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Guns and Commerce in Dialectical Perspective

Thomas Lundmark*

The philosophy of Hegel envisions a world-soul that can be known through the dialectical method of logic.¹ The dialectical method of logic is founded upon the negation of contradictions or, said another way, the reconciliation of opposites.² According to this method, one concept or event (thesis) inevitably produces its opposite (antithesis). The tension between these opposites generates a new category (synthesis). This new category can be said to unify the opposites in a way that, in a sense, preserves them while at the same time abolishes them, thereby avoiding their self-contradictoriness.³

The world-soul animates world and national history, including the legal history reflected in constitutions, laws, and the acts of public institutions⁴ such as courts. The sequence of dialectical logic is the same as the sequence of history. Thus history can be explained as a teleological process aimed at unfolding the dialectical sequence of concepts and events.⁵

In Hegelian terms, the Supreme Court's decision in *Lopez v. United States*⁶ marks the intersection of two dialectical progressions, one judicial

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1. THE NEW COLUMBIA ENCYCLOPEDIA 757 (1975). The German term rendered as "world-soul" is *Weltgeist*.

2. Friedrich Hegemann & Walter Jaeschke, *Die Wissenschaft der Logik*, in HEGEL: EINFÜHRUNG IN SEINE PHILOSOPHIE 75, 84 *et seq.* (Otto Pöggeler ed. 1977).

3. Michael Forster, *Hegel's Dialectical Method*, in THE CAMBRIDGE COMPANION TO HEGEL 130, 146-47 (1995).

4. Manfred Baum & Kurt Rainer Meist, *Recht-Politik-Geschichte*, in HEGEL: EINFÜHRUNG IN SEINE PHILOSOPHIE 106, 106 (Otto Pöggeler ed. 1977).

5. *Id.* at 136.

6. *Lopez v. United States*, 115 S. Ct. 1624 (1995). The literature on *Lopez* is expanding rapidly. Some of the many treatments are Stephen R. McAllister, *Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause?*, 44 KAN. L. REV. 217 (1996), criticized in Tom Stacy, *What's Wrong with Lopez*, 44 KAN. L. REV. 243 (1996). See also Dailey, *infra* note 131; Regan, *infra* note 147; Cahn, *infra* note 131; Comment, *infra* note 146; Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615 (1995); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995); Charles Fried, *The Supreme Court, 1994 Term: Foreword: Revolutions?*, 109 HARV. L. REV. 13 (1995); Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695 (1996); Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643 (1996); Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801 (1996); Symposium: Reflections on *United States v. Lopez*, 94 MICH. L. REV. 533 (1995);

and one legislative. The first progression is the evolution of judicial construction on the reach of the interstate commerce clause⁷ as a source of federal legislative jurisdiction. Here the narrow thesis (buying and selling across state lines⁸) was replaced by its expansive antithesis (everything is interstate commerce⁹) only to give way in *Lopez* to its synthesis (economic activity with a substantial interstate effect¹⁰). The second dialectical progression is legislative. Federal gun control legislation has progressed from its original thesis (right to bear arms¹¹) to an antithesis: a ban in all places on the sale of certain weapons (e.g., automatic weapons¹²) or a ban of all weapons in certain places (e.g., school yards¹³). The resulting synthesis manifests itself in the five-day waiting period (temporary ban) for the purchase of all weapons (Brady Bill¹⁴).

These two progressions (legislative and judicial) are themselves variations on the underlying theme of the evolution of federal-state balance. Orchestrated by state and federal legislatures, courts, politicians, and voters, the original foundational thesis (state sovereignty¹⁵) composed its theoretical opposite: New Deal legislation.¹⁶ The variety of federal and

Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1 (1996); Renee M. Landers, *Federalization of State Law: Enhancing Opportunities for Three-branch and Federal-state Cooperation*, 44 DEPAUL L. REV. 811 (1995); William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719 (1995); Stephen M. McJohn, *The Impact of United States v. Lopez: The New Hybrid Commerce Clause*, 34 DUQ. L. REV. 1 (1995).

7. U.S. CONST. art. I, § 8, cl. 3: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

8. See discussion *infra* notes 83 through 92.

9. See discussion *infra* notes 93 through 103.

10. See discussion *infra* notes 104 through 119.

11. U.S. CONST. amend. II. The Second Amendment's right to bear arms is used as a shorthand term for a more complex history and cluster of issues briefed *infra* notes 41 through 47.

12. 18 U.S.C. § 922(o) (1994), see discussion *infra* note 48.

13. 18 U.S.C. § 922(q)(2)(A) (1994), see discussion *infra* note 106.

14. 18 U.S.C. § 922(s) (1994), see discussion *infra* note 52.

15. The Tenth Amendment (U.S. CONST. amend. X, quoted *infra* note 31) serves in this article as a shorthand for the state-sovereignty thesis. The term "sovereignty" is employed to refer to those unarticulated powers ("states' rights") that belong exclusively to state regulatory jurisdiction. E.g., *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("The Constitution created a Federal Government of limited powers. . . . The States thus retain substantial sovereign authority under our constitutional system."); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985) ("The States unquestionably do 'retain a significant measure of sovereign authority' . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government" (citation omitted)). The term is used advisedly. See Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 346 (arguing that the word is inappropriate to American federalism).

16. The importance of New Deal legislation and the judicial responses to it are discussed in Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620 (1994). See BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 40, 47-50, 105-30 (1991). According to Professor Ackerman, the events of 1937 constitute a revolution that "ends in the constitutional triumph of the activist welfare state." *Id.* at 40. See generally BRUCE A. ACKERMAN,

state gun control laws and judicial interpretation is the cacophonous synthesis of the discordant extremes of state and federal domination.

The discussion begins by tracing the legislative evolution of federal gun control measures (Part A-1 through Part A-3), culminating in a reflection on where the next legislative antithesis will likely sprout (Part A-4). Attention is focused on three potential avenues of legislative advancement: amendment to the constitution, passage of a gun control law restricted to commerce, and employment of the congressional taxing or spending powers. Despite the availability of these avenues, the author concludes that the political forces that arouse legislative activity are too weak and diffuse to sire vigorous antithetical action by Congress in the near future, in part because handguns do not pose a threat to the vast majority of non-Black Americans.¹⁷

The discussion then tracks the dialectical development of judicial construction of the interstate commerce clause that gave birth to *Lopez* (Part B). The author sketches the judicial development in outline form to highlight the conceptual forces at work in forging the synthetic reasoning of *Lopez* (Part B-1 through Part B-3). The author then applies this reasoning to probe the constitutionality of other commerce clause enactments, such as those regulating the environment and governing families, to divine the future of the judicial progression (Part B-4). The author perceives the emergence of a synthesis that is weightier than *Lopez* and that might better be described as a historical progression buried on a deeper stratum. This is cognition of the value of localism, known in Europe as the principle of subsidiarity.¹⁸

I. LEGISLATIVE GUN CONTROL MEASURES

The *Lopez* case raises the issue of the extent of the legislative power of the federal government of the United States. This power is delegated by article 1 section 1 of the Constitution to the Congress. This article of the Constitution also contains a catalogue of legislative powers, which include the powers to declare war,¹⁹ to coin money,²⁰ to operate post offices,²¹ to raise and support armies,²² to grant copyrights and patents,²³ to

RECONSTRUCTING AMERICAN LAW 6-22 (1984) (discussing the realist legacy of the New Deal).

17. See discussion *infra* notes 64 through 67.

18. Subsidiarity is discussed *infra* notes 146 through 160.

19. U.S. CONST. art. I, § 8, cl. 11.

20. *Id.* art. I, § 8, cl. 5.

21. *Id.* art. I, § 8, cl. 7.

22. *Id.* art. I, § 8, cl. 12.

23. *Id.* art. I, § 8, cl. 8.

establish uniform bankruptcy rules,²⁴ to impose federal excise taxes,²⁵ to spend for the general welfare,²⁶ to regulate citizenship matters,²⁷ and to regulate foreign commerce and commerce between the states.²⁸

In order to stress that the federal government—unlike the governments of the states—was a government of delegated powers, the Constitution was amended with the Tenth Amendment in 1791²⁹ which consists of the tautological³⁰ sentence: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”³¹

The spending power³² is probably the most important,³³ at least since 1913 when, upon ratification of the Sixteenth Amendment, the Congress received power to levy income taxes.³⁴ According to the spending power,

24. *Id.* art. I, § 8, cl. 4.

25. *Id.* art. I, § 8, cl. 1.

26. *Id.*

27. *Id.* art. I, § 8, cl. 4.

28. *Id.* art. I, § 8, cl. 3.

29. *Id.* amend. X. For a general discussion of the Court's Tenth Amendment jurisprudence, see, e.g., Martha Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985); Rapaczynski, *supra* note 15; William W. Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769.

30. Justice O'Connor in *New York v. United States*, 505 U.S. 144, 157 (1992). See *United States v. Darby*, 312 U.S. 100, 111 (1940) (upholding sections of Fair Labor Standards Act as within scope of regulation of interstate commerce). Justice Stone, delivering the opinion of the Court in *Darby*, wrote:

Our conclusion is unaffected by the Tenth Amendment. . . . The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

Id. at 123-24.

31. U.S. CONST. amend. X.

32. U.S. CONST. art. I, § 8, cl. 1. The commerce clause has gained in importance in part because regulations under the commerce clause, unlike those under the spending clause, enable the imposition of criminal penalties. Robert L. Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271, 274 (1973); see GERALD GUNTHER, *CONSTITUTIONAL LAW* 137 (12th ed. 1991).

33. These do not just include outlays for defense, which make up one-fifth of the federal budget, but also for social programs. Just three of these federal social programs—Social Security (retirement), Medicare (medical care for the aged and handicapped), and Medicaid (medical care for the poor)—are responsible for one-third of the federal budget. David Hage et al., *Facing the Fiscal Facts*, U.S. NEWS & WORLD REPORT, May 22, 1995, at 51. Other social programs which are based on the federal spending power include Aid for Families with Dependent Children (AFDC) and Food Stamps (coupons with which to buy foodstuffs). Five million families with 9 million children received AFDC in 1994. Robert J. Samuelson, *Welfare Can't Be Reformed*, NEWSWEEK, March 27, 1995 at 47. Over 27 million US residents, i.e., over 10 percent of the population, received Food Stamps in October 1994. SAN DIEGO UNION-TRIB., Dec. 30, 1994 at A8.

34. U.S. CONST. amend. XVI: “The Congress shall have power to lay and collect taxes on

Congress may spend money for the general welfare: "The Congress shall have Power to lay and collect Taxes, Duties, Imports and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."³⁵ While many commentators,³⁶ including the author,³⁷ advocate rigorous review of federal inducements to the states under the spending clause, the Supreme Court accords Congress wide discretion,³⁸ contenting itself with a lax, four-part inquiry: (1) Does the inducement promote the general welfare; (2) Is it clear and unambiguous in what it requires and in the consequences from non-participation; (3) Is the inducement related to a federal interest in particular national projects or programs; and (4) Does it avoid transgressing constitutional provisions that may provide an independent bar to the conditional grant of federal

incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." The Sixteenth Amendment overturned *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), and repealed Article I, Section 9, Clause 4 of the Constitution, which had stated that "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

The Sixteenth Amendment effectively gave the national government unlimited control of the nation's wealth and a virtually unlimited spending power. Lino A. Graglia, *From Federal Union to National Monolith: Mileposts in the Demise of American Federalism*, 16 HARV. J.L. & PUB. POL'Y 129, 130-31 (1993).

35. U.S. CONST. art. 1, § 8, cl. 1.

36. E.g., Rapaczynski, *supra* note 15; Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1131 (1987) ("If the front door of the commerce power is open, it may not be worth worrying whether to keep the back door of the spending power tightly closed"). Other treatments include Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85; Ronald D. Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. PA. L. REV. 289 (1984); David E. Engdahl, *The Spending Power*, 44 DUKE L. J. 1 (1994); Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1929 (1995); Note, *Tower of Power: South Dakota v. Dole and the Strength of the Spending Power*, 49 U. PITT. L. REV. 1097 (1988); Note, *The Surface Transportation Assistance Act: Federalism's Last Stand?*, 11 VT. L. REV. 203, at 212-13, 230 (1986).

37. Lundmark, *infra* note 109, at 424, (advocating use of the three-part test of *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981) for federal measures that directly bind the states: (1) Does the measure regulate the states as states; (2) Does it address matters that are indisputably attributes of state sovereignty; and (3) Does it directly impair the ability of states to structure integral operations in areas of traditional governmental concern. *Id.* at 286-87). Two renowned constitutional scholars doubt the need for judicial review of states' rights issues. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954) (contending that the states can effectively protect their own interests through the national political process) and Jesse H. Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1560 (1977) ("Numerous structural aspects of the national political system serve to assure that states' rights will not be trampled, and the lesson of practice is that they have not been.").

38. TRIBE, *infra* note 103, at 475 n.1: "Congress can, [after *Dole*], achieve by way of its spending power much of what the twenty-first amendment may deny it the ability to achieve through its commerce power." See RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 150-51 (1993).

funds.³⁹ Because of the laxity of this standard, Congress can, under the present state of judicial review, financially encourage all activity which it rationally believes to be in the national interest.⁴⁰

A. *Right to Bear Arms and the 10th Amendment: The Thesis*

An explication of the federal regulation of firearms can begin with this proclamation of the Second Amendment: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."⁴¹ While commentators are almost⁴² universal in opining that the right to bear arms is not a personal right but rather a right enjoyed by each state to arm a militia,⁴³ one cannot dispute the fact that there was no federal regulation of firearms for over a century. Thus it seems warranted for the purposes of historic analysis to identify the thesis (lack of regulation) with the Second Amendment's right to bear arms. This being done, it would seem that minor, indirect incursions into the right to bear arms—those that do not challenge the essence or validity of the right—should be seen as recapitulations or even revalidations of the right (thesis) rather than as contradictions to it. The National Firearms Act of 1934⁴⁴ should be viewed in this non-antithetical way, for it merely imposed a tax on the disposition of certain weapons.⁴⁵ The Omnibus Crime Control and Safe Streets Act of 1968⁴⁶ also does not undermine the thesis (lack of regulation), for this legislation merely requires a federal business permit to import, manufacture, and sell weapons and munitions, even if the business is not involved in interstate commerce.⁴⁷

39. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987).

40. Federal grants to states and localities have constituted an increasingly large proportion of total state and local revenues, increasing from 11 percent in 1950 to 20 percent in 1991. See U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, 2 SIGNIFICANT FEATURES OF FISCAL FEDERALISM, REVENUES AND EXPENDITURES, 56, tbl. 23 (1992). See Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 871-72 (1979) (tracing development of federal offers of funds to the states from their beginnings in the early 1800's).

41. U.S. CONST. amend. II.

42. For a contrary view, see Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

43. Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 247 (1989). No court has ever recognized a personal constitutional right to bear arms. Andrew D. Herz, *Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U.L. REV. 57, 58 (1995).

44. I.R.C. §§ 5801-5872, 48 Stat. 1236-40.

45. This law has as its constitutional base the federal taxing power (U.S. CONST. art. I, § 8, cl. 1) and is therefore not affected by the *Lopez* decision, which applies to commerce clause regulations.

46. Pub. L. No. 90-351.

47. This law directly affects commerce and substantially (if indirectly) affects interstate

B. Prohibitions: The Antithesis

The antithesis to firearm freedom finally emerged with the 1988 machine gun banning amendment to the Firearm Owners' Protection Act⁴⁸ and with the federal⁴⁹ assault weapons ban.⁵⁰ Both the machine gun and assault weapons bans qualify for consideration as antithetic legislative pronouncements because they contradict the thesis that an individual's right to possess a firearm is absolute.

The Supreme Court has not directly ruled on the constitutionality of the machine gun prohibition. However, in 1991 the Supreme Court refused discretionary review in the case of *Farmer v. Higgins*.⁵¹ That case concerned a plaintiff who wanted to construct a machine gun himself, but who was denied a permit to do so by the appropriate federal agency, the Bureau of Alcohol, Tobacco and Firearms. From the denial of review one might conclude that the Supreme Court would uphold the constitutionality of the machine gun prohibition if confronted with the question directly. In any event, both the machine gun and assault weapon bans should survive challenge under *Lopez* because the bans against ownership are coupled with prohibitions against disposition and acquisition, which are commercial transactions.

C. A Waiting Period: The Synthesis

A form of synthesis between the thesis (absolute freedom) and antithesis (prohibition) is seen in the provisions of the Brady Bill.⁵² Enacted in 1993, the Brady Bill requires a five-day waiting period before buying a weapon.⁵³ In Hegelian terms, this waiting-period approach can be thought of as the unification of opposites (absolute freedom and prohibition) in a

commerce, fulfilling the requirements of the *Lopez* decision.

48. 18 U.S.C. § 922(o) (1994): "[I]t shall be unlawful for any person to transfer or possess a machine-gun." The courts have interpreted the law not to forbid the ownership and sale of weapons manufactured and registered before May 19, 1986, when the law took effect. *See States v. Rock Island Armory, Inc.*, 773 F. Supp. 117, 119 (C.D. Ill. 1991) and *Farmer v. Higgins*, 907 F.2d 1041 (11th Cir. 1990), *cert. denied*, 498 U.S. 104 (1991).

49. As far as state legislation is concerned, California's prohibition against attack weapons was upheld in *Fresno Rifle & Pistol Club v. Van de Kamp*, 965 F.2d 723, 731 (9th Cir. 1992). Similar prohibitions can be found in 1993 Conn. Acts 93-306; and 1990 N.J. Laws 32. In Virginia one may only purchase one gun per month. VA. CODE ANN. § 18.2-308.2:2(Q) (Michie Supp. 1994).

50. Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. §§ 921-924 (1994).

51. *Farmer v. Higgins*, 907 F.2d 1041 (11th Cir. 1990), *cert. denied*, 498 U.S. 104 (1991).

52. 18 U.S.C. § 922(s) (1994).

53. It also requires the chief law enforcement officer of each state to do a background check on each prospective buyer. "A chief law enforcement officer . . . shall make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun by the prospective buyer] would be in violation of the law, . . ." *Id.*

way that, in a sense, preserves them while at the same time abolishing them.⁵⁴

While the *Lopez* rationale does not threaten the constitutionality of the Brady Bill, the law is nevertheless unconstitutional for another reason. Under our system of federalism, the federal legislature should not be able to give orders to the state parliaments and governments and in that way turn them into agencies of the federal government.⁵⁵ A monetary incentive would, however, be constitutional. It would encourage, rather than require, the states to join a nationwide system of background checks.⁵⁶

Another bill presently pending before the Congress also possesses the synthetic quality of the Brady Bill because it too combines the opposites of freedom and prohibition. This is the Gun Violence Prevention Act,⁵⁷ also referred to as Brady II. If enacted, this bill would require that each purchaser of a weapon obtain a license.⁵⁸ If this weapons-licensing program were to be financed by the federal government, then it would be constitutional as an expenditure for the common good under Congress's spending power.⁵⁹ Incentives, such as financial support for implementation and enforcement, could be offered to the states to encourage them to enact new or extend existing legislation. However, the bill takes another tack: it would require the states to establish and enforce the weapons-licensing program with no incentives. As such, the law would be unconstitutional under constitutional interpretation predating the *Lopez* decision.⁶⁰

D. Future of the Legislative Progression

Hegel's theory implies that those who take the first steps in creating a new social order cannot predict what future society will be like because

54. See text *supra* note 3.

55. Congress may not simply "commandeer . . . the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York v. United States*, 505 U.S. 144, 176 (1992) (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)). See Note, *Federal Gun Control in the United States: Revival of the Tenth Amendment*, 10 ST. JOHN'S J. LEGAL COMMENT. 151 (1994) and cases discussed, including *United States v. Cortner*, 834 F. Supp. 242 (M.D. Tenn. 1993), *rev'd sub nom.* *United States v. Osteen*, 30 F. 3d 135 (6th Cir. 1994), *petition for cert. filed*, No. 94-6640 (Oct. 24, 1994).

56. See the discussion of the congressional spending power *supra* notes 32 through 40. See also *New York v. United States*, 505 U.S. 144 (1992).

57. Gun Violence Prevention Act, S. 1882, 103d Cong., 2d Sess. (1994).

58. Under this bill, all handgun buyers must possess a handgun card, a nationally uniform license issued through the states. This card will be issued after a thorough background check, including fingerprints. Applicants for a card must complete a basic firearms safety course, and must pass a test. The card would be issued by the states following uniform minimum standards issued by the Secretary of the Treasury. *Id.*

59. U.S. CONST. art. 1, § 8, cl. 1. See discussion *supra* notes 32 through 40.

60. See *supra* notes 32 through 40 (discussing congressional spending power). See also *New York v. United States*, 505 U.S. 144 (1992).

they lack knowledge of the spirit necessary to understand how the new society will actualize the nature of the world-soul.⁶¹ Nevertheless, we still might be able to identify, for instance, the main social problems in the present order and the social movement that will bring the new order into being.⁶²

The magnitude of the gun control problem—and, indeed, whether or not it really is a problem—is subject to serious controversy. The controversy has nothing to do with the Second Amendment's right to bear arms, but rather with the question whether the flood of weapons can be stopped and whether doing so will have any appreciable effect on the rates of violent crime, accidental homicide, and murder and manslaughter.

Many Americans are alarmed by the fact that the American murder and manslaughter rate is twice that of France and Germany; yet these rates are, in turn, twice the rate in Great Britain,⁶³ and people in France and Germany do not seem to be alarmed. The ease of acquisition of a weapon does not entirely explain these statistical differences. On the other hand, a gunshot is certainly more life-threatening than, say, a knife wound. If handguns were less readily available, one would expect a reduction in gun-inflicted injuries and fatalities.

Some of the American ambivalence⁶⁴ toward gun control regulation is undoubtedly attributable to the fact that the vast majority of Americans are not personally affected by the high murder and manslaughter rates. The simple fact is that the murder and manslaughter rates among the non-Black population are not particularly high. Approximately fifty percent of all victims of murder and manslaughter are Black.⁶⁵ Further, murder and manslaughter are often associated with drug dealing, with which the vast majority of the population has no contact. In other words, for the vast majority of the population, the risk of being the victim of murder or manslaughter is quite low. Traffic accidents, HIV, and suicide all claim more victims than crime.⁶⁶ Statistically, one's chances of reaching old age are

61. Allen W. Wood, *Hegel and Marxism*, in *THE CAMBRIDGE COMPANION TO HEGEL* 414, 439 (1995). Even Marx, who saw the downfall of capitalism and the victory of the working class as inevitable, stopped short of writing "recipes for the cookshops of the future." *Id.* at 440.

62. *Id.*

63. Herz, *supra* note 43, n.3 at 58.

64. Another popular argument is that the activities of the powerful gun lobby prevent actualization of the public will. *E.g.*, Herz, *supra* note 43, at 112. The author believes that the popular will is simply not strong enough to change the status quo.

65. 1995 F.B.I. UNIFORM CRIME REPORT FOR THE US, tbl. 2.4, at 14.

66. In 1992 traffic accidents claimed 41,710 lives, HIV killed 33,590, and suicide accounted for 29,760 deaths. Homicide and legal intervention accounted for 29,570 fatalities. *SAN DIEGO UNION-TRIB.*, Jan. 9, 1997, at A-4, col. 5.

just as good in the United States as in Europe,⁶⁷ and this despite floods, earthquakes, and tornadoes.

If Congress wished to revive the Gun-Free School Zones Act or enact more expansive gun control legislation, such as in England,⁶⁸ it could follow one of three paths. First, it could recommend to the states that the Constitution be amended to give the Congress legislative jurisdiction to enact the law. Second, Congress could fit the legislation into one of the three *Lopez* categories (channels of commerce, instrumentalities, or substantial effect of economic activity on interstate commerce). Third, Congress could entice the states into enacting legislation by offering incentives. These three possibilities are addressed in order.

1. Constitutional Amendment

To amend the United States Constitution requires first that both houses of Congress, by two-thirds majority, vote to recommend an amendment. The amendment takes effect upon ratification by the legislatures of three-fourths of the states.⁶⁹

Three precedential amendments to the United States Constitution, all of which followed unpopular decisions of the United States Supreme Court, might be mentioned. The infamous case of *Dredd Scott v. Sandford*⁷⁰ concerned a federal law which prohibited slavery in certain areas. The Supreme Court determined that the Congress lacked jurisdiction to enact the law, because slavery was a municipal matter, i.e., one for the states: the federal government had no jurisdiction. This decision of the United States Supreme Court was "reversed" through the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments, which ban slavery and expressly grant Congress jurisdiction to enact implementing legisla-

67. The life expectancy in the United States is 75.5 years, just barely longer than in Great Britain (75.3 years), Denmark (75.4 years), Finland (75.0 years), Austria (74.4 years), and Germany and Belgium (74.8 years), and not far behind France (75.9 years), Sweden (77.1 years) and Norway (76.8 years). WORLD RESOURCES INSTITUTE, THE 1993 INFORMATION PLEASE ENVIRONMENTAL ALMANAC 517, 519, 525, 531, 561, 565, and 603 (1993).

68. In the aftermath of the Dunblane massacre, in which Thomas Hamilton killed 16 children and their teacher, the House of Commons passed legislation to ban all handguns above .22 caliber. THE DAILY TELEGRAPH, Nov. 20, 1996, at 25; 9 CAL. INT'L L. SEC. NEWSL. 14 (1996/1997). Compensation for gun owners affected by the proposed ban on most pistols is expected to cost more than £ 100 million. THE DAILY TELEGRAPH, Nov. 16, 1996, at 12.

69. Article V of the U.S. Constitution requires the consent of two-thirds of both houses of Congress to propose amendments, and the subsequent consent, by the legislature or by a convention, of three-fourths of the states for ratification. An amendment also can be proposed by a national convention called by Congress pursuant to the Application of the legislatures of two-thirds of the states. U.S. CONST. art. V.

70. 60 U.S. 393 (1857).

tion.⁷¹ In a case from 1895 the Supreme Court declared the federal taxation of incomes to be unconstitutional.⁷² The federal income tax amendment (Sixteenth Amendment) was ratified in 1913, relieving the constitutional infirmity. The most recent example is a case⁷³ ruling unconstitutional a law which gave 18-year-olds the right to vote in state and local (in addition to federal) elections. That law was refashioned into the Twenty-Sixth Amendment, ratified by the states in 1971.

For many reasons, the likelihood of a constitutional amendment for gun control legislation, or even to grant the federal government a general police power, is quite low. Banning guns on school grounds or elsewhere does not have the moral legitimacy or federal urgency that, say, banning slavery did. Unlike with the income tax amendment, the federal government would not be significantly benefitted by amendment to allow gun control legislation or to fight crime generally. In contrast to the 18-year-old voting amendment, ownership of guns on school grounds and elsewhere does not concern a basic democratic institution, such as voting.

2. *Passage of a New Law, Restricted to Commerce*

The Congress could also attempt to redraft the Gun-Free School Zones Act to fit into one of the three *Lopez* categories (channels of commerce, instruments of commerce, or substantial effect on interstate commerce).

Weapons are not channels of commerce, like hotels, and therefore do not fit into the first category. To fit into the second category (instruments), Congress might forbid the import and export of weapons between the states and forbid the possession of a weapon manufactured in another state or country. The mere possession of a weapon is not an economic activity and therefore will not fit into the third category (substantial effect of an economic activity on interstate commerce). On the other hand, the sale of a weapon⁷⁴ is a commercial activity. Basing its legislation on the commerce clause, Congress could constitutionally forbid both the sale and acquisition of a handgun, as well as the possession of a handgun with the intent to sell it, since these activities are closely related to

71. U.S. CONST. amend. XIV, quoted *infra* note 134. Amendment XV reads:

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition or servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

72. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

73. *Oregon v. Mitchell*, 400 U.S. 112 (1970).

74. See *Huddleston v. United States*, 415 U.S. 814, 833 (1974) (upholding federal regulation of weapon sales under the commerce clause).

commerce. If the legislation sought a total weapons ban, then the prohibition against possession could probably be attached to the prohibition against sale, since a prohibition against sale would be practically unenforceable if it were not coupled with a prohibition against ownership.⁷⁵ In other words, a federal prohibition against the ownership of weapons would probably be constitutional if it were coupled with a prohibition against sale.

3. Incentive Programs

In order to realize a nationwide prohibition of guns on school grounds, Congress could concentrate on those few states which still do not have prohibitory provisions in their penal codes. As mentioned above,⁷⁶ numerous states—almost 40—already forbid the possession of weapons on school grounds. In order to encourage further legislative activity, Congress could employ the spending power by offering incentives⁷⁷ to ensure the cooperation of the states. The most famous example of this “cooperative federalism”⁷⁸ is probably the uniform minimum drinking age.⁷⁹ It is necessary for the Congress to offer incentives because Congress lacks the power to dictate legislation to the state legislatures.⁸⁰

75. Actions for compensation for expropriation are outside the scope of this article. Compare *Andrus v. Allard*, 444 U.S. 51 (1979) (prohibition against commerce in parts of eagles held not to constitute a taking of property without compensation because possession was not prohibited) with *Mugler v. Kansas*, 123 U.S. 623 (1887) (closing of a brewery did not give rise to a claim for compensation because the sale of alcoholic beverages had been legislatively branded a “nuisance”). See Thomas Lundmark, *Neueste Enteignungsrechtsprechung des US Supreme Court und ihre Bedeutung für das Naturschutzrecht*, NATUR UND RECHT (appearing shortly). See also note 68, *infra*, mentioning the compensation provided for under new legislation in the United Kingdom that bans certain handguns.

76. See *infra* note 114.

77. Three days after the Court’s ruling in *Lopez*, President Clinton announced plans to introduce legislation that would encourage states to ban guns from school zones by linking Federal funds to enactment of school-zone gun bans. Todd S. Purdum, *Clinton Seeks Way to Retain Gun Ban in School Zones*, N.Y. TIMES, Apr. 30, 1995, at A1. See Lundmark, *infra* note 109, at 421.

78. The courts have often referred to Medicaid, and other federal welfare programs largely administered and implemented by states, as examples of “cooperative federalism.” See, e.g., *Harris v. McRae*, 448 U.S. 297, 308 (1980); *Douglas v. Babcock*, 990 F.2d 875, 878 (6th Cir.), *cert. denied*, 114 S. Ct. 86 (1993); *Washington Dep’t of Social & Health Servs. v. Bowen*, 815 F.2d 549, 557 (9th Cir. 1987); see also *King v. Smith*, 392 U.S. 309, 316 (1968) (using the term “cooperative federalism” to describe the Aid to Families with Dependent Children program); and *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 289 (1981) (using the term to describe provisions of the Surface Mining and Reclamation Act found constitutional).

79. National Minimum Drinking Age Act, 23 U.S.C. § 158 (1994), upheld in *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that the spending power permits Congress to condition highway funds on states’ adoption of minimum drinking age).

80. See *New York v. United States*, 505 U.S. 144 (1992) (holding that a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b (Supp. 1992)

II. JUDICIAL CONSTRUCTION OF THE INTERSTATE COMMERCE CLAUSE

According to the text of the commerce clause, the federal power over commerce extends to international commerce, to interstate commerce, and to commerce with the Indian tribes.⁸¹ Power to regulate intrastate commerce therefore rests textually with the states.⁸²

A. *Early Commerce Clause Jurisprudence: The Thesis*

During the nineteenth century, federal courts employed the commerce clause, if at all, when the law of a single state was claimed to interfere with the interstate transportation and commerce in goods, for, stated generally, the commerce clause prohibits states from imposing unreasonable burdens upon interstate commerce.

In order to decide these cases, federal judges had to define what was meant by "commerce" and by "interstate." According to the Supreme Court in 1824, commerce that was "interstate" was commerce which concerned more states than one.⁸³ In other words, it presupposed a geographical transborder element. The judges of the federal courts employed a mercantile definition of commerce, holding that commerce consisted of buying and selling.⁸⁴ According to this definition, production, manufacturing, and mining were merely precursors of commerce, but not commerce themselves. Therefore, they could not be regulated by Congress under the commerce clause.⁸⁵

This early construction of the commerce clause had the practical effect of legitimating the status quo. By construing the commerce clause in such a narrow fashion, the federal judges avoided having to declare countless laws of the state governments to be unconstitutional even

specifying that a state that fails to provide for the disposal of all internally generated waste becomes liable for all damages suffered by the generator or owner as a result of the state's failure take possession of the waste was an unconstitutional command to implement legislation enacted by Congress). This case is discussed at length, among other places, in Hazeltine, *infra* note 103, Levy, *infra* note 103, and Caminker, *infra* note 103.

81. U.S. CONST. art. I, § 8, cl. 3, *quoted in supra* note 7.

82. Historically, the interstate commerce clause was intended to prevent Balkanization and to encourage creation of a national market. *See Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). Similar concerns motivated the formation of the European Common Market. *See* GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 2 (1993); THOMAS C. FISCHER, *THE EUROPEANIZATION OF AMERICA: WHAT AMERICANS NEED TO KNOW ABOUT THE EUROPEAN UNION* 29 (1995) (reviewed in Thomas Lundmark, 45 *AM. J. OF COMP. L.* (1997)).

83. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

84. *E.g.*, *United States v. E. C. Knight Co.*, 156 U.S. 1, 13 (1895) ("Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities . . . may be regulated, but this is because they form part of interstate trade or commerce").

85. *See Wickard v. Filburn*, 317 U.S. 111, 121 (1942) (describing development of commerce clause jurisprudence).

though they had or could have had a detrimental effect on interstate commerce. For example, in one case the federal judges held that a ferry monopoly was intrastate because the ferry never crossed a border,⁸⁶ even though passengers and freight moved across state lines. In another case the Supreme Court ruled that brewing and packaging of intoxicating beverages did not constitute buying and selling ("commerce"), but rather merely "production." Thus the states could forbid the production of alcoholic beverages without doing violence to the commerce clause.⁸⁷

The mercantile test for commerce survived into the late 19th century, which was a time of expanding federal preoccupation with commerce.⁸⁸ As a result of this new federal legislative interest in commerce, the commerce clause became a handy weapon for attacks upon federal legislation. New federal regulations of production, manufacturing, and mining were held to be unconstitutional because, not being commerce, Congress had no power to regulate them.

In one case, a federal agency sought to block the acquisition of a sugar refinery on the ground that its acquisition would give rise to a monopoly unlawful under the Sherman Antitrust Act. The federal judges theorized that the manufacture of sugar was a precondition of commerce, but not exactly commerce itself; as such, it could not be part of interstate commerce over which the federal government had jurisdiction.⁸⁹ The same reasoning was applied to the federal Child Labor Act, which forbade the transportation of goods manufactured with the help of child labor. According to the Supreme Court at the time, manufacture was not commerce,⁹⁰ at least not interstate commerce. The same reasoning was followed for mining. "Mining," according to the Court, "brings the subject matter of commerce into existence. Commerce disposes of it"; and thus Congress could not legislate a nationwide minimum wage for miners, because mining was not commerce.⁹¹ Even if mercantile commerce as

86. *Veazie v. Moor*, 55 U.S. 568, 573-575 (1853). In an earlier case, *Gibbons* had operated a passenger ferry between New York and New Jersey under a federal license. Ogden claimed that the federal license violated his monopoly, granted by the state of New York, over steamboat transportation between the two states. Because *Gibbons'* transportation of passengers took place between two states, i.e., it was transborder, it was held to constitute interstate commerce and to lie within the federal legislative jurisdiction. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

87. *Kidd v. Pearson*, 128 U.S. 1, 17, 20-22 (1888). For an overview of constitutional questions regarding the regulation of alcohol, see Thomas Lundmark, *Freiheit der Werbung und der Grundsatz der Verhältnißmäßigkeit in der amerikanischen Rechtsprechung*, 1994 VERWALTUNGS-ARCHIV 522.

88. Examples of federal legislation stemming from this time period include the Interstate Commerce Act of 1887, 24 Stat. 379; and the Sherman Antitrust Act of 1890, 26 Stat. 209 (current version at 15 U.S.C. § 1 *et seq.* (1994)).

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

90. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

91. *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936).

then defined was involved, the federal judges would differentiate between measures that directly (constitutionally) and indirectly (unconstitutionally) regulated commerce. Applying this ancillary test, the federal judges held a federal law setting maximum working hours and minimum wages for the poultry industry to be unconstitutional because the effects of the law on commerce were indirect, not direct.⁹²

B. *Recent Commerce Clause Jurisprudence: The Antithesis*

The great shift in the opinion of the Supreme Court came in 1937 shortly after President Roosevelt announced his "Court Packing Plan."⁹³ According to Roosevelt's legislative plan, the number of judges on the Supreme Court was to be increased in order to ensure that younger judges—those sympathetic to Roosevelt's legislation—had a majority on the Court. Even though Roosevelt's plan was met with opposition in Congress, the Court began backing down from its protection of the supremacy of the states in economic matters.⁹⁴

In the seminal opinion *National Labor Relations Board v. Jones & Laughlin Steel Corporation*⁹⁵ the Supreme Court not only abandoned the direct-indirect test, it went further: Even *intrastate* activities were reachable by Congress under the commerce clause if they had such a close and substantial relation to interstate commerce that their control was essential or appropriate to protect that commerce from burdens and obstructions. Using this new standard, the Supreme Court upheld the National Labor Relations Act of 1935 which, among other things, outlawed unfair employment practices such as firing employees for union activity. There followed decisions which emphasized the cumulative effect of the regulated activity on commerce and interstate commerce. Following the lead of Congress, the Supreme Court so expanded the reach of the commerce clause that all activity could be regulated if it had some conceivable, if only cumulative, effect on an interstate transaction. Thus the Supreme Court upheld laws which forbade local, usurious credit transactions;⁹⁶

92. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (in which the Supreme Court declared the National Industrial Recovery Act of 1933, 15 U.S.C. § 703 (1994), unconstitutional, in part as an unlawful delegation of legislative power to the executive without sufficient standards).

93. On February 5, 1937, President Franklin Delano Roosevelt announced a bill to reorganize the federal judiciary. See Franklin D. Roosevelt, The 342d Press Conference (Feb. 5, 1937), in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE CONSTITUTION PREVAILS 1937, 35, 49-50 (1941).

94. See generally DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 235 (1990).

95. 301 U.S. 1 (1937).

96. *Perez v. United States*, 402 U.S. 146, 155-156 (1971).

which prohibited discrimination in privately owned restaurants⁹⁷ and hotels⁹⁸; which regulated the harvest and consumption of small quantities of wheat⁹⁹; and which punished arson attacks on apartment buildings.¹⁰⁰ The Court even stopped calling production, manufacture, and mining a precursor to commerce. Indeed, one case exclusively concerned the regulation of intrastate mining, yet the federal regulation was upheld on the strength of the commerce clause.¹⁰¹

Until the *Lopez* case, the commerce clause seemed not to limit Congress's legislative prerogative in any way. Indeed, since the New Deal of the 1930's not a single piece of commerce clause legislation had been held unconstitutional for lack of jurisdiction.¹⁰² Two textbook authors wrote in 1991: "The Supreme Court today interprets the commerce clause as a complete grant of power."¹⁰³

C. *The Lopez Synthesis*

In 1992 a twelfth grader came to school in San Antonio, Texas, with a concealed pistol. He was promptly charged with violation of a law, enacted by the legislature of the state Texas,¹⁰⁴ which forbade possession of a gun on the grounds of a school. The following day the complaint against him in the state court was dismissed, and he was charged by the federal grand jury with violation of a federal law.¹⁰⁵ According to the federal Gun-Free School Zones Act of 1990,¹⁰⁶ it is a federal crime knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.¹⁰⁷

97. *Katzenbach v. McClung*, 379 U.S. 294, 299-301 (1964).

98. *Heart of Atlanta Hotel v. United States*, 379 U.S. 241 (1964).

99. *Wickard v. Filburn*, 317 U.S. 111 (1942).

100. *Russell v. United States*, 471 U.S. 858, 862 (1985).

101. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981).

102. The last case declaring a commerce clause regulation unconstitutional for want of federal legislative jurisdiction was *Railroad Retirement Board v. Alton Railway Co.*, 295 U.S. 330 (1935).

103. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 154 (4th ed. 1991). "For almost four decades after 1937, the conventional wisdom was that federalism in general--and the rights of states in particular--provided no judicially-enforceable limits on congressional power." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-20, at 378 (2d ed. 1988). See also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 158 (1990); ROGERS M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 162 (1990); William A. Hazeltime, *New York v. United States: A New Restriction on Congressional Power Vis-a-Vis the States?*, 55 OHIO ST. L.J. 237 (1994); Richard E. Levy, *New York v. United States: An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 KAN. L. REV. 493 (1993); and Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995).

104. TEX. PENAL CODE ANN. § 46.03(a)(1) (Supp. 1994).

105. *Lopez v. United States*, 115 S. Ct. 1624, 1626 (1995).

106. 18 U.S.C. § 922(q)(2)(A) (1994).

107. A school zone is defined in 18 U.S.C. § 921(a)(25) as "in, or on the grounds of, a

The public defender moved to dismiss the criminal indictment on grounds of federalism, arguing that Congress has no power to regulate schools.¹⁰⁸ Education, the defense lawyer argued, belongs traditionally to the jurisdiction of the several states of the United States, or to state or local agencies, usually school districts.¹⁰⁹ The trial court rejected this argument, but the young man prevailed before the Fifth Circuit Court of Appeals¹¹⁰ and before the Supreme Court. The federal law under which he was convicted was held unconstitutional for lack of federal legislative jurisdiction.

The dissenting opinions in *Lopez* of Justices Breyer, Stevens, Souter, and Ginsburg apply the expansive definition of commerce that had been used for the past 50 years: any activity can be commerce. The dissenting opinion of Stevens provides a good example of this (antithetical) reasoning:

Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity. In my judgment, Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use; it necessarily follows that Congress may also prohibit their possession in particular markets.¹¹¹

public, parochial or private school [or] within a distance of 1,000 feet from the grounds of a public, parochial or private school."

108. The constitutional right to bear arms, discussed *supra* note 41, is not mentioned in the 164-page opinion of the Court in *Lopez*.

109. Thomas Lundmark, *Die Bedeutung der Gliedstaaten im amerikanischen Verfassungssystem*, 1992 DIE ÖFFENTLICHE VERWALTUNG 419.

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

111. Compare the legislative findings, adopted by Congress after the enactment of the legislation, found at 18 U.S.C. § 922(q) (1994):

- (1)(A) Crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;
- (B) Crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;
- (C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, . . . ;
- (D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce; . . .
- (G) . . . [a] decline in the quality of education has an adverse impact on interstate commerce

Having met the requirement of "commerce," the dissenting Justices turn to the issue that the commerce be "interstate." Here they join in the opinion of Breyer, who, loyal to the antithetical position, argues as follows: violence in schools, including violence with weapons, hinders learning by the pupils, which in turn has an impact on interstate commerce because a good education is important in the job market, and job markets are interstate.¹¹²

Of course schools play a very important role in society, but the relationship to commerce is weak and even a little insulting, since children are not sent to school solely or even predominately to serve commercial ends. Sometimes it is difficult to accept that the Congress can regulate something as ephemeral and banal as day-to-day commercial transaction, and not something as meaningful and lasting as a grade-school education. But this is exactly how the federal government was designed, the majority reasoned: the federal government was meant to augment the powers of the states, not the other way around.

The Gun-Free School Zones Act, which was part of a larger legislative package, was signed by President George Bush under protest. He saw federal regulation as unnecessary and potentially disruptive to legitimate state regulation of the same subject matter.¹¹³ And, in fact, almost 40 states—including Texas, where the *Lopez* case arose—have such legislation on their books.¹¹⁴

112. As a law student notes, this argument would also support a federal ban on chewing gum in schools, because gum chewing hinders learning, which in turn has an impact on interstate commerce because a good education is important in the job markets. James M. Maloney, Note, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 *FORDHAM L. REV.* 1795, 1826 (1994).

113. "The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed upon the States by the Congress." President's Statement upon Signing S. 3266, 26 *WEEKLY COMP. PRES. DOC.* 1945 (Nov. 29, 1990).

114. E.g., N.D. CENT. CODE § 62.1-02-05 (1985); 18 PA CONS. STAT. ANN. § 912 (1983). After the Gun-Free School Zones Act was passed in 1990, many states amended existing laws or enacted similar bans. E.g., ALASKA STAT. § 11.61.195(a)(2)(A) (Supp. 1993); ARIZ. REV. STAT. ANN. § 13-3102(A)(12) (Supp. 1993); ARK. CODE ANN. § 5-73-119(a)(2)(A) (Michie 1993); CAL. PENAL CODE § 626.9 (Deering Supp. 1994); COLO. REV. STAT. ANN. § 18-12-105.5 (West Supp. 1993); CONN. GEN. STAT. ANN. § 53a-217b (West Supp. 1993); FLA. STAT. ANN. § 810.095 (West 1994); GA. CODE ANN. § 16-11-127.1 (1994); IDAHO CODE § 18-3302C(1) (Supp. 1994); ILL. ANN. STAT. ch. 720, para. 5/24-1 (a)(12)(c)(1) (Smith-Hurd 1994); LA. REV. STAT. ANN. § 14:95(A)(5) (West Supp. 1994); ME. REV. STAT. ANN. tit. 20-A, 6552 (West 1994); MD. ANN. CODE art. 27, § 36A (1992); MASS. GEN. L. 269 § 10(j) (1992); MINN. STAT. ANN. § 609.66(1)(b)(1) (West Supp. 1994); MISS. CODE ANN. § 97-37-17 (1993); MO. ANN. STAT. § 571.030(1)(8) (Vernon Supp. 1994); MONT. CODE ANN. § 45-8-334 (1993); NEV. REV. STAT. § 202.265.1(c) (1993); N.J. STAT. ANN. § 2C:39-5.e (West Supp. 1994); N.M. STAT. ANN. § 30-7-2.1 (Michie Supp. 1993); N.Y. PENAL LAW § 265.01(3) (McKinney 1989); N.C. GEN. STAT. § 14-269.2 (1993); OHIO REV. CODE ANN. § 2923.122 (Anderson 1993); OKLA. STAT. ANN. tit. 21, § 1280.1 (West Supp. 1994); OR. REV. STAT. § 166.370 (1993); R.I. GEN. LAWS § 11-47-60 (1993); S.C. CODE ANN. § 16-23-420 (Law. Co-op. Supp. 1993); S.D. CODIFIED LAWS ANN. § 13-32-7 (Supp. 1994); TENN. CODE ANN. § 39-17-1309 (1991); TEX. PENAL CODE ANN. § 46.03(a)(1) (Vernon Supp. 1994);

The judges in the majority of the *Lopez* case (Rehnquist, O'Connor, Scalia, Kennedy, and Thomas) agreed with the former President. In his opinion for the majority, Chief Justice Rehnquist differentiates three types of commerce based laws. First, Congress may regulate the channels of interstate commerce, such as hotels.¹¹⁵ Second, Congress can regulate the instrumentalities of interstate commerce, or persons or things in interstate commerce. Examples include safety measures for vehicles, even if they are not necessarily driven across state boundaries.¹¹⁶ Third, federal legislative jurisdiction extends to certain activities having some relation to interstate commerce, or that affect interstate commerce in a particular way. This is where the synthesis is reached. Rehnquist reiterates the test for measuring the constitutionality of a commerce clause law: "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."¹¹⁷ First, the activity regulated must be economic, i.e., commercial. Second, this activity must have a substantial interstate effect, suggesting that a cumulative or theoretical effect alone might be insufficient.¹¹⁸

In the case of the Gun-Free School Zones Act only the third avenue of constitutionality comes into question, that of economic activities having a substantial relation to interstate commerce, or substantially affecting interstate commerce. Using Rehnquist's synthetic standard,¹¹⁹ the case is easy to decide. Mere possession of a gun at school is not economic activity. Congress therefore lacks jurisdiction to regulate this activity under the interstate commerce clause.

D. Future Judicial Progression: Subsidiarity

The magnitude of the fallout from the *Lopez* decision is not mathematically quantifiable. More than 100 federal laws in the United States Code, including more than 25 criminal provisions, employ the words "af-

UTAH CODE ANN. § 76-3-203.2 (Supp. 1993); VT. STAT. ANN. tit. 13, § 4004 (Supp. 1993); VA. CODE ANN. § 18.2-308.1 (Michie Supp. 1994); WASH. REV. CODE ANN. § 9.41.280 (West Supp. 1994); WIS. STAT. ANN. § 948.605 (West Supp. 1993).

115. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). The anti-discrimination law at issue in the *Heart of Atlanta* case and other Civil Rights laws are not threatened by the reasoning of the *Lopez* decision because they fit into this category of the channels of commerce.

116. *Southern R. Co. v. United States*, 222 U.S. 20 (1911).

117. *Lopez*, 115 S. Ct. at 1634 (emphasis added).

118. The second part of the test—substantial effect on interstate commerce—is technically a dictum because it was not necessary to the decision of the Court because the regulation at issue failed the first prong of the test.

119. The absence of legislative findings, which was important to the Court of Appeals in declaring the law unconstitutional, was relatively unimportant to the United States Supreme Court, which agreed with the Government that Congress was not required to make formal findings on the substantiality of the influences on interstate commerce. *Lopez*, 115 S. Ct. at 1626 (1995). On the issue of findings in general, see *Maloney supra* note 112, at 1817.

fecting commerce" in defining the reach of the law.¹²⁰ In addition, many laws which are based on the commerce clause, including the Gun-Free School Zone Act, do not mention the commerce clause at all. Because of these facts, and because of the breadth of the topic, the following discussion can make only observations of a general nature.

Federal social programs—such as old-age benefits,¹²¹ medical care for the poor,¹²² and medical care for the aged and handicapped¹²³—are based on the federal spending power¹²⁴ and as such are not directly affected by the *Lopez* decision. Federal anti-discrimination laws, even if based on the commerce clause, are not threatened by *Lopez* because they regulate the channels of commerce, such as hotels, restaurants, and the workplace.¹²⁵ Federal criminal law is concerned to a great extent with interstate and international crimes, such as drug smuggling, and crimes which employ the channels of commerce, including telephones and the post office.¹²⁶ Tax laws enjoy their own base of federal legislative jurisdiction,¹²⁷ even when employed as instruments of indirect regulation.¹²⁸

Federal family law is a field in which the impact of *Lopez* has already been felt: a federal district court in Arizona¹²⁹ has ruled that Congress exceeded its regulatory powers under the commerce clause in enacting the Child Support Recovery Act of 1992,¹³⁰ which establishes a national program to aid states in developing and implementing child support enforcement policies and procedures.¹³¹ But other courts have upheld the Child Support Recovery Act as a constitutional exercise of Congress's commerce power.¹³² Other family law legislation appears constitutional

120. *Lopez*, 115 S. Ct. at 1646 (1995) (Breyer, J., dissenting). The author's LEXIS-search revealed 112.

121. Social Security Act, 42 U.S.C. §§ 1395-1395ccc (1994).

122. *Id.* §§ 1395-1395xx (Medicaid).

123. *Id.* §§ 1396-1396u (Medicare).

124. U.S. CONST. art. I, § 8, cl. 1, discussed *supra* notes 32 through 40.

125. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). They may protect the constitutional right of interstate travel. See *United States v. Guest*, 383 U.S. 745 (1966). Another basis of congressional empowerment is section 5 of the Fourteenth Amendment. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

126. See generally Beale, *supra* note 6, Brickey, *supra* note 6, and Kurland, *supra* note 6.

127. U.S. CONST. art. I, § 8, cl. 1.

128. See, e.g., *Sonzinsky v. United States*, 300 U.S. 506 (1937), *rev'd on other grounds*. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 99-16, p. 145 (1987).

129. *United States v. Mussari*, 894 F. Supp. 1360 (D. Ariz. 1995); *United States v. Schroeder*, 894 F. Supp. 360, 364 (D. Ariz. 1995).

130. 18 U.S.C. § 228 *et seq.* (1994).

131. Discussed in Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1817 (1995). See generally Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1095-97 (1994) (examining federalism concerns).

132. *United States v. Hopper*, 899 F. Supp. 389, 393 (S.D. Ind. 1995); *United States v. Murphy*, 893 F. Supp. 614, 616-17 (W.D. Va. 1995); *United States v. Hampshire*, 892 F. Supp.

under *Lopez* either because it regulates the "channels of commerce,"¹³³ employs the grant of Congressional power under the Fourteenth Amendment¹³⁴ to enforce that Amendment's prohibition of state discrimination,¹³⁵ or employs the spending power of Congress.¹³⁶

The *Lopez* case will have little effect on the constitutionality of federal environmental legislation because most of the laws are not based exclusively on the "affecting commerce" aspect of the commerce clause. If they are, then jurisdictional problems may arise in the application of an otherwise constitutional statute. The Clean Water Act seeks to control the discharge of pollutants into the "waters of the United States."¹³⁷ Overzealous administrative extension of this territorial jurisdiction can bring invalidity of an action.¹³⁸ Another very important piece of environmental legislation, the Clean Air Act, is not affected by the reasoning of the *Lopez* decision because it employs a system of incentives to the states to entice them to prepare and enforce State Implementation Plans.¹³⁹ The Endangered Species Act can in part be considered an exercise of the power of the federal government to enter into treaties with foreign countries.¹⁴⁰ Federal laws implementing treaties are binding on the states without a separate ground of federal legislative jurisdiction.¹⁴¹ The National

1327, 1329-30 (D. Kan. 1995).

133. Safe Homes for Women Act of 1994, 18 U.S.C. §§ 2261-2266 (1994) (making domestic abuse a federal crime when the perpetrator crosses state lines).

134. U.S. CONST. amend. XIV: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

135. Howard M. Metzenbaum Multi-Ethnic Placement Act of 1994, 42 U.S.C. § 5115a (1994) (prohibiting state agencies from denying foster or adoptive placements solely on the basis of race). See also Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1994) (that implements the full faith and credit clause of the Constitution (U.S. Const. art. IV) by extending full faith and credit standard to child custody determinations). See generally Walter W. Cook, *The Power of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421 (1919).

136. Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5107, 5116, 5118 (1994) (establishing comprehensive federal program directed toward the prevention and treatment of child abuse and neglect); Child Support Enforcement Act, 42 U.S.C. §§ 651-669 (1994) (establishing national program to aid states in developing and implementing child support enforcement policies and procedures); Family Violence Prevention and Services Act, 42 U.S.C. §§ 10401-10418 (1994) (providing federal funding to states to address the problem of family violence).

137. 33 U.S.C. § 1251 *et seq.* (1994). The discharge of dredged or fill material into navigable waters without a permit violates the Act, which defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The Environmental Protection Agency and the Corps of Engineers have adopted regulations defining "waters of the United States" to include numerous bodies of water including wetlands. 33 C.F.R. § 328.3(a); 40 C.F.R. § 230.3(s).

138. See *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir. 1993).

139. See Thomas Lundmark, *The Clean Air Act Today*, 27 AMERICAN STUDIES NEWSLETTER 1 (1992).

140. See *Missouri v. Holland*, 252 U.S. 416 (1920).

141. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). See generally Paul M. Orbuch & Thomas O. Singer, *At Particular Risk*, THE ENVIRON. FORUM, July-Aug. 1995 at 28.

Environmental Policy Act,¹⁴² like many federal environmental laws, affects federal agencies and projects that are supported by federal funds, in other words, projects which would fall under Congress's spending power.¹⁴³ As such they are not affected by the *Lopez* decision.

Other federal environmental laws, on the other hand, are exclusively based on the interstate commerce clause. Exemplary is the Surface Mining Control and Reclamation Act of 1977,¹⁴⁴ which dictates mining practices for open-space mining and requires restoration after mining. In 1981 the Supreme Court¹⁴⁵ upheld the constitutionality of the law despite the fact that it only indirectly (if at all) regulated interstate commerce. The Supreme Court would likely reach the same result today, because mining is a commercial activity with a substantial impact on interstate and foreign commerce.

The political and judicial struggle regarding states' rights seems destined, at least in the near future, to be dominated by the concepts and precepts of the commerce and the spending clauses. This is unfortunate, because the tradition, thinking, and terminology of commerce, spending, and economics do not lend themselves well to the present-day debate on federalism. For instance, the reason why school-ground guns do not seem to many to be an appropriate subject of federal regulation has nothing to do with commerce or the economy or federal spending but rather with the tradition of local supervision of education and with the conviction that local governance of education is preferable.

According to one commentator, family law, like education, should remain "localized" under the commerce clause.¹⁴⁶ Another suggests that federal power over commerce ought only exist where there is special justification for it.¹⁴⁷ Without ever referring to it by name, both of these commentators, as well as many others, have articulated values underpinning the European principle of subsidiarity.

"Subsidiarity expresses a preference for governance at the most local level consistent with achieving government's stated purposes."¹⁴⁸ Exam

142. 42 U.S.C. § 4321 *et seq.* (1994).

143. U.S. CONST. art. I, § 8, cl. 1, discussed *supra* notes 32 through 40.

144. 30 U.S.C. § 1201 *et seq.* (1994).

145. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981).

146. Dailey, *supra* note 131, *passim*. See also Comment, *Abusing the Power to Regulate: The Child Support Recovery Act of 1992*, 46 CASE W. RES. L. REV. 935 (1996). See also *Lopez*, 115 S. Ct. at 1634, (referring to "a distinction between what is truly national and what is truly local" (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937))). *Lopez* does not succeed in making this distinction. McJohn, *supra* note 6, at 36.

147. Donald H. Regan, *How to Think about the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554 *passim* (1995). Compare Bermann, *infra* note 148, at 452-53: "[S]ubsidiarity systematically places the burden of proof on the proponents of Community action."

148. George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Com-*

ples can found in the Constitution of Germany and in the Treaty of Rome, the "constitution"¹⁴⁹ of the European Union. In Germany, the principle of subsidiarity finds potential¹⁵⁰ application to a long list of subject matter areas, such as civil law, criminal law, weapons legislation, and welfare,¹⁵¹ in which the federal and state governments have concurrent jurisdiction. In these areas, the German Constitution circumscribes the federal legislative prerogative:

- (2) The federal government has legislative jurisdiction [in matters subject to concurrent jurisdiction] only to the extent that federal legislation is necessary because
1. a matter cannot be effectively regulated by legislation of individual states or
 2. the regulation of a matter by state law could impair the interests of other states or of the whole [of the people] or
 3. the protection of legal or economic uniformity . . . demands it.¹⁵²

The principle of subsidiarity enjoins institutions of the European Union to act in areas of concurrent jurisdiction "only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States."¹⁵³ The new provision¹⁵⁴ reads as follows:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

munity and the United States, 94 COLUM. L. REV. 331, 339 (1994). Subsidiarity promotes the (sometimes overlapping) virtues of self-determination and accountability, political liberty, flexibility, preservation of identities, diversity, and respect for internal divisions of component states. *Id.* at 340-43. The apparent purpose was to ease fears that greater legal and political integration of Europe would needlessly trample claims to self-governance and cultural diversity. *Id.* at 334.

149. BERMANN ET AL., *supra* note 82, at 47.

150. Perhaps because the principle of subsidiarity was imposed on the Germans by the Allies, it has never been taken seriously by the Federal Constitutional Court. See CURRIE, *supra* note 103, at 42-49.

151. Grundgesetz für die Bundesrepublik Deutschland arts. 74 and 74a, 1 Bundesgesetzblatt 1 (1949), as amended. An English translation can be found at CURRIE, *supra* note 103, App., at 370-72.

152. Grundgesetz, *supra* note 151, art. 72 (translated by the author). An English translation can be found at CURRIE, *supra* note 103, App., at 369.

153. Maastricht Treaty on European Union art. G(5), adding a new Article 3b to the Treaty Establishing the European Community. O.J. C 224/1 (Aug. 31, 1992). The text of this treaty is also found as an appendix to BERMANN ET AL., *supra* note 82, at 246 (1995 SUPP.).

154. The Treaty on European Union came into force on November 1, 1993. BERMANN ET AL., *supra* note 82, at 2 (1995 Supp.).

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.¹⁵⁵

Professor Bermann's splendid article on subsidiarity collects and interprets expressions of subsidiarity found in the interstices of American institutions.¹⁵⁶ He finds few guarantees in the U.S. system that the federal government will act only when the states cannot or will not do so on their own.¹⁵⁷ Professor Bermann rejects the Tenth Amendment as a constitutional anchor,¹⁵⁸ but perhaps the "necessary and proper" clause¹⁵⁹ might be read to embody subsidiarity. Or subsidiarity might be held to belong to penumbral states' rights à la the privacy rights of individuals.¹⁶⁰ Or perhaps the Constitution will be amended, or the congressional mentality will so change that no amendment is necessary. In any event, the author senses that *Lopez* signals the emergence of a deeper synthesis, one that can be referred to as localism or subsidiarity.

III. CONCLUSION

The *Lopez* decision is important because it announces and applies a new interpretation of the interstate commerce clause as a basis for federal legislation. Instead of employing the very narrow interpretation given the

155. The final paragraph of the new Article 3b expresses what is commonly known as the principle of proportionality. The principle of proportionality holds that "the individual should not have his freedom of action limited beyond the degree necessary for the public interest." Case 11/70, *Internationale Handelsgesellschaft GmbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 1127, [1972] C.M.L.R. 255, 256. See generally DERRICK WYATT & ALAN DASHWOOD, *EUROPEAN COMMUNITY LAW* 89-91 (3D ED. 1993). The U.S. Constitution's "necessary and proper" clause (U.S. CONST. art. I, cl. 18) is not read to impose any comparable limitation on Congress. See *McCulloch v. Maryland*, 17 U.S. 316, 423 (1819).

156. Bermann, *supra* note 148, at 406.

157. *Id.* at 403. Professor Bermann's article preceded the Supreme Court's decision in *Lopez*, but does cite the opinion of the Court of Appeals. See *id.* at 417.

158. "The Tenth Amendment, whose breadth lends it only a superficial resemblance to the principle of subsidiarity, simply cannot be read as subsidiarity's U.S. counterpart." *Id.* at 423.

159. U.S. CONST. art. I, cl.18, mentioned in *supra* note 155.

160. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (The "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance").

clause at the beginning of this century (referred to as thesis) or employing the extremely broad, antithetical interpretation of the last fifty years ("everything is interstate commerce"), the Justices of the Supreme Court have settled on a synthesis: if economic activity substantially affects interstate commerce, then the federal government may regulate that activity under the commerce clause. In addition, the means and instrumentalities of commerce remain subject to federal regulation.

The *Lopez* decision's immediate impact on existing legislation will be minor. Few pieces of legislation will be declared unconstitutional. Therefore it is not to be expected that an attempt will be made to amend the Constitution to give Congress the power it lacked to enact the Gun-Free School Zones Act. Even after the decision in *Lopez*, Congress can devote itself to legislative matters of more substance and importance¹⁶¹ than a prohibition against school weapons. For many other pieces of federal weapons legislation—such as the machine gun prohibition and the waiting period law (Brady Bill)—are not threatened by the *Lopez* decision. Congress can still exercise its legislative jurisdiction to control weapons. What is lacking is the political will, not the legislative jurisdiction. The reason for this is in part the fact that, for non-Black Americans, the murder and manslaughter rates in the United States approximate those in Europe, which is believed by most to have much lower crime rates.

The author perceives *Lopez* as a harbinger of a new movement toward recognition of the virtues of local governance. Like its subsidiarity, its European counterpart, local governance or "localism" respects diversity, and it promotes self-determination, accountability, and flexibility. How this movement will manifest itself remains to be seen.

161. There were very few prosecutions under the Gun-Free School Zones Act. See Note, *Federal Gun Control in the United States: Revival of the Tenth Amendment*, 10 ST. JOHN'S J. LEGAL COMMENT. 151 (1994). For another case that reached the appellate courts, see *United States v. Edwards*, 13 F.3d 291 (9th Cir. 1993).