LAW

UNITED STATES V. LOPEZ

Recent U.S. Supreme Court Decision Signals an Intention To
Limit Congress’ Powers Under the Commerce Clause

Introduction
On April 26, 1995, the Supreme Court of the United States handed down its decision in the case of United States v. Lopez. By a narrow 5-4 margin, the Court struck down a federal law that outlawed the possession of a handgun within 1,000 feet of a school. Advocates of the legislation had sought to justify it as a legitimate exercise of the Congress’ ability to regulate interstate commerce. Lopez marks the first time in over 60 years that the Supreme Court has struck down a law that sought to rely on this power. Because it may signal the beginning of a reevaluation of the scope of the Commerce Clause, the Lopez case warrants careful examination. Any limitation on the Congress’ powers under the Commerce Clause would have significant effects on manufacturing.

This report examines the history of the Supreme Court’s interpretation of the Commerce Clause. It then summarizes the reasoning used in both the majority opinion and the dissents in the Lopez case. Finally, it analyzes the issues involved in interpreting the Commerce Clause and the impact any reevaluation might have on manufacturers. If the Supreme Court were to define the Commerce Clause in a way that puts effective bounds on the federal government’s power to regulate activities that do not directly affect interstate commerce, federal legislation and regulations dealing with the environment, workplace safety, and labor relations could all face new restrictions.

Background
In 1990, the Congress passed the Gun-Free School Zones Act which forbids “any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.” Alfonso Lopez, then a 12th grade student in San Antonio, Texas, was caught carrying a concealed handgun at his high school. Mr. Lopez was originally charged under a state law forbidding the possession of a firearm on school premises. The next day these charges were dismissed and Mr. Lopez was charged under the federal statute. A trial court found Mr. Lopez guilty of the federal charge and sentenced him to six months imprisonment and two years supervised release. The defendant appealed this sentence, arguing that the federal law “is unconstitutional as it is beyond the power of Congress to legislate control over our public schools.”

The District Court for the Western District of Texas had earlier denied a motion to dismiss the charges on this ground. The Court of Appeals for the Fifth Circuit, however, reversed, holding that §922(q) “in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause.”

The government appealed to the Supreme Court.

In a 5-4 decision, the Supreme Court affirmed the Court of Appeals for the Fifth Circuit, ruling that the statute was an unconstitutional infringement of state

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3 Quoted in Lopez, p. 1616.
4 2 F.3d 1342, 1367-1368 (1993).
powers. The majority opinion was written by Chief Justice William H. Rehnquist, with Justices Sandra Day O’Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas concurring. Justice Kennedy wrote a concurring opinion, in which Justice O’Connor joined. Justice Thomas also wrote a concurring opinion. Although these concurring opinions have no precedential value, they help in interpreting why certain Justices in the majority decided the way they did. This is important in analyzing the direction the Court is likely to take in the future.

The main dissent was written by Justice Stephen Breyer, and joined by Justices John Paul Stevens, David H. Souter, and Ruth Bader Ginsburg. Justices Stevens and Souter also filed dissenting opinions of their own.

**A Brief History of the Commerce Clause**

Although the size of the federal government has grown dramatically over the past 60 years, the United States is still a federal system in which the powers of the federal government are limited to those ceded to it by the states. In addition to the division of powers and checks and balances that constrain each of its individual branches, the powers of the federal government as a whole are limited to those specifically granted to it in the Constitution. The Tenth Amendment explicitly states that “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.” In one of the most important early cases, *Marbury v. Madison*, the Court asserted that the final interpretation of the constitutionality of congressional and executive acts lay with it.

Article 1, Section 8, clause 4 of the Constitution gives the Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” Over the past 60 years, however, the Supreme Court has deferred to the Congress in its interpretation of the Commerce Clause, allowing the Congress to regulate almost any activity that directly or indirectly affects interstate commerce. In doing so the Court has removed any explicit constraints on the ability of the Congress to regulate economic activity. Congress has used this freedom not only to regulate the flow of goods and services between the states, but also to regulate a wide variety of economic behavior that it believes causes social and economic problems which in turn affect interstate commerce.

It was not always so. The Supreme Court’s interpretation of the Commerce Clause has passed through three distinct periods. In the first period, lasting almost through the turn of the last century, both the Court and the Congress took the idea of limited government seriously. Congress seldom passed laws that encroached on the power of states. Most cases involving the Commerce Clause dealt with state laws that potentially encroached on the federal powers rather than the other way around. This self-restraint on the part of the federal government was partly a reflection of the more localized economy that existed during the first 100 years of our nation’s history. It was also a result of the important political role that states played prior to the Civil War and the direct election of U.S. Senators.

Any questions of the prominence of the federal government passed with the Civil War. The rapid pace of economic growth and technological advances and the rise of large industrial trusts increasingly brought problems of interstate commerce into the foreground. As the role of interstate commerce grew, so did the need for federal legislation. Beginning in the late 1800s, the Congress passed a number of laws that sought to regulate various aspects of interstate commerce. Some of these laws merely corrected state impediments to commerce moving interstate. Others, such as the child labor laws, tried to use the Congress’ power over interstate commerce as an opening to address broader social objectives.

During this second period, however, the Supreme Court continued on its conservative path. It struck down a number of federal statutes on the ground that the connection between the statute and interstate commerce was too indirect to justify federal encroachment. The Court attempted to draw a line between direct effects on interstate commerce, which the Congress could constitutionally regulate, and indirect effects, which were beyond the reach of the Commerce Clause. The Court also drew a distinction between manufacturing and commerce. While the Congress could regulate commerce, it was not allowed to interfere with the manufacturing process, nor could it forbid manufactured products from moving between the states, just because they were made according to certain methods. Thus, the Court struck down federal laws regulating child labor and minimum wages. It is important to note that the line being drawn was between the powers of the states and that of the federal government. The rights of individual persons or businesses were not involved.

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3 U.S. Constitution, Amendment X.
4 1 Cranch. 137 (1803).
At the same time, the Court used the concept of Substantive Due Process in which it held that the due process clauses of the Fifth and Fourteenth Amendments protected liberty of contract and private property against unwarranted government interference. Substantive Due Process incorporated two basic principles. First, the Court ruled that the right to contract was protected by the due process clauses of the Fifth and Fourteenth Amendments. Second, notwithstanding the due process protection, the government could regulate economic activity under its normal police powers, but only to the extent that the regulation was reasonably related to a legitimate concern for the safety, health, morals, and general welfare of the public. In these cases, the Court took upon itself the task of defining a line between the government’s power to legislate and the right of the individual to the pursuit of property and freedom of contract. Even states could not interfere with the right to contract by setting maximum work hours or minimum wages. In these cases the economic rights of persons and businesses were involved.

In a long series of cases stretching over 40 years, the Court attempted to draw coherent lines separating federal from state power and government power from individual freedom to enter into voluntary contracts. Rapid changes in the national economy conspired with the inherent difficulty of such a task to deny the Court complete success in developing rules that lower courts could safely apply and legislatures rely on. If the rapid economic development at the turn of the century made the enunciation of such a rule increasingly important, the Depression of the 1930s made it urgent. The Court’s position as an independent check on the power of state and federal legislatures to regulate economic activity came under increasing attack. President Franklin D. Roosevelt began his first term by moving aggressively to expand the federal government’s role in the economy. When the Supreme Court blocked his efforts by declaring the National Industrial Recovery Act, the Railroad Retirement Act, and other major laws unconstitutional, the President proposed his infamous court-packing scheme.

Contemporaneously, the Supreme Court reversed its course and decided a series of cases that collectively mark a turning point and the beginning of the third period in the Court’s interpretation of the Commerce Clause. In NLRB v. Jones & Laughlin Steel Corp., the Court upheld the constitutionality of the National Labor Relations Act. In the same session, it also decided West Coast Hotel Co. v. Parrish, reversing an earlier opinion and upholding a state law establishing a minimum wage for women. With these cases, the prior judicial tests of indirect versus direct effects on interstate commerce and of Substantive Due Process effectively ended, and the court abandoned its attempts to serve as an independent check on the economic powers of the federal government.

Since 1937, the Supreme Court has adopted the position that legislatures may regulate any form of economic activity so long as there is a reasonable basis for thinking that passage of the legislation is needed to protect the public health, safety, or welfare and so long as the legislation does not involve a protected class. With respect to federal legislation, the Court in effect has ruled that the Congress can safely regulate any activity that can reasonably be said to affect interstate commerce either directly or indirectly. This line of reasoning was stretched to its limits in Wickard v. Filburn when the Court allowed the Congress to set quotas on the domestic production of wheat for personal use on the ground that such use, when aggregated, would reduce the demand for commercial wheat and therefore affect the amount of wheat moving interstate. Reading Wickard literally, there would appear to be no limit on the Congress’ power to regulate economic activity. The lines between the federal and state legislatures and between government generally and individual economic rights were redrawn with the result that maximum flexibility was given to the Congress.

Following this line of reasoning, the Court has upheld every federal statute relying on the Commerce Clause for the last 60 years. Nevertheless, as a result of historical accident, some areas of social policy, such as crime, primary education, and street repair, have remained the primary responsibility of state and local government. Occasionally, when a federal statute has impinged on an area of traditional state authority, the Court has narrowly interpreted the federal statute absent a clear expression from the Congress that it meant to restrict state action. It has always upheld any explicit decision to encroach on state powers, however. The result has been a steady...

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11Adkins v. Children’s Hospital, 261 U.S. 525 (1923).
14301 U.S. 1 (1937).
15300 U.S. 379 (1937).
16Legislation that discriminates according to race, national origin, alienage, or sex generally faces stricter scrutiny. Legislation also may be stricken down if it violates a specific provision of the Constitution such as the right to trial or the protection of free speech.
17317 U.S. 111 (1942).
growth in the federal government's involvement in the nation's economy.

The Majority's Decision in *Lopez*.

Both the majority and the minority opinions agree on many points. The first is that we have a federal system in which the powers of the federal government are limited to those enumerated in the Constitution.\(^{18}\) Although the balance of power has shifted sharply to the federal side over the last 100 years, in principle the federal government's powers are still limited to those originally granted to it by the states and their citizens. Second, the Commerce Clause does not grant the Congress the power to regulate all activities that could conceivably affect interstate commerce. Third, the Supreme Court, not the Congress, must determine the boundary between permissible and unconstitutional legislation dealing with the Commerce Clause.

The majority opinion identifies three broad categories of commercial activity. First, the Congress may regulate the use of the *channels* of interstate commerce. Second, it also may regulate the *instrumentalities* of interstate commerce or persons or things in interstate commerce, even though it addresses a threat that comes only from intrastate activities. In these first two categories, its power to regulate is broad.

Third, the Congress may regulate activities that have an *effect* on interstate commerce. The majority's opinion clarified that the Congress can regulate such activities only if their effect on interstate commerce is *substantial*. The Court pointed out that the Gun-Free School Zones1(281,563),(553,603) Act involves two areas in which states have traditionally had the primary responsibility: crime and primary education. It also noted that some 40 states had already enacted their own laws dealing with the possession of handguns near schools, using a variety of approaches to do so. Indeed, in the *Lopez* case, a state law already existed to deal with the problem. The need for federal legislation was small. Finally, the activity regulated, the possession of a firearm, had no direct connection to interstate commerce or economic activity.

The federal government had argued that the Gun-Free School Zones Act was reasonably related to interstate commerce since the presence of hand guns, when aggregated, interferes with students' ability to obtain an education. An educated workforce is in turn a key determinant of economic competitiveness on both the state and national level. Although a similarly weak line of causation had worked in *Wickard*, the majority found this reasoning too tenuous to justify federal involvement and pointed out that similar reasoning could be used to uphold legislation regulating almost any type of economic activity.

The concurring opinions defined both the limits and the potential of the majority's opinion. Justice Kennedy's opinion, in which Justice O'Connor joined, stressed the immense stake the legal system has in maintaining prior case law on these issues. This stake argues for caution in reexamining issues that have once been decided. The two Justices seem to struggle between reluctance to reverse the permissiveness of past Courts and fear that blurring the separation between state and federal powers weakens political accountability. However, their admonition that it is the political branches that have the primary duty to preserve the federal balance does not solve the problem of federal encroachment.

Justice Kennedy refers to education as a traditional concern of the states. One of the principal benefits of federalism is its use of the states as laboratories for experimentation on the best policy for problems such as this one, where the best solution is far from clear. Section 922(q), by foreclosing the states from fulfilling this role in an area only remotely concerned with commerce, oversteps the Congress' powers. The two Justices seem reluctant to go much further, however.

In his concurring opinion, Justice Thomas, on the other hand, makes clear his view that, by failing to place limits on the Commerce Clause, the Court has abandoned its duty to preserve the principle of federalism. In his words:

> Our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.\(^{19}\)

He points out that the tenuous reasoning used in the principal dissent to connect the possession of firearms in a school area to effects on interstate commerce could be used to justify any type of federal regulation, even laws which most observers now would agree are beyond the powers of the Congress to regulate. Under the dissent's reasoning, the Congress could enact mandatory curricula for primary

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\(^{18}\) James Madison wrote that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." Federalist No. 45.

\(^{19}\) Thomas concurring, p. 1642.
schools, as long as it determined that such curricula would improve national competitiveness. The dissent's position, while avoiding the difficult job of defining a line in an inherently uncertain area, in effect does so by abandoning any role in fashioning restraints. This leaves it to the Congress to restrain itself. In contrast, Justice Thomas contested the view that the Congress even has power to regulate all areas that substantially affect interstate commerce. His concurring opinion distinguished commerce, where the Congress has broad powers, from manufacturing and agriculture, where he reasoned its powers ought to be more restrained. Any other interpretation makes the Congress' other enumerated powers under Article 1, Section 8 unnecessary.

The dissenting Justices agreed that the Congress' power under the Commerce Clause is limited. But they cannot say where the limits lie and from their reasoning it seems that whatever effective limits exist must be self-imposed by the Congress. Their principal disagreement with the majority is in its assertion that the Court must limit the Congress to the regulation of activities that substantially affect interstate commerce. Instead, they would limit the Court's role to determining whether the congressional determination that legislation was needed is "within the realm of reason" and whether the means chosen are reasonably adapted to the ends. The Court's task is not to determine whether a regulated activity sufficiently affects interstate commerce, but to determine whether the Congress could have had a rational basis for concluding so. This implies that, in order to strike down federal legislation, the Court must find that the Congress either acted irrationally or purposefully intended to overstep its constitutional bounds.

Analysis of the Possible Impact of Lopez on Manufacturing

At first glance a decision involving the possession of handguns in a schoolground is of marginal interest to manufacturers. Indeed, the direct effects of this case are nil. The potential significance of this case, and it could be great, lies in the fact that for the first time since 1937 the Supreme Court has interpreted the Commerce Clause in a manner that restricts the powers of federal government. Until now, the post-New Deal history has been an uninterrupted expansion in the federal government's role in addressing economic and social problems. If Lopez signifies the Court's willingness to define a line beyond which the Congress cannot legislate, then a similar definition may be applied to limit the Congress' powers in other areas such as the environment, worker safety, and public health where the Congress has used the Commerce Clause to enhance the power of the federal government.

Interpretation of the Commerce Clause involves a number of separate issues. The first issue is, Who has the final power to decide whether an act of the Congress oversteps its constitutional powers? On this question all Justices agree that the Court, not the Congress, has this duty. They also agree that a line exists between constitutional and unconstitutional exercises of the Commerce Clause: there are limits on the ability of the Congress to regulate economic activities.

The majority and minority differ dramatically on the practical significance of this duty, however. Until Lopez, the Court had avoided defining this line by always upholding the Congress' assertion of its powers. In Lopez, a majority of the Court has begun the difficult task of defining such a line, recognizing the impossibility of deriving precise formulations. The dissent avoids this challenge by deferring to the judgment of the Congress. The result is to make the Congress, not the Court, the de facto interpreter of its own power to regulate the economy.

The dissent's reasoning is not without ground. It is not certain that absent the Court's intervention, the power of the federal government would expand continuously. There are obvious dangers in letting the Congress determine the limits of its own powers, as the minority in Lopez seem content to do. There are, however, countervailing pressures that could be used to limit the Congress. One is pressure by the states themselves. Another is popular dissatisfaction with the results of federal power used unwisely. Both are now acting to return decisionmaking to the states in areas such as health care, welfare, environmental standards, and land use. Granted that a balance must be struck between federal and state powers, it is not clear that the Court can make the political judgments necessary to produce a better balance than that produced by the natural tension between the two powers of federalism guided by public opinion. Future Courts are unlikely to be any more successful in defining an objective line between permissible and impermissible exercises of the Commerce Clause than were past Courts. Even if such a line exists, it must surely change over time. The electoral process may be capable of striking the proper balance without the Court's help.

Nor is it clear that federal power is too great. Most manufacturers would agree that Congresses controlled by Democrats have legislated too broadly in a number of areas. A distinction must be made, however, between the constitutional extent of federal

\[2^a\text{Souter dissenting, p. 1651.}\]

\[2^b\text{Majority opinion, p. 1634.}\]
powers and the way in which the prior Congresses have chosen to exercise them. Manufacturers may derive greater benefit if both federal and state powers are used more wisely within the current boundaries than if federal powers are pared back unilaterally without limits on the states.

Legislation at the federal level is not always harmful to manufacturers. For example, the recent debate over tort reform involves some of the same principles of federalism as does the Gun-Free School Zones Act. Opponents of reform argue that tort and product liability law have traditionally been areas of state law, that the states are moving to correct many of the existing problems, and that the imposition of a single federal standard would destroy experimentation within the states to develop better systems of law. These same arguments were used to limit federal powers in the *Lopez* case.

Second, even when federal powers are used unwisely, manufacturers are often better off with one imperfect law than with 50 different state laws. The burden of conforming national or even regional operations to dozens of different, often conflicting, local laws has previously been used to argue for federal preemption in areas such as bankruptcy and insurance. Manufacturers are surely better off with one uniform labeling law than with 50 different ones, regardless of the connection to interstate commerce. Uniform laws, such as the Uniform Commercial Code, can considerably ease this problem, but never eliminate it.

Finally, the actual impact of *Lopez* may be small. At least two ways have been suggested to get around the Court’s decision. The first is to require state legislatures to pass an identical bill as a condition for receiving federal education assistance. As long as the federal government continues to be the primary assessor of taxes and a major source of revenue to state governments, its leverage over them will be great.

A second alternative is to amend §922(q) so that it applies only to guns that have entered into interstate commerce. The Clinton Administration settled on this alternative and sent a proposed bill to the Congress. Most observers believe the amended bill would be constitutional. If it is, *Lopez* will be of little help to manufacturers.

In an age when almost everything passes through interstate commerce at some point in its production or use, the Congress’ power will continue to be unlimited.

However, as Justice Souter noted in his dissent, the history of the Court’s restrictive interpretations of the Commerce Clause is closely bound to that of Substantive Due Process. In the *Lopez* case, the majority addressed only the question of where to draw the line between federal and state powers to regulate personal behavior. It remains the case that, whichever government governs, the Court will impose no effective requirement that they legislate wisely unless the legislation discriminates on the basis of a protected class or touches one of the few areas in which the Court has found a right of privacy. Yet, precisely such a requirement would be of the greatest benefit to manufacturers. Over the last several decades, both federal and state governments have enacted an entire structure of regulation that delivers benefits to some sectors of society at the expense of others. The beneficiaries of government action often constitute a very small group of the population, who receive substantial per capita economic gains. These laws or regulations typically impose only a small per capita cost on the rest of the population but have little or no positive effect on any social problem that could benefit the majority of citizens. Indeed, their cumulative cost frequently imposes large burdens on economic growth. Yet, since the late 1930s, the Court has refused to impose any constitutional restriction on the government’s power to regulate the economic activity of some Americans so that others may benefit. The result has been rapid growth in the power of government at all levels, giving private interests an incentive to divert their attention to government activity, first to protect their interests against encroachment from others, but eventually to gain an advantage for themselves.

As noted, the decision in *Lopez* involved only the line between federal and state powers under the Commerce Clause. Yet, in order to rule on whether the chain of causation between a given act and interstate commerce is sufficient to allow the Congress to regulate it, the Court must inevitably use some test of reasonableness. In doing so, the Court may be forced also to rule on whether the act unreasonably restricts the economic rights of individuals to engage in voluntary contractual exchanges. This involves a second constitutional balance, that between the government’s right to regulate and the individual’s right to pursue his own interests.

The second line would be of greater use to manufacturers. Both the Fifth and Fourteenth Amendments protect life, liberty, and property from unreasonable restriction without due process. Freedom of property has been treated as a secondary right, however. For the past 60 years, there has been no independent check on the power of Congress to pass laws affecting most economic behavior. There has been no constitutional check to see whether laws passed by the Congress truly benefit society at large or just some chosen faction or whether more reasonable, less intrusive restrictions were readily available. It is true that judgment on these questions is difficult and often involves large gray areas. But those who advocate leaving such issues to the political process usually ignore the tremendous amount of effort that goes into
swaying government from one narrow faction to another and the large costs that unwise legislation imposes on society.

_United States v. Lopez_ represents a departure from almost six decades of judicial acquiescence in the expansion of federal powers. It is not clear that the decision represents the beginning of a trend, however. The prospects for an extension of its reasoning depend heavily on future appointments to the Court, and thus, to a great extent, on the outcome of the presidential elections in 1996. They also depend upon the willingness and ability of the majority in _Lopez_ to enunciate a clear test for determining the boundaries of the Commerce Clause. The philosophy of liberalism is relatively easy to enunciate: identify a problem, think of a solution, impose it. It does not always work, however. Developing an alternative philosophy that would define consistent and defensible limits on the powers of government is much more difficult.

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