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Just Another Kid with a Gun? United States v. Michael R.: Reviewing the Youth Handgun Safety Act Under the United States v. Lopez Commerce Clause Analysis

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NOTE

JUST ANOTHER KID WITH A GUN?

UNITED STATES v. MICHAEL R.: REVIEWING THE YOUTH HANDGUN SAFETY ACT UNDER THE *UNITED STATES v. LOPEZ* COMMERCE CLAUSE ANALYSIS

I. INTRODUCTION

In 1995, for the first time in nearly sixty years, the United States Supreme Court struck down a federal statute as falling outside the proper scope of the Commerce Clause.[1] In *United States v. Lopez*,[2] the Court attempted to define a limit on the commerce power within the structure of federalism.[3] Rejecting the "near plenary power" Congress had exercised under the Commerce Clause since 1937,[4] the Court maintained that the enumeration of the federal powers in the Constitution presumes that some powers must remain under the exclusive control of the states.[5] After articulating a new commercial-activity

1. *See* Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 554 (1995).

2. 514 U.S. 549 (1995).

3. *See Lopez*, 514 U.S. at 567-68.

4. See Julian Epstein, *Evolving Spheres of Federalism After U.S. v. Lopez and Other Cases*, 34 HARV. J. ON LEGIS. 525, 526 (1997).

5. *See Lopez*, 514 U.S. at 568.

element in its Commerce Clause review,[6] the Court held that the law challenged in *Lopez* was not concerned with commercial activity and, therefore, was beyond the scope of the commerce power.[7]

The *Lopez* decision prompted many defendants, charged under a wide variety of federal statutes, to attack those statutes as unconstitutional under the new "commercial activity" test.[8] The United States Court of Appeals for the Ninth Circuit addressed one such challenge in *United States v. Michael R.*[9] Section II of this note discusses *Michael R.*'s facts and procedural history. Section III outlines the history of Commerce Clause jurisprudence, with an emphasis on the recent change in the Supreme Court's review of Congress' use of the commerce power under *Lopez*. In addition, Section III details the legislative history of the Youth Handgun Safety Act, 18 U.S.C. § 922(x), the law under which *Michael R.* was prosecuted and which Congress intended to be an exercise of the commerce power. Section IV analyzes the Ninth Circuit's reasoning in *Michael R.* Section V critiques this reasoning in light of the Supreme Court's holding in *Lopez*, and prior Commerce Clause history, and finds that *Michael R.* further substantiates the theory that the judiciary is not the branch of government that should define the limits of federalism. Finally, Section VI concludes that despite its initial fanfare as either revolutionary or reactionary, subsequent cases, such as *Michael R.*, indicate that *Lopez* does not represent a new era of Commerce Clause review.

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6. *See Lopez*, 514 U.S. at 551; Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793, 813 (1996).

7. *See Lopez*, 514 U.S. at 561.

8. *See* United States v. Bell, 70 F.3d 495, 497 (7th Cir. 1995). These challenges were usually unsuccessful. *See id.* For an extensive discussion of post-*Lopez* challenges, see *United States v. Wall*, 92 F.3d 1444 (6th Cir. 1996). Both the majority opinion and Judge Boggs' opinion include comprehensive lists of the lower court challenges. Judge Boggs' opinion catalogs these cases with incredible thoroughness: "The cases given . . . do not include every case where *Lopez* was cited, only those cases where the *Lopez* issue was material to the outcome of the case or the case contained strong dicta suggesting the relevant court's view of the constitutionality of the statute at issue." *Wall*, 92 F.3d at 1485 n.64.

9. 90 F.3d 340 (9th Cir. 1996) (per Ezra, J., sitting by designation; joined by Pregerson & Trott, JJ.).

II. FACTS AND PROCEDURAL HISTORY OF *MICHAEL R.*

On June 23, 1995, police officer Clayton Alan Kidd was on plainclothes patrol, in an unmarked police vehicle, in a high crime area of Tucson, Arizona.[10] Officer Kidd was part of an anti-gang activity team.[11] Around 10:30 p.m., Kidd saw a pickup truck, containing two occupants, driving towards him.[12] The occupants had features and demeanors that made Kidd suspect they might be gang members.[13] The two people in the truck were "mad-dogging" Kidd, an activity that is often a prelude to gang violence.[14] Kidd drove away and the pickup truck followed him, at one point attempting to pass him on a residential street.[15] Eventually, officers in two marked vehicles stopped the pickup truck.[16]

At the time of the stop, three individuals who had been lying down in the back of the truck, including the defendant, Michael R., sat up.[17] The officers then ordered everyone out of the truck.[18] As Michael R. got out, the officers heard something metallic hit the pavement.[19] Upon finding a small .22 caliber pistol on the ground near Michael R., the officers promptly arrested him.[20]

The United States Attorney's Office filed an information charging Michael R. under the Federal Juvenile Delinquency Act[21] for a violation of 18 U.S.C. § 922(x)(2), juvenile in posses-

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10. *See* United States v. Michael R., 90 F.3d 340, 342 (9th Cir. 1996).
11. *See id.*
12. *See id.*
13. *See id.* at 342-43. The court only mentions that "Kidd noticed that they were Hispanic males with very short, almost shaven hair." *Id.*
14. *See id.* at 343. The court described "mad-dogging" as looking at someone with a "stern expression." *Id.*
15. *See Michael R.*, 80 F.3d at 343.
16. *See id.*
17. *See id.*
18. *See id.*
19. *See id.*
20. *See Michael R.*, 90 F.3d at 343.
21. *See* Juvenile Justice and Delinquency Prevention Act (JJDPA) of 1974, Pub. L. No. 93-415, §§ 101-545, 88 Stat. 1109, 1109-43 (1974) (as amended by the Comprehensive Crime Control Act (CCCA) of 1984, Pub. L. No. 98-473, tit II, 98 Stat. 1976 (1984) (codified at 18 U.S.C. §§ 5031- 5042)). The JJDPA and the CCCA modernized the Federal Juvenile Delinquency Act of 1938, Pub. L. No. 75-666, §§ 1-9, 52 Stat. 764, 764-66

sion of a handgun.[22] At the juvenile proceedings, Michael R. challenged admission of the gun, claiming that it was the fruit of an unconstitutional search.[23] He also challenged the constitutionality of § 922(x)(2), arguing that federal regulation of juvenile handgun possession was unconstitutional because it exceeded Congress' commerce power.[24]

The trial court denied the motion to suppress the gun, holding that the police had a legitimate basis for stopping the truck.[25] The court also denied the challenge to the statute, finding that regulating juvenile handgun possession was

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(1938) (codified as amended at 18 U.S.C. §§ 5031-5042), which had remained nearly unaltered since 1938. *See* William S. Sessions & Faye M. Bracey, *A Synopsis of the Federal Juvenile Delinquency Act*, 14 ST. MARY'S L. J. 509, 509 (1983). Under the new juvenile delinquency laws, a person under the age of 18 who commits an act that would be a federal crime if committed by an adult commits an act of juvenile delinquency. *See* 18 U.S.C. § 5031 (1994). The charge does not involve an offense, *per se*, but rather addresses the defendant's status as a juvenile delinquent. *See* Sessions & Bracey, *supra*, at 510. The Act embodies Congress' preference for resolution in state, rather than federal, courts. *See* Annotation, *Treatment of Juvenile Alleged to Have Violated Law of United States Under Federal Juvenile Delinquency Act (18 U.S.C.A. §§ 5031-5042)*, 58 A.L.R. FED. 232, 236 (1982). Before a federal delinquency proceeding can begin, the U.S. Attorney must certify that either: "(1) a juvenile court or other pertinent state court does not have power over the case or declines to accept authority . . . or (2) the state lacks necessary projects and services capable of satisfying the needs of child offenders." Sessions & Bracey, *supra*, at 518. Juvenile justice has the primary goal of rehabilitation, rather than punishment. *See id.* at 510. Thus, the Supreme Court has balanced the requirements of criminal due process against the interest in protecting the privacy of the child. *See id.* at 511-516. The Court has adopted due process requirements, such as the privilege against self-incrimination, representation by appointed counsel, confrontation of witnesses, proof beyond a reasonable doubt and double jeopardy, while not requiring trial by jury. *See id.* In addition, the Act protects the juvenile's rights by mandating that: (1) charges be brought by information, not grand jury indictment; (2) a court order is required to have the juvenile photographed or fingerprinted; (3) the child's name cannot be released to the media; and (4) the trial occur within thirty days of the beginning of a juvenile's detention. *See id.* at 516, 526. If the government proves that the juvenile has committed an act of delinquency, the defendant is adjudged delinquent and the judge can either suspend sentence with conditions, place the juvenile on probation, or commit the child to the custody of the Attorney General. *See* Sessions & Bracey, *supra*, at 535, *referring to* 18 U.S.C. § 5037(b). If placed in the Attorney General's custody, then the child can be incarcerated as long as he or she is kept separate from adults. *See* Sessions & Bracey, *supra*, at 537.

22. *See Michael R.*, 90 F.3d at 343. Section 922(x)(2) reads: "It shall be unlawful for any person who is a juvenile to knowingly possess-- (A) a handgun; or (B) ammunition that is suitable for use only in a handgun." 18 U.S.C. § 922(x)(2) (1994).

23. *See Michael R.*, 90 F.3d at 343.

24. *See id.*

25. *See id.*

within Congress' commerce power.[26] Michael R. appealed the district court's decision to the Ninth Circuit Court of Appeals.[27] He argued that § 922(x)(2) was unconstitutional for two reasons: (1) the law violated the Tenth Amendment by encroaching upon state criminal jurisdiction; and (2) § 922(x)(2) was unconstitutional under *Lopez* because it did not regulate a commercial activity nor did it contain a jurisdictional element tying the law to interstate commerce.[28] The Ninth Circuit granted review of both issues.[29]

III. BACKGROUND

Congress' constitutional power to "regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes" is known as the federal commerce power.[30] In its legislative findings, Congress stated that § 922(x), the statute under which Michael R. was charged, was an exercise of its power to regulate interstate commerce.[31] An understanding of how § 922(x) conforms to the history of Commerce Clause jurisprudence and how this history, in turn, was shaped by the concept of federalism, is essential to understanding the Ninth Circuit's decision in *Michael R.*

A. FEDERALISM AND THE HISTORY OF COMMERCE CLAUSE REVIEW

The history of the Supreme Court's review of laws enacted pursuant to the Commerce Clause, like the Youth Handgun

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26. *See id.*

27. *See id.*

28. *Michael R.*, 90 F.3d at 343.

29. *See id.* at 342. This note analyzes and critiques only the Commerce Clause issue. As to the Fourth Amendment suppression issue, the Ninth Circuit affirmed the lower court's ruling denying the suppression motion. *See Michael R.*, 90 F.3d at 347. The court found that the vehicle stop was based on probable cause to believe that a traffic violation had occurred and was therefore proper. *See id.* Any argument regarding a pretextual reason for the stop was precluded by the Supreme Court's decision in *Whren v. United States*, 517 U.S. 806, (1996). *See Michael R.*, 90 F.3d at 347.

30. U.S. CONST. art I, § 8, cl. 3. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 4.1, at 131 (5th Ed. 1995).

31. *See* H.R. REP. NO. 103-711, at 390-91 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1858-59.

Safety Act, is closely tied to the Court's view of its place in maintaining the structure of federalism.[32] Federalism is a basic structural theory of the American system of government.[33] In essence, federalism is the political theory that two independent, sovereign systems of government are better able to ensure liberty and prosperity.[34] A number of rationales explain why this balance of power under federalism is beneficial.[35] These rationales include: (1) decentralizing power ensures diversity and allows for experimentation in governing approaches by the states; (2) placing power in both national and state hands protects against tyranny, either from an overly powerful federal government or from a local majority exercising power over a local minority; (3) having two systems of government increases citizen participation in political affairs and makes government entities more accountable to their constituents; and (4) splitting power between the national and local governments is the most efficient use of resources because the national government can focus on national problems, while local governments can concentrate on local concerns.[36]

Many consider federalism the greatest American innovation to political theory.[37] While the existence of federalism as a basic structural element is clear, the exact balance of power it mandates is not expressly stated.[38] Commerce Clause jurisprudence illustrates the Court's struggle to interpret the policy

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32. *See* NOWAK & ROTUNDA, *supra* note 30, §4.1, at 131.

33. *See* Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism,* 13 GA. ST. L. REV. 1009, 1010 (1997).

34. *See* United States v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). Federalism can be defined as "a system where certain powers, although not denied to government in general, are denied to the central government and granted only to the governments of some or all territorial sub-units." Rubin, *supra* note 33, at 1012. Federalism also "refers to the extent to which consideration of state government autonomy has been and should be used by the judiciary as a limit on federal power." Edwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 504 (1995) [hereinafter Chemerinsky, *Values*].

35. *See* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 761, 775-84 (1995).

36. *See id.*

37. *See* Calabresi, *supra* note 35, at 754. ("federalism is much more important to the liberty and well being of the American people than any other structural feature of our constitutional system").

38. *See* Edwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. L. REV. 959, 970 (1997) [hereinafter Chemerinsky, *Formalism*].

of federalism in defining where to strike the balance between congressional action and the reservation of power to the states.[39]

1. The Early Expansive View of the Commerce Power

From 1789 until the late 1800's, the Supreme Court was not often challenged to define the limits of congressional power under the Commerce Clause because Congress simply did not pass many laws that implicated the commerce power.[40] When the Court addressed the commerce power in the seminal case of *Gibbons v. Ogden*,[41] however, it gave the commerce power a very broad reach.[42] In *Gibbons*, Chief Justice Marshall, writing for the Court, found that the commerce power, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the constitution."[43] As long as the regulation did not concern an activity occurring wholly within one state, and only affecting that state, the Commerce Clause authorized Congress' action.[44] In later cases, the Court held that the Commerce Clause also implicitly prevented the states from regulating in ways that discriminated against or unduly burdened interstate commerce.[45]

This implicit prohibition became known as the dormant Commerce Clause.[46] The Supreme Court declared that because Congress had the supreme power to regulate interstate commerce, even when Congress remained "dormant," the commerce power, nonetheless, prevented the states from inhibiting interstate commerce.[47] The Court looked to the nature of the state regulation to determine whether the Commerce Clause and

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39. *See* NOWAK & ROTUNDA, *supra* note 30, § 4.1, at 131.
40. *See id.*, § 4.4, at 139.
41. 22 U.S. (9 Wheat.) 1 (1824).
42. *See* NOWAK & ROTUNDA, *supra* note 30, § 4.4, at 140.
43. *Gibbons*, 22 U.S. (9 Wheat.) at 196.
44. *See* NOWAK & ROTUNDA, *supra* note 30, § 4.4, at 140.
45. *See id.*, § 8.1, at 281.
46. *See id.*
47. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-2, at 406-407 (2d ed. 1988); *see also* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

federalism allowed the state to act.[48] Under the dormant Commerce Clause analysis, regulations impacting interstate activities, such as transportation, were improper.[49] State regulation of wholly intrastate activities, such as manufacturing, however, was permissible.[50]

The dormant Commerce Clause doctrine remains an active area of constitutional jurisprudence.[51] As the American economy became more national in scope, however, Congress began to enact more laws based on its commerce power to address new national problems.[52] In response, the Supreme Court, began to focus its attention on defining the extent of Congress' commerce power within the boundaries of federalism.[53]

2. The Middle Era and Restriction of the Commerce Power

The second era of Commerce Clause history began in the late 1800's and continued until 1937.[54] During this period, Congress began to address the social and economic problems created by the Industrial Revolution and the Great Depression.[55] The Court blocked these reform attempts, claiming that federalism prohibited extension of the commerce power into these areas.[56] The Court interpreted the Tenth Amendment as a reservation of powers to the states, creating areas of domestic

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48. *See* TRIBE, *supra* note 47, § 6-4, at 408.

49. *See Cooley*, 53 U.S. (12 How.) 299.

50. *See* United States v. E.C. Knight Co., 156 U.S. 1 (1895).

51. *See* General Motors Corp. v. Tracy, 117 S. Ct. 811 (1997) (upholding an Ohio law that taxed sales of natural gas by sellers, both in-state and out-of-state, except sales by "natural gas companies," even though only in-state sellers could meet the definition of a natural gas company); Oregon Waste Sys., Inc. v. Oregon Dep't of Envtl. Quality, 511 U.S. 93 (1994) (striking down a differential charge on out-of-state waste because the state did not justify the amount of the difference); Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) (striking down an Iowa law prohibiting the use of 65-foot double trailer semi trucks).

52. *See* TRIBE, *supra* note 47, § 5-4, at 306-07; *see also* United States v. Lopez, 514 U.S. 549, 604 (1995) (Souter, J., dissenting) ("it was really the passage of the Interstate Commerce Act of 1887 that opened a new age of congressional reliance on the Commerce Clause for authority to exercise general police powers at the national level").

53. *See* TRIBE, *supra* note 47, § 5-4, at 307.

54. *See* NOWAK & ROTUNDA, *supra* note 30, § 4.5, at 144.

55. *See* TRIBE, *supra* note 47, § 5-4, at 308; *Lopez*, 514 U.S. at 570 (Kennedy, J., concurring).

56. *See* NOWAK & ROTUNDA, *supra* note 30, § 4.5, at 145.

affairs beyond the reach of the federal government, regardless of whether an enumerated power appeared to reach them.[57]

The Court repeatedly struck down legislation aimed at improving working conditions and remedying the hardships of the economic depression.[58] The Court used semantic distinctions, similar to those of the dormant Commerce Clause doctrine, in its review of Congress' actions.[59] While regulating the shipping of goods across state lines, for example, was within Congress' power, regulating the production of those same goods was not.[60] Ultimately, the test became whether the regulated activity had a "direct" or "indirect" effect on interstate commerce.[61] If the activity directly affected interstate commerce, Congress could regulate it.[62] If the effect was only an indirect one, however, Congress was powerless, and regulatory power fell to the states.[63] The underlying rationale behind these distinctions was the laissez-faire economic philosophy of the Justices.[64] The Court employed formalistic distinctions, supported

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57. *See id.* The Tenth Amendment states "[t]he 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.

58. *See* NOWAK & ROTUNDA, *supra* note 30, § 4.5, at 145.

59. *See* TRIBE, *supra* note 47, § 5-4, at 307-08.

60. *See* United States v. E.C. Knight Co., 156 U.S. 1 (1895) (shipping); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (production).

61. *See* NOWAK & ROTUNDA, *supra* note 30, § 4.5, at 145; *see also* Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935).

62. *See* NOWAK & ROTUNDA, *supra* note 30, § 4.5, at 145.

63. *See id.*; *see also Lopez*, 514 U.S. at 554-55.

64. *See Lopez*, 514 U.S. at 606 (Souter, J., dissenting); *see also* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*"). The Court not only rejected Congress' actions as disrupting federalism, but it also found that state regulations were violating other constitutional protections. This dual attack had the effect of preventing any government from exercising some control over the economy. *See Lopez*, 514 U.S. at 605 (Souter, J., dissenting). For examples of federal legislation struck down by the Court, see *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down a law which regulated minimum wages and maximum work hours of coal miners); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, (1935) (striking down the National Industrial Recovery Act of 1933, which authorized federal codes that regulated trade practices, wages, prices, work hours and collective bargaining); *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935) (invalidating law creating a mandatory retirement and pension plan for interstate carriers); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (the Child Labor Case, which struck down a federal law prohibiting interstate shipment of goods manufactured by children under fourteen). The Court was equally narrow-minded with state laws. *See Lopez*, 514 U.S. at 605 (Souter, J., dis-

by its interpretation of the Tenth Amendment and the balance of power under federalism, as tools to stop government from regulating the private sector.[65]

As the Court continued to strike down economic reform laws during the New Deal era, Congress and President Franklin D. Roosevelt became increasingly unhappy with the Court's decisions.[66] This conflict continued to grow until one member of the Supreme Court, Justice Owen Roberts, began to vote the other way, creating a majority that sustained the laws, rather than striking them down.[67] President Roosevelt then appointed seven Supreme Court Justices between 1937 and 1941, ensuring the end of the era limiting the commerce power.[68]

3. The Modern Era of the Substantial Effects and Rational Basis Tests

Beginning in 1937, with the watershed case of *NLRB v. Jones & Laughlin Steel Corp.*,[69] the Court expressly rejected the prior era's theory of federalism.[70] The Court discarded that period's semantic distinctions and adopted a more deferential approach to analyzing congressional exercise of the commerce power.[71] After *Jones & Laughlin*, the Court would not look solely to whether a regulated activity actually crossed state lines or directly affected interstate commerce, but instead would examine whether the activity substantially affected interstate commerce.[72] Thus, even wholly intrastate activities

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senting); *see also* Lochner v. New York, 198 U.S. 45 (1905) (initiating a line of cases that thwarted state attempts to regulate economic activity based on Fourteenth Amendment substantive due process grounds).

65. *See* Chemerinsky, *Formalism*, *supra* note 38, at 970-71.

66. *See* NOWAK & ROTUNDA, *supra* note 30, § 4.7, at 154. This "unhappiness" eventually led to President Roosevelt's infamous court packing plan. *See id.* at 154-55.

67. *See id.* at 155.

68. *See id.*; Chemerinsky, *Values*, *supra* note 34, at 512-13.

69. 301 U.S. 1 (1937).

70. *See* NOWAK & ROTUNDA, *supra* note 30, § 4.8, at 155.

71. *See id.*

72. *See id.* at 155-56; *see also Jones & Laughlin*, 301 U.S. at 37. The Court stated that:

> Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that

could be regulated under the Commerce Clause if their effect on interstate commerce was substantial.[73] Ultimately, the Court also increased the deference it paid to congressional decisions in determining whether the activity substantially affected interstate commerce.[74]

Under the rational basis test, the Supreme Court would no longer make its own factual determination of whether the activity substantially affected interstate commerce.[75] Instead, all the Court required was a showing of some rational basis for Congress to find a substantial interstate commerce connection.[76] As long as some rational basis for the law existed, the Court would uphold it.[77]

The theoretical basis for a vast expansion of the commerce power came in the case of *Wickard v. Filburn*.[78] In *Wickard*, the Court held that Congress could regulate activities that, by themselves, did not have a substantial effect on interstate commerce, if many separate instances of the activity would have a substantial cumulative effect on interstate commerce.[79] This development opened the door for Congress to regulate the activities of individual citizens that, viewed separately, had only a trivial impact on interstate commerce.[80]

The Court's review process during this period returned the commerce power to its earlier, near absolute, status.[81] This approach allowed Congress to pass many of the laws considered important to modern society.[82] During the next fifty-eight

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> commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.

Id.

73. *See* NOWAK & ROTUNDA, *supra* note 30, § 4.8, at 156.
74. *See id.* at 155.
75. *See id.*; *see also* Katzenbach v. Mc Clung, 379 U.S. 294, 303-04 (1964).
76. *See* NOWAK & ROTUNDA, *supra* note 30, § 4.8, at 156.
77. *See id.*
78. 317 U.S. 111 (1942).
79. *See Wickard*, 317 U.S. at 127-28.
80. *See* TRIBE, *supra* note 47, § 5-5, at 310.
81. *See* Epstein, *supra* note 5, at 525.
82. *See id.* The Court sustained modern laws involving economic reform, civil rights and environmental regulation as being proper exercises of the commerce power. *See id.*

years, the Court allowed federal power to expand with almost no boundaries, even into areas of traditional state concern.[83]

4. *United States v. Lopez*: A Return to Limits on the Commerce Power

Much to the surprise of observers, the Supreme Court went against the deferential tradition established in Commerce Clause analysis by striking down the Gun Free School Zones Act in *United States v. Lopez*, in 1995.[84] The case arose from the conviction of Alphonso Lopez, Jr. for a violation of 18 U.S.C. § 922(q)(1)(A).[85] Lopez, a twelfth-grade student, brought a .38 caliber revolver and five bullets to his high school in San Antonio, Texas.[86] Acting on an anonymous tip, local law enforcement officers arrested Lopez and filed state charges against him.[87] The state dismissed the charges after federal agents charged Lopez with a violation of § 922(q)(1)(A).[88] Eventually, Lopez was indicted on one count of "knowingly [possessing] a firearm at a place [he knew] or ha[d] reasonable cause to believe, [was] a school zone."[89] Lopez moved to dismiss the indictment on the grounds that the statute was "unconstitutional as it is beyond the power of Congress to legislate control over our public schools."[90] The district court denied the motion to

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83. *See* Regan, *supra* note 1, at 559, 562.

84. *See Lopez*, 514 U.S. at 552; Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 675 (1995).

85. *See Lopez*, 514 U.S. at 551-52. Section 922(q)(1)(A) provided that "[i]t 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. § 922(q)(1)(A) (1988 & Supp. V 1993). A school zone was defined 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) (1988 & Supp. V 1993). Section 922(q) has been modified twice since 1988. The 1994 amendment added a new § 922(q)(1), which set forth the law's legislative findings. *See* 18 U.S.C. § 922(q)(1) (1994). In 1996, the offense description was amended to read "[i]t shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C.A. § 922(q)(2)(A) (West 1985 & Supp. 1997).

86. *See Lopez*, 514 U.S. at 551.

87. *See id.*

88. *See id.*

89. *Id.* (quoting 18 U.S.C. 922(q)(1)(A) (1988 & Supp. V 1993.)).

90. *Lopez*, 514 U.S. at 551.

dismiss and Lopez was subsequently tried and convicted.[91] Lopez appealed his conviction to the United States Court of Appeals for the Fifth Circuit.[92] The Fifth Circuit reversed the conviction, relying heavily on the lack of any congressional findings supporting an extension of the commerce power to firearm possession in a school zone.[93]

The Supreme Court affirmed the Fifth Circuit's result, albeit on different grounds.[94] The Court conducted an independent review, examining the constitutionality of the statute on its merits.[95] The Court then held that § 922(q) was unconstitutional because it did not regulate a commercial activity.[96] Therefore, the law went beyond Congress' commerce power and intruded upon the powers reserved to the states.[97]

One of the most widely noted aspects of the *Lopez* decision was the articulation of the "commercial activity test."[98] The Court held that Congress could only use the commerce power to regulate commercial activity.[99] The Court reasoned that prior cases, in which it had sustained congressional actions, involved either a statute that regulated economic activities or one that contained an explicit interstate commerce jurisdictional element.[100] In Lopez's case, the Court found that the act of bringing a gun to school did not have commercial implica-

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91. *See id.* at 551-52.

92. *See id.* at 552.

93. *See id.*

94. *See id.* The Court noted that Congress is not required to make findings supporting the use of the commerce power, thus the absence of findings in this case was not fatal. *See id.* at 562-63. The Court stated, however, that legislative findings would be considered in the analysis if they were present. *See id.* The dissenters agreed that legislative findings, at best, give a law "the benefit of some *extra* leeway," *Id.* at 617 (Breyer, J. dissenting) (emphasis in original), and at worst "go no further than expressing what is obviously implicit in the substantive legislation, at such a conclusory level of generality as to add virtually nothing to the record." *Id.* at 612 n.2 (Souter, J. dissenting).

95. *See Lopez*, 514 U.S. at 562-63.

96. *See Lopez*, 514 U.S. at 551, 565-66.

97. *See id.* at 551.

98. *See Lopez*, 514 U.S. at 551; Althouse, *supra* note 6, at 813; Merritt, *supra* note 84, at 695.

99. *See Lopez*, 514 U.S. at 551.

100. *See id.* at 559-61.

tions.[101] The Court held that "possession of a gun in a local school zone [was] in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."[102] In addition, unlike other statutes containing a jurisdictional element that required the government to prove a tie to interstate commerce on a case-by-case basis, the Gun Free School Zones Act had no such element.[103]

In defense of the statute's constitutionality, the government argued that the presence of guns in and around schools leads to violence and this violence adversely affects the nation's economy by deterring travel and increasing national insurance costs, and by threatening the learning environment, to the students' detriment.[104] An effective education is crucial to the creation of an efficient national work force.[105] Therefore, the government reasoned that disruption of the learning environment caused by gun violence has a negative effect on the national economy.[106]

In conducting its independent review of the nature of the activity regulated, the Court expressly dismissed this "costs of crime" rationale as requiring the Court to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power . . . ."[107] The Court refused to interpret the Commerce Clause as authorizing Congress to reach into traditional areas of state power, such as education and criminal law.[108] To do so, the Court held, would violate federalism as the Court defined it. Sustaining this law would be the equivalent of concluding (1) that the commerce power could reach into any aspect of a citizen's life, even those of traditional state concern,

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101. *See id.* at 561.
102. *Id.* at 567.
103. *See id.* at 561.
104. *See Lopez*, 514 U.S. at 563-64.
105. *See id.* at 564.
106. *See id.*
107. *Id.* at 564, 567.
108. *See id.*

and (2) that there can be no "distinction between what is truly national and what is truly local."[109]

B. THE YOUTH HANDGUN SAFETY ACT AND THE COMMERCE CLAUSE

Title 18 of the United States Code, § 922, defines federal crimes involving firearms.[110] Section 922 became law in 1968 and was enacted to address aspects of firearm possession, use, manufacturing, and shipping.[111] Regulated activities include: licensing firearms dealers; selling and transporting weapons; possession of firearms by felons, fugitives, addicts, and illegal aliens; and possession of machine guns and other altered weapons.[112] In 1994, subsection (x) was added to § 922 to combat the problems associated with juvenile handgun possession.[113]

Section 922(x) contains six parts.[114] Part 1 prohibits the sale or transfer of handguns or handgun ammunition to someone the seller knows, or should know, is a juvenile.[115] Part 2 prohibits juveniles from knowingly possessing a handgun or handgun ammunition.[116] Part 3 identifies juvenile handgun possession excepted from the law.[117] Finally, parts 4, 5, and 6 address the provision's procedural aspects.[118]

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109. *Lopez*, 514 U.S. at 567-68.

110. 18 U.S.C. § 922 (1994).

111. 18 U.S.C.A. § 922, Historical Note p. 227 (West 1976).

112. *See* 18 U.S.C. § 922 (1994).

113. *See* H.R. REP. NO. 103-711, at 390-91 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1858-59.

114. 18 U.S.C. § 922(x) (1994).

115. *See id.* "(1) It shall be unlawful for a person to sell, deliver, or otherwise transfer to a person who the transferor knows or has reasonable cause to believe is a juvenile-- (A) a handgun; or (B) ammunition that is suitable for use only in a handgun." *Id.*

116. *See id.* "(2) It shall be unlawful for any person who is a juvenile to knowingly possess-- (A) a handgun; or (B) ammunition that is suitable for use only in a handgun." *Id.*

117. *See id.*

> (3) This subsection does not apply to-- (A) a temporary transfer of a handgun or ammunition to a juvenile or to the possession or use of a handgun or ammunition by a juvenile if the handgun and ammunition are possessed and used by the juvenile-- (i) in the course of employment, in the course of ranching or farming related to activities at the residence of the juvenile (or on property used for ranching or farming at

Unlike § 922(q), the subsection challenged in *United States v. Lopez*, § 922(x) has a detailed legislative history.[119] The congressional findings describe why Congress prohibited the sale of handguns to, and the possession of handguns by,

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which the juvenile, with the permission of the property owner or lessee, is performing activities related to the operation of the farm or ranch), target practice, hunting, or a course of instruction in the safe and lawful use of a handgun; (ii) with the prior written consent of the juvenile's parent or guardian who is not prohibited by Federal, State or local law from possessing a firearm, except-- (I) during transportation by the juvenile of an unloaded handgun in a locked container directly from the place of transfer to a place at which an activity described in clause (i) is to take place and transportation by the juvenile of that handgun, unloaded and in a locked container, directly from the place at which such an activity took place to the transferor; or (II) with respect to ranching or farming activities as described in clause (i), a juvenile may possess and use a handgun or ammunition with the prior written approval of the juvenile's parent or legal guardian and at the direction of an adult who is not prohibited by Federal, State or local law from possessing a firearm; (iii) the juvenile has the prior written consent in the juvenile's possession at all times when a handgun is in the possession of the juvenile; and (iv) in accordance with State and local law; (B) a juvenile who is a member of the Armed Forces of the United States or the National Guard who possesses or is armed with a handgun in the line of duty; (C) a transfer by inheritance of title (but not possession) of a handgun or ammunition to a juvenile; or (D) the possession of a handgun or ammunition by a juvenile taken in defense of the juvenile or other persons against an intruder into the residence of the juvenile or a residence in which the juvenile is an invited guest.

Id.

118. *See* 18 U.S.C. § 922(x):

(4) A handgun or ammunition, the possession of which is transferred to a juvenile in circumstances in which the transferor is not in violation of this subsection shall not be subject to permanent confiscation by the Government if its possession by the juvenile subsequently becomes unlawful because of the conduct of the juvenile, but shall be returned to the lawful owner when such handgun or ammunition is no longer required by the Government for the purposes of investigation or prosecution.

(5) For purposes of this subsection, the term "juvenile" means a person who is less than 18 years of age.

(6) (A) In a prosecution of a violation of this subsection, the court shall require the presence of a juvenile defendant's parent or legal guardian at all proceedings. (B) The court may use the contempt power to enforce subparagraph (A). (C) The court may excuse attendance of a parent or legal guardian of a juvenile defendant at a proceeding in a prosecution of a violation of this subsection for good cause shown.

Id.

119. *See* H.R. REP. NO. 103-711, at 390-91 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1858-59. Section 922(q) was revised at the same time § 922(x) was enacted and the new version of § 922(q) included part (1), which set forth the legislative findings supporting the Gun Free School Zones Act. *See* 18 U.S.C. §922(q) (1994). The *Lopez* court rejected these after-the-fact findings. *See Lopez*, 514 U.S. 549, 563 (1995).

juveniles.[120] Congress gave two main justifications for the regulation: (1) crime involving guns, drugs and juveniles is a pervasive national problem that cannot be solved at the local level alone; and (2) guns have an effect on interstate commerce because the weapons generally travel in interstate commerce and the crime and violence associated with juvenile handgun possession affect interstate commerce.[121] Accordingly, "[i]nasmuch as illicit drug activity and related violent crime overflow State lines and national boundaries, the Congress has power under the interstate Commerce Clause and other provisions of the Constitution, to enact measures to combat these problems."[122]

1. Juvenile Handgun Possession is a National Problem

Congress found that the problem of juvenile handgun use exceeded the capabilities of local and state authorities.[123] As stated in the congressional findings, handguns move especially easily from state to state, as do illicit drugs and the gangs that ship them.[124] This mobility allows for easy access by juveniles, creates a ripe environment for the development of violent criminals, and fosters the random use of handguns on the streets.[125]

More importantly, Congress found that violent crime resulting from juvenile handgun use and the illicit drug trade go "hand-in-hand."[126] Attempting to eliminate one without controlling the other would be ineffective.[127] Strong attempts by

120. *See* H.R. REP. NO. 103-711, at 390-91 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1858-59.

121. *See id.*

122. *Id.* at 1859.

123. *See id.* "Individual States and localities find it impossible to handle the problem by themselves; even States and localities that have made a strong effort to prevent, detect, and punish crime find their efforts unavailing due in part to the failure or inability of other States and localities to take strong measures." *Id.*

124. *See id.* at 1858.

125. *See* H.R. REP. NO. 103-711, at 390-91 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1858. "[P]roblems with crime at the local level are exacerbated by the interstate movement of drugs, guns, and criminal gangs; firearms and ammunition, and handguns in particular, move easily in interstate commerce . . . ." *Id.*

126. *Id.*

127. *See id.* at 1858-59.

some states to crack down on these activities had been unsuccessful because other states were unable or unwilling to enact similarly strict measures.[128] Therefore, it appeared that only a rigorous national approach to the problem of juvenile handgun possession and use would successfully curb violent crime and illegal drug trafficking.[129]

2. Juvenile Handgun Possession Affects Interstate Commerce

Congress found that juvenile handgun use affects interstate commerce in two ways.[130] First, a handgun, its parts, ammunition and raw materials, have all moved in interstate commerce.[131] Second, Congress recognized a "costs of crime" relationship between juvenile handgun possession and violent use, and interstate commerce.[132] Gun violence deters interstate and international travel.[133] Economies suffer in areas where gun violence occurs because the ordinary citizen traveler may believe that violent crime exists unchecked in those areas and, thus, will avoid them.[134] The damaging effect of violent crime on tourism, coupled with the interstate character of the illicit drug trade and handgun transportation, led Congress to conclude that juvenile handgun possession and use involves and impacts interstate commerce and, therefore, can be regulated under the Commerce Clause.[135]

IV. THE NINTH CIRCUIT'S ANALYSIS IN *MICHAEL R.*

The Ninth Circuit approached *Michael R.* mindful of Commerce Clause history and, in particular, the changes mandated

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128. *See id.* at 1859.

129. *See id.*

130. *See* H.R. REP. NO. 103-711 at 390-91 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1858.

131. *See id.*

132. *See id.*

133. *See id.*

134. *See id.* "While criminals freely move from State to State, ordinary citizens may fear to travel to or through certain parts of the country due to the concern that violent crime is not under control." *Id.* Foreigners may decline to travel in the United States for the same reason. *See id.*

135. *See* H.R. REP. NO. 103-711 at 390-91 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1858.

by *Lopez*.[136] The court also noted that the constitutionality of § 922(x) was an issue of first impression in the circuit courts.[137]

The court began its analysis, regarding whether regulation of juvenile handgun possession was constitutional under the Commerce Clause, by stating that the court reviews de novo legal questions, such as the constitutionality of a law.[138] The court next considered the basis of commerce power applicable to § 922(x)(2).[139] In *Lopez*, the Supreme Court had recognized three acceptable areas of commerce power regulation.[140] Congress may regulate "(1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and (3) those activities having a substantial relation to interstate commerce."[141] The Ninth Circuit agreed with the parties that § 922(x) could only implicate the third category: activities having a substantial relation to interstate commerce.[142]

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136. *See* United States v. Michael R., 90 F.3d 340, 343 (9th Cir. 1996).

137. *See id.* at 344. Only one reported district court decision had reached the issue, United States v. Cardoza, 914 F.Supp. 683 (D. Mass. 1996), *aff'd*, 129 F.3d 6 (1st Cir. 1997). *See Michael R.*, 90 F.3d at 344 n.2. The district court in *Cardoza* found § 922(x)(2) constitutional, holding that § 922(x) regulated activity that had a substantial impact on interstate commerce. *See Cardoza*, 914 F.Supp. at 687. The court pointed out that § 922(x) regulated the supply and demand sides of the juvenile market, but used this fact to find a substantial impact on interstate commerce, not to determine that juvenile handgun possession was a commercial activity. *See id.* Indeed, the district court did not mention *Lopez's* commercial activity requirement in its discussion of § 922(x). *See id.* After *Michael R.* was decided, the First Circuit Court of Appeals affirmed the district court's ruling in *United States v. Cardoza*, 129 F.3d 6, 8 (1st Cir. 1997). This decision contained a more complete discussion of the commercial activity requirement, using the supply and demand elements of § 922(x) to determine that juvenile possession of handguns was a commercial activity in this context. *See id.* at 12-13.

138. *See Michael R.*, 90 F.3d at 343.

139. *See id.* at 344.

140. *See id.*

141. *Id.* (quoting United States v. Lopez, 514 U.S. 549, 558-59 (1995)). The first basis of the commerce power addresses regulation of the items of commerce that move between the states, such as food, people, or guns that move across state lines. *See Lopez*, 514 U.S. at 558. The instrumentalities of commerce are the actual means of moving items between the states, such as railways and airplanes. *See id.* The third category is the modern doctrine which allows regulation of intrastate activities that have a substantial cumulative effect on interstate commerce. *See id.* at 558-59.

142. *See Michael R.*, 90 F.3d at 344.

The Ninth Circuit's analysis focused on distinguishing *Michael R.* from *Lopez*.[143] The court pointed out that *Lopez* was decided by a "narrow" majority.[144] The Ninth Circuit noted that the Supreme Court found possession of a firearm in a school zone was not sufficiently related to interstate commerce to be a constitutional exercise of the commerce power.[145] In addition, the Ninth Circuit observed that the *Lopez* Court rejected the "costs of crime" and "national productivity" rationales advanced by the government in support of § 922(q).[146] The Ninth Circuit then proceeded to evaluate the constitutionality of § 922(x)'s prohibition of juvenile handgun possession under *Lopez*.[147]

The Ninth Circuit relied on a single sentence from the *Lopez* decision to support its finding that juvenile handgun possession was a commercial activity.[148] In *Lopez*, Chief Justice Rehnquist wrote that the statute regulating the possession of firearms in school zones was only a criminal statute and was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[149] The Ninth Circuit stated that, in contrast, prohibiting juvenile possession of handguns under § 922(x)(2) *was* part of a larger regulation of economic activity.[150] The court defined § 922(x) as the larger regulatory scheme, finding that the statute as a whole sought to regulate the entire juvenile handgun market.[151] This regu-

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143. *See id.*

144. *See id.* In *Lopez*, Justices O'Connor, Scalia, Kennedy and Thomas joined Chief Justice Rehnquist in the majority opinion. *See Lopez*, 514 U.S. at 550. Justice Kennedy wrote a separate concurring opinion, in which Justice O'Connor joined, and Justice Thomas wrote another concurrence. *See id.* Justices Stevens and Souter filed dissents and also, along with Justice Ginsburg, joined in Justice Breyer's dissenting opinion. *See id.*

145. *See Michael R.*, 90 F.3d at 344.

146. *See id.*

147. *See id.* at 344-45.

148. *See id.* at 344.

149. *Lopez*, 514 U.S. at 561.

150. *See Michael R.*, 90 F.3d at 344 ("[f]irst we note that this statute is part of a larger regulation that deals with the sale, delivery, or transfer of firearms to a juvenile").

151. *See id.*

latory plan was accomplished both by prohibiting the *sale or transfer* of handguns to juveniles, in part one, and by prohibiting the *possession* of handguns by juveniles, in part two.[152] Thus, the court found that § 922(x), as a whole, sought to regulate the complete juvenile handgun market by striking at both its supply and demand sides.[153] Striking down the prohibition against juvenile possession of handguns would nullify Congress' attempt to create a larger regulatory scheme for the juvenile handgun market.[154] Therefore, the Ninth Circuit held that juvenile handgun possession was a commercial activity under *Lopez* because it represented the demand side of the commercial juvenile handgun market.[155]

After defining possession, for the purposes of § 922(x), as an economic activity, the Ninth Circuit then explained why Michael R.'s possession had a substantial effect on interstate commerce.[156] The court relied on the statute's own legislative findings, as well as other legislative findings relating to gun violence, to reach its conclusion.[157]

The Ninth Circuit first noted that *Lopez* allowed the courts to consider legislative findings when evaluating the constitutionality of a law.[158] The court then expressly adopted § 922(x)'s congressional findings to support the use of the commerce power to prohibit juvenile possession of handguns.[159] In these findings, Congress ascertained that juvenile handgun possession substantially affects interstate commerce because: (1) the handgun parts, ammunition and raw materials move in interstate commerce; (2) violent crime resulting from juvenile handgun possession and use deters interstate travel of citizens and foreigners; and (3) handgun possession and illegal drug

152. *See id.*
153. *See id.*
154. *See Lopez*, 514 U.S. at 561.
155. *See Michael R.*, 90 F.3d at 344.
156. *See id.* at 344-45.
157. *See id.*
158. *See id.* at 344 n.3.
159. *See id.* at 345. These findings are discussed *supra* in section III. B.

trafficking go hand-in-hand.[160] The Ninth Circuit declared the first two findings to be self-evident and simply stated that juvenile possession of handguns "implicate[d] interstate commerce through the manufacturing process and by its deterrent effect on interstate travel."[161] Regarding the third finding, the court explained that juveniles play a role in the interstate trafficking of illegal drugs, as "runners," and that crime statistics show that many of them carry guns to complete their activities.[162] Therefore, the drug trade would suffer through prohibition of juvenile handgun possession because juvenile runners would not be able to arm themselves in the execution of their duties.[163]

In addition, the Ninth Circuit further stated that gun violence, in general, does affect commerce, and juvenile possession and use of handguns adds to this violence.[164] The court referenced its recent decision in *Mack v. United States*,[165] in which the court adopted the legislative history of the Brady Act.[166] In *Mack*, albeit in dicta, the court stated that "[t]he legislative history of the Brady Act also contains findings that gun violence affects commerce, and we accept those findings."[167] In *Michael R.*, the court adopted these findings without explicitly describing or explaining them.[168]

Ultimately, the Ninth Circuit held that the juvenile handgun possession prohibited by §922(x)(2) was, in fact, an economic activity that substantially affected interstate commerce and was, therefore, an activity that could be constitutionally

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160. *See Michael R.*, 90 F.3d at 345, (citing H.R. REP. NO. 103-711 at 390-91 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1858-59).

161. *Michael R.*, 90 F.3d at 345.

162. *See id.*

163. *See id.*

164. *See id.*

165. 66 F.3d 1025 (9th Cir. 1995).

166. *See Mack*, 66 F.3d at 1028 n.5. (citing the Brady Handgun Control Act, P.L. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. § 922(s))). Section 922(s) created a national waiting period for a handgun purchase and required that local law enforcement officials perform background checks on handgun purchasers. *See Mack*, 66 F.3d at 1027.

167. *Mack*, 66 F.3d at 1028 n.5.

168. *See Michael R.*, 90 F.3d at 345.

regulated by Congress pursuant to its commerce power.[169] As a result, the Ninth Circuit affirmed the district court's decision, holding that § 922(x)(2) was constitutional.[170]

V. CRITIQUE

On a factual level, there is little difference between Michael R.'s activity, knowingly possessing a handgun, and Lopez's activity, knowingly possessing a handgun in a school zone. The factual similarities make it difficult to find that the former is a commercial activity, while the latter "has nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms."[171] In fact, Lopez's activity was arguably more "commercial" than Michael R.'s because another student paid Lopez $40 to bring the gun to school.[172] Regardless, the Supreme Court rejected the notion that Lopez's activity had commercial implications.[173] An examination of the facts reveals no reason why Michael R.'s action should be considered commercial. If Lopez's action was not commercial, Michael R.'s could not be either.

The true basis for the distinction lies not on a factual level but on a conceptual one: federalism. The ruling in *Michael R.* is best viewed as evidence of the basic flaw in the Supreme Court's attempts to define the balance of power mandated by federalism throughout the history of commerce power review.[174] Beneath the Supreme Court's Commerce Clause decisions is a weighing of the value of the law in question against the value of the separation of powers between the federal and state governments.[175] In each case, the Court has used a

169. *See id.*
170. *See id.*
171. United States v. Lopez, 514 U.S. 549, 561 (1995).
172. *See* United States v. Lopez, 2 F.3d 1342, 1345 (5th Cir. 1993). The other student was apparently planning to use the gun in a "gang war." *See id.* The Supreme Court's decision does not mention this fact. *See* Althouse, *supra* note 6, at 796 n.24.
173. *See Lopez*, 514 U.S. at 561.
174. *See* Chemerinsky, *Formalism*, *supra* note 38, at 970.
175. *See id.* at 973-74.

framework of legal theory to justify its initial decision about the desirability of the law.[176] *Michael R.* serves as a reminder that marking the boundaries of federalism in Commerce Clause review requires a functional approach, involving the weighing of many factors.[177] Congress, not the judiciary, is properly charged with making these determinations.[178] *Michael R.* exemplifies the problems that are created when the courts become involved in this political decision.

A. THE HISTORY OF THE COMMERCE CLAUSE IS THE HISTORY OF THE SUPREME COURT'S THEORY OF FEDERALISM

Congress' exercise of the commerce power is perhaps the ultimate battleground in the conflict to determine the proper balance between the powers of the national and state governments. The importance of interstate commerce in the American economy was on the rise long before the founders drafted the Constitution.[179] Indeed, a major factor in the decision to abandon the Articles of Confederation and create the Constitution was the increasing importance of eliminating barriers to free trade between the states.[180] Justice Kennedy recognized the ever-increasing role interstate commerce plays in modern American life when, in *Lopez*, he stated that "[i]n a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence . . . ."[181] As a result, the Commerce Clause has the potential to justify the federal government's reach into any intrastate activity, thereby effectively eliminating the separation of powers between the national and state governments.[182] Federalism was designed to prevent this

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176. *See* Regan, *supra* note 1, at 562.

177. *See* Chemerinsky, *Formalism*, *supra* note 38, at 973.

178. *See Lopez*, 514 U.S. at 577, (Kennedy, J., concurring) ("To be sure, one conclusion that could be drawn from The Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process."); Calabresi, *supra* note 35, at 790 (noting that "[f]or many years now, it has been the prevailing view both in the Supreme Court and the law schools that constitutional federalism guarantees should not be enforced *judicially*").

179. *See* TRIBE, *supra* note 47, § 6-3, at 404.

180. *See id.*

181. *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

182. *See* NOWAK & ROTUNDA, *supra* note 30, § 4.1, at 131.

result. It was designed to protect diversity and experimentation; to protect against tyranny of the national government; to increase political activity and accountability; and to promote the most effective use of governmental power to solve problems.[183] The fact that the Commerce Clause seems to touch every aspect of American life is in direct conflict with the notion that there must be two separate sovereign governments to protect our liberty and prosperity.[184] The Supreme Court's review of Congress' exercise of the commerce power has been an attempt to define the relationship between the Commerce Clause and federalism.[185] The Court has been unable to accomplish this balancing in a consistent and meaningful way.[186]

The history of Commerce Clause review can be described as the Supreme Court oscillating between two interpretations of the Tenth Amendment. The first interpretation is that the Amendment represented merely a "truism," simply stating that Congress' powers are limited to those expressed or implied in the Constitution, but having no bounds beyond constitutional limits, such as the Bill of Rights.[187] The second view is that the Tenth Amendment "reserves a zone of activities to the states and Congress may not intrude into this zone, even when it is exercising its power under Article I of the Constitution."[188] The Supreme Court has struck the balance of federalism by applying the theory to which it adhered at the time and creating a structure of legal rules; either giving Congress broad power, by upholding its laws (the truism view), or reserving some power for the states, by striking down federal laws (the reserved powers view).

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183. *See* Chemerinsky, *Formalism*, *supra* note 38, at 973-74.

184. *See* NOWAK & ROTUNDA, *supra* note 30, § 4.1, at 131.

185. *See id.*

186. *See Lopez*, 514 U.S. 604 (Souter, J., dissenting) (describing the history of Commerce Clause review as a "chastening" experience for the Court).

187. *See* Chemerinsky, *Formalism*, *supra* note 38, at 971. The Supreme Court articulated the idea that the Tenth Amendment was a truism in *United States v. Darby*, 312 U.S. 100, 124 (1941) ("The amendment states but a truism that all is retained which has not been surrendered"). The Court adhered to this view, although it did not articulate it as such, during the first period of Commerce Clause history. *See* Chemerinsky, *Formalism*, *supra* note 38, at 971.

188. Chemerinsky, *Formalism*, *supra* note 38, at 971.

In the early period, for example, the Court, particularly Chief Justice Marshall, took the truism view of the Tenth Amendment.[189] The new nation was still forming and a strong central government was important to ensuring a coherent union.[190] In addition, Congress simply did not pass many laws under the commerce power during this period and, as a result, few laws infringed on the areas of traditional state power.[191] The Court created the legal structure of congressional powers with no limit other than the Constitution itself and the Necessary and Proper Clause, which merely required that a law be helpful in reaching a legitimate goal.[192] The wide extent of Congress' power even served as a justification for the Court to prevent the states from regulating when Congress had not acted.[193]

During the second era of Commerce Clause review, the Supreme Court took the view that federalism and the Tenth Amendment reserved powers to the states.[194] The Court viewed Congress' actions as threats to federalism, representing the tyranny of the national government in regulating local, private businesses.[195] Thus, the Court created a legal structure to enforce its theory of the proper balance of power under federalism, limiting the commerce power to those activities which

189. *See id.*

190. *See* NOWAK & ROTUNDA, *supra* note 30, § 4.4, at 139.

191. *See id.*

192. *See id.* at 140. The Necessary and Proper Clause derives from Article I, §8 of the Constitution, which provides that Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution" the powers granted to Congress by the Constitution. U.S. CONST. art. I, § 8, cl. 18. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall gave the authoritative definition of the term "necessary and proper[:]" "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *McCulloch*, 17 U.S. (4 Wheat.) at 421. This interpretation, in essence, gives Congress the power to make laws that are convenient to the execution of its duties and sets merely a threshold standard of review. *See* TRIBE, *supra* note 47, § 5-3, at 301-303.

193. *See* TRIBE, *supra* note 47, § 6-2, at 403-404.

194. *See* Chemerinsky, *Formalism*, *supra* note 38, at 971.

195. *See id.* at 971-72.

(1) were interstate as opposed to intrastate and (2) directly affected interstate commerce.[196]

During the modern, pre-*Lopez* period, the Court returned to the truism interpretation of the Tenth Amendment.[197] The Court reviewed many laws that had tremendous beneficial impacts on American life.[198] Although the independence of the states may have suffered somewhat, these laws were either highly beneficial to general prosperity, like the New Deal legislation, or they advanced the ideal of federalism by protecting local minorities from the tyranny of local majorities, like the Civil Rights laws of the 1960's.[199] The Court simply did not view its function as deciding the balance of power between the states and federal government.[200] Instead, the Court deferred to Congress.[201] The Supreme Court created new legal structures to facilitate this deference. During this period, exercise of the commerce power was justified if the regulated activity had a substantial effect on interstate commerce, even if many individual actions needed to be combined to create that substantial impact.[202] In addition, the Court looked only for a rational basis for Congress' decision to regulate; the Court did not undertake an independent search for Congress' intended basis for the law.[203]

United States v. Lopez, then, can be viewed as an instance where the Court decided that Congress had gone too far.[204] The Court viewed the Gun Free School Zones Act as a threat to federalism and was committed to curbing the expansion of the

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196. *See* NOWAK & ROTUNDA, *supra* note 30, § 4.5, at 145.

197. *See* Chemerinsky, *Formalism*, *supra* note 38, at 972.

198. *See* TRIBE, *supra* note 47, § 5-5, at 310-11.

199. *See id.*

200. *See Lopez*, 514 U.S. at 607 (Souter J., dissenting) ("Adoption of rational basis review expressed the recognition that the Court had no sustainable basis for subjecting economic regulation as such to judicial policy judgments").

201. *See* Merritt, *supra* note 84, at 682.

202. *See* Wickard v. Filburn, 317 U.S. 111, 127-28 (1942).

203. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 277 (1981).

204. *See* Merritt, *supra* note 84, at 712. Merritt finds that "[t]he important point [of *Lopez*] is that Congress must proceed in a way that recognizes the possibility of some limits and takes the doctrine of enumerated powers seriously." *Id.* at 690.

commerce power.[205] Congress' complete failure to justify its intrusion into the traditional state zones of power of education and criminal law signaled to the Court that federalism itself was threatened.[206] The Court was determined to put some life back into federalism, and to do so, it created yet another legal structure, the commercial activity test.[207] In *Lopez*, federalism was preserved by defining Lopez's gun possession as a non-commercial activity that was beyond the commerce power.[208]

B. *MICHAEL R.*'S PLACE IN COMMERCE CLAUSE HISTORY

Michael R. involved a criminal charge pursuant to a law that is almost indistinguishable from the law at issue in *Lopez*. The Ninth Circuit, in essence, decided that the Youth Handgun Safety Act benefited, rather than threatened, federalism and, thus, the court created a legal structure to justify its decision to uphold the law. The Supreme Court followed the same procedure to reach the opposite result in *Lopez*.

1. How the Youth Handgun Safety Act Benefits, Rather Than Threatens, Federalism

The Ninth Circuit relied on legislative findings to determine that gun violence and juvenile handgun possession could have a substantial effect on interstate commerce.[209] In fact, the court stated it had "no doubt that possession of a handgun by a juvenile, as a general matter, could have a substantial effect on interstate commerce."[210] The court also found that the illicit drug trade, in which juveniles with handguns played an increasing role, was a national problem.[211] Thus, the Youth Handgun Safety Act furthered a goal of federalism because it allowed for the most efficient and effective allocation of resources by allowing the national government to combat a national problem that overwhelmed the abilities of local govern-

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205. *See Lopez*, 514 U.S. at 567-68.
206. *See id.*
207. *See* Chemerinsky, *Formalism*, *supra* note 38, at 982.
208. *See Lopez*, 514 U.S. at 561.
209. *See* United States v. Michael R., 90 F.3d 343, 344-45 (9th Cir. 1996).
210. *Id.* at 344.
211. *See id.* at 345.

ments.[212] The Ninth Circuit stated that its "common sense understanding of the facts" led it to conclude that the law was a proper exercise of the commerce power.[213] Indeed, the court made no mention of federalism in its opinion, indicating that it did not view this law as a threat to federalism, but rather as a beneficial exercise of the commerce power.

2. The Legal Structures Created to Allow the Court to Reach this Decision

Although the Ninth Circuit viewed § 922(x) as a beneficial law, in order to uphold it, the court needed to satisfy the legal structure created in *Lopez*: the commercial activity test.[214] To that end, the court simply added to the *Lopez* structure, adopting yet another doctrine properly termed the "market regulation exception."[215]

In *Michael R.* the court examined the concept of possession in relation to the larger regulatory scheme of § 922(x).[216] Possession, as prohibited by § 922(x)(2), represented not the simple act of possessing a handgun but rather the outcome of the commercial activity of purchasing the handgun or receiving it in transfer.[217] Thus, § 922(x)(1), which outlawed the sale or transfer of handguns to juveniles, and § 922(x)(2) regulate the entire juvenile handgun market by addressing both its supply and demand sides.[218] When Congress regulated an entire market, the court held, the regulation of possession satisfied *Lopez*'s commercial-activity requirement because the larger

212. *See* H.R. REP. NO. 103-711 at 390-91 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1859.

213. *Michael R.*, 90 F.3d at 345.

214. *See id.* at 344.

215. *See id.* The Ninth Circuit noted that the district court, in finding the statute constitutional, had relied, in part, on the fact that "there is an overall regulatory scheme to try and keep guns out of minors' hands requiring intrastate regulation." *Id.* at 343 n.1.

216. *See id.* at 344.

217. *See id.*

218. *See id.*

regulatory scheme would be hampered if possession could not be controlled.[219]

This market-regulation approach distinguishes the statute at issue in *Michael R.* from the statute in *Lopez*. Section 922(q), the *Lopez* statute, only addressed possession and use of a firearm in a school zone.[220] The law did not prohibit selling or transferring a firearm to a person who would possess or use the weapon in a school zone.[221] Thus, § 922(q) clearly did not seek to address the market of firearms possessed or used in school zones, assuming such a market existed and could be regulated.[222] Section 922(x), on the other hand, does address an entire market.[223]

Use of the market regulation scheme as a means to define a commercial activity can be viewed as an extension of the *Wickard* doctrine, which allowed the courts to consider the cumulative effect of a multitude of trivial acts on interstate commerce.[224] In *Michael R.*, the Ninth Circuit was not only combining the cumulative effect of the same activity nationwide, as in the case of farmers growing extra wheat in *Wickard*, but it was also aggregating two different types of activities to create a market effect, namely the sale of handguns to, and the possession of handguns by, juveniles.[225] The aggregate effect of different activity types, as seen in *Michael R.*, makes juvenile handgun possession an economic activity, even though many acts of juvenile handgun possession throughout the country, by themselves, might not implicate economic activity at all.[226]

The other aspect of the legal structure the Ninth Circuit used in *Michael R.* was "due deference to the legislative findings."[227] In reaching its decision, the Ninth Circuit gave

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219. *See id.*
220. *See* 18 U.S.C. § 922(q) (1994).
221. *See id.*
222. *See Lopez*, 514 U.S. at 561.
223. *See Michael R.*, 90 F.3d at 344.
224. *See Wickard*, 317 U.S. at 127-28.
225. *See Michael R.*, 90 F.3d at 344.
226. *See id.*
227. *Id.* at 345.

weight to the same type of generalized, conclusory legislative findings that the Supreme Court flatly rejected in *Lopez*.[228] Even the dissenters in *Lopez* found these factually-unsupported statements of Congressional purpose and conclusions unhelpful in their review of the statute.[229] In light of the explicitness of this general disdain, giving the legislative findings of § 922(x) any weight is suspect.[230] Affording them due deference, however, is even more questionable.

In addition, the Ninth Circuit failed to elaborate on its adoption of Congress' findings that gun violence affects interstate commerce, and referenced only its *Mack* decision.[231] *Mack*, however, is no more enlightening than *Michael R.* because the Ninth Circuit similarly adopted unsupported, generalized findings of the same type rejected in *Lopez*.[232] In addition, the question of whether gun violence affected interstate commerce was not raised as an issue in *Mack*.[233] The Ninth Circuit's adoption of Congress' findings in *Michael R.* ignored the *Lopez* decision, which rejected conclusory legislative findings and the "costs of crime" rationale.[234]

Although the Ninth Circuit did not expressly state it, the adoption of Congress' findings in *Michael R.* was consistent with the application of the rational basis standard of review.[235] In the pre-*Lopez* era, once the Supreme Court found a rational basis for Congress' decision to regulate an activity, the analysis was complete.[236] Although the *Lopez* Court did not actually

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228. *See id.* The Court in *Lopez* refused to even consider the after-the-fact findings contained in § 922(q), as amended. *See Lopez*, 514 U.S. at 563.

229. *See Lopez*, 514 U.S. at 612 n.2 (Souter, J., dissenting); *id.* at 617-18 (Breyer, J., dissenting).

230. *See supra* note 94.

231. *See Michael R.*, 90 F.3d at 345.

232. *See* Mack v. United States, 66 F.3d 1025, 1028 n.5 (9th Cir. 1995) (referring to the Brady Handgun Violence Prevention Act, H.R. REP. NO. 103-344 *reprinted in* 1993 U.S.C.C.A.N. 1984).

233. *See Mack*, 66 F.3d at 1028.

234. *See Lopez*, 514 U.S. at 562-64.

235. *See id.* at 612-14 (Souter, J., dissenting). Justice Souter believed that "[Legislative findings] may, in fact, have great value in telling courts what to look for, in establishing at least one frame of reference for review, and in citing to factual authority." *Id.* at 614.

236. *See* Katzenbach v. McClung, 379 U.S. 294, 303-304 (1964).

apply a rational-basis review, neither did it expressly reject that standard.[237] *Michael R.* represents the Ninth Circuit's interpretation of *Lopez* as holding that a court should conduct an independent analysis into whether the activity is commercial, but then defer to legislative expertise when determining a particular activity's effects on interstate commerce.

In *Michael R.*, the Ninth Circuit utilized language that implicated the continued use of the deferential, rational-basis standard as part of the legal structure the court used to find the law constitutional.[238] The court stated it had "no doubt that possession of a handgun by a juvenile, as a general matter, could have a substantial effect on interstate commerce."[239] The court did not state that the activity *did* have a substantial effect, only that it *could* have one. This statement indicates that the Ninth Circuit had no doubt that the legislature could have found that such an effect existed and that such a finding would have been rational.

Thus, in *Michael R.*, the Ninth Circuit added to the legal structure of *Lopez* by articulating the market regulation exception, while it retained the rational basis standard of review. The creation and application of this legal structure allowed the court to sustain a law that it viewed as beneficial, and not threatening, to the basic structure of federalism, even though, on its face, the law seemed equally as suspect as the law in *Lopez*.

C. THE FUTURE OF COMMERCE CLAUSE REVIEW

Michael R. represents the inherent difficulty with judicial attempts to define the balance of federalism through review of Congressional actions under the Commerce Clause. In reviewing the use of the commerce power, the courts have, on the surface, concentrated on determining *if* Congress may regulate.[240] Implicitly, however, to decide the proper extent of na-

237. *See* Althouse, *supra* note 6, at 799.
238. *See Michael R.*, 90 F.3d at 344-45.
239. *Id.* at 344.
240. *See* Regan, *supra* note 1, at 560-62.

tional power under the framework of federalism, the question is *should* Congress regulate.[241] The Supreme Court came closest to asking the right question in *Lopez*. The Court, in effect, found that Congress should not regulate in the area of gun possession and education because this would endanger federalism.[242] The Court reasoned, therefore, that although the commercial activity test "may in some cases result in legal uncertainty," the line between what is "truly national and truly local" must be drawn somewhere.[243]

Decisions regarding which problems require national action are the essence of the power given to Congress by Article I of the Constitution.[244] Underlying the Court's decision to strike down the Gun Free School Zones Act in *Lopez* was the Court's belief that Congress should not use the commerce power as a "general police power of the sort retained by the states."[245] The fact that the *Lopez* Court did not articulate its position that Congress *should* not regulate gun possession near a school, and, instead, decided that Congress *could* not regulate this "noncommercial" activity, indicates that the Court is still unwilling to admit that it is making policy decisions regarding how Congress should legislate.

Lopez then, is best defined as an attempt by the Supreme Court to, as the saying goes, "keep Congress honest."[246] When

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241. *See id.* at 557.

242. *See Lopez,* 514 U.S. at 566, 567-68.

243. *Id.*; *see also* Merritt, *supra* note 84, at 676 (describing *Lopez* as "a line drawn across the far reaches of the regulatory sand").

244. *See supra*, note 178.

245. *Lopez,* 514 U.S. at 567.

246. *See* Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921, 922-23 (1997) ("A number of scholars, for example, explain the decision as merely a 'sort of "signalling device"– a reminder to Congress that the Court is still out there, willing (however reluctantly) to intervene if federal legislators become too complacent about extending their authority'") (quoting from Guns in Schools, 1995: Hearings on S. 890 Before the Subcomm. on Youth Violence of the Senate Judiciary Comm., (1995) (statement of Professor Larry Kramer), available on WESTLAW, 1995 WL 435712, (F.D.C.H.U.), at 26; *see also Lopez*, 514 U.S. at 578 (Kennedy, J., concurring). Justice Kennedy wrote that:

> Although it is the obligation of all officers of the Government to respect the constitutional design, the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing free-

Congress makes no attempt to show the Court that, at a minimum, it thought about the effects of its regulation on federalism, the Court will treat the regulation as though Congress was threatening federalism itself, and the Court will find a way to strike down the law.[247] On the other hand, *Michael R.* was an acknowledgment by the Ninth Circuit that when Congress has made some effort to explain why it chose to regulate an activity, the court will give great deference to Congress' decision.[248]

VI. CONCLUSION

Lopez and *Michael R.* illustrate the problem created by the Supreme Court's attempt to protect federalism by defining the boundaries of the commerce power through formalistic analysis.[249] Whether the benefits of a certain law outweigh that law's tendency to lessen federalism's protection of diversity and experimentation, its protection against tyranny, its ability to increase political participation and accountability, or its distribution of power in the most efficient manner, is essentially a political question. Thus, if the judicial branch chooses to review the permissible extent of the commerce power, this review is necessarily composed of an implicit decision regarding whether Congress should act, and a court-created framework of legal theories that will allow the court to reach the decision it desires.

This system of review is fatally flawed because it can always be manipulated by subsequent courts, or by Congress if it uses the "magic words" in its legislation.[250] The Ninth Circuit's

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> dom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.

Id. (citations omitted).

247. *See Lopez*, 514 U.S. at 566. Chief Justice Rehnquist realized that the commercial activity test "may in some cases result in legal uncertainty." *Id.* The Court, however, was willing to accept this uncertainty as the price for establishing some "judicially enforceable outer limits" to the reach of the commerce power. *Id.*

248. *See Michael R.*, 90 F.3d at 345.

249. *See* Chemerinsky, *Formalism*, *supra* note 38, at 960.

250. *See id.* at 981-82. For a discussion of how Congress may rewrite a law to pass *Lopez* scrutiny, see Litman & Greenberg, *supra* note 246, detailing the post-*Lopez* changes to the Gun Free School Zones Act.

ability to distinguish *Lopez* in *Michael R.* presents additional proof of this flawed approach. In his dissent, Justice Souter described *Lopez* as either a "misstep" or an "epochal case."[251] In fact, it is neither.[252] As *Michael R.* demonstrates, *Lopez* changed nothing fundamental in Commerce Clause review; rather it was directly in line with the same formalistic method the Supreme Court has previously employed.[253] Truly significant change in this area will come only if the Supreme Court admits that federalism is a policy, not a rule. The Court must then acknowledge that it is making policy decisions when it examines the Commerce Clause under its current system of review. Alternatively, the Court must remove itself from the decision making process altogether and allow Congress to define the policy of federalism, subject only to the limits of the political process itself.

Since only two appellate court decisions, *Michael R.* and *Cardoza*, have addressed the issue thus far, it will probably be some time before the Supreme Court chooses to review the constitutionality of § 922(x)(2).[254] Where the Court takes Com-

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251. United States v. Lopez, 514 U.S. 549, 614-15 (1995) (Souter, J., dissenting).

252. The majority of commentators have determined the *Lopez* did not mark the beginning of a new era of Commerce Clause review, for a wide variety of reasons. Chemerinsky found *Lopez* merely represented more judicial formalism. *See* Chemerinsky, *Formalism, supra* note 38, at 967. Merritt decided that the *Lopez* decision "rests on the confluence of almost a dozen factors making the case virtually unique." Merritt, *supra* note 84, at 692. According to Regan, *Lopez's* "distinction between commercial and noncommercial activities that affect commerce is an unsupported and ill-considered gloss on an already misguided theory." Regan, *supra* note 1, at 555. Even those scholars who agree with the outcome of *Lopez* express doubt as to the decision's future impact. *See* Althouse, *supra* note 6, at 813 ("I sense that *Lopez* may amount to nothing more than a citation for the commercial/noncommercial distinction and the general proposition that the courts do have at least some role, however minimal, in limiting Congress to its enumerated powers . . ."). One commentator, Calabresi, described *Lopez* as an "extraordinary event" marking "a revolutionary and long overdue revival" of limiting federal powers. Calabresi, *supra* note 35, at 752. Calabresi nonetheless realized that it was likely *Lopez* will not change the practical outcome in future commerce power analysis. *See id.* at 831.

253. *See* Chemerinsky, *Formalism, supra* note 38, at 961, 978.

254. Since *Michael R.*, there have been a number of other challenges to § 922(x)(2) within the Ninth Circuit. These cases have the same title: *United States v. Juvenile Male.* The citations are: 120 F.3d 269 (9th Cir. 1997); 116 F.3d 487 (9th Cir. 1997); 107 F.3d 18 (9th Cir. 1997) (two cases); and 98 F.3d 1347 (9th Cir. 1996) (three cases). In the last group of cases, the two requests for certiorari that were filed were denied. *See* 117 S.Ct. 1010 (1997). In the unreported decisions of each of these post-*Michael R.* cases, the Ninth Circuit has rejected the challenge based entirely on the holding in

merce Clause review in the meantime is, of course, unknown. Given the lengthy history of Commerce Clause review and the Supreme Court's apparent reluctance to remove itself from the task of drawing federalism boundaries, no real change to the Court's approach is likely to occur in Michael R.'s lifetime.

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Michael R. In the First Circuit, the Court of Appeals recently affirmed the constitutionality of 922(x)(2) in *United States v. Cardoza*, 129 F.3d 6 (1st Cir. 1997). *See supra* note 137. At the time of this writing, no other published opinion regarding the constitutionality of § 922(x)(2) had been recorded.

* Golden Gate University Class of 1999. This article is dedicated to the memory of David Jeffreys, an incredible friend and human being. I thank my editors, Julie Coldicott, Laurel Vreeland and Susan Lee, as well as my faculty advisors, Roberta Simon and Marc Stickgold. Thanks also to all the others who have helped with the writing of this article. Of course, extra special thanks to my wife, Susan Rattenbury, for her nearly unwavering patience and support during the writing of this article and the rest of my law school career.