NOTE

Tort Reform in the Wake of *United States v. Lopez*

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Introduction

In response to the perceived excesses of lawyers,[1] formidable grass-roots movements in many states have successfully promoted legislation to limit damage recoveries in tort actions.[2] In response to a perceived public clamoring for tort reform, Republicans in the United States Congress, as part of their ten-point "Contract with America," have pledged to enact tort reform measures,[3] and thereby federalize an area of law that, until now, has largely been left to the states.[4]

Until recently, few would have questioned Congress's power to overhaul the tort system.[5] The Supreme Court's Commerce Clause

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1. *See* Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. REV. 723, 723-25 (1994).

2. *See* Eleanor N. Bradley, *State Reform of Tort Laws Proceeds During Calls for Federal Intervention*, U.S.L.W. (daily ed.), May 24, 1995.

3. *See* Nancy Mathis, *GOP Urges Bipartisan Government*, HOUS. CHRON., Nov. 10, 1994, at A1.

4. *See infra* note 15 and accompanying text.

5. Assumably, Congress would enact tort reform under the authority of the Commerce Clause, which allows Congress "[t]o regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3.

jurisprudence seemed "infinitely elastic,"[6] as illustrated by *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,[7] where the Court held that Congress had dominion over virtually every area of law as long as there was a "rational basis" for taking action under the commerce power.[8]

But in November of 1994, the Court's ruling in *United States v. Lopez*[9] called into question the expansive Commerce Clause jurisprudence of the last fifty years. In *Lopez*, the Court held that Congress had no authority to enact the Gun-Free School Zones Act of 1990,[10] which barred possession of firearms in school zones. In striking down the law, the *Lopez* Court advanced a "substantial effects" test: Under the commerce power, Congress could only regulate those activities that had a substantial effect on interstate commerce.[11] The Court found that because guns near schools did not substantially affect interstate commerce, Congress had no authority to regulate them.[12]

Chief Justice Rehnquist's opinion signaled a slight retreat from the Court's traditionally expansive interpretation of Congress's commerce power. *Lopez* demonstrated that congressional commerce power, like any other constitutional grant of power, does have limits—the Court ruled that the Commerce Clause was not "a blank check" for Congress.[13]

Opponents of tort reform have hailed the *Lopez* ruling as a revolutionary godsend.[14] For years they have argued that state tort law has no more than the "feeblest connection" to interstate commerce.[15] They claim that tort law is a traditional state function immune from federal pre-emption under principles of federalism. In light of the Court's shift in *Lopez*, it is possible that the Court will entertain con-

6. Paul D. Kamenar, *A Welcome Check on Voracious Government*, TEX. LAW., May 15, 1995, at 17.

7. 452 U.S. 264 (1981).

8. *Id.* at 276-77.

9. 115 S. Ct. 1624 (1995).

10. 18 U.S.C. § 922(q) (1994).

11. *See* 115 S. Ct. at 1630.

12. *See id.* at 1634.

13. T.R. Goldman, *Tort Reform Opponents Have New Weapon in* Lopez, CONN. L. TRIB., May 15, 1995, at 15 (quoting Professor Laurence Tribe of Harvard Law School).

14. Under *Lopez*, "the federal government can regulate the manufacture and distribution of a product, but not its possession or use." *Id.* (summarizing the interpretation of Ned Miltenberg of the Association of Trial Lawyers of America). "Insofar as we are dealing with automobiles and drugs, for example, there's no question that product liability law on these kinds of things is constitutional. But if I go into a hospital and a doctor butchers my operation, what is that connection with interstate commerce? This has always seemed extremely dubious, probably before *Lopez*, but certainly after." *Id.* (quoting Alan Morrison, an attorney for Public Citizen's Litigation Group).

15. *Id.*

stitutional challenges to federal tort reform initiatives as beyond the reach of the Commerce Clause.

This Note examines the constitutionality of congressional proposals to cap punitive damages.[16] Part I provides an overview of some recent attempts to reform the tort system. Part II briefly analyzes *Lopez*. Part III argues that the effect of massive punitive damage awards on interstate commerce is more than substantial. Part IV argues that the encroachment of punitive damage limitations on any area of traditional state concern is slight and is outweighed by the need to alleviate interstate commerce of an onerous economic burden. Part V attempts to define the commerce power's outer limits with respect to regulation of punitive damages. I conclude that the Supreme Court, contrary to the predictions of many, will uphold most federal attempts at tort reform as constitutionally permissible, *Lopez* notwithstanding.

I. Background Information

In November of 1994, the new Republican majority stormed into the United States House of Representatives with their ten-point "Contract with America." Key provisions of the Contract included a constitutional amendment to balance the federal budget, a new crime bill, welfare reform, tax reform, term limits, and tort reform.[17] Republican enthusiasm ran high for the first 100 days of the new congressional term. Even President Clinton jumped on the Republican bandwagon and signed three Contract-related bills into law.[18]

But as the year 1995 wore on, the Contract lost its luster.[19] Representative Bill Richardson, D.-N.M., put it this way: "There's been a lot of rhetoric and a lot of press releases but hardly any bills signed into law."[20] The new round of heated rhetoric and bickering did not seem to differ at all from the partisan exchanges of the past. Republicans met with substantial roadblocks in their efforts to enforce the Contract. The balanced budget amendment initiative was killed in the

16. *See, e.g.*, H.R. 956, 104th Cong. (1995); *see also* Bradley, *supra* note 2. In focusing exclusively on House proposals to cap punitive damages, the author is not unmindful of other laudable tort reform proposals (such as loser-pays provisions, abolition of joint and several liability, heightened requirements for standing, and raising the burden of proof to clear and convincing evidence wherever punitive damages are at stake).

17. *See* Mathis, *supra* note 3, at A1.

18. *See* Peter Grier, *Revolt in Review: What the 104th Congress Achieved*, CHRISTIAN SCI. MONITOR, Dec. 29, 1995, at 1. The three bills extended to Congress the labor standards required by private employers, decreased federal bureaucratic paperwork, and forbade Congress from imposing obligations on the states without providing the funds necessary to accomplish them.

19. *See generally* Bryan Sierra, *Washington News*, UPI, Dec. 18, 1995.

20. Jim Abrams, *Record Split for GOP in Congress*, CHARLESTON GAZETTE, Nov. 27, 1995, at P1A (quoting Former Representative Bill Richardson, D-N.M).

Senate,[21] the new members of Congress breached their promise to limit their terms in office,[22] welfare reform attempts were effectively frustrated by a Clinton veto,[23] and the new crime bill was tied up indefinitely in the Senate.[24] Despite these setbacks, the Republicans stood their ground on tort reform, a key provision of the Contract.

Scorned by trial lawyers[25] and urged on by the business lobby,[26] the Republicans were determined to pass tort reform legislation.[27] According to business advocates, litigation was killing the American economy.[28] For years, they claimed, trial lawyers, operating under the innocuous guise of stockholders and consumer action groups, licked their chops whenever they spied a successful business, ready to claim a piece of the pie.[29] For years, frivolous lawsuits calculated to withstand summary judgment motions had been crippling businesses, compelling them to settle out of court to avoid the expense of litigation.[30] Business advocates further claimed that trial lawyers typically sought out "sympathetic plaintiffs," calculated to provoke a jury to take a stand against the privileged class.[31] The ever-present fear of a "death sentence," a dreaded multimillion dollar punitive damage award,[32] dissuaded businesses from challenging the trial lawyers. Many businesses were quick to settle lawsuits in order to avoid even the

21. *See id.*

22. *See id.*

23. *See* Pamela M. Prah, *Welfare Reform: Clinton Vetoes Welfare Package*, DAILY LAB. REP., Jan. 11, 1996, at D6.

24. *See* Abrams, *supra* note 20, at P1A.

25. *See* W. John Moore, *Take the Money and Run*, NAT'L J., Mar. 25, 1995, at 772. The fact that the Association of Trial Lawyers of America is more generous in their financial support of Democratic candidates ($2.04 million in the last election) than of Republican candidates ($127,500) has "embittered many House Republicans." *Id.*

26. *See* Robert A. Rosenblatt, *House Approves Curbs on Federal Civil Suits*, L.A. TIMES, Mar. 8, 1995, at A1.

27. The main components of the proposed tort reform were ceilings on the amount of punitive damages an injured party could receive and the abolition of joint and several liability. *See* Bradley, *supra* note 2.

28. *See, e.g.*, Lawrence E. Smarr, *Derail the Trial Lawyers' Gravy Train Before It Demolishes Our Economy*, WASH. TIMES, Dec. 28, 1995, Letters, at A18.

29. *See generally* Lorri Grube, *Cost of Litigation to U.S. Businesses*, CHIEF EXECUTIVE, Jan. 1, 1995, at 56.

30. *See Senate Overrides President's Veto; Securities Litigation Reform Bill Now Law*, 28 Sec. Reg. & L. Rep. (BNA) 3 (Jan. 5, 1996) [hereinafter *Senate Overrides*].

31. Abdon M. Pallasch, *Brother, Can You Spare $2.9 Million for a Cup of Coffee?*, CHI. LAW., March, 1995, at 5.

32. *See* Timothy S. Bishop & Jeffrey W. Sarles, *Bonds, a Crushing Burden*, NAT'L L.J., Nov. 13, 1995, at C25. A recent example is the already infamous case of *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). The Supreme Court reversed a $4,000,000 punitive damage award (reduced to $2,000,000 on remittitur, *id.* at 1595) against a BMW dealer who failed to inform a buyer that his car was refinished—that is, had lost some of its original luster—even though it was not noticeable to the naked eye.

chance of a catastrophic financial loss at the hands of an unpredictable jury.[33]

American businesses claimed they were losing their competitive edge as a consequence of the exorbitant sums of "protection money"[34] they had to pay the trial lawyers.[35] Business advocates further claimed that the ever-present epidemic of costly litigation made it increasingly difficult for them to compete with their foreign counterparts.[36] Although the purity of its motive was questionable,[37] the new Congress set out to destroy the litigation epidemic through tort reform.

Trial lawyers had reason to be concerned. They had grown wealthy from the massive tort litigation of the seventies and eighties: plaintiff attorneys from contingency fees, and defense attorneys from the sheer volume of litigation needed to combat the plaintiffs. They were not about to give up this cherished source of income, and were prepared to fight to the death.[38] Tort reform opponents delivered urgent speeches throughout the country, typically appealing to the interests of the "little guy"[39] and "the consumer,"[40] the need to protect "widows and orphans,"[41] and the fundamental right of all citizens to "have their day in court."[42]

Nonetheless, on December 22, 1995 the United States Senate voted overwhelmingly to pass the Private Securities Litigation Reform Act of 1995[43] over President Clinton's veto.[44] This securities reform

33. *See* Pallasch, *supra* note 31, at 5.

34. Robert A. Rosenblatt, *Cox Vows Bill to Force Municipal Disclosure*, L.A. TIMES, Jan. 20, 1995, at D3 (comparing trial lawyers to the "mobsters" of the past (such as Al Capone), who "demanded 'protection' money from helpless merchants").

35. *See* Pallasch, *supra* note 31, at 5.

36. *See id.*

37. *See* Moore, *supra* note 25, at 772. According to Moore, the business community and their political action committee lobbyists typically contribute heavily to Republican candidates while trial lawyers and labor unions typically contribute heavily to Democratic candidates. *See id.*

38. American Medical Association (AMA) member Dr. Kirk Johnson thus characterized the anticipated fight of the trial lawyers when confronted with medical malpractice reform measures. *See* Brian McCormick, *Tort Reform Victory in the House*, AM. MED. NEWS, Mar. 27, 1995, at 1.

39. Bill Grady, *Lawyer Has Taste for Excess*, NEW ORLEANS TIMES-PICAYUNE, Dec. 3, 1995, at B1 (quoting trial lawyer David Bond). Only moments before Bond stepped into his antique Rolls Royce, he had insisted that his role was to defend the "little guy."

40. Grube, *supra* note 29, at 56.

41. Representative John Dingell (D-Mich.) characterized the securities reform measure as "the skinning of widows and orphans." Phillip Terzian, *Slow Motion Economic Suicide*, PROVIDENCE J., Dec. 6, 1995, at 7B (quoting John Dingell).

42. Henriette Champagne, *Weld Ponders Legal System Changes*, MASS. LAW. WKLY., Apr. 17, 1995, at 30 (quoting James Doyle, Treasurer of the Massachusetts Trial Lawyers Association).

43. 15 U.S.C.S. § 77L (West 1996).

measure was designed to combat law firms and professional plaintiffs who filed "frivolous and extortionate" shareholders' strike suits whenever "a company's share price drop[ped] unexpectedly."[45] Essentially, the Act gave greater legal protection to accountants and corporate officials who estimated a corporation's future earnings.[46] The new law made it difficult for the owner of a single share of stock to use an unfulfilled economic forecast as the sole basis for a lawsuit.[47]

This victory not only raised the morale of the beleaguered Republicans, it revived the fateful specter of future tort reform measures, notably House Resolution 956, a House proposal to limit punitive damages to $250,000 or three times economic damages, whichever is greater, in nearly all civil actions.[48] Trial lawyers and their advocates in Congress (mostly Democrats) are crying foul, and are bound to challenge these measures.

Although the trial lawyers lost this first battle, they are not yet ready to concede defeat. If all else fails, tort reform opponents still have one remaining trump card—the Constitution. Invoking the canon of strict statutory construction, they could argue that Congress has no explicit constitutional authority to regulate an inviolate sphere of state concern, in this case, substantive tort law.[49]

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44. *See Senate Overrides*, *supra* note 30, at 3.

45. David R. Sands, *Bill to Reform Laws on Securities Fraud Nearing Passage*, WASH. TIMES, Dec. 3, 1995, at A3.

46. *See Senate Overrides*, *supra* note 30, at 3. The new "safe harbor" shields accountants' and company officials' economic forecasts from any automatic presumption of fraud based solely on a sudden decline in value of company stock. *See id.* The safe harbor applies only where predictive statements are accompanied by "meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statements." *Id.* (quoting the new statute). Excluded from the safe harbor were "projections made in the course of initial public offerings, tender offers, blank check offerings, and penny stock offerings." *Id.*

47. According to Senator Pete Domenici, R.-N.Y., provisions were included to restrict "professional plaintiffs," and to ban "bonus payments to pet plaintiffs, settlement term disclosure, attorney compensation reform, sanctions for lawyers filing frivolous cases, [and] restrictions on secret settlements and attorney's fees." *Senate Overrides Security Bill Vote*, CONG. PRESS RELEASES, Dec. 22, 1996.

48. The House bill (HR 956) would also raise the burden of proof to "clear and convincing evidence" where punitive damages are at stake. *See* Bradley, *supra* note 2.

49. Many trial lawyers have argued that punitive damage caps transgress the limits of the Commerce Clause. See, for example, the lawyers quoted *supra* note 14. This argument has support in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938), which held that "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in nature or 'general' . . . . Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States."

II. *United States v. Lopez*

The Court in *Lopez* listed "three broad categories of activity that Congress may regulate under its commerce power":[50] (1) "the channels of interstate commerce,"[51] (2) "the instrumentalities of interstate commerce,"[52] and (3) "those activities having a *substantial relation* to interstate commerce."[53] It is the last of these categories that engenders the most controversy, and its parameters are at issue in *Lopez*.

Chief Justice Rehnquist's analysis in the majority opinion begins with the "first principles" of our federalist system.[54] The opinion quotes James Madison: "The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite."[55] In the words of former Chief Justice Marshall, the commerce power is restricted to "*commerce* which concerns *more states than one.*"[56] Thus, since "[t]he enumeration [of the commerce power] presupposes something not enumerated,"[57] the Constitution's express enumeration of interstate commerce must preclude congressional regulatory power over that which is not commerce, or over commerce that is not interstate. These principles form the historical basis for the *Lopez* decision: the federal government is a government of enumerated powers, which are few and defined, and the Commerce Clause grants Congress the limited power to regulate *interstate commerce*, nothing more and nothing less.

However, cases arose where "interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce."[58] The Court found that "the Commerce Clause authorized such regulation."[59] From this commingling principle eventually emerged the direct/indirect distinction: Activities that *directly* affected interstate commerce were within the reach of Congress, but activities that *indirectly* affected interstate commerce were beyond the scope of the com-

50. United States v. Lopez, 115 S. Ct. 1624, 1629-30 (1995).

51. *Id.* at 1629.

52. *Id.*

53. *Id.* at 1629-30 (emphasis added).

54. *Id.* at 1626.

55. THE FEDERALIST No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961), *quoted in Lopez*, 115 S. Ct. at 1626.

56. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824) (emphasis added), *quoted in Lopez*, 115 S. Ct. at 1627.

57. *Gibbons*, 22 U.S. at 195, *quoted in Lopez*, 115 S. Ct. at 1627.

58. *Lopez*, 115 S. Ct. at 1627.

59. *Id.*

merce power.[60] If the regulated activity was related to interstate commerce only *indirectly*, it was not amenable to federal regulation, lest there be "virtually no limit to the federal power."[61]

In *NLRB v. Jones & Laughlin Steel Corp.*,[62] the Court stated the test somewhat differently. Recognizing that the question of the scope of Congress's power was "necessarily one of degree,"[63] the Court held that Congress had the power to regulate intrastate activities that 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."[64]

In exploring the outer limits of the commerce power, the *Lopez* Court found federalism to be an important consideration:

> [T]he scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[65]

Chief Justice Rehnquist, rejecting the notion that "[a]ll activities affecting commerce, even in the minutest degree may be regulated and controlled by Congress,"[66] agreed that the Court has never "declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."[67]

The Court cited *Wickard v. Filburn*[68] to demonstrate the absolute outer limits of the commerce power.[69] Roscoe Filburn was a local farmer who owned twenty-three acres of property where he grew wheat to feed his livestock.[70] The United States Secretary of Agriculture fined him pursuant to the Agriculture Adjustment Act of 1938 for

60. *See id.* at 1628 (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935)).

61. *A.L.A. Schechter Poultry*, 295 U.S. at 548, *quoted in Lopez*, 115 S. Ct. at 1628.

62. 301 U.S. 1 (1937).

63. *Id.* at 37.

64. *Id.* (emphasis added); *see also* United States v. Darby, 312 U.S. 100, 118 (1941) ("The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.").

65. *Lopez*, 115 S. Ct. at 1628-29 (quoting *Jones & Laughlin*, 301 U.S. at 37).

66. Maryland v. Wirtz, 392 U.S. 183, 204 (1968) (Douglas, J., dissenting), *quoted in Lopez*, 115 S. Ct. at 1629.

67. *Wirtz*, 392 U.S. at 197 n.27, *quoted in Lopez*, 115 S. Ct. at 1629.

68. 317 U.S. 111 (1942).

69. *See Lopez*, 115 S. Ct. at 1630.

70. *See Wickard*, 317 U.S. at 114.

exceeding the allotment of home-grown wheat authorized under the statute.[71] The *Wickard* Court upheld the fine because, although the impact of Filburn's home-grown wheat on the market may have been trivial, "his contribution, taken together with that of many others similarly situated, [was] far from trivial."[72] When Filburn and similarly situated wheat farmers opted to grow their own wheat rather than buy it at the artificially inflated market price, they contributed, albeit minutely, to lowering the market wheat price.[73] Hence, "[h]ome-grown wheat . . . compete[d] with wheat in commerce."[74]

The *Lopez* Court argued that even the marginal impact of home-grown wheat on commerce was more tenable than the Government's rationale for regulating guns in schools.[75] Section 922(q) of the Gun-Free School Zones Act[76] "by its terms ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[77] The government argued that, because guns in schools "may result in violent crime" the costs of which were "spread throughout the population" through insurance, they imposed substantial costs on the population at large.[78] In addition, the Government argued that guns in schools undermined the educational process, and therefore adversely affected national productivity and interstate commerce.[79] The Court asserted that, under the Government's rationale, "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example."[80] The Court concluded that to find that guns in schools substantially affected interstate commerce, it "would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[81]

Finally, the Court decided that under such an attenuated commerce doctrine there would be no distinction between what is "truly national and what is truly local."[82] Because the powers of Congress

71. *See id.* at 114-15.
72. *Id.* at 128.
73. *See id.* at 128. According to the *Wickard* Court, the purpose of the Agriculture Adjustment Act was to regulate the prices of crops, and avoid "surpluses and shortages." *Id.* at 115.
74. *Id.* at 128.
75. *See* 115 S. Ct. at 1630.
76. 18 U.S.C. § 922(q) (1994).
77. *Lopez*, 115 S. Ct. at 1630-31.
78. *Id.* at 1632.
79. *See id.*
80. *Id.*
81. *Id.* at 1634.
82. *Id.*

enumerated in the Constitution do not include a plenary police power, the Gun-Free School Zones Act was unconstitutional.[83]

III. Substantial Effect on Interstate Commerce

If punitive damages have a substantial effect on interstate commerce, they are the legitimate object of federal regulation. So what constitutes a substantial effect? *Lopez* did not define the term precisely, but gave numerous examples of cases defining the contours of the test.[84] The *Lopez* Court concluded that the commerce power's limits derived from practical reasoning rather than any rigid mathematical formula.[85] Like all other powers enumerated in the Constitution, the question of the commerce power's limits is "'necessarily one of degree.'"[86]

We know what a substantial effect is *not*: If a federal regulation's economic effect is so far removed from interstate commerce that it amounts to a plenary police power for Congress when applied to other areas of the law, then the regulation is unconstitutional.[87] Thus, a two-tiered inquiry emerges out of *Lopez*. On the one hand, the *Lopez* Court is concerned with the extent of the regulated activity's economic effect on interstate commerce. But the *Lopez* majority appears equally concerned with the extent to which the regulation might upset the delicate balance of federalism through congressional usurpation of traditional state prerogatives. This Part argues that the actual economic effect of tort suits is more than substantial, and Part IV explores the issues of federalism implicated by federal tort reform.

Punitive damages constitute a substantial part of the country's "tort tax."[88] The cost of tort litigation in the United States is a staggering $80 billion a year, constituting 2.5% of the gross national product (GNP), an amount unparalleled in any other country.[89] That $80 billion figure includes only litigation-related expenses: attorneys' fees, discovery, expert fees, payouts, settlements, and insurance costs.[90] It does not include the cost of avoiding litigation (e.g., unnecessary tests that doctors perform) and the immeasurable costs to society in products that are never marketed for fear of future lawsuits.[91] It defies reason to suggest that these costs do not have a substantial effect on the national economy.

83. *See id.*
84. *See id.* at 1629-30.
85. *See id.* at 1634.
86. *Id.* at 1633 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).
87. *See id.* at 1633.
88. Leslie Spencer, *The Tort Tax*, FORBES, Feb. 17, 1992, at 40.
89. *See id.*
90. *See id.*
91. *See id.*

Furthermore, the size of punitive damage awards and the frequency with which they are awarded have increased rapidly over the last twenty years.[92] California damage awards are particularly illustrative of this trend. Before 1960 the highest punitive damage award in California to be affirmed on appeal was $10,000.[93] In the sixties that figure rose to $250,000,[94] and in the seventies to $749,000.[95] Even that figure was dwarfed in the eighties by *Eaton v. PKL Companies*,[96] in which a record-breaking punitive damage award of $15,000,000 was affirmed on appeal. Thus, from 1959 to 1989, the highest damage awards have increased by a factor of well over a thousand, while the cost of living has increased by a mere factor of three.[97] Regardless of the comparatively negligible pre-1960 effect of punitive damages on commerce, their potentially devastating economic impact has skyrocketed in recent years.

Arbitrary damage awards plague every kind of commercial enterprise.[98] According to Theodore Olson, a partner with Gibson, Dunn & Crutcher and a leading advocate of tort reform, excessive punitive damages can cause harm and financial ruin to

> the manufacturers of products, . . . the providers of financial assistance, the growers of crops, auditors and accountants, the transportation industry, homeowners, state and local governments and playgrounds, swimming pools and nurseries, convenience stores, small businesses, restaurants, non-profits and volunteers, school teachers, Little League coaches, and . . . millions of others.[99]

Although products liability suits are often cited as the most egregious examples of punitive damage excesses,[100] Olson lists some striking examples of recent awards from tort actions other than products liability, all of which were affirmed on appeal.[101] Among them are *Sprague v. Walter*[102] ($31 million against a newspaper for defamation); *Ebeling & Reuss, Ltd. v. Swarovski International Trading Corp.*[103] ($16.5 mil-

92. *See Punitive Damages Tort Reform: Hearings on S. 671 and S. 672 Before the Senate Comm. on the Judiciary*, 104th Cong. 6 (1995) (prepared statement of Theodore B. Olson) [hereinafter Olson].

93. *See* Larrick v. Gilloon, 1 Cal. Rptr. 360 (Ct. App. 1959).

94. *See* Toole v. Richardson-Merrell Inc., 60 Cal. Rptr. 398 (Ct. App. 1967).

95. *See* Neal v. Farmers Ins. Exch., 582 P.2d 980 (Cal. 1978).

96. No. B010958 (Cal. Ct. App. July 18, 1989) (unpublished opinion).

97. The rate of inflation has increased an average of 6% a year over the last 30 years, doubling the cost of living every 12 years. *See* Dan Rutherford, *Tulsan's Tactics Vary with Time*, TULSA WORLD, Mar. 2, 1996, at E1.

98. *See* Olson, *supra* note 92, at 13.

99. *Id.*

100. *See, e.g.*, Spencer, *supra* note 88, at 40.

101. *See* Olson, *supra* note 92, at 12.

102. 656 A.2d 890 (Pa. 1995).

103. No. 88-4878, 1992 WL 211554 (E.D. Pa. 1992).

lion for fraud and patent infringement); *Chemstar, Inc. v. Liberty Mutual Insurance Co.*[104] ($14 million for insurance bad faith); *Latham Seed Co. v. Nickerson American Plant Breeders, Inc.*[105] ($10 million for fraud); and *Hanson v. American National Bank and Trust Co.*[106] ($5.75 million for breach of a construction contract). Olson concludes that "[t]hese judgments, and the additional suits they inspire, dislocate and impede commerce, produce discrimination against interstate commerce and disrupt and reorder the decisionmaking process throughout America."[107]

Moreover, while the Supreme Court has not yet ruled on Congress's power to regulate punitive damages under the commerce power, the Court has implicitly recognized the devastating effect of punitive damages on interstate commerce. In her dissent in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,[108] Justice O'Connor first recognized that

> [t]he threat of such enormous awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. Similarly, designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages.[109]

Later, in *Pacific Mutual Life Insurance Co. v. Haslip*,[110] a majority of the Court recognized that the Constitution might impose tangible, substantive limits on the amount of punitive damages a jury may award.[111]

In *Honda Motor Co. v. Oberg*,[112] the Court further recognized that juries disproportionately inflict arbitrary damage awards on out-of-state businesses. According to the *Honda* Court, "the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries."[113] Moreover, "presentation of evidence of a defendant's net worth creates the po-

104. 42 F.3d 1398 (9th Cir. 1994) (unpublished table decision), *cert. denied* 116 S. Ct. 1847 (1996).

105. 978 F.2d 1493 (8th Cir. 1992).

106. 844 S.W.2d 408 (Ky. 1992), *cert. granted and judgment vacated*, 509 U.S. 918, *aff'd on remand*, 865 S.W.2d 302 (Ky. 1993).

107. Olson, *supra* note 92, at 14.

108. 492 U.S. 257 (1989).

109. *Id.* at 282 (O'Connor, J., concurring in part and dissenting in part) (citation omitted).

110. 499 U.S. 1 (1991).

111. *See id.* at 18-19.

112. 114 S. Ct. 2331 (1994).

113. *Id.* at 2340.

tential that juries will use their verdicts to express biases against big businesses, particularly those without local presences."[114]

Finally, in the seminal case of *BMW of North America, Inc. v. Gore*,[115] the Court overturned a $2,000,000 punitive damage award against a BMW dealer for its failure to disclose to a buyer that the vehicle had been repainted, even after the Alabama Supreme Court had already reduced the jury's original award of $4,000,000. Although the Court relied principally on the Due Process Clause, the Court also alluded to the dormant commerce power in reaching its conclusion.[116]

BMW had made it a practice not to report to its dealers any repairs it made to any vehicle in its inventory that accounted for no more than 3% of the car's value.[117] In calculating the damage award, the Alabama jury attempted to punish BMW for its cumulative wrongful acts, not only in Alabama, where this practice was illegal, but even in those states where such a practice might have been entirely legal.[118] This, the Court held, was an improper consideration.[119] Thus, although the majority in *Gore* did not consider the constitutionality of federal tort reform measures, the majority implicitly recognized the difficult financial burden a runaway jury can impose on interstate commerce.

Indeed, regionalism and a distrust of outsiders may combine to induce a local jury to avenge a local plaintiff aggrieved by a far-away company. Improved mobility and communications, contrary to the views of many, do nothing to decrease the tension between small-town juries and interstate businesses. On the contrary, the rise of interstate corporations, local prejudice against out-of-state businesses, and the increased ease in asserting jurisdiction over them, may serve only to exacerbate the deleterious impact of windfall punitive damage awards on interstate commerce.

In the final analysis, punitive damages arising out of commercial lawsuits encompass all areas of tort law and have a direct impact on the economy at large. At 2.5% of the GNP, of which punitive damages compose a large part,[120] the tort system's pervasive economic impact differs vastly from the relatively negligible economic effect of guns in schools. Moreover, the Supreme Court has implicitly recognized the devastating economic effects of windfall damage awards,

114. *Id.* at 2340-41.

115. 116 S. Ct. 1589 (1996).

116. *See id.* at 1604 ("While each state has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.").

117. *See id.* at 1593.

118. *See id.* at 1595.

119. *See id.* at 1604.

120. *See generally* Olson, *supra* note 92.

and appears willing to accept caps, should Congress decide to give them the force of law.

IV. Concerns with Federalism

Equally troubling to the *Lopez* Court was the potential obliteration of our federalist system, that is, the clearly defined boundaries between those governmental functions that are properly national and those that are properly local.[121] According to Justice Kennedy, federalism safeguards the rights of the people: "'A healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.'"[122] More importantly, Justice Kennedy wrote, it is necessary for political accountability that the lines be clearly drawn between federal and state prerogatives:

> Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.[123]

Without clearly defined roles for the federal and state governments, we risk diffusion of political responsibility. The tenuous rationale supporting federal regulation of guns in schools could potentially destroy the federal-state balance,[124] "foreclose[ ] the States from experimenting and exercising their own judgment in an area to which the States lay claim by right of history and expertise,"[125] or, at the very least, confuse the roles of the federal and state governments in areas (e.g., public schools and education) where they have been long established.[126]

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121. *See* 115 S. Ct. at 1634.

122. *Id.* at 1638 (Kennedy, J., concurring) (quoting Gregory v. Aschcroft, 501 U.S. 452, 458 (1991)).

123. *Id.*

124. *See id.* at 1640.

125. *Id.* at 1641.

126. *See id.* at 1640-41. Traditional state functions, which inhere in state sovereignty and are immune from federal encroachment, were defined generally in *National League of Cities v. Usery*, 426 U.S. 833 (1976) (holding that Congress could not constitutionally enforce federal wage and hour standards on state and municipal employees). *Usery* lists several examples of traditional state functions, including "fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* at 851. The *Usery* Court defined the category of traditional state functions as those typically "performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." *Id.*

However, the Court later found in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), that the *Usery* standard for traditional state functions was unworkable: "We held that the inquiry into a particular function's 'traditional' nature was merely a means of determining whether the federal statute at issue unduly handicaps 'basic state

Punitive damages have historically been considered a traditional state concern. The Supreme Court ruled in *Erie Railroad Co. v. Tompkins*[127] that neither the federal courts nor Congress had the power to declare substantive rules of common law in any state, be they rules of commercial law or tort law.[128] If we were to rely entirely on the express language of *Erie*, Congress might be precluded from passing any tort legislation, no matter how immediate the relation to interstate commerce.

However, contrary to the restrictive language of *Erie*, a wealth of precedent holds that where interstate commerce is burdened, areas of law traditionally controlled by the states may be regulated by Congress.[129] Indeed, no problem more concerned our Constitution's Framers than the need to protect interstate commerce from parochial state regulation.[130] James Madison observed that to remedy "[t]he defect of power" under the Articles of Confederation, "[a] very material object" of the Constitutional Convention was the "relief of the States which import and export through other States, from the improper contributions levied on them by the latter."[131] Madison, a strong defender of state sovereignty, nonetheless considered the need for a central commerce authority to be paramount, lest the more "commercial" states exploit the others.[132] Thus, where an area of law so burdens interstate commerce, allowing local interests to levy "improper contributions"[133] on out-of-state interests, an area to which the states would otherwise lay "claim by right of history and expertise,"[134] that area must be pre-empted by Congress.

Since *Erie*, the Supreme Court has not yet ruled directly on the extent to which Congress may pre-empt state tort law. However, re-

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prerogatives,' but we did not offer an explanation of what makes one state function a 'basic prerogative' and another function not basic." *Id.* at 540 (quoting United Transp. Union v. Long Island R.R. Co., 455 U.S. 678, 686-87 (1982) (citation omitted)). According to the *Garcia* Court, it was "difficult, if not impossible, to identify an organizing principle" that would distinguish traditional state government functions from other governmental functions. *Id.* at 539.

127. 304 U.S. 64 (1938).

128. *See id.* at 78.

129. *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 626-40 (1973); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Transit Comm'n v. United States, 289 U.S. 121, 127-28 (1933); Houston, E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342, 351-52 (1914).

130. *See* THE FEDERALIST No. 42 (James Madison).

131. *Id.* at 283 (Jacob E. Cooke ed., 1961).

132. *See id.*

133. *Id.*

134. *Lopez*, 115 S. Ct. at 1641 (Kennedy, J., concurring).

cent cases suggest that Congress's reach is far.[135] Indeed, "[w]hen Congress has 'unmistakably . . . ordained' that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall."[136] Under the commerce power, federal laws may expressly pre-empt traditional fields occupied by the states where it is "the clear and manifest purpose of Congress" to do so.[137] No traditional state function, much less tort law, is absolutely immune from federal encroachment, so long as Congress acts pursuant to the Commerce Clause.

For most commercial torts, congressional pre-emption of punitive damages would not lead to the obliteration of federalism. Given the paramount desire of our Constitution's Framers to unburden commerce from "parochial" state interests, Congress's authority to regulate punitive damage awards arising out of commercial lawsuits falls squarely under the commerce power.

V. Limits of Federalism

Lopez stood principally for the proposition that there are limits to the federal commerce power.[138] So what are those limits with regard to federal pre-emption of punitive damages? Those limits must be consistent with the Court's definition of the commerce power's scope as a practical one, based on an intuitive, common sense judgment rather than a rigid formula.[139]

Wickard lends support to the proposition that even the most minuscule activities that upset the balance of market forces are enough to substantially affect interstate commerce.[140] Although *Lopez* ac-

135. *See, e.g.*, Cipollone v. Liggett Group, 505 U.S. 504, 522-23 (1992) (holding that a federal statute requiring warning labels on cigarettes pre-empted petitioner's claims based on state law imposing a legal duty to warn on cigarette manufacturers).

136. *Rath Packing*, 430 U.S. at 525 (citation omitted) (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963)).

137. *Rice*, 331 U.S. at 230, *quoted in Rath Packing*, 430 U.S. at 525.

138. Justice Kennedy, in a discussion with Hastings law students, affirmed that the Court in *Lopez* struck down a federal statute for "the unremarkable fact that the federal government is one of enumerated powers." Justice Anthony Kennedy at the University of California, Hastings College of the Law (February 8, 1996).

139. *See Lopez*, 115 S. Ct. at 1636 (Kennedy, J., concurring).

140. *See generally* 317 U.S. 111. In the wake of *Lopez*, the *Wickard* "home-grown wheat" case raises some interesting questions with respect to home-grown *weed*. California voters recently enacted Proposition 215, a ballot initiative permitting persons with ailments such as cancer, AIDS, anorexia, or "any other illness for which marijuana provides relief," to possess or cultivate marijuana for personal use upon a doctor's recommendation. CAL. HEALTH & SAF. CODE § 11362.5(b)(1) (West Supp. 1997). In response, the Clinton Administration has threatened, pursuant to the Drug Enforcement Agency's licensing scheme for doctors who prescribe drugs, to suspend the licenses of all doctors who prescribe or recommend marijuana to their patients. *See* William Claiborne, *Federal Warning on Medical Marijuana Leaves Physicians Feeling Intimidated*, WASH. POST, Jan. 1, 1997, at

cepts *Wickard* in principle, it appears that the *Lopez* Court desires to retreat from *Wickard*'s expansive interpretation of the commerce power.[141] Common sense tells us that Congress would hardly be justified in regulating damage awards arising out of garden variety neighborhood "nuisance" cases, where the requisite connection with interstate commerce is tenuous at best. In like manner, common sense informs us that Congress would not be justified in regulating damages in a case where a schoolyard bully is sued for battery.[142] For Congress to regulate torts of such a local character would cross the line, as their nexus with interstate commerce is dubious at best.[143] For Congress to regulate local torts would invite federal regulation of virtually all areas of law traditionally left to the states, and obliterate the distinction between "what is truly national and what is truly local."[144] Bearing this in mind, it is evident that cases wholly "local" in character would be immune from federal regulation: battery, noncommercial slander, sexual harassment in a noncommercial setting, or false imprisonment of one local resident by another, to name a few.[145]

A6. Marijuana possession and cultivation for personal use fall squarely within the domain of a state's traditional power to regulate public health, safety, and morals. Cf. *Lopez*, 115 S. Ct. at 1634; Barnes v. Glen Theatre, Inc. 501 U.S. 560, 568 (1991) (defining police power).

However, *Wickard* lends strong support to concurrent federal and state jurisdiction over commerce in marijuana, even commerce which is wholly *intrastate*. *See Wickard*, 317 U.S. at 119-20. Although the *Lopez* Court cited *Wickard* as "perhaps the most far reaching example" of expansive commerce power, *Lopez*, 115 S. Ct. at 1630, the Court still upheld Wickard's rationale. *See id.* at 1630-31. To pre-empt California's liberal marijuana laws under *Wickard*, Congress or the Attorney General would merely have to demonstrate the existence of a national market for marijuana. Moreover, Congress or the Attorney General could further argue that home-grown marijuana competes with FDA-approved drugs in interstate commerce. *See Wickard*, 317 U.S. at 128; *see generally* Champion v. Ames (The Lottery Case), 188 U.S. 321 (1903) (holding that Congress has the authority to prohibit the interstate carriage of lottery tickets, which, although legal in one state, were contrary to public morals of another). Finally, no inherent limitation in the commerce power would preclude Congress from regulating marijuana out of existence through its power to tax. *See, e.g.*, Sonzinsky v. United States, 300 U.S. 506, 513-14 (1937) ("Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competence of the courts."); *see also* United States v. Sanchez, 340 U.S. 42 (1950).

141. *See Lopez*, 115 S. Ct. at 1630 (citing *Wickard* as the most "far reaching example of Commerce Clause authority over intrastate activity").

142. However, it is conceivable that damages arising out of extortionate activities of the schoolyard bully may belong to a class of activities that affect commerce when their aggregate effect is considered. *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971) (holding that Congress could criminalize the extortionate credit activities of a local loan shark because the wrongful acts of all loan sharks affected commerce when viewed in the aggregate).

143. *See* Goldman, *supra* note 13, at 15.

144. *Lopez*, 115 S. Ct. at 1634.

145. *See* Goldman, *supra* note 13, at 15 (citing Professor Eugene Volokh of UCLA law school, who distinguishes between "commercial" and "non-commercial" torts).

If *Lopez* is remembered for anything, it will be as the moment when the Supreme Court "decline[d] to proceed any further" in expanding its already generous interpretation of the commerce power.[146] In the grand scheme of things, Ms. O'Leary's milking cow affects interstate commerce in much the same way as Roscoe Filburn's home-grown wheat. Similarly, when Billy the bully extorts lunch money from his schoolmates, he affects commerce in much the same way as the defendants in *Lopez* and *Perez*. But if federal prosecution of the schoolyard bully is justified because the bully's activities somehow affect interstate commerce, would not this rationale support federal regulation over most local matters, thereby destroying every last vestige of the federalist principles upon which this country was founded?

Going back, once again, to the notion that the commerce power's scope is a "practical" distinction, we can define it thus: damage awards arising out of all but the most local torts affect interstate commerce in a manner that is not incompatible with federalism. Thus, federalization of all but the most local damage awards is constitutionally permissible under *Lopez*.

VI. Conclusion

There is no inherent limitation to the Commerce Clause that would preclude federally imposed caps on punitive damages. Much to the disappointment of the trial lawyers' lobby and other opponents of tort reform, *Lopez is nothing revolutionary*. Although *Lopez* does signal a slight retreat from the expansive Commerce Clause jurisprudence of the last fifty years, it is not apparent that the Court will further limit congressional commerce power.

The Court will likely hold that in all but the most local of civil actions, massive punitive damage awards substantially affect interstate commerce. Neither punitive damage reform nor the commerce rationale supporting it would lead to federal usurpation of any traditional state police power. Because punitive damages have become so commercial in nature, federal pre-emption would be permitted. The Court is likely to find punitive damage limitations favorable, necessary, and completely in keeping with the Constitution and the Framers' intent, given the impact of massive damage awards on interstate commerce.

146. *Lopez*, 115 S. Ct. at 1634.