

# Washington University Journal of Law & Policy

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Volume 16 *Access to Justice: The Social Responsibility of Lawyers | New Federalism*

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January 2004

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### Recommended Citation

Conrad J. Weiler Jr., *Explaining the Original Understanding of Lopez to the Framers: Or, The Framers Spoke Like Us, Didn't They?*, 16 WASH. U. J. L. & POL'Y 163 (2004),  
[https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol16/iss1/10](https://openscholarship.wustl.edu/law_journal_law_policy/vol16/iss1/10)

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# Explaining the Original Understanding of *Lopez* to the Framers: Or, The Framers Spoke Like Us, Didn't They?

Conrad J. Weiler, Jr.\*

## INTRODUCTION

The power to regulate commerce is one of the most far-reaching of Congress's powers. Not only was a power over commerce one of the chief goals of the Framers,<sup>1</sup> but, especially since the 1930s, it has been the primary basis of a vast array of domestic legislation.<sup>2</sup> This domestic legislation in turn has rested in large part on the Supreme Court's acceptance of a broad definition of the power to regulate commerce among the states.<sup>3</sup> But because commerce is largely private sector activity, it is also regulated by state governments in their own capacities to regulate commerce as well as under their general police powers over health, safety and welfare of their people. Thus, national regulation of commerce frequently triggers federalism

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1. On this point virtually all of the legion sources on the Framing agree. *See, e.g.*, MAX EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 87, 220, 222 (2003); THE FEDERALIST NO. 11, at 49 (Alexander Hamilton) (George W. Carey & James McClellan eds., Liberty Press, 2001); ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION (7th ed. 1991); CATHY D. MATSON & PETER S. ONUF, A UNION OF INTERESTS: POLITICAL AND ECONOMIC THOUGHT IN REVOLUTIONARY AMERICA 2, 90–100 (1990); FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 98 (1985) [hereinafter NOVUS ORDO]; CURTIS P. NETTELS, THE EMERGENCE OF A NATIONAL ECONOMY 91 (1962); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 119–20 (14th ed. 2001); Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731, 756 (2003).

2. SULLIVAN & GUNTHER, *supra* note 1, at 119.

3. SULLIVAN & GUNTHER, *supra* note 1, at 119, 145, 148; 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 814–15 (3d ed. 2000); Choper, *supra* note 1, at 731–32; Ronald D. Rotunda, *The Implications of the New Commerce Clause Jurisprudence: An Evolutionary or Revolutionary Court?*, 55 ARK. L. REV. 795, 800 (2003).

issues.<sup>4</sup> For nearly sixty years after the 1937 *Jones & Laughlin*<sup>5</sup> decision, the Court rejected virtually all federalism-based challenges to a broad congressional application of the power over commerce among the states. This allowed Congress to broadly address domestic issues such as civil rights, employment rights, environmental controls, organized crime, age discrimination, discrimination against people with disabilities, and many others, without requiring that the regulated activity be itself commercial, only that it “affect commerce” in some degree.<sup>6</sup>

However, in the 1995 decision *United States v. Lopez*,<sup>7</sup> the Supreme Court signaled moving towards a jurisprudence of originalism while narrowing the reach of the federal power to regulate commerce among the states and enlarging the independence of the states from federal control. While the change signaled by *Lopez* is not (so far, at least) a complete return to pre-*Jones & Laughlin* jurisprudence, it is now clear that the era of broad congressional action in domestic policy, regardless of effects on states, justified by a broad “affecting commerce” rationale is over, at least until there is a significant change in the Court’s membership. Since *Lopez*, the Court, by the same five-to-four majority, has only struck down one other law directly based on the narrow definition of commerce in *Lopez*.<sup>8</sup> But the Court has also either struck down or narrowed the effect of several other laws passed under the earlier, more expansive view of what could be regulated as affecting commerce because they transgress the inherent immunity of states by allowing citizens to sue states for violation of federal laws.<sup>9</sup> The

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4. RALPH A. ROSSUM & G. ALAN TARR, *AMERICAN CONSTITUTIONAL LAW: THE STRUCTURE OF GOVERNMENT* 322 (5th ed. 1999).

5. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

6. Justice Breyer noted that “Congress has enacted many statutes (more than one hundred sections of the United States Code), including criminal statutes (at least twenty-five sections) that use the words ‘affecting commerce’ to define their scope.” *United States v. Lopez*, 514 U.S. 549, 630 (1995) (Breyer, J., dissenting); *see also* TRIBE, *supra* note 3, at 812–15.

7. 514 U.S. at 558–68.

8. *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating part of the 1994 Violence Against Women Act allowing women to sue attackers under federal law for gender-based violence, because gender-motivated violence is not economic in nature nor does it substantially affect commerce).

9. *See* *Fed. Mar. Comm’n v. South Carolina*, 535 U.S. 743 (2002); *Kimel v. Fla. Bd. of*

narrowing of the power over commerce in *Lopez* and an enlarged sense of the inherent attributes of sovereignty of the states, together with greater respect for “traditional” state activities, and narrowing the reach of the Fourteenth Amendment’s Section Five enforcement powers of Congress constitute what has been called the Rehnquist Court’s “New Federalism.”<sup>10</sup>

An important part of the Court’s rationale in *Lopez*, and other “new federalism” decisions, is a sense that they are returning to the original meaning of the Constitution. We are aware that there may be differences between the Framers’ intent and the original understanding of the meaning of the Constitution when it was adopted. The discussion here will not enter into the debate over the methods and propriety of originalism, nor is it necessary.<sup>11</sup> What we

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Regents, 528 U.S. 62 (2000) (holding that power to regulate commerce among the states, based upon the Age Discrimination in Employment Act, cannot abrogate states’ sovereign immunity, and allowing state employee to sue for age discrimination); *Alden v. Maine*, 527 U.S. 706 (1999) (extending state’s sovereign immunity to suit in its own courts for violation of the Fair Labor Standards Act); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (holding that Trademark Remedy Clarification Act cannot abrogate states’ sovereign immunity by allowing private suit for trademark misrepresentation); *Printz v. United States*, 521 U.S. 898 (1997) (invalidating commerce-clause-based provision of Brady Handgun Control Act requiring local police to do background checks on prospective gun purchasers); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (barring commerce-power-based suit against state for failing to negotiate with Indian tribe under Indian Regulatory Gambling Act). Since several of the laws struck down as infringing on inherent state sovereignty were also based on the power over commerce, the narrowed power over commerce stemming from *Lopez* reinforces the effect of the expanded state sovereignty notion.

10. See THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT (Herman Schwartz ed. 2002) for a recent critique of the Rehnquist Court’s “New Federalism,” especially his chapter on “The States’ Rights Assault on Federal Authority.” See also Erwin Chemerinsky, *Have the Rehnquist Court’s Federalism Decisions Increased Liberty?*, HUM. RTS, Fall, 2002, at 3. Others argue that the actual impact of *Lopez* itself has been benign, see Rotunda, *supra* note 3, at 795–96, small, see Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1262–66 (2003); Richard W. Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 3–4 (2003), or mixed, see J. Mitchell Pickerill, *Leveraging Federalism: The Real Meaning of the Rehnquist Court’s Federalism Jurisprudence for States*, 66 ALB. L. REV. 823, 824–29 (2003). The Court’s “New Federalism” may restrain Congressional power over commerce among the states but does not seem to have extended to the power to regulate commerce with the Indian Tribes, Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1–2, 4 (2003), or to the power to regulate foreign commerce, Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intransience Uniformity*, 55 ARK. L. REV. 1149, 1166–67 (2003).

11. See KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL

do here is to focus narrowly on one aspect of *Lopez*'s connection with the Framing era, which is to consider whether there is semantic continuity between key words of the *Lopez* holding and words the Framers and Americans of their day would have used; or, in other words, to perform a kind of reverse textualism and see how the Framers would have understood *Lopez*.<sup>12</sup> After examining the meaning of key words in the *Lopez* holding and what they meant in the eighteenth century, we conclude not only that neither the Framers nor any American of their day would have understood *Lopez* to have anything like the meaning intended by the *Lopez* majority, but because of changed meanings of language the Framers would likely have violently rejected the literal holding of *Lopez*. We conclude by considering what this repugnancy between the language of *Lopez* and the language of the Framers means for the originalism of *Lopez*, its overall intelligibility, and the regulation of commerce.

### I. *UNITED STATES V. LOPEZ*

*Lopez* dealt with the Gun-Free School Zones Act of 1990<sup>13</sup> (GFSZA), enacted under the power to regulate commerce among the states. The GFSZA made it a federal crime to have a gun within one thousand feet of a school.<sup>14</sup> Chief Justice Rehnquist's majority opinion striking down the GFSZA held that Congress had exceeded its power to regulate commerce among the states because the GFSZA regulated activity—having a gun near a school, which was in itself not at all economic—and because this activity did not substantially affect commerce among the states. Chief Justice Rehnquist explained that the Act was problematic for several reasons. First, it regulated

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MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999) for the fullest discussion. Throughout this article the term original understanding will be used to refer to the meaning the Constitution was thought to have by Americans, including the Framers, at the time of its adoption.

12. We will provide evidence both of the words of the Framers and of the more general usage of the word in question, but since we conclude that there are no differences between the Framers' usage and the more general usage of the words that we examine here, we simply call the words in question "the Framers' words."

13. Pub. L. 101-647, 104 Stat. 1484 (current version at 18 U.S.C. §§ 921(a)(25)–(27), 922(q)(2)–(4), 924(a)(4) (2000)).

14. §§ 921(a)(25), 922(q)(2)(A).

education, one of the most traditional of all state activities; thus, it invaded the Tenth Amendment powers of the states. Second, the Act lacked both congressional findings and a jurisdictional element connecting possession of guns near schools to commerce among the states.<sup>15</sup>

Few people would have strongly defended the GFSZA as vitally necessary to improve American education, and the Court might have rejected the GFSZA on narrower grounds, such as the other problems of the GFSZA referred to by Chief Justice Rehnquist.<sup>16</sup> Instead, however, the *Lopez* majority chose to redefine the criteria for congressional regulation of commerce among the states in two ways.

First, no previous cases have explicitly held that the activity to be regulated must itself be “economic” in nature. Admittedly, though the Court did not define “economic,” many of the Court’s cases upholding a broad commerce power over the previous decades dealt with activities that might have been regarded as “economic,” and Chief Justice Rehnquist’s majority opinion relied on this factual characteristic to justify this part of the *Lopez* holding: “Even *Wickard* [*v. Filburn*],<sup>17</sup> which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not.”<sup>18</sup> *Wickard* involved a challenge to a fine imposed because of the refusal of Filburn, a dairy farmer in Ohio, to limit his 1941 wheat production to a quota of 223 bushels assigned him under the Agricultural Adjustment Act.<sup>19</sup> The purpose of that Act was to raise depressed agricultural prices by limiting supply through production quotas.<sup>20</sup> Instead, Filburn harvested an extra 239 bushels beyond his quota, claiming that he sold only some of his wheat, using the rest for his livestock, seed, and personal consumption.<sup>21</sup> Despite

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15. 514 U.S. 549, 559–64, 567 (1994).

16. See generally Mark R. Killenbeck, *Madison, M’Culloch, and Matters of Judicial Cognizance: Some Thoughts on the Nature and Scope of Judicial Review*, 55 ARK. L. REV. 901 (2003).

17. 317 U.S. 111 (1942).

18. 514 U.S. at 560.

19. 317 U.S. at 113–15.

20. *Id.* at 115.

21. *Id.* at 114.

Filburn's argument that his wheat was neither in commerce nor among the states, and hence beyond federal regulation, the Court sidestepped these issues and upheld his fine on the basis of the fact that "wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices."<sup>22</sup> *Wickard*, in other words, allowed regulation of purely local, non-commercial activity that had a substantial effect on commerce among the states under an "aggregation" principle.<sup>23</sup> But Chief Justice Rehnquist transformed the broad holding of *Wickard* into a *limitation* on the power over commerce by arguing that the activity in question, even if local and non-commercial, was nonetheless still "economic," and then making the economic character of the intrastate activity in question a requirement for regulation.<sup>24</sup> However, as Justice Breyer's *Lopez* dissent pointed out, the Court in previous cases had never explicitly required that the activities to be regulated had to be "economic" in nature, so that this part of Chief Justice Rehnquist's *Lopez* holding does not follow any previous holding of the Court and is a deliberate narrowing of the regulation of commerce from where it stood under *Wickard*.<sup>25</sup> Moreover, it is unclear how this will affect the aggregation principle.<sup>26</sup>

Second, the *Lopez* Court determined that in order to be regulated by the power over commerce among the states, an "intrastate" or "local" activity must substantially affect commerce.<sup>27</sup> This explicit requirement of the "substantially affecting" test made it more difficult to regulate activity under the power over commerce,

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22. *Id.* at 129.

23. Using numerous activities which themselves may be neither commercial nor "among the states," but which collectively may have a substantial impact on commerce among the states as a legal basis for invoking the federal power to regulate commerce among the states, has been called the "aggregation" principle, and was the basis of the 1964 Civil Rights Act and most modern federal environmental and criminal legislation. *Lopez*, 514 U.S. at 616 (Breyer, J., dissenting); see also Choper, *supra* note 1, at 743-46.

24. *Lopez*, 514 U.S. at 560, 567. "[A]s *Wickard* and later cases make clear, there is no requirement that the activity regulated be commercial or economic." Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1367, 1395 (1996).

25. *Lopez*, 514 U.S. at 628 (Breyer, J., dissenting).

26. *Id.*; see also Choper, *supra* note 1, at 743-46.

27. 514 U.S. at 559.

because, as Chief Justice Rehnquist himself conceded, some previous cases had allowed a more lax “affecting commerce” test.<sup>28</sup>

This dual narrowing of the power to regulate commerce among the states, at least for activity found to be neither “commercial” nor “among the states,” raises questions about the continued viability of much domestic federal legislation dealing with the environment, racial or gender discrimination, discrimination against people with disabilities in private employment and public accommodations, or other areas where the activities in question may not seem clearly “economic in nature,”<sup>29</sup> nor to “substantially affect” commerce. *Lopez* challenges the power over commerce for not only future legislation, but also areas of federal law now thought to be fully established. In addition, by giving itself the power to define what is “economic,” in addition to what is “commerce,” *Lopez* revived the specter of the *Lochner v. New York* and *United States v. E.C. Knight Co.* era, when the Court actively enforced its own definition of “liberty of contract” to limit state economic legislation and applied arbitrary distinctions such as that between manufacturing and commerce, and effects on commerce that were “direct,” as opposed to “indirect,” to limit use of the federal power over commerce.<sup>30</sup>

## II. *LOPEZ* AND ORIGINAL UNDERSTANDING

A strong element of the majority’s decision in *Lopez*, as well as of its closely related federalism jurisprudence, is the claim that by limiting the power over commerce they are turning toward, if not fully restoring, the original understanding of the Constitution.<sup>31</sup> Justice Clarence Thomas has been the Court’s most explicit advocate for the view that the years since 1937 have seen the Court stray far from the original understanding of the Framers in the regulation of

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28. *Id.* In dissent, Justice Breyer suggested a “significantly affecting commerce” test. *Id.* at 615–16 (Breyer, J., dissenting).

29. *Id.* at 630–31 (Breyer, J., dissenting).

30. See *Lochner v. New York*, 198 U.S. 45 (1904); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1894); PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* (1998).

31. See David M. Sprick, *Ex Abundanti Cautela (Out of an Abundance of Caution): A Historical Analysis of the Tenth Amendment and the Continuing Dilemma Over “Federal” Power*, 27 CAP. U. L. REV. 529, 556–71 (1999).

commerce. This view is becoming influential in some lower federal courts<sup>32</sup> and also has some academic support.<sup>33</sup> Justice Thomas's concurring opinion in *Lopez* is perhaps the fullest statement of his position: "At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes. . . . As one would expect, the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture."<sup>34</sup> Justice Thomas then quoted three dictionaries from the founding era in support.<sup>35</sup> Next, Justice Thomas asserted that to include the term manufacturing in the commerce power would lead to regulating manufacturing "with foreign nations" and "with the Indian tribes," which "does not make sense as a matter of intent or as a matter of plain common sense English."<sup>36</sup> Justice Thomas also pointed out that Alexander Hamilton used the terms "commerce," "agriculture," and "manufacturing" to refer to distinct activities.<sup>37</sup> Justice Thomas next disagreed that any "affecting commerce" or even a "substantially affecting" commerce test was intended by the Framers.<sup>38</sup> Finally, giving bite to his views, Justice Thomas suggested that he would like the Court to return to the original understanding of the Framers regarding commerce.<sup>39</sup> Justice Scalia did not offer a separate opinion in *Lopez*, but is a strong advocate of textualism, adherence to meaning of the words of the text of the Constitution when it was adopted.<sup>40</sup>

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32. See David N. Mayer, *Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 339 n.194 (1996).

33. Reviewed briefly *infra* at note 65.

34. *Lopez*, 514 U.S. at 585–86 (Thomas, J., concurring) (citations omitted).

35. *Id.*

36. *Id.* at 587.

37. *Id.* at 586.

38. *Id.* at 588–89.

39. *Id.* at 589. Chief Justice Rehnquist's majority opinion in *Lopez* does an excellent job of reviewing the history of Commerce Clause jurisprudence, though we argue that his opinion, ironically, ultimately falls into the same trap as the pre-1937 Court. On the use and pitfalls of using dictionaries, see Samuel A. Thumma and Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 264–74 (1999).

40. Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1187–88 (2003); see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

The concurrence in *Lopez* by Justice Kennedy, joined by Justice O'Connor, was more willing to accept some accommodation with the Framers' original understanding regarding the regulation of commerce. Kennedy implicitly accepted that "the economic system the Founders knew"<sup>41</sup> was simpler than today's and that regulation of commerce was intended to be narrower at that time, but that for the sake of "stability of our Commerce Clause jurisprudence"<sup>42</sup> they would not return to "an understanding of commerce that would serve only an eighteenth century economy."<sup>43</sup> They asserted that the course of the interpretation of the power over commerce since the Framing has been less than consistent because "neither the course of technological advance nor the foundational principles for the jurisprudence itself were self-evident to the courts that sought to resolve contemporary disputes by enduring principles."<sup>44</sup> They concluded 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."<sup>45</sup>

Justices Kennedy and O'Connor seem to differ from Justice Thomas not so much in their view of the Framers' understanding of the power to regulate commerce, but in the rigidity of their commitment to originalism.<sup>46</sup> They seem to be saying that while they tend to agree with Justice Thomas's assertions of the narrowness of the Framers' understanding regarding the regulation of commerce, they would accept a more flexible Commerce Clause jurisprudence that would evolve to meet the needs of our modern economy, needs the Framers did not anticipate. Their concern in *Lopez* seemed to be less with defining the Framers' understanding regarding the power over commerce than with staking out barriers to protect federalism.<sup>47</sup>

Perhaps because of these differences within his majority, Chief Justice Rehnquist's opinion in *Lopez* literally avoided the issue of the

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41. 514 U.S. at 568 (Kennedy, J., concurring).

42. *Id.* at 574.

43. *Id.*

44. *Id.* at 568.

45. *Id.* at 574.

46. *Id.* at 568–83.

47. Stephen R. McAllister, *Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause?*, 44 U. KAN. L. REV. 217, 235–38 (1996).

original understanding of the Framers regarding the regulation of commerce, finding merely that the power to regulate commerce—whatever commerce may mean—requires that activities be economic in themselves and that they “substantially affect” commerce before they come under the sway of the federal commerce power.<sup>48</sup> However, his general appeal to “first principles,”<sup>49</sup> suggests a return to the Framers’ “original understanding,” and his holding moves the law towards Justice Thomas’s position. On the face of it, though, the Kennedy-O’Connor “evolutionary” viewpoint and the Rehnquist “substantially affecting local activities economic in nature” test portray themselves to be moderate, middle of the road approaches that accept the need to take reasonable, but limited steps beyond the narrow, outmoded understanding of the Framers.

In contrast, however, we think that the main purpose of the power over commerce *was* to create a national single market and a stable national economy. Clearly, the Framers could not anticipate the specific changes in technology, markets, consumer demand, theories of how best to produce national wealth, the size of the country, or other factors relating to commerce, but they fully expected general technological change as well as westward growth. The Framers anticipated that the power over commerce would be broad enough to deal with these changes and their effects. Further, we think that the Framers fully expected that the power to regulate commerce could extend to manufacturing as well as agriculture, mining, forestry, fishing, and transportation when such activities were not purely local and affected the larger production of national wealth, and that the power over commerce was expected to extend to any other activity that affected larger commerce not otherwise barred by the Constitution.<sup>50</sup> If we are correct, the *Lopez* holding is not a reasonable, middle-of-the-road holding, but a narrowing of the power over commerce that the Constitution originally provided.

However, the challenge we make here to *Lopez*’s originalism does not require broad discussions of the Framers’ understanding

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48. 514 U.S. at 559–60, 567.

49. *Id.* at 552–53.

50. Evidence for these assertions, including the author’s own Lexis survey, will hopefully be available soon as a book.

regarding the power over commerce, or even a conclusion that they intended a broad power over commerce. For this article we focus on the implications for *Lopez* of changes since the Framing in the meaning of three key words in the *Lopez* holding: “economic,” “substantially,” and “affect,” though we will also briefly consider the meaning of “commerce.”

### III. THE MEANING OF “ECONOMY” IN 1787

*Lopez* requires that activities to be regulated under the power over commerce must be “economic” in nature.<sup>51</sup> By economic, the Court presumably means the modern sense of having to do with the national system of production, distribution and consumption of wealth, goods and services.<sup>52</sup>

In 1787 the word “economy” had the *opposite* of this modern meaning. We start with Dr. Johnson’s 1765 dictionary, simply to begin the discussion, not because any dictionary is first in authority in defining constitutional meaning. Johnson defined “oeconomy” as: “(1) management of a household, (2) frugality, (3) disposition or regulation, (4) a system of motions.” He provided no entry for “oeconomic,” but we assume that this adjectival form of the noun “oeconomy” would have had the same core meaning.<sup>53</sup> There was no usage at that time of the word “economy” or its then more common variant, “oeconomy,” which corresponded to our modern meaning of “economy.” The modern sense of “the economy” did not emerge until the latter part of the nineteenth century with the emergence of economics as a separate academic discipline and was not commonly used until the early twentieth century.<sup>54</sup>

Examples of the use of the term “economy”<sup>55</sup> in the first two senses defined by Dr. Johnson, and primarily as “frugality,” abound

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51. 514 U.S. at 559–60, 567.

52. HENRY SIDGWICK, *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* 58 (John Eatwell et al. ed., 1987).

53. SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* 501 (Barnes & Noble Books 1994) (1756). Nor was there an entry for “economy”—the classical diphthong still prevailed.

54. 3 PETER GROENEWEGEN, *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* 905–06 (John Eatwell et al. eds, 1987).

55. We will henceforth use the modern spelling except where we are actually quoting a

during the Framing era in a wide range of discussions of what today we would call public finance, economics, and public policy generally. For example, the British Privy Council and Board of Trade routinely reviewed colonial legislation for conformity with the colonial charter, British commercial regulations, and conformity to British law generally. When these agencies found no such interference worth dealing with they would often allow the colonial laws to stand as dealing with “domestic” or “internal oeconomy.” There was no bright-line test for what type of colonial laws might fall into these categories: they were essentially residual categories, corresponding to matters in principle not excluded from the power of the colonial government which did not offend British trade interests, or other principles of British law, or which Britain felt could not be enforced in any case.<sup>56</sup> We believe there was continuity between most British colonial meanings and those of the Framers in the area of regulation of trade, and that the word “economy” in the context of the regulation of commerce denoted activities left to the colonies or states for their own internal governance—analogueous to activities the Tenth Amendment is thought to have reserved to the states.<sup>57</sup>

For example, in 1775 the Privy Council reviewed twelve Pennsylvania acts dealing with relieving debtors, creating a new county, issuing bills of credit, suppressing disorderly discharge of guns, inspection of salt fish for export, selling land, regulating the assize of bread, erecting a new jail, and appointing wardens for the port of Philadelphia. The Council allowed the acts to become law because they were “passed either for the purposes of *internal police and oeconomy*, or for the relief of insolvent debtors . . . .”<sup>58</sup>

Further, Sir James Steuart in 1767 defined the term “oeconomy” as “the art of providing for all the wants of a family, with prudence and frugality.”<sup>59</sup>

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writer who used the diphthong.

56. ELMER BEECHER RUSSELL, *THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL* 224–27 (Columbia University 1915).

57. *See infra* Part V, “THE MEANING OF ‘AFFECT’ IN 1787,” for the discussion of how the internal affairs of the states related to those things which affected commerce.

58. 8 *THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 to 1801* app. XXXII, at 650 (1902) [hereinafter *PA. STATS.*, 1682–1801] (emphasis added).

59. SIR JAMES STEUART, *AN INQUIRY INTO THE PRINCIPLES OF POLITICAL ECONOMY*

Closer to home, on the eve of the Convention, Tench Coxe addressed Dr. Franklin and others gathered in Franklin's Philadelphia home on the commercial system needed for the United States. Speaking of credit, Coxe said: "The restoration of public credit at home and abroad should be the first wish of our hearts, and requires every *oeconomy*—every exertion we can make."<sup>60</sup> Clearly Coxe was using the term "oeconomy" with Dr. Johnson's second meaning, frugality. In Convention, George Mason of Virginia attempted to encourage "*oeconomy* frugality and american manufactures [sic]."<sup>61</sup> In various *Federalist* papers, Hamilton used the word "economy" in the same sense of "frugality." In *No. 22*, for example, Hamilton wrote of the requisition system as an obstacle "to an *economical* system of defence" and as being "unfriendly to *economy* and vigour."<sup>62</sup> *No. 13* followed a discussion of revenue and is subtitled, *The same Subject continued, with a view to Economy*.<sup>63</sup> The meaning is explained in the first two sentences: "As connected with the subject of revenue, we may with propriety consider that of *economy*. The money saved from one object, may be usefully applied to another . . ."<sup>64</sup> Examples of "economy" as "frugality" abound in the ratification debates as well. Clearly, the use of "economy" or "economic" to denote local or household management or frugality was well established in the colonial era and continued into (and well past) the time of the Framing, generally as well as in the context of regulation of commerce.

The change in meaning of "economy" to its modern sense only well after the Framing era is confirmed by examination of the use of the term by the Supreme Court itself. The author's survey of the use

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(1767), reprinted in 1 THE WORKS: POLITICAL, METAPHYSICAL & CHRONOLOGICAL OF SIR JAMES STEUART 1 (Augustus M. Kelley 1967).

60. TENCH COXE, AN ENQUIRY IN THE PRINCIPLES ON WHICH A COMMERCIAL SYSTEM FOR THE UNITED STATES SHOULD BE FOUNDED 49 (photo. reprint, Am. Imprints) (1787).

61. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 606 (Max Farrand ed., 1966) [hereinafter RECORDS] (emphasis added). The connection among these seemingly disparate goals is the widely held belief that promoting American manufactures would reduce wasteful spending on British manufactures.

62. THE FEDERALIST NO. 22, at 105–06 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (emphasis added).

63. THE FEDERALIST NO. 13 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

64. *Id.* at 60 (emphasis added).

of the term “economy” in all the recorded opinions of the Court shows that the term “economy” was used in dozens of cases going back to the 1790s, but primarily with the meaning “frugality,” or as part of the more commonly used term “political economy.” It was also sometimes used in the sense of management of household or domestic economy. There were only two uses of the term in the nineteenth century possibly in our modern sense, one in 1869, one in 1884, and only three others before 1935. Only in the middle of the epic battle between FDR and the Court over the constitutionality of his New Deal programs passed under the power over commerce did the Court begin frequently to use the term in its modern meaning, though it has not completely dropped the other meanings.<sup>65</sup>

As a result of the dramatic change in the meaning of the term “economy” after the later 1800s, the Framers would have been shocked by the “economic in nature” test of *Lopez*. Even the most ardently nationalist Framers would have understood “economy” to include what was *not* within the regulation of commerce among the states, i.e., “the management of a household,” the “internal or police affairs of a state,” or less shocking, but also less intelligibly, “frugality.”<sup>66</sup> They would have understood these terms as extending national power into state and personal affairs beyond what even Britain only incompletely did, yet provoked a revolution. In a word, the Framers would have understood this part of *Lopez* to do exactly the *opposite* of what the *Lopez* majority claim they are trying to do: protect first principles of federalism.

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65. The study is still incomplete, but a list of cases is available from the author or easily reproduced. A total of 1045 cases used the term “economy” since 1790. Out of a total of 105 cases using the word “economy” before 1900, there were only two modern usages before 1900 and only three more before 1935, but the term was used in 822 cases after that, primarily in the modern meaning. We found no usage of “oeconomy,” but perhaps this is because the diphthong was converted to an “e” by Lexis.

66. The term “economy” is still widely used in the second sense of “frugality”—for example, we frequently refer to “economical” shopping or shoppers. The meaning of “management of a household” is probably now obsolete, though it still survives in high-school “home economics” courses.

#### IV. THE MEANING OF "SUBSTANTIALLY" IN 1787

The second part of the *Lopez* test requires that intrastate activities to be regulated under the power over commerce also "substantially affect commerce." As with the term "economy," the *Lopez* Court seems also to have employed these words in a modern sense not used in 1787. Starting with "substantially," the Court in *Lopez* obviously employed the term in the modern sense of "amply" or "in considerable amount,"<sup>67</sup> because the term is chosen after a long discussion by Chief Justice Rehnquist about the degree to which activities should be connected to commerce in order not to intrude on the reserved powers of the states.<sup>68</sup>

But in 1787 "substantially" usually meant "real" rather than "amply." Dr. Johnson's dictionary says: "In manner of a substance; with reality of existence. . . . Strongly; solidly. . . . Truly; solidly; really; with fixed purpose . . . . With competent wealth."<sup>69</sup> Admittedly the second meaning of "strongly" or "solidly" is closer to the "considerable" meaning used in *Lopez*, but it is difficult to confirm which meaning the Framers would have gleaned from *Lopez* because from what we have seen of writings of the time there was virtually no usage of this term relating to the regulation of commerce, trade and navigation. We think this is partly a result of the fact that "affect" was rarely used with any modifier in the late eighteenth century, a point to be discussed next, and partly a result of the fact that the meaning of "with reality of existence" was the predominant one. Therefore, people writing about trade matters, especially merchants, lawyers, or seasoned political activists such as the Framers, were not likely to use the term "substantially" to confirm that they actually meant what they were saying. This would be like adding the word "really" to statements made today to emphasize that they were true. Probably for the same reason, the term was rarely used by the Court itself until recent decades. For example, the Court used the term "substantial" only a few times before the late 1800s, and never regarding commerce, and used the terms "substantially

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67. RANDOM HOUSE UNABRIDGED DICTIONARY 1897 (2d ed. 1987).

68. *United States v. Lopez*, 514 U.S. 549, 559 (1994).

69. JOHNSON, *supra* note 53, at 713.

affecting” in only twenty-four cases in its entire history. Moreover, the Court used the term “substantially affecting commerce” or “substantially affecting interstate commerce” in only thirteen cases, and nine of those cases were since 1975.<sup>70</sup>

In conclusion, the use of “substantially” to convey a quantitative measure is a relatively modern usage that the Framers would probably not have understood the way the Rehnquist Court employed it in *Lopez*. The Framers probably would have understood “substantially” to have the same meaning as we attach today to “substantive,” as in “substantive due process,” meaning “real” or “actual” due process, not “a lot of” due process. Thus the Framers would have understood the *Lopez* Court to be saying that “activities to be regulated had to affect commerce with reality of existence,” or “really” or “truly” affect it, rather than what the Court intended, which is that “they have to affect commerce amply or in considerable measure.” But even if they had understood it to mean “to strongly or solidly affect commerce,” as the next section discusses, this phrasing would have been seen by the Framers as redundant, if not unusual, since to them the term “to affect commerce” itself already meant “to actually affect commerce.”

## V. THE MEANING OF “AFFECT” IN 1787

In the Framing era the term “to affect,” or variants such as “affecting,” was used moderately frequently in discussions of the regulation of commerce. However, “to affect,” or its inflections, were almost never used as far as we can tell in discussions of the regulation of commerce in the Constitutional Convention. Nor was “to affect” used normally with an adverbial modifier of any kind, and we have almost never found an example of “substantially” or “significantly” being used to modify “affect” in the Framing era. As

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70. All conclusions and data are based on the author’s Lexis searches. The use of “substantial” and its inflections seems to have roughly accompanied the rise of the modern meaning of “economy” in Supreme Court discourse. Justice Thomas has also noticed that the “substantial effects” test is a twentieth century innovation, though in rejecting it as well as the “affecting commerce” test, he would presumably disagree with our contention in the next section that the latter was the test the Framers intended. *Lopez*, 514 U.S. at 596 (Thomas, J., concurring).

far as the author can tell, the term “to affect” was used almost always by itself right up to the 1930s in constitutional law discussions of the regulation of commerce. For example, the Court used the term “affect commerce” in five cases before the Civil War, including several times in the first commerce case, *Gibbons v. Ogden*.<sup>71</sup> Yet as shown above, the Court did not feel constrained to prefix the “substantially” adverbial modifier to the term to limit its extent, until the New Deal.

Dr. Johnson defined “affect” as “to have an effect on something,”<sup>72</sup> and this is pretty much the meaning that the term has had across the centuries, at least in this context. For example, in 1731 London merchants complained to Parliament of numerous supposedly discriminatory and unfair commercial practices committed by most of the American colonies in violation of the acts of navigation. A bill was introduced into the House of Commons to forbid the colonies from passing any law that would “affect the trade or navigation of Great Britain.” This bill provoked considerable opposition from the colonies. The Council of Virginia objected that a law in “such indefinite terms” would “in effect deprive them of the most valuable privilege granted them by the Crown as an encouragement to their first settlement,” meaning the power to legislate for themselves:

[B]ecause our whole employment as well as interest bears so near relation to our Mother-country, that it will be almost impossible to frame any law that may not be construed some way or other *to affect the Trade or Navigation* of Great Britain. We can't, for example, lay any tax for the support of H.M. Government: we can't confine our coopers to a reasonable gauge in the setting of tobacco hogsheads: nor can we make any provision for the improvement of our staple commodities; for preventing the making or false packing of unsound and unmerchantable tobacco, pitch and tar; or for the just payment of debts in good and valuable commodities (in all which the

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71. 22 U.S. 1 (1824).

72. JOHNSON, *supra* note 53 (Times Books Ltd. 1983) (1755).

interest of the British merchants is equally concern'd with our own) without violating so general an Act of Parliament.<sup>73</sup>

For example, one of the last reviews of colonial laws was done in 1773 of thirty Pennsylvania laws passed in March and September, 1772. The Board of Trade recommended approval of all of them for the following reason:

That as these laws are in their general objects and provisions confined to such matters *as relate merely to the internal police and government of the colony, and do not affect the trade and commerce of Great Britain*, or the interests or authority of the Crown, the said Lords Commissioners see no reason why they may not be recommended to your Majesty for approbation. . . .<sup>74</sup>

A full discussion of this important point is beyond the scope of this article, but clearly the “affecting commerce” test has a pedigree long preceding the New Deal, and its dangers to local autonomy were known long before *Lopez*. We believe there is ample evidence to show that the Framers expected the “affecting commerce” test to be part of the power over commerce for legislative or judicial review purposes, and to reach matters that were not necessarily commercial in themselves. We believe that because of their familiarity with the “internal police” or “internal economy” and “affecting commerce or trade” concepts utilized in Privy Council review of colonial legislation for conformity with British trade interests, the problem of balancing the rights and interests of the states against those of the new national government in commercial regulation was well known to the Framers.<sup>75</sup> We believe that, like Britain, the Framers intended to regulate whatever activities affected commerce among the states, regardless of whether those activities were otherwise part of the internal police or internal oeconomy of a state.

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73. CALENDAR OF STATE PAPERS, COLONIAL SERIES, AMERICA AND WEST INDIES, 1731, at 322–23 (Cecil Headlam & Arthur Percival Newton eds., 1938) (emphasis added).

74. 8 PA. STATS., 1682–1801, *supra* note 58, app. XXX., at 597 (1897) (emphasis added).

75. Following British usage, the terms “internal police” or “internal oeconomy” were frequently used as synonyms in the Framing era. RUSSELL, *supra* note 56, at 224–27.

Ironically, the term “affect” is difficult to find in the records of the Convention or ratification, and especially difficult to find with a modifier. Roger Sherman of Connecticut used it in a proposal, that was precisely on point but was defeated, “that no State shall without its consent be affected in its internal police . . . .”<sup>76</sup> The only instance we have found in Framing era documents where “affect” is used with a modifier is, oddly enough, in the Constitution itself, where it used three times.<sup>77</sup>

The Article V language “no amendment . . . shall in any Manner affect . . .” logically means that within the four corners of the Constitution, simply “to not affect” by itself might allow some effects by certain “manners.” Or, to put it more directly, “to not in any manner affect” something means to have no effect of any kind, whereas to not “affect” something, might still allow indirect or minor effects. Presumably, following British practice, a finding that an activity was not “affecting” something such as commerce would still have allowed certain minor or indirect effects on commerce by means of certain “manners,” or that the decision to do anything about things affecting commerce might be discretionary. The phrase “in any Manner affect” seems to have had a twofold purpose: first, the very fact that it was unusual to modify the term “to affect”<sup>78</sup> was clearly designed to alert and admonish the country and Congress not to make any changes to or affecting these provisions; and second, in fact the language itself means to not allow any exceptions at all if it came to a test in court. Certainly the critical nature of the bargain protecting the slave trade to the entire Constitution supports this interpretation.

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76. RECORDS, *supra* note 61, at 630.

77. Two instances concern the jurisdiction of the Supreme Court: the phrase “all Cases affecting Ambassadors, other public Ministers and Consuls,” appears in Article III, Section 2, Clauses 1 and 2. The third instance is in Article V of the Constitution, part of Morris’s fateful bargain over the removal of the Navigation Act supermajority requirement in return for protection of slavery: “[N]o Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses of the Ninth Section of the first Article [concerning importation of slaves, and proportionate taxation] . . . .” The “in any Manner” phrase was inserted at the request of Rutledge of South Carolina, on September 10, late in the Convention, and was the result of long and hard bargaining to keep several of the southern states in the Union. RECORDS, *supra* note 61, at 557. For Iredell’s explanation in the North Carolina ratifying convention, see 4 PHILIP B. KURLAND & RALPH LERNER, *THE FOUNDERS’ CONSTITUTION*, 582–83 (1987).

78. See *supra* Part IV.

Thus, this exception seems to support the general rule that “affect” was generally used by itself.

After ratification, Justices Marshall and Johnson used the unmodified phrase “affecting commerce” repeatedly in *Gibbons v. Ogden*, the first Supreme Court case over the power to regulate commerce among the states, regarding extent of the power over commerce in relation to the powers of states.<sup>79</sup> For example, Justice Marshall said:

The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which *affect* the States generally; but not to those which are completely within a particular State, which do not *affect* other States . . . .<sup>80</sup>

We conclude, therefore, that the normal term of relationship of activities to the regulation of commerce assumed by the Framers to be sufficient to be regulated under the power to regulate commerce, with certain exceptions, was that the activities “affect” commerce. Thus, the Framers would have understood the *Lopez* test so far to mean that “activities to be regulated under the power to regulate commerce have to have the nature of management of a household, or frugality, and in reality have an effect on commerce.” In addition to violating federalist principles, this phrasing is somewhat unintelligible. It should be apparent that whatever definition of “commerce” is now plugged into this phrase, the result will still violate federalist principles because of the “economic” problem. However, the meaning of “commerce” and “economic” are related, so let us very briefly review some aspects of the meaning of “commerce.”

## VI. THE MEANING OF COMMERCE IN 1787

Ironically, for all the importance of the meaning of the term “commerce” to federal power,<sup>81</sup> the Court has never attempted to

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79. 22 U.S. 1 (1824).

80. *Id.* at 195 (emphasis added).

81. See *supra* text accompanying notes 1–2.

definitively define it. Nor does the *Lopez* Court attempt to define it, despite its importance in applying the *Lopez* test.<sup>82</sup> But for the purposes of this article, it is actually not necessary to arrive at a particular definition of “commerce”: any definition of “commerce” leads to absurd results as the Framers would have understood *Lopez*.

To briefly review the history of attempting to give meaning to this term, the Framers did not define commerce. At the Convention, they never actually had a general discussion of the reach of the power to regulate commerce, but only discussed it in connection with particular problems related to commerce. Consequently, our insights into the meaning of the power over commerce from the Convention derive mainly from debates over federal export taxes, state import and export taxes, port preferences, state inspection and tonnage duties, and whether a supermajority would be required to exercise the power. Moreover, the power over commerce was also little discussed in the ratification conventions, the *Federalist* papers, or in any writings of the time. Thus, the Framers’ understanding of this power must be inferred from indirect discussions in Convention and other materials.

Since the 1930s a number of major attempts have been made to arrive at a sense of the Framers’ understanding, with varying conclusions. The earlier literature from the 1930s to the 1960s, takes generally the viewpoint that the Framers intended a broad power over commerce.<sup>83</sup> More recently, although Nelson and Pushaw have found

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82. For a fuller discussion of the importance of the lack of definition of this term in *Lopez*, see Choper, *supra* note 1, at 731–93. Space also prohibits consideration of the meaning of “to regulate” which we think also implies broad authority to make commerce conform to a plan determined by Congress, including acting upon things not themselves commercial.

83. Perhaps the first is Stern’s 1934 article, arguing that the Randolph Plan proposal to give Congress power over all matters in which the states were separately incompetent signaled a broad power over commerce. See Robert L. Stern, *That Commerce Which Concerns More States than One*, 47 HARV. L. REV. 1335, 1335–66 (1934). Corwin also wrote a lengthy defense of a strong power over commerce. See generally EDWARD S. CORWIN, *THE COMMERCE POWER VERSUS STATES RIGHTS* (1962) (preface dated 1936). Hamilton and Adair wrote a more comprehensive review. See generally WALTON H. HAMILTON & DOUGLASS ADAIR, *THE POWER TO GOVERN: THE CONSTITUTION—THEN AND NOW* (1937). Frank Bourgin’s brief but incisive work comes to largely the same conclusion. FRANK BOURGIN, *THE GREAT CHALLENGE: THE MYTH OF LAISSEZ-FAIRE IN THE EARLY REPUBLIC* (1989) (not published until 1989 though researched before 1945). Then there is the massive work by Crosskey. See generally WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953). While a mine of data and insights into the Framing era, it has been

historical evidence for a broad power over commerce,<sup>84</sup> other research has tended to support a narrower view of the power over commerce.<sup>85</sup>

It is beyond the scope of this article to enter into detailed discussions of these works or to enter into the evidence for our own conclusions regarding the power over commerce. Here it is enough to show that the eighteenth century meaning of “economic” as “frugality” or “management of a household” makes *any* meaning of “commerce,” whether broad or narrow, lead to absurd results as the Framers would have understood the *Lopez* formulation. Under the narrow, Thomasian definition of commerce as limited to buying, selling, barter and transportation, the *Lopez* holding becomes: “the power to regulate commerce covers activities with the nature of management of a household, or frugality, and which truly have an effect on buying, selling, barter and transportation.” Under the broad definition of commerce as having to do with the earning of specie in foreign trade for the purpose of national wealth, or with any gainful activity, in the Framers language *Lopez* would read: “those activities may be regulated under the power over commerce which have the nature of management of a household, or frugality, and which actually affect the production of national wealth through gain of specie in foreign trade,” or “affect gainful activity.” Thus, regardless of the definition of “commerce,” the eighteenth century “management of a household” meaning of “economy” still takes federal power into the most intimate recesses of private activity not

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somewhat discredited because of its gratuitous attacks on Madison, its sometimes extreme conclusions, and its generally contentious and difficult quality.

84. Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 8–9 (1999).

85. Epstein argued that the Framers intended a very narrow power over commerce. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1387–1455 (1987). Randy Barnett has searched the historical record and concluded that the power to regulate commerce was understood at the Framing to be narrow, limited largely to buying, selling, and transportation. See Randy E. Barnett, *New Evidence of the Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001). Our own unpublished research, based partly on the experience of British regulation of the colonial economy, supports a broad power over commerce.

perhaps even left to the states to regulate under their police powers, let alone to the federal government.

## VII. THE FRAMERS' SENSE OF "THE ECONOMY"

Possibly the *Lopez* majority selected the "economic in nature" criterion in hopes of setting some limits to the power over commerce in favor of the states while hoping to avoid the pitfalls of the pre-1937 "direct-indirect" and "commerce-manufacturing distinctions." Certainly Justices Kennedy and O'Connor, at least, presume that the Framers had a sense of an economy, albeit a supposedly simpler one. Probably the Court gave no thought to the "management of a household" problem of the pre-twentieth century meaning of "economy." Regardless, the changed meaning of this term forces *Lopez* into one of two directions in order to retain its originalist roots. Either it must be denied that the Framers and the people of their age had any concept approaching our modern sense of "economic," or of "economy," in which case *Lopez*'s "economic in nature" test is no longer originalist, but an innovation grafted onto the Framers' understanding, which the Kennedy-O'Connor concurrence implies, but contradicts Justices Kennedy and O'Connor's assumption that they did have a sense of an economy, or we try to find the term the Framers would have understood to express the modern sense of "economy"—the comprehensive system of production and distribution of goods, services and wealth.

The first position, that the Framers had no sense approaching what we mean today by "the economy," would make the "management of a household" problem of *Lopez* disappear, but at the cost of weakening *Lopez*'s originalist foundations regarding the power over commerce. It would concede that the *Lopez* "economic in nature" test is a modern innovation, added onto whatever narrow scope the Framers supposedly understood the power over commerce to be, probably that asserted by Justice Thomas. But it would beg the question of what larger purposes the Framers thought they were serving if they only intended to regulate buying and selling. Be that as it may, that the Framers had no sense of "the economy" is difficult to maintain. After all, those in Philadelphia were largely representatives of the merchant and propertied elite, and many of

them and the ratifiers had first-hand experience with the complex British mercantile system as colonial lawyers, merchants, or officials, or in trying to deal with it in trade after the war.<sup>86</sup> Many were likely therefore aware of the more than seventy Acts of Parliament since 1660 as well as the hundreds of decisions of the Privy Council reviewing colonial laws and thousands of instructions of the Board of Trade all regulating larger scale American productive activities, transportation and trade in the narrow sense, and what affected all of them, inside the colonies as well as with each other and with other parts of the complex transatlantic manufacturing and trading system of the larger British empire.<sup>87</sup> This system included: 1) bounties for American rice, tobacco, naval stores, indigo, lumber, hemp, silk, and barrels exported to Britain; 2) enumeration of American tobacco, rice, cotton, indigo, fustic, dye-woods, ginger, sugar, barrels, hemp, lumber, copper ore, pig and bar iron, naval stores, furs, and other products requiring them to be exported only to Britain; 3) prohibitions on American hat, wool, iron and steel production and discouragement of other American manufacturing that might compete with British export manufactures; 4) prohibition of tobacco production elsewhere in the empire and support of slavery especially to aid Virginia and Maryland tobacco culture; 5) duties on American exports abroad as well as to other colonies; 6) rules on which ports particular American exports had to go to, and which colonies could import certain goods; 7) regulations requiring ships, crews, captains, owners, and factors to be British; 8) control over American money and laws affecting collection of debt by British merchants; 9) Privy Council review of colonial legislation to overturn laws injurious to British commerce; and 10) instructions to colonial governors to

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86. Thirty-four of the Framers in Philadelphia were lawyers, of whom eight dealt primarily with foreign or interstate commerce, and ten lived mostly from public office; sixteen conducted large scale agricultural operations and thus were certainly familiar with the export economy; seven were merchants engaged in commerce; and three were retired and living from wealth made in economic activities. FORREST McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* 86–88 (1958).

87. Their awareness is attested to by the widespread use of the term “Navigation Act” as a synonym for “regulation of commerce,” as seen by the presence of the former term in the draft Constitution itself as an alternative expression of the power to regulate commerce and lengthy debates over the requirement of a two-thirds vote to pass navigation acts. RECORDS, *supra* note 61, at 183, 374–75, 563, 631–32.

prevent American manufacturing or any other activities injurious to Britain's commerce including manufacturing.<sup>88</sup>

After the end of the war, Americans expected to return as participants in the British system, and were thunderstruck by the British Order in Council of July 2, 1783, excluding Americans from their most lucrative trade in the British Caribbean.<sup>89</sup> When their main market was taken away for earning specie to pay for the flood of British manufactured imports that entered the country the moment hostilities stopped, draining the country within months of specie, and exacerbating most of the economic problems of the mid-1780s, regaining entry into it became the single most important commercial goal of American leaders. This culminated in the grant of the power over commerce in the Constitution, buttressed by federal controls on state import and export duties, state inspection and tonnage duties and laws, and other provisions, precisely to create a single American market as a bargaining chip with Britain for re-entry into the Caribbean.<sup>90</sup>

The Framers spoke knowledgeably of the balance of trade,<sup>91</sup> bills of exchange,<sup>92</sup> of a bank,<sup>93</sup> and of passing export taxes onto foreign customers by placing them on goods where demand was high.<sup>94</sup> They were familiar with the idea central to British commercial dominance that manufacturing added value to goods and increased profit in trade,<sup>95</sup> and with the existence of large factories in Britain. They were aware of how technological innovations and draconian laws protecting the British woolen industry and especially its technology helped Britain grow wealthy by manufacturing and exporting woolen and other products to America at prices lower than American-made

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88. Summarized from BERNHARD KNOLLENBERG, *ORIGINS OF THE AMERICAN REVOLUTION: 1759–1766*, at 33–34, 157–64 (Bernard W. Sheehan ed., Liberty Fund 2002) (1960).

89. MATSON & ONUF, *supra* note 1, at 44.

90. *See* THE FEDERALIST NO. 11, at 50 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

91. *Id.* at 54.

92. RECORDS, *supra* note 61, at 447.

93. *Id.* at 616.

94. *Id.* at 306.

95. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* at IV.vii.b n.51 (1776) (photo. reprint, R. H. Campbell & A. S. Skinner eds., LibertyClassics 1981) (Oxford Univ. Press 1976).

products.<sup>96</sup> They understood the differential effects of export and import duties on production and consumption of different goods,<sup>97</sup> the difficulties of a shortage of circulating specie, and the costs of fluctuation on the value of currency in trade.<sup>98</sup> They came from states with more or less elaborate systems of inspections of dozens of export and some import goods.<sup>99</sup> They were presumably familiar with their colleague Franklin's decades old essay on why labor costs were high in America,<sup>100</sup> read Adam Smith, Sir James Steuart and other writers on commerce, including Lord Sheffield's 1784 *Observations on the Commerce of the American States*.<sup>101</sup> The latter book, under the rubric of "commerce," systematically surveyed American trade (in the narrow sense), manufacturing and consumption patterns and concluded that Britain need not end its exclusion of American trade from the Caribbean because its Caribbean colonies could get by without American imports, and Britain had little to fear from the development of American manufactures. This book incensed Madison, and Gouverneur Morris referred to it in Convention.<sup>102</sup> Some of the Framers had heard Tench Coxe's paper partially rebutting Sheffield by brilliantly arguing that labor-saving machinery would be the solution to the high cost of American labor, allowing the United States to compete with Britain.<sup>103</sup> Most of the Framers had stood on the banks of the Delaware River on the afternoon of August 22, 1787 to watch John Fitch propel his steamboat upstream,<sup>104</sup> and

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96. *Id.* chs. viii–ix; see also RECORDS, *supra* note 61, at 362 (discussing Thomas Fitzsimmons's reference to Britain's export taxes on wool which were part of the whole system of protecting the British wool industry). In addition, Coxe's paper at the home of Franklin on the eve of the Convention proposed policies to acquire British industrial technology. See Coxe, *supra* note 60. Coxe was one of the Commissioners to the Annapolis Convention of 1786 that proposed calling the Philadelphia Convention, so he could be considered a Framers.

97. This was a concern throughout the debate over a federal export tax. RECORDS, *supra* note 61, 305–08.

98. James Madison, *Vices of the Political System of the United States*, in 1 THE FOUNDERS' CONSTITUTION 167 (Philip B. Kurland & Ralph Lerner eds., 1987).

99. RECORDS, *supra* note 61, at 586–89.

100. Benjamin Franklin, *Observations Concerning the Increase of Mankind*, in THE PAPERS OF BENJAMIN FRANKLIN 227–34 (Leonard W. Labaree et al. eds., 1961).

101. JOHN LORD SHEFFIELD, OBSERVATIONS ON THE COMMERCE OF THE AMERICAN STATES (photo. reprint, Augustus M. Kelley 1970) (1784).

102. RECORDS, *supra* note 61, at 359–61.

103. See COXE, *supra* note 60.

104. JOHN FITCH, THE AUTOBIOGRAPHY OF JOHN FITCH 178–79 (Frank D. Prager ed.,

voted to put the patent clause in the Constitution, so they understood the impact of technology on commerce. They clearly had a sense of a larger system of production, labor, investment, transportation, capital, technology, production, and the sale of goods both within the transatlantic region and increasingly among the states, as well as with the regulation of this larger system.

So the evidence is that the Framers *did* have a sense of what we mean by the economy, and it included more than just buying and selling.<sup>105</sup> The question is, did they have a *word* for this system?

In Book IV of *The Wealth of Nations*, Adam Smith called the system of regulating the overall production of the wealth of the British Empire the “mercantile or commercial system,” and described it as broadly covering such means as described above to promote or retard or even prohibit aspects of agriculture, mining, fisheries, forestry, manufacturing, and transportation, as well as buying and selling and any other activity which affected it as the “means by which the *commercial system* proposes to increase the quantity of gold and silver in any country by turning the balance of trade in its favour.”<sup>106</sup> We believe that the word that American commercial and political leaders of the late 1700s had for what would correspond to our sense of the economy was the same word that Adam Smith used, not surprisingly also the same term the Framers used in the Constitution: “commerce.”

To be sure, there were also major differences between the “economy” then and now, and these differences explain at least some of the seemingly contradictory evidence for both broad and narrow meanings of “commerce.” The American economy of the 1780s was a dual economy. On the one hand, the American economy was heavily oriented towards transatlantic exports and imports, and remained heavily so until the early 1800s. A substantial amount of goods, such as salt beef and pork, wheat, barrels, hemp, and other products, were produced on a small scale even in rural areas and on

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1976).

105. McDonald asserts that a concept of the economy had recently evolved in the late eighteenth century, though he does not say what it was called. See NOVUS ORDO, *supra* note 1, at 97.

106. 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 428–29, 451 (photo. reprint, R. H. Campbell et al. eds., 1981) (1979).

the frontier for export to earn specie. At the same time, a sizeable amount of manufactured goods were imported and sold even in rural areas, so that the growth of the economy and higher levels of enjoyment of life depended to a far greater extent than even today on foreign trade, primarily on British manufactures paid for by specie earned in large part by goods Americans sold to the British Caribbean, and by the carrying trade.

Overseas commerce did not merely make colonial life comfortable; it made it possible. Without foreign trade, the colonists would have been unable to earn sufficient credits in their balance of payments to buy imported goods. Many of the immigrants would not have come in the first place, and only a few of those who did come would have stayed.<sup>107</sup>

The part of the economy that was directed toward earning specie or transactions in foreign trade, and to a lesser extent in the then still small trade among the states, was called what Smith called it: “the commercial system,” or “commerce” in the broad sense, and that is what the Framers intended to regulate nationally.

The part of the economy that was not “commercial” was called husbandry, domestic oeconomy, trade, or commerce in their narrow sense, wherein most basics of life for most people, even in the cities and towns, *were* produced at home, on the plantation, or very nearby—economy in the management of a household sense—and bartered or bought and sold using state-issued paper money, commodity money, or other money substitutes, because hard money—gold, silver coin, British pounds, or letters of credit—was chronically scarce or unavailable at all.<sup>108</sup> In this sense, the Kennedy-O’Connor image of a simple, primitive American economy has a real basis and corresponds to the Framers’ understanding of the term “economy,” but it is not the basis of the power over commerce in the Constitution so much as the basis of what was *left out of* the power over commerce. As discussed above, Britain excluded “domestic

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107. JOHN J. MCCUSKER & RUSSELL R. MENARD, *THE ECONOMY OF BRITISH AMERICA 1607–1789*, at 71 (1985) (emphasis added).

108. DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA*, at 107–13, 152–65 (1980).

oeconomy” from the regulation of commerce, and this term continued to be used to refer to activities left to the states.<sup>109</sup> To be sure, there was no bright line separating these “economies” even then, as the discussion above concerning the British Privy Council and the affecting commerce test versus domestic police shows, but it was perhaps easier then to understand the difference by seeing if the activity was directed toward large-scale trade or earning scarce specie. Over the centuries, the difference between these two economies has largely disappeared, as the household economy has largely become absorbed into the commercial economy, and we now have an almost fully monetized, global, highly specialized and interdependent economy in which virtually all our material needs are provided through larger commerce. Thus, the Framers’ “oeconomy” has become part of our “economy,” not because of overly broad interpretation of the power to regulate commerce, but because of the evolution of the subject of regulation itself, commerce.

#### VIII. COMMERCE AS THE FRAMERS’ CONCEPT OF “THE ECONOMY”

In sum, if we accept that the Framers had a concept of the economy that they called “commerce” that encompassed buying, selling, transportation and production for national gain of specie in trade, and substitute this in the *Lopez* formulation as a rough equivalent of the modern meaning of “the economy,” then *Lopez reduces* the power to regulate commerce to *less than* the power to regulate commerce: in the Framers’ words expressing how the Framers would understand the *Lopez* Court’s words, *Lopez* would now read: “those activities inside a state may be regulated under the power to regulate commerce which are commercial in nature and which truly have an effect on commerce.” Clearly, it is absurd to require something that is commercial in nature to also really affect itself in order to be regulated under the power over commerce. And if we state *Lopez* in modern terms, it reads: “those activities may be

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109. For example, “[f]rom this view of the powers delegated to the federal government, it will clearly appear, that those exclusively granted to it have no relation to the *domestic economy* of the state.” ST. GEORGE TUCKER, 1 BLACKSTONE’S COMMENTARIES 186 (1803) (emphasis added).

regulated which are economic in nature and which substantially affect the economy.” Again, requiring things which are economic in nature to also substantially affect the economy in order to apply the power to regulate commerce to them reduces the power over commerce to *less than* it is stated to be in the Constitution, because things that are economic in nature but which do not substantially (in the sense of amply) affect the economy may not be regulated under the power to regulate the economy. Either way, *Lopez* no longer suffers from the problem of extending the power over commerce into “management of households;” instead, *Lopez* now suffers the *opposite* problem of *reducing* the power over commerce to *less than* what the plain words of the Constitution state. As a result, reading *Lopez* as the Framers would read it if “commerce” meant our modern sense of “the economy” means that a great many matters that are actually commercial in nature could not be regulated under the power to regulate commerce, let alone noneconomic matters which nonetheless affect commerce.<sup>110</sup>

In sum, the “management of a household” meaning of “economy” in the Framers’ language and the problem of finding the Framers’ word for our modern sense of economy mean either that the *Lopez* majority implicitly adopts Justice Thomas’s narrow version of the Framers’ definition of commerce, while not agreeing with him that the scope of the power over commerce *should be* so narrowly limited, which the Justice O’Connor and Justice Kennedy concurrence implicitly concedes, or, as we argue, because the Framers intended to regulate what we call the economy, that the *Lopez* holding actually restates the power over commerce to be *less than* the Framers intended. And if the Framers did not have a concept for the economy, or their term for it was not commerce, then *Lopez* makes the Court the arbiter of the meaning of the term “economic.” This would put them perilously close to enforcing their own economic views, as the *Lochner* and *Knight* Courts were said to have done, and to do this without any rationale rooted in the language or understanding of the Framers.

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110. Space also unfortunately prohibits consideration of the “among the states” limitation on the power over commerce, but we think that it largely corresponded to whatever was in the larger commercial system.

## IX. CONCLUSION

The *Lopez* holding requiring in-state activities to be economic in nature in order to be regulated under the power over commerce among the states sets up a confrontation of the language of *Lopez* with the language of the Framers, revealing a massive contradiction within the originalist underpinnings of *Lopez* regarding the regulation of commerce. Either the Framers had no concept of an economy in the modern sense, in which case *Lopez* needs to explain why the power over commerce may regulate things which are economic in nature despite the fact that the Framers had no such idea in mind, and why the Court is the body to define what is economic in nature. Or, if the Framers did intend the power over commerce to regulate the economy in the modern sense of the word, excluding a now almost totally disappeared non-commercial sector then called “economy,” then the *Lopez* holding *reduces* the power over commerce to *less* than the Framers intended, and takes us past the Constitution into the direction of the Articles of Confederation. Either way, the *Lopez* holding may hardly claim originalist credentials for its Commerce Clause jurisprudence.