Deadbeat Dads as Champions of Federalism? Lopez's Dramatic (Unintended?) Effect on Commerce Clause Jurisprudence, as Illustrated by the Child Support Recovery Act

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DEADBEAT DADS AS CHAMPIONS OF FEDERALISM? LОРЕZ’S DRAMATIC (UNINTENDED?) EFFECT ON COMMERCE CLAUSE JURISPRUDENCE, AS ILLUSTRATED BY THE CHILD SUPPORT RECOVERY ACT

I. INTRODUCTION

As a direct response to commercial disputes between the states under the Articles of Confederation, the Constitution of the United States mandates that "[The Congress shall have Power] to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." During different periods of history, the Supreme Court has alternated between narrow and broad constructions of this clause, thereby regulating the breadth of Congress's ability to, in turn, regulate things in and affecting interstate commerce. For the past half-century, many activities have been construed as affecting commerce which, at first glance, may not seem even remotely like commerce or, for that matter, anything else governed by Congress's enumerated powers.

1. See BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE COMMERCE § 5.01, at 5–3 (1999). Bittker notes:

[James] Madison wrote that the federal power over commerce "grew out of the abuse of the power [during the Articles of Confederation period] by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government." As for federal regulation of private enterprise, it was scarcely even being discussed in the first few decades of the Constitution's life.


2. U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause) (emphasis added).

3. See infra Part II.

4. Id. Though not often cited in Commerce Clause cases, the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, may at least play an implicit role as an alternative constitutional basis to justify congressional forays into the regulation of things not obviously interstate commerce. Justice Sandra Day O'Connor convincingly argued this in her dissent in Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528 (1985):

This Court has been increasingly generous in its interpretation of the commerce
In this sense, Commerce Clause jurisprudence necessarily intersects with the Tenth Amendment, as many areas of regulation not specifically delegated to Congress in the Constitution nevertheless fall under the ambit of the Commerce Clause when a broad construction is applied.

Over the last six decades, the Supreme Court has applied a very broad interpretation of the clause. Accordingly, Congress's power to regulate under the Commerce Clause has become plenary over that period, with the Court sanctioning legislation that affects many aspects of American life, including those areas of legislation that have traditionally been reserved for the states, most notably criminal and family law. In fact, the argument can be (and has been) made that the exercise of the commerce power as it is currently construed is often tantamount to an implicit grant of a police power to the federal government, a power that is not enumerated and thus reserved to the states by virtue of the Tenth Amendment. At the very least, it allows a power of Congress, primarily to assure that the National Government would be able to deal with national economic problems.

It would be erroneous, however, to conclude that the Supreme Court was blind to the threat to federalism when it expanded the commerce power. The Court based the expansion on the authority of Congress, through the Necessary and Proper Clause, "to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." It is through this reasoning that an intrastate activity "affecting" interstate commerce can be reached through the commerce power.

Id. at 583-85 (O'Connor, J., dissenting) (citations omitted) (quoted in BITTKER, supra note 1, at 5-11); see also United States v. Morrison, 529 U.S. 598, 637 (2000) (Souter, J., dissenting) (claiming that congressional commerce power is "complemented by the authority of the Necessary and Proper Clause"). However, though the Necessary and Proper Clause may be an alternate basis for expansive congressional regulation under the Commerce Clause, it does not play a role in the analysis of the most commonly cited cases. Rather, the majority of cases defends or condemns regulation solely on interpretations of the Commerce Clause itself. BITTKER, supra note 1, at 5-7.

5. The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

6. See infra Part II.


8. See discussion of cases construing the constitutionality of the Child Support Recovery Act (CSRA), infra Part IV.

9. For an example of one such argument, see United States v. Bailey, 115 F.3d 1222, 1238-39 (5th Cir. 1997) (Smith, J., dissenting) (noting that, since the CSRA is unconstitutional under all three of the requirements in Lopez, it is tantamount to a federal
degree of federal regulation of local activities virtually unheard of during the nation's youth.\footnote{This state of the nation would have astonished the first generation of American lawyers, for whom the constitutionality of federal participation in so-called internal improvements—the infrastructure of the new nation's economic system—was still a bitterly contested and unresolved issue.}{\textit{Id.}}

However, in recent years two cases have been decided by the Court that have the potential to limit the power that Congress has traditionally been afforded under the Commerce Clause. In \textit{United States v. Lopez},\footnote{514 U.S. 549 (1995).}{\textit{Id. at 549.}} the Court struck down the Guns Free School Zones Act (GFSZA),\footnote{18 U.S.C. § 922(q)(1)(A) (Supp. V 1993).}{\textit{Id.}}\footnote{529 U.S. 598 (2000).}{\textit{Id.}}\footnote{42 U.S.C. § 13981 (1994).}{\textit{Morrison,} 529 U.S. at 617.}{\textit{Morrison,} 529 U.S. at 598 (2000).}{\textit{Id.}}\footnote{505 U.S. 144 (1992).}{\textit{Id.}} a federal statute criminalizing the possession of a firearm on or near a school zone.\footnote{529 U.S. 598 (2000).}{\textit{Morrison,} 529 U.S. at 617.}{\textit{Morrison,} 529 U.S. at 598 (2000).}{\textit{Id.}} In \textit{United States v. Morrison},\footnote{529 U.S. 598 (2000).}{\textit{Id.}} a provision of the Violence Against Women Act (VAWA) granting a federal civil cause of action for the victims of gender-motivated violence was similarly struck down.\footnote{529 U.S. 598 (2000).}{\textit{Morrison,} 529 U.S. at 617.}{\textit{Morrison,} 529 U.S. at 598 (2000).}{\textit{Id.}} In arguing these cases, Congress claimed that each Act was constitutional under its commerce authority. However, for the first time since 1937, the Court disagreed. Hence, the modern Court has shown itself willing to buck decades of precedent in order to institute at least minimal boundaries on congressional power deriving from the Commerce Clause. When one steps back to look at the larger picture, these cases intersect with and inform another line of cases represented by \textit{New York v. United States},\footnote{505 U.S. 144 (1992).}{\textit{Id.}} which purport to limit congressional police power, which is not an enumerated power. See also \textit{United States v. Morrison,} 529 U.S. 598, 618 (2000) (discussing the Violence Against Women's Act, and concluding, \textit{inter alia}, that "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and the vindication of its victims").

10. \textit{See Bittker, supra} note 1, at 5–3. After commenting that the current construction of the Interstate Commerce Clause does little to immunize any economic activity from federal action, Bittker notes: "This state of the nation would have astonished the first generation of American lawyers, for whom the constitutionality of federal participation in so-called internal improvements—the infrastructure of the new nation's economic system—was still a bitterly contested and unresolved issue." \textit{Id.}


12. \textit{Id. at} 549.


16. \textit{Morrison,} 529 U.S. at 617.

17. 505 U.S. 144 (1992). While this case does not deal directly with Commerce Clause jurisprudence, it does address the difficulties that come into play when Congress passes laws that regulate the states themselves. The Court held that, in regulating state government activities, it cannot do so in such a fashion as to commandeer or coerce the state legislature into doing its bidding. \textit{See id. at} 149; \textit{see also Printz v. United States,} 521 U.S. 898 (1997) (invalidating a provision of the Brady Handgun Violence Prevention Act requiring local police to do background checks on purchasers of handguns on the grounds that it is an unconstitutional appropriation of state agencies by the national government). However, \textit{New York} does recognize the principle that Congress may entice a state legislature to regulate on
control over the autonomy of state legislatures and agencies. This in turn belies the Rehnquist Court, as it is presently composed, as more committed to the never forgotten but seldom-applied tenets of traditional federalism than any other Court seated in the last three-quarters of a century.

However, upon closer examination, it becomes apparent that the Court's revitalization of the Commerce Clause is undercut by the formulation of the Lopez analysis itself. This truth is illustrated by the set of cases brought under Lopez that challenge the constitutionality of the Child Support Recovery Act of 1992 (CSRA), a federal law making it a crime to fail to pay court-ordered child support for a child residing in another state. After the Lopez decision, there was some dispute as to

its own accord through the use of the spending power. 505 U.S. at 167; accord South Dakota v. Dole, 483 U.S. 203, 206-08 (1987) (holding that Congress may use the spending power to encourage states to do its bidding by conditioning the receipt of federal funds on the passage of a particular regulation, as long as the regulation has something to do with the overall scheme of the federal spending program).

18. See supra note 17.

19. This, of course, is not to say that the Rehnquist Court is turning modern conceptions of federalism on its ear. Despite the undeniable significance of Lopez and Morrison, the fact remains that congressional authority to regulate under the Commerce Clause is now, and likely will continue to be, sweeping. These cases do not hold themselves out as a severe limitation of congressional power. Rather, by the Court's own admission, Lopez only serves to proscribe an outer limit to the commerce power. See Lopez, 514 U.S. at 556; accord Morrison, 529 U.S. at 608. For a complex sociological examination of the Court's willingness to apparently revive some version of traditional federalism as, counterintuitively, a signifier of the collapse of federalism into a centralized national government, see ROBERT F. NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM (2001).


(a) Offense. Whoever willfully fails to pay a past due support obligation with respect to a child who resides in another State shall be punished as provided in subsection (b).

(b) Punishment. The punishment for an offense under this section is-

(1) in the case of a first offense under this section, a fine under this title, imprisonment for not more than 6 months, or both; and

(2) in any other case, a fine under this title, imprisonment for not more than two years, or both.

(c) Restitution. Upon a conviction under this section, the court shall order restitution under section 3663 in an amount equal to the past due support obligation as it exists at the time of sentencing.


Offense—Any person who—
whether this statute would pass muster under what seemed to be a stricter interpretation of the Commerce Clause; in virtually every federal circuit, the CSRA was challenged as an invalid regulation not contemplated by Congress’s commerce power. However, as with many other federal statutes, the lower courts seemed loath to overturn the CSRA as outside the boundaries of the Commerce Clause analysis articulated in Lopez. In 2000, the Supreme Court decided Morrison, and new challenges to the CSRA have surfaced. While as yet none of these suits have been successful, the CSRA has once again become a hot constitutional topic. What sets the CSRA rulings apart in the realm of

(1) willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000;
(2) travels in interstate or foreign commerce with the intent to evade a support obligation, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000; or
(3) willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 2 years, or is greater than $10,000;
shall be punished as provided in subsection (c).
21. See infra Part IV.
22. Statutes that have come under fire after Lopez are, inter alia, the Hobbs Act, the federal arson statute, the Anti-Carjacking Act, and the Endangered Species Act. David B. Sentelle, Speech, Lopez Speaks, is Anyone Listening?, 45 LOY. L. REV. 541, 549-56 (1999).
23. See id. An ardent supporter that Lopez (and presumably Morrison) represents a "sea change" in Commerce Clause jurisprudence, Judge Sentelle of the United States Court of Appeals for the D.C. Circuit opined on the reasons why the circuit courts chose not to extend the holding of Lopez:

And so [Lopez represented] another sea change. And so there was a new bold decision declaring a reversal of the rachet [sic.] and new direction, a return of federal power to the states respectively or to the people. Or was there?

Much of the legal community seems to think not. Much of the academy, and unfortunately the bench, seem stuck in the past. They seem to believe that if they ignore this specter of change, it will go away.

Id. at 548.
24. See infra Parts IV, V.
25. As noted by several critics and legal scholars, while many other statutes have been challenged after Lopez was decided, few have undergone the same pitched battle as has the CSRA. Within three years after Lopez, almost all of the circuits had reviewed the law and found it constitutional. However, the CSRA boasted the dubious distinction of being struck down as unconstitutional by more district courts during that time span than any other statute. See Sara L. Gottovi, United States v. Lopez, Theoretical Bang and Practical Wimper?
Commerce Clause jurisprudence is that, in reading and applying *Lopez*, the circuits have unwittingly pointed to a perhaps unintended\(^{26}\) development in Commerce Clause doctrine that has the potential to undermine the new limitations on congressional power painstakingly advanced by the Supreme Court.

This Comment will first give an overview history of Commerce Clause jurisprudence out of which *Lopez* draws its constitutional doctrine in Part II, followed in Part III by a detailed exposition and critique of the three-prong analysis set forth in *Lopez* and reiterated in *Morrison*. This critique will illustrate that, by compartmentalizing the proper justifications for the exercise of Congress's commerce power into three distinct categories, the Court has seriously misstated its precedents. The Comment will then go on in Part IV to present a case study of how the circuit courts' CSRA holdings highlight this potentially monumental and, possibly, completely unintended by-product of the *Lopez* decision. The CSRA cases illustrate that the *Lopez* Court resurrected separate and distinct justifications for congressional regulation under the Commerce Clause, which since 1937 have been subsumed and controlled by an overarching analytical structure. According to the *Lopez* analysis, these justifications no longer need to be subjected to the scrutiny of a newly empowered Commerce Clause, consequently undermining *Lopez*’s apparent federalist thrust.

II. COMMERCE CLAUSE JURISPRUDENCE

The first construction of the Commerce Clause comes from Justice John Marshall in the 1824 Supreme Court decision of *Gibbons v. Ogden*.\(^{27}\) It was in this case that the Marshall Court first enunciated a


26. As suggested by the title of this Comment, the question as to whether the effects of the *Lopez* and *Morrison* decisions discussed herein were or were not actually intended by the Supreme Court is deliberately left open. While the impetus of this Comment is in part derived from the apparent contradiction between the "federalist thrust" of recent Supreme Court decisions on one hand, and the fact that the *Lopez* and *Morrison* decisions seem to undermine that thrust, it remains to be seen as to whether this was an intentional act on the part of the Court as opposed to an unintended side-effect of years of automatic regurgitation of several Commerce Clause principles, as implied by the discussion *infra* Part III.C. As alluded to at the end of Part V of this Comment, it is ultimately up to the Supreme Court itself to attempt to clear up such inconsistencies. However, given the apparent pro-federalist stance of the current Court, one may be led to assume (at one's own risk, of course), that the undermining effects of the *Lopez* and *Morrison* analyses are unintended.

27. 22 U.S. (9 Wheat.) 1 (1824).
broad definition of commerce, and set in motion the mechanism resulting in the current broad conception of Congress's commerce power. Responding to the position that commerce is limited "to traffic, to buying and selling, or the interchange of commodities," the Court stated that "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." As such, the commerce power is broad, "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the [C]onstitution." By way of limitation is the very nature of the language contained within the Commerce Clause: Congress can permissibly regulate only such commerce as is carried on between, or "among" the states. As pointed out in Gibbons, this necessarily requires intercourse between at least two states and does not affect that commerce which is carried out solely within one state.

Unfortunately for future versions of the Court, the very breadth of this initial definition created great difficulty in determining just what sort of

28. Id. at 189.
29. Id. at 189–90.
30. Id. at 196. It is the "complete in itself" language of this quote that ultimately obviates the need to invoke the Necessary and Proper Clause in justifying commercial regulation. Contra Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528, 583, 584–85 (1984) (O'Connor, J., dissenting). See supra note 4 and accompanying text.
31. The Gibbons court ruminated at some length on the essential division between interstate and intrastate commerce:

The word 'among' means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of 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. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State.

22 U.S. at 194–95.
activities came under the rubric of the commerce power.

Arguably, when the Court next had an opportunity to review the constitutionality of a federal law, it began to operate under a much more restricted view of commerce than originally posited by the Marshall Court. While Gibbons points out that the Commerce Clause grants to Congress the authority to enter the territorial limits of the states, as commerce among the states necessarily must begin entirely within one state and end entirely within another, subsequent decisions narrowly circumscribe when a given activity actually transforms from purely intrastate in nature to an interstate commercial activity. To accomplish this, the Court imported from its Dormant Commerce Clause cases a line of precedents which "held that certain categories of activity such as 'production,' 'manufacturing,' and 'mining' were within the province of state governments." Cases from this period which construe the commerce power in this way (and, indeed, Commerce Clause cases generally) must be read in the context of the economic and social tensions of their time. In the years following the Civil War, Americans "turned [their] energies

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32. As the Court pointed out in Lopez: "For nearly a century [after Gibbons], the Court's Commerce Clause decisions dealt but rarely with the extent of Congress' power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce." United States v. Lopez, 514 U.S. 549, 553 (1995). This was a result of the practicality that there was simply little interstate commerce for Congress to regulate prior to the onset of the industrial revolution. See BITTKER, supra note 1, at 5-3 to 5-4. Thus, the Court was able to develop the counterpart doctrine of the Dormant Commerce Clause much earlier than the doctrines discussed in this Comment in such notable cases as Cooley v. Bd. of Wardens of the Port of Philadelphia, 53 U.S. (12 How.) 299 (1851). See PAUL R. BENSON, JR., THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970 25-29 (1970).

33. In turn, Gibbons necessarily entails at least minimal regulation of commercial activity that occurs wholly within one state:

Can a trading expedition between two adjoining States, commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a State. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States.

22 U.S. at 196.

34. See infra text accompanying notes 37-43, 57-64.

35. Lopez, 524 U.S. at 554 (citation omitted) (summarizing earlier Commerce Clause cases).
primarily to the business of creating material wealth." In turn, this created an economic environment unprecedented in the history of the nation. As such, the fear of trusts and monopolies and the consequent "artificial price fixing of goods and services, discriminatory treatment of customers, and the practical exclusion of any viable competition" created civil distrust of large corporations. In response to this, Congress began to regulate interstate commerce, beginning with the creation of the Interstate Commerce Commission via the Interstate Commerce Act of 1887 and with the Sherman Antitrust Act of 1890. However, as part of the political and social elite, the Court "moved decisively towards laissez-faire constitutionalism[,"] and as such "[was] quick to take jurisdiction over cases involving interstate businesses, [but] did not want to encourage federal regulation of such businesses." To accomplish the aims of laissez-faire constitutionalism, the Court began to narrowly construe Congress's ability to regulate commerce under the Commerce Clause.

The most influential and sweeping statement of this policy comes in

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36. BENSON, supra note 32, at 48.
37. Id. Benson notes that the Court's earliest Interstate Commerce Clause cases frequently had to do with the regulation of railroads: "Nowhere, perhaps, was this more evident than in the railroad industry with its multitude of sharp practices—rebates, pooling agreements, basing-point systems, and so forth—all of which were designed to exploit shippers and the general public alike." Id.
38. See LES BENEDICT, supra note 1, at 225. Les Benedict notes:

As companies grew larger, there were fewer of them in any one industry. The growing concentration of industry made it possible for the leaders in an industry to know each other, and to cooperate to control the market. As the first well-organized economic interests, big businesses were able to exercise more control over their markets and more influence over government than poorly organized or unorganized groups like farmers, workers, and consumers.

The ability of big business to cooperate in order to control prices and wages contradicted most Americans' ideas about how the economic and political system should work. Most Americans believed in free competition among many employers and producers. Free competition in an open market would lead to the highest wages, lowest prices, and best products possible. They were dismayed and angered as big businesses began to cooperate to close markets and reduce competition.

Id.
41. LES BENEDICT, supra note 1, at 239.
42. Id. at 241.
United States v. E.C. Knight Co. Brought under the Sherman Act, this case outlines the first of several different rationales used to determine the constitutionality of a statute created under the Commerce Clause, or of the application of that statute to a particular business concern. In holding that a national sugar conglomerate's monopoly was not subject to the Sherman Act, the Court stated:

Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it.

The Court thereby instituted a formulaic test as to whether a given activity can be brought under the aegis of Congress's commerce power. E.C. Knight posits the existence of a bright-line distinction between secondary and primary effects on commerce, such as the manufacture of sugar, which E.C. Knight directly controlled, as opposed to the placement of those goods in interstate commerce, which Knight only controlled via contracts with shippers. This "direct/indirect" test served to narrowly restrict congressional authority by excluding production activities from the definition of commerce. Congress was only able to regulate such activities that directly related to the use of interstate commerce and was thereby precluded from regulating activities that only indirectly affected commerce and were carried out wholly within one state.

However, a series of subsequent decisions began to belie this strict

43. 156 U.S. 1 (1895).
44. Id. at 12.
45. Id. at 17. The Court concluded:

[I]t does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree.

Id.
stance on Commerce Clause jurisprudence. As progressivism took hold in the early twentieth century, courts began to look more favorably upon the regulation of big business as an essential facet of progressive reform and the institution of the welfare state.\(^\text{46}\) In particular, the Supreme Court, led by Justices Holmes and Brandeis, became a front of progressive ideology, and nowhere was this more evident than in the changes wrought in Commerce Clause jurisprudence.\(^\text{47}\) The formula instituted in place of the direct/indirect test by the court invoked the concept of the "stream of commerce," as illustrated by *Swift v. United States*.\(^\text{48}\) Contending that his meat packing operation was a wholly intrastate activity, Swift claimed that the federal government had no power to enjoin the price fixing scheme that he and his compatriots had concocted.\(^\text{49}\) Again considering the constitutionality of an application of the Sherman Act, the Court handed down a unanimous opinion that upheld the law as applied:

Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce.\(^\text{50}\)

Thus, anyone who exercised control over some portion of the "current of commerce among the states" was subject to regulation by Congress. This was tantamount to a repudiation of the test applied in *E.C. Knight*, as it "was difficult to see how the slaughtering of beef to be sent through interstate commerce differed from the refining of sugar for

\(^\text{46}\) For an overview of progressive ideology and how it related to big business, see generally LES BENEDICT, supra note 1, at 247–66. It suffices to say that the intellectual forces behind the progressive movement were dissatisfied with the perceived antiquated notion of *laissez-faire* economics, and as such, were committed to the use of government as a control over economy and society in order to improve upon the American way of life. See id.

\(^\text{47}\) See id.

\(^\text{48}\) 196 U.S. 375 (1905) (Holmes, J., opinion of the Court).

\(^\text{49}\) Id. at 398.

\(^\text{50}\) Id. at 398–99.
the same purpose."\(^5\)

Various other cases illustrate the progressive Court's expansive interpretation of the commerce power. In a series of cases, the Court consistently upheld the use of the commerce power to prohibit the "immoral and injurious uses"\(^5\) of the channels of interstate commerce. Thus, the Court upheld the regulation of interstate shipments of lottery tickets,\(^5\) the interstate transportation of prostitutes,\(^5\) and the shipment of spoiled or mislabeled food across state lines.\(^5\)

In 1914, the Supreme Court continued to reinforce Congress's broad latitude of discretion under the commerce power with the *Shreveport Rates Case*.\(^5\) In the process, the Court used the "substantial-effects" standard:

Its authority, *extending to these interstate carriers as instruments of interstate commerce*, necessarily embraces the right to control their operations in all matters having *such a close and substantial relation to interstate traffic* that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.

. . . .

It is for Congress to supply the needed correction where the

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51. LES BENEDICT, *supra* note 1, at 262.
53. Champion v. Ames, 188 U.S. 321 (1903) [hereinafter the *Lottery Case*].
55. Hipolite Egg Co. v. United States, 220 U.S. 45 (1911). This case, the *Lottery Case*, and *Hoke* mark some of the high points of judicially enforced progressivism and the idea of a constitutionally centralized welfare state. In the *Lottery Case*, Justice Harlan inquired:

> [M]ay not Congress, for the protection of the people of all the States, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the States?

*Lottery Case*, 188 U.S. at 355 (emphasis added). This language is echoed in Justice McKenna's opinion in *Hoke*: "[T]he powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral." 227 U.S. at 322. Consequently, the Court betrayed itself as willing to allow Congress to use any or all of its enumerated powers, for no more specific reason than the general welfare of the people. See BENSON, *supra* note 32, at 55–59.

relation between intrastate and interstate rates presents the evil
to be corrected, and this it may do completely by reason of its
control over the interstate carrier in all matters having such a
close and substantial relation to interstate commerce that it is
necessary or appropriate to exercise the control for the effective
government of that commerce.\footnote{57}

Therefore, the Court buttressed the substantial-effects concept with
the proposition that such regulations were necessary protections of the
instruments of interstate commerce, which by virtue of the fact that they
necessarily must pass through states, may be subjected to wholly
intrastate activities.\footnote{58}

However, the attitude of the Court soon began to change once again.
In 1918, the Court decided the case of \textit{Hammer v. Dagenhart},\footnote{59}
which signaled at least a temporary end to the permissive construction of the
Commerce Clause. Responding to the conservative reaction to World
War I and two decades of radical progressivism, the White Court
resurrected the direct/indirect test in order to slow down the steady
stream of commercial regulation.\footnote{60} The Taft Court of the 1920s followed

\footnote{57. \textit{Id.} at 351, 355 (emphasis added). The \textit{Shreveport Rates Case} is perhaps the best
remembered of the Court's numerous railroad regulation cases. From this line of cases was
eventually drawn the inference that any such method of interstate transportation, including,
"navigable rivers, lakes, and canals of the United States; the interstate railroad track system;
the interstate highway system; . . . interstate telephone and telegraph lines; air traffic routes;
[and] television and radio broadcast frequencies[,]" were to be included as instruments of
(alteration in original).

58. \textit{See} \textit{Lopez}, 514 U.S. at 558 (citing the \textit{Shreveport Rates Case} and asserting that
"Congress is empowered to regulate and protect the instrumentalities of interstate commerce,
or persons or things in interstate commerce, even though the threat may come only from
intrastate activities"). \textit{See also infra} Part III.C.2 for further discussion of \textit{Lopez}'s use of the
protection of the instrumentalities of interstate commerce as a justification for congressional
regulation under the Commerce Clause.

59. 247 U.S. 251 (1918) [the \textit{Child Labor Case}].

60. \textit{See} \textit{LES BENEDICT, supra} note 1, at 272. Indeed, it is interesting to note that, just as
the Court's expansion of the Commerce Clause can be traced to progressive unease about big
business, it's contraction of Congress's commerce power during the 1920s grew out a growing
comfort and satisfaction with the industrial realm:

As Americans recoiled from radicalism, they became more sympathetic to business
interests. No longer perceived as a rapacious exploiter of consumers and workers,
American business was credited with creating the great prosperity of the 1920s, a
time when ever-greater numbers of Americans could afford to buy the consumer
goods that made life easier and more enjoyable. Outside of some western states,
suit and began to use the direct/indirect test to strike down just about every congressional foray into social reform legislation via regulation of interstate commerce between the years 1918 and 1936. In *Hammer* and its counterpart, *Bailey v. Drexel Furniture Co.*, the Court struck down the Child Labor Acts of 1916 and of 1919, respectively. The Acts were intended to enforce social policy via the Commerce Clause by making it more difficult to sell goods made by children across state lines. In each case, the Court followed *E.C. Knight* and ruled that, since the statutes regulated "local manufacture" and not interstate commerce, they were not within an enumerated power, and were therefore unconstitutional under the Tenth Amendment:

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution.

The Court moved on to firmly entrench itself in a pro-state stance by striking down several federal statutes in cases such as *A.L.A. Schechter Poultry Corp. v. United States* and *Carter v. Carter Coal*.

Unfortunately, by that time the nation was mired in the Great

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*Id.* In many ways, it was dissatisfaction with economic affairs that again led society to turn towards radical regulation of business during the New Deal. Hence, the "pendulum swing" between permissive and restrictive conceptions of the Commerce Clause must be read in connection with temporally corresponding historical events. However, as illustrated by the cases to follow, the 1930s Court was not as quick to follow this societal preference as it heretofore had been.

61. See *infra* notes 64–66 and accompanying text.

62. 259 U.S. 20 (1922) [*The Child Labor Tax Case*].

63. The Child Labor Act of 1916 outlawed the transportation of goods made by children across state lines. The Act of 1919 attempted to do the same by "imposing a punitive tax on goods made with child labor . . .." LES BENEDICT, supra note 1, at 276.


65. 295 U.S. 495 (1935) (holding that hourly wage regulations were unconstitutional by virtue of their indirect relationship to interstate commerce).

66. 298 U.S. 238 (1936) (holding that mining coal was only indirectly connected to interstate commerce, and consequently the regulation thereof by Congress was unconstitutional).
Depression. Despite the need for strong centralization of economic policy, during the early part of the 1930s, the Court refused to back down from its support of state sovereignty and continued to strike down New Deal programs passed pursuant to the commerce power left and right. However, after President Roosevelt succeeded in appointing a liberal majority to the Supreme Court Bench in 1937, the Court literally did an about face and "began the process of repudiating dual federalism and states-rights constitutionalism." The watershed decision in *NLRB v. Jones & Laughlin Steel Corporation* upheld the National Labor Relations Act, and in doing so, "departed from the distinction between 'direct' and 'indirect' effects on interstate commerce." This case also served to reintroduce the substantial-effects test into the mainstream of Commerce Clause jurisprudence:

Although activities may be intrastate in character when separately considered, if they 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, Congress cannot be denied the power to exercise that control. Undoubtedly the scope of this power must be considered in the 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. The question is necessarily one of degree.

67. See *Les Benedict*, supra note 1, at 290–95.
68. *Id.* at 297.
69. 301 U.S. 1 (1937).
71. *J&L Steel*, 301 U.S. at 37 (citations omitted). *See also* United States v. Darby, 312 U.S. 100 (1941). In *Darby*, the Court expanded on the definition of "substantial effect":

The power of Congress ... extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

*Id.* at 118. In essence, the Court asserted that the regulation of things not explicitly commerce is acceptable, so long as that regulation is necessary to an overall regulatory scheme, i.e., the protection of things in commerce or the instrumentalities of commerce. It is presumably this
Explicitly rejecting the direct/indirect distinction for the first time, the Court went on to apply the test to smaller concerns via the "aggregate-effects" doctrine in the case of *Wickard v. Filburn* in 1942.\(^{72}\) The aggregate-effects theory is premised upon the idea that even the smallest local business concern or activity can have an effect on interstate commerce if the activity of that concern is taken as representative of the activities of the industry nationwide.\(^{73}\) In *Maryland v. Wirtz*,\(^{74}\) the Court stated: "[W]here a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence."\(^{75}\) The aggregate-effects doctrine informs the substantial-effects test and provides a convenient constitutional mechanism for congressional regulation of activities that were previously out of the federal government's reach.

Since the 1940s, Congress's commerce power has become plenary, with federal regulations touching many important areas that nevertheless do not intuitively invoke thoughts of commerce *per se*. For instance, in *United States v. South Eastern Underwriters Association*,\(^{76}\) the Court held that insurance, previously supposed not to be commerce,\(^{77}\) was subject to the commerce power: "No commercial

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language that is echoed by the statement in *Lopez* that the GFSZA "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." 514 U.S. at 561.

72. 317 U.S. 111 (1942). *Wickard* states:

But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as, "direct" or "indirect."

*Id.* at 125.

73. *Id.* at 127–28 (noting that "appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial").

74. 392 U.S. 183 (1968).

75. *Id.* at 196 n.27.

76. 322 U.S. 533 (1944).

77. *See, e.g.*, Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1865) (holding that insurance contracts are indemnity agreements and as such "are not articles of commerce in any proper meaning of the word" in that they are "personal contracts between parties which . . . are not inter-state transactions, though the parties may be domiciled in different States").
enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause."8 In another example, Heart of Atlanta Motel, Inc. v. United States,79 the commerce power was invoked by the Civil Rights movement to legitimize federal prosecution of the motel's policy against lodging African-Americans.80 The Court explicitly stated:

That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.81

Echoing the standard originally set forth in the Lottery Case and its progeny,82 Heart of Atlanta Motel looks beyond the actual congressional motive for passing the act. Instead, the Court was willing to search for some rational basis that would serve to connect the statute to interstate commerce. Hence, in Hodel v. Indiana, the Court stated:

A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce.83

78. South-Eastern Underwriters, 322 U.S. at 553. The Court also stated:

The power granted Congress is a positive power. It is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one;—to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing. This federal power to determine the rules of intercourse across state lines was essential to weld a loose confederacy into a single, indivisible Nation; its continued existence is equally essential to the welfare of that Nation.

83. Id. at 552 (footnotes omitted).

84. See supra notes 52–55 and accompanying text.
commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.\textsuperscript{83}

The institution of this "rational basis" standard confirms the traditional formulation of the substantial-effects test as one of minimal scrutiny, consequently giving Congress an almost-plenary power to regulate under the Commerce Clause.

III. \textit{LOPEZ AND MORRISON: CONSTITUTIONAL WONDERS OR CONSTITUTIONAL BLUNDERS?}

A. \textit{United States v. Lopez}

Between \textit{Heart of Atlanta Motel} and the mid-1990s, Congress's power under the Commerce Clause continued to dramatically expand. However, the situation changed in 1995, a year that saw the Court hand down its decision in \textit{United States v. Lopez}.\textsuperscript{84} \textit{Lopez}, for the first time in close to sixty years, struck down a federal statute as a violation of Congress's power to regulate particular activities under the Commerce Clause. The majority's opinion, largely an encapsulation of the Court's storied history of interstate commerce decisions, labors to distinguish the statute in question from previous cases and thus appears to preserve as a whole the Court's previous Commerce Clause jurisprudence. However, the "sea change" of \textit{Lopez} is not in its reaffirmation of earlier precedents.\textsuperscript{85} Rather, it is the Court's refusal, for the first time in years, to continue to expand the aggregate-effects doctrine to cover the regulation of activities that at best have only marginal, inferential connections to interstate commerce.\textsuperscript{86}

In 1990, Congress enacted the Gun-Free School Zones Act

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\textsuperscript{83} 452 U.S. 314, 323–24 (1981). See also Katzenbach v. McClung, 379 U.S. 294 (1964). The \textit{Katzenbach} Court stated:

As we noted in \textit{Heart of Atlanta Motel} both Houses of Congress conducted prolonged hearings on the Act. And, as we said there, while no formal findings were made, \textit{which of course are not necessary}, it is well that we make mention of the testimony at these hearings the better to understand the problem before Congress and determine \textit{whether the Act is a reasonable and appropriate means toward its solution}.

\textit{Id.} at 299 (emphasis added).

\textsuperscript{84} 514 U.S. 549 (1995).

\textsuperscript{85} See Sentelle, supra note 22, at 544.

\textsuperscript{86} See id. at 559.
(GFSZA), which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." Alfonso Lopez was indicted under the GFSZA for possession of a firearm on school grounds, and he subsequently challenged his indictment on the federal charge, claiming that the Act was beyond the enumerated powers of Congress and therefore unconstitutional. However, the United States District Court for the Western District of Texas denied his motion, "concluding that § 922(q) '[was] a constitutional exercise of Congress' well-defined power to regulate activities in and affecting commerce, and the 'business' of elementary, middle and high schools . . . affects interstate commerce." Subsequently waiving his right to a jury trial, Lopez was convicted and sentenced to six months in prison and two years of supervision.

The most surprising turning point in the case prior to the Supreme Court's final adjudication came upon Lopez's appeal, in which Judge Garwood of the Fifth Circuit found that the application of the Act in the instant case did indeed exceed congressional authority under the Constitution. Stopping short of striking down the act altogether, the court explained:

Congress has not done what is necessary to locate section 922(q) within the Commerce Clause. And, we expressly do not resolve the question whether section 922(q) can ever be constitutionally applied. Conceivably, a conviction under section 922(q) might be sustained if the government alleged and proved that the offense had a nexus to commerce.

Hence, the court wisely deferred to the Supreme Court the determination of whether section 922(q) could in fact be constitutionally applied.

89. Lopez, 514 U.S. at 551.
90. Id. at 551-52 (citations omitted).
91. Id. at 552.
92. United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993). Judge Garwood also noted that this was a matter of first impression in the federal courts. Id. at 1345.
93. Id. at 1368.
applied through the use of an indictment alleging a "nexus to commerce,"94 thus correcting the congressional omission of Commerce Clause language from the text of the statute. Nonetheless, with that caveat, the court went on to hold that "section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause."95

After the Fifth Circuit denied the federal prosecutor an en banc hearing,96 the Supreme Court granted certiorari.97 Following an overview of the relevant history of the Commerce Clause, the Court asserted that, though the commerce power is now broad, it has never been conceded that it is without limits.98 The Court then outlined three areas of regulation that have traditionally been permitted as proper exercises of congressional authority:

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce.... Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.99

94. Id. At this point in the history of Commerce Clause jurisprudence, it indeed seemed wise for a lower federal court to defer the ultimate question to the Supreme Court. Considering the fact that it had been close to sixty years since any federal statute was struck down under the Commerce Clause, it is no surprise that the Fifth Circuit was wary of placing boundaries on the then apparently plenary congressional power to legislate under the Commerce Clause. See discussion of the history of Commerce Clause Jurisprudence, supra Part II.

95. Lopez, 2 F.3d at 1367-68.
98. United States v. Lopez, 514 U.S. 549, 556-58 (1995). The Court pointed out language in a number of decisions that reserved the right to limit congressional power under the Commerce Clause. Most notably, the Court quoted J&L Steel:

[The scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so 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."

Id. at 557 (quoting NLRB v. J&L Steel, 301 U.S. 1, 37 (1937)).
99. Lopez, 514 U.S. at 558-59 (citations omitted).
The Court first summarily dismissed the applicability of the first two prongs of this analysis to the case at hand. Admitting that its previous cases were not always clear as to how much of an effect on interstate commerce is a substantial effect, the majority nevertheless reaffirmed the substantial-effects test as the proper tool to utilize in determining the constitutionality of regulations under the Commerce Clause.

The Court also reaffirmed its use of the aggregate-effects theory, as originally set forth in Wickard, as the correct method of determining whether a particular activity has a substantial effect on interstate commerce. However, it is at this point in the analysis where the Court deviated from precedent and drew a distinction between Lopez's case and those that came before: "Even Wickard, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not."

The Court continued by developing this crucial distinction. Whereas the activity in Wickard, though local and diminutive compared to the national market, was nevertheless economic, the GFSZA had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." The Court also pointed out that the Act is not even an essential portion of a larger economic regulatory framework "in which the regulatory scheme could be undercut unless the intrastate activity were [also] regulated[,]" as was the case in Maryland v. Wirtz.

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100. The Court stated:

We now turn to consider the power of Congress, in the light of this framework, to enact § 922(q). The first two categories of authority may be quickly disposed of: § 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if § 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

Id. at 559.

101. Id.
102. Id. at 556.
103. Id. at 560.
104. Id. at 561.
105. Id.
Pointing out that nowhere in the GFSZA is language denoting a jurisdictional element "which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce[.]" the Court concluded that, at the very least, such language is necessary to determine whether the statute applies in a particular circumstance. Thus, the Court addressed the Fifth Circuit's question as to whether the statute could be constitutionally applied if the indictment alleged a sufficient nexus between the activity and interstate commerce. The Court compared Lopez's situation with the situation in United States v. Bass, which challenged a federal statute that made possession, reception, or transportation of a firearm in commerce a crime. The crucial distinction between the two cases according to the Court was that the statutory language under scrutiny in Bass contained jurisdictional language, while section 922 did not. In fact, the Court overturned the conviction in Bass because the government had failed to prove the jurisdictional element. With the Court finding no such jurisdictional limitation in section 922, the statutory language "[left] no reasonable alternative" but to rule it an unconstitutional exercise of power. The Court then noted that, although Congress is not required to present "formal findings as to the substantial burdens that an activity has on interstate commerce[.]" such findings nevertheless would have been helpful in determining whether the GFSZA can ever be constitutionally applied under Wickard's aggregate-affects theory. Nevertheless, the government presented a line of reasoning that the Court labeled "cost of crime" and "national productivity" logic. In essence, the government argued that, in the aggregate, crime adversely affects interstate commerce because of the economic damage to its

107. Lopez, 514 U.S. at 561.
108. Id.
110. Lopez, 514 U.S. at 562 (explaining the holding of Bass).
111. Id.
112. Id.
113. Id. (explicating the method of review of statutes under constitutional scrutiny: "The principle is old and deeply embedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative" (citation omitted)).
114. Id. at 562.
115. Id. at 563.
116. Id. at 564.
Furthermore, the government posited that guns in school zones destroy the nurturing educational environment, making children learn less and thereby affecting the productivity of the nation. The Court rejected this reasoning:

Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Thus, just as the GFSZA statute is facially unconstitutional, it is also unconstitutional as applied.

B. United States v. Morrison

What Congress took away from the Lopez decision was the idea that it must have some concrete proof that the particular regulated activity has an interstate attribute that provides the necessary nexus between the activity itself and interstate commerce as a whole. It began to make sure that hearings and studies on the subject were performed en masse prior to the enactment of laws purportedly authorized under the Commerce Clause. However, the Court again struck down a federal law in United States v. Morrison in 2000, despite a congressional showing of proof that the law was connected to interstate commerce, stating: "[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." Shocking many legal scholars for the second time in five years, the Court again embraced a limitation on congressional commerce power by reaffirming the holding of Lopez.

117. Id.
118. Id.
119. Id. The Court later labeled this method "but-for" reasoning. See United States v. Morrison, 529 U.S. 598, 613 (2000).
120. See, e.g., Morrison, 529 U.S. at 614 (recognizing that the statute in question was supported by numerous congressional findings).
121. See, e.g., id.
122. 529 U.S. 598 (2000).
123. Id. at 614.
The challenge in *Morrison* was to the constitutionality of a portion of the Violence Against Women Act of 1994 (VAWA), which granted a federal civil remedy to the victims of gender-motivated violence. The Court began its analysis in *Morrison* by recapitulating the tenet that, though expansive, Congress's commerce power is not wholly plenary, as some had previously believed. The Court then turned to the three-pronged analysis identified in *Lopez* and, once again, summarily dismissed the applicability of the first two categories of regulation. In deciding whether the VAWA regulates an activity that substantially affects interstate commerce, the Court found four factors that were key to the substantial-effects analysis in *Lopez* that were likewise integral to the analysis in *Morrison*: (1) a statute must by its terms have something to do with "'commerce' or any sort of economic enterprise, however broadly one might define those terms"; (2) the statute must contain an express jurisdictional element "'which might limit its reach to a discrete set of [offenses] that additionally have an explicit connection with or effect on interstate commerce'"; (3) the existence of legislative findings that the regulated activity actually affects interstate commerce; and (4) that the link between the offense and interstate commerce is not so attenuated through the use of "'but-for' reasoning as to make the connection trivial."

The Court continued by applying these principles to the VAWA, concluding that "the proper resolution of the present cases is clear."

The VAWA fails on the first two factors in the analysis, in that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity[.]" and the statute itself contains no jurisdictional element "establishing that the federal cause of action is in pursuance of Congress's power to regulate interstate commerce."

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125. *Morrison*, 529 U.S. at 608. See Gottovi, *supra* note 25, at 688 (noting that "'cases were decided so consistently in favor of expansive congressional commerce power that commentators often considered any legislation passed under the Commerce Clause to be per se constitutional").
126. *Morrison*, 529 U.S. at 609; see also *supra* note 100 and accompanying text.
128. *Id.* at 611–12 (quoting *Lopez*, 514 U.S. at 562).
129. *Morrison*, 529 U.S. at 612.
130. *Id.* at 612–13.
131. *Id.* at 613.
132. *Id.*
133. *Id.* Instead, "Congress elected to cast § 13981’s remedy over a wider, and more
However, the Court was forced to acknowledge the voluminous legislative findings presented by the government in support of the third substantial effects factor. The Court chose to ignore these findings as irrelevant, however, stating: 

"[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." These findings must, in turn, rely on something other than the "but-for" reasoning previously rejected as untenable in *Lopez* so as not to demolish the "Constitution's distinction between national and local authority..." In turning down the government's arguments on this point, the Court reiterated the central concern that produced the *Lopez* decision:

[T]he but-for causal chain... would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. Congress may have recognized this specter when it expressly precluded § 13981 from being used in the family law context. See 42 U.S.C. § 13981(e)(4).

In essence, the Court condemned such laws as destroying the very purely intrastate, body of violent crime.* *Id.*

134. *Id.* at 614.
135. *Id.* at 614. The Court quoted *Lopez*:

[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so. *Rather,* [w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.*

*Id.* (alterations in original) (citations omitted).

136. *Id.* at 615.
137. *Id.* at 615–16.
essence of federalism, as formulated via the Commerce Clause, by obviating the need for a distinction between what is truly local and what is truly national.\textsuperscript{138} When directed solely at intrastate activities, the punishment of violent crimes by the federal government does precisely this: "Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."\textsuperscript{139}

\textit{C. Wonders or Blunders?}

Although \textit{Morrison's} language is perhaps a bit more forceful than that found in \textit{Lopez}, the only real difference between the two cases is the Court's lack of receptivity to congressional findings, despite the implication in \textit{Lopez} that such findings would be helpful. \textit{Morrison} also served to crystallize the four subparts of the substantial-effects analysis. Apart from that, \textit{Morrison} seemingly leaves the three-prong \textit{Lopez} analysis intact.\textsuperscript{140} These two cases, taken together, have wrought a major change in Commerce Clause jurisprudence. However, potentially the most significant change stemming from \textit{Lopez} is not the newfound "teeth" of the substantial-effects test. Rather, it comes from the Court's formulation of the three categories of commercial regulation in which Congress may permissibly engage.\textsuperscript{141} As pointed out above, the Court virtually ignored the first two prongs of the analysis, quickly passing over them in order to get to the substantial-effects analysis in both \textit{Lopez} and \textit{Morrison}.\textsuperscript{142} The question, then, is why the Court did this. The answer, evident within the case law cited in the \textit{Lopez} decision itself, is that since 1937 the Court had always done this. The first two prongs of \textit{Lopez}'s Commerce Clause inquiry can be traced back to formulas composed by the Court prior to \textit{J&L Steel's} institution of the substantial-effects test as the paramount method of Commerce Clause analysis.\textsuperscript{143} However, as illustrated by the very cases the Court cited in

\begin{itemize}
\item \textsuperscript{138} \textit{Id.} at 616–17.
\item \textsuperscript{139} \textit{Id.} at 618.
\item \textsuperscript{140} \textit{But see} United States v. King, No. 5100 Cr. 653 (RWS) 2001 U.S. Dist. LEXIS 1120 (S.D.N.Y. Feb. 8, 2001) (implying that \textit{Morrison} actually served to make the first two prongs of the \textit{Lopez} analysis subordinate to an overarching substantial-effects analysis). \textit{See also infra} text accompanying and following notes 228–33.
\item \textsuperscript{141} \textit{See supra} text accompanying note 99.
\item \textsuperscript{142} \textit{See supra} notes 100, 126 and accompanying text.
\item \textsuperscript{143} \textit{See generally supra} Part II (outlining the relevant history of Commerce Clause
\end{itemize}
Lopez, these categories of regulation have since been subsumed under and incorporated into the substantial-effects test in the years that followed.144

One of the key underpinnings of Congress's plenary commerce power between 1937 and 1995 was that the Court would not specifically require a commercial motivation for the law. For example, in United States v. Darby, the Court stated that "[t]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control."145 As long as there was some rational standard upon which to base the regulation the Court would allow the legislation as constitutional.146 Having established this, the Court would then draw heavily on prior Commerce Clause decisions to identify a rational commercial justification for the law in question. Once having done so, the Court would go on to apply the substantial-effects test to discover whether such rationale was actually fulfilled.

1. Channels

The first prong of the Lopez test is that "Congress may regulate the use of the channels of interstate commerce."147 In support of this assertion, the Court cited United States v. Darby,148 Heart of Atlanta Motel,149 and Caminetti v. United States.150 The oldest of these three, Caminetti, is a relatively obscure case as far as Commerce Clause jurisprudence is concerned. Decided in 1917, it predates the extensive jurisprudence.

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144. See infra Part III.C.
145. 321 U.S. 100, 115 (1941). See also Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258–59 (1964), in which the Court stated:

The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate.

Id. (emphasis added).
146. See supra note 83 and accompanying text.
148. 312 U.S. 100 (1941).
150. 242 U.S. 470 (1917).
use of the substantial-effects test and is the direct progeny of the Lottery Case.\footnote{151} Indeed, Caminetti cited the Lottery Case in finding that "the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question."\footnote{152} As such, the holding in this case is indeed predicated on the very concept identified as the first prong of the Lopez analysis: that Congress can constitutionally regulate the channels of interstate commerce.

Darby, the first of the other two cases, concerned a challenge to the Fair Labor Standards Act of 1938, a New Deal program that prohibited the shipment in interstate commerce goods manufactured under unfair working conditions.\footnote{153} This case was decided in 1941, four years after J&L Steel re-instituted the substantial-effects test, and as such makes extensive use of that opinion in its holding:

[I]t does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce . . . . A recent example is the National Labor Relations Act, for the regulation of employer and employee relations in industries in which strikes, induced by unfair labor practices named in the Act, tend to disturb or obstruct interstate commerce. See National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 38, 40. But long before the adoption of the National Labor Relations Act this Court had many times held that the power of Congress

\footnote{151} For a discussion of the Lottery Case and its other progeny, see supra notes 53–55 and accompanying text.

\footnote{152} Caminetti, 242 U.S. at 491. Caminetti actually dealt with the White Slave Traffic Act of 1910, the same act already found constitutional in Hoke v. United States, 227 U.S. 308 (1913). See supra notes 54–55 and accompanying text. In Caminetti, the Court states:

Moreover, this act has been sustained against objections affecting its constitutionality of the character now urged. Hoke v. United States, 227 U.S. 308; Athanasaw v. United States, 227 U.S. 326; Wilson v. United States, 232 U.S. 563. In the Hoke Case, the constitutional objections were given consideration and denied upon grounds fully stated in the opinion (pp. 308 et seq.). It is true that the particular case arose from a prosecution of one charged with transporting a woman for the purposes of prostitution in violation of the act. But, holding as we do, that the purposes and practices for which the transportation in these cases was procured are equally within the denunciation of the act, what was said in the Hoke Case as to the power of Congress over the subject is as applicable now as it was then.

\footnote{242 U.S. at 491–92.}

\footnote{153} Darby, 312 U.S. at 109.
to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it.\(^{154}\)

The Court in *Darby* predicated its analysis on the precept that Congress could constitutionally regulate the channels of interstate commerce. Thereby, the wholly intrastate activities that had a substantial effect on the use of those channels were subject to regulation as well. The "channels" argument represented the justification, while the substantial-effects test provided the mechanism through which that justification was fulfilled. Consequently, this case actually represents a melding of the two standards, rather than an explication of a distinct and separate standard, as *Lopez* seems to indicate.

*Heart of Atlanta Motel* exhibits a similar dynamic. The *Lopez* Court held this case out as an example of congressional regulation of the channels of interstate commerce.\(^{155}\) And yet, as discussed above,\(^{156}\) the ultimate holding of this case is based on a substantial-effects analysis: "Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce."\(^{157}\) Once again, Congress's regulation of intrastate activity is excused by virtue of that activity's substantial effect on interstate commerce. As such, Congress is justified in imposing such regulation by its ability to, in turn, regulate the use of the channels of interstate commerce.

While *Darby* and *Heart of Atlanta* can be seen as falling within the first prong of the *Lopez* analysis, they cannot be seen exclusively as such. These cases represent the appropriation of previous Commerce Clause precedents, such as *Caminetti*, to lend justification to the use of the substantial-effects test, thereby allowing Congress to constitutionally reach wholly intrastate activities.

2. Instrumentalities

The second prong of the *Lopez* analysis stated: "Congress is

\(^{154}\) *Id.* at 119–20 (non-essential citations omitted).


\(^{156}\) See *supra* notes 79–82 and accompanying text.

empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.\textsuperscript{158} Again the Court cited three cases, this time with two predating \textit{J&L Steel}. The first of these was \textit{Southern Railway Co. v. United States},\textsuperscript{159} which upheld a law "intended to embrace all locomotives, cars and similar vehicles used on any railroad which is a highway of interstate commerce."\textsuperscript{160} As such, this case dealt with the regulation of the instrumentalities of interstate commerce. However, the \textit{Lopez} Court neglected to cite the following passage, in which the \textit{Southern Railway} Court posited:

Is there such a \textit{close or direct relation} or connection between the [intrastate and interstate] classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in \textit{a real or substantial sense} by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate?\textsuperscript{161}

Answering its own question, the Court stated:

\begin{quote}
[T]his is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it.\textsuperscript{162}
\end{quote}

Hence, even in this early example, the Court was actually using a version of the substantial-effects doctrine to uphold the regulation of a wholly intrastate activity. As in the "channels" cases, the justification for this is the constitutional mandate to Congress to regulate and protect the instrumentalities of interstate commerce. This is born out by the

\begin{footnotes}
\item 158. \textit{Lopez}, 514 U.S. at 558.
\item 159. 222 U.S. 20 (1911).
\item 160. \textit{id.} at 26.
\item 161. \textit{id.} (emphasis added).
\item 162. \textit{id.} at 26–27.
\end{footnotes}
Lopez Court's subsequent citation to the *Shreveport Rates Case*, which, as discussed above, was the seminal case that introduced the substantial-effects test into the mainstream of Commerce Clause jurisprudence.  

The third case cited, *Perez v. United States*, was decided several years after *J&L Steel* and, like the previous two cases, contemplated Congress's power to regulate and protect the instrumentalities of interstate commerce and the things within them. "The Commerce Clause reaches . . ., [the] protection of the instrumentalities of interstate commerce, as, for example, the destruction of an aircraft, or persons or things in commerce, as, for example, thefts from interstate shipments." However, the majority of the Commerce Clause analysis in *Perez* did not actually address the "instrumentalities" justification. Instead, the Court, just as in *Lopez*, merely stated the standard and moved on to a pure substantial-effects analysis. 

3. Substantial-Effects

If anything, the *Perez* case serves only to amplify the predominance of the substantial-effects test in the realm of Commerce Clause jurisprudence, as well as the fact that the substantial-effects test has become its own justification for regulation under the Commerce Clause. However, as illustrated by the analysis above, it is not the case that the first and second prongs themselves are also stand-alone bases for regulation. In fact, it is just the opposite; according to the precedents the Court itself cited in *Lopez* and discussed above, regulations justified through the first two prongs must then be customarily subjected to the substantial-effects test.

Even a cursory examination of these cases can lead only to the conclusion that the first two prongs of the *Lopez* analysis have, since 1937, been subsumed by the overarching analytical structure of the substantial-effects test. While it is true that the Court has drawn this three-pronged division before in cases such as *Perez*, it is not true that

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163. *See supra* notes 56–58 and accompanying text. As noted above, the *Shreveport Rates Case* also used the protection of the instrumentalities of interstate commerce as justification of its application of the substantial effects test. *Id.*

165. *Id.* at 150 (citation omitted).
166. *Id.* at 151–57.
167. An examination of *Perez* reveals that the three-prong test asserted in *Lopez* is not original to that case:
those cases came to represent a fundamental change in Commerce Clause jurisprudence as Lopez has. By misstating its precedents in what it must have known would be an important, well-publicized, and oft-cited case, the Court has opened up the potential for Commerce Clause-based regulations that, for the first time in over sixty years, need not be subjected to the substantial-effects test. Just as the Lopez Court began to require more rigorous scrutiny of statutes passed under the substantial-effects justification, it simultaneously provided a loophole via standards that were heretofore subsumed and incorporated into the substantial-effects analytical framework.

The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods or of persons who have been kidnapped. Second, protection of the instrumentalities of interstate commerce, as for example, the destruction of an aircraft, or persons or things in commerce, as, for example, thefts from interstate shipments. Third, those activities affecting commerce.

Id. at 150 (citations omitted); see also Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc., 452 U.S. 264, 276–77 (1981) (reiterating the three-part analysis set forth in Perez). Indeed, the Lopez Court recognizes it as unoriginal to Lopez. See United States v. Lopez, 514 U.S. 529, 558 (1995).
IV. THE LOWER FEDERAL JUDICIARY AND THE CSRA

Previous commentators have noted that the *Lopez* "opinion's pro-federalist strength" has been undermined by the Court's failure to offer a "clearly heightened level of scrutiny as an alternative to... broad precedents." However, the theory presented in this Comment—that *Lopez* actually misstates Commerce Clause jurisprudence in such a way as to allow the lower federal judiciary to escape having to apply the new, more rigorous substantial-effects analysis—has yet to be advanced. While one might suspect that federal courts, required for the last sixty years to apply the substantial-effects test, would continue to do so, the opposite is the case. The analytical shortcomings of *Lopez* outlined above have already been exploited, as amply illustrated by the slew of cases in the lower federal judiciary centered on the constitutionality of

168. It is important to recognize at this point that the following discussion is not purported to be a determination of whether the CSRA is or is not constitutional. Instead, the scope of this Comment deals solely with how CSRA rulings in federal courts have served to highlight the perceived deficiencies in constitutional interpretation exhibited by *Lopez* and discussed in depth in Part III.C.

With that caveat in mind, it is nevertheless instructive to point out that the circuit court opinions discussed in this section deal exclusively with the 1992 version of the CSRA. See supra note 20 (quoting the text of 18 U.S.C. § 288(a) (Supp. V 1993)). Much of the circuit court disagreement in these cases revolved around the fact that the 1992 version of the statute contained no reference whatsoever to interstate commerce. See, e.g., United States v. Bailey, 115 F.3d 1222, 1226 (5th Cir. 1997). The opposing argument is that this omission can be corrected by recognizing the fact that the statute operates only when the parent resides in a different state than the child. See id. The 1998 version, however, divides the "offense" portion of the statute into three separate provisions, the second of which does contain an explicit reference to interstate commerce. See supra note 20 (quoting the text of 18 U.S.C. § 288(a)(2) (Supp. V 1993) (making it a crime to travel "in interstate commerce... with the intent to evade a child support obligation")). Thus, it is entirely possible that Congress has at least partially corrected the difficulties that gave rise to all of the litigation cited herein in the first place.

However, the viability of the discussion herein is unaffected by this for two reasons. First, the first and third provisions of § 288(a), as currently formulated, are separate offenses than that promulgated in subsection 2 (in that the three provisions are disjunctive) and still contain no reference to interstate commerce. As such, these portions of the Act continue to be susceptible to Commerce Clause challenges. See United States v. Morrison, 529 U.S. 598, 613 (2000) (noting that a statute promulgated pursuant to the Commerce Clause should contain at least a jurisdictional element "establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce."). Second, and more importantly, the constitutionality of the CSRA is not properly within the purview of this Comment, as expressed in the caveat above. Whether or not the Supreme Court ultimately vindicates the arguments within these cases is therefore inmaterial, in that they would continue to highlight the complexities injected into Commerce Clause interpretations by *Lopez*’s three-prong test.

the Child Support Recovery Act (CSRA).  

Within two years after the Lopez decision was handed down, ten out of the eleven numbered circuits were required to decide upon its constitutionality under the Commerce Clause; in each, the statute was upheld. The Sixth Circuit, however, handed down its final CSRA opinion, with results similar to the previous cases, in 2001. What is crucial to this discussion is that all but three circuits made little or no attempt at justifying the CSRA via an application of the substantial-effects test. Of those three that did attempt a substantial-effects analysis, none justified the statute solely by that rationale. Of the courts that found for constitutionality under the first or second prong of the analysis, all followed Lopez's lead in misstating, and consequently completely ignoring, the import of the earlier Supreme Court precedents. Instead, time and again, the CSRA was upheld as constitutional as either a proper regulation of the channels of interstate

170. For the text of the CSRA before and after its 1998 amendments and a discussion of the difference between them, see supra notes 20 and 168.

171. See United States v. Williams, 121 F.3d 615 (11th Cir. 1997), cert. denied, 523 U.S. 1065 (1998) (holding the CSRA constitutional under the second prong of the Lopez analysis); United States v. Black, 125 F.3d 454 (7th Cir. 1997), cert. denied, 523 U.S. 1033 (1998) (holding the CSRA constitutional under the second prong of the Lopez analysis); United States v. Crawford, 115 F.3d 1397 (8th Cir. 1997), cert. denied, 522 U.S. 934 (1997) (holding the CSRA constitutional under all three prongs of the Lopez analysis); United States v. Bailey, 115 F.3d 1222 (5th Cir. 1997), cert. denied, 522 U.S. 1082 (1998) (holding the CSRA constitutional under the first and second prongs of the Lopez analysis); United States v. Johnson, 114 F.3d 476 (4th Cir. 1997), cert. denied, 522 U.S. 904 (1997) (holding the CSRA constitutional under the second prong of the Lopez analysis); United States v. Parker, 108 F.3d 28 (3rd Cir. 1997), cert. denied, 522 U.S. 837 (1997) (agreeing with the analyses of Mussari, Sage, and Hampshire as to the second prong of the Lopez analysis, and additionally holding the CSRA constitutional under the third prong); United States v. Vongiorno, 106 F.3d 1027 (1st Cir. 1997), reh'g denied, 110 F.3d 132 (1st Cir. 1997) (holding the CSRA constitutional under the second prong of the Lopez analysis); United States v. Mussari, 95 F.3d 787 (9th Cir. 1996), cert. denied, 520 U.S. 1203 (1997) (holding the CSRA constitutional under the second prong of the Lopez analysis); United States v. Hampshire, 95 F.3d 999 (10th Cir. 1996), cert. denied, 519 U.S. 1084 (1997) (holding the CSRA constitutional under the second and third prongs of the Lopez analysis); United States v. Sage, 92 F.3d 101 (2nd Cir. 1996), cert. denied, 519 U.S. 1099 (1997) (holding the CSRA constitutional under the second prong of the Lopez analysis).

172. United States v. Faasse, 265 F.3d 475 (6th Cir. 2001) [hereinafter Faasse II], rev'g en banc, 227 F.3d 660 (6th Cir. 2000)(holding the CSRA constitutional under the first and second prongs of the Lopez analysis, and stating in dicta that it is constitutional under the third as well). This case overruled a three-judge panel of the Sixth Circuit, which held the CSRA unconstitutional in 2000. See infra, text accompanying notes 219–25.

173. See Faasse II, 265 F.3d 475 (6th Cir. 2000); supra note 171.

174. See supra note 171.
commerce or of the instrumentalities of interstate commerce, without
subjecting it to the previously mandatory substantial-effects analysis.175

A. Channels of Interstate Commerce

In three of the circuits, the courts have held that the CSRA can in
fact be supported under the first prong of the Lopez analysis.176 The
Fifth Circuit in United States v. Bailey,177 responding to Bailey's
argument that the Act's jurisdictional nexus requirement "is simply a
condition precedent guaranteeing only the diversity of state residence
that does not, on its face, implicate interstate commerce[,]"178 began by
ceding the point that mere diversity of residence is not enough to invoke
the congressional commerce power.179 The court noted:

Bailey is correct in his premise that the diversity of residence
between parent and child alone is insufficient to bestow upon
Congress the power to regulate under the Commerce Clause. If
we were to so hold, we would unwittingly open the floodgates to
allowing Congress to regulate any and all activity it so desired,
even those activities traditionally reserved for state
regulation . . . .

However, the court pointed out that the CSRA also requires a child
support obligation created by a state court order in order to become
applicable.180 The court went on to say that, once Bailey moved out of
the state in which his child lived, he necessarily must make use of the
channels of interstate commerce, either via the mail or electronic
means,182 as there is no other way to get the money from a parent in one

175. See, e.g., Bongiorno, 106 F.3d at 1033 (noting that "we have no occasion to decide
whether unpaid child support substantially affects interstate commerce"); Sage, 92 F.3d at 107
("None of the concerns expressed in the Lopez opinion is at stake in this case."); Johnson,
114 F.3d at 479 ("Looking to these three possible sources of Commerce Clause power to
enact the CSRA, we pass categor[y] . . . (3) ('activities substantially affecting interstate
commerce') . . . "); Bailey, 115 F.3d at 1226 ("We decline to reach the question whether the
CSRA may also be upheld under the third category [of the Lopez analysis].").
176. See Faasse II, 265 F.3d 475 (6th Cir. 2001); United States v. Crawford, 115 F.3d 1397
(8th Cir. 1997); United States v. Bailey, 115 F.3d 1222 (5th Cir. 1997).
177. 115 F.3d 1222 (5th Cir. 1997).
178. Bailey, 115 F.3d at 1226.
179. Id.
180. Id.
181. Id.
182. See id. at 1226–27 (noting that the channels of interstate commerce refer to "the
state to the child in another.\textsuperscript{183}

The Sixth Circuit echoed Bailey in its decision of United States v. Faasse.\textsuperscript{184} Citing Lopez's references to Heart of Atlanta Motel and Darby, the court stated: "These cases teach that Congress has the power, under category one [of the Lopez analysis], to regulate or exclude certain categories of goods from flowing... through the channels of commerce."\textsuperscript{185} Apparently, this court concurred with the idea propounded in Bailey that, since payments necessarily move through the channels of interstate commerce, they can be (albeit loosely) considered "goods" and are therefore subject to regulation under the first prong of the Lopez analysis.

\textbf{B. Instrumentalities of, or Persons or Things in, Interstate Commerce}

The lion's share of argumentation over the CSRA's constitutionality has been over whether it regulates the instrumentalities of, or persons or things in, interstate commerce. The vast majority of circuits have upheld the CSRA under this prong of the Lopez analysis, and there are several distinct issues that arise within it. The first, and perhaps most important of these issues, is whether child support obligations can themselves be considered "things" in interstate commerce. Many of the courts note that the Supreme Court considers intangibles, such as support obligations, as things properly the subject of the commerce power.\textsuperscript{186} Furthermore, a support obligation constitutes a thing in

\begin{itemize}
  \item \textsuperscript{183} Bailey, 115 F.3d at 1227; accord, Crawford, 115 F.3d at 1400 (noting that "payment of child support on behalf of an out-of-state child requires the use of channels of interstate commerce, which renders the CSRA constitutional under the first Lopez category as well").
  \item \textsuperscript{184} Faasse II, 265 F.3d at 489–90.
  \item \textsuperscript{185} Id. at 490.
  \item \textsuperscript{186} See, e.g., id. at 486. The court stated:

It matters not, for purposes of the Constitution, whether the child support payment is a tangible thing. In South-Eastern Underwriters Ass'n, 322 U.S. at 546 ... in which the Supreme Court upheld Congress's authority to regulate interstate insurance contracts, the Court made clear that "Congress can regulate traffic though it consist of intangibles."

\textit{Id.}; see also United States v. Bongiorno, 106 F.3d 1022, 1031 (1st Cir. 1997) (citing United States v. Shubert, 348 U.S. 222, 226 (1955)).
\end{itemize}
commerce because it is satisfied "by a payment that will normally move in interstate commerce . . . ." 187

The most succinct and widely cited argument on this point is the one advanced by the Second Circuit in United States v. Sage.188 The court noted that on several occasions, the Supreme Court has ruled that contracts for interstate sales constitute transactions in commerce.189 The Sage court went on to state: "In the present case the obligation stems from a court order, not a contract, but the principle is the same." 190 This sentiment has been echoed by a variety of other circuits.191 Hence, the Faasse II court agreed with the Sage court's association of child support obligations with interstate transactions in general:

The power confined to Congress by the Commerce Clause is declared in The Federalist to be for the purpose of securing the "maintenance of harmony and proper intercourse among the States." . . . It is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one;—to govern affairs which the individual states—with their limited territorial jurisdictions, are not fully capable of governing.192

When expanded as such, the association between child support obligations and "transactions which[] reach[] across state boundaries"193 leads the circuits to the next pillar of their argument; Congress is acting within its right in that it must step in where state courts' efforts to enforce their own child support orders fail. As the Sage court put it:

187. Bongiorno, 106 F.3d at 1031 (quoting United States v. Mussari, 95 F.3d 787, 790 (9th Cir. 1996)).
188. 92 F.3d 101 (2d Cir. 1996).
189. Id. at 106 (citing Dahne-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921) (holding a Kentucky law preventing the enforcement of an interstate contract invalid under the Dormant Commerce Clause); see also Sonneborn Bros. v. Cureton, 262 U.S. 506, 515 (1923) ("contracts" for interstate sales are "interstate commerce in its essence")).
190. Sage, 92 F.3d at 106.
191. See, e.g., United States v. Johnson, 114 F.3d 476, 480 (4th Cir. 1997) (citing Sage); United States v. Bailey, 115 F.3d 1222, 1229 (5th Cir. 1997) (noting that "[a]lthough the instant case involves an obligation arising from a court order, not a contract, the premise is the same . . . .").
192. Faasse II, 265 F.3d 475, 484 (6th Cir. 2001) (quoting United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 551–52 (1944)).
193. Id. (quoting United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 551–52 (1944)).
The fact that, because of the nature of our Federal system, [the State] was unable effectively to enforce [the child support] obligation does not mean that it did not exist or had somehow vanished. All the Act does is enable the United States to help [the State] do what it could not do on its own, namely, enforce Sage's obligation to send money from one State to another.  

In support of this justification for the CSRA, the circuits commonly cited the Judiciary Committee's report that "'the annual deficit in child support payments remains unacceptably high,' especially 'in interstate collection cases, where enforcement of support is particularly difficult,'" and "'interstate extradition and enforcement in fact remains a tedious, cumbersome, and slow method of collection . . . ." Several of the cases also quote Congressman Henry Hyde's concern over delinquent parents "'mak[ing] a mockery of State law by fleeing across State lines to avoid enforcement actions by State courts and child support agencies.'"

Hence, interstate support obligations, as things in commerce, are necessarily subject to congressional regulation, according to the second prong of the Lopez analysis. As such, the courts have drawn the conclusion that the CSRA is analogous to other federal statutes that are meant to foster the growth of interstate commerce. Even though the

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194. Sage, 92 F.3d at 105. See also Faasse II, 265 F.3d at 485.
196. Id. (citations omitted).
197. Id. (citations omitted); see also Sage, 92 F.3d at 103–04 (quoting the same language from Congressman Hyde).
198. See, e.g., United States v. Hampshire, 95 F.3d 999, 1003 (10th Cir. 1996).
199. See, e.g., Sage, 92 F.3d at 105. The Sage court noted:

Sage argues that the Act is not within the Commerce Clause power and thus invalid on its face because it concerns not the sending of money interstate but the failure to send money.

Such reasoning would mean that Congress would have no power to prohibit a monopoly so complete as to thwart all other interstate commerce in a line of trade. Yet the Sherman Act, ... is within the Commerce Clause power. To accept Sage's reasoning would disable the United States from punishing under the Hobbs Act, making it a crime to "obstruct" interstate commerce, someone who successfully prevented interstate trade by extortion and murder. There would be no trade to obstruct.

Id. (citations omitted); see also United States v. Mussari, 95 F.3d 787, 790 (9th Cir. 1996) (noting that a delinquent parent's "intentional refusal to satisfy the debt is as much an
Act criminalizes the failure to engage in interstate commerce (by not making the required payments), Congress can nevertheless pass regulations in order to "prevent [this] frustration of an obligation to engage in commerce."\textsuperscript{200}

Consequently, the argument made by many CSRA defendants—that, since the obligations arise out of family law, their regulation must traditionally be reserved to the states via the Tenth Amendment—has not been looked upon with favor in the circuit courts:

This circumstance is frivbling ... [A]lthough the underlying child support order is a product of state law, the delinquent parent's location vis-à-vis the minor child creates interstate nexus in the form of an obligation to make regular payments across state boundaries. Indeed, the CSRA applies only when the state-imposed child support order develops an interstate character ... \textsuperscript{201}

The key to this argument, according to the Bailey court, is that the federal district courts are not required by the CSRA to issue family law decrees or to amend orders already made by state courts. The Fifth Circuit maintained that "[f]ederal courts have long divested themselves of jurisdiction over only the issuance of divorce, alimony, and child custody decrees, finding that such domestic relations matters are within the unique province of state courts to decide."\textsuperscript{202} However, "[t]he CSRA in no way endeavors to regulate this hallowed ground; it seeks merely to enforce a child support order already promulgated by a state court."\textsuperscript{203}

V. SYNTHESIS

As already stated, the above-cited opinions of the circuit courts rarely attempted to undergo a substantial-effects scrutiny in order to uphold the CSRA.\textsuperscript{204} Those that did espoused many of the same

\textsuperscript{200} Sage, 92 F.3d at 105–06.
\textsuperscript{201} Bongiorno, 106 F.3d at 1032.
\textsuperscript{202} United States v. Bailey, 115 F.3d 1222, 1231 (5th Cir. 1997).
\textsuperscript{203} Id.
\textsuperscript{204} See, e.g., United States v. Hampshire, 95 F.3d 999, 1003–1004 (10th Cir. 1996); United States v. Parker 108 F.3d 28, 30 (3d Cir. 1997); United States v. Crawford, 115 F.3d 1397, 1400 (8th Cir. 1997).
formulations of the test that are routinely used in rubber-stamping statutes passed under the aegis of the Commerce Clause and approved via the minimal scrutiny of rational basis review.\textsuperscript{205} It is, therefore, not clear as to how these courts would apply the substantial-effects test if forced to do so seriously. However, it is clear that the Supreme Court's interpretation of its precedents in \textit{Lopez} has allowed the lower federal judiciary to skirt the serious application of a substantial-effects analysis. If it were true to its precedents, the Court would have required that, once a justification for the CSRA had been established, it would yet have to be subjected to the substantial-effects formula spelled out in \textit{Lopez} and clarified by \textit{Morrison}.

There are two prime examples of serious applications of the substantial-effects test to the CSRA. The first, a pre-\textit{Morrison} application of the substantial-effects analysis, is found in Judge Jerry Smith's dissent to the Fifth Circuit's decision in \textit{United States v. Bailey}.\textsuperscript{206} Judge Smith stated:

\begin{quote}
[The CSRA] contains no reference to interstate commerce, regulates an activity that is not commercial, and invades the field of family law, a traditional area of exclusive state sovereignty. Therefore, I conclude that [the CSRA] flouts the limitations on the Commerce Clause, flies in the face of \textit{Lopez}, and threatens to "obliterate the distinction between what is national and what is local and create a completely centralized government."\textsuperscript{207}
\end{quote}

Thus, in using language directly from the \textit{Lopez} decision, Judge Smith addressed several of the factors identified in \textit{Lopez} as pertinent to whether a given regulation is permissible under a substantial-effects analysis. First, the CSRA contains no jurisdictional nexus, in that it does not require the use of the channels of interstate commerce "as a prerequisite to federal regulation . . . 'which would ensure, through a case-by-case inquiry, that the [activity] in question affects interstate commerce[.]"\textsuperscript{208} Second, the Act does not regulate a commercial

\textsuperscript{205} \textit{See supra} note 83 and accompanying text. For a convincing recitation of the idea that the lower federal judiciary is continuing to decide Commerce Clause cases in general, and CSRA cases in particular, according to the minimal scrutiny standards customarily applied in Commerce Clause challenges, see Gottovi, \textit{supra} note 25, at 719–21. \textit{See also} Sentelle, \textit{supra} note 22.
\textsuperscript{206} 115 F.3d 1222, 1233–40 (5th Cir. 1997) (Smith, J., dissenting).
\textsuperscript{207} \textit{Id.} at 1233 (quoting \textit{United States v. Lopez}, 514 U.S. 549, 557 (1995)).
\textsuperscript{208} \textit{Bailey}, 115 F.3d at 1238 (Smith, J., dissenting) (citation omitted). For this factor as
activity, in that child support obligations are not commercial, bilateral transactions. Instead, Judge Smith contended, they are unilateral, and as such include none of the elements of actual commerce. Thus, child support payments lack the necessary "relationship to trade and commercial intercourse," effectively transforming the "Interstate Commerce Clause [into the] Interstate Clause.

Judge Smith continued by applying the last two factors identified in *Lopez* and *Morrison* as to whether a given regulation is permissible under a substantial-effects analysis. With enviable prescience, he intuited the portion of *Morrison* disregarding the voluminous legislative findings in that case and the fact that the findings must rely on something other than the "but-for" reasoning previously rejected by *Lopez*:

In *Lopez*, the Supreme Court disavowed the use of speculative economic theories to prove that a given activity "substantially affects" interstate commerce, as the employment of such theories would permit Congress to "regulate any activity that it found was related to the economic productivity of individual citizens: family law . . . for example."

In essence, Judge Smith proffered the exact argument brought to the forefront in the *Morrison* decision three years later: that all of the congressional records and findings which the *Bailey* majority focused upon in its opinion were irrelevant in that they were used simply to provide an inferential, but-for connection to interstate commerce. Therefore, because the CSRA fails under each of these factors, and "with the revival of federalism as a constitutional value in *Lopez*, [Judge Smith] conclude[s] that the statute cannot survive constitutional
Another source of significant substantial-effects scrutiny comes from a panel of the Sixth Circuit, and represents the closest the circuits have yet come to a split over the CSRA. This particular panel, led by Circuit Judge Batchelder, was the first appellate court in the nation to actually hold the CSRA unconstitutional.\textsuperscript{219} Overruled by the 2001 \textit{Faasse II} case, discussed in some detail above,\textsuperscript{220} this case, \textit{Faasse I}, nevertheless represents an important, if only symbolic, step towards recognizing the inherent constitutional complexities of the CSRA. In actuality, the substantial-effects portion of this analysis echoed much of Judge Smith's dissent in \textit{Bailey}. However, by this time \textit{Morrison} had been decided—and the \textit{Faasse I} decision made use of it by stating that a large dollar amount does not, in itself, satisfy the requirement of a substantial effect on interstate commerce.\textsuperscript{221}

What are most striking and convincing are not Judge Batchelder's arguments addressing the Commerce Clause, but rather those addressing basic principles of federalism. His central theme was that, when states have chosen not to regulate something via a criminal penalty, Congress does damage to the structure of federalism by imposing a criminal sanction anyway.\textsuperscript{222} To illustrate this, the court provided a description of Michigan's system of regulating child support obligations, which relies on the sanctity of judicial discretion and creates a steadily increasing civil penalty structure ranging from wage garnishment to (when it appears to the judge that other measures appear unlikely to correct the delinquency) civil incarceration.\textsuperscript{223} The judge then contended that the CSRA undermines the effectiveness of this valued judicial discretion, and since Michigan trial court judges are elected, it therefore "prevents Michigan officials from regulating in accordance with the views of the local electorate."\textsuperscript{224} Judge Batchelder went on to state:

\textit{[T]he Act carves up Michigan law by predicing liability on

\begin{footnotes}
\footnotetext[218]{\textit{Bailey}, 115 F.3d at 1240 (Smith, J., dissenting).}
\footnotetext[219]{United States v. Faasse, 227 F.3d 660 (6th Cir. 2000) [hereinafter \textit{Faasse I}], \textit{reh'g granted, vacated}, 234 F.3d 312 (6th Cir. 2000), \textit{rev'd}, 265 F.3d 475 (6th Cir. 2001).}
\footnotetext[220]{See supra text accompanying notes 172–73, 184–85, 192–93.}
\footnotetext[221]{\textit{Faasse I}, 227 F.3d at 671.}
\footnotetext[222]{\textit{Id.} at 665.}
\footnotetext[223]{\textit{Id.} at 665–66.}
\footnotetext[224]{\textit{Id.} at 666.}
\end{footnotes}
violations of Michigan Court orders, but putting deterrence and penalty decisions into the hands of United States officials in that minority of cases in which the state of residence of the payer is different from that of the child.225

This places Batchelder's analysis directly in the same line of cases as New York v. United States;226 by arguing that the CSRA, in essence, dictates the direction of state officials, he invoked the federalist principles brought to bear in that case. Judge Batchelder affirmed this reading: "By piggybacking a criminal sanction on Michigan child support orders, the CSRA recognizes the primacy of the State's laws at the same time that it expressly overrides portions of such laws."227

Hence, this judge, perhaps to the exclusion of all other circuit court judges who have presided over a case reviewing the constitutionality of the CSRA, has seen fit to point out the place that Lopez and Morrison hold in the theoretical structure of the Rehnquist Court's recent federalism cases. Though perhaps not an earth-shattering change in today's state-federal balance of power, Lopez and Morrison, along with New York and Printz, nevertheless represent a reminder to Congress that it is not the case that "the Court lacks the authority and responsibility to review congressional attempts to alter the federal balance."228

However, some question remains as to whether the Court has done what it seems to have set out to do in Lopez and Morrison. As illustrated above,229 by articulating the analytical framework for the Commerce Clause in a compartmentalized, three-pronged fashion, the Court has seriously misstated its precedents. True, the three justifications for commercial regulation by Congress do have precedents in the case law, but those precedents also dictate that the only one that can stand alone as a justification is the substantial-effects test. The "channels" and "instrumentalities" rationales, as such, have since 1937 been subsumed under the overarching analytical framework that the Court has built up around the substantial-effects doctrine. While this may seem like splitting hairs and of no practical consequence, the very fact that the circuit courts have utilized these rationales in construing

225. Id.
227. Faasse I, 227 F.3d at 666.
229. See supra Part III.C.
the CSRA so as to avoid having to do a substantial-effects analysis is
portentous. Indeed, though the Smith dissent and Batchelder opinion
outlined above may not be entirely convincing, they nevertheless raise
great concerns as to whether the CSRA would actually pass a serious
application of the test, such as was applied to the GFSZA in Lopez.
Therefore, by misstating its precedents in such a way as to undermine
that which it apparently hoped to accomplish in Lopez, the Court has
created a way to circumvent the newfound rigors to be applied as a
result of that decision.

That the Supreme Court must at least address the issues presented
herein is therefore undeniable. A final example lends credence to this
assertion: one district court seems actually to have stumbled upon the
thrust of the argument presented herein. In United States v. King, the
Southern District of New York ruled that "the holding in Morrison
clarified that Congress may regulate conduct that obstructs interstate
commerce through the Commerce Clause only where that conduct has a
'substantial effect' on such commerce—i.e., under the third prong of
Lopez." In reversing that decision, the Second Circuit noted:

It would appear that, under the district court's reading of
Morrison, Congress cannot regulate activity that obstructs either
channels of interstate commerce, or instrumentalities of and
persons and things in interstate commerce—the first and second
categories of the Lopez framework—unless the regulated
commerce-obstructing activity independently satisfies Lopez's
third prong—substantially affecting commerce—as well.

Though the Second Circuit may well have been correct in stating
that the Morrison decision likely did not intend that result, it is
important to note that the Southern District of New York was not
entirely misguided in saying so, in that its decision is justified at least in
part by the discussion of Supreme Court precedents conducted herein.
The fact that the Second Circuit dismisses the idea with little or no
discussion indicates a need for the Supreme Court to provide a cogent
discussion on the subject and institute guidelines for the lower judiciary

230. No. 51 00 Cr. 653 (RWS), 2001 U.S. Dist. LEXIS 1120 (S.D.N.Y. Feb. 8, 2001),
rev'd, 276 F.3d 109 (2d Cir. 2002).
231. Id. at *13–14.
233. Id. at 112–13.
VI. CONCLUSION

Within the framework of modern-day Commerce Clause jurisprudence, federal courts have little or no choice but to address the Lopez decision before determining the constitutionality of a federal statute. This is because Lopez, at least initially, purports to impose a limit on the congressional commerce power, a condition unheard of for well over a half-century. However, Lopez does more than that: through the Court's use of a compartmentalized, three-prong test to determine the constitutionality of a regulation promulgated under the Commerce Clause, it has introduced a semantic "loophole," which allows federal courts to circumvent the newly instituted rigors of the substantial-effects test. More properly, this loophole comes to light via the explication of the "channels" and "instrumentalities" justifications as separate and distinct justifications for congressional commercial regulation, despite the fact that Supreme Court case-law seems to indicate that these two justifications have long since been subsumed by the overarching substantial-effects analysis.

That this is a real, practical tension within the Lopez decision, and not just a purely academic distinction, is quintessentially illustrated by the wealth of federal circuit case-law surrounding the constitutionality of the Child Support Recovery Act. In deciding these cases, the federal circuit courts have consistently taken advantage of the loophole so as not to have to subject the Act to the rigors of a revitalized substantial-effects analysis. Instead, the courts have consistently upheld the Act under either the first or second prong of the Lopez analysis, thereby circumventing the heightened level of scrutiny required by the third prong.\textsuperscript{234} The circuits were not technically wrong in doing so, however,

\textsuperscript{234.} Consequently, the circuit courts can avoid what may very well be the most difficult standard that the CSRA would otherwise have to meet, \textit{i.e.}, the substantial-effects analysis. From the discussion \textit{supra} Part IV, the observation may easily be made that a Lopez-style substantial-effects analysis would be the most arduous test for the CSRA to pass. It makes sense, then, that the vast majority of the circuits did not even attempt an in depth substantial-effects analysis. \textit{See supra} notes 171–75 and accompanying text. Rather, as this Comment has set out to illustrate, the circuits merely dismissed a serious application of the substantial-
in that the Lopez Court misstated its precedents so as to allow such an interpretation. Consequently, the Lopez decision, while purporting to serve as a limitation of congressional regulation, undermines itself by allowing a way to bypass such limitations. Hence, the Court would do well to clarify exactly what it intended when it divided the Commerce Clause analysis into three separate justifications for regulation, apparently against the weight of over a half-century of precedents. These precedents seem to indicate that, at least since 1937, the substantial-effects analysis is the one, overarching test that a particular statute must pass in order to be deemed constitutional under the Commerce Clause.

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