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CAN CONGRESS DO THAT? AN ANALYSIS OF THE FEDERAL PROHIBITION ON MARIJUANA POSSESSION

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I. INTRODUCTION

Since the founding of the Republic, there have been questions regarding the proper scope of national authority. Despite significant gains by proponents of expanding federal influence, recent years have witnessed an increasing willingness to ask whether or not the federal government possesses the authority to undertake a given action. No greater phenomenon is responsible for facilitating this concern than Congress's increasing zeal to enact ever more federal criminal statutes. Although the reasons for this are rooted in a myriad of political factors, perhaps the main impetus is Congress's perennial desire to appear tough on crime. There are, however, at least three reasons to doubt the constitutional existence of such authority: (1) the lack of any delegation of general police power to the federal government;[1] (2) the arguable prohibition of such a power–at least in the absence of a state request as expressed in the Domestic Violence Clause;[2] and (3) the Tenth Amendment's expression of the idea of proper and improper spheres of federal and state authority.[3] These considerations raise legitimate questions about the proper role of our national government in the war against crime. This Comment discusses the arguments supporting such federal action, as well as some of the problems associated with it, both legal and political, relating to the possession of marijuana.

II. THE AGGREGATION DOCTRINE

While it is usually conceded that the federal government has no general police power, as a practical matter this has merely forced Congress to rely on other affirmative grants of authority, most notably the Commerce Clause, in order to achieve its national objectives. The major theory justifying an expansive reading of federal power under the Commerce Clause is probably the so-called "aggregation" doctrine.[4] Under this theory, Congress does not look at an item's isolated effect on interstate commerce, but rather at the overall impact of such activities across the nation.[5] Such activities, taken in total, can be found to affect interstate

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1. *See generally* U.S. CONST. art. I, § 8 (listing Congress's enumerated powers).

2. U.S. CONST. art. IV, § 4. *See* Jay S. Bybee, *Insuring Domestic Tranquillity:* Lopez, *Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1 (1997) (giving an extensive analysis and compelling argument that the Domestic Violence Clause may in fact stand as an independent barrier to the enactment of many general federal criminal laws).

3. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

4. *See* Wickard v. Filburn, 317 U.S. 111, 127-28 (1942).

5. *Id.*

commerce.[6] In *Wickard v. Filburn*,[7] the Supreme Court found that wheat grown by a farmer to feed his own livestock affected the aggregate demand for wheat nationwide.[8] This implicated the Commerce Clause and allowed Congress to regulate wheat production for one's own farming use.[9] Similarly, while the possession of a "joint"[10] by an individual may be a local problem, the combined effect of such possession throughout the nation would have a significant impact, even if the marijuana was never shipped across state lines but only grown, sold, and used within each state.[11] This is precisely the type of reasoning to which Justice Stewart objected in *Perez v. United States*.[12]

It has been over twenty-seven years since Justice Stewart's lone dissent in *Perez* stated the danger of treating the overall effect of local crimes across the nation as a problem to be appropriately addressed by the federal government.[13] His concern has been largely borne out, as subsequent congressional acts have steadily expanded federal criminal law into numerous areas previously considered within the exclusive province of state government.[14] Any activity, criminal or otherwise, if viewed through the lens of aggregate impact, could probably be said to exert a substantial effect on interstate commerce.[15] Does this mean that Congress may regulate almost any activity? Justice Thomas voiced this concern in *United States v. Lopez* when he stated that "[t]he aggregation principle is clever, but has no stopping point."[16]

Justice Thomas noted that as understood by the Founders, agriculture, for example, was not subject to federal regulation as it was a totally local activity.[17] Likewise, cultivating marijuana for one's own use would certainly seem to qualify as a local activity (as well as an agricultural one). *Filburn*, however, indicates that Congress may "regulate" growing marijuana as surely as it may regulate growing wheat.[18] "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many oth-

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6. *Id.* (*Filburn* left unclear whether such activity need only "affect" interstate commerce or whether it must "substantially affect" such commerce, but the *Lopez* Court held it was the latter standard. *See* United States v. Lopez, 514 U.S. 549, 559 (1995)).

7. 317 U.S. 111 (1942).

8. *Id.*

9. *Id.* at 128-29.

10. A "joint" is a marijuana cigarette. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1219 (1986).

11. *See generally Filburn*, 317 U.S. at 127-28 (proposing that local activities may find themselves subject to federal regulation given their aggregate effect on interstate commerce).

12. 402 U.S. 146 (1971) (Stewart, J., dissenting).

13. *Id.* at 157-58.

14. Professor Bybee gives good illustrations of where we are now, regarding federalization of traditionally local crimes, by citing a number of federal statutes. Bybee, *supra*, note 2, at 3 n.5.

15. *See Perez*, 402 U.S. at 157-58 (Stewart, J., dissenting).

> But it is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.

16. United States v. Lopez, 514 U.S. 549, 600 (1995) (Thomas, J., concurring).

17. *Id.* at 586.

18. *See generally* Wickard v. Filburn, 317 U.S. 111, 127-28 (1942).

ers similarly situated, is far from trivial."[19] But the Constitution does not use the degree of impact as a threshold requirement that triggers national authority. We only need to replace growing wheat with some other activity, such as larceny, to see the implications of the Court's reasoning.

It would almost certainly be agreed that larceny has a devastating effect on interstate commerce, but can we read the Commerce Clause so broadly as to allow a congressional proscription of shoplifting[20] or purse snatching?[21] Can we candidly say that the federal government may charge an individual who steals a pocket knife with a federal offense? If so, we have quite frankly erased any principled distinction between local and federal crimes. If this were the Founders' intent, one would imagine that they would have been considerably more specific and open about granting such massive authority.

III. SECTION 844(A)[22] AND *United States v. Lopez*

The specific provision at issue in this Comment is 21 U.S.C. § 844(a), which states in relevant part:

> It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, [if without prior drug convictions] . . . .[23]

Penalties are reduced to a civil fine not to exceed $10,000 and no criminal conviction if the Attorney General determines the amount possessed is small enough that it is for personal use.[24] Offenses for manufacturing and distributing controlled substances are addressed by 21 U.S.C. § 841 and carry significantly greater penalties.[25]

Attempting to squeeze criminal statutes through the Commerce Clause has resulted in some necessary trimming. The congressional findings in the Controlled Substances Act[26] indicate the natural tension that exists whenever Congress forays into areas of criminal law appropriately addressed by state authority.

First, in enacting the Controlled Substances Act, Congress declared that "[m]any of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of

19. *Id.* at 127-28.
20. *Perez*, 402 U.S. at 157-58 (Stewart, J., dissenting).
21. *Id.*
22. 21 U.S.C. § 844(a) (1994 & Supp. III 1997).
23. *Id.*
24. 21 U.S.C. § 844a(a) (1994).
25. 21 U.S.C. § 841 (1994 & Supp. III 1997).
26. 21 U.S.C. §§ 801-904 (1994).

the American people."[27] Second, it noted that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people."[28] While these two findings are no doubt true, Congress is attempting to expand the General Welfare Clause of Article I beyond its contextual meaning.[29] The Welfare Clause is part of the Spending Clause[30] under which Congress may appropriate funds for the "general Welfare of the United States."[31] This provision, however, should not be read as granting Congress broad police authority, particularly given that "[i]n specifically enumerating legislative powers, the Constitutional Convention rejected Alexander Hamilton's proposal that Congress have the 'power to pass all laws which they shall judge necessary to the common defense and general welfare of the Union.'"[32] This historical note indicates that justification for the federal control of marijuana is precariously balanced on the General Welfare Clause, since it does not appear to be the functional equivalent of a general police power.

Third,

> [a] major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—
> (A) after manufacture, many controlled substances are transported in interstate commerce,
> (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and
> (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.[33]

The use of qualifiers such as "major," "many," "usually," and "commonly"[34] illustrates the constitutional weakness of this justification. It is a tacit admission that there are at least some controlled substances that may, in fact, never travel between the states. Possession of these "intrastate" substances should, therefore, be of local concern.

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27. 21 U.S.C. § 801(1) (1994).
28. 21 U.S.C. § 801(2) (1994).
29. *See* U.S. CONST. art. I, § 8 cl. 1 ("[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States").
30. *Id.*
31. *Id. See also* 1 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: STRUGGLES FOR POWER AND GOVERNMENTAL ACCOUNTABILITY 525 (1991). O'Brien noted: "Since 1937 the Court has [] consistently affirmed Congress's broad power to spend for the purpose of promoting the general welfare."
32. O'BRIEN, *supra* note 31 at 444 (quoting Alexander Hamilton in RECORDS OF THE FEDERAL CONVENTION, 617, 627 (Max Farrand ed. 1911)).
33. 21 U.S.C. § 801(3) (1994).
34. *See id.*

Congress's fourth finding was that "[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances."[35] This appears to be merely another articulation of a local activity having a national impact. As the third and fourth findings go to the heart of 21 U.S.C. § 844(a), they were questioned by the Supreme Court in *Lopez*.[36]

Lopez shined a bright light on the federal government's rationale in the area of commerce-based criminal statutes.[37] It potentially rocks the very foundation of traditional arguments that favor an ever-expanding federal police power under the guise of commerce. Although *Lopez* was not a drug case, the Supreme Court's analysis is directly applicable because the law at issue in *Lopez* (18 U.S.C. § 922(q)) is very similar to 21 U.S.C. § 844(a), as both attempted to prohibit the "possession" of an item Congress determined to be harmful.[38] The statute in *Lopez* prohibited "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[39] As the Court noted, "[18 U.S.C. § 922(q)] neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce."[40] Neither does 21 U.S.C. § 844[41]–like 18 U.S.C. § 922 (q)(2)(A), it punishes "possession" and nothing more.[42]

In Lopez, two of the three traditional categories for federal control and regulation, "the use of the channels of interstate commerce . . . [and,] . . . the instrumentalities of interstate commerce, or persons or things in interstate com-

35. 21 U.S.C. § 801(4) (1994).

36. 514 U.S. 549 (1995).

37. The Supreme Court expressed concern that the government's reach would leave little beyond its grasp. *Id.* at 564.

> We pause to consider the implications of the Government's arguments. The Government admits, under its 'costs of crime' reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's 'national productivity' reasoning, 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. Under the theories that the Government presents in support of [18 U.S.C.] § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.

(citation omitted).

38. 18 U.S.C. § 922(q)(1)(A) (1994 & Supp. III 1997); 21 U.S.C. § 844 (1994).

39. 18 U.S.C. § 922(q)(2)(A) (1994 & Supp. III 1997).

40. *Lopez*, 514 U.S. at 551.

41. 21 U.S.C. § 844(a) (1994 & Supp. III 1997).

42. *See id.*; 18 U.S.C. § 922(q)(2)(A) (1994 & Supp. III 1997).

merce,"[43] did not apply.[44] The third and most expansive category addressed congressional authority "to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."[45] This federal prohibition under

> [18 U.S.C. §] 922(q) [was] a criminal statute that by its terms ha[d] nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) [was] not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It [could not], therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.[46]

Prohibiting the carrying of a firearm on school property failed to constitute a commercial activity, thereby minimizing the precedential value of cases that allowed such regulation in the name of commerce.[47] This resulted because "[t]he Court added one important wrinkle to the substantial effects doctrine by indicating that the effects of individual instances of the regulated activity may be aggregated only if the activity is commercial."[48] Thus, having found that the possession of a firearm was non-commercial, the Court would only consider the impact of the individual crime which, of course, meant there was little possibility of ever meeting the threshold of the substantial effects test.[49]

It bears noting that shortly after the *Lopez* decision, Congress passed virtually the same law but added twelve words that may charitably be described as a technical fix.[50] The words simply require that before the possessor of the weapon

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43. *Lopez*, 514 U.S. at 558.

> [The Supreme Court has] identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.

(citation omitted).

44. *Id.* at 559.

> The first two categories of authority [could] be quickly disposed of: [since] § 922(q) [was] not a regulation of the use of the channels of interstate commerce, nor [was] it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor [could] § 922(q) be justified as a regulation by which Congress [had] sought to protect an instrumentality of interstate commerce or a thing in interstate commerce.

45. *Id.* at 558-59 ("[f]inally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce") (citations omitted).

46. *Id.* at 561 (footnote omitted).

47. *Id. See also* Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921 (1997). "This conclusion was pivotal in the Court's analysis because it meant that in gauging the effect of the intrastate activity, the Court would consider the activity in isolation rather than in the aggregate." *Id.* at 929.

48. *Id.*

49. *Id.*

50. *See* 18 U.S.C.A. § 922(q)(2)(A) (West 1976 & Supp. 1999).

becomes subject to the law, the weapon must have traveled in interstate commerce.[51] This new law has virtually the same impact as the law struck down by the *Lopez* Court because almost all firearms have traveled, at one time, in interstate commerce. In the eyes of some commentators, however, this removes the question from category three and places it into categories one and two, thereby avoiding the substantial effects test.[52]

Whether these commentators are correct is ultimately of little import to 21 U.S.C. § 844 because it is relatively easy to grow marijuana for use in the state, and therefore, interstate commerce is not implicated in any rational way. Thus, *Lopez* is relevant now, particularly when considering whether or not, in an attempt to avoid a *Lopez* challenge, Congress adds a requirement that for marijuana to be prohibited it must have traveled in interstate commerce. Although this reasoning could apply to numerous other controlled substances, many would be far more difficult to manufacture or cultivate in any one state.

Fifth, "controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate."[53] The feasibility of distinguishing between intrastate and interstate commerce goes to the heart of congressional authority under the Commerce Clause. If Congress wishes to prosecute for possession, proving movement in interstate commerce should be required. The requirement of having to prove interstate travel is a direct result of Congress's attempt to use the Commerce Clause as a general police power. Therefore, it would seem disingenuous for Congress to use the fact that it is difficult to differentiate between drugs manufactured and distributed interstate versus intrastate as a justification when this problem is a direct result of the Commerce Clause's interstate nature.

Sixth, "[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic."[54] This is a classic boot-strap argument–the end is used to justify the means. Congress wishes to accomplish a laudable goal, but, in order to do so, it must engage in an activity that is arguably unconstitutional. In such circumstances, the former should not be allowed to justify the latter–Congress either has the authority or it does not. This is the problem with possession as opposed to interstate transportation;[55] simple possession is by definition an intrastate activi-

51. *Id.*
52. Litman & Greenberg, *supra* note 47, at 929-30.
53. 21 U.S.C. § 801(5) (1994).
54. 21 U.S.C. § 801(6) (1994).
55. One might ask whether a crime should be considered an offense against the United States merely because it crosses a state line, or whether such a crime would not better be viewed as an offense against the several states.

ty. Congress, however, is within its authority to punish possession on federal property.[56]

Seventh, "[t]he United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances."[57] The utility of this rationale as a basis for enhancing federal power is highly problematic,[58] if not politically impossible. A plurality of the Supreme Court has, in fact, already stated that it believed such an atempt would be flatly unconstitutional.[59]

IV. INTERJURISDICTIONAL CONFLICT

Duplicitous regulation of criminal activity has the potential of leading to interjurisdictional conflicts. Both 21 U.S.C. § 844 and 18 U.S.C. § 922 illustrate this point.

On November 5, 1996, California and Arizona[60] passed state-wide referendas that allowed for the medicinal use of marijuana.[61] Several states have followed

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56. U.S. CONST. art. I, § 8 cl. 17.

57. 21 U.S.C. § 801(7) (1994).

58. *See generally* Reid v. Covert, 354 U.S. 1 (1957); Missouri v. Holland, 252 U.S. 416 (1920).

59. *Reid*, 354 U.S. at 16.

> There is nothing in [Article VI's] language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result . . . . It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights–let alone alien to our entire constitutional history and tradition–to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions . . . . There is nothing new or unique about what we say here. This court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.

(footnotes omitted).

60. Section 13-3412.01 was created by Proposition 200 in Arizona, but the Arizona State Legislature responded by passing Section 5 of Chapter 124 of the 1997 session laws, which stated that:

> Sections 2 and 4 [Section 4 is codified as 13-3412.01] of this act do not become effective unless the United States Congress authorizes the medical use of marijuana or unless the federal food and drug administration authorizes the medical use of marijuana and the drug enforcement administration reschedules marijuana to a schedule other than schedule I. The attorney general shall notify the director of the Arizona legislative council of the date on which the condition is met.

ARIZ. REV. STAT. ANN. § 13-3412.01 (West Supp. 1998).

This effort to redraft the medical marijuana law failed when the voters of Arizona defeated Proposition 300 in November of 1998. This proposition had essentially asked if the law, as drafted by the legislature, should become effective. ARIZ. REV. STAT. ANN. § 13-3412.01 (West 1989 & Supp. 1999).

Part A of § 13-3412.01 reads:

> Notwithstanding any law to the contrary, any medical doctor licensed to practice in this state may prescribe a controlled substance included in schedule I as prescribed by § 36-2512 to treat a disease, or to relieve the pain and suffering of a seriously ill patient or terminally ill patient, subject to the provisions of this section. In prescribing such a controlled substance, the medical doctor shall comply with professional medical standards.

ARIZ. REV. STAT. ANN. § 13-3412.01(A) (West 1989 & Supp. 1999).

61. Eric E. Sterling, *Drug Policy: A Smorgasbord of Conundrums Spiced by Emotions Around Children and Violence*, 31 VAL. U. L. REV. 597, 629 n.101 (1997).

suit.[62] California's Proposition 215 provides a defense against state charges of marijuana possession.[63]

The California law reads in part:

> Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.[64]

When Congress enacted 21 U.S.C. § 844(a), it made the possession of a controlled substance illegal in the absence of a prescription or other applicable statutory exception.[65] Patients residing in a state that allows the medical use of marijuana would apparently be able to circumvent the federal ban by obtaining a physician's prescription. By providing this opportunity, the citizens of California may have driven a stake through the heart of the federal "war on drugs." The interjurisdictional conflict surrounding this issue has thus far been more political than legal, but there have already been warnings by the Clinton administration that it will seek "to revoke the DEA registration of physicians who recommend or prescribe Schedule I controlled substances."[66] Such action would effectively prevent a physician from prescribing controlled substances.[67] This response results in the federal government's working against the state. Moreover, the credibility of Clinton's threat is somewhat suspect as a vigorous, widespread pursuit of prescribing doctors could adversely affect health care delivery in California–a situation that would be difficult for our national leaders to defend.

The Gun-Free School Zones Act[68] (which is still in effect in its revised form) is illustrative of a potential jurisdictional conflict analytically comparable to the marijuana problem. In Mississippi, state law provides exceptions for the possession of firearms on school property, some of which conflict with the federal code.[69] Mississippi's exceptions include, when:

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62. *See, e.g.*, ALASKA STAT. §§ 17.37.010 to 17.37.070 (West, WESTLAW through 1998 portion of End of 1998 Sp. Sess.)(§§ 17.37.020 & -.050 repealed 1999; §§ 17.37.010, -.030, -.040, -.060 & -.070 amended 1999); WASH. REV. CODE ANN. § 69.51 (West 1997 & Supp. 1999).

63. Sterling, *supra* note 62, at 637.

64. CAL. HEALTH & SAFETY CODE § 11362.5(b)(2)(d) (West 1996 & Supp. 1999).

65. 21 U.S.C. § 844(a) (1994 & Supp. III 1997).

66. Sterling, *supra* note 62, at 640 (quoting Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (1997)).

67. *Id.* at 639.

68. 18 U.S.C.A. § 922(q) (West 1976 & Supp. 1999).

69. MISS. CODE ANN. § 97-37-17(6) & (7) (1994 & Supp. 1998); 18 U.S.C.A. § 922(q)(2)(B)(iii) (West 1976 & Supp. 1999).

> (a) The person is not a student attending school on any educational property;
> (b) The firearm is within a motor vehicle; and
> (c) The person does not brandish, exhibit or display the firearm in any careless, angry or threatening manner . . . . or [when] [a]ny weapon not prescribed by Section 97-37-1 which is in a motor vehicle under the control of a parent, guardian or custodian, as defined in Section 43-21-105, which is used to bring or pick up a student at a school building, school property or school function.[70]

This statute is an example of federalism allowing the tailoring of laws to reflect community concerns on a more local scale than would ever be possible through "one size fits all" legislation from Congress.

The Gun-Free School Zones Act counterpart to section 97-37-17(6) of the Mississippi Code is more restrictive and requires the weapon be "(I) [] [un]loaded; and (II) in a locked container, or a locked firearms rack that is on a motor vehicle";[71] a comparable counterpart to section 97-37-17(7)(g) of the Mississippi Code does not exist.[72] Therefore, an individual with a firearm on a state university campus could be abiding by state law but violating federal law even though he was on state property. Congress would in effect be telling the State of Mississippi who could possess a firearm on the state's own land! It does not take an extreme position on states' rights to see that this situation is constitutionally untenable. If nothing else, the Tenth Amendment would seem, at least, to stand for the proposition that states may reasonably regulate their own property.

V. CONCLUSION

The Supreme Court's ruling in *Lopez* would quite possibly allow a successful challenge to the constitutional validity of 21 U.S.C. § 844(a) because this particular statute is focused on simple possession of marijuana. The mere act of possessing marijuana would seem to be no more a commercial activity than the possession of a firearm on school property.[73] Furthermore, other federal criminal laws that regulate traditionally local crimes may be constitutionally suspect.

The expansive interpretation of the Commerce Clause has in the last few decades come to look less like a justifiable regulation of commerce among the states and more like an end-run around the constitutional limits on congressional authority. The Constitution provides the correct procedure should society decide such powers are necessary: amendment. Article V of the Constitution authorizes the following:

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70. MISS. CODE ANN. § 97-37-17(6) & (7)(g) (1994 & Supp. 1998).

71. 18 U.S.C.A. § 922(q)(2)(B)(iii) (West 1976 & Supp. 1999).

72. The closest would probably be 18 U.S.C.A. § 922(q)(2)(B)(vii), which provides an exemption for a weapon "that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities." 18 U.S.C.A. § 922(q)(2)(B)(vii) (West 1976 & Supp. 1999).

73. *See* United States v. Lopez, 514 U.S. 549, 561 (1995). *See also* Litman & Greenberg, *supra* note 47.

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several states, or by Convention in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .[74]

In other words, we may grant general police power to the central government, we may further curtail state authority, we may even federalize shoplifting–but before we do, we must pay homage to the founding document of this nation.

An amendment would allow the states to register their agreement or disagreement with Congress on the subject of a general federal police power. Of course, such an amendment would essentially eviscerate state power and it is difficult to imagine that it would be ratified. Thus, if the states would not bestow upon Congress that power today, would they really have done so over 200 years ago under the auspices of the Commerce Clause?

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74. U.S. CONST. art. V.