

THE NEW ACTIVIST COURT

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INTRODUCTION

The New York Times recently charged that “[r]adical change is underway at the Supreme Court.”¹ As the 1994-95 Term ended, *The Times* accused the Court of “toppling doctrines and precedents that had held for decades,” while displaying “a disrespect [for Congress] bordering on contempt.”² Linda Greenhouse, *The Times* legal commentator, supported the attack in a separate article:

An ascendant bloc of three conservative Justices with an appetite for fundamental, even radical change drove the Court on a re-examination of basic Constitutional principles. Long-held assumptions about the authority of the national government, the relationship between Washington and the states, and the ability of the Federal Government to take race into account in making public policy were all placed on the table for dissection. Some precedents were overruled, others sharply limited in a gaudy show of zero-based jurisprudence.³

The popular press is finally recognizing what those who watch the Court closely have known for some time: the current Court is very activist, perhaps as activist as the Warren Court in its heyday.

Judicial activism means different things to different people. As Justice Ginsburg stated during her confirmation hearings, judicial activism is “a label too often pressed into service by critics of court

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1. *A Court Running in the Wrong Direction*, N.Y. TIMES, July 6, 1995, at A20 (editorial).

2. *Id.* *The New York Times* renewed its charges as the new Term began on October 2, 1995, accusing the “revisionists . . . [of] embark[ing] on a course of judicial activism that closely parallels the rethinking of the social contract taking place across the street in the new Republican Congress.” *High Court Anxiety*, N.Y. TIMES, Oct. 2, 1995, at A16 (editorial).

3. Linda Greenhouse, *Farewell to the Old Order in the Court: The Right Goes Activist and the Center Is a Void*, N.Y. TIMES, July 2, 1995, § 4 (Week in Review), at 1.

results rather than the legitimacy of court decisions."⁴ When most people use the phrase, however, they are referring to *how* a court decides cases. They are talking about process more than result.

Critics charge that activist judges violate separation of powers principles by assuming legislative or executive functions.⁵ President Reagan, who nominated Justices O'Connor, Kennedy, and Scalia, said he wanted to appoint justices "who understand the danger of short-circuiting the electoral process and disenfranchising the people through judicial activism."⁶ He went on to state that our Founding Fathers "never intended . . . that the courts preempt legislative prerogatives."⁷ President Bush, who nominated Justices Souter and Thomas, echoed this theme: "Judge Souter is committed to interpreting, not making the law. . . . I have selected a person who will . . . not legislate from the Federal bench."⁸

4. Rorie Sherman & Claudia MacLachlan, *Congress OKs Money for Jurors and Lawyers*, NAT'L L.J., July 19, 1993, at 29. Ginsburg elaborated on this point in response to questions from Senator Dennis DeConcini (D-AZ). See *Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. 169-71 (1993) [hereinafter *Ginsburg Hearings*] (testimony of Ruth Bader Ginsburg) (observing that necessity sometimes requires courts to give legislative remedies). Senator Hatch's comments on judicial activism during the hearings show a plain concern with the results of court decisions.

[J]udicial activism has resulted in the elevation of the rights of criminals and criminal suspects and the concomitant strengthening of the criminal forces against the police forces of our country; the twisting of the constitutional and statutory guarantees of equal protection of the law such that reverse discrimination often results; prayer being chased out of the schools; and the Court's creating out of thin air a constitutional right to abortion on demand, to just cite a few instances

Id. at 6 (statement of Sen. Hatch).

5. *Ginsburg Hearings*, *supra* note 4, at 30 (statement of Sen. Specter); 137 CONG. REC. S14,311 (daily ed. Oct. 3, 1991) (statement of Sen. Hatch).

6. Bernard Weinraub, *Reagan Says He'll Use Vacancies to Discourage Judicial Activism*, N.Y. TIMES, Oct. 22, 1985, at A1.

7. *Id.* Members of President Reagan's administration echoed this theme. Presidential spokesman Larry Speakes stated that a court "appointee must agree that the 'role of the court is to interpret the law, not enact new law by judicial fiat.'" Julia Malone, *Reagan Can Tip Supreme Court Scale to Right*, CHRISTIAN SCI. MONITOR, June 19, 1981, at 1. Attorney General William French Smith "accused unelected judges of substituting their own policy preferences for the determinations of the public's elected representatives." Bill Peterson, *In the Administration, a Pattern Develops on Conservatives' Agenda*, WASH. POST, Feb. 22, 1982, at A2. Presidential counselor Edwin Meese said that the President wanted to appoint judges who "have a sense of judicial restraint We want people to be judges, not legislators." *Reagan's Judicial Appointments: How Much Impact?*, PR Newswire, Nov. 1, 1982, available in LEXIS, News Library, Wires File.

8. *Comments by the President on His Choice of Justice*, N.Y. TIMES, July 24, 1990, at A18 (editorial).

Senator DeConcini presented an interesting variation on this theme during Justice Ginsburg's confirmation hearings. He found Justice Scalia's approach to statutory interpretation to be activist:

Justice Scalia is a proponent of so-called textualism. He attempts to limit the statutory interpretation to the text and ignores the legislative history. He does not look at committee reports, he does not look at congressional debate. Rather, he has decided he will just look at the statute to determine congressional intent. . . . [C]ongressional

Although the judiciary has primary responsibility for saying what the Constitution means, judges are considered activist when they articulate new constitutional rights not explicitly mentioned in the Constitution,⁹ or when they overturn statutes based on their own readings of constitutional values.¹⁰ Judges are likewise considered activist when they stretch or loosen doctrines designed to ensure that cases are properly before them for review, such as the doctrines of standing, mootness, and ripeness, or the final judgment rule.¹¹ Finally, judges are considered activist when they ignore, distort, or overrule prior precedent.¹²

This Article contends that the Rehnquist Court is activist in all of these ways. Support for this contention is developed by analyzing three recent Supreme Court cases that dramatically demonstrate the Court's activism. The cases are *Lucas v. South Carolina Coastal Council*,¹³ which reinterprets the Fifth Amendment Takings Clause, *Boyle v. United Technologies Corp.*,¹⁴ which creates a new federal common law defense for military contractors, and *United States v. Lopez*,¹⁵ which voids a federal criminal statute because it exceeded Congress' power under the Commerce Clause of the Constitution.

legislative history is not always clear, I am very cognizant of that, but I believe ignoring it per se is a form of judicial activism

Ginsburg Hearings, *supra* note 4, at 325 (statement of Sen. DeConcini).

9. A.E. Dick Howard, *Chief Enigma*, A.B.A.J., Oct. 1995, at 67. Senator Hatch pushed this point to its logical extreme during the hearings on the nomination of Justice Ginsburg. In Senator Hatch's view, the role of the judicial branch "is to enforce the provisions of the Constitution . . . as their meaning was originally intended by the Framers." *Ginsburg Hearings*, *supra* note 4, at 5 (statement of Sen. Hatch).

10. Howard, *supra* note 9, at 67; William Wayne Justice, The Two Faces of Judicial Activism, Address Before the George Washington University National Law Center (Mar. 10, 1992), in 61 GEO. WASH. L. REV. 1, 2 (1992).

11. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-87 (1975) (relaxing requirement that only final judgments may be appealed); *Roe v. Wade*, 410 U.S. 113, 124-25 (1973) (finding exception to rule against hearing moot cases so that abortion cases might reach appellate courts); *Peters v. Kiff*, 407 U.S. 493, 504-05 (1972) (granting white petitioners standing to challenge systematic exclusion of blacks from juries). Some commentators also consider it activist when the Court declines to hear cases properly assigned to it by Congress. See generally Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (contending that abstention doctrines ignore dictates of valid jurisdictional and civil rights statutes and thus usurp legislative authority in violation of separation of powers principles).

12. See Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 236, 241 (1983) (listing interpretive stability, "the degree to which a Supreme Court decision either retains or abandons precedent or existing judicial doctrine," as measure of judicial activism); see also Christopher E. Smith & Avis Alexandria Jones, *The Rehnquist Court's Activism and the Risk of Injustice*, 26 CONN. L. REV. 53, 58 (1993) (describing one dimension of judicial activism as "a judicial decision that substitutes judicial policy for the policy of elected branches of government" (quoting HENRY GLICK, COURTS, POLITICS, AND JUSTICE 309 (2d ed. 1988))).

13. 505 U.S. 1003 (1992).

14. 487 U.S. 500 (1988).

15. 115 S. Ct. 1624 (1995).

Although these decisions are from very different areas of the law, they all exemplify the current judicial activism.

These cases were chosen for several reasons. First, they each involve important legal subjects. If the Justices continue farther down the new paths they have mapped, the changes will be profound and far-reaching. Second, the cases together present examples of the techniques of judicial activism outlined above. They demonstrate the process of judicial activism in all of its facets. Finally, the cases involve different areas of the law, which shows that the Court's new activism is broad-based.¹⁶

I. *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*

Lucas v. South Carolina Coastal Council is an activist decision because the Court created a new rule of law. In the process, it badly distorted precedent. The Court also reached out to hear the case even though it may not have been ripe for review. *Lucas* signaled a major change in takings law. The Fifth Amendment to the United States Constitution states, "private property [shall not] be taken for public use, without just compensation."¹⁷ *Lucas* creates a new categorical rule: any regulation of property that eliminates all of its viable economic use is a per se taking, unless the proscribed use was not a part of the owner's title to begin with.¹⁸ The Court also invites the lower courts to define the relevant parcel of land so as to make it easier to find a compensable total taking.¹⁹ *Lucas* suggests that courts consider a partial restriction of an owner's rights to be a total taking of the part restricted, thus requiring compensation in many more cases than in the past.²⁰ *Lucas* tips the balance in favor of property owners and against government by making it more difficult and expensive to regulate land use.

The stakes hardly could be higher. Using the police power, government at all levels routinely regulates property to protect the citizenry from harm and to promote the public health and safety. Regulations that restrict the use of property often diminish its value. Justice Holmes once remarked, "Government hardly could go on if to some extent values incident to property could not be diminished

16. This Article does not mean to suggest that judicial activism is either good or bad per se, nor does the author present his own views about the underlying merits of the cases. The Article simply seeks to demonstrate that the Rehnquist Court is very activist.

17. U.S. CONST. amend. V.

18. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992).

19. See *id.* at 1016 n.7 (avoiding answering question of what constitutes relevant parcel of land and thus leaving question open for lower court to decide).

20. See *id.*; see also *infra* notes 95-100 and accompanying text.

without paying for every such change in the general law."²¹ On the other hand, government's power to take property without compensation must have some limits. Making an individual bear the entire cost of a public benefit is often unfair.²² If extended too far, the police power could wholly extinguish private property rights.²³

The Supreme Court has struggled mightily for over a century to achieve a proper balance between the competing public and private interests. As Justice Brennan remarked in *Penn Central Transportation Co. v. New York City*,²⁴ "what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty."²⁵ Early takings cases strongly favored the government. Historically, the Takings Clause required compensation only if government directly appropriated property,²⁶ or, as a practical matter, took possession.²⁷ As the Court explained in *Mugler v. Kansas*,²⁸ "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property."²⁹ The Court found no taking even when the prohibition on the property's use made it worthless, or very nearly so.³⁰

21. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

22. *See* *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (stating that "Fifth Amendment's guarantee . . . [was] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

23. *Pennsylvania Coal*, 260 U.S. at 415 (explaining that although Fifth Amendment is "qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears"). For a thoughtful discussion of some of the larger issues underlying takings cases and a brief review of the relevant literature, see EVA H. HANKS ET AL., *ELEMENTS OF LAW* 200-19 (1994).

24. 438 U.S. 104 (1978).

25. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978).

26. *See* *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870) (interpreting Fifth Amendment "as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power").

27. *See* *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878) (finding that government actions restricting private property use do not constitute taking whereas physical invasion of real estate that is in effect "a practical ouster of [private owner's] possession" is taking).

28. 123 U.S. 623 (1887).

29. *Mugler v. Kansas*, 123 U.S. 623, 668 (1887) (emphasis added). In *Mugler*, a Kansas distiller sought compensation after an amendment to the state constitution made it illegal to manufacture and sell alcoholic beverages. *Id.* at 637. The Court denied relief, even though the plaintiff had built his brewery before the amendment. *Id.* at 625, 675; *see also* *Hadacheck v. Sebastian*, 239 U.S. 394, 408-10 (1915) (refusing to provide compensation when municipality passed ordinance prohibiting plaintiff from operating his brick mill within city limits).

30. *See* *Mugler*, 123 U.S. at 657 (refusing compensation despite fact that "buildings and machinery constituting these breweries are of little value" because of state constitutional amendment); *see also* *Hadacheck*, 239 U.S. at 408-10 (affirming lower court's decision to refuse compensation despite fact that land was more valuable for brickmaking than for any other purpose).

In 1922, *Pennsylvania Coal Co. v. Mahon*³¹ significantly changed takings law by adopting a balancing test that was heavily dependant on the facts of each case.³² In *Mahon*, the plaintiffs bought their home from the Pennsylvania Coal Company.³³ The deed expressly reserved to the company the right to remove coal under the property, and stated that the grantee waived any claim to damages that might occur in the process.³⁴ When Pennsylvania passed a statute forbidding mining coal in a way that caused the subsidence, or sinking, of surface land under homes, the Mahons sought to enjoin the company from mining under their property.³⁵ The state supreme court held that the statute was a legitimate exercise of the police power and denied the company any compensation.³⁶ The United States Supreme Court reversed.³⁷

The Court's new balancing test weighed public and private interests on an ad hoc basis:

As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.

....

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. . . . [T]his is a question of degree—and therefore cannot be disposed of by general propositions.³⁸

These vague and flexible standards obviously have allowed the Court great leeway in deciding takings cases.³⁹ In *Mahon*, Justice Holmes

31. 260 U.S. 393 (1922).

32. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

33. *Id.* at 412.

34. *Id.*

35. *Id.* (asserting that Kohler Act removed coal company's rights to mine coal on plaintiffs' property).

36. *Id.*

37. *Id.* at 416.

38. *Id.* at 413, 415-16.

39. See BRUCE ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 165 (1977) (observing how Justice Holmes' ad hoc approach allowed judges to reach decisions different than his own in *Mahon*).

chose to characterize the coal company's loss as very great.⁴⁰ He minimized the public interest by saying, "This is the case of a single private house. . . . The damage is not common or public."⁴¹ Holmes made no mention of the obvious public interest in having the surface of Pennsylvania remain at ground level rather than sinking by stages into the abyss. Instead, he concluded that when individuals and communities acquire only surface rights to property, they should not be entitled to "greater rights than they bought."⁴²

The Supreme Court followed the general standards announced in *Mahon* for the next seventy years.⁴³ In case after case, the Court reaffirmed that no precise rule or test could be formulated.⁴⁴ Instead, it decided takings issues by weighing the public and private interests on a case-by-case basis. In *Penn Central Transportation Co. v. New York City*, the Court listed several factors to weigh:

The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.⁴⁵

in *Mahon*).

40. *Pennsylvania Coal*, 260 U.S. at 414.

41. *Id.* at 413.

42. *Id.* at 416.

43. See ACKERMAN, *supra* note 39, at 236 n.9 (observing in 1977 that "[t]he Court had made no important doctrinal advance since *Pennsylvania Coal v. Mahon*").

44. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981) ("[T]his Court has generally been unable to develop any 'set formula' for determining [takings issues]." (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979))); *Agins v. Tiburon*, 447 U.S. 255, 260-61 (1980) ("[N]o precise rule determines when property has been taken . . ."); *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962) ("There is no set formula to determine where regulation ends and taking begins."); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) ("Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case."); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) ("The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions.").

45. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (citations omitted); see also *Hodel*, 452 U.S. at 295 (identifying significant factors "such as impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action" that are considered when examining "taking" issues (quoting *Kaiser*, 444 U.S. at 175)); *Agins*, 447 U.S. at 261 ("[T]he question necessarily requires a weighing of private and public interests."); *Goldblatt*, 369 U.S. at 594 ("[A] comparison of values before and after is relevant, [but] is by no means conclusive.") (citations omitted).

The prevailing standards thus were firmly established, and served tolerably well for at least two generations.

The Court made only one exception to its ad hoc, interest-balancing approach. In *Loretto v. Teleprompter Manhattan CATV Corp.*,⁴⁶ the Supreme Court held that permanent physical occupation of property should be deemed a taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."⁴⁷ The Court said it had invariably found a taking when owners suffered "permanent physical occupation" of their property.⁴⁸ It distinguished temporary physical invasions, which are subject to the general balancing test, from permanent physical occupation of property, which merits relief without applying the balancing test.⁴⁹

It was against this backdrop that the Court decided *Lucas v. South Carolina Coastal Council*.⁵⁰ Justice Scalia delivered the opinion of the Court, and was joined by Chief Justice Rehnquist and by Justices White, O'Connor, and Thomas.⁵¹ Justice Scalia began by reviewing the facts. In 1986, David H. Lucas bought two beachfront lots on an island off the coast of South Carolina where he planned to build single-family homes.⁵² When he bought the property, it was not within a "critical area" under South Carolina's Coastal Zone Management Act, and thus no special permits were required to build.⁵³ In 1988, however, South Carolina amended the Act to prohibit erection of "occupiable improvements" on additional beachfront areas, which included Lucas' lots.⁵⁴ Lucas sued in state court, claiming that the construction bar constituted a taking under the Fifth and Fourteenth Amendments.⁵⁵ The trial court agreed, finding that the prohibition "deprive[d] Lucas of any reasonable economic use of the lots . . . and

46. 458 U.S. 419 (1982).

47. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982).

48. *Id.* at 427-35.

49. *See id.* at 432 (concluding that balancing test is applicable to physical invasions but not to permanent physical occupation). In *Penn Central*, the Court stated: "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . ." *Penn Central*, 438 U.S. at 124. The phrase "may more readily be found" suggests that a taking might *not* be found in some circumstances.

50. 505 U.S. 1003 (1992).

51. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1006 (1992). Justice Kennedy filed an opinion concurring in the judgment. *Id.* at 1032 (Kennedy, J., concurring). Justices Blackmun and Stevens each filed dissenting opinions. *Id.* at 1036, 1061. Justice Souter filed a separate statement. *Id.* at 1076.

52. *Id.* at 1008.

53. *Id.*

54. *Id.* at 1008-09.

55. *Id.* at 1009.

render[ed] them valueless."⁵⁶ The South Carolina Supreme Court reversed.⁵⁷ It held that the government owed no compensation under the Takings Clause because the legislation was designed to prevent serious public harm to South Carolina's coastal zone.⁵⁸

Justice Scalia began his discussion of takings law⁵⁹ by noting that the Court had "generally eschewed any 'set formula'" for determining takings questions, preferring instead to engage in "essentially ad hoc factual inquiries."⁶⁰ Justice Scalia then announced the new categorical rule, although he attempted to mask it by asserting that he was merely reaffirming standards set in earlier cases:

We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into

56. *Id.* (quoting appendix to petition for certiorari at 37). The majority's eagerness to make new law is highlighted by their uncritical acceptance of this erroneous factual finding. As Justice Blackmun points out in his dissenting opinion, Lucas retained many rights of ownership, such as the right to exclude others from his property and the right to picnic, swim, camp, or live on the property in a movable trailer. *Id.* at 1044 (Blackmun, J., dissenting). He might also have been able to sell it to adjoining owners wishing to insure an unobstructed view of the water. *Id.* (Blackmun, J., dissenting); see also *id.* at 1065 n.3 (Stevens, J., dissenting) (doubting that land is valueless based on fact that Lucas still had "other uses" for land available to him). The defendant argued in its brief on the merits that the trial court finding was erroneous, but the majority refused to consider the argument because the defendant had failed to raise the challenge in its Brief in Opposition to Lucas' petition for certiorari. *Id.* at 1020 n.9. While the Court has the power to decide a case based on an erroneous finding, *id.* at 1045 (Blackmun, J., dissenting), it also has the power to refuse to accept findings by state courts that are clearly erroneous. See *Ward v. Love County*, 253 U.S. 17, 23 (1920) (disregarding state court finding and facts set forth in petition that payment of taxes by Indians was voluntary and basing its decision on fact that payment was compelled).

57. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 902 (S.C. 1991).

58. *Id.* at 900-02.

59. As a threshold matter, the Court addressed whether the case was ripe for review. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1010-14 (1992). The Court's treatment of this issue again demonstrates how eager it was to reach the merits and make new law. In 1990, after the case was argued in the South Carolina Supreme Court, but before it was decided, South Carolina amended the applicable statute to allow special permits for construction of habitable structures on previously restricted land. *Id.* at 1010-11. The South Carolina Supreme Court, however, did not rest its decision on ripeness grounds. *Id.* at 1011-13. Thus, while Lucas remained free to apply for a special permit for future construction, he was denied any further opportunity to make a takings claim for the past deprivation occurring from 1988, when building was first restricted, to 1990, when the special permit procedure was adopted. *Id.* at 1011. Because the Court had previously held that temporary deprivations of use may be compensable under the Takings Clause, see *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987), the majority concluded that Lucas' claim for past deprivation was ripe for review. *Lucas*, 505 U.S. at 1012.

While the Court technically is correct, it plainly is stretching to hear this case. As Justice Stevens notes in his dissenting opinion, it is not even clear that Lucas suffered any temporary deprivation from 1988 to 1990 because the record does not reveal if he actually planned to build during that period. *Id.* at 1062 (Stevens, J., dissenting). Given the lack of ripeness of Lucas' permanent takings claim, and the uncertainty of the record as to the temporary takings claim, the Court easily could have avoided reaching the merits. Indeed, Justice Stevens accuses the Court of "[c]avalierly dismissing the doctrine of judicial restraint." *Id.* at 1062 (Stevens, J., dissenting).

60. *Lucas*, 505 U.S. at 1015 (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)).

the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. . . .

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land."⁶¹

Justice Scalia correctly asserts that permanent physical invasions or occupation of property are takings per se.⁶² But categorical treatment has never been accorded when regulation denies all economically viable use of land, and the cases he cites simply do not support that proposition. Justice Scalia builds his argument on one sentence from *Agins v. Tiburon*⁶³ that is repeated in *Nollan v. California Coastal Commission*,⁶⁴ *Keystone Bituminous Coal Ass'n v. DeBenedictis*,⁶⁵ and *Hodel v. Surface Mining & Reclamation Ass'n*.⁶⁶ Justice Scalia's reasoning is weak for several reasons. First, the sentence he relies on is dicta. Second, on close examination, the sentence does not quite make sense. Third, Justice Scalia takes the sentence completely out of context. Far from establishing a categorical rule, *Agins* is the quintessential balancing case.⁶⁷

The plaintiffs in *Agins* acquired five acres of unimproved land in the city of Tiburon, California.⁶⁸ Subsequently, the city adopted zoning ordinances that limited development of the property.⁶⁹ The plaintiffs filed suit in state court claiming that the ordinances were facially unconstitutional, and that the city had completely destroyed the value of their property.⁷⁰ The city demurred, and the trial court

61. *Id.* (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)) (emphasis added) (citations omitted).

62. See *supra* notes 46-49 and accompanying text (noting that permanent physical invasions constitute per se takings).

63. 447 U.S. 255 (1980). The sentence Justice Scalia relies on is: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance state interests . . . or denies an owner economically viable use of his land . . ." *Id.* at 260 (citations omitted).

64. 483 U.S. 825, 834 (1987).

65. 480 U.S. 470, 495 (1987).

66. 452 U.S. 264, 295-96 (1981).

67. *Agins v. Tiburon*, 447 U.S. 255, 260-61 (1980).

68. *Id.* at 257.

69. *Id.*

70. *Id.* at 258.

sustained the demurrer.⁷¹ The California Supreme Court affirmed,⁷² and explicitly rejected the plaintiffs' claim that the ordinances completely destroyed the value of the property because the ordinances by their terms permitted construction of from one to five residences on the tract.⁷³

The sentence Justice Scalia relies upon appears near the beginning of *Agins'* discussion of takings law. It reads: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land."⁷⁴ The sentence clearly is dicta, because, as noted above, the ordinances did not deprive the plaintiffs of all economically viable use of their land. The plaintiffs were still allowed to build some houses on the parcel.⁷⁵

More importantly, the sentence makes little sense. It makes more sense if the "or" is changed to "and," which may be what Justice Powell, who wrote *Agins*, meant to say. With that change, the sentence would suggest that both public and private interests should be considered. As actually worded, however, one can read the sentence to mean that a regulation effects a taking if *either* of the conditions mentioned is satisfied. That is, a regulation effects a taking if it does not advance a legitimate state interest, *or* if it denies an owner economically viable use of his land. Justice Scalia interprets the sentence this way—or at least he says a taking occurs if the second condition is satisfied; that is, if the regulation deprives the owner of economically viable use of his land.⁷⁶ But what if the first condition is satisfied and not the second? What if a regulation advances no state interest, but costs a landowner little or nothing at all? Is that a taking? Clearly not. The sentence makes more sense if one substitutes "and" for "or." One may reasonably find a taking if the ordinance does not advance an important state interest *and* it significantly restricts ownership rights.⁷⁷

71. *Id.*

72. *Id.*

73. *Id.* at 259 n.6. Although the case was decided by demurrer and thus without evidence being submitted, California law allows a court to reject allegations in a complaint if they are contrary to a law of which the court may take judicial notice. *Id.* The Court rejected the plaintiffs' allegations because they were inconsistent with the terms of the ordinance. *Id.*

74. *Id.* at 260 (citations omitted).

75. *Agins*, 447 U.S. at 257.

76. Because the rule is absolute according to Justice Scalia, presumably a taking occurs even if the regulation advances *critical* state interests. And indeed, this was clearly the case in *Lucas*. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1007 (1992) (explaining that land that qualified as "critical area" was not immune from Fifth Amendment taking).

77. Interestingly, Justice Scalia has in the past used "and" rather than "or" to connect the two conditions. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) ("We have

Justice Scalia also takes the *Agins* sentence completely out of its context. The sentence is the topic sentence of a paragraph that reaffirms the traditional rule that courts decide takings cases by an ad hoc balancing of public and private interests, not by a mechanical, single factor analysis.⁷⁸ Following the topic sentence, the paragraph continues:

The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests. The seminal decision in *Euclid v. Ambler Co.* is illustrative. In that case, the landowner challenged the constitutionality of a municipal ordinance that restricted commercial development of his property. Despite alleged diminution in value of the owner's land, the Court held that the zoning laws were facially constitutional. They bore a substantial relationship to the public welfare, and their enactment inflicted no irreparable injury upon the landowner.⁷⁹

In the remaining paragraphs of *Agins*, Justice Powell weighs California's interest in preserving open space in residential neighborhoods against the plaintiff's interest in obtaining maximum profit from development of the land.⁸⁰ The Court concludes that because California's interest is an important one, and the plaintiff may still build on the land, no taking has occurred.⁸¹ Thus, read as a whole, *Agins* is a classic example of the Court's cautious, ad hoc balancing approach to takings issues. Justice Scalia badly distorts the case by citing it as the source of a categorical rule.⁸²

The other cases cited by Justice Scalia similarly fail to establish a categorical rule. All of the cases quote the language from *Agins*, but in none did the regulations deprive the owners of all economically

long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land'" (quoting *Agins*, 447 U.S. at 260)) (emphasis added). *Agins* states what effects a taking; *Nollan* states what does *not*. Perhaps the need for "and" rather than "or" between the two conditions was more apparent to Justice Scalia when the proposition was stated negatively in *Nollan*. Again, it does not make much sense to say that a regulation does not effect a taking if it denies some but not all economic use of land but serves no legitimate government purpose. Chief Justice Rehnquist recently repeated the conjunctive formulation in *Dolan v. City of Tigard*. See 114 S. Ct. 2309, 2316-17 (1994) (citing *Agins*, 447 U.S. at 260).

78. See *Agins*, 447 U.S. at 260.

79. *Id.* at 260-61 (citations omitted).

80. See *id.* at 261.

81. *Id.* at 261-62.

82. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992).

viable use of their land.⁸³ Thus, the language continued to be dicta. *Nollan v. California Coastal Commission* is very far afield because it actually involved the first rather than the second of the *Agins* conditions. In *Nollan*, the Court found a taking because the regulation did not substantially advance a legitimate state interest.⁸⁴ The Court held that there was not a sufficient relationship, or nexus, between the goal of the regulation and the means chosen to accomplish the goal.⁸⁵

Keystone and *Hodel* both involved unsuccessful facial challenges to regulations restricting coal mining. Thus, neither case considered the effect of the regulations on a specific piece of property. *Keystone* explicitly relied on the balancing test of *Pennsylvania Coal Co. v. Mahon*, and quoted the *Agins* language in a paragraph that weighed the public interest against the private cost to coal companies.⁸⁶ The Court's discussion of the two factors suggests that the factors do not operate independently. The Court specifically reaffirmed several early cases where the taking was total or near total, but no constitutional violation was found because the state had a particularly strong interest in regulating the activity.⁸⁷ *Hodel* rejected the takings claim in cursory fashion. The Court seemed irked that the coal companies had made a facial challenge, which "ignored this Court's oft-repeated admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision

83. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (quoting *Agins* as source of denial of all economically viable use test); *Keystone*, 480 U.S. 470, 495 (1987) (finding that enactment of Surface Mining Act did not make it commercially impracticable to continue mining bituminous coal); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981) (finding the Surface Mining Act does not categorically deny an owner from mining surface coal).

84. *Nollan*, 483 U.S. at 837.

85. *Id.* at 837-39. The California Coastal Commission conditioned the plaintiffs' right to build a new beachfront house on the plaintiffs granting the public an easement to walk across plaintiffs' beach. *Id.* at 828. The Commission thought that the new house would block the view of the ocean, and thus contribute to a "wall" of residential structures that would psychologically prevent the public from recognizing that a stretch of coastline existed nearby. *Id.* But Justice Scalia found it "quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house . . . [or] lowers any 'psychological barrier' to using the public beaches." *Id.* at 838.

The Court also concluded that the easement was a "permanent physical occupation" of the property that should automatically be considered a taking under the rule of *Loretto v. Teleprompter Manhattan CATV Corp.* *Id.* at 831-32; see *supra* notes 46-49 and accompanying text (explaining that permanent physical invasion is per se taking).

86. *Keystone*, 480 U.S. at 484-85.

87. See *id.* at 488-93 (citing to *Pennsylvania Coal*, *Agins*, and *Miller v. Schoene*, 260 U.S. 393 (1922)). The Court stated: "[We have] repeatedly upheld regulations that destroy or adversely affect real property interests." *Id.* at 489 n.18.

necessary.”⁸⁸ Adherence to this rule was particularly important in takings cases, the Court said, because it has traditionally evaluated takings claims on an ad hoc, fact specific basis.⁸⁹ The Court discussed both the strong public interest in regulating strip-mining of coal, and the fact that the statute did not deprive the coal companies of all economically viable use of their land.⁹⁰ Again, *Hodel* plainly did not adopt a categorical rule as claimed by Justice Scalia in *Lucas*.

The Court’s creation of the new categorical rule in *Lucas* clearly constitutes judicial activism. The Court expands a constitutional right and badly distorts precedent. As a practical matter, however, the rule by itself probably will not revolutionize takings jurisprudence. Even when an owner is deprived of all economically viable use of her property, to recover she must also demonstrate that her title does not already contain the restriction imposed on the property.⁹¹ Thus, if local nuisance law already proscribes a particular use of property, the state need not compensate an owner when it enacts an ordinance imposing a similar restriction.⁹² In addition, the owner must demonstrate that the regulation renders the property valueless.⁹³ As the Court recognizes in *Lucas*, such cases will be “relatively rare.”⁹⁴ Indeed, state courts can avoid the new *Lucas* rule simply by finding that the regulated property retains some residual economic value.

Perhaps realizing that the new rule might be too easily circumvented, Justice Scalia invited the lower courts to define the relevant parcel of property so as to make it easier to find a compensable total taking. He stated:

Regrettably, the rhetorical force of our “deprivation of all economically feasible use” rule is greater than its precision, since the rule does not make clear the “property interest” against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. . . . The answer to this difficult question may lie in how the owner’s reasonable expectations have been shaped by the State’s

88. *Hodel*, 452 U.S. at 294-95.

89. *Id.* at 295.

90. *Id.* at 268-69, 279-80, 296-97.

91. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (claiming that property owners should expect occasions where state power will restrict use of property).

92. *Id.* at 1028-30.

93. *Id.* at 1016.

94. *Id.* at 1018.

law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.⁹⁵

Lower courts might rely upon this language to find many more compensable takings. As John E. Fee notes, "If the relevant property interest . . . is defined narrowly enough, as for example, only those rights that have been regulated away, then a taking will always have occurred" and compensation will be required for any regulation of land.⁹⁶

While Justice Scalia does not suggest that the Court means to go this far, he ignores much case law in suggesting that the issue is an open one. In fact, the issue was fairly well-settled. In *Penn Central Transportation Co. v. New York City*, the Court held:

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole⁹⁷

Similarly, in *Andrus v. Allard*,⁹⁸ the Court held that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."⁹⁹ Whether the lower courts will accept Justice Scalia's invitation to consider the issue anew is not yet clear.¹⁰⁰ For

95. *Id.* at 1016-17 n.7. The Court goes on to state that it could avoid this difficult issue in *Lucas* because the state trial court found that the regulation left the beachfront lots without economic value. *Id.*

96. John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1536 (1994).

97. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978).

98. 444 U.S. 51 (1979).

99. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); see also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496-98 (1987) (relying on *Penn Central* and *Andrus* to reject claim that regulation requiring plaintiffs to leave 50% of their coal in place amounted to total taking of coal left in place).

100. The lower courts appear to be responding cautiously. Several courts have refused to treat a partial taking of property as a total taking of the part regulated. See, e.g., *Stephenson v. United States*, 33 Fed. Cl. 63, 69-70 (1994) (finding that flooding of property may constitute taking if it permanently impairs usefulness of property); *Naegele Outdoor Advertising, Inc. v. City of Durham*, 803 F. Supp. 1068, 1073-74 (M.D.N.C. 1992) (holding that taking of small units of property does not violate Fifth Amendment because property must be viewed in its aggregate form); *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258, 261 (Minn. Ct. App. 1992) (stating that two year moratorium that denies owner all economic use of property is not categorical taking under Fifth Amendment). But see *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179-82 (Fed. Cir. 1994) (treating 12.5 acre portion of 250 acre parcel as separate unit and ordering compensation).

our purposes, it is enough to note that for a court to state that settled law is unsettled is as activist as it is to assert that precedent establishes a rule that it does not establish. In both ways, Justice Scalia and the other Justices joining his opinion in *Lucas v. South Carolina Coastal Council* have engaged in judicial activism.

II. *BOYLE V. UNITED TECHNOLOGIES CORP.*

Lucas made new law when it extended the reach of the Takings Clause of the Fifth Amendment. But at least it made new law in an area where the Supreme Court traditionally has played a paramount role. The Court has a duty to interpret the Constitution.¹⁰¹ Moreover, the judiciary is the primary means for enforcement of constitutional rights.¹⁰²

The federal courts create common law in different ways, some of which are at least as controversial as creating new constitutional rights. Although no general federal common law exists,¹⁰³ an ever-growing body of specialized federal common law has emerged.¹⁰⁴ Judge Henry J. Friendly has identified several techniques that courts use to create common law including: "spontaneous generation as in the cases of government contracts or interstate controversies, implication of a private federal cause of action from a statute providing other sanctions, construing a jurisdictional grant as a command to fashion federal law, and the normal judicial filling of statutory interstices."¹⁰⁵ The fourth of these techniques, the courts filling in statutory interstices, is probably the least controversial because it is unavoidable. Legislators simply cannot anticipate all questions about the meaning

The Supreme Court may have recognized the danger posed by the *Lucas* language. In *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264 (1993), the Court appeared to reaffirm the traditional standards as set forth in *Penn Central*, *Andrus*, and *Keystone*. *Id.* at 2290. The facts of *Concrete Pipe* were very different, however, than cases involving partial takings of real property. In *Concrete Pipe*, the plaintiff claimed that it was denied procedural due process by an arbitration decision imposing a "withdrawal liability" when plaintiff withdrew from a multiemployer pension plan. *Id.* at 2270. Plaintiff also claimed that its "property" was taken without just compensation. *Id.* at 2290. The Court rejected plaintiff's attempt "to shoehorn its claim" into a *Lucas* total taking by asserting that "[t]he property of [plaintiff] which is taken, is taken in its entirety." *Id.* (quoting Brief for Petitioner). It remains to be seen how the Court will rule when the takings claim is not so far-fetched.

101. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819) (claiming that Supreme Court has "ultimate power" to decide constitutional questions).

102. See *Davis v. Passman*, 442 U.S. 228, 241 (1979) (explaining duty of federal courts to protect rights created by Constitution) (citing, *inter alia*, *Baker v. Carr*, 369 U.S. 186, 217 (1962)), and *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

103. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

104. See Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964).

105. *Id.* at 421.

and application of statutes.¹⁰⁶ The other three techniques, however, have been *very* controversial.¹⁰⁷

"Spontaneous generation" is a diplomatic way of saying that a court makes up the law, either out of thin air, or by borrowing it from whatever source it chooses. *Boyle v. United Technologies Corp.*¹⁰⁸ uses this technique in adopting a new federal defense that a private corporation can use to defend against a state tort claim.¹⁰⁹ In the process, the Court denied relief to the family of an airman who suffered a "tragic and unnecessary death."¹¹⁰

Boyle is an activist decision because the Court usurped Congress' role in creating the new defense. Precedent did not support the decision. Moreover, the new defense preempted previously applicable state law. *Boyle* thus trampled on two principles that are sacred to proponents of judicial restraint—separation of powers and federalism. Essentially, there are things happening in *Boyle* to upset you, no matter what your political persuasion.¹¹¹

106. See Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 717-18 (1987) (reasoning that judges may be better suited to determine appropriate remedies in particular cases).

107. The third technique, construing a jurisdictional grant as a command to fashion federal law, was employed in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). The Court construed the provisions of the Labor Management Relations Act of 1947, that gave district courts subject matter jurisdiction over suits for violation of contracts between an employer and a labor union, as a command to fashion a body of substantive law governing enforcement of collective bargaining agreements. *Id.* at 450-51. In dissent, Justice Frankfurter fumed that the Court gave the jurisdictional provision an "occult content." *Id.* at 461 (Frankfurter, J., dissenting). He criticized the Court for not seeing the separation of powers problem. *Id.* at 465 (Frankfurter, J., dissenting). He wrote:

The Court, however, sees no problem of "judicial power" in casting upon the federal courts, with no guides except "judicial inventiveness," the task of applying a whole industrial code that is as yet in the bosom of the judiciary. There are severe limits on "judicial inventiveness" even for the most imaginative judges. The law is not a "brooding omnipresence in the sky," and it cannot be drawn from there like nitrogen from the air.

Id. (Frankfurter, J., dissenting).

Several Justices have strongly criticized the traditional standards for implication of private rights of action from statutes as violating separation of powers principles. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 395-409 (1982) (Powell, J., dissenting, joined by Chief Justice Burger, Justice Rehnquist, and Justice O'Connor). According to this view, Congress alone has the power to create private rights of action. It is undemocratic for judges to do so because that circumvents the majoritarian political process. See *Cannon v. University of Chicago*, 441 U.S. 677, 743 (1979) (Powell, J., dissenting) (claiming that judicial creation of causes of action "denigrates the democratic process"). It also impermissibly extends the subject matter jurisdiction of the federal courts to disputes that Congress has not assigned to the courts. *Id.* at 745-46 (Powell, J., dissenting).

108. 487 U.S. 500 (1988).

109. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504, 511-13 (1988).

110. *Id.* at 515 (Brennan, J., dissenting).

111. For scholarly discussions of *Boyle* and its implications, see Ronald A. Cass & Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 VA. L. REV. 257 (1991); Michael D. Green & Richard A. Matasar, *The Supreme Court and the Products Liability Crisis*:

Justice Scalia wrote the opinion of the Court, joined by Chief Justice Rehnquist, and Justices White, O'Connor, and Kennedy.¹¹² The facts are as follows. David Boyle, a marine helicopter pilot, drowned when his helicopter crashed in the Atlantic Ocean during a training exercise.¹¹³ His father brought a diversity action in federal district court against Sikorsky Helicopter.¹¹⁴ The senior Mr. Boyle made two claims under Virginia tort law. First, he alleged that Sikorsky had defectively repaired the helicopter's automatic flight control system, which then malfunctioned and caused the crash.¹¹⁵ Second, he alleged that Sikorsky improperly designed an escape hatch.¹¹⁶ The hatch opened out, instead of in, thus making it impossible to open against outside water pressure.¹¹⁷ In addition, the handle of the hatch was obstructed by other equipment.¹¹⁸

A jury awarded a general verdict of \$725,000 in favor of Mr. Boyle.¹¹⁹ The court of appeals reversed and directed entry of judgment for Sikorsky.¹²⁰ As to the first claim, the court held that Mr. Boyle had failed to satisfy his burden under Virginia tort law of showing that the repair work was done by Sikorsky, rather than the Navy.¹²¹ As to the second claim, the court applied a new federal common law defense for military contractors.¹²² Under this defense,

liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.¹²³

The court held that Sikorsky satisfied these requirements.¹²⁴

Lessons from Boyle's Government Contractor Defense, 63 S. CAL. L. REV. 637 (1990); Carole A. Loftin, Note, *Expansion of the Government Contractor Defense: Applying Boyle to Vaccine Manufacturers*, 70 TEX. L. REV. 1261 (1992).

112. *Boyle*, 487 U.S. at 501. Justices Brennan, Marshall, Blackmun, and Stevens dissented. *Id.* at 515, 531.

113. *Id.* at 502.

114. *Id.*

115. *Id.* at 503.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* (relying on *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986)). The Fourth Circuit created the new defense in *Tozer* on May 27, 1986, the same day it decided *Boyle*. *Tozer*, 792 F.2d at 403; *Boyle*, 792 F.2d 413, 413 (4th Cir. 1986).

123. *Boyle*, 487 U.S. at 512.

124. *Id.*

The issue in *Boyle* was whether, in the absence of legislation by Congress, it was appropriate for the federal court to create the defense, rather than simply using Virginia tort law to determine liability.¹²⁵ *Boyle* thus raises both separation of powers and federalism concerns. Congress, rather than the courts, usually legislates substantive rights and duties, and under the *Erie* doctrine, state law generally governs tort claims and defenses.¹²⁶ Justice Scalia does not address these concerns head on. Instead, he casts the issue as one of federal court preemption of state law.¹²⁷ While this does not avoid the separation of powers and federalism concerns, it makes one thing very clear. Because preemption extinguishes state law, the plaintiff in the next case cannot avoid *Boyle* by proceeding in state court. The state court would be obliged to apply the new federal defense.¹²⁸

Justice Scalia announced two requirements for court-ordered preemption of state law. First, the field of activity must involve a "uniquely federal interest,"¹²⁹ and second, there must be either a "significant conflict" between the federal interest and the operation of state law or the application of state law would frustrate the objective of federal legislation.¹³⁰ Justice Scalia admits that the Court seldom agrees to preempt state law.¹³¹ He cites only two situations in which the Court has done so. These situations involve the obligations and rights of the United States under its contracts¹³² and the civil liability of federal officials for actions taken in the course of their duty.¹³³ In both situations, the Court has found sufficiently important federal interests to create a body of federal common law and displace state law.

Boyle is plainly distinguishable. *Boyle* does not involve the obligations or rights of the United States under its contracts. No federal

125. *Id.* at 504.

126. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

127. *See Boyle*, 487 U.S. at 504.

128. This result would not be as clear if the Court had cast the issue as an *Erie* choice of law question, and then chosen to apply federal common law rather than state law. In that instance, a state court in a subsequent case might not feel compelled to make the same choice, particularly if different facts made the balance of federal and state interests come out differently. Once preemption occurs there is no balancing left to do because federal law occupies the field.

129. *Boyle*, 487 U.S. at 507 (noting that determination that area involves "uniquely federal interest" is necessary but not sufficient reason for displacing state law).

130. *Id.* at 507 (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966) and *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979), respectively).

131. *Id.* at 504-05.

132. *See United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592 (1973) (holding that land acquisition agreement authorized by Act of Congress and to which United States is party is to be governed by federal law).

133. *See Westfall v. Erwin*, 484 U.S. 292, 295 (1988) (holding that negligent conduct by federal employees during employment is absolutely immune from state-law tort liability).

contract is at issue in the case. Nor did Mr. Boyle sue any federal officials. *Boyle* is a tort action by one private party against another.

Undeterred, Justice Scalia also asserts that suits against government contractors implicate "uniquely federal interests."¹³⁴ He states, "The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected."¹³⁵ Despite Justice Scalia's attempt to disguise it, the "uniquely federal interest" here can be expressed in one word: money.

Once Justice Scalia asserted the federal interest, it became clear that there was a conflict between that interest and the operation of state law.¹³⁶ If usual state tort principles apply, the military contractor will be held liable for its wrongdoing.¹³⁷ The contractor may then pass the extra costs on to the government by charging higher prices.¹³⁸ Thus, Justice Scalia concludes that "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced."¹³⁹

The Court's analysis is reminiscent of *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,¹⁴⁰ a diversity case familiar to most first-year law students as an important decision in the development of the modern *Erie* doctrine. In *Byrd*, the Court adopted a three-part balancing test for deciding *Erie* choice of law issues.¹⁴¹ First, a federal court is to assess whether the state rule is "bound up with the definition of the rights and obligations of the parties,"¹⁴² or is instead merely "a form and mode" of enforcing state law.¹⁴³ This inquiry is appropriate for

134. *Boyle*, 487 U.S. at 505-06.

135. *Id.* at 507.

136. *Id.* at 512.

137. *Id.*

138. *Id.* at 507.

139. *Id.*

140. 356 U.S. 525 (1958).

141. *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 536 (1958); *Byrd* was a welcome retreat from the rigid outcome determination test of *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). *York* held that an issue was "substantive," and thus state law should apply under *Erie*, if application of federal rather than state law would significantly affect the result of a case. *Id.* at 109-10. Because practically any legal rule has the potential to affect the outcome of a case, *York*, to some extent, endangered uniform application of the Federal Rules of Civil Procedure in federal courts. JOHN J. COUND ET AL., *CIVIL PROCEDURE, CASES AND MATERIALS* 387 (6th ed. 1993).

142. *Byrd*, 356 U.S. at, 536.

143. *Id.* (citing *York*, 326 U.S. at 108).

deciding how important the state rule is to the state.¹⁴⁴ Second, the court is to determine whether there are important countervailing federal interests that would be compromised if state law is applied.¹⁴⁵ Third, the court is to assess whether applying federal rather than state law will change the outcome of the case.¹⁴⁶ If it will, this factor supports application of state law.¹⁴⁷

The link between *Byrd* and *Boyle* may seem tenuous at first glance because Justice Scalia does an incomplete job of applying the *Byrd* balancing test in *Boyle*. He directly addresses only one of the three factors, namely, the strong federal interest in a rule that will give protection to military contractors.¹⁴⁸ By implication, however, the Court decides that Virginia's interest does not outweigh the federal interest. The state interest, which Justice Brennan mentions in his dissent, is not hard to identify.¹⁴⁹ Virginia wishes to protect its citizens from harm, and the immunity the Court creates "contravenes the basis tenet that individuals be held accountable for their wrongful conduct."¹⁵⁰ Justice Scalia does not discuss the third *Byrd* factor,

144. Perhaps Justice Brennan, the author of *Byrd*, was trying to express the same concerns that Justice Harlan raised in *Hanna v. Plumer*, 380 U.S. 460 (1965), when he said:

To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether substantive or procedural, is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation.

Id. at 475 (Harlan, J., concurring).

145. *Byrd*, 356 U.S. at 537-38.

146. *Id.* at 536-37.

147. *Id.* at 537-40.

148. See *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988).

149. *Id.* at 515 (Brennan, J., dissenting) (noting that Virginia tort law would have allowed compensation for Boyle's tragic and unnecessary death).

150. *Id.* at 523 (Brennan, J., dissenting) (citations omitted). There is irony here because Justice Scalia's incomplete *Byrd*-balancing mirrors Justice Brennan's truncated balancing in *Byrd* itself. In *Byrd*, the choice of law issue was whether a judge or a jury should decide whether the petitioner was a statutory employee within the meaning of the state Workers' Compensation Act and thus obliged to accept compensation rather than sue in court. *Byrd*, 356 U.S. at 527-28. State law required a judge to decide the issue; federal common law required the jury to decide. *Id.* at 533-34. Justice Brennan, in finding a strong federal interest for having the jury decide the question, stated: "An essential characteristic of [the federal judicial] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." *Id.* at 537.

Justice Brennan was unable to discover the obvious and strong state interest in having a judge decide. Plainly, if juries determine the statutory employee issue along with the merits of a case, there is a strong likelihood that their opinion on the merits would color their decision on the coverage issue. For example, pretend you are on a jury. A 55-year-old father of eight has been blinded in an industrial accident due to the gross negligence of his employer, a large corporation. You must decide whether the plaintiff was a statutory employee. If he was, you must dismiss the case and the plaintiff will be awarded \$400 a week for 60 weeks. On the other hand, if you decide he was *not* a statutory employee, you may award the plaintiff \$5,000,000. Clearly, leaving the coverage question to the jury might endanger South Carolina's workers' compensation law. In assessing the state's interest in having a judge decide the issue, Justice

perhaps because it does not support the conclusion he wants to reach. The third factor favors application of state law because application of federal law will change the outcome in many cases.¹⁵¹ In fairness to Justice Scalia, however, this factor has become less important over the years.¹⁵²

By creating a new defense that preempts state law, *Boyle* plainly compromises federalism concerns underlying the *Erie* doctrine. As Justice Brennan points out, the sweep of the Court's lawmaking at the expense of state law is breathtaking:

[The new defense] applies not only to military equipment like the CH-53D helicopter, but (so far as I can tell) to any made-to-order gadget that the Federal Government might purchase after previewing plans—from NASA's Challenger space shuttle to the Postal Service's old mail cars. The contractor may invoke the defense in suits brought not only by military personnel like Lt. Boyle, or Government employees, but by anyone injured by a Government contractor's negligent design It applies even if the Government has not intentionally sacrificed safety for other interests like speed or efficiency, and, indeed, even if the equipment is not of a type that is typically considered dangerous; thus, the contractor who designs a Government building can invoke the defense when the elevator cable snaps or the walls collapse. And the defense is invocable regardless of how blatant or easily remedied the defect, so long as the contractor missed it and the specifications approved by the Government, however unreasonably dangerous, were "reasonably precise."¹⁵³

Brennan examined an opinion of the South Carolina Supreme Court that did not express this interest. *Id.* at 535. By looking only in a place where the state interest was not expressed, Justice Brennan concluded that the state interest was slight. *Id.* at 536. The South Carolina rule was merely "a form and mode of enforcing the immunity and not a rule intended to be bound up with the definition of the rights and obligations of the parties." *Id.* (citation omitted).

Justice Scalia's treatment of the state interest in *Boyle* and Justice Brennan's treatment of the state interest in *Byrd* dramatically demonstrate the shortcoming of balancing tests that weigh several subjective factors. Such tests give judges enormous discretion to reach the result they desire based on personal or political considerations.

151. In *Boyle*, it was unclear whether the military contractor defense would have changed the outcome. The court of appeals reversed and remanded with directions that judgment be entered for the contractor. *Boyle v. United Technologies Corp.*, 792 F.2d 413, 415-16 (4th Cir. 1986), *vacated*, 487 U.S. 500 (1988). But, the Supreme Court was uncertain as to precisely what the court of appeals had decided. *Boyle*, 487 U.S. at 514. If the court of appeals decided on the record before it that no reasonable jury could rule for Boyle under a properly formulated defense, then its decision was correct. *Id.* If the court of appeals assessed on its own whether the defense was established, this was erroneous. *Id.* The court instead should have remanded to allow a jury to decide the question. *Id.*

152. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) (failing to mention "outcome determinative" test); *Hanna v. Plumer*, 380 U.S. 460, 466-67 (1965) ("Outcome-determination" analysis was never intended to serve as a talisman.") (citing *Byrd*, 356 U.S. at 537).

153. *Boyle*, 487 U.S. at 516 (Brennan, J., dissenting).

The breadth of the new defense also makes the Court's disregard of separation of powers principles particularly striking. As Justice Stevens notes in his dissenting opinion, the Court should defer to Congress when it is asked "to create an entirely new doctrine"¹⁵⁴ that involves "a balancing of the conflicting interests in the efficient operation of a massive governmental program."¹⁵⁵ Moreover, on six separate occasions, Congress declined to enact legislation creating a special defense for military contractors or providing indemnification for civil judgments.¹⁵⁶ This suggests that Congress did not want military contractors to have a special defense. While congressional inaction is not always a reliable indicator of congressional intent,¹⁵⁷ there seems to be a good reason why Congress would not want to enact the legislation—the *Boyle* defense removes a strong incentive for government contractors to design and manufacture equipment carefully.¹⁵⁸

Boyle is thus an activist decision in several ways. The Court plainly invaded the province of the states and of Congress when it created the military contractor defense. It also ignored precedent, leaving the courts to struggle with the scope of the new defense.¹⁵⁹

III. UNITED STATES V. LOPEZ

United States v. Lopez is another striking example of judicial activism. *Lopez* held that Congress' enactment of the Gun-Free School Zones Act of 1990¹⁶⁰ exceeded its power under the Commerce Clause of the Constitution.¹⁶¹ The decision departs from nearly sixty years of precedent. Indeed, prior authority flatly contradicts virtually every material assertion in Chief Justice Rehnquist's opinion.¹⁶² Thus, not

154. *Id.* at 531 (Stevens, J., dissenting).

155. *Id.* at 532 (Stevens, J., dissenting).

156. See *id.* at 515 n.1 (Brennan, J., dissenting) (listing legislation that Congress has refused to pass for government contractors).

157. See *Schweiker v. Chilicky*, 487 U.S. 412, 440 (1988) (Brennan, J., dissenting) (noting that in act where Congress failed to include remedial scheme for improper denial of Social Security disability benefits, congressional inaction was poor indicator of congressional intent).

158. One can push this argument too far, of course. Bidding for government contracts is competitive. If a product is low quality, the contractor will lose business in the future.

159. The lower courts are divided on whether the *Boyle* defense should extend to nonmilitary contractors. For a listing of the cases pro and con, see *Carley v. Wheeled Coach*, 991 F.2d 1117, 1119 n.1 (3d Cir. 1993).

160. 18 U.S.C. § 922(q)(2)(A) (1994) (forbidding "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone").

161. *United States v. Lopez*, 115 S. Ct. 1624, 1626 (1995).

162. Chief Justice Rehnquist wrote the opinion for the Court and was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. *Id.* at 1625.

surprisingly Justice Stevens chides the Court for "the radical character of [its] holding."¹⁶³

The Constitution states that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹⁶⁴ In *Gibbons v. Ogden*,¹⁶⁵ Chief Justice Marshall defined this power very broadly, stating that it encompasses not only regulation of interstate traffic or the interstate buying and selling of goods, but any "intercourse . . . between nations, and parts of nations, in all its branches."¹⁶⁶ Congress may "prescribe the rule[s] by which commerce is to be governed."¹⁶⁷ In addition, the power is plenary; it is "complete in itself, [and] may be exercised to its utmost extent, and [it] acknowledges no limitations, other than are prescribed in the constitution."¹⁶⁸

In the years following *Gibbons*, the Court had few occasions to consider the scope of Congress' affirmative power to regulate commerce.¹⁶⁹ The Court instead considered the validity of state laws that burdened or discriminated against interstate commerce.¹⁷⁰ Congress' power was challenged, however, when it began to regulate national economic life in the late 1800s and early 1900s.¹⁷¹ Decisions at that time departed from the broad view of *Gibbons*.¹⁷² The Court held that activities such as production,¹⁷³ manufacturing,¹⁷⁴ and mining¹⁷⁵ were local and that therefore Congress could not

163. *Id.* at 1651 (Stevens, J., dissenting). *Lopez* has already occasioned scholarly commentary. See Symposium, *Reflections on United States v. Lopez*, 94 MICH. L. REV. 533-831 (1995).

164. U.S. CONST., art. I, § 8, cl. 3.

165. 22 U.S. (9 Wheat.) 1 (1824).

166. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824).

167. *Id.* at 196.

168. *Id.*

169. *United States v. Lopez*, 115 S. Ct. 1624, 1627 (1995) (noting that after *Gibbons*, Court rarely addressed extent of Congress' power).

170. See *Wickard v. Filburn*, 317 U.S. 111, 121 (1942) ("During this period there was perhaps little occasion for the affirmative exercise of the commerce power, and the influence of the Clause on American life and law was a negative one, resulting almost wholly from its operation as a restraint upon the powers of the states.").

171. See *Wickard*, 317 U.S. at 121-22 (noting that after Congress' enactment of Interstate Commerce Act in 1887 and Sherman Anti-Trust Act in 1890, Supreme Court gave narrow scope to power of Congress).

172. See *id.* at 121 (detailing development of Commerce Clause jurisprudence).

173. See *Kidd v. Pearson*, 128 U.S. 1, 20, 24 (1888) (noting that no distinction is more popular or more clearly expressed "in economic and political literature, than that between manufacture and commerce," and that while manufacturing transforms raw materials into usable form, commerce constitutes buying, selling, and transportation of manufactured product).

174. See *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) ("Commerce succeeds to manufacture, and is not part of it.").

175. See *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918) (explaining that making goods and mining coal do not constitute commerce, despite fact that these things are later shipped or used in interstate commerce).

regulate them under the Commerce Clause.¹⁷⁶ Some decisions held that Congress could regulate activities affecting commerce directly, but could not regulate activities affecting commerce indirectly.¹⁷⁷ The cataclysmic economic turmoil of the 1930s swept these distinctions away as Congress, using the Commerce Clause, enacted a tidal wave of legislation to rescue the country from the Great Depression.¹⁷⁸ The Court's cramped Commerce Clause jurisprudence threatened economic recovery.¹⁷⁹ After some initial hesitation,¹⁸⁰ the Court adopted a much broader view of the commerce power.¹⁸¹

Several cases explicitly rejected both the distinction between commerce and production, mining, or manufacturing¹⁸² and the distinction between direct and indirect effects on commerce.¹⁸³ The Court held that Congress may regulate activity that affects commerce, even if that activity by itself appears wholly local or intrastate and its effect on commerce is indirect.¹⁸⁴ As the Court stated in *Wickard v.*

176. See *National Labor Relations Bd. (NLRB) v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34 (1937) (providing extensive list of cases that found activity to be local and thus beyond Congress' power to regulate under Commerce Clause).

177. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 309 (1936) (holding that statute regulating coal prices and hours and wages of miners had only "secondary and indirect" effect on interstate commerce); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935) (distinguishing between direct and indirect effect on interstate commerce as necessary to determine whether federal government may regulate intrastate commerce and noting that distinction must be made on case-by-case basis); *E.C. Knight Co.*, 156 U.S. at 16 (noting that conspiracies to control domestic enterprise only restrain external trade indirectly).

178. See Henry J. Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019, 1023-24 (1977) (providing brief summary of major enactments during 1930s).

179. See GERALD GUNTHER, *CONSTITUTIONAL LAW* 115-22 (12th ed. 1991) (stating that Court's narrow interpretation of commerce power led to invalidation of important New Deal legislation); William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 356-57 (stating that Supreme Court's narrow construction of Commerce Clause in mid-1930s placed New Deal laws in jeopardy and barred movement toward new legislation).

180. See, e.g., *Carter*, 298 U.S. at 309 (invalidating legislation as exceeding Congress' power); *Schechter*, 295 U.S. at 546 (same). These decisions provoked President's Roosevelt's plan to add additional Justices to the Supreme Court. GUNTHER, *supra* note 179, at 119, 122; Leuchtenburg, *supra* note 179, at 358-59, 375-79.

181. See generally Robert L. Stern, *The Commerce Clause and the National Economy, 1933-46*, 59 HARV. L. REV. 645 (1946) (tracing expansion of commerce power).

182. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (stating that federal power is not determined by subject of regulation); *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 40 (1937) (noting that fact that employees were engaged in production is not determinative of whether Commerce Clause applies).

183. See *Perez v. United States*, 402 U.S. 146, 151-52 (1971) (emphasizing that "activity . . . may still . . . be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this [is] irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'" (quoting *Wickard*, 317 U.S. at 125)).

184. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277 (1981) (holding that if Congress rationally determined that activity affects interstate commerce, Congress can regulate activity); *Fry v. United States*, 421 U.S. 542, 547 (1975) (holding that purely intrastate activity may be regulated by Congress when it affects commerce "among the States or with foreign nations"); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) ("The commerce power is not confined in its exercise to the regulation of commerce

Filburn.¹⁸⁵ "[Q]uestions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce."¹⁸⁶

Moreover, the Court made clear that Congress could regulate noncommercial activity as long as the activity affected interstate commerce.¹⁸⁷ In short, "[i]t is the effect upon commerce, not the source of the injury, which is the criterion."¹⁸⁸ In addition, the Court held that Congress could regulate a class of activities that affected commerce and that individuals who violated the regulations could be sanctioned without any specific proof that their actions affected commerce.¹⁸⁹ Finally, the Court adopted a very deferential standard of review. The Court would uphold legislation if Congress had a rational basis for concluding that a regulated activity affected interstate commerce,¹⁹⁰ regardless of whether Congress made specific factual findings demonstrating the connection.¹⁹¹

among the states. It extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end."); *United States v. Darby*, 312 U.S. 100, 118 (1941) (holding that Congress has power to regulate intrastate commerce affecting interstate commerce).

185. 317 U.S. 111 (1942)

186. *Wickard v. Filburn*, 317 U.S. 111, 120 (1942); see also *Wrightwood Dairy*, 315 U.S. at 121 (recognizing that one need not be engaged in interstate commerce in order to be subject to regulation).

187. See, e.g., *Perez*, 402 U.S. at 156-57 (holding that Congress can regulate loan-sharking under Commerce Clause because activity affects interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) ("That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid."); *Wickard*, 317 U.S. at 125 ("But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . .").

188. *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 32 (1937) (citations omitted).

189. See *Hodel*, 452 U.S. at 277 (stating that wholly intrastate activity can be regulated where activity, combined with similar activity by others, affects interstate commerce); *Perez*, 402 U.S. at 152 (holding that when class of activities is properly regulated, particular intrastate activity may be regulated without proof that it affected commerce); *Katzenbach v. McClung*, 379 U.S. 294, 304-05 (1964) (holding that absence of direct evidence connecting discriminatory restaurant service with flow of food in interstate commerce was not a crucial matter).

190. See *Hodel*, 452 U.S. at 276 (holding that Congress rationally determined that regulating surface coal mining was necessary to protect interstate commerce from its adverse effects); *Katzenbach*, 379 U.S. at 304 (determining that Congress had rational basis for finding racial discrimination in restaurants had adverse effect on flow of interstate commerce); *Heart of Atlanta Motel*, 379 U.S. at 261-62 (holding that Congress reasonably determined that racial discrimination has disruptive effect on commerce and thus Congress, under Commerce Clause, could prohibit racial discrimination in places of public accommodation).

191. See *Perez*, 402 U.S. at 156-57 ("Congress need [not] make particularized findings in order to legislate."); *Katzenbach*, 379 U.S. at 299 (noting that "no formal findings were made, which of course are not necessary").

This was the law when the Court decided *United States v. Lopez*. Alfonso Lopez, Jr., came to school in San Antonio, Texas, carrying a handgun and bullets.¹⁹² When school authorities discovered the gun, Lopez was arrested and charged with violation of state law.¹⁹³ The next day the federal government filed additional charges under the Gun-Free School Zones Act of 1990, which made it a federal crime "for any individual knowingly to possess a firearm at a place that the individual knows . . . is a school zone."¹⁹⁴ Lopez moved to dismiss the case on the ground that the statute exceeded Congress' authority under the Commerce Clause.¹⁹⁵ The district court denied the motion and Lopez was convicted after a bench trial and sentenced to six months in prison and two years supervised release.¹⁹⁶ The court of appeals, however, accepted Lopez's Commerce Clause defense and reversed.¹⁹⁷ The Supreme Court granted certiorari,¹⁹⁸ and affirmed.¹⁹⁹

The Court begins its opinion by briefly, and quite accurately, tracing the doctrinal developments in Commerce Clause jurisprudence, pausing only to mention that there are *some* limits on Congress' commerce power.²⁰⁰ The Court accepted the categorization of Commerce Clause cases²⁰¹ set forth in *Perez v. United States*.²⁰² Under this framework, Congress may regulate (1) the "use of the channels of interstate or foreign commerce which Congress deems are being misused;" (2) the "instrumentalities" of interstate commerce, or "persons or things in commerce;" and (3) activities "affecting" interstate commerce.²⁰³ The *Lopez* opinion becomes very strained, however, when the Court turns to consider Congress' power

192. *United States v. Lopez*, 115 S. Ct. 1624, 1626 (1995).

193. *Id.*

194. 18 U.S.C. § 922(q)(2)(A) (1994).

195. *Lopez*, 115 S. Ct. at 1626.

196. *Id.*

197. *Id.*

198. *United States v. Lopez*, 2 F.3d 1342 (5th Cir.), *cert. granted*, 114 S. Ct. 1536 (1994).

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

200. *Id.* at 1628-29. The Court also notes, fairly enough, that the rational basis test contemplates that in some instances the Court may find that Congress did *not* have a rational basis for concluding that a regulated activity affected interstate commerce. *Id.* at 1629 n.2.

201. *Id.* at 1629.

202. 402 U.S. 146, 150 (1971).

203. *Perez v. United States*, 402 U.S. 146, 150 (1971). Both the Chief Justice in the majority opinion and Justice Breyer in dissent in *Lopez* note that the Court has sometimes used the word "substantially" and sometimes not used it in defining the third category. 115 S. Ct. at 1630; *id.* at 1657 (Breyer, J., dissenting). In *Lopez*, the majority opts to require a substantial effect on commerce, while Justice Breyer would require only a "significant" effect. Compare *id.* at 1630 (majority opinion) with *id.* at 1657 (Breyer, J., dissenting).

to enact the Gun-Free School Zones Act. The Chief Justice seems to be paddling upstream against a strong current.

Chief Justice Rehnquist admits that the Court has upheld "a wide variety of congressional Acts regulating intrastate economic activity where [it has] concluded that the activity substantially affected interstate commerce."²⁰⁴ The Chief Justice cites five cases in support of this proposition: "Examples include the regulation of intrastate coal mining, intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests, and production and consumption of home-grown wheat."²⁰⁵ This body of precedent poses a formidable problem for the Court because guns in schools affect interstate commerce at least as much as the activities regulated in these other cases. Chief Justice Rehnquist deals with the cases by attempting to distinguish *Wickard v. Filburn* and wholly ignoring the others.²⁰⁶

Chief Justice Rehnquist's attempt to distinguish *Wickard* is unconvincing on the facts and flatly contradicts existing law. *Wickard* upheld economic regulation of local, intrastate activity that had very little effect on interstate commerce. Filburn was an Ohio farmer.²⁰⁷ Each year he grew a small crop of winter wheat.²⁰⁸ He sold a portion, fed part to poultry and livestock, used some to make flour for home consumption, and kept the rest for seed.²⁰⁹ Congress enacted the Agricultural Adjustment Act of 1938²¹⁰ to control the amount of wheat grown in the United States in order to avoid surpluses and shortages and to help maintain consistent prices.²¹¹ Filburn was allotted only 11.9 acres for 1941, but he planted twenty-three acres.²¹² Ultimately, a penalty was imposed.²¹³ Filburn refused to pay, and sued to enjoin enforcement of the penalty.²¹⁴

In a portion of the *Wickard* opinion quoted by Chief Justice Rehnquist, the Court explained that Filburn's activity affected interstate commerce because the variability and volume of home-grown wheat, if left unregulated, would have a substantial influence

204. *Lopez*, 115 S. Ct. at 1630.

205. *Id.* at 1630 (citing *Hodel*, *Perez*, *Katzenbach*, *Heart of Atlanta Motel*, and *Wickard*) (citations omitted).

206. *See id.*

207. *Id.* at 114.

208. *Id.*

209. *Id.*

210. 7 U.S.C. § 1281 (1994).

211. *Wickard*, 317 U.S. at 115.

212. *Id.* at 114.

213. *Id.* at 115.

214. *Id.* at 113-15.

on price and market conditions: "[I]f we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market."²¹⁵ Thus, home-grown wheat affected interstate commerce by competing with wheat in commerce.²¹⁶

The Chief Justice distinguishes *Wickard* in *Lopez* on the ground that the Agricultural Adjustment Act regulated economic activity, while the Gun-Free School Zones Act "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise."²¹⁷ The Act is not a part of a larger regulation of economic activity that, when viewed in the aggregate, substantially affects interstate commerce.²¹⁸

This analysis has several problems. First, *Wickard* did not necessarily view Filburn's activity as commerce. In a portion of the *Wickard* opinion quoted earlier by Chief Justice Rehnquist, the Court states: "But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce"²¹⁹ Second, as *Wickard* and later cases make clear, there is no requirement that the activity regulated be commercial or economic activity.²²⁰ The Court has stated, "It is the effect upon commerce, not the source of the injury, which is the criterion."²²¹ Third, guns in schools affect commerce as much as growing wheat for home consumption. As Justice Breyer explains in his dissenting opinion, "the problem of guns in schools is widespread and extremely serious."²²² School violence significantly interferes with education.²²³ In the modern economy, education is essential to success.²²⁴ Moreover, a badly educated populace cannot compete effectively with workers from other countries.²²⁵ Why "is it not . . .

215. *United States v. Lopez*, 115 S. Ct. 1624, 1630 (1995) (quoting *Wickard*, 317 U.S. at 128).

216. *Lopez*, 115 S. Ct. at 1630.

217. *Id.* at 1630-31.

218. *Id.*

219. *Wickard*, 317 U.S. at 125.

220. See *supra* notes 187-88 and accompanying text (discussing congressional regulation of noncommercial activity).

221. *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 32 (1937) (citing *Second Employers' Liability Cases*, 223 U.S. 1, 51 (1911)). See Louis H. Pollack, Symposium: *Foreword: Reflections on United States v. Lopez*, 94 MICH. L. REV. 533, 547 (1995) ("From a constitutional perspective, the important question should be whether the activity sought to be regulated has a substantial effect on commerce—in other words, a substantial 'economic' effect—not whether the activity is itself 'economic.'").

222. *Lopez*, 115 S. Ct. at 1659 (Breyer, J., dissenting).

223. *Id.* (Breyer, J., dissenting).

224. *Id.* at 1659-60 (Breyer, J., dissenting).

225. *Id.*

obvious," Justice Breyer asks, "that a widespread, serious, and substantial physical threat to teaching and learning also substantially threatens the commerce to which that teaching and learning is inextricably tied?"²²⁶

In addition, the activities regulated in the other cases that Chief Justice Rehnquist cites, but does not discuss, have no greater effect on interstate commerce than guns in schools. The effect is different in each of the cases, but not necessarily more substantial than in *Lopez*. The statute in *Hodel v. Virginia Surface Mining & Reclamation Ass'n* regulated intrastate strip mining.²²⁷ Strip mining destroys or diminishes the value of the land for both commercial and noncommercial purposes.²²⁸ It also causes water pollution, which may affect other states.²²⁹ Strip mining's effect on interstate commerce, however, is no more direct than the effect of guns in schools. In addition, the statute upheld in *Perez*²³⁰ is very similar to the statute overturned in *Lopez*. The Consumer Credit Protection Act outlawed loan-sharking.²³¹ Loan sharks typically lend money to individuals at very high-interest rates, and use violence or threats of violence as a method of collection.²³² *Perez* was convicted of a wholly intrastate crime. He loaned money to the owner of a new butcher shop, and then made very ugly threats to try to get back the loan plus substantial additional moneys.²³³ The Court upheld the law on the theory that extortionate credit transactions help fund organized crime.²³⁴ Because organized crime affects interstate and foreign commerce, Congress could regulate loan-sharking.²³⁵ Distinguishing *Perez* from *Lopez* is difficult. Why do threats to a local businessman have more effect on interstate commerce than carrying a gun in school? In addition, loan-sharking in the aggregate probably does not affect interstate commerce more substantially than the overall incidence of guns in schools.

226. *Id.* at 1660 (Breyer, J., dissenting); see also *id.* at 1651 (Stevens, J., dissenting) (agreeing with Justice Breyer).

227. *Hodel v. Virginia Surface & Mining Reclamation Ass'n*, 452 U.S. 264, 268-72 (1981) (analyzing Surface Mining Act, 30 U.S.C. §§ 1201-1328).

228. *Id.* at 277.

229. *Id.* at 279-80.

230. *Perez v. United States*, 402 U.S. 146, 147 (1971) (analyzing Consumer Credit Protection Act, 18 U.S.C. § 891).

231. 18 U.S.C. § 891 (1994).

232. *Perez*, 402 U.S. at 147-48.

233. *Id.* at 148.

234. *Id.*

235. *Id.* at 149-50, 154-57.

*Heart of Atlanta Motel, Inc. v. United States*²³⁶ and *Katzenbach v. McClung*²³⁷ upheld provisions of the Civil Rights Act of 1964 that require hotels and restaurants to provide lodging²³⁸ and meals²³⁹ to African Americans. In both cases, the Court held that local racial discrimination affected interstate commerce because it deterred blacks from traveling interstate.²⁴⁰ While the impact on interstate commerce may be more direct than in *Lopez*, it does not seem more substantial.

Finally, Chief Justice Rehnquist's attempt to distinguish between commercial and noncommercial activity in defining congressional power is unworkable. He acknowledges the problem: "Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty."²⁴¹ The problem is highlighted by Justice Kennedy's concurring opinion where he characterizes the activities regulated in *Perez*, *Heart of Atlanta*, and *Katzenbach* as commercial²⁴² and the activity regulated in *Lopez* as noncommercial.²⁴³ While threatening someone to get them to repay a debt or turning a black person away from a restaurant or motel because of their race may arguably be more "economic" or "commercial" than possessing a gun in a school, the distinction is a subtle one, particularly when the gun may be used to rob fellow students. In addition, the commercial-noncommercial distinction is reminiscent of the content-based or subject matter distinctions that the Court used in an earlier era and abandoned as unworkable.²⁴⁴ It is unlikely that the new distinction will work any better than the old distinctions between commerce and manufacturing, production, or mining.²⁴⁵

236. 379 U.S. 241 (1964).

237. 379 U.S. 294 (1964).

238. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964).

239. *Katzenbach v. McClung*, 379 U.S. 294, 297 (1964).

240. *Heart of Atlanta Motel*, 379 U.S. at 252-53; *Katzenbach*, 379 U.S. at 300.

241. *United States v. Lopez*, 115 S. Ct. 1624, 1633 (1995). Professor Donald H. Regan has called Chief Justice Rehnquist's attempt to distinguish between commercial and noncommercial activities that affect commerce "an unsupported and ill-considered gloss on an already misguided theory." See Donald H. Regan, *How to Think About the Federal Commercial Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 555 (1995).

242. *Lopez*, 115 S. Ct. at 1637 (Kennedy, J., concurring).

243. *Id.* at 1638, 1640 (Kennedy, J., concurring).

244. See *supra* notes 183-86 and accompanying text (discussing cases rejecting distinction between commerce and production, mining, and manufacturing).

245. Justice Kennedy admits that the content-based distinctions proved unworkable, *Lopez*, 115 S. Ct. at 1635 (Kennedy, J., concurring), and states that the "lesson" applicable in the *Lopez* case "is the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause." *Id.* at 1637 (Kennedy, J., concurring).

Chief Justice Rehnquist next argues that the Gun-Free School Zones Act "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."²⁴⁶ As an example of such a provision, he cites a former federal statute that made it a crime for a felon to "receiv[e], posses[s], or transpor[t] in commerce or affecting commerce . . . any firearm."²⁴⁷ There are at least two major problems with this argument. First, the Chief Justice may be confusing his categories. As noted above, the Court lists three categories of activities that Congress may regulate under the commerce power.²⁴⁸ If a gun moves in interstate commerce, Congress clearly can regulate it under the second category of "persons or things [that move] in interstate commerce."²⁴⁹ Activities that affect interstate commerce constitute a separate, third category,²⁵⁰ and the Court has not required that regulated items in this category cross state lines.²⁵¹ Second, and perhaps more serious, the Chief Justice simply ignores the well-established line of cases holding that Congress may regulate a *class of* activities affecting commerce.²⁵² The government may then sanction individuals who violate the regulations without any specific proof that the individual's actions affected interstate commerce.²⁵³ Thus, as long as guns in schools in the aggregate affect commerce, it should not matter that the statute did not require the government to prove that Lopez's possession of a gun affected commerce.

Chief Justice Rehnquist next cites the lack of specific congressional findings describing the effect of guns in schools on interstate commerce as a ground for invalidating the statute.²⁵⁴ The Chief Justice again contradicts well-established precedent in using the absence of findings in this way. Past cases asked only whether Congress could rationally conclude that the regulated activities affect

246. *Id.* at 1631.

247. *Id.* (quoting former 18 U.S.C. § 1202(a)).

248. See *supra* notes 202-03 and accompanying text (stating that Congress may regulate use of channels of interstate commerce, persons or things that move in commerce, and activities affecting commerce).

249. *Lopez*, 115 S. Ct. at 1629.

250. *Id.* at 1629-30; *Perez v. United States*, 402 U.S. 146, 150 (1971).

251. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 305 (1981) (upholding regulation of strip-mined coal without any requirement that coal move in interstate commerce); *Wickard v. Filburn*, 317 U.S. 111, 129 (1942) (upholding regulation of home-grown wheat that never left farm).

252. See *supra* note 189 and accompanying text (discussing line of cases).

253. See *supra* note 189 and accompanying text (discussing liability of class member without proof action affected commerce).

254. *Lopez*, 115 S. Ct. at 1631.

commerce, and did not require Congress to make formal findings.²⁵⁵ Chief Justice Rehnquist says that he agrees with this standard²⁵⁶ but then tries to avoid it by saying "to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."²⁵⁷ Although the effect may not be visible to the "naked eye," it should be apparent to an open mind, particularly when both the government and Justice Breyer explain the effect.²⁵⁸

The Court then goes on to discuss the effect of guns in schools on interstate commerce, but does not come back to the findings issue.²⁵⁹ Instead, it makes a "parade of horrors" argument. If we accept Justice Breyer's argument, says the Court, placing any limits on congressional power to regulate American life under the Commerce Clause would become impossible.²⁶⁰ The Court contends, for example, that Justice Breyer's argument would also permit direct regulation of local schools and of family life.²⁶¹ The Court may be correct. School curricula and family child-rearing practices arguably affect the national economy as substantially as do guns in schools. Nonetheless, the Court's decision to draw the line where it does inevitably appears arbitrary and is inconsistent with precedent. The Court recognizes the line-drawing problem.²⁶² But it concludes that the Gun-Free School Zones Act impermissibly erodes the distinction between "what is truly national and what is truly local."²⁶³

Lopez may simply reflect the Court's alarm at the increasing federalization of state criminal law. Chief Justice Rehnquist argues forcefully that the States possess the primary authority for enforcing the criminal law: "When Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'"²⁶⁴

255. See *supra* notes 190-91 and accompanying text (discussing rational basis analysis of Commerce Clause regulation).

256. *Lopez*, 115 S. Ct. at 1631.

257. *Id.* at 1632.

258. See *id.* at 1659-63 (Breyer, J., dissenting) (explaining firearm possession and its effect on interstate commerce). But see *id.* at 1632-33 (criticizing Justice Breyer's argument that firearm possession threatens interstate commerce).

259. *Id.* at 1632.

260. *Id.* at 1633-34.

261. *Id.*

262. See *id.* (admitting imprecision of Commerce Clause jurisprudence).

263. *Id.*

264. *Id.* at 1631 n.3 (quoting *United States v. Emmons*, 410 U.S. 396, 411-12 (1973) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971))).

The federalization of state criminal law is alarming.²⁶⁵ But should the Court try to reverse the trend, or leave the matter to Congress? The Court also may be using a bludgeon rather than a scalpel to accomplish its goal. The commerce power, as interpreted over the last two generations, underlies a broad range of legislation. Much of it has little to do with criminal law. Is it wise to unsettle sixty years of understandings and expectations concerning such an important constitutional provision simply to keep some gun possession cases out of federal court?²⁶⁶ Reasonable minds may differ as to whether the Court's decision is correct, but it is plain that the activist Rehnquist Court takes matters into its own hands in *Lopez*.²⁶⁷

CONCLUSION

This Article contends that the current Supreme Court is extremely activist. Together, *Lucas*, *Boyle*, and *Lopez* clearly support this contention. *Lucas* created a new rule of law, and in the process, badly distorted precedent. The Court also reached out to hear the case even though it may not have been ripe for review. *Boyle* usurped Congress' role by legislating a new federal contractor defense to state tort claims. Precedent did not support the decision. Moreover, the new defense preempted previously applicable state law. *Boyle* thus offended both separation of powers and federalism principles. *Lopez* held that the Gun-Free School Zones Act of 1990 exceeded Congress' power under the Commerce Clause. The decision departs from

265. The practice has been very controversial. Critics charge that it invades the province of the states, involves the federal government in crimes of scant federal concern, and overburdens the federal courts. See generally Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 983-96 (1995) (discussing impact of expansion of federal criminal jurisdiction); Donald H. Zeigler, *Twins Separated at Birth: A Comparative History of the Civil and Criminal Arising Under Jurisdiction of the Federal Courts and Some Proposals for Change*, 19 VT. L. REV. 673, 772 (1995) (discussing criticism of congressional expansion of federal criminal jurisdiction).

266. Professor Deborah Jones Merritt assesses the treatment of *Lopez* by the lower courts in *Commerce!*, 94 MICH. L. REV. 674, 712-28 (1995).

267. See 115 S. Ct. 1624, 1642 (Thomas, J., concurring) (noting that Court is "drifting" from original understanding of Commerce Clause). Justice Thomas' extraordinary concurring opinion makes the majority opinion look like a model of judicial restraint. Justice Thomas wants to turn the clock back to the nineteenth century. He would adopt the old distinction between mining, manufacture, and production, on the one hand, and commerce on the other. *Id.* at 1643. He also would abandon the substantial effects test "as but an innovation of the 20th century," *id.* at 1648, that "appears to grant Congress a police power over the Nation," *id.* at 1649. In addition, Thomas rejects the "class of activities" standard because he believes it allows Congress to regulate "whole categories of activities that are not themselves either 'interstate' or 'commerce.'" *Id.* at 1650. Justice Thomas believes that the Court's "wrong turn" was its "dramatic departure in the 1930s from a century and a half of precedent." *Id.* at 1649. Accordingly, he concludes that the Court must modify its Commerce Clause jurisprudence. *Id.*

nearly sixty years of precedent, and badly unsettles the understandings of an important constitutional provision.

This Article simply sought to demonstrate the Court's new activism, and not to explore the legitimacy or wisdom of this course. As the Court continues to render what appear to be overtly political, result-oriented decisions, one wonders whether some more neutral principles of adjudication would not be preferable. Perhaps Herbert Wechsler was right when he urged the Court to render decisions that rest "on reasons that in their generality and their neutrality transcend any immediate result that is involved."²⁶⁸

268. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

