some impact on Congress itself. For over seventy years, Congress essentially had free reign to regulate under its commerce power because the Supreme Court upheld every piece of legislation based on the Commerce Clause. Due to the extended duration in which Congress acted with virtually no limits on its Commerce Clause power, it is plausible that Congress mistakenly viewed its commerce power as infinite. The \textit{Lopez} decision could be a wake-up call for Congress, reminding them that there are

\begin{itemize}
\item \textsuperscript{250} Chippendale, \textit{supra} note 187, at 480.
\item \textsuperscript{251} See cases cited \textit{supra} note 132.
\item \textsuperscript{252} 60 F.3d 547 (9th Cir. 1995).
\item \textsuperscript{253} Id. at 550.
\item \textsuperscript{254} Id.
\item \textsuperscript{255} 21 U.S.C. § 860 (1990).
\item \textsuperscript{256} United States \textit{v. Garcia-Salazar}, 891 F. Supp. 568 (D. Kan. 1995).
\end{itemize}
limits on its power to regulate under the Commerce Clause. *Lopez* manifested the Court's willingness to draw the line at a certain point and hold that Congress had gone too far.

Whether *Lopez* will have any impact on Congress is yet to be seen. If it has, federal regulation of local criminal activity should decrease. Congress will be unwilling to enact controversial legislation if it believes that the Court is apt to strike it down. Yet, the potential future impact of *Lopez* on Congress must be evaluated while keeping in mind the constant pressure from the American public for Congress to be tough on crime. Members of Congress like to keep their constituencies happy; therefore, public sentiment could offset any impact that *Lopez* might have. The impact of *Lopez* on congressional restraint will only become apparent after the passage of time.

VII. A POSSIBLE SOLUTION TO AN IMPENDING CRISIS

In light of the apparent ineffectiveness of *Lopez*, another solution to this problem must be devised. There have been a wide variety of theories contemplating the best means possible for solving the impending crisis facing our overburdened federal judiciary. Among the proposed solutions are suggestions for the expansion of the federal judicial system, a proposed commission to study the federal criminal code and determine which statutes are excessive, more congressional restraint, and more prosecutorial discretion. However, Chief Justice Rehnquist has suggested the best possible solution, one that would not only solve the present crisis, but remain true to the concept of federalism. Rehnquist suggested that "resources could be better devoted to the war on crime in a manner that supports state efforts and preserves a more traditional allocation between state and federal criminal jurisdictions."257

Moreover, "[m]uch of the Roundtable discussion centered on the desirability of providing federal resources to the states, rather than enacting new federal offenses or appropriating additional funds for more federal enforcement."258 Rather than deplete federal resources by creating federal crimes that duplicate state penal codes, federal resources should be funneled to the states to aid them in dealing with essentially local crime. In regard to public school zones and gun control, a majority of states have already enacted statutes similar to the federal Gun Free School Zones Act. Federal funds should be used to aid states in their enforcement of these local statutes and to encourage states without similar laws to enact them. One Congressman suggested that the federal government provide states with "seed money" to encourage them to adopt programs that have proved successful in

257. Rehnquist, supra note 187, at 6-7.
258. Beale, supra note 193, at 1299.
other states.\textsuperscript{259} This solution promotes the use of states as laboratories to experiment with the control of crime, in addition to revitalizing traditional federalism.

The federal government should spend its resources on effectively overseeing its limited criminal jurisdiction, and the additional resources expended in the quest for a federal criminal code should be allocated to the states. There are areas of criminal law in which a federal statute is more practical than a state statute. However, this is a finite category and it is limited to areas where there is truly a pressing national need, where multi-state litigation is involved, when the activity involves a highly sophisticated enterprise that goes beyond state resources or expertise, or when dealing with widespread state or local corruption.\textsuperscript{260} Federal jurisdiction should not be expanded to include areas that traditionally have been considered to be within a state’s sovereignty, such as family law, education, and local crime.

A reallocation of federal resources would not only aid states as they strive to fight the “war on crime,” but it would also shift the federal focus to the areas of criminal law within its original jurisdiction. The federal government’s role in criminal enforcement would return to one of assistance rather than domination over the states.\textsuperscript{261} If this return were effectuated, the impending threat to the federal judiciary and the on-going formation of a national police state would be eliminated. The dreams and ideals of the Framers would once again be a reality.

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\textsuperscript{259} Id.
\textsuperscript{260} Mengler, \textit{supra} note 167, at 502.
\textsuperscript{261} Id. at 517.