THE FOOL ON THE HILL:
CONGRESSIONAL FINDINGS,
CONSTITUTIONAL ADJUDICATION,
AND UNITED STATES V. LOPEZ

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During my childhood, say, roughly "[b]etween the end of the Chatterley ban [a]nd the Beatles’ first LP,"1 a common response to overreaction was "don’t make a federal case out of it." I do not believe that I have heard that expression since, well, Sgt. Pepper’s Lonely Hearts Club Band. That is not very surprising, because my childhood began with the federal judicial call to arms in aid of civil rights in Brown v. Board of Education2 and spanned the time of the far more powerful and wide-ranging congressional responses adopted in the Civil Rights Act of 1964,3 the Voting Rights Act of 1965,4 the Fair Housing Act of 1968,5 and ultimately the federalization of a matter once thought to be at the core of the local police power, intrastate crime.6 Making a federal statutory case out of it became an increasingly routine strategy for attacking social ills. The Supreme Court customarily went along for the ride, often

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broadly construing the congressional enactment to promote its mission.\(^7\) Although the Court sometimes adopted a narrowing interpretation where a criminal statute arguably invading the local police power was ambiguous,\(^8\) it never declared any congressional initiative to be beyond the legislative power of Congress.

Yet also during my childhood, I came to understand that, "[a]s every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government."\(^9\) I must have, anyway, because the Supreme Court has said so.\(^10\)
To be sure, I do not recall experiencing any cognitive dissonance at the conflict between principles of constitutional federalism and the ever-expanding congressional role. As Saint Paul suggested, however, as an adult I must relinquish such childish ways, especially because, in the view of the Supreme Court, "[i]n the tension between federal and state power lies the promise of liberty."  

Whether or not that tension actually produces liberty, it does foster constitutional litigation. The most recent case, United States v. Lopez, in which the Court struck down federal legislation as beyond Congress's commerce power for the first time since the New Deal, writes a new chapter on what the Court has called the "oldest question of constitutional law." In this essay, I address one of the many questions left hanging by Lopez: what role do congressional processes and findings play in assessing the constitutionality of federal legislation adopted pursuant to the commerce power? I first provide an overview of the ways in which the Supreme Court has treated congressional findings, including the Lopez case. I then assess the potential utility of legislative processes and findings more broadly, examining possible analogies to precedents outside the Commerce Clause arena. My conclusion is that the approach taken in Lopez may be a plausible technique to encourage appropriate congressional procedures and consideration, but in principle cannot be cabined short of having applications outside the past time to give this adage a rest.

11. 1 Corinthians 13:11.

12. Gregory, 501 U.S. at 459. As this quotation demonstrates, Gregory, an opinion by Justice O'Connor, like Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), which Justice O'Connor jointly authored, embodies the justificatory jurisprudential technique of reasoning by aphorism. See, e.g., id. at 844 ("Liberty finds no refuge in a jurisprudence of doubt"); id. at 851 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."). Perhaps some future case can be encapsulated in "freedom's just another word for nothin' left to lose." KRiSTOPHER KRiSTOFFERSON, Me and Bobby McGee on Me and Bobby McGee (Columbia 1971).

To be sure, as Justice O'Connor has also written, "[s]ome truths are so basic that, like the air around us, they are easily overlooked." New York v. United States, 505 U.S. 144, 187 (1992). Nonetheless, a basic problem with this technique is, of course, that aphorisms have more pith than pull. That is an essential point, I take it, of my colleague Mike Paulsen's imaginative reimagining of Brown through the lens of Casey in a way that would have reaffirmed Plessy. See Michael S. Paulsen & Daniel N. Rosen, Brown, Casey-Style: The Shocking First Draft of the Segregation Opinions, 69 N.Y.U. L. Rev. 1287 (1994). The first sentence of the "draft opinion" is "[w]here there is doubt, there is no law." Id. at 1288.


14. New York, 505 U.S. at 149.
review of commerce-power exercises. Whether the Court will prove willing to apply somewhat more searching review of legislative processes and outcomes in noneconomic cases that, unlike Lopez, involve personal equality rather than the structures of federalism will determine, I suggest, whether Lopez can be defended as a principled decision promoting legislative attention to important but often undervalued constitutional interests.

I.

In September 1935, during the dark days of the Great Depression across the land and of the constitutional depression across the Roosevelt Administration, a government attorney three days short of his twenty-fifth birthday completed a memorandum. It considered whether the congressional findings adopted in the newly enacted National Labor Relations Act\(^\text{15}\) demonstrated that the statute was within the legislative power of Congress pursuant to its authority to regulate commerce among the states. According to these findings, the denial of collective bargaining rights to workers led to strikes and other forms of labor unrest that, in turn, burdened interstate commerce in a variety of ways.\(^\text{16}\) In his memorandum, the youthful attorney concluded that, based on precedent, the Supreme Court should defer to the congressional findings unless they were not fairly debatable.\(^\text{17}\) Consistent with the legal realism of his times, however, he quickly conceded that the difficulty with his analysis "is that it is too mechanical and does not make allowance for judicial bias."\(^\text{18}\) The attorney continued:

A more realistic approach might result in the empty conclusion that if the [Supreme] Court decides to sustain the National Labor Relations Act its opinion will be written in the language used above. The ultimate answer to the real question—the weight to be given to the legislative determination in the Court's consideration of the validity of the statute as distinct from the weight given it in its phrasing


\(^{18}\) Id. at 22.
in the written decision—depends upon speculation as to how radical a departure from existing constitutional theory and generally accepted forms of legislative control the Court deems the National Labor Relations Act to be.\(^{19}\)

The attorney was Stanley Surrey,\(^{20}\) who in relatively short order had the good sense to forsake constitutional law in favor of federal taxation, a subject in which he became a leading figure of this century.\(^{21}\) The National Labor Relations Act also weathered the later years quite well, its constitutionality being upheld two years later in the landmark decision of *NLRB v. Jones & Laughlin Steel Corp.*\(^{22}\) Although *Jones & Laughlin* and the watershed opinion that followed, *United States v. Darby*,\(^{23}\) which upheld the Fair Labor Standards Act of 1938,\(^{24}\) did not simply defer to congressional findings in upholding federal legislation regulating commercial intrastate conduct, in each case the Court seemed satisfied that Congress had developed adequate factual support for the linkage between the statutory scheme and interstate commerce.\(^{25}\)

In short order, the judicial abandonment of strict review of legislation adopted under the Commerce Clause became so apparent that it would have been a waste of public resources to assign a latter-day government attorney a task similar to Surrey's. Congressional power under the Commerce Clause justifies federal regula-

\(^{19.}\) *Id.*

\(^{20.}\) *Id.*


\(^{22.}\) 301 U.S. 1 (1937).

\(^{23.}\) 312 U.S. 100 (1941).

\(^{24.}\) Ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-212 (1988)).

tion of one farmer feeding his own crops to his own animals,26 of hotels and even locally oriented eateries that racially discriminate in their clienteles,27 of intrastate activities that harm the environment, such as strip mining,28 and of intrastate criminal activity of an economic nature, such as loan sharking.29 Indeed, it would appear that Congress had authority indistinguishable from the local police power over any local activity that could, through the application of a lively imagination, be indirectly linked to interstate commercial concerns. These developments were increasingly supported by reference to congressional findings.30

This progression was not without its critics, however, and some of the controversy concerned the role of congressional findings. Most notably, in Perez v. United States,31 the case upholding the federal loan sharking statute as applied to local unlawful lending, the Court heavily relied upon congressional findings and legislative history concluding that loan sharking was linked to interstate organized crime.32 Indeed, the Court never itself embraced the proposition that extortionate credit transactions affected interstate commerce. Instead, the Court stressed that “[e]xtortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce,”33 and that “[t]he findings of Congress are quite adequate on that ground.”34 Although it hastened to add that Congress need not “make particularized findings in order to legislate,”35 the Court left itself open to the interpretation that

30. See LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-5 (2d ed. 1988). Tribe pointed out that

[i]n recent years, Congress has relied in part upon the “cumulative effect” principle as its constitutional justification for civil rights legislation, certain criminal statutes, regulatory measures affecting the sale of foods and additives, and a registration law for drug producers. In each case, congressional fact-findings stressed that the regulation of local incidents of an activity was necessary to abate a cumulative evil affecting national commerce. The Supreme Court has without fail given effect to such congressional findings.

32. See id. at 147, 154-57.
33. Id. at 154 (emphasis added).
34. Id. at 155. In its concluding paragraph, the Court said that “[i]t appears” that loan sharking was linked to organized interstate crime. Id. at 157.
35. Id. at 156.
Congress can reach practically anything under its Commerce Clause power so long as detailed findings are adopted. Justice Stewart dissented from this view, demanding a showing that "loan sharking is an activity with interstate attributes that distinguish it in some substantial respect from other local crime."36 A decade later, while concurring specially in upholding the federal strip-mining statute, Justice Rehnquist argued that, "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so. Congress's findings must be supported by a 'rational basis' and are reviewable by the courts."37

Notwithstanding these rather isolated complaints, however, by the 1980s, the Commerce Clause game seemed about over.38 Casebook editors were driven to dream up wild hypotheticals to try to find ways to encourage students to consider whether the commerce power had any practical limits at all.39 The hypotheticals were, however, not much more implausible than actual lower-court cases upholding the expansive application of federal legislation. The lower courts had applied federal criminal statutes containing a requirement of a nexus with interstate commerce in remarkably expansive ways. For example, a federal statute outlawing arson of a building used in an activity that affects commerce40 reaches the burning of a private home that received natural gas that had traveled in interstate commerce41 or electricity from an interstate

36. Id. at 157 (Stewart, J., dissenting).
38. See Tribe, supra note 30, § 5-5, at 310 n.6 ("Exactly what significance Chief Justice Rehnquist's more restrictive view of the commerce clause [expressed in his separate opinion in Hodel] would have in application is unclear; in any event, none of his fellow Justices have shown any inclination to plow with him territory that the Court tilled so fruitlessly from 1887 to 1937.").
39. See, e.g., Daniel A. Farber et al., Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century 789, 813, 817 (1993) (questioning whether congressional power could reach a child's front-yard entrepreneurial venture, Leslie's Lemonade Stand); Gerald Gunther, Constitutional Law 140 (12th ed. 1991) (contemplating federal prohibition on possession of all pills because it is difficult to distinguish dangerous pills from others); Geoffrey R. Stone et al., Constitutional Law 197, 209 (2d ed. 1991) (suggesting federal prohibition of shoplifting and federal regulation of the lawn, parking lot, and disposal of trash at carry-out restaurant); cf. Brief for National Conference of State Legislatures et al. as amicus curiae, at 20 n.11, Lopez, 115 S. Ct. 1624 (1995) (No. 93-1260) (containing suggestion by Barry Friedman, a prominent scholar of federalism, that Congress could prohibit daydreaming because it "reduces economic productivity and thus has a substantial effect on interstate commerce").
41. See United States v. Stillwell, 900 F.2d 1104, 1106-10 (7th Cir.), cert. denied, 498
Federal criminal statutes embodying no requirement of a nexus with interstate commerce have sometimes been given essentially universal application, often based on thin congressional findings,\(^4\) at least so long as it is clear that Congress did not intend a limiting nexus requirement.\(^4\)

Into this valley of deference rode a few federal lower court judges in the 1990s. A federal district judge surely stunned most observers by striking down the federal “carjacking” statute,\(^4\) which prohibits the use of a firearm, “with the intent to cause death or serious bodily harm,” in stealing “from the presence of another” a car “that has been transported, shipped or received in interstate commerce.”\(^4\) Although the decision was ultimately reversed,\(^7\) the carjacking case was a signal that at least some low-

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43. See, e.g., United States v. Lopez, 459 F.2d 949, 951-53 (5th Cir.), cert. denied, 409 U.S. 878 (1972) (upholding a federal prohibition of intrastate drug trafficking based on congressional findings that it was necessary to regulate interstate trafficking and that intrastate trafficking had a substantial and direct effect on interstate commerce); United States v. Lopez, 461 F.2d 499, 500 (5th Cir. 1972) (per curiam) (upholding a federal prohibition of simple narcotics possession on similar rationale); Stevens v. United States, 440 F.2d 144, 151 (6th Cir. 1971) (upholding conviction under federal statute that court construed as prohibiting possession by convicted felon of any firearm, regardless of any nexus to commerce, where the relevant finding in the statute was a bare conclusion that possession of weapons by convicted felons is “a burden on commerce or threat affecting the free flow of commerce”); see also United States v. Wilks, 58 F.3d 1518, 1520 (10th Cir. 1995) (upholding federal prohibition of possession and transfer of machine guns even though commerce nexus was not an element of the offense and little in the way of congressional findings was made).

44. See United States v. Bass, 404 U.S. 336, 349-50 (1971) (holding that where federal statute invades traditional area of local criminal jurisdiction, requirement of a showing of interstate nexus will be presumed to be element of crime unless statutory text and legislative history clearly demonstrate the contrary). Bass applied this canon to the statute at issue in Stevens and imposed a commerce-nexus requirement. Bass, 404 U.S. at 350. The nexus requirement remains easy to satisfy, though. See, e.g., Scarborough v. United States, 431 U.S. 563, 575 (1977) (showing that a gun had previously traveled in interstate commerce was sufficient to satisfy nexus between commerce and felon’s possession of firearm).


47. The reversal was based on United States v. Johnson, 22 F.3d 106 (6th Cir. 1994), which upheld the constitutionality of the carjacking statute. See United States v. Osteen,
er-court judges were frustrated with the gymnastics required to sustain, under the Commerce Clause, some applications of federal criminal law to intrastate crime.

Much more successful, of course, was the Fifth Circuit’s counterattack on the commerce power in United States v. Lopez, which was eventually affirmed by the Supreme Court. The federal statute at issue in Lopez, the Gun-Free School Zones Act of 1990, criminalized possession of a gun near a school. The statute contained no commerce-nexus element, nor was it supported by formal congressional findings or much legislative history that might serve as evidence of informal findings. In assessing its constitutionality, the Fifth Circuit made much of the role of formal or informal congressional findings in supporting exercises of the commerce power. It concluded that “[w]here Congress has made findings, formal or informal, that regulated activity substantially affects interstate commerce, the courts must defer ‘if there is any rational basis for’ the finding. Practically speaking, such findings almost always end the matter.” The Fifth Circuit saw Congress as having the primary responsibility for assessing the boundary of the commerce power, but noted that “[e]courts cannot properly perform their duty to determine if there is any rational basis for a Congressional finding if neither the legislative history nor the statute itself reveals any such relevant finding.” Furthermore, “in such a situation there is nothing to indicate that Congress itself consciously fixed, as opposed to simply disregarded, the boundary line between the commerce power and the reserved powers of the states. Indeed, as in this case, there is no substantial indication that the commerce power was even invoked.”

The Fifth Circuit concluded that congressional findings would
have been particularly useful because the federal statute at issue invaded not just the local police power in general, but management of a traditional state function, public education, in particular. The statute also could not be justified as supported by formal or informal findings made by earlier Congresses in related legislation, for never before had Congress enacted an analogous statute. The court contrasted its precedents upholding federal criminalization of the possession of narcotics and enhancing the punishment for drug offenses near schools on the ground that “all drug trafficking had been held properly subject to federal regulation on the basis of detailed Congressional findings that such was necessary to regulate interstate trafficking.”

Following the grant of certiorari by the Supreme Court in *Lopez*, but prior to oral argument, Congress attempted to respond to the Fifth Circuit’s concerns about the absence of findings. Inserted into the Violent Crime Control and Law Enforcement Act of 1994 was a provision amending the Gun-Free School Zones Act to include congressional findings about the effects on interstate commerce of gun possession in schools. Ultimately, however, the

53. *Id.*
54. *Id.* at 1366.
55. *Id.*
56. *Id.* at 1366 n.50.
57. *Id.*
60. The amendment provided as follows:

The Congress finds and declares that—

(A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;

(B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;

(C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Judiciary Committee of the House of Representatives and Judiciary Committee of the Senate;

(D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;

(E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;

(F) the occurrence of violent crime in school zones has resulted in a decline in
congressional rescue effort failed. The Solicitor General did not contend that these later findings could operate *nunc pro tunc*, instead making the more defensible argument that the *post hoc* findings simply added evidence to support the rational basis for a nexus with commerce.\footnote{61}

Like the Fifth Circuit, Chief Justice Rehnquist's majority opinion in *Lopez* struck down the Gun-Free School Zones Act. Although the respondent's brief had urged the Court to take that step because of the absence of congressional findings,\footnote{62} the Court's major doctrinal basis for its holding had little to do with the presence or absence of findings. Instead, the essential analytical move was the holding that federal regulation adopted under the Commerce Clause may reach only those wholly intrastate activities that *substantially* affect interstate commerce.\footnote{63} Like the Fifth Circuit, the Supreme Court found insufficient linkage between gun possession near schools and interstate commerce. The Court concluded that accepting the government's arguments in defense of the statute—that gun possession near schools may result in violent crime, which in turn affects the national economy by causing economic losses spread across society through the vehicle of insurance and by reducing travel to areas where violence is prevalent\footnote{64}—would essentially empower Congress to regulate "any activity that it found

\begin{itemize}
\item the quality of education in our country;
\item this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;
\item States, localities, and school systems find it almost impossible to handle gun-related crime by themselves; even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and
\item Congress has power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.
\end{itemize}


\footnote{61}{See United States v. Lopez, 115 S. Ct. 1624, 1632 n.4 (1995) (discussing page 25 of transcript of oral argument). The Government's supplemental brief simply called these findings to the attention of the Court and conceded that the later legislation did "not resolve the conflict in the courts of appeals regarding the validity of prosecutions under the [pre-existing statute]." See Supplemental Brief for the United States at 2, *Lopez*, (No. 93-1260) (quoting Petition for Writ of Certiorari at 6 n.4, *Lopez* (No. 93-1260)).}

\footnote{62}{See Brief for Respondent at 19, 36-37, *Lopez*, (No. 93-1260) (arguing the need for findings in this case).}

\footnote{63}{See *Lopez*, 115 S. Ct. at 1629-30.}

\footnote{64}{See id. at 1632.}
was related to the economic productivity of individual citizens.”

According Congress this power, the Court believed, would destroy any meaningful distinction between the local police power and the enumerated authority of Congress, “even in areas such as criminal law enforcement or education where States historically have been sovereign.” For similar “slippery slope” reasons, the Court rejected Justice Breyer’s argument, in dissent, that congressional power was justified because violence in schools degrades the educational process, which in turn has adverse consequences upon the economy.

The Court in *Lopez* repeatedly stressed that the gun statute was a regulation that was noneconomic in character. In his concurring opinion, Justice Kennedy, joined by Justice O’Connor, both of whose votes were crucial to constituting the majority, even more clearly indicated that the noneconomic nature of the regulation was crucial to the Court’s rigorous inquiry about effects on interstate commerce. In this way, the Court seemed to distinguish all earlier cases, in which commercial transactions were the justifications for the exercise of the commerce power. In essence, *Lopez* held that a regulation that is noneconomic in character may be justified, under the Commerce Clause, only when its subject matter has a significant linkage to commercial transactions of an interstate magnitude, especially if it invades a core state function such as public education.

Unlike the Fifth Circuit below, the Supreme Court deemphasized the importance of the absence of congressional findings. The Court’s only discussion of the issue was as follows:

> Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce, the

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65. *Id.*
66. *Id.; see also id.* at 1632-34.
67. *See id.* at 1632-34 (rejecting dissenting opinion of Breyer, J., joined by Stevens, Souter & Ginsburg, JJ.).
68. *See 115 S. Ct.* at 1626, 1630-34.
69. *See id.* at 1637 (Kennedy, J., joined by O’Connor, J., concurring) (stating that “Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy”); *id.* at 1640 (recognizing that “unlike the earlier cases to come before the Court here neither the actors nor their conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus”).
Government concedes that "[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.\textsuperscript{70}

The Court thus appeared to approach the role of formal congressional findings quite differently than the Fifth Circuit. The appeals court viewed the absence of formal findings to be a narrow, procedural ground upon which to invalidate the statute, while the Supreme Court considered the lack of findings simply to negate one source of potential support for the proposition that the statute had a rational connection to interstate commerce.

Nonetheless, as Justice Souter noted in his dissent, the Court did not clearly repudiate the proposition that formal findings might have tipped the scales in the case.\textsuperscript{71} It also remains true, as the Fifth Circuit had stressed, that before \textit{Lopez}, the presence of formal findings might have seemed, as a practical matter, to ensure validity of the statute in question.\textsuperscript{72} Therefore, although \textit{Lopez} provides no authoritative answer to the future utility of congressional findings, the decision provides the occasion for a consideration of that question. Assessing this problem requires returning to the pre-New Deal era in which congressional power to regulate intrastate activities under the Commerce Clause was the exception, not the rule. Indeed, \textit{Lopez} itself, by being the first case to invalidate Commerce Clause legislation in over half a century, clearly indicates that, to understand the sudden disarray on the current scene, one must go back to what just might be the future.

\textsuperscript{70} Id. at 1631-32 (quoting Brief for United States at 5-6). Like the Fifth Circuit, see supra text accompanying note 54, the Supreme Court also concluded that the government could not rely upon any knowledge accumulated by Congress through previous enactments because the Gun-Free School Zones Act was not analogous to any prior legislation. \textit{Id.} at 1632.

\textsuperscript{71} Id. at 1655 (Souter, J., dissenting).

\textsuperscript{72} See supra text accompanying note 50.
II.

Prior to the watershed decisions in *Jones & Laughlin*, *Darby*, and *Filburn*, the Court had sent some signals about the utility of congressional findings that a statutory initiative had a sufficient nexus to interstate commerce. Probably the most revealing precedent upholding doubtful federal legislation containing formal findings was *Board of Trade of Chicago v. Olsen*, involving the congressional power to regulate futures sales of grain. Congress first indirectly attempted to put such regulation in place through *The Future Trading Act*, which prohibitively taxed such sales unless the boards of trade in question complied with congressional regulations. The Court struck down that approach in *Hill v. Wallace*, largely on the ground that it was a sham exercise in which the tax power was used for regulatory purposes. The Court in *Hill*, however, also opined that

sales for future delivery on the Board of Trade are not in and of themselves interstate commerce. They cannot come within the regulatory power of Congress as such, unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon.

Congress immediately responded to *Hill* by passing the *Grain Futures Act*, which contained express, detailed, and persuasive findings concerning the relationship between grain futures transactions and interstate commerce. In upholding the new statute in *Olsen*,

73. 262 U.S. 1 (1923).
74. Ch. 86, 42 Stat. 187 (1921).
75. 259 U.S. 44 (1922).
76. The Court relied, see *id.* at 67-68, upon its famous decision in a companion case to *Hill*, *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), the child labor tax case.
77. 259 U.S. at 69.
78. Ch. 369, 42 Stat. 998 (1922) (regulating transactions on grain futures exchanges).
79. *Id.* at 999. Section 3 of the Act, 42 Stat. 999, provided as follows:

Transactions in grain involving the sale thereof for future delivery as commonly conducted on boards of trade and known as "futures" are affected with a national public interest; that such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling grain and the products and by-products thereof in interstate commerce; that the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of grain and the products and by-products thereof and to facilitate the movements thereof in
the Court emphasized that these findings were directly aimed at the Court's concerns in *Hill* and had been "reached after many years of investigation and examination of witnesses, including the advocates of regulation and those opposed, and men intimately advised in respect to the grain markets of the country." These favorable procedural aspects, when combined with the Court's conclusion that Congress's findings were not unreasonable in light of the evidence amassed in support of them, led the Court to uphold the statute.

In contrast to *Olsen*, the Court gave short shrift to congressional findings in several other cases. Perhaps the best example is *Carter v. Carter Coal Co.*, in which the Court struck down the Bituminous Coal Conservation Act of 1935 as beyond the commerce power. The statute, which regulated wages, work hours and conditions, and collective bargaining in the coal industry, contained congressional findings that lacked specificity. The findings basically asserted that the coal industry affected the national public interest, that regulation of the industry was required, and that the production and distribution of coal affected interstate commerce. In striking down the statute as beyond the commerce power, the Court essen-

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Id. at 999.

80. See Board of Trade of Chicago v. Olsen, 262 U.S. 1, 32 (1923) (noting differences between the statute struck down in *Hill* and the newer statute).

81. *Id.* at 10; see also *id.* at 10-15 (reviewing the evidence on these matters gathered by Senate and House committees as well as by the Federal Trade Commission).

82. See *id.* at 37-38 (emphasizing that Congress had "expressly declared" certain transactions to affect interstate commerce in particular ways, that the findings were supported by evidence before the Congress, and that therefore "we would be unwarranted in rejecting the finding of Congress as unreasonable"). For other cases before *Jones & Laughlin* deferring to congressional findings, see Norman v. Baltimore & Ohio R.R., 294 U.S. 240, 311-16 (1935), and Stafford v. Wallace, 258 U.S. 495, 521 (1922).

83. 298 U.S. 238 (1936).


tially lectured the Congress that it lacked any plenary power to legislate in the national interest. The Court stated that the findings "[did] not constitute an exertion of the will of Congress which is legislation, but a recital of considerations which in the opinion of that body existed and justified the expression of its will in the present act."86 "Whether the end sought to be attained by an act of Congress is legitimate is wholly a matter of constitutional power,” the Court rather impatiently explained, “and not at all of legislative discretion."87

A.L.A. Schechter Poultry Corp. v. United States88 delivered, albeit indirectly, a similar message about general, unfocused congressional findings. The National Industrial Recovery Act89 at issue in that case contained a finding merely asserting that an economic emergency existed that burdened interstate commerce.'90 In striking down the regulation as beyond the commerce power, the Court did not even bother to trouble itself with these findings.'91

These cases suggest that the Court would not wholly defer to congressional findings, which is wholly unsurprising considering the independent judicial duty to assess constitutionality. Surrey understood the law to be to that effect in September 1935,'92 So too did a leading academic commentator writing a decade before.'93 When the findings are detailed rather than boilerplate and

86. Carter, 298 U.S. at 290 (emphasis in original).
87. Id. at 291.
89. Ch. 90, 48 Stat. 195 (1933).
90. Ch. 90, § 1, 48 Stat. at 195.
91. The Court did allude to the generality of these findings in its discussion of the delegation of legislative power found in the Act. See Carter, 295 U.S. at 531, 534-35, 537-42.
92. See Surrey, supra note 17, at 20-21. Surrey stated that
[i]t seems clear that such findings will not be regarded by the Court as finally and conclusively determining the factual questions involved. Such acceptance would practically force the Court to hold the National Labor Relations Act and other similar statutes valid under the commerce clause without further discussion, for if the unfair labor practices of employers do in fact obstruct and burden interstate commerce they can be controlled by Congress. As the Court is not disposed to deprive itself of its power of judicial control in such cases, it will not accept the legislative findings as determinative of the factual questions.
93. See Henry Biklé, Judicial Determinations of Questions of Fact Affecting the Constitutional Validity of Legislative Action, 38 HARV. L. REV. 6, 19 (1924) (“It is clear that the legislative finding as to the fact upon which the validity of the legislation depends
are responsive to judicial concerns, however, it only stands to reason that they ought to carry some weight in the judicial assessment. *Olsen* speaks to the validity of this rather obvious conclusion.

The key element in the analysis, which thus far has received short shrift, is just *how* the factual findings of Congress can be responsive to judicial concerns. The most elaborate and persuasive demonstration of social facts cannot overcome a clear judicial limitation upon legislative power: either the court must strike down the well-intended but ultra vires legislation, or it must modify the constitutional standard for assessing the legislation as a way to uphold it. To be sure, this is not an hermetically sealed process. The legislative factual demonstration may persuade the judges of the legitimacy of a factual conclusion that at first blush seemed implausible. *Olsen* seems to have been an example of that phenomenon. The larger lesson of the New Deal Supreme Court, though, is that a thorough, sustained effort of factual reeducation—for example, about the nationwide interrelation of the American economy and the "felt necessities" of federal regulation of it—may, in time, reorient the thinking of the judiciary sufficient to work an evolution in constitutional law. That, coupled with other, less debatable facts of life—that Justices grow old and leave the Court, to be replaced by those more attuned to the sentiments of the current political majority—is what the "switch in time" was all about.

*Jones & Laughlin* was not the result of judicial deference to congressional factual conclusions per se nearly so much as it was evidence of constitutional (that is, judicial) evolution in the face of a sustained and increasingly thoughtful congressional showing that its power to regulate "commerce among the states" must, in light of the demonstrably integrated national economy, include the authority to regulate labor-management relations. Eventually, after *Darby* and *Wickard v. Filburn*, the case upholding regulation of a farmer's production of crops to feed to his own animals, it became clear that the economic reeducation of the Court had become complete, and that the judicial acceptance of the notion of an

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94. This usage is, of course, Holmes'. See *Oliver Wendell Holmes, Jr., The Common Law* 1 (1881).
95. United States v. Darby, 312 U.S. 100 (1941).
96. 317 U.S. 111 (1942).
integrated national economy accorded Congress the authority to engage in economic regulation essentially across the board. Again, a proceduralist focus on formal congressional processes and fact-finding did not mechanically produce these results. Indeed, Darby made clear that the absence of congressional findings was no fatal legislative flaw.\(^7\) Seven years later, the Court made it even clearer that Congress not only need not have made formal legislative findings to support its exercise of the commerce power, it need not even recite that this power had been invoked.\(^8\)

These precedents from the New Deal and shortly thereafter make much of the Fifth Circuit's analysis in Lopez seem incongruous. Recall that the appellate court stressed that Congress not only had made no formal findings that the possession of guns near schools affected commerce, it had not even made clear that it was invoking its commerce power in the first place.\(^9\) Based on these precedents, one is entitled to respond, “so what?”

The Fifth Circuit's approach receives little support from the post-New Deal era, either. The cases upholding the constitutionality of the Civil Rights Act of 1964 indicated that Congress no longer even needed an economic motivation to exercise its commerce power.\(^10\) Formal congressional fact-finding had essentially nothing to do with these cases. Indeed, the congressional factual premises for this legislation were never formally inscribed in the statute. It was enough for the Court that the premises were explicitly articulated in a legislative history documenting their factual plausibility.\(^11\)

Where, then, could the Fifth Circuit have found the idea that the absence of formal findings could be fatal to legislation adopted

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97. The Court in Darby recognized that
Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce . . . . It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect . . . . And sometimes Congress itself has said that a particular activity affects the commerce . . . .

312 U.S. at 120.

98. See Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948) ("The constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.");

99. See supra text accompanying notes 50-52.


101. See Katzenbach v. McClung, 379 U.S. 294, 299 (1964) (stating that "no formal findings were made, which of course are not necessary"); id. at 299-300 (investigating the legislative history and finding sufficient support for the exercise of the commerce power).
pursuant to the Commerce Clause? In one sense, the appellate court created the notion out of thin air. There simply is no Supreme Court decision, before or after Jones & Laughlin, suggesting such a requirement. The most that can be said for the Fifth Circuit's approach, as a matter of precedent, is that the Supreme Court in Perez signaled that the presence of formal congressional findings should lead to extraordinary judicial deference in assessing the constitutionality of legislation. 102 On its face, of course, Perez says nothing about the judicial inquiry in the absence of findings.

Perez does suggest, however, that procedural regularity and formal findings have some role to play in assessing the efficacy of an exercise of congressional commerce power. I want to explore three possibilities in this regard: the relation between congressional fact-finding and congressional authority; the relation between congressional process and judicial statutory-interpretation techniques rooted in constitutional values; and the relation between congressional process and judicial constitutional scrutiny.

The first concerns the special way findings of fact influence constitutional law. Much constitutional law is based on factual premises. Whether there is a nexus with commerce, whether discrimination has occurred, and whether state regulation burdens interstate commerce are just three examples in which "legislative facts"—the facts that provide the premise for a rule of law—can be contentious and must be evaluated. Three decades ago, Archibald Cox proposed that, because Congress has greater fact-finding ability than the federal courts, its judgment on such questions should not be judicially second-guessed. 103 Cox was writing in the aftermath of Katzenbach v. Morgan, 105 which seemingly held that Congress had the authority to expand (but not to contract) the protections of the Fourteenth Amendment. 106 In light

102. See supra text accompanying notes 31-37.
106. Justice Brennan's opinion for the Court in Morgan was not crystal-clear, but it suggested that Congress had authority to outlaw state practices if, in Congress's judgment, they were violations of equal protection, even if the Court would disagree. See 384 U.S.
of the famous statement in *Marbury v. Madison*\(^{107}\) that "it is emphatically the province and duty of the judicial department to say what the law is,"\(^{108}\) any complete judicial deference to congres-
sional constitutional interpretation would seem insupportable.\(^{109}\) Cox attempted to explain the purported "Morgan power" not as a
power to revise our fundamental law, but instead as authority to
make definitive factual conclusions.\(^{110}\)

If Cox was correct, then the presence of factual findings in a
case like *Perez* should result in complete judicial deference. The
courts must accept Congress's judgment about a nexus with inter-
state commerce as the last word. This approach, however, has not
withstood the test of time. The Court has not adopted this under-
standing of *Morgan* when it squarely had the opportunity,\(^{111}\) nor
has it relied upon this understanding of *Morgan* in later cases.\(^{112}\)

More fundamentally, the fact-finding rationale for *Morgan* was
faulty from the start. Whether a statute has a nexus with interstate
commerce is not, strictly speaking, a factual question.\(^{113}\) To be

\(^{107}\) 5 U.S. (1 Cranch) 137 (1803).

\(^{108}\) Id. at 177.

\(^{109}\) See also *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (stating that federal courts are
"supreme in the exposition of the law of the Constitution").

\(^{110}\) See *Cox*, *Constitutional Adjudication*, supra note 104, at 104-07.

\(^{111}\) In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court considered the constitution-
ality of a federal statute lowering the voting age to eighteen for both state and federal
elections. As a matter of substantive constitutional law, it was unlikely that a majority of
the Justices would have struck down a higher voting age: this was the era of the "two-
tiered" approach to equal protection review, see infra notes 146-47 and accompanying
text, and age classifications would have received only a minimal rational-basis scrutiny.(In relatively short order, of course, the Court did formally relegate age classifications to
this weak review. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312
(1976)). A simple way to uphold the statute would have been to embrace Cox's notion
that Congress has a superior capacity to find facts that constitute discrimination violating
equal protection norms. Precisely that theory was adopted—by only three Justices. *See
Mitchell*, 400 U.S. at 242-49, 278-81 (joint opinion of Brennan, White & Marshall, JJ.,
concurring in part and dissenting in part). Justice Harlan, writing separately, objected
that the judgment about invidious discrimination was evaluative, not "factual." *See id.* at 206-
07 (Harlan, J., concurring in part and dissenting in part). The other Justices did not
squarely address this debate. That a majority of the Court in *Mitchell* struck down the
federal statute as applied to state elections does indicate, however, that the Cox rationale
was at least implicitly rejected.

\(^{112}\) See infra text accompanying notes 120-22.

\(^{113}\) For a good discussion of the overall problem, with reference to Commerce Clause
sure, a factual assessment is essential for the proper resolution of the issue. In the end, however, what is called for is a legal conclusion—a conclusion with the force of law, rather than a factual conclusion—based on the application of a legal standard to the best assessment of facts available. The process can be broken down into its constituent parts: the articulation of a legal standard, and then the application of that standard to the available facts.

The creation of the legal standard to implement a vague constitutional mandate—whether the nexus with commerce must be “direct” or may be “indirect,” for example—is usually viewed as a judicial, not a legislative, function. That is, after all, what the dictum from *Marbury* is all about. Since *Marbury*, and certainly since *Cooper v. Aaron*, the judiciary has seen itself as the branch of government charged with this task. To be sure, *Cooper* may have been too arrogantly dismissive of the role of the other branches, and there are good arguments that Congress and the President have the responsibility to consider constitutionality, and act on their views, at least so long as the primary judicial role is respected. In particular, as *Olsen* suggests, the political branches should have the authority to articulate factual premises and legal conclusions different from the judiciary, and the judiciary should consider them with respect. Nonetheless, for almost all public law scholars, the courts have the final responsibility.

In the final analysis, merely calling a question one of fact, and

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114. 358 U.S. 1, 18 (1958).
115. My colleague Mike Paulsen’s recent exposition, positing that on constitutional questions each federal branch has a “coordinate construction” power, is powerfully argued. See Michael S. Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 Geo. L.J. 217 (1994). My own views are closer to those of Paul Brest, who has argued that conscientious legislators have a duty to engage in faithful constitutional interpretation, but ultimately must accord some deference to judicial resolutions of such questions. See Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 Stan. L. Rev. 585 (1975). However one allocates interpretive power, it should be viewed as just that, and not some other authority called “fact-finding.”
therefore for the legislature, or one of law, and therefore for courts, substitutes result-oriented labeling for careful institutional analysis. A realistic appraisal suggests that "characterizing a matter as one of law or [of] fact is no more than a conclusion, based upon an evaluation of pertinent policies, that one branch of government rather than another should make the decision in question." In this realm, prudence suggests there should be an intermediate ground between judicial or congressional monopoly on constitutional interpretation, especially on questions of congressional power. In fact, the most important recent precedent considering congressional power to enforce the Civil War Amendments may provide a working model for such a middle ground.

In Rome v. United States, the Court considered the constitutionality of the Voting Rights Act, which prohibits covered jurisdictions from making any changes in electoral rules that have a discriminatory effect upon protected classes, even if the change in question is not motivated by discriminatory reasons. The Supreme Court has held that the Fifteenth Amendment forbids only intentional racial discrimination in voting, and thus there was a strong argument that the Voting Rights Act exceeded Congress's authority "to enforce" that amendment, as judicially interpreted. To be sure, the simplest way to uphold the statute would have been to invoke the Morgan power. That the Court did not, and indeed has never done so since Morgan, is striking evidence that this power has not withstood the test of time.

Yet the Court in Rome upheld the statute anyway. It adopted a clever mediating tack. So long as Congress attempted to enforce the correct, judicially articulated constitutional standard—that is, that the Fifteenth Amendment was triggered only by intentional discrimination—Congress had wide discretion in choosing the means to achieve that enforcement. Because the jurisdictions covered by the statute had a history of intentional discrimination in voting, Congress was justified in being suspicious of electoral changes with discriminatory effects. In light of this context, and

118. For a thoughtful discussion of defining constitutional meaning through an ongoing Court-Congress dialogue, see Barry Friedman, Dialogue and Judicial Review, 91 MICH. L. REV. 577 (1993).
119. 446 U.S. 156 (1980).
121. See Rome, 446 U.S. at 175-78.
considering how hard it is to prove discriminatory intent, a prohibition on electoral changes with discriminatory effects was deemed a reasonable, albeit overinclusive, way to prevent changes motivated by discriminatory intent.

Note that under Rome, the judiciary establishes what the law is—what the constitutional standard shall be—and then accords Congress substantial, but not complete, discretion in applying that standard to the facts of the real world, including the power to adopt overbroad prophylactic rules to protect against the violation of the standard. Unlike Morgan and Cox’s fact-finding spin on it, this model does not allow Congress, in effect, to change the meaning of the Constitution as interpreted by the Court. Instead, so long as Congress acts reasonably to comply with judicially created constitutional standards, the Court will accord Congress the discretion to carry out its responsibilities.

At first blush, the Rome model is similar to Perez, where Congress also articulated the judicial standard and made formal findings of its satisfaction—that is, intrastate loan sharking was linked to interstate organized crime. The only problem is that in Perez the congressional showing of facts supporting this premise was thin—much thinner, in fact, than the facts upon which Rome upheld the Voting Rights Act.

Reconciling Rome and Perez might turn on the distinction between the sources of congressional power in these cases. Congressional power to legislate pursuant to the Fifteenth Amendment is available only “to enforce” the substantive provisions of that amendment. Section 1, the substantive provision, is triggered only by an intentional deprivation of voting rights for racial reasons. This is a narrow and hard-to-prove standard, probably explained mostly by the desires to avoid labeling state and local governments racist except on clear evidence and to avoid asking judges essen-

122. In my judgment, the best way to defend the Morgan power on the facts of that case is not based on superior congressional capacity to find facts, but instead on the notion that, under the proper interpretation of the Reconstruction Amendments, Congress should have legislative authority equivalent to a national police power concerning civil rights. See generally William Cohen, Congressional Power To Interpret Due Process and Equal Protection, 27 Stan. L. Rev. 603 (1975). This would result from a judicial, rather than congressional, authoritative interpretation of these Amendments. In any event, my concern here is the equation of the Morgan power with Cox’s fact-finding theory, not with other efforts to defend that power, which may prove more persuasive. See, e.g., Douglas Laycock, RFRA, Congress, and the Ratchet, 56 Mont. L. Rev. 145, 153-65 (1995).
tially to take on a legislative function by balancing the harms resulting from discriminatory effects against whatever justifications there might be for the governmental decisions causing those effects. That the trigger for congressional power to interpret the Civil War Amendments is interpreted grudgingly by judges may explain why the factual support for a nexus with that trigger in Rome should be stronger than would be necessary in a commerce case.

This line of analysis leads to two intriguing observations. First, of course, the trigger for congressional power to enforce the Commerce Clause was judicially interpreted grudgingly until Jones & Laughlin. Both the requirement of a nexus with interstate commerce and a nexus with violations of the Civil War Amendments are imposed in large part for federalism reasons, to avoid allowing congressional power to swallow up the local police power. That was as plain in the Civil Rights Cases, the case requiring the nexus for the Civil War Amendments, as it was in the pre-Jones & Laughlin line of cases as well, perhaps most prominently discussed in Hammer v. Dagenhart and Carter Coal. If, from the legal realist point of view, the “felt needs” associated with the Great Depression and the Democratic New Deal led to Jones & Laughlin and its progeny, why has a similar loosening of congressional power not occurred for enforcing the Civil War Amendments?

Morgan was a potentially liberating opinion, but it now seems to have died on the vine. Had it been written more directly to overrule the Civil Rights Cases and to hold that the Congress has a national police power concerning civil rights, Morgan would have been the civil-rights equivalent to the liberating Commerce Clause opinions in Darby, Filburn, Heart of Atlanta, and McClung. For today it seems clear, even after Lopez, that, pursuant to the Commerce Clause, Congress has what amounts to a national police power to engage in economic regulation, even where the ultimate goal of the regulation is social (as in Heart of Atlanta and

123. These are some of the concerns that apparently animated the Court in Washington v. Davis, 426 U.S. 229 (1976), to require a showing of intentional discrimination to invalidate facially neutral classifications under the Equal Protection Clause. Four years later, in Mobile v. Bolden, the Court extended the Davis approach to the Fifteenth Amendment. See Bolden, 446 U.S. at 61-65.
124. 109 U.S. 3 (1883).
125. 247 U.S. 251 (1918).
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McClung) rather than economic.126

One explanation might be that there has never been a crisis in recent times in which the Court has invalidated important civil rights legislation, thereby setting up a strong societal reaction and retaliation from the political branches. Indeed, in one of the great ironies of constitutional law, the Civil Rights Act of 1964 outlaws racial discrimination in public accommodations127—the same activity outlawed by the Civil Rights Act of 1875,128 which was struck down in the Civil Rights Cases. The difference is that the 1964 Act is constitutionally justified by the commerce power, as interpreted in Heart of Atlanta and McClung. The incredible expansion of the commerce power has largely prevented any civil rights equivalents to Carter Coal, Hammer (which invalidated child-labor legislation), and so on. Where the commerce power has not been invoked—for example, with respect to the Voting Rights Act—the Court has still upheld the statute as consistent with Congress's authority under the Civil War Amendments.129

The other essential difference may be in the specificity of the underlying matter to which a nexus must be shown. “Affecting interstate commerce” is, of course, a question of degree, and there seems to be no reason to try to draw a sharp line around it, especially where, in the first instance, the judgment must be made by a co-equal branch, Congress. A violation of the Civil War Amendments, on the other hand, will most commonly be defined in case-by-case litigation in which individuals sue states and local governments, rather than in congressional hearings or the like. For the benefit of both parties, certainty and predictability are required, so individuals know their rights and states and local governments know their responsibilities and where constitutional liability, with all its economic and stigmatic consequences, begins.

Of course, Lopez might result in a reordering of congressional

126. See supra text accompanying notes 68-69, 99-100.
128. Ch. 114, 18 Stat. 335 (1875).
129. Justices Stewart, Powell, and Rehnquist dissented in Rome, and more recently the Court has expressed qualms about the constitutionality of the Voting Rights Act, if it is understood to compel states to take race into account in redistricting their legislatures. See Miller v. Johnson, 115 S. Ct. 2475 (1995); Shaw v. Reno, 113 S. Ct. 2816 (1993); cf. Holder v. Hall, 114 S. Ct. 2581, 2591-619 (1994) (Thomas, J., joined by Scalia, J., concurring in the judgment) (urging colorblindness in interpreting the Voting Rights Act). At this writing, however, no judicial frontal attack has been made on congressional power to enforce the Reconstruction Amendments.
power, in which the commerce power and the power to enforce the Civil War Amendments become more congruent. At a minimum, after *Lopez*, a prudent Congress might wish to follow the *Rome* model when exercising its commerce power: articulate the judicial standard (the subject of the statute must have a substantial effect upon interstate commerce) and then document the satisfaction of that standard through facts developed in hearings and other legislative methods. Any such reordering is unlikely to depend upon the presence of formal congressional findings—which, after all, may be trumped-up or mere boilerplate—nearly as much as upon the development of a sound factual basis for congressional power. A heightened concern about congressional processes and their outcomes along these lines—what might be labeled "due process of lawmaking"—could take many different tacks. Two such routes seem to me to be especially interesting to examine.

The first, suggested by the Fifth Circuit in *Lopez*, would focus upon what Bill Eskridge and I have called "quasi-constitutional law"—the use of techniques to nullify the force of congressional action without outright declaring it unconstitutional. In a rather inscrutable discussion, the Fifth Circuit attempted to draw support for its invalidation of the gun statute by noting that the law invaded not just the local police power in general, but local control of a core state function, education, in particular. The appeals court then cited several Supreme Court cases buffering federal intrusions upon state authority. As the appeals court itself recognized, however, "the rule being applied in those cases is one of statutory construction," and thus has no obvious application in a case in which the constitutionality of a federal statute is at issue. Moreover, following the overruling of *National League of Cities v. Usery* in *Garcia v. San Antonio Metropolitan Transit Authority*, the Constitution does not forbid congressional exercises of the commerce power that invade core state functions.

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130. See Hans A. Linde, *Due Process of Lawmaking*, 55 Neb. L. Rev. 197, 199 (1976) (coining the phrase, which I am using in a broader sense than he did, for Linde did not approve of intrusive "rational basis" inquiries).


132. See *Lopez*, 2 F.3d at 1364-66.

133. *Id.* at 1365.


The Supreme Court in *Lopez* also obliquely referred to these statutory cases,\textsuperscript{136} which supports both the instinct that they are somehow relevant and the conclusion that it is difficult to express precisely why that might be so. In my judgment, these cases are relevant and represent an opportunity for the Court to provide some flexible, process-based judicial review in place of wooden judicial invalidation of congressional initiatives.

In jettisoning almost all Tenth Amendment limitations on the commerce power, even when it invades core state functions, *Garcia* intimated that the primary protection of federalism is through the congressional process.\textsuperscript{137} This abandonment of substantive constitutional law—*Marbury*-style invalidation—would not logically require the judicial avoidance of all inquiries into the processes and outcomes of the legislative arena. Indeed, in short order, the Court in *Gregory v. Ashcroft*\textsuperscript{138} transformed the old *Usery* substantive inquiry into an interpretive one: a federal statute enacted pursuant to the commerce power would be construed as invading core state functions only if its text compelled that interpretation.\textsuperscript{139} Justice O'Connor's opinion for the Court in *Gregory* stated that, "inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress's Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise."\textsuperscript{140} To implement this "super-strong clear statement requirement,"\textsuperscript{141} the Court in *Gregory* apparently borrowed its approach to interpreting federal statutes arguably abrogating the states' Eleventh Amendment immunity to suit: the statute does not invade state prerogatives unless Congress has "ma[de] its intention to do so 'unmistakably clear in the language of the statute.'"\textsuperscript{142} In essence, the serious federalism problems would be addressed through judge-created techniques of

\textsuperscript{136} See 115 S. Ct. at 1631 & n.3; see also id. at 1640-42 (Kennedy, J., joined by O'Connor, J., concurring) (stating that careful review of gun statute is called for because it intrudes on core state functions).

\textsuperscript{137} See *Garcia*, 469 U.S. at 556 ("[T]he principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.").


\textsuperscript{139} Id. at 464-65.

\textsuperscript{140} Id. at 464.

\textsuperscript{141} See Eskridge & Frickey, supra note 131, at 597, 623-25.

\textsuperscript{142} See *Gregory*, 501 U.S. at 460 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).
To be sure, the flight from constitutional invalidation to quasi-constitutional interpretive methods that I have traced is not directly applicable to the Lopez problem. The statute in question plainly outlawed the possession of guns near schools, and thereby unmistakably invaded the core state functions of implementing the local police power in general and of providing public education in particular. At a more abstract level, however, Garcia and Gregory combine to suggest not only that what language Congress chooses, but how Congress came to embrace that language, is a matter of judicial concern. The clear-statement requirement adopted in Gregory is a forthright judicial effort to influence congressional processes. Most obviously, the approach attempts to force Congress to draft statutes clearly. More subtly, it essentially seeks not just to force the objection based on the invasion of state sovereignty onto the congressional agenda, but also to highlight it. The assumption must be that the Gregory canon of interpretation will lead to more thorough and thoughtful congressional deliberations concerning whether invasions of state sovereignty are justified, and is not simply a way to prevent wholly inadvertent intrusions on state authority. Indeed, in Gregory, the Court forthrightly stated that the clear-statement requirement was designed to assure “that the legislature has in fact faced, and intended to bring into issue, the critical matters involved.” On this understanding, the Gregory canon is a judicial means of implementing Garcia’s shift from substance to process in the protection of state sovereignty.

If, as I have argued, Gregory is an approach for implementing Garcia’s procedural focus, rather than some interpretive end in itself, other judicially constructed means may be forthcoming as well. One obvious candidate is a requirement of formal congressional findings in certain situations. Because findings could simply be boilerplate drafting with little impact upon the Garcia-promoted internal congressional dialogue about federal legislation and state sovereignty, however, a broader focus upon congressional process might seem more fruitful. Yet, in the ordinary case, of course, the legislative process is irrelevant to the constitutionality of the congressional product. There are a few cases, however, that essen-

143. Id. at 461 (citing Bass, 404 U.S. at 349).
144. At the state level, the best counterexample is probably the enforcement of the common state constitutional requirement that every law have only one subject, expressed in its title. See, e.g., Department of Educ. v. Lewis, 416 So. 2d 455 (Fla. 1982); Millard
tially embrace the view that the quality of legislative procedures makes a difference in assessing constitutionality. It is to this final subject that I now turn.145

For at least two decades, federal constitutional law has been embroiled in a controversy about "tiers of scrutiny."146 Before the 1970s, two tiers existed: strict scrutiny (which was strict in theory, but fatal in fact)147 and the rational basis test, which allowed essentially any statute to pass constitutional muster. Much sprawl and muddle has arisen since that time. Strict scrutiny has not always been fatal.148 The Court sometimes could not agree149 or refused to make clear150 what scrutiny it was applying, and the rational basis test occasionally leapt up and struck down a statute.151 The most interesting development, though, has been the creation of a

M. Ruud, "No Law Shall Embrace More than One Subject," 42 MINN. L. REV. 389 (1958). The single-subject rule might seem mere formalism, but it could well have the useful effects of forcing the legislature to place unrelated issues in separate bills, rather than combine them for logrolling purposes.

145. For a thoughtful scholarly presentation of the position that attention to the legislative process should influence the constitutional calculus, see Terrance Sandalow, Judicial Protection of Minorities, 75 MICH. L. REV. 1162 (1977). See also DANIEL A. FARBER & PHILIP P. FRICKLEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 122-25, 129-30, 136-38 (1991). For one Justice's embrace of this perspective, see Fullilove v. Klutznick, 448 U.S. 448, 549-52 (1980) (Stevens, J., dissenting). For the argument that judicial review should focus on "due process" of legislative processes but not be concerned with substantive review of the rationality of the legislative product, see Linde, supra note 130.


147. Id. at 8.

148. See, e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (opinion of Powell, J.) (purporting to apply strict scrutiny but suggesting that the admissions program at Harvard, which took race into account as a non-conclusive factor, would be constitutional). In the most recent affirmative-action precedent, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995), Justice O'Connor's majority opinion took great pains to suggest that strict scrutiny does not inevitably lead to constitutional invalidation.

149. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion of Brennan, J.) (proposing strict scrutiny for gender classifications); id. at 691 (Powell, J., joined by Burger, C.J., and Blackmun, J., concurring in the judgment) (deferring the question of the level of scrutiny applicable to gender classifications).


third, intermediate tier. The most prominent cases subjected to intermediate scrutiny have been those involving gender classifications.\textsuperscript{152} When a statute is assessed under mid-level scrutiny, its sensitive classification, such as one based on gender, can be sustained only if it "serve[s] important governmental objectives and [is] substantially related to achievement of those objectives."\textsuperscript{153} This standard contemplates a judicial inquiry into the legislative process, for it seeks to evaluate the actual governmental objective that motivated the legislature. More than that, however, the invocation of heightened scrutiny in effect bursts the presumption of constitutionality and shifts the burden of winning the argument on constitutionality to the government and away from the person challenging the sensitive classification.\textsuperscript{154} Thus, this heightened scrutiny essentially forces legislatures to "choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact."\textsuperscript{155}

It seems clear that, in at least two cases, congressional procedures and fact-gathering have influenced the constitutional outcome. In upholding the exclusion of women from the selective service in \textit{Rostker v. Goldberg},\textsuperscript{156} the Court stressed that the Congress had recently "carefully considered and debated" the alternatives.\textsuperscript{157} \textit{Rostker} is to equal-protection review what \textit{Perez} is to Commerce-Clause review. In contrast, at least once the Court took into account the absence of congressional consideration. In \textit{Califano v.}

\textsuperscript{152} Craig v. Boren, 429 U.S. 190 (1976), is, of course, the foundational opinion. The Court has also applied intermediate scrutiny to classifications that disadvantage persons born outside of marriage. See, e.g., Craig v. Jeter, 486 U.S. 456 (1988).

\textsuperscript{153} Craig, 429 U.S. at 197.

\textsuperscript{154} See Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

\textsuperscript{155} Our decisions establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."


\textsuperscript{156} Craig, 429 U.S. at 199 (emphasis added).

\textsuperscript{157} Id. at 70.
Goldfarb, the Social Security provision in question provided that survivor’s benefits, based on the earnings of a deceased husband, were automatically payable to his widow, but that a surviving widower would get such benefits only if his deceased wife had provided at least half of his support. The Court had earlier upheld a gender classification that, the Court thought, appropriately recognized that widows are more economically disadvantaged than widowers. The Court had also upheld a gender classification designed to compensate women naval officers for the increased difficulties they faced in building a record justifying promotion in rank caused by their exclusion from combat and many forms of sea duty.

In Goldfarb, the Court refused to apply the compensatory rationale of these cases because there was no indication that the gender classification at issue was based on “a reasoned congressional judgment that nondependent widows should receive benefits because they are more likely to be needy than nondependent widowers.” By stressing the absence of appropriate congressional support as a factor negating constitutionality, Goldfarb is the equal-protection analogue to Lopez.

All that these analogies do, however, is leave us with a greater—indeed, the ultimate—puzzle that follows from Lopez. The heightened inquiry into congressional process found in the gender cases resulted from the heightened constitutional scrutiny applied to gender classifications. Yet Lopez did not purport to apply heightened scrutiny to the gun statute at issue in that case. It acknowledged that under the relevant precedent, the only question was whether “a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.” As Justice Souter stressed in his dissent, the degree of scrutiny applied by the majority seems much more rigorous than the rational-basis inquiry routinely applied by the Court. Moreover, as Justice Breyer stated in his dissent, the absence of formal congressional

163. See id. at 1651-57 (Souter, J., dissenting).
findings "at most, deprives a statute of the benefit of some extra leeway."\textsuperscript{165} Justice Souter (correctly) read the majority opinion as turning on "commercial character,"\textsuperscript{166} but wondered if "[f]urther glosses on rationality review . . . may be in the offing," such as whether "the congressional statute deal[s] with subjects of traditional state regulation" or "contain[s] explicit factual findings supporting the otherwise implicit determination that the regulated activity substantially affects interstate commerce."\textsuperscript{167} Just what does \textit{Lopez} mean for rational-basis review?

There is at least one relatively recent equal-protection decision that purports to turn on rational-basis review that is somewhat analogous to \textit{Lopez} and that might shed light for the future.\textsuperscript{168} In \textit{Cleburne v. Cleburne Living Center},\textsuperscript{169} decided a little more than a decade ago, the Court considered an equal-protection challenge to a municipality’s exclusion of a group home for the developmentally disabled. The majority opinion of Justice White firmly rejected applying intermediate scrutiny, essentially fearing it would produce a slippery slope for other cases brought by permanently disabled persons.\textsuperscript{170} Then, applying what it called rational-basis review, the Court invalidated the city’s zoning decision anyway.\textsuperscript{171}

The rationality standard the Court in \textit{Cleburne} invoked had at least four innovative features. Two of them are captured in the Court’s statement that "legislation that distinguishes \textit{between the mentally retarded and others} must be rationally related to a legitimate governmental purpose."\textsuperscript{172} First, the Court did not quote a generic version of rational-basis review, found in the great run of cases, that essentially says that all legislation, regardless of its subject matter, subject to this minimal level of scrutiny must be

\textsuperscript{165} \textit{Lopez}, 115 S. Ct. at 1658 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting) (emphasis in original).

\textsuperscript{166} See id. at 1654 (Souter, J., dissenting). On the importance of the noneconomic character of the regulation, see supra text accompanying notes 68-69.

\textsuperscript{167} \textit{Lopez}, 115 S. Ct. at 1654 (Souter, J., dissenting).

\textsuperscript{168} For citation of earlier cases, see supra note 151.

\textsuperscript{169} 473 U.S. 432 (1985).

\textsuperscript{170} See id. at 445. In a nutshell, Justice White stated that the developmentally disabled are differently situated from others; legislatures have shown sympathy to their plight, negating the inference that they are politically powerless; and according heightened scrutiny to these classifications would create a "slippery slope" problem in assessing the demands of other groups for the protections of strengthened scrutiny.

\textsuperscript{171} See id. at 448.

\textsuperscript{172} Id. at 446 (emphases added).
upheld if any rational basis for it can be ascertained.173 Instead, the Court focused on the precise problem before it: a classification dealing with the developmentally disabled. This concretized the inquiry and emphasized that noneconomic human deprivation, not mere economic regulation, was involved. Second, the requirement of a relation to a legitimate governmental purpose was novel. Usually, any governmental purpose that is not independently unconstitutional— that is, does not run afoul of some constitutional provision other than equal protection—will suffice.174 To the extent that legitimacy is a normative concern broader than independent unconstitutionality, that breathes substantive life into the Equal Protection Clause itself and makes this form of rational-basis review more stringent than the garden-variety form. Indeed, a passage soon thereafter in the opinion confirms this conclusion and constitutes the third innovation. The Court wrote that “some objectives—such as a ‘bare . . . desire to harm a politically unpopular group’—are not legitimate state interests.”175 In this manner, the Court essentially held that, at least outside the field of economic regulation, the Equal Protection Clause prohibits the government from bashing people because of antipathy. Finally, in applying this second-order rationality review, the Court seemed to conclude that plaintiffs had made a prima facie case of unconstitutionality and then shifted the burden of proof on constitutionality to the city, which failed to present a nondiscriminatory factual basis for its decision.176

173. See, e.g., Beech Communications, 113 S. Ct. at 2101-03.
174. Although this understanding of the most minimal level of scrutiny is not ordinarily stated as such, it is implicit in most of the cases involving economic regulation. See, e.g., id. at 2101 (“In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”). In noneconomic cases before Cleburne, however, the Court had occasionally indicated that the end served by the governmental action must be legitimate. See D. Don Welch, Legitimate Government Purposes and State Enforcement of Morality, 1993 U. Ill. L. Rev. 67, 83-86.
175. Cleburne, 473 U.S. at 446-47 (quoting United States v. Dept. of Agriculture v. Moreno, 413 U.S. 528, 531 (1973)).
176. The Court twice stressed that “the record” did not reveal how the developmentally disabled were different in any nonarbitrary or nondiscriminatory way from others. Id. at 448, 450. The Court finally stated that “[t]he City never justify[d]” its decision. Id. at 450. These comments contrast sharply to garden-variety rational-basis techniques. Ordinarily, of course, the challenger bears an insurmountable burden of proof, for she must carry the “burden ‘to negative every conceivable basis which might support’” the law. Beech Communications, 113 S. Ct. at 2102 (quoting Lehnhausen v. Lake Shore Auto Parts, 410 U.S. 356, 364 (1973)). Moreover, because when applying minimal scrutiny the Court
Remarkably, although they may seem light-years apart doctrinally, *Cleburne* shares several important features with *Lopez*. The rationality review used in both of them is far more stringent than the usual, “anything goes” variety. The apparent reason why the Court used a second-order rationality inquiry is that the regulation was noneconomic in nature and touched upon important personal (*Cleburne*) or structural (*Lopez*) values. Probably a critical factor in both decisions is that both of these values are difficult to enforce through judicial review. The message of both cases, I believe, is that the lesson of the New Deal is that economic regulation is not a matter for serious judicial second-guessing, but that other measures seriously invading personal or structural values can be subjected to meaningful judicial review. Because of significant line-drawing problems of the “slippery slope” variety in formally applying intermediate scrutiny to classifications based on developmental disability and to federal statutes invading state sovereignty, however, this review will understandably be on a case-by-case basis. That kind of second-order rationality review may result in shifting the burden of defending the statute in question to the government, which will often be a fact-based inquiry. Accordingly, explicit legislative findings based on a well-developed legislative history would be very helpful to the government in defending the statute.

The irony is that the Rehnquist Court has created *Lopez* two years after it may have terminated *Cleburne*. In *Heller v. Doe*,177 a sharply divided Court applied routine rational-basis review, rather than the second-order kind applied in *Cleburne*, to a classification disadvantaging the developmentally disabled as compared to the mentally ill. In my view, Justice Souter, in dissent, invoked the true understanding of *Cleburne* by requiring a second-order level of scrutiny “to a classification on the basis of mental disability”178 and then applying that degree of review in a diligent manner consistent with *Cleburne*.

When all is said and done, the heightened concern about con-

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177. 113 S. Ct. 2637 (1993).
178. *Id.* at 2651.
gressional fact-development and fact-finding suggested by *Lopez* could be a plausible technique for curbing legislative excess in noneconomic cases in general. If so, *Cleburne*, too, ought not only survive, but flourish. Both cases, if carefully applied and thoughtfully limited, could promote a meaningful dialogue between judiciary and legislature concerning just where the difficult-to-draw lines should exist concerning important constitutional values of personal equality and federalism. In contrast, if we are ultimately left with *Lopez* alone, I fear that the Rehnquist Court has again subjected itself to the criticism that the values it promotes are formalist rather than humanitarian, selectively countermajoritarian, and "reflect an overall constitutional vision that is strikingly old-fashioned."  

III.

Did the Court in *Lopez* "ignor[e] the painful lesson learned in 1937," as Justice Souter suggested in dissent? An affirmative answer to that question is plausible, but not inevitable. Justice Souter is not likely to bolster his arguments by reference to popular culture, but as I have already fallen victim to that technique in the introduction to this essay, perhaps it is a fitting way to end it as well. Lennonism (and McCartneyism) might provide not simply a time frame for considering developments in federalism, but some worthy language as well.

*Lopez* comes close to treating Congress as the fool on the Hill—a metaphor of real salience to vociferous supporters of federalism. But constitutional law should be a long and winding road of many lanes, only one of which is federalism. Treating the concerns animating *Lopez* as constitutionally cognizable should mean that they are generalizable to analogous situations, such as some equal protection cases. That, too, is a path fraught with difficulties, but it

179. For one model of how second-order rationality review might work, see Gunther, supra note 146. For a more recent exposition, see Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 69 (1985), discussing "strengthened rationality review."

180. On the importance of such a dialogue in contributing to a public law that is stable but not static, see William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law As Equilibrium*, 108 HARV. L. REV. 26, 87 (1994).

181. See Eskridge & Frickey, supra note 131, at 640.


183. See supra text accompanying notes 1-6.

at least would make *Lopez* more like law and less like power. That Hill is, after all, home to the Court as well, and roomy enough for more than one fool.