

## Sec. 8—Powers of Congress

## Cl. 3—Power to Regulate Commerce

nels of interstate commerce, (2) the use of instrumentalities of interstate commerce, or (3) activities that substantially affect interstate commerce.<sup>781</sup>

Clearly, the Court said, the criminalized activity did not implicate the first two categories.<sup>782</sup> As for the third, the Court found an insufficient connection. First, a wide variety of regulations of “intra-state economic activity” has been sustained where an activity substantially affects interstate commerce. But the statute being challenged, the Court continued, was a criminal law that had nothing to do with “commerce” or with “any sort of economic enterprise.” Therefore, it could not be sustained under precedents “upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.”<sup>783</sup> The provision did not contain a “jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.”<sup>784</sup> The existence of such a section, the Court implied, would have saved the constitutionality of the provision by requiring a showing of some connection to commerce in each particular case.

Finally, the Court rejected the arguments of the government and of the dissent that there existed a sufficient connection between the offense and interstate commerce.<sup>785</sup> At base, the Court’s concern was that accepting the attenuated connection arguments presented would result in the evisceration of federalism. “Under the theories that the government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.”<sup>786</sup>

Whether *Lopez* bespoke a Court determination to police more closely Congress’ exercise of its commerce power, so that it would

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<sup>781</sup> 514 U.S. at 558–59. For an example of regulation of persons or things in interstate commerce, see *Reno v. London*, 528 U.S. 141 (2000) (information about motor vehicles and owners, regulated pursuant to the Driver’s Privacy Protection Act, and sold by states and others, is an article of commerce)

<sup>782</sup> 514 U.S. at 559.

<sup>783</sup> 514 U.S. at 559–61.

<sup>784</sup> 514 U.S. at 561.

<sup>785</sup> 514 U.S. at 563–68.

<sup>786</sup> 514 U.S. at 564.