STUDENT NOTES

The Gun-Free School Zones Act: The Shootout Over Legislative Findings, the Commerce Clause, and Federalism

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* Member, Third Year Class; University of Washington, B.A., 1991. The author would like to thank Professor Ray Forrester for introducing me to this topic, Jim Harper for his insights and criticisms, and the editorial board of the *Hastings Constitutional Law Quarterly* for their flexibility and hard work.

> "[I]s not the school ground a most important vestige, the one place where children are entitled to a safe and secure harbor free of fear and violence? Are not these children the nation's future? Does Congress really need a hearing or further findings to recognize the importance of it all?"[1]

Introduction

The Framers of the Constitution intended the Commerce Clause to be a specific, narrow power.[2] Since then, the Commerce Clause has become a seemingly ubiquitous source of power on which to base legislation. Limits on the commerce power have become less than clear because congressional statutes facing Commerce Clause attacks have almost universally been upheld as constitutional.[3]

The social ills of our country often are national in scope and require solutions from the federal Congress. School violence is one of these social ills. The Supreme Court has recognized the severity of the problem: "In recent years, school disorder has often taken particularly ugly forms; drugs and violent crime in the school have become major social problems."[4] Statistics on violence in schools are startling. Eighty-two percent of school district officials recently reported that student violence had increased over the last five years.[5] A recent study suggested that 39.9 percent of male Virginia high school students carried a weapon to school during the preceding month.[6] Another study found that 22 percent of students in some areas carry guns to school.[7] The result of this escalating arsenal is disturbing. Youths are not only taking arms to school, they are using them. Between July 1, 1992, and May 26, 1994, seventy-four intentional deaths occurred on school campuses.[8] Forty-seven of those deaths involved the use of firearms.[9]

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1. United States v. Glover, 842 F. Supp. 1327, 1337 (D. Kan. 1994).

2. "The Congress shall have power to . . . regulate commerce with foreign nations, and among several states, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

3. *See infra* part I.A.

4. New Jersey v. T.L.O., 469 U.S. 325, 339 (1985).

5. Amicus Brief for the National School Safety Center at 4, United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993) (No. 93-1260) (citing NATIONAL SCHOOLS BOARDS ASSOC., VIOLENCE IN THE SCHOOLS: HOW AMERICA'S SCHOOL BOARDS ARE SAFEGUARDING OUR CHILDREN (1993)).

6. *Id.* at 5 (citing VIRGINIA DEP'T OF EDUC., 1992 YOUTH RISK BEHAVIOR SURVEY REPORT 8 (1992)).

7. *Id.* (citing NATIONAL INSTITUTE OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, GUN ACQUISITION AND POSSESSION IN SELECTED JUVENILE SAMPLES 5 (1993)).

8. *Id.* (citing NATIONAL SCHOOL SAFETY CENTER, SCHOOL ASSOCIATED VIOLENT DEATHS 7 (1994)).

9. *Id.*

Recently, two federal appellate courts reached opposite conclusions regarding the constitutionality of a federal firearms statute. These court decisions reflect different views on how far the Commerce Clause extends. Perhaps more importantly, the split illustrates fundamentally different views of federalism, the allocation of power between the federal government and the states. The split between the circuits gives the Supreme Court a rare opportunity to further define the scope of the Commerce Clause and to clarify the balance of power between states and the federal government.

On September 15, 1993, in *United States v. Lopez*,[10] the Fifth Circuit Court of Appeals held that the Gun-Free School Zones Act (hereinafter "section 922(q)")[11] was unconstitutional. Section 922(q) makes it a felony to possess a firearm within 1,000 feet of a school zone.[12] The lower court convicted Alfonso Lopez, Jr.[13] of possession of a firearm within a school zone.[14] The appellate court, however, held that section 922(q)(1) was unconstitutional because it went beyond the reach of the legislature's commerce power.[15] The court held that section 922(q) was unconstitutional on its face because neither congressional findings, nor legislative history, indicated that regulating gun possession fell within the commerce power.[16] Further, section 922(q) failed to specify that it was enacted under the commerce power.[17] Thus, the *Lopez* court fashioned a new requirement for legislation under the Commerce Clause: Congress must demonstrate, or at least assert, either in an explicit finding or in the legislative history, that the regulated activity falls within the commerce power.[18] The *Lopez* court took an unprecedented step in limiting the commerce power and preserving state sovereignty within our federal system.

On December 21, 1993, the Ninth Circuit Court of Appeals upheld section 922(q) as constitutional, affirming the conviction of Ray Harold Edwards III under the Gun-Free School Zones Act.[19] In *Ed-*

10. 2 F.3d 1342 (5th Cir. 1993), *cert. granted*, 114 S.Ct. 1536 (1994).

11. 18 U.S.C. § 922(q).

12. 18 U.S.C. § 922(q)(1)(A) provides: "It shall be unlawful 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." 18 U.S.C. § 921(a)(25) defines a school zone as: "(A) in, or on the grounds of, a public, parochial or private school; or (B) within a distance of 1,000 feet from the grounds of a public, parochial or private school." 18 U.S.C. § 921(a)(25) (Supp.V 1993).

13. Lopez was a twelfth-grade student attending Edison High School in San Antonio, Texas. *Lopez*, 2 F.3d at 1345.

14. *Id.* Lopez arrived at school carrying a concealed .38 caliber handgun. *Id.*

15. *Id.* at 1367.

16. *Id.*

17. *Id.* at 1366.

18. *Id.* at 1367.

19. United States v. Edwards, 13 F.3d 291 (9th Cir. 1993).

wards, neither congressional findings nor the legislative history of the statute illustrated how possessing a gun within a school zone affects interstate commerce.[20] The court held such findings were unnecessary.[21] The court acknowledged that its decision created an intercircuit conflict with the Fifth Circuit.[22] However, the *Edwards* court rejected the reasoning of *Lopez*, explaining that Supreme Court precedent does not require congressional findings in order to legislate.[23]

Essentially, different views of federalism underlie the divergent conclusions of the Fifth and Ninth Circuits on the constitutionality of section 922(q). *Lopez*, by requiring Congress to make preliminary findings that the activity being regulated falls within a specifically enumerated constitutional power, attempts to constrict the burgeoning commerce power and keep Congress from regulating areas of law traditionally reserved to the states. *Edwards*, by holding such a preliminary finding unnecessary, maintains the existing balance of power between the federal government and the states. The Supreme Court granted certiorari to the *Lopez* case and now has an opportunity to clarify what Congress must do in order to exercise Commerce Clause powers. According to existing Commerce Clause precedent, which does not require Congress to make preliminary findings linking the regulated activity to a constitutional power, section 922(q) is constitutional.[24]

This Note examines the constitutionality of the Gun-Free School Zones Act in light of the intercircuit split and focuses on the necessity of making preliminary findings for statutes. Part I discusses the general scope of the Commerce Clause, the necessity of legislative findings, and recent Tenth Amendment jurisprudence. Part II summarizes cases which address the constitutionality of section 922(q), including *Lopez, Edwards*, and other federal district court decisions. Part III discusses the recent amendments to section 922(q) which provide findings linking the possession of guns to interstate commerce. These findings may cure the constitutional defects the Fifth Circuit found in section 922(q).[25] Part IV discusses the greater federalism concerns which *Lopez* implicates. This section also summarizes Tenth Amendment arguments made opposing section 922(q), and analyzes how the Supreme Court may be prepared to entertain such Tenth Amendment arguments in light of recent decisions. Part V, the conclusion, proposes that the Supreme Court uphold section 922(q) as constitutional,

20. *Id.* at 293.
21. *Id.*
22. *Id.* at 294.
23. *Id.*
24. *See infra* part I.B.
25. VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994, H.R. CONF. REP. NO. 711, 103d Cong., 2d Sess. at 342 (1994).

reverse *Lopez*, and maintain the status quo regarding legislative findings.[26]

I. Background

A. The Scope of the Commerce Power

The Constitution grants Congress the power to enact legislation only on specific enumerated subjects.[27] All subjects outside these enumerated powers are reserved for the states to regulate by the Tenth Amendment.[28] One of these enumerated powers, perhaps the most expansive, is the power to regulate interstate commerce.[29]

The Supreme Court has consistently upheld statutes under constitutional attack based on the commerce power. In the process, the Court has expanded the range of activities which affect interstate commerce. Today Congress has great freedom to regulate activities which do not appear to affect interstate commerce.

The first significant Supreme Court case involving the scope of the commerce power is *Gibbons v. Ogden*.[30] *Gibbons* involved a dispute over exclusive navigation rights in New York waters.[31] The plaintiff transported passengers in his steamboats between New York and New Jersey.[32] New York state granted plaintiff the exclusive rights to this shipping activity, excluding out-of-state shipping competitors from navigating the harbor. When the defendant, a New Jersey shipping competitor, traveled the same waters as the plaintiff, the plaintiff sought an injunction against the defendant.[33] The Supreme Court dismissed the plaintiff's action, holding that a state may not grant exclusive navigation rights which conflict with interstate com-

26. See GLENN HARLAN REYNOLDS, KIDS, GUNS, AND THE COMMERCE CLAUSE: IS THE COURT READY FOR CONSTITUTIONAL GOVERNMENT?, (Cato Institute Policy Policy Analysis No. 216, Oct. 10, 1994), for an argument that *United States v. Lopez* should be affirmed to enforce the original constitutional boundaries and thereby put a limit on special interest lobbying of the federal government. See James M. Maloney, Note, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 FORDHAM L. REV. 1795 (1994), for a comprehensive argument that *Lopez* should be affirmed by the Supreme Court.

27. U.S. CONST. art. I, § 8.

28. "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.

29. "Congress shall have the power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3.

30. 22 U.S. 1 (1824).

31. *Id.*

32. *Id.*

33. Gibbons v. Ogden, 19 U.S. 448, 448-49 (1821) (dismissed for want of jurisdiction because no final decree was pronounced in state court).

merce.[34] "America understands, and has uniformly understood, the word 'commerce' to comprehend navigation,"[35] wrote the Court. The Court noted that the Commerce Clause extends only to those activities which "affect the States generally; but not . . . those which are completely within a particular State."[36]

The great bulk of modern Commerce Clause cases occurred after the 1937 court-packing scare during President Roosevelt's administration. In order to preserve the Supreme Court's membership at nine, the Court began to allow Congress to regulate a much broader scope of activities under the Commerce Clause. For example, *United States v. Darby*[37] involved the constitutionality of the Fair Labor Standards Act.[38] The Fair Labor Standards Act prohibited the "shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act."[39] The issue before the Court was whether employment conditions, a purely intrastate subject, could be regulated by Congress because the lumber produced by Darby was eventually sold in interstate commerce.[40] The Court held that Congress had the power to regulate the labor conditions under the Commerce Clause because the activity had a substantial effect on interstate commerce.[41] The Court also held that although only a portion of the lumber would be sold outside the state, Congress could regulate this industry because this portion was inexorably commingled with lumber to be sold in-state.[42]

In *Wickard v. Filburn*,[43] the Supreme Court developed the substantial effect test, as well as the aggregate theory of interstate commerce. *Wickard* involved the Agricultural Adjustment Act of 1938[44] which regulated the amount of wheat a farmer could grow per acre.[45] The Act's goal was to decrease the production of wheat to increase demand and keep the price at a certain level.[46] The plaintiff grew

34. *Gibbons*, 22 U.S. at 1.
35. *Id.* at 190.
36. *Id.* at 195.
37. 312 U.S. 100 (1941).
38. *Id.* at 108.
39. United States v. Darby, 312 U.S. 100, 109 (1941).
40. *Gibbons*, 22 U.S. at 113.
41. *Id.* at 123.
42. *Id.* at 121.
43. 317 U.S. 111 (1942).
44. 7 U.S.C. §§ 1281-393 (1988).
45. "The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce." *Wickard*, 317 U.S. at 115.
46. *Id.*

more wheat than his allotted share,[47] and would have been penalized by the Act.[48] He sued the Secretary of Agriculture to enjoin the enforcement of the Act alleging that it was unconstitutional.[49] The plaintiff argued that the Act was beyond the scope of the commerce power because it was a "regulation of production and consumption of wheat."[50] These activities, "local in character," have only an "indirect" effect on interstate commerce, he argued.[51] The Supreme Court created a new "substantial effect" standard.[52] The Court held that although plaintiff's "own contribution to the demand for wheat [was] trivial," this alone was not enough to "remove him from the scope of federal regulation where . . . his contribution, taken together with that of many others similarly situated, [was] far from trivial."[53] Thus, Congress now had the power to regulate activities which individually did not substantially affect interstate commerce but did when taken in aggregate.

The Supreme Court granted congressional statutes even more deference in the 1960's with the development of the rational basis test. The rational basis test first appeared in *Heart of Atlanta Motel, Inc. v. United States.*[54] In *Heart of Atlanta,* the issue was whether section 201 of the Civil Rights Act of 1964[55] could be used to prevent the defendant's motel from turning away blacks on the basis of their race.[56] The appellate court affirmed an injunction restraining the Heart of Atlanta Motel from refusing to lodge blacks. The defendant motel-owner argued that the Act was unconstitutional and beyond the scope of the commerce power because turning away blacks did not affect interstate commerce.[57] The Supreme Court disagreed, acknowledging that Congress had voluminous testimony in the legislative history which linked

47. *Id.* at 114. The plaintiff was limited by the terms of the Act to harvest only 11.1 of his 23 acres. He sowed all 23 acres, and harvested an excess of 239 bushels of wheat. *Id.*

48. *Id.* at 114-15. The excess wheat "constituted farm marketing excess, subject to a penalty of 49 cents a bushel, or $117.11 in all." *Id.*

49. *Id.* at 113.

50. *Id.* at 119.

51. *Id.*

52. *Id.* at 125. "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.*

53. *Id.* at 127-28.

54. 379 U.S. 241 (1964).

55. The Civil Rights Act provides in part that "all persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, . . . and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(9) (1994).

56. *Heart of Atlanta Motel,* 379 U.S. at 249.

57. *Id.* at 243-44.

racial discrimination with interstate commerce.[58] The Court held that as long as Congress has a rational basis for finding that the regulated activity affects interstate commerce, the Court will not question the constitutional basis for the statute.[59]

The Supreme Court reiterated the rational basis test in *Katzenbach v. McClung.*[60] In *McClung,*[61] the defendant owned and operated a family restaurant which refused to serve black patrons in the dining area.[62] The Attorney General of Alabama sought to prevent this racially biased treatment by enforcing the Civil Rights Act of 1964 against the defendant's restaurant.[63] The defendant restaurant-owner won an injunction in the lower court, preventing the Attorney General of Alabama from enforcing the statute against him.[64] The lower court found the statute unconstitutional.[65] The Supreme Court reversed the injunction and upheld the statute as constitutional. The Court examined the legislative history to determine whether a rational basis existed. "Where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."[66] Again, the Court deferred to Congress regarding the constitutional basis for a statute, where Congress had a rational basis to make such a determination.

In *Perez v. United States,*[67] the Supreme Court broadened the commerce power even more. Perez was convicted of loan sharking under Title II of the Consumer Credit Protection Act.[68] He appealed his conviction on the grounds that the Act was unconstitutional and beyond the scope of the commerce power because his loan sharking activities were purely intrastate and had no effect on interstate commerce.[69] The Court rejected this argument, holding that all that was necessary to uphold the statute was a showing that the defendant's activities were in a class of activities within reach of federal power.[70]

58. *Id.* at 252.

59. *Id.* at 258-59. "The only question[ ] . . . [is] whether Congress had a rational basis for finding that racial discrimination by motels affected commerce." *Id.*

60. 379 U.S. 294 (1964).

61. *Id.*

62. *Id.* at 296. The restaurant offered a carry out service for blacks. *Id.*

63. *Id.*

64. *Id.* at 295.

65. *Id.*

66. *Id.* at 303-04.

67. 402 U.S. 146 (1971).

68. 18 U.S.C. §§ 891-96 (1988).

69. *Perez,* 402 U.S. at 146. Perez was convicted of loan sharking with a butcher, to whom he loaned money to help open his business. *Id.* No evidence of other out of state activity was produced. *Id.*

70. *Id.* at 154.

Justice Douglas said, "where the class of activities is regulated and that class is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances' of the class."[71] Thus, because loan sharking was in a class of activities which affected interstate commerce, defendant's particular activities were as well, even though they were conducted on a purely local scale.

The Supreme Court has given Congress great freedom to legislate under the Commerce Clause. However, it cannot yet be considered a "blank check." Whether Congress can legislate without making a preliminary finding linking the regulated activity with interstate commerce is still in doubt.

B. Legislative Findings of Constitutionality

Few Supreme Court cases have explicitly addressed whether Congress must demonstrate a nexus between the regulated activity and the power on which the statute is based. The cases that exist seem to offer a fairly clear rule: preliminary findings are not required to legislate. However, even though no such demonstration is required of Congress, the Court often relies on legislative findings to aid its constitutional analysis. This contradiction creates confusion as to what exactly Congress must do to legislate within the bounds of the Constitution. Should courts follow the words of the Supreme Court and not require findings? Or should they infer a rule from the Supreme Court's reliance on legislative findings?[72]

Archibald Cox examined the history of legislative findings to support congressional action. Although his work is almost 30 years old, his observations remain valuable. In his foreword to a review of the 1965 Supreme Court term,[73] Cox concluded that legislative findings were unnecessary to support the constitutionality of federal statutes.[74] Prior to the 1930s, Cox observed, Congress was not required to make findings because cases often upheld "legislation under the commerce clause . . . which apparently rested upon factual conclusions for which

71. *Id.* (emphasis omitted) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968).

72. Courts should articulate a rule explicitly to insure its precedential effect. But see John Wallace, Comment, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism and Politics in Casey,* 42 BUFF. L. REV. 187, 235 (1994) (citing Robert A. Sprecher, THE DEVELOPMENT OF THE DOCTRINE OF STARE DECISIS AND THE EXTENT TO WHICH IT SHOULD BE APPLIED, 31 A.B.A. J. 501, 502-03 (1945)) for an argument that the binding force of stare decisis does not come from the words used, nor reasons given by a judge for a particular decision, but from the principles necessary for the decision of the case.

73. Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

74. *Id.* at 105.

no legislative record could be cited."[75] Cox then summarized the increasing use of legislative findings by courts during the 1930s:

> In the 1930's, when experience had taught the importance of informing the judges about the social and economic conditions giving rise to legislation, it became the federal practice to present the evidence to congressional committees, to make a record in the committee reports and on the floor, and to embody the desired conclusions in statutory findings. Presentation of the case upon judicial review of the constitutionality of a statute thus assumed some of the appearance of judicial review of the record of an administrative hearing for the purpose of determining whether the agency's findings and order rest upon substantial evidence . . . . *The analogy, however, is only superficial, and the practice of relying upon the legislative record when it exists should not be taken to show that such a record is required.*[76]

Cox observed that although it has become frequent practice for courts to refer to the legislative record to determine the constitutionality of congressional action, "no case has ever held that a record is constitutionally required."[77]

Cox offered a rationale for the judiciary's deference toward Congress. According to Cox, the judiciary's deference

> rests upon appreciation of the fact that the fundamental basis for legislative action is the knowledge, experience, and judgment of the people's representatives, only a small part, or even none, of which may come from the hearings and reports of committees or debates upon the floor.[78]

The Supreme Court cases support Cox's interpretation to a large degree.

The Court's deference to Congress is demonstrated by the presumption of constitutionality accorded statutes.[79] This presumption was first articulated in *United States v. Carolene Products Co.*[80] In *Carolene Products,* the defendant challenged the Filled Milk Act[81] on the grounds that the Act was unconstitutional and beyond the scope of the commerce power.[82] The Supreme Court upheld the Act and

75. *Id. See, e.g.*, United States v. Ferger, 250 U.S. 199 (1919); Southern Ry. v. United States, 222 U.S. 20 (1911).

76. Cox, *supra* note 73, at 105 (emphasis added).

77. *Id.*

78. *Id.*

79. *See* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); United States v. Carolene Products Co., 304 U.S. 144, 152 (1938); United States v. Butler, 297 U.S. 1, 67 (1936) (dictum); Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580, 584 & n.1 (1935); Legal Tender Cases, 79 U.S. (12 Wall.) 457, 531 (1871).

80. 304 U.S. 144 (1938).

81. *Id. See also* ch. 262, 42 Stat. 1486 (1988) (current version at 21 U.S.C §§ 61-64 (1994)).

82. *Carolene Products,* 304 U.S. at 145-46.

defined the scope of the presumption of constitutionality. The Court held,

> Even in the absence of [legislative findings] the existence of facts supporting the legislative judgment is to be presumed . . . unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis.[83]

Thus, although Congress made extensive findings on how filled milk affected public health and interstate commerce, such findings were not required to uphold the constitutionality of the statute. The Court explicitly stated that findings were not required, although it relied on legislative findings to determine whether the activity had a relation to interstate commerce.[84]

Congress' responsibilities regarding legislative findings were elaborated on in *United States v. Darby*.[85] In sustaining the constitutionality of a statute, the *Darby* Court indicated that Congress was not required to find that the regulated activity had an effect on interstate commerce.[86] The Court noted that

> Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on [interstate] commerce . . . . It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect . . . . And sometimes Congress itself has said that a particular activity affects commerce.[87]

The Court then gave examples of constitutional statutes enacted under all three scenarios,[88] implying that all were acceptable and equally constitutional.

In *Woods v. Cloyd W. Miller Co.*,[89] the Court went a step further and held that Congress need not demonstrate that the regulated activity affects interstate commerce, nor indicate that it is invoking the commerce power. In the Court's words, "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."[90] Here the Court clearly demarcated the respective functions of the legislative and judicial branches. The legislature may legislate without giving a thought to the source of the constitutional power or how the regulated activity relates to that

83. *Id.* at 152.

84. *Id.* Again, the problem is whether courts should do as the Court says or does. *See supra* note 72.

85. 312 U.S. 100 (1941).

86. *Id.* at 118.

87. *Id.* at 120.

88. *Id.* at 120-21.

89. 333 U.S. 138 (1948).

90. *Id.* at 144.

power. The judiciary alone will undertake to determine the constitutional validity of the statute. Nonetheless, the *Woods* Court consulted the statute's legislative history in its analysis of the constitutional question.[91]

In *Katzenbach v. McClung*,[92] the Supreme Court reviewed the constitutionality of Title II of the Civil Rights Act.[93] The *McClung* Court reiterated its rule that Congress has no obligation to make legislative findings.[94] In the Court's words, "no formal findings were made, which of course are not necessary."[95] Again, the Court analyzed the legislative history of the Act to aid its determination of the constitutionality of the statute.[96]

In *Katzenbach v. Morgan*,[97] the Supreme Court applied the same deference toward Congress for a statute enacted under the Equal Protection Clause of the Fourteenth Amendment. In reviewing the constitutionality of section 4(e) of the Voting Rights Act of 1965,[98] the Court deferred to Congress judgment that the regulated activity fell within its power.[99] "[I]t is not for us to review the congressional resolution of these factors," the Court wrote, "It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."[100] As Archibald Cox noted, "The choice of words cannot have been casual. . . . Implicit in the reasoning is the proposition that the basis for the congressional determination need not appear in the legislative record."[101] The principle seems to apply to all statutes enacted by Congress, because the Court has applied it to statutes enacted under both the commerce power and the Equal Protection Clause of the Fourteenth Amendment. Although, as Cox laments, "[O]ne wishes that the point might have been treated more explicitly."[102]

The most recent case in which the Supreme Court addressed the issue of legislative findings of constitutionality was *Perez v. United States*.[103] In *Perez*, the Court reviewed the constitutionality of Title II of the Consumer Credit Protection Act.[104] Again, the Court deferred

91. *Id.*
92. 379 U.S. 294 (1964).
93. 42 U.S.C. § 2000a (1988).
94. *McClung*, 379 U.S. at 299.
95. *Id.*
96. *Id.* at 299-300.
97. 384 U.S. 641 (1966).
98. 42 U.S.C. § 1973b(e) (1964 ed., Supp. I).
99. *Morgan*, 384 U.S. at 653.
100. *Id.*
101. Cox, *supra* note 73 at 104.
102. *Id.*
103. 402 U.S. 146 (1971).
104. 18 U.S.C. §§ 891-96 (Supp. V 1964).

to legislative judgment in determining whether loan sharking affected interstate commerce.[105] Although the Court reviewed the legislative history of the Act, it explicitly stated that no such legislative history was required.[106] The Court noted, "We have mentioned in detail the economic, financial, and social setting of the problem as revealed to Congress. We do so not to infer that Congress need make particularized findings in order to legislate."[107] Once more, as in previous cases, the Supreme Court asserted the rule that Congress need not make findings, either explicitly or in the legislative history. Again, however, the Court used the legislative history to analyze the constitutionality of the statute.

C. Federalism Revived? Recent Tenth Amendment Jurisprudence of the Supreme Court

While the Framers of the Constitution likely did not envision the tremendous expansion the Commerce Clause would experience in the twentieth century, they did create a check on the federal government's power. The Tenth Amendment reserves power to the states to regulate any area not specifically reserved to the federal government.[108] In theory, the Tenth Amendment is an elegant division of power between the federal and state government. Before 1968, the Tenth Amendment was invoked, however, only sparingly by the Supreme Court. In the last twenty-five years, the Supreme Court has invoked the Tenth Amendment more frequently to preserve state sovereignty. There are signs that the Court is prepared to limit congressional power to invade areas of traditional state jurisdiction. In fact, *Lopez* may provide an opportunity for the Court to limit congressional use of the Commerce Clause and redefine the federalist balance. Such action would be unwise in light of the crime in our schools today, a problem the Gun-Free School Zones Act addresses.

Modern debate over the Tenth Amendment began with three cases involving the Fair Labor Standards Act. The issue in all three cases was whether the federal minimum wage standards, as set forth in the Fair Labor Standards Act, applied to the states.

In *Maryland v. Wirtz*,[109] the Court held that the minimum wage standards applied to state schools and hospitals. The Court explicitly gave greater weight to the commerce power over notions of state sov-

105. *Perez*, 402 U.S. at 156.

106. *Id.*

107. *Id.*

108. The Tenth Amendment provides: "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.

109. 392 U.S. 183 (1968).

ereignty.[110] The Court reasoned that the federal government

> may override countervailing state interests whether these be described as "governmental" or "proprietary" in character . . . . This Court will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens.[111]

Eight years later, *National League of Cities v. Usery*[112] expressly overruled *Wirtz* by a narrow 5-4 vote.[113] In *National League of Cities*, the Court claimed it "has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce."[114] The Court added that it is not within Congress' commerce power "to directly displace the states' freedom to structure integral operations in areas of traditional governmental functions"[115] or "to force directly upon the States [Congress'] choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."[116] The Court invoked the Tenth Amendment to protect states sovereign power to control their "traditional" or "integral" government functions.

The Court's new interest in protecting state sovereignty would last only nine years. In *Garcia v. San Antonio Metro Transit Authority*,[117] the Court again reversed its position on the applicability of the Fair Labor Standards Act to non-federal entities.[118] The issue in the case was whether the federal minimum wage standards applied to a municipally owned and operated mass transit system. The Court held that the standards did apply, expressly overruling *Usery* and reinstating *Wirtz*.[119] Again the margin was a narrow 5-4 vote, with Justice Blackmun casting the swing vote. Finding the *Usery* rule unworkable, the Court held that states must look to the national political process for protection from congressional regulation under the Commerce Clause.[120] In the Court's words, "state sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations

110. *Id.* at 195.
111. *Id.* at 198-99 (footnote omitted).
112. 426 U.S. 833 (1976).
113. *Id.* at 840.
114. *Id.* at 842.
115. *Id.* at 852.
116. *Id.* at 855.
117. 469 U.S. 528 (1985).
118. *Id.* at 556-57.
119. *Id.*
120. *Id.* at 554.

on federal power."[121] However, *Garcia* did leave open the possibility that states could be protected from legislation under the Commerce Clause if "possible failings" in the political process occurred.[122] Thus, after *Garcia*, the vitality of the Tenth Amendment was again uncertain. Indeed, according to the dissent, the *Garcia* majority held the "unprecedented view that Congress is free under the Commerce Clause to assume a State's traditional sovereign power, and to do so without judicial review of its action."[123]

The Court reaffirmed *Garcia* in *South Carolina v. Baker*,[124] holding that states are protected from legislation based on the Commerce Clause only by the national political process.[125] The Court altered the "possible failings" exception of *Garcia,* however. Where "extraordinary defects" occur in the national political process, courts will step in to protect the states.[126]

Gregory v. Ashcroft[127] marked renewed interest by the Court in the Tenth Amendment. The Court articulated the "plain statement rule," which provides that "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"[128] *Gregory* seems to invite the search for traditional government functions which *Garcia* explicitly disapproved. The four remaining justices of the *Garcia* majority strongly dissented.

The most recent case invoking the Tenth Amendment to protect states sovereignty is *New York v. United States*.[129] *New York* involved the constitutionality of the Low Level Radioactive Waste Act of 1985,[130] which was designed to solve the shortage of sites for disposal of radioactive waste.[131] The third provision of the Act, known as the "take title" provision, forced states to provide disposal facilities or take title to the waste.[132] The issue was whether the "take title" provision was within the commerce power, or whether it violated state sovereignty guaranteed by the Tenth Amendment.[133] In its analysis, the Court ignored its own recent precedent: "This case presents no occa-

121. *Id.* at 558.
122. *Id.* at 554.
123. *Id.* at 575.
124. 485 U.S. 505 (1988).
125. *Id.* at 512.
126. *Id.*
127. 501 U.S. 452 (1991).
128. *Id.* at 460-61 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (alteration in original)).
129. 112 S. Ct. 2408 (1992).
130. *Id.* at 2414.
131. *Id.*
132. *Id.* at 2416.
133. *Id.*

sion to apply or revisit the holdings of any of these cases [*Wirtz*, *National League of Cities*, or *Garcia*], as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties."[134] Instead, the Court invoked federalism principles to declare the "take title" provision of the statute unconstitutional:

> In this provision, Congress has not held out the threat of exercising its spending power or its commerce power; it has instead held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction. A choice between two unconstitutionally coercive regulatory techniques is no choice at all.[135]

In light of *New York* and *Ashcroft*, the Court's disinterest in *Garcia*, and the departure of Justice Blackmun, the Court may be prepared to expand its protection of the state sovereignty through the Tenth Amendment. *United States v. Lopez* may provide just such a vehicle. While *Lopez* hinges on the necessity of legislative findings, overtones of federalism pervade the opinion.

II. Cases Involving the Constitutionality of the Gun-Free School Zones Act

The first reported case to challenge the constitutionality of the Gun-Free School Zones Act was a Fifth Circuit case, *United States v. Lopez*.[136] *Lopez* struck down the statute as unconstitutional, sparking similar challenges to the statute in other jurisdictions.[137] Approximately six months later, in *United States v. Edwards*, the Ninth Circuit Court of Appeals upheld the statute as constitutional.[138] What follows is a summary of both cases, and a critique of their legal reasoning based on Supreme Court precedent. Also included is an examination of federal district court cases which have addressed the constitutionality of section 922(q). The issue of whether preliminary findings to support the exercise of a constitutional power are required has created a principled debate, dividing the federal courts almost equally. The Supreme Court decision next year will be eagerly anticipated by many.

A. *United States v. Lopez:* A Summary and Critique

On March 10, 1992, twelfth-grader Alfonso Lopez carried a concealed .38 caliber handgun to his high school.[139] Although the gun

134. New York v. United States, 112 S. Ct. 2408, 2420 (1992) (citations omitted).
135. *Id.* at 2428.
136. 2 F.3d 1342 (5th Cir. 1993).
137. *Id.* at 1367-68.
138. 13 F.3d 291 (9th Cir. 1993).
139. 2 F.3d at 1345.

was unloaded, Lopez carried five bullets with him.[140] He planned to give the gun to a classmate in exchange for forty dollars.[141] The gun was to be used in a gang war after school.[142] School officials received an anonymous tip, confronted Lopez, and retrieved the gun.[143]

Lopez was charged with violating section 922(q).[144] At his trial, Lopez moved to dismiss the indictment on the grounds that section 922(q) is unconstitutional because it "does not appear to have been enacted in furtherance of any of those enumerated powers" which the Constitution grants to Congress.[145] The district court denied the motion, holding that section 922(q) "is a constitutional exercise of Congress' well-defined power to regulate activities in and affecting commerce."[146] Lopez was found guilty and sentenced to six months imprisonment and two years of supervised release.[147]

On appeal to the Court of Appeals for the Fifth Circuit, Lopez again challenged the constitutionality of section 922(q).[148] The *Lopez* court reversed the conviction, holding section 922(q) unconstitutional.[149] To support its opinion, the court analogized to *United States v. Bass*,[150] other federal firearm statutes, and Supreme Court cases involving the necessity of legislative findings.

1. Analogy to United States v. Bass

The court first analogized the *Lopez* case to a similar Supreme Court case, *United States v. Bass*.[151] In *Bass*, the Supreme Court reviewed the constitutionality of section 1202(a)(1) of the Omnibus Crime Control and Safe Streets Act of 1968 (hereinafter "section 1202").[152] Section 1202 provides that a person convicted of a felony "who receives, possesses, or transports in commerce or affecting commerce . . . any firearm" shall be punished in accordance with the statute. The issue before the Court in *Bass* was whether the words "in interstate commerce" applied to all three of the prohibited activities, or only to "transports."[153] The Court chose the former interpretation,

140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* (quoting appellant).
146. *Id.* (quoting the lower court, Western District of Texas, docket number SA-92-CR-84-1).
147. *Id.*
148. *Id.*
149. *Id.*
150. 404 U.S. 336 (1971).
151. *Lopez*, 2 F.3d at 1347.
152. Act of June 19, 1968, 18 U.S.C. app. § 1202(a)(repealed 1986).
153. *Bass*, 404 U.S. at 338.

holding that "in interstate commerce" applied to all three prohibited activities.[154] The Court explained that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."[155] A contrary reading of section 1202 would make it a federal offense for a felon to merely possess a firearm, without requiring a showing of a connection to interstate commerce. This would "dramatically intrude[ ] upon traditional state criminal jurisdiction."[156] Thus, the Court resolved the ambiguity in the statute by requiring the interstate commerce nexus for all three activities.[157]

The *Lopez* court applied this principle to the Gun-Free School Zones Act.[158] The court implied that, because section 922(q) similarly prohibits possession of firearms in certain contexts, it must also "intrude[ ] upon traditional state criminal jurisdiction."[159] Therefore, the *Lopez* court found, section 922(q) is unconstitutional.[160]

The *Bass* court's reasoning is inapplicable to *Lopez* because *Bass* involved an issue of statutory interpretation, not a constitutional issue.[161] The *Bass* court invoked the rule of lenity,[162] which requires that where two competing interpretations of a statute exist, the interpretation most favorable to the defendant must be adopted.[163] In *Bass*, the rule of lenity dictated that an interstate nexus must be established separately for each activity of receiving, possessing, and transporting a firearm. *Bass* did not hold that an interstate nexus is required in all cases for all activities. In *Lopez,* the statute is not ambiguous. The issue is not how to interpret section 922(q), but whether it is beyond the bounds of the commerce power. *Bass* and *Lopez* address fundamentally different questions and deserve different treatment.

The *Bass* court's assertion that criminal law is a subject of traditional state jurisdiction is also questionable.[164] Congress has enacted firearm legislation extensively in this century. In fact, the *Lopez* opin-

154. *Id.* at 347.

155. *Id.* at 349.

156. *Id.* at 350.

157. *Id.* at 347.

158. 2 F.3d at 1364-68.

159. *Bass*, 404 U.S. at 350.

160. *Lopez*, 2 F.3d at 1347. The Court does not directly explain how the *Bass* rule is applicable to *Lopez*. It summarizes the *Bass* decision without applying it to the facts of *Lopez*. *See Lopez*, 2 F.3d at 1347.

161. *Bass*, 404 U.S. at 339.

162. *Id.* at 347.

163. *See id.* at 336, 347 (1971); Rewis v. United States, 401 U.S. 808, 812 (1971).

164. *Bass*, 404 U.S. at 336, 349.

ion documents this extensive history.[165] This legislation has generally been upheld as constitutional.[166] *Lopez* offers no other evidence to suggest that firearms legislation is exclusively within the jurisdiction of the states. Thus, it seems clear that federal legislation proscribing firearm possession does not invade the exclusive jurisdiction of the states. As a result, the *Bass* opinion provides virtually no meaningful support for *Lopez*.

2. *Most Federal Firearm Statutes Require an Interstate Nexus for Each Individual Case*

The *Lopez* court found section 922(q) unconstitutional because it does not require that a connection to interstate commerce be proved in each case.[167] Most federal firearms statutes require the prosecution to prove such a connection. In the court's words, "[W]ith the exception of a few relatively recent, special case provisions, federal laws proscribing firearm possession require the government to prove a connection to commerce, or other federalizing feature, in individual cases."[168]

The *Lopez* court attempted to distinguish section 922(q) from other federal firearms statutes which do not require a connection to interstate. The court began with firearm statutes which involve federally licensed dealers, manufacturers, or importers. The court explained that those who choose to hold a federal license, or to deal with federal licensees, may be required in reference to the activities licensed to conform to federal requirements.[169] These federal licensing requirements alleviate the need for a connection to interstate

165. *Lopez*, 2 F.3d at 1348-60. *See*, National Firearms Act of 1934, 26 U.S.C. §§ 5801-5872 (1988 & Supp.V 1993) (originally codified in 26 U.S.C. § 1132, 48 Stat. 1236 (1934); Federal Firearms Act of 1938, 15 U.S.C. §§ 901-940, 52 Stat. 1250 (repealed 1968); Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 901-907, 921-928, 82 Stat. 197 (1968) (current version at 18 U.S.C. §§ 921-930) (repealing Federal Firearms Act of 1938); Gun Control Act of 1968, 18 U.S.C. §§ 921-928, 82 Stat. 1213 (amending Omnibus Crime Control and Safe Streets Act of 1968); Firearms Owners' Protection Act, 18 U.S.C. §§ 922-929, 100 Stat. 449 (amending Omnibus Crime Control and Safe Streets Act of 1968); Undetectable Firearms Act of 1988, 102 Stat. 3816 (amending 18 U.S.C. § 922(p)); Anti-Drug Abuse Amendments Act of 1988, 102 Stat. 4184, 4361 (adding 18 U.S.C. §§ 924(f)-(g), 930); Crime Control Act of 1990, 104 Stat. 4789 (amending 18 U.S.C. §§ 922, 930); Gun-Free Zone Act of 1990, 104 Stat. 4844 (adding 18 U.S.C. § 922(q)).

166. One district court noted in United States v. Holland, 841 F.Supp. 143 (E.D. Pa. 1993), that courts have upheld two other subsections of Section 922 involving only intrastate activity. *See* United States v. King, 532 F.2d 505, 510 (5th Cir. 1976) (upholding Section 922(a), a statute which makes it illegal for an unlicensed dealer to sell firearms intrastate); United States v. Hale, 978 F.2d 1016, 1018 (8th Cir. 1993) (upholding Section 922(o), which regulates the possession of machine guns and has no interstate requirement).

167. *Lopez*, 2 F.3d at 1368.

168. *Id.* at 1347.

169. *Id.* at 1348 & n.9.

commerce.[170]

The *Lopez* court then attempted to distinguish section 922(q) from the seven "recent, special case provisions" in section 922 which do not contain an interstate commerce nexus requirement.[171] Federal firearm statutes which are not subject to the nexus requirement, but which nevertheless have been upheld as constitutional are 18 U.S.C. §§ 922(a)(6), (b)(1), (b)(2), (b)(4), and (m).[172]

The court also distinguished 18 U.S.C. § 922(d).[173] Section 922(d) prohibits the transfer of firearms to certain disqualified persons, such as felons and fugitives.[174] Section 922(d) does not contain an explicit nexus requirement, yet has not been held unconstitutional. The court distinguished section 922(d) from section 922(q), arguing that section 922(d) "deals with transfers, not mere possession."[175] This distinction was endorsed in *United States v. Nelson*,[176] where the Fifth Circuit noted that "acquisition of firearms is more closely related to interstate commerce than mere possession."[177]

Eighteen U.S.C. § 922(o) also lacks a nexus requirement.[178] Section 922(o) makes it unlawful for "any person to transfer or possess a machine gun."[179] The *Lopez* court distinguished section 922(o) even though the statute is closely analogous to section 922(q).[180] The court argued that because section 922(o) is "restricted to a narrow class of highly destructive, sophisticated weapons," it implicitly suggests a connection to interstate commerce which section 922(q) does not.[181] Therefore, no express tie to interstate commerce is required with section 922(o).[182]

The *Lopez* court also distinguished 18 U.S.C. § 922(p) as a "recent, special case provision."[183] Section 922(p) makes it unlawful for any person to "manufacture, import, ship, deliver, possess, transfer, or receive" any firearms not detectable "when subjected to inspection by the type of x-ray machines commonly used at airports."[184] Again, section 922(p) criminalizes mere possession of a firearm in absence of a

170. *Id.*
171. *Id.* at 1348.
172. *Id.*
173. *Lopez*, 2 F.3d at 1354.
174. 18 U.S.C. § 922 (1988); *see Lopez*, 2 F.3d at 1354.
175. *Lopez*, 2 F.3d at 1354.
176. 458 F.2d 556 (5th Cir. 1972).
177. *Id.* at 559.
178. *Lopez*, 2 F.3d at 1356.
179. 18 U.S.C. § 922(o)(1) (1988); *see Lopez*, 2 F.3d at 1356.
180. *Lopez*, 2 F.3d at 1356.
181. *Id.*
182. *Id.*
183. 18 U.S.C. § 922(p) (Supp.V 1993); *see Lopez*, 2 F.3d at 1356.
184. 18 U.S.C. § 922(p)(1)(B) (Supp.V 1993); *see Lopez*, 2 F.3d at 1356.

nexus requirement. The *Lopez* court distinguished section 922(p) from section 922(q) because language regarding airports in the statute "plainly reflects the act's interstate commerce related purpose and nexus."[185] Thus, the court implicitly found a commerce connection in section 922(p), unlike section 922(q).

The *Lopez* court's attempts to distinguish these special case provisions from section 922(q) are strained and unconvincing. Two examples highlight the court's failure to adequately distinguish these provisions from section 922(q).

In distinguishing section 922(q) from section 922(o), a statute which prohibits the possession of a machine gun, the court concludes that possession of a machine gun "is more suggestive of a nexus to or effect on interstate or foreign commerce than possession of any firearms whatever."[186] The court reasons that a machine gun, simply because it is a sophisticated weapon, is more likely to have a connection to interstate commerce than most firearms. Sophistication is no basis for a firearm's connection to interstate commerce. Sophisticated weapons can be used in used and manufactured in an intrastate just as easily as unsophisticated weapons.

The commerce connection the court infers for section 922(p) is also unconvincing. Section 922(p) prohibits possession of firearms which are undetectable in airport x-ray machines.[187] The *Lopez* court found that section 922(p) implies a connection with interstate commerce because firearms which are undetectable in airport x-ray machines are manufactured for the purpose of being transported by airplane.[188] Therefore, the court assumes that such weapons will be transported in interstate commerce in the future. Because transportation by airplane is often interstate, the court assumes interstate commerce must necessarily be implicated. This assumption is unwarranted. Such a firearm may never enter interstate commerce. For example, a defendant may possess a prohibited weapon within the same state as the place of manufacture. This weapon would never have entered interstate commerce. To infer a commerce nexus for weapons simply because they can't be detected by x-ray is extraordinary. Although *Lopez* contends that most recent federal firearms statutes require a connection with commerce in individual cases,[189] upon a close analysis the court fails to support this contention.[190]

185. *Lopez*, 2 F.3d at 1357.
186. *Id.* at 1356.
187. *Id.* at 1357.
188. *Id.*
189. *Id.* at 1347.
190. Congress' efforts to regulate drugs in school zones is analogous to section 922(q). *See* Schoolyard Drug Act, 21 U.S.C. § 860 (1993). Both regulate dangerous activities in a school zone, and neither specifically requires a nexus with interstate commerce. Yet, the

3. Support from Supreme Court Cases

Lopez then cites case law to support its holding.[191] However, the *Lopez* court fails to adequately address Supreme Court precedent on the Commerce Clause. This is demonstrated by its pronouncement of the rule that Congress must establish under what constitutional grant of power it is legislating,[192] and demonstrate[193] that the activity being regulated falls within that grant of power.[194] The *Lopez* court held that section 922(q)

> plows thoroughly new ground and represents a sharp break with the long standing pattern of federal firearms legislation . . . [because] neither the act itself nor its legislative history reflect any congressional determination that the possession denounced by section 922(q) is in any way related to interstate commerce or its regulation, or, indeed, that Congress was exercising its powers under the Commerce Clause.[195]

Finding support for this nexus requirement from Supreme Court cases, however, required subtle and creative interpretation on the part of the *Lopez* court.

Lopez observed that courts traditionally defer to congressional findings "in the legislation itself and findings that can be inferred from committee reports . . . [which provide] for some nexus to interstate commerce."[196] Courts will generally defer to such findings if they can construe any rational basis for them.[197] *Lopez* then lists recent cases which have upheld statutes under Commerce Clause attacks by virtue of congressional findings, as well as legislative history demonstrating a nexus to interstate commerce.[198] *Lopez* found such a requirement im-

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Schoolyard Drug Act has been upheld as constitutional. United States v. McDougherty, 920 F.2d 569, 572 (9th Cir. 1990).

191. *Id.* at 1360.

192. *Id.* at 1364. "Indeed, as in this case, there is no substantial indication that the commerce power was even invoked," implying that it is a necessity to indicate which power is invoked. *Id.* (footnote omitted).

193. This demonstration may come from an explicit legislative finding in the statute itself, or from the legislative history.

194. *Lopez*, 2 F.3d at 1367-68

> We hold that section § 922(q) . . . is invalid as beyond the power of Congress under the Commerce Clause. Whether with adequate congressional findings or legislative history, national legislation of similar scope could be sustained, we leave for another day. Here we merely hold that Congress has not done what is necessary to locate section 922(q) within the Commerce Clause.

Id. (footnote omitted).

195. *Id.* at 1366.

196. *Id.* at 1362.

197. Heart of Atlanta Motel v. United States, 379 U.S. 241, 252 (1964).

198. *Lopez*, 2 F.3d at 1362.

Cases which have upheld statutes under Commerce Clause attacks on the basis of congressional findings include EEOC v. Wyoming, 460 U.S. 226 (1983) (Age Discrimina-

plicit, although no language in any of these cases explicitly requires that a statute contain such a demonstration.

The Supreme Court cases simply do not support the conclusion that a congressional finding linking the regulated activity to interstate commerce is required. To begin with, *Lopez* cites no case in which this nexus requirement is explicitly stated. It merely infers this requirement from the Supreme Court's reliance on legislative findings. The *Lopez* court assumes that congressional findings are required for all statutes because the Supreme Court often uses congressional findings or legislative history to aid its review of the constitutionality of a particular statute. Until the Court makes such a requirement explicit, this is an unwarranted leap.

4. Distinguishing Adverse Supreme Court Language

Lopez recognized the existence of contrary Supreme Court case law.[199] Supreme Court cases have held that Congress need not make findings of any sort to legislate.[200] For instance, in *Perez v. United States*,[201] the Supreme Court noted that by referring to legislative findings it did not mean "to infer that Congress need make particularized findings in order to legislate."[202] *Lopez* ignored these words because "[n]o citation of authority is given, nor is the meaning of the . . . sentence entirely clear."[203] Furthermore, *Lopez* found support for its legislative finding requirement from the Supreme Court's de facto reliance on such findings.[204] Thus, *Lopez* ignored the Supreme Court's explicit language in *Perez*, and created a requirement that Congress make findings.

In *Woods v. Cloyd W. Miller Co.*,[205] the Supreme Court stated that "the constitutionality of action taken by Congress does not de-

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tion in Employment Act); FERC v. Mississippi, 456 U.S. 742 (1982) (Public Utility Regulatory Policies Act); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (Surface Mining Control and Reclamation Act); Perez v. United States, 402 U.S. 146 (1971) (Consumer Credit Protection Act).

Cases which have upheld statutes under Commerce Clause attacks on the basis of legislative history include Katzenbach v. McClung, 379 U.S. 294 (1964) (Civil Rights Act); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (Civil Rights Act).

199. *Lopez*, 2 F.3d at 1362 n.41.

200. *See supra* part I.B.

201. 402 U.S. 146 (1971).

202. *Id.* at 156.

203. *Lopez*, 2 F.3d at 1362 n.41.

204. *Id.* "[T]he opinion [*Perez*] as a whole shows extensive consideration of and reliance on not only the evidence before Congress and the legislative history, but also the formal Congressional findings, which the Court had already observed were quite adequate to the sustain the act." *Id.*

205. 333 U.S. 138 (1948).

pend on recitals of the power which it undertakes to exercise."[206] *Lopez* disregards this precedent and requires that Congress specify under what constitutional grant of power it is legislating for a statute to be constitutional. *Lopez* supports this by pointing out that immediately after this passage in *Woods*, the Supreme Court examined the legislative history in order to prove the constitutionality of the statute.[207] *Lopez* opts to find the actions of the Court more persuasive than its words, a view which does not comport with stare decisis.[208] Although *Lopez* makes an almost plausible argument with very adverse case law, ultimately the precedent is simply not in its favor.

While *Lopez* cites regularly to Supreme Court cases, and develops an extensive historical outline of federal firearms legislation, the opinion's conclusion is fundamentally flawed. The *Lopez* court misreads much of the relevant Supreme Court language. *Lopez* attempts to curb Congress' commerce power by requiring a legislative finding of constitutionality for statutes. While the motivation for such an attempt may have merit, the precedent simply does not support it. In addition, section 922(q) serves a vital function in restoring safety to our schools.[209]

The *Lopez* court's view of section 922(q) is not unanimous among the federal courts. Shortly after *Lopez*, section 922(q)'s constitutionality came before the Ninth Circuit Court of Appeals. The Ninth Circuit, *United States v. Edwards*,[210] followed Supreme Court precedent and upheld the statute as constitutional. The *Edwards* court's analysis of section 922(q)'s constitutionality is ultimately more persuasive.

B. *United States v. Edwards*

On the afternoon of December 11, 1991, Ray Harold Edwards was in the parking lot of Grant Union High School in Sacramento, California with four other males.[211] Four police officers approached them and made brief conversation.[212] The police officers asked to check the trunk of Edwards' car.[213] After Edwards consented, the police officers found a .22 caliber rifle and a sawed-off bolt-action rifle.[214] Edwards was charged with violating section 922(q).[215] Ed-

206. *Id.* at 144.
207. *Lopez*, 2 F.3d at 1364 n.45.
208. *See supra* note 72.
209. *See supra* text accompanying footnotes 4-9, and *see infra* text accompanying footnotes 311-315.
210. 13 F.3d 291 (9th Cir. 1993).
211. *Id.* at 292.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.* at 291.

wards was convicted, and appealed to the Ninth Circuit.[216]

The sole issue before the court was the constitutionality of section 922(q).[217] Edwards argued that section 922(q) is an unconstitutional exercise of congressional power under the Commerce Clause.[218] The court disagreed, affirming Edwards' conviction and upholding the constitutionality of section 922(q).[219]

First, the *Edwards* court distinguished *United States v. Bass.*[220] *Bass* involved an issue of statutory interpretation, while the issue in *Edwards* was whether the regulated activity must be explicitly linked to interstate commerce under section 922(q). Therefore, *Bass* does not apply to the constitutional analysis of section 922(q).

Edwards then cited *United States v. Evans*[221] for the proposition that "violence created through the possession of firearms adversely affects the national economy, and that consequently, it was reasonable for Congress to regulate the possession of firearms pursuant to the Commerce Clause."[222] *Evans* also held that it is "unnecessary for Congress to make express findings that a particular activity . . . affects interstate commerce."[223] Relying on precedent from its own circuit, *Edwards* found that section 922(q) was constitutional without an express finding that interstate commerce was affected.

Edwards recognized that its decision to uphold section 922(q) would create an intercircuit conflict with *Lopez.*[224] However, the *Edwards* court was unpersuaded by the view expressed in *Lopez* that "[c]ourts cannot properly perform their duty to determine if there is any rational basis for a congressional finding if neither the legislative history nor the statute itself reveals any such relevant finding."[225] *Edwards* found that *Lopez* ignored two Supreme Court cases which had stated exactly the opposite.[226] Both *Perez*[227] and *Katzenbach*[228] did not require a legislative showing of a nexus with interstate commerce. *Edwards* restated and followed the rule from these two cases: "Where . . . Congress in adopting earlier legislation has found that the activity sought to be regulated affects interstate commerce, additional hear-

216. *Id.* at 291.
217. *Id.* at 292.
218. *Id.*
219. *Id.* at 294.
220. 404 U.S. 336 (1971). *See supra* text part II.A.1.
221. 928 F.2d 858 (9th Cir. 1991).
222. *Edwards*, 13 F.3d at 293.
223. *Id.* at 293 (citing *Evans*, 928 F.2d at 862; *see also* Perez v. United States, 402 U.S. 146, 156 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964)).
224. 13 F.3d at 294.
225. *Id.* at 1363-64.
226. *Edwards*, 13 F.3d at 294.
227. Perez v. United States, 402 U.S. 146 (1971).
228. Katzenbach v. McClung, 379 U.S. 294 (1964).

ings and findings on this question are unnecessary."[229] In commenting on the failure of the *Lopez* court to follow the language of *Perez*, the *Edwards* court remarked that ignoring such precedent was "heretical."[230] Unlike *Lopez*, *Edwards* followed the precedent of the Supreme Court in holding that the courts need not locate congressional findings which link the regulated activity to interstate commerce, and thereby upheld the constitutionality of section 922(q).[231]

C. District Court Cases Involving the Constitutionality of Section 922(q)

Federal district courts besides the Ninth and Fifth Circuits have also reviewed the constitutionality of the Gun-Free Schools Zones Act.[232] Although these decisions are not binding on either the Ninth or the Fifth Circuits, they offer further insight into the unsettled law regarding preliminary findings by Congress. A majority of these federal district court cases uphold section 922(q)'s constitutionality, using arguments similar to those articulated in *Edwards*.

In *United States v. Holland*,[233] a Third Circuit district court upheld section 922(q).[234] *Holland* cited *Perez v. United States*[235] for the proposition that Congress needs to make "specific findings of fact to support its conclusion that a class of activity affects interstate commerce."[236] In this respect, the *Holland* court misreads *Perez* even more erroneously than the *Lopez* court did. *Perez* simply does not require Congress to make preliminary findings.[237] Nonetheless, *Holland* upheld section 922(q) by finding that the requisite legislative history supported the statute.[238] Because the 1968 Omnibus Crime

229. *Edwards*, 13 F.3d at 295.

230. *Id.* 295 n.4 (9th Cir. 1993). "The Fifth Circuit's suggestion that an inferior federal court is not bound by a ruling of the Supreme Court that is not supported by citation to prior authority is baffling if not heretical. Because the Supreme Court is the highest court in the land, any new principle of law it proclaims in interpreting the constitutionality of a statute will of necessity be unsupported by any prior authority. Whether or not it is supported by citation to relevant precedent, an opinion of our Supreme Court becomes part of the law of the United States which our oaths of office compel us to apply." *Id.*

231. *Id.* at 295-96.

232. See, e.g., United States v. Diego Ornelas, 841 F. Supp. 1087 (D. Colo. 1994); United States v. Holland, 841 F. Supp. 143 (E.D. Pa. 1993); United States v. Morrow, 834 F. Supp. 364 (N.D. Ala. 1993).

233. 841 F. Supp. 143 (E.D. Pa. 1993).

234. *Id.* at 145.

235. 402 U.S. 146 (1971).

236. *Holland*, 841 F. Supp. at 144 (quoting *Perez*, 402 U.S. at 156).

237. As the *Edwards* court noted, "there is no lack of clarity in the Supreme Court's holding that congressional findings are unnecessary in determining whether a reasonable Congress would conclude that an activity affects interstate commerce." United States v. Edwards, 13 F.3d 291, 295 (9th Cir. 1993).

238. *Id.* at 144.

Control and Safe Streets Act contained legislative history which linked the possession of firearms with interstate commerce, and the Comprehensive Crime Control Act of 1990 similarly regulated firearms, *Holland* concluded that "[t]his legislative history is evidence that Congress found that the regulated class of firearms had a substantial effect on interstate commerce."[239] *Holland* came to the correct result by applying the wrong rule. Neither legislative history, nor findings are required by Congress in order to legislate.

In *United States v. Diego Ornelas,*[240] a Tenth Circuit district court upheld section 922(q). *Diego Ornelas* interpreted *Perez* and other Supreme Court cases similarly to *Edwards*, finding that no requirement exists for Congress to make particularized findings regarding how a given activity relates to interstate commerce.[241] *Diego Ornelas* observed that "[t]he only function of the courts . . . is to determine whether the activity regulated is within the reach of the federal power."[242] In doing so, courts *may* consider earlier legislation regulating activity within the same class of activities.[243] Since the original section 922 enacted in 1968 found firearms to be linked to interstate commerce, *Diego Ornelas* held that section 922(q) falls within the reach of federal power.[244] The *Diego Ornelas* court's opinion is both reasonable and supported by precedent. Courts may, but are not required to consider legislative history when reviewing the constitutionality of statues.

Further, *Diego Ornelas* observed that legislation based on the commerce power is rarely aimed at the regulation of commerce *per se.* Therefore, requiring legislative findings merely creates an unnecessary procedural task by mandating that Congress establish how an activity relates to interstate commerce. "Congress simply would make the requisite findings, which would have to be upheld 'if there is any rational basis' for them, and reenact the provision."[245] The accuracy of these findings would only be called into question on the rare occasion that a court could find no rational basis for them. The argument is persuasive. It is doubtful that requiring such findings would motivate Congress to conduct any serious constitutional analysis. The likely result would be that Congress would include findings composed of boil-

239. *Id.* at 144-45 (footnote omitted).

240. 841 F. Supp. 1087 (D. Colo. 1994).

241. *Id.* at 1090.

242. *Id.* at 1090-91 (citations omitted).

243. *Id.* at 1091.

244. *Id.* at 1091-92.

245. *Id.* at 1092-93 n.10. In fact, this is exactly what Congress did when it passed amendments to 922(q) in the Crime Bill. Violent Crime Control and Law Enforcement Act of 1994, H.R. CONF. REP. No. 711, 103d Cong., 2d Sess. pg. 342 (1994). *See infra* part III.

erplate language in a mechanical fashion—hardly an improvement of the current constitutional scheme.

The *Diego Ornelas* court came to its conclusion reluctantly. The court was disturbed by the increasing scope of the Commerce Clause, and the federalization of crimes traditionally regulated by the States. "The current race to federalize state crimes epitomizes the very tendency most feared by those who wrote and ratified the Constitution: a strong central government relegating to itself all power."[246] Judge Carrigan, writing for the *Diego Ornelas* court, made his concerns explicit when he concluded, "Were I not bound by precedents of the Supreme Court and the Tenth Circuit, I would hold [section] 922(q) unconstitutional."[247] Judge Carrigan's approach to the constitutionality of section 922(q) is admirable for its integrity. While he expresses his disfavor of current Commerce Clause jurisprudence, he nevertheless feels compelled to follow such precedent. The *Lopez* opinion lacks this intellectual honesty.

In *United States v. Morrow,*[248] these same concerns about the scope of the Commerce Clause led the Eleventh Circuit District Court to find section 922(q) unconstitutional. *Morrow* used *Lopez* as persuasive authority for its decision:

> This court joins the Fifth Circuit in expecting Congress at least to share with the public, and with the overworked federal courts upon which Congress thrusts the enforcement of an accelerating volume of federal crime fighting statutes, some articulated, rational, constitutional basis for the federal government's assumption of jurisdiction over the perceived problem.[249]

While the *Morrow* court does not explicitly require legislative findings, it appears to encourage them. *Morrow* joins *Lopez* in attempting to make Congress articulate a constitutional basis for its legislation. While there may be some truth to the *Morrow* Court's observation that the increase in federal criminal statutes has overburdened federal courts,[250] requiring congressional findings will not alleviate this problem. Any solutions to problems concerning the federalization of crime do not lie in declaring section 922(q) unconstitutional for lack of findings.

In January of 1994, two federal district courts for the District of Kansas addressed the issue of section 922(q)'s constitutionality. The first case was *United States v. Trigg.*[251] In *Trigg,* the court concluded

246. *Diego Ornelas,* 841 F.Supp. at 1093 n.11.

247. *Id.*

248. 834 F. Supp. 364 (N.D. Ala. 1993).

249. *Id.* at 365.

250. *See infra* text accompanying notes 308-310 for O'Connor's recent comments on the federalization of criminal law.

251. 842 F. Supp. 450 (D. Kan. 1994).

that section 922(q) was an unconstitutional exercise of Congress' commerce power.[252] After briefly summarizing *Lopez* and *Edwards*, the court found that "the views articulated by the Fifth Circuit [were] more faithful to the values of federalism embodied in our Constitution.[253] The court held that, although "[t]here is no place for weapons—particularly firearms—in and around schools. . . . , Congress must legislate in the area of firearms within the constraints imposed by the Commerce Clause."[254] With these general allusions to congressional violation of federalism principles, the *Trigg* court held section 922(q) unconstitutional.

Ironically, and perhaps indicating the extent to which federal courts are split on this issue, another district court in Kansas reached the opposite conclusion only seven days later. In *United States v. Glover*,[255] the court upheld section 922(q) as constitutional. After an extensive analysis of both *Lopez* and *Edwards*, as well as many of the district court cases cited above, the court held that although *Perez* "is open to more than one interpretation," formal findings are not necessary in order for Congress to legislate.[256]

Tenth Circuit precedent also supported the *Glover* opinion. The Tenth Circuit held in *Morgan v. Secretary of Housing and Urban Development*[257] that "the absence of formal findings concerning the effect on interstate commerce . . . does not prevent Congress from regulating under the Commerce Clause."[258] The *Glover* court was also motivated by the dire need to decrease violence in our schools. In his opinion, Chief Judge Kelly asked whether legislative findings are really more important than saving the lives of the nation's school children.

> In my view, given the situation as it exists in our present day society, the time has come for the full weight of the United States to be brought to bear in the area with which we are dealing. It should have taken no hearing in 1990 for Congress to recognize the use of weapons, particularly in concert with drug activities and gang-related activities, seems to pervade our entire society. Every city has been impacted. The senseless violence resulting from the use of these weapons—random shootings, drive-by shootings—is commonplace. Regrettably, our young folks today have taken up these practices. It would appear that possession of a gun is a badge of honor. More importantly, is not the school ground a most important vestige, the

252. *Id.* at 453.
253. *Id.*
254. *Id.*
255. 842 F. Supp. 1327 (D. Kan. 1994).
256. *Id.* at 1336.
257. 985 F.2d 1451 (10th Cir. 1993) (citations omitted).
258. *Id.* at 1455.

> one place where children are entitled to a safe and secure harbor free of fear and violence? Are not these children the nation's future? Does Congress really need a hearing or further findings to recognize the importance of it all? I think not.[259]

The issue of section 922(q)'s constitutionality has invoked a variety of opinions on the necessity of legislative findings, violence in America, and our constitutional framework. The case law from the lower courts is sharply divided. The Supreme Court faces another difficulty in deciding *Lopez*, however. Congress has added an amendment to section 922(q).

III. Recent Amendment to Section 922(q): Are Retroactive Findings Enough to Save the Statute?

In the fall of 1993, perhaps in response to the *Lopez* decision, an amendment to the Gun-Free School Zones Act was introduced in both the House of Representatives and the Senate.[260] This amendment contains explicit findings which link the possession of guns within a school zone to interstate commerce.[261] Congress passed this

259. *Glover*, 842 F. Supp. at 1336-37.

260. *Id.* at 1327 (citing S. 1607, 103d Cong., 1st Sess. (1993); H.R. 3355, 103d Cong., 1st Sess. (1993)).

261. The amendment reads as follows:

> Sec. 2972. Gun-Free School Zones. (a) Amendment of Title 18, United States Code—Section 922(q) of Title 18, United States Code, is amended—
>
> (1) by redesignating paragraphs (1), (2), and (3) as paragraphs (2), (3), and (4), respectively; and
>
> (2) by inserting after (q) the following new paragraph:
>
> (1) the Congress finds and declares that—
>
> (A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;
>
> (B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;
>
> (C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Judiciary Committee of the House of Representatives and Judiciary Committee of the Senate;
>
> (D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;
>
> (E) while criminals freely move from state to state, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;
>
> (F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;
>
> (G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;
>
> (H) states, localities, and school systems find it almost impossible to handle gun-related crime by themselves; even states, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find

amendment as part of the Crime Bill in August, 1994.[262] Seemingly, the constitutional defects which the *Lopez* court found in section 922(q) are cured by this amendment. It is unclear, however, how the Supreme Court will address these amendments.

The amendments to section 922(q) introduce complicated mootness issues to the *Lopez* case. By providing findings which link the possession of guns to interstate commerce, Congress seems to have alleviated the need for a Supreme Court decision on the matter. However, the confused state of the Supreme Court's recent mootness jurisprudence leaves the exact procedural posture of *Lopez* in doubt.[263]

As an initial matter, the Court may address the newly amended version of section 922(q). In *Fusari v. Steinberg*,[264] the Supreme Court granted certiorari to review the constitutionality of the unemployment benefit hearing procedures in Connecticut. After the Court granted certiorari, but prior to the issuance of its decision, the Connecticut legislature amended the statute in question to eliminate any constitutional defects.[265] The Court noted that although the amendments "may alter significantly the character of the system . . . [t]his Court must review the District Court's judgment in light of presently existing Connecticut law, not the law in effect at the time that judgment was rendered."[266] This rule is supported by a long line of cases.[267] The more difficult issue is whether the Supreme Court will address the

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their efforts unavailing due in part to the failure or inability of other states or localities to take strong measures; and

(I) Congress has power, under the interstate Commerce Clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the nation's schools by enactment of this subsection.

Violent Crime Control and Law Enforcement Act of 1994, H.R. REP. 7 11, 103d Cong., 2d Sess. 342 (1994).

262. *Id.*

263. A case becomes moot when the Court's jurisdiction is terminated by a change in the circumstances of the controversy. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE (6th ed. 1986). *See also* A. Greenbaum, *Mootness on Appeal in Federal Courts: A Reexamination of the Consequences of Appellate Disposition*, 17 U.C. DAVIS L. REV. 7 (1983).

264. 419 U.S. 379 (1975).

265. *Id.* at 385.

266. *Id.* at 386-87.

267. *See, e.g.*, Diffenderfer v. Central Baptist Church, 404 U.S. 412, 414 (1972)("We must review the judgment of the District Court in light of Florida law as it now stands, not as it stood when the judgment below was entered."); Hall v. Beals, 396 U.S. 45, 48 (1969) ("We review the judgment below in light of the Colorado statute as it now stands, not as it once did."); Thorpe v. Houston Auth., 393 U.S. 268, 281-82 (1969) ("The general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision."); United States v. Alabama, 362 U.S. 602, 604 (1960) ("Under familiar principles, the case must be decided on the basis of law now controlling."); Hines v. Davidowitz, 312 U.S. 52, 60 (1941).

amended version of section 922(q), whether it will dismiss certiorari as improvidently granted, or whether it will remand the case to the District Court for further proceedings in light of the statutory change.

In *Northeastern Florida Contractors v. Jacksonville*,[268] the most recent case involving an intervening statutory change after the grant of certiorari, the Court reviewed the amended version of the statute. In *Northeastern Florida Contractors*, the plaintiff challenged the constitutionality of a city ordinance which required that ten percent of city contracts be set aside for "Minority Business Enterprises."[269] After the Supreme Court granted certiorari the city repealed the ordinance, replacing it with a new ordinance which reduced the number of contracts to be set aside.[270] The city argued that the case had become moot due to intervening changes in the ordinance. The Court, however, invoked the "voluntary cessation" doctrine, and held that the case was not moot. The Court applied the "'well settled' rule that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'"[271] Under this analysis, the Supreme Court is free to address the newly amended version of section 922(q) in *Lopez*.

The Supreme Court also justified its holding in *Northeastern Florida Contractors* by observing that the statutory changes were not significant. In the Court's opinion, the new ordinance was not "sufficiently altered so as to present a substantially different controversy than the one the District Court originally decided."[272] Because the statute was essentially the same, the Court could address the amended version. Under this analysis, the Court would also be able to review the newly amended version of section 922(q). The amendments to section 922(q) only add findings to the preamble of the statute.[273] Therefore, the Court may find that the changes are minor and do not abate the pending controversy. As a result, the Court may choose to address the newly amended statute directly.

The dissenters in *Northeastern Florida Contractors* felt that the intervening statutory changes made the case moot. "It seems clear," they wrote, "that when the challenged law is revised so as plainly to cure the alleged defect . . . there is no live controversy for the Court to decide."[274] The dissenters cited *Diffenderfer v. Central Baptist*

268. 113 S. Ct. 2297 (1993).

269. *Id.* at 2299.

270. *Id.* at 2300.

271. *Id.* at 2301 (quoting City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982)).

272. *Id.* at 2301 n.3.

273. *See supra* note 261.

274. *Id.* at 2305.

Church[275] in support of this proposition. *Diffenderfer* involved a Florida statute that exempted church property from taxation, even if it was used for primarily commercial purposes.[276] The plaintiff challenged the statute asserting that it violated the First Amendment's Establishment and Free Exercise Clauses.[277] While the case was pending before the Supreme Court, the statute was repealed and replaced with a new statute that only exempted church property used predominantly for religious purposes.[278] The Court held that the case was moot, vacated the judgment of the district court, and remanded the case to the district court with leave to the appellants to amend their pleadings.[279] *Diffenderfer* would seem to clearly support the *Northeastern Florida Contractors* dissent's view of the mootness issue. *Diffenderfer* is also supported by a long line of cases before it.[280] If the Supreme Court should choose to disregard *Northeastern Florida Contractors* and resume its previous line of mootness cases, it may vacate the judgment of the Fifth Circuit Court of Appeals and remand to the district court with leave to the defendant to amend his pleading to challenge the newly amended statute.[281]

Although the mootness principles enunciated in *Northeastern Florida Contractors* and *Diffenderfer* seem generally applicable, neither of those cases are factually analogous to *Lopez* since neither involve a constitutional challenge to a federal criminal statute. *United States Department of the Treasury v. Galioto*[282] involves similar facts. In *Galioto*, the plaintiff challenged the constitutionality of a federal firearms statute.[283] Eighteen U.S.C. § 922(d) prohibited firearm sales to persons who had been committed to a mental hospital.[284] The plaintiff argued that section 922(d) violated the Equal Protection Clause.[285] Prior to the Supreme Court's decision, Congress redrafted

275. 404 U.S. 412 (1972).
276. *Id.*
277. *Id.*
278. *Id.* at 414.
279. *Id.* at 415.
280. Fusari v. Steinberg, 419 U.S. 379, 380 (1975) (vacating decision of the district court and remanding for reconsideration in light of the intervening changes in Connecticut law); Sanks v. Georgia, 401 U.S. 144, 153 (1971) (dismissing appeal and remanding to the Georgia Supreme Court in light of statutory changes); Thorpe v. Houston Auth., 393 U.S. 268, 281-82 (1969) (reversing and remanding in light of the intervening changes in HUD housing authority guidelines); United States v. Alabama, 362 U.S. 602, 604 (1960) (vacating judgments of the court of appeals and the district court, and remanding case in light of newly enacted Civil Rights Act).
281. It is not entirely clear how mootness principles in civil cases pertain to a criminal case like *Lopez*.
282. 477 U.S. 556 (1986).
283. *Id.* at 558.
284. *Id.* at 557.
285. *Id.* at 558-59.

the statute, allowing former mental patients to apply to the Secretary of the Treasury for permission to buy a firearm. The Supreme Court noted, "This enactment significantly alters the posture of this case."[286] Because the equal protection issues had become moot, the Court vacated and remanded the judgment of the district court.[287] Once again, the Court remanded a changed statute to the district court for reconsideration.

Seemingly, *Galioto* provides guidance for the Supreme Court in the *Lopez* decision. However, *Lopez* differs from Galioto. *Lopez* involves a criminal acquittal, whereas *Galioto* involves only a challenge to a statute preventing former mental patients from buying firearms. In *Galioto,* the case was remanded because remaining issues were best addressed by the district court. *Lopez* does not have any factual issues left to address. The only new considerations are the findings which were added by the amendment. In addition, there may be an ex post facto principle which bars the district court from reinstituting the same proceeding against the defendant with the newly amended version of the statute.

How the Supreme Court will view *Lopez* after the amendments to section 922(q) is unclear. The Court will probably follow *Diffenderfer* and vacate the judgments of the court of appeals and the district court, remanding for proceedings in light of the newly amended statute. In essence, this would mean reinstating the initial trial and relitigating the issue of section 922(q)'s constitutionality. However, the Court may choose to follow *Northeastern Florida Contractors* and review the newly amended version of section 922(q) itself. Of course, the Court would first have to find that the amendments did not significantly alter the statute. As a practical matter, the Supreme Court may pursue a number of options and will decide the *Lopez* case if it finds it compelling to do so. Ultimately, the broader issues of the scope of the Commerce Clause,[288] the Tenth Amendment, and the boundaries of

286. *Id.* at 559.

287. *Id.* at 560.

288. The Supreme Court may choose to address whether section 922(q) is a constitutional exercise of the Commerce Clause as a substantive matter, beyond the legitimacy of the Fifth Circuit's findings requirement. This is an issue which *Lopez* did not reach. Section 922(q) should withstand this form of constitutional review as well. The Supreme Court should uphold section 922(q) if it can perceive any rational basis by which the possession of a firearm within a school zone affects interstate commerce. Heart of Atlanta Motel v. United States, 379 U.S. 241, 258-59 (1964); Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964). Possession of firearms within a school zone also substantially affects interstate commerce under a number of arguments. Wickard v. Filburn, 317 U.S. 111, 124 (1942). First, violent schools detract from the quality of education, which reduces the competency of American students and damages our competitiveness internationally. Brief for the United States Attorney General at 22, United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993) (No. 93-1260). Second, because drug free school zones have been upheld as constitu-

our federal system may inspire the Court to issue its own opinion rather than remand the case for further proceedings.[289]

IV. Tenth Amendment and Federalism Implications of Section 922(q)

While the cases analyzing the constitutionality of section 922(q) focus on the narrow issue of whether legislative findings are required, broader federalism concerns under the Tenth Amendment lie at the heart of the issue. Commerce Clause and Tenth Amendment analyses are really opposite sides of the same coin.[290] An issue involving the scope of the Commerce Clause is simultaneously an issue of state sovereignty under the Tenth Amendment. "In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question . . . as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment."[291] Thus, a handful of courts have analyzed section 922(q)'s constitutionality by framing their arguments in terms of whether Congress had invaded an area of traditional state sovereignty under the Tenth Amendment.

In *Lopez*, the court noted that it drew support for its conclusion concerning the importance of congressional findings from "recent holdings that when Congress wishes to stretch its commerce power so far as to intrude upon state prerogatives, it must express its intent to do so in a perfectly clear fashion."[292] The *Lopez* court began with the premise that both the regulation of schools and firearms have been areas traditionally left to the states.[293] This proposition is debatable. The *Lopez* court itself details the extensive history of gun control measures that Congress has undertaken during this century.[294] Such a history hardly supports the theory that firearm statutes are traditionally within the exclusive jurisdiction of the states.[295]

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tional, so should gun-free school zones. United States v. Holland, 841 F. Supp. 143, 144 (E.D. Pa. 1993). Third, firearm violence is a national health problem. Brief for National School Safety Center, United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993) (No. 93-1260) (citing M. Rosenberg et al., *Let's Be Clear: Violence Is A Public Health Problem,* 267 JAMA 3071 (1992)).

289. *See infra* part IV.

290. The Tenth Amendment provides, "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.

291. *New York,* 112 S. Ct. at 2419.

292. United States v. Lopez, 2 F.3d 1342, 1365 (5th Cir. 1993).

293. *Id.* at 1347.

294. *Id.*

295. *See supra* text accompanying note 165.

The court in *United States v. Diego Ornelas*[296] also invoked Tenth Amendment arguments, although it ultimately held that section 922(q) was a constitutional exercise of the commerce power. Although the court felt bound by Supreme Court precedent to uphold the statute, it expressed its concern with the federalization of criminal law:

> [I]n its haste to define as federal crimes conduct traditionally subject only to state or local regulation and prosecution, Congress is stretching the commerce power far beyond its intended scope, and thus emasculating the Tenth Amendment's clear intent to reserve regulation of conduct that does not *affect* interstate commerce to the states and the people.
>
> . . . .
>
> . . . If the Tenth Amendment retains any vitality whatever in the area of criminal law, that remnant is fast being eroded.[297]

The *Diego Ornelas* court's primary concern with the federalization of criminal law is that often state and federal laws will overlap.[298] This creates the unfair result of disparate punishments for virtually identical crimes depending on whether the criminal defendant is punished under state or federal law. Federal prosecutors can, at their discretion, "choose either to prosecute under a harsh federal statute or leave the matter to state prosecution under a comparatively lenient statute."[299] The *Diego Ornelas* court remains unconvinced by the rationale of *Garcia v. San Antonio Metropolitan Transit Authority*.[300] While states should theoretically be able to rely on the national political process to prevent Congress from invading state sovereignty, in reality they cannot because "irresistible political pressures to be perceived as 'tough on crime' are driving Congress to federalize crimes such as that here charged, in circumstances where clear-minded, objective analysis can discern no meaningful effect on interstate commerce in the sense intended by the Commerce Clause."[301] Thus, while the *Diego Ornelas* court felt constrained by precedent to uphold section 922(q) as constitutional, it presented strong Tenth Amendment and pragmatic arguments to overturn the statute.[302]

United States v. Morrow[303] also invoked arguments based on the

296. 841 F. Supp. 1087, 1090 (D.Colo. 1994).

297. *Id.* at 1093 n.11 (emphasis added).

298. In fact, sixteen states have enacted their own versions of the Gun-Free School Zones Act. This may be due in part to their concern that section 922(q) will be struck down as unconstitutional. Greg Lucas, *School Gun-Free Zone OKd*, S.F. CHRON., Sept. 30, 1994, at A1.

299. *Diego Ornelas*, 841 F. Supp. at 1093 n.11.

300. 469 U.S. 528 (1985).

301. 841 F. Supp. at 1093.

302. *Id.*

303. 834 F. Supp. 364 (N.D. Ala. 1993).

Tenth Amendment to find section 922(q) unconstitutional. The *Morrow* court chastised Congress for its limitless use of the Commerce Clause in legislation. For instance, the court noted that

> Congress expects courts invariably to presume that Congress intends to hang any and all new federal legislation which purports to control activity within the several states on the so-called Commerce Clause, without Congress having to say so. After all, has not everyone been conditioned to believe that there is nothing which moves or has ever moved which does not support an invocation of the Commerce Clause as the means for conferring federal jurisdiction and control over the activity and/or problem that Congress wishes to govern and/or solve[?][304]

The *Morrow* court continued:

> Although the Congress has systematically whittled away at the old idea of the superiority inherent in the local solution of problems, the principle of federalism still has enough vitality to demand an explanation from Congress when Congress finds that the states' various means of handling a particular societal problem are so ineffectual as to be moribund and in need of replacement by an overarching new federal remedy.[305]

Bitterly protesting the erosion of the traditional federalism balance, *Morrow* held section 922(q) unconstitutional.

The *Morrow* court overstates the point. Section 922(q) does not "replace" state criminal law, it merely supplements it. Section 922(q)(3) provides explicitly that "[n]othing in this subsection shall be construed as preempting or preventing a state or local government from enacting a statute establishing gun free school zones as provided in this subsection."[306] State and local authorities are thereby free to prosecute under their respective laws.

As discussed, the Supreme Court's recent Tenth Amendment jurisprudence has been turbulent.[307] The Court may be prepared to address Tenth Amendment considerations in section 922(q). Comments made earlier this year by Justice O'Connor indicate a continued interest in exploring issues of federalism that began in her opinion in *New York v. United States*.[308] In an address to the Ninth Circuit Court of Appeals conference, Justice O'Connor attacked the Crime Bill as part of a dangerous trend to federalize criminal law. "Congress seems to be moving clearly in the direction of recognizing national problems and deciding that the way to deal with them is to federalize the issues

304. *Id.* at 365.

305. *Id.*

306. *See* 18 U.S.C. § 922(q)(3).

307. *See supra* text accompanying footnotes 108-135.

308. 112 S. Ct. 2408 (1992).

and bring them into federal courts."[309] She went on to explain that this trend could have a "drastic effect on the federal bench" since criminal cases make up roughly a third of court caseloads.[310] If the Court chooses to do so, the *Lopez* opinion may provide a vehicle for addressing the federalism balance.

The Tenth Amendment arguments discussed above are persuasive in theory. However, viewed in the context of the *Lopez* opinion, they are considerably less persuasive. *Lopez* focuses on the narrow issue of whether Congress must make preliminary findings in order to legislate. Even if the *Lopez* findings requirement is upheld by the Supreme Court, this requirement will not alleviate Tenth Amendment concerns. Because Congress typically does not regulate commerce when it invokes the Commerce Clause, requiring Congress to make a legislative finding amounts to little more than a procedural technicality. Congress need only include boilerplate language at the beginning of the statute which alleges that the regulated activity affects interstate commerce. Section 922(q) would presumably be constitutional, for instance, if one sentence was included somewhere in the legislative history saying that possession of firearms affects interstate commerce because fewer tourists will travel in that state as a result of the increased violence. Congress need not actually possess a sincere belief that the activity affects interstate commerce, nor provide any evidence that it does. Findings alone will not cure infringements on state sovereignty. If the Supreme Court wishes to address federalism, it should change the substantive Tenth Amendment jurisprudence rather than uphold what is merely a trivial procedural requirement.

Ultimately, section 922(q)'s constitutionality hinges on whether legislative findings are more important than saving our schools from the threat of gun violence. Even the most cursory look at our schools indicates that they are in a state of emergency. Section 922(q) serves an essential function in restoring sanity in our education system. Currently, the National School Safety Center estimates that more than 100,000 students carry guns to school every day.[311] In 1987, more than 250,000 students brought a handgun to school at least once.[312] "Students in Chicago, New York, Miami, and elsewhere are exhibiting signs of post traumatic stress syndrome.' Young children exposed to violence in the schools . . . have become numb—seemingly immune to sights of brutality in the same way as the children of Belfast, Beirut, or

309. Harriet Chiang, *O'Connor Says Crime Bill Would Overload Federal Courts*, S.F. CHRON., Aug. 17, 1994, at A3.

310. *Id.*

311. Brief for Petitioners at 4, United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993) (No. 93-1260) (citing 136 CONG. REC. 1165 (1990)(comment by Senator Kohl)).

312. *Id.*

Johannesburg."[313] Schools in fifteen states search students with metal detectors, and many school systems are using gun sniffing dogs and SWAT teams.[314] A National Education Association and National PTA summarized the effects of this violence succinctly, "[t]he threat of violence is a significant factor in the dropout rate, the stress related to fear of violence threatens the educational goals related to student achievement and fear of violence impedes the ability of schools to attract and retain qualified school personnel."[315] The Supreme Court should carefully weigh the practical effect of holding section 922(q) unconstitutional. Concern for the safety of our schools should outweigh the need for a congressional procedure as trivial and useless as the findings requirement.

V. Conclusion

United States v. Lopez, while making creative use of Supreme Court precedent, wrongly held section 922(q) unconstitutional. No requirement has ever existed for Congress to make legislative findings which link the activity being regulated with a constitutional grant of power. Reviewing statutes for constitutionality has traditionally been the courts' responsibility. Nor is there any reason to create such a requirement now. In addition, any federalism concerns are outweighed by the need to decrease gun violence in our schools. Section 922(q) serves a valuable purpose. The importance of this statute should preclude the Court from voiding it based on technicalities. In his dissent in *New York v. United States*, Justice White made an argument that applies here:

> Ultimately, I suppose, the entire structure of our federal constitutional government can be traced to an interest in establishing checks and balances to prevent the exercise of tyranny against individuals. But these fears seem extremely far distant to me in a situation such as this. We face a crisis of national proportions . . . For me, the Court's civics lecture has a decidedly hollow ring at a time when action, rather than rhetoric, is needed to solve a national problem.[316]

Similarly, the *Lopez* reasoning puts the "procedural cart before the substantive horse."[317] In deciding the constitutionality of section

313. *Id.* (quoting SUBCOMMITTEE ON CRIME OF THE HOUSE COMM. ON THE JUDICIARY, 101st Cong., 2d Sess. (1990) (statements of witnesses before the subcommittee)[hereinafter House Hearings]).

314. *Id.* at 20 (citing HOUSE HEARINGS at 39).

315. *Id.* at 20 (citing HOUSE HEARINGS at 44).

316. 112 S. Ct. 2408, 2444 (1992)(White, J., dissenting)(discussing the constitutionality of the Low Level Radioactive Waste Act).

317. Amicus Brief of the National Sch. Safety Ctr., United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993) (No. 93-1260) (*available* in LEXIS, Genfed library, Briefs file).

922(q), the Court should keep the relevant precedent and the importance of the Gun-Free School Zones Act at the forefront of its considerations. The Supreme Court should reverse *United States v. Lopez* and uphold section 922(q) as constitutional.