CASE NOTE*

UNITED STATES v LOPEZ: CONSTITUTIONAL INTERPRETATION IN THE UNITED STATES AND AUSTRALIA

> For want of a nail, a shoe was lost; for want of a shoe, a horse was lost; for want of a horse, a battle was lost; and for want of a battle, the war was lost. Does Congress' power to declare war give it the authority to regulate nails.[1]

I. INTRODUCTION

The highly publicised case of *United States v Alfonso Lopez*,[2] ("*Lopez*") raises important issues for both US and Australian constitutional law. In particular, issues are raised about future interpretation of the Commerce power in the US and in Australia, as well as the significance and effect of parliamentary findings of fact in both jurisdictions.

On 10 March 1992, Alfonso Lopez, a student at Edison High School in Texas, brought a .38 calibre handgun with ammunition to school, allegedly with the intention of selling the gun to another student. The gun was concealed, but the school authorities (acting on an anonymous tip) confronted Lopez who admitted that he was carrying the weapon.

Lopez was originally charged with firearm possession on school premises under a Texas state statute,[3] but these charges were subsequently replaced with a

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1 P Kamenar, "*US v Lopez*" *Legal Times*, 8 May 1995, p 25.

2 (April, 1995) 63(5) *The United States Law Week* at 4343.

3 See Tex. *Penal Code Ann.* §46.03(a)(1)(Supp 1994).

complaint that Lopez had violated the federal *Gun-Free School Zones Act* 1990,[4] which made it an offence for anyone to bring a gun within 1 000 feet of a school.

The accused was indicted by a federal grand jury on a charge of knowingly possessing a firearm at a place which the accused knew to be a school zone, in violation of §922(q). The accused moved that the indictment be dismissed on the ground that §922(q) was beyond Congressional power, as the federal government does not have power over public schools. At first instance, the Court denied the motion, holding that §922(q) was within Congress' "well-defined power to regulate activities in and affecting commerce". Subsequently, the accused was found guilty and sentenced to six months imprisonment.

On appeal, the accused again argued that the provision under which he was convicted was beyond Congressional power to legislate under the Commerce Clause. (Art I, §8, cl 3). The Court of Appeals for the Fifth Circuit accepted his argument and reversed the conviction. The Court held that §922(q) was beyond the power of Congress under the Commerce Clause, particularly in view of the lack of Congressional findings underpinning the nexus between the subject matter of the provision and the Commerce Clause.[5] Subsequently the Supreme Court granted certiorari.[6]

A. Summary of the Decision

The US Supreme Court, in a bitterly divided 5-4 decision, voted to affirm the Court of Appeal's decision, holding that §922(q) of the *Gun-Free School Zones Act* was invalid as being beyond the valid legislative power of Congress under the Commerce Clause.

Five opinions were delivered. The opinion of the Court was written by Chief Justice Rehnquist, who was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justices Kennedy and Thomas both filed concurring opinions. The lead dissenting opinion was authored by Justice Breyer, who was joined by Justices Stevens, Souter, and Ginsberg. Justices Stevens and Souter each filed a dissenting opinion.

While it was somewhat predictable that Justices Breyer and Ginsberg (both of whom were appointed by President Clinton) were in dissent, that they were joined by two of the swing votes of the Court, Justice Stevens (the only Justice appointed by President Ford) and Justice Souter (appointed by President Bush), evidences the closeness of the decision.[7]

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4 18 USC §922(q)(1)(A) (1988 ed, Supp V).

5 Court of Appeals, Fifth Circuit, 2 F.3d 1342 (1993).

6 511 US (1994). It should be noted that shortly after the United States Court of Appeal for the Fifth Circuit overturned the trial judgment in the *Lopez* case, the United States Court of Appeal for the Ninth Circuit held in the case of *United States v Edwards* that the *Gun-Free School Zones Act* was constitutionally within the ambit of Congress' power, thus giving rise to an intercircuit conflict. This intercircuit conflict may have motivated the Supreme Court to grant certiorari to hear the *Lopez* appeal.

7 All of the members of the majority were appointed by Republican Presidents, Chief Justice Rehnquist having been appointed by President Nixon (elevated to the Chief's position by President Reagan), Justices O'Connor, Scalia, and Kennedy all appointed by President Reagan, and Justice Thomas appointed among great controversy by President Bush. For a detailed examination of Justice Thomas' appointment see T Phelps and H Winternitz, *Capitol Games*, Harper Collins (2nd ed, 1993).

B. Reaction to the Decision

In the United States, gun-control is always a very controversial issue. The might of the National Rifle Association coupled with the words of the second amendment to the US Constitution has led to great resistance to regulation of firearms. Nonetheless, against a backdrop of increasing violence and gun use, especially among teenagers, in 1990 the US Congress enacted the *Gun-Free School Zones Act*.

Despite the extreme positions that are common in the gun-control debate, this Act was relatively uncontroversial. After all, who really believes (and is willing to speak up) that students *should* be allowed to bring guns to school?

It thus came as a great shock to the American people when the US Supreme Court found that the *Gun-Free School Zones Act* was beyond Congressional power granted under the Commerce Clause and thus invalid as infringing the US Constitution. The *Lopez* case was the first time in almost 60 years that the US Supreme Court had struck down federal legislation on the basis that it exceeded the scope of the Commerce Clause.

The case immediately led to a great deal of discussion and debate in the US news media. *USA Today*, the highest circulation national daily in the United States, argued in its editorial that "...gimmicks like gun-free school zones [do] nothing to curb school violence".[8] This view was not echoed by others in the news media.[9]

On close analysis, this case was not another round in the conservative/liberal gun-control debate, but rather raises issues of fundamental importance in both the United States and Australia about the nature of a federal State and the limitations on the grant of power made to the central government to legislate for the nation's trade and commerce. Moreover, *Lopez* raises important issues as to the balance between the Judiciary and the Legislature and the notion of a separation of powers.

The significance of *Lopez* in this context has been quickly recognised by American legal scholars. For example, Harvard Law Professor Lawrence H Tribe described the decision as a "dramatic move by the Court" but noted that "if ever there was an act that exceeded Congress' Commerce Power, this was it".[10] Others have suggested that this case should be viewed as an "important reaffirmation of federation principles",[11] slowing the constantly expanding exercise of federal power.

What is not yet clear is what enduring effect *Lopez* will have on American constitutional law: some argue that the *Lopez* decision is the beginning of a fundamental shift in the US Supreme Court's approach - a "constitutional moment", in the words of Yale Law Professor Bruce Ackerman.[12] Others suggest

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8 Editorial, *USA Today* (International Edition), 4 May 1994, p 5A.

9 See "The Supreme Court", *Economist*, 6 May 1995, p 29; Editorial, *New York Times*, 2 May 1995, p 13; Editorial, *Time*, 8 May 1995, p 85; Editorial, *Washington Post*, 27 April 1995, p 1.

10 Editorial, *Washington Post*, 27 April 1995, p A01.

11 Note 1 *supra* at p 25.

12 K Fedarko, "A Gun Ban is Shot Down" *Time*, 8 May 1995, p 14.

that *Lopez* is merely a one-off aberration - what another Yale Law Professor, Michael Graetz, describes as a "constitutional minute".[13]

In Part II, this note will summarise the judgments in *Lopez*. Commentary will be provided in Part III, focusing first on the Commerce Clause and then on the use of legislative findings in constitutional cases. Part IV will provide a comparison with Australian constitutional law.

II. THE COURT'S JUDGMENTS

A. The Majority Opinions

(i) Chief Justice Rehnquist[14]

The Court's opinion in the *Lopez* case was delivered by Chief Justice Rehnquist. He began by identifying the three main areas where Congress is competent to legislate under the commerce power:

> First, Congress may regulate the use of the channels of interstate commerce... Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce... Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce...[15]

Chief Justice Rehnquist then commented that "admittedly, our case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause".[16] However, with brief analysis of the case law on this point, Chief Justice Rehnquist reached the conclusion that the appropriate test is that the "regulated activity must have a 'substantial effect' on interstate commerce".[17]

It is this substantial effect test which forms the linchpin of Chief Justice Rehnquist's judgment. He noted that the *Gun-Free School Zones Act* is essentially a criminal statute which, on its face, has nothing to do with interstate commerce.[18]

Chief Justice Rehnquist then expressly rejected the US Government's central argument that guns create violent schools, which in turn threaten the learning environment, which in turn leads to less educated citizens, which in turn has an adverse effect on national economic well-being. His view of this argument was concisely summarised when he said:

> Under the theories which the government presents it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.[19]

Chief Justice Rehnquist, concluded his observations on the Commerce Clause with the following comments:

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13 *Ibid.*
14 Justices O'Connor, Scalia, Kennedy and Thomas joined.
15 Note 2 *supra* at 4346.
16 *Ibid.*
17 *Ibid.*
18 *Ibid.*
19 *Ibid* at 4347.

> The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce... To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Power to a general police power of the sort retained by the States.[20]

Chief Justice Rehnquist expressed concern about the lack of Congressional findings as to the effect that the activity in question has on interstate commerce. Plainly in his view, the existence of such findings would have made it substantially easier for Congress to show the necessary nexus between the regulated activity and interstate trade.

(ii) Justice Kennedy Concurring[21]

Justice Kennedy's judgment took a more historical overview of the Commerce Clause power, and analysed the case law in considerable depth. However, he relied on the same two elements that the Chief Justice considered to be critical in his judgment:

> The statute before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of the term... Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, the inference contradicts the federal balance the Framers designed and this Court is obliged to enforce.[22]

That is, Justice Kennedy was also deeply concerned with, first, a broad interpretation of the Commerce Clause resulting in a reduction of the scope of the exclusive State legislative domain, and second, the *sine qua non* of a rational connection between the legislation in question and interstate commerce. However, unlike the Chief Justice, Justice Kennedy refrained from debating the semantics of the substantial effect test, and preferred a more pragmatic, common-sense based test: "the realm of commerce in the ordinary and usual sense of the term".

(iii) Justice Thomas Concurring

Justice Thomas delivered the final majority judgment, displaying the most rigorous legal analysis of the majority judgments. His judgment is arguably the most socially 'conservative' but also the most legally radical. After commencing with a detailed historical review of the case law, Justice Thomas tackled the substantial effect test issue directly, concluding that:

> My review of the case law indicates that the substantial effects test is but an innovation of the 20th century.[23]

However, having made this point, Justice Thomas did not try to distinguish or otherwise deal with post 1930s case law, other than to say that the US Supreme Court in the 1930s and 1940s made a "wrong turn" in departing "from a century

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20 *Ibid* at 4348.

21 Justice O'Connor joined.

22 Note 2 *supra* at 4353

23 *Ibid* at 4357.

and a half of precedent".[24] Justice Thomas's prescription was simple: he expressly overruled the case law since the 1930s, particularly the substantial effect test, and suggested a return to a principle of limited Commerce Clause power more consistent with "the original understanding of the Constitution".[25]

In contrast to the other majority judgments, Justice Thomas also attempted to grapple with the theoretical underpinnings of the substantial effect test. Rather than merely holding that the presence of guns in school did not substantially effect interstate commerce, as the rest of the majority did, Justice Thomas identified what he considered to be the theoretical flaw with the substantial effect test and, on this basis, advocated completely overturning the substantial effect test.

Justice Thomas observed:

> The substantial effects test suffers...because of its 'aggregation principle'... In applying the effects test, we ask whether the class of activities as a whole substantially effects interstate commerce, not whether any specific activity within the class has such effect when considered in isolation... The aggregation principle is clever, but has no stopping point... One can always draw the circle broadly enough to cover an activity that, when taken in isolation, would not have a substantial effect on commerce.[26]

Like the other majority judges, Justice Thomas also voiced his concerns that a widely interpreted Commerce Clause "appears to grant Congress a Police Power over the Nation",[27] although, unlike the other majority judgments, this did not occupy a focal point in his reasoning.

B. The Dissenting Opinions

(i) Justice Breyer[28]

Justice Breyer delivered the leading dissentient judgment, with Justice Ginsberg concurring. Justice Breyer based his decision squarely on the application of the substantial effect test.

Justice Breyer began by endorsing the aggregation principle which Justice Thomas had rejected:

> ...in determining whether a local activity will likely have an effect upon interstate commerce, a court must consider, not the effect of an individual act (a single instance of gun possession), but rather the cumulative effect of all similar instances (that is: the effect of all guns possessed in or near schools).[29]

Justice Breyer then discussed in detail a constitutional interpretation principal which the majority judgments did not deal with in much detail: the "rational basis" test.[30] Justice Breyer observed that the relevant legal question was not whether the regulated activity itself had a substantial effect on interstate commerce, but whether the Congress could, from an objective point of view, be said to have had a

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24 *Ibid* at 4348.
25 *Ibid.*
26 *Ibid* at 4358.
27 *Ibid.*
28 Justices Stevens, Souter and Ginsberg joined.
29 Note 2 *supra* at 4362.
30 Although this was implicit in the majority judgments - see comments above in relation to Justice Kennedy's judgment particularly.

rational basis for concluding that the regulated activity substantially affected interstate commerce.[31]

On this basis, Justice Breyer analysed whether Congress had a rational basis for finding that gun-control in schools would have a significant effect on interstate commerce. Essentially, Justice Breyer accepted the Government's key arguments: first, he found from surveying available empirical evidence and literature that guns in schools could objectively be considered to be negatively impacting on US education standards; and second, that lower education standards were rationally capable of being seen to impact negatively on interstate trade. On this basis, Justice Breyer concluded that Congress could rationally have found that "gun-related violence in and around schools is a commercial, as well as a human, problem".[32] The balance of Justice Breyer's judgment is devoted to advancing empirical support for the above proposition.[33]

Justice Breyer argued that the absence of legislative findings had little significance - it merely deprived the *Gun-Free School Zones Act* of "extra deference".[34]

Justice Breyer concluded by trenchantly criticising the majority judgments on three grounds:[35] first, the majority judgments effectively overrode Supreme Court precedent since the 1930s; second, the implicit effect of the majority decision meant a return to the 'commercial' vs 'non commercial' transaction distinction;[36] and third, by overturning a decided body of case law, the majority were giving rise to legal uncertainty.[37]

(ii) Justice Stevens

Justice Stevens delivered a short judgment, concurring with the judgments of Justice Breyer and Justice Souter. Justice Stevens began by commenting that:

> The welfare of our future 'commerce...among the several States,'...is likely dependent on the character the education of children. I therefore agree entirely with Justice Breyer's explanation of why Congress has ample power to prohibit the possession of firearms in or near schools...

Justice Stevens concluded by stating that:

> Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity. In my judgment, Congress has power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use...

(iii) Justice Souter

Justice Souter delivered the remaining dissentient judgment. Like the other dissenting judgments, Justice Souter began his analysis with a strong endorsement

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31 Note 2 *supra* at 4363.
32 *Ibid.*
33 *Ibid* at 4363-5.
34 *Ibid* at 4363.
35 *Ibid* at 4365.
36 Note 55 *infra.*
37 Note 2 *supra* at 4365.

of the rational basis test. Justice Souter then engaged in his own historical survey of Commerce Clause case law, and interestingly, analysed how the rational basis test and Commerce Clause interpretation in the United States had developed concurrently, concluding that:

> Thus, under commerce, as under due process, adoption of rational basis review expressed the recognition that the Court had no sustainable basis for subjecting economic regulation as such to judicial policy judgments...[38]

Justice Souter then concluded his judgment by assessing whether indeed a rational basis existed for Congress to find that gun-control in public schools would have a substantial effect on interstate commerce. In this respect, Justice Souter expressly accepted the reasoning of Justice Breyer, that "the commercial prospects of an illiterate State or Nation are not rosy...". [39]

It should also be noted that Justice Souter, more so than the other minority judges, expressly dealt with and rejected the majority concern that an extended Commerce Clause power would infringe on the States' legislative domain. He pointed out that:

> ...as for the notion that the commerce power diminishes the closer it gets to customary state concerns, that idea has been flatly rejected...[40]

Justice Souter observed that a constitutional power is to be given its fullest expression, and the impact of the application of this constitutional interpretation principle on the balance between State and federal powers is not a relevant consideration when interpreting the Constitution. He began his analysis by citing the case of *Maryland v Wirtz,* in which Justice Harlan had said:

> There is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise in powers so as not to interfere with the free and full exercise of the powers of the other...[41]

After reviewing the case law, Justice Souter concluded his argument with the following observation:

> ...our hesitance to presume that Congress has acted to alter the state-federal status quo...has no relevance whatever to the enquiry whether it has the commerce power to do so...[42]

Justice Souter noted that while Congressional findings are useful and "to be hoped for in the difficult cases", their absence in this case should not have affected the result. Justice Souter's argument was that if findings had been made, the Supreme Court would neither have examined the legislation less carefully nor more readily deferred to the judgment of Congress.

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38 *Ibid* at 4360.
39 *Ibid.*
40 *Ibid.*
41 *Ibid* at 4361.
42 *Ibid.*

III. COMMENTARY

A. Interpretation of the Commerce Clause

(i) History of the Commerce Clause

The United States Constitution provides that, inter alia:

> ...the Congress may regulate...commerce amongst the several states.[43]

This simple phrase delimiting Congressional legislative competence has been the subject of lengthy jurisprudential debate in the United States.

In 1874, the case of *Gibbons v Ogden,*[44] which in many respects marks the beginning of modern US Commerce Clause jurisprudence, laid down the basic framework for subsequent Commerce Clause interpretation, when the US Supreme Court held that: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse".[45] In so doing, the *Gibbons'* case for the first time acknowledged that the Commerce Clause related not only to commerce itself, but also to those activities which were connected to, and could have an impact on, commerce between the states of the US federation. The *Gibbons'* case meant that the focus shifted from a precise analytic understanding of the word 'commerce' to more vague considerations of factors which affect, impact on, or otherwise relate to 'commerce'.

The *Gibbons'* case opened the door for a string of cases which progressively widened the scope of the Commerce Clause. Thus, for example, legislation which declared illegal the interstate transporting of items such as lottery tickets and diseased food products was held to be a valid exercise of legislative power under the Commerce Clause.[46] Similarly, the US Supreme Court developed a line of reasoning which held that where the regulation of *intra*state trade was necessarily incidental to the regulation of *inter*state trade, the Commerce Clause could be validly used as a source of legislative power.[47]

At the same time, there was, at least until the 1930s, a strong line of case authority limiting the scope of the *Gibbons'* decision. Laws which prohibited the interstate movement of goods produced by child labour, for instance, were held to exceed the scope of the Commerce Clause,[48] as child labour was considered to be too remote to be properly characterised as directly incidental to the regulation of commerce. Similarly, the US Supreme Court developed a somewhat artificial distinction between 'commerce' and 'manufacturing': laws regulating 'manufacturing' were held to fall outside of the legislative competence of the Congress.[49]

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43 US Constitution, Art I s 8 cl 3.

44 22 US (9 Wheat) 1 (1824).

45 JM Maloney, "Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearm Possession" (1994) 62 *Fordham Law Review* 1795 at 1803.

46 *Champion v Ames* 188 US 321 (1903); *Hipolite Egg Co v US* 220 US 45 (1911).

47 *Houston v US* 234 US 342 (1914).

48 *Hammer v Dagenhart* 247 US 251 (1918).

49 *US v EC Knight Co* 156 US 1 (1895).

The modern day understanding of the Commerce Clause in the US was crystallised in the 1930s, as a result of the 'New Deal' legislative package, introduced by President Franklin Delanor Roosevelt.

Much of the legislative basis of the New Deal package relied upon an expansive use of the Commerce power.[50] President Roosevelt, determined to pass the New Deal legislation, attempted to change the number of judges on the US Supreme Court from 9 to 15 and to 'stack' the Court with members sympathetic to the objectives of the New Deal.[51] By 1941, President Roosevelt had been responsible for selecting 7 of the 9 judges that made up the US Supreme Court.[52] In the result, much of the New Deal legislation was passed, and ultimately upheld by the US Supreme Court as being a valid exercise of the Commerce power; thus the scope of the Commerce Clause was significantly expanded during this period.

The process began with the case of *National Labour Relations Board v Jones & Laughlin Steel Corporation*.[53] In this case, the 'commerce' and 'manufacture' distinction of the *Knight* case[54] was abandoned. The Court also overruled the distinction between 'direct' and 'indirect' effects on commerce that had informed much of the reasoning in cases such as the *Child Labour* case.[55] Instead, the Court rationalised the streams of interpretation of the Commerce Clause, and held that the *National Labour Relations Act* 1935 fell within the bounds of the Commerce Clause because labour disputes had a "significant effect" on commerce. This significant effect test has become the central focus of all subsequent US Commerce Clause jurisprudence.

The significant effect test was further clarified in the case of *United States v Darby*.[56] This case was decided when the 'Roosevelt Court' was firmly entrenched. The *Labour Standards Act* 1938 was upheld as being constitutionally valid, and in the process the *Child Labour* case was directly overruled. The Supreme Court held that:

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end...[57]

On this basis, legislation that regulated intrastate work conditions was held to be a valid exercise of legislative power under the Commerce Clause, as intrastate work conditions were related to, and effected, the ultimate legitimate legislative end of interstate commerce.

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50 For a good overview of the history and law in this area, see G Gunther, *Constitutional Law*, Federation Press (12th ed, 1991) p 115.

51 JM Maloney, note 45 *supra* at 1808; R Pilon, "Its Not About Guns; The Court's *Lopez* Decision is Really About Limits on Government" *The Washington Post*, 21 May 1995; G Gunther, note 50 *supra* at 122-4.

52 *Ibid*, JM Maloney.

53 301 US 1 (1937).

54 Note 45 *supra*.

55 Note 48 *supra*.

56 312 US 100 (1941).

57 Note 55 *supra* at 318.

The third case in the New Deal 'trilogy' was the case of *Wickard v Filburn*.[58] In that case, a farmer who grew wheat for personal consumption was charged with exceeding a quota specified in the *Agricultural Adjustment Act* 1938. Mr Filburn challenged the constitutional validity of the Act to regulate an activity that was entirely local to a particular state, and indeed, entirely local to his back garden. However, the Supreme Court held that the Act was valid in that "home-grown wheat...competes with wheat in commerce",[59] and that notwithstanding Mr Filburn's negligible amount of production, he still was not "removed from the scope of federal regulation".[60] Significantly, what guided the Court's decision was a principle of "aggregation": the substantial effect of a given activity in commerce is not to be considered in terms of individual, isolated instances of that activity, but should be aggregated, so that the cumulative effect of many examples of the same or similar activity on interstate commerce is the dominant concern.

Again, the *Filburn* case endorsed the substantial effect test - the rationale of the Court's ruling being the notion that Congress was permitted, under the Commerce Clause, to legislate on an activity which "exerts a substantial economic effect on interstate commerce".[61]

Since the 1940s, the scope of the commerce power in the United States has been progressively expanded into a whole range of areas which appear to have a rather tenuous connection to commerce between the states. For example, much of the US civil rights legislation was based on the Commerce Clause.[62] Thus, in *Katzenbach* for instance, the Supreme Court held that "racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce".[63] The Supreme Court appeared to be greatly stretching its interpretation to accomplish legitimate and desirable policy ends.

Commerce Clause interpretation in the US reached its zenith with the case of *Perez v United States*.[64] In that case, Congress passed *the Consumer Credit Protection Act* relying on the Commerce Clause, regulating the activities of "loan sharks", and making "extortionate credit transactions" illegal. Perez, who was charged under this Act, challenged its constitutional validity. The Supreme Court upheld the legislation on the basis of express Congressional findings that extortionate credit transactions substantially affected interstate trade.

It was against this backdrop of a widely expanded judicial understanding of the scope of the Commerce Clause that the *Lopez* case arose for decision. It should be noted, however, that the *Lopez* judgment did not, from a judicial point of view, arise in a vacuum. There had already been murmurings in the court that the interpretation of Commerce Clause had been extended too far, and several of the

58 317 US 111 (1942).
59 *Ibid* at 128.
60 *Ibid.*
61 *Ibid* at 125.
62 *Katzenbach v McClung* 379 US 294 (1964); *Heart of Atlanta Motel v United States* 379 US 241 (1964).
63 *Katzenbach v McClung, ibid* at 304.
64 402 US 146 (1971).

majority judges in the *Lopez* case had previously been part of minority judgments seeking to limit the width of Commerce Clause interpretation.[65]

(ii) The Interpretation and Application of the Commerce Clause in Lopez

At its most fundamental, the *Lopez* case can be reduced to an empirical question: is the possession of a gun in a local school vicinity so closely and intimately connected with interstate commerce so as to be within the scope of the Commerce Clause? The negative answer by the majority is plainly the better view; as the majority in *Lopez* point out, it is, at the very least, an extremely generous reading of the chain of cause and effect to argue that gun-control has a substantial effect on interstate commerce. As Rehnquist CJ aptly notes, linking gun-control and interstate commerce involves "piling inference upon inference".[66]

However, the majority decisions in the *Lopez* case, with the possible exception of Justice Thomas' decision, are somewhat unsatisfactory in that they fail to grapple with the key element of Commerce Clause jurisprudence, the substantial effect test. Justices Kennedy and O'Connor simply accept that gun-control does not have a substantial effect on commerce. Chief Justice Rehnquist's judgment also fails to clearly delimit the scope of the power. While he is on firm ground in saying that the claim that gun-control in schools has a substantial effect on interstate commerce is to stretch the chain of inference too far, he fails to set out a test to guide that determination in future cases.

The majority decisions lack a concise and coherent attempt to define the boundaries of the substantial effect test. No attempt is made to lay down general principles of how to apply the substantial effect test, and how, in future cases, a court could ascertain whether any given activity substantially effects interstate commerce.

Justice Thomas, who is the only majority judge who attempts to deal with the substantial effect test, overrules the test in a rather simplistic fashion. His rejection of the aggregation principle is unsatisfactory. He rejects the aggregation principle on the grounds that when looking at a significantly large series of isolated activities as a whole, one would always be able to argue that those activities would substantially affect interstate commerce. However, by the same token, if one were to accept his argument and thus look at these activities in isolation, then the inverse would necessarily be true: considered in isolation, any given individual activity would seldom be of sufficient magnitude on its own to substantially effect interstate commerce.

The majority decisions also focus extensively on the notion that a wide reading of the Commerce Clause would give Congress an almost unfettered police power and would upset the 'federal balance'.

The minority judgments dispute this point. Justice Souter in particular points out that the fact that a wide reading of any given constitutional power may undermine State legislative competence is not a relevant consideration when

65 *Hodel v Virginia Surface Min & Recl. Association* 452 US 264 (1981), per Rehnquist CJ; *Perez*, note 64 *supra*, per Stewart J; *Gazia v San Antonia Metropolitan Transit Authority* 469 US 528 (1985), per Burger CJ and Justices Powell, Rehnquist and O'Conner; G Gunther, note 50 *supra* at 172-5.

66 Note 2 *supra* at 4348, see final note in Chief Justice Reinquist's judgment.

applying principles of constitutional interpretation. The minority judgments highlight the well-worn constitutional maxim that each power enumerated in a constitutional document is to be given its fullest possible reading, and the fact that, from time to time, that full reading of a constitutional power results in an expansion or contraction of the limits of that power does not invalidate the extended scope of that power.[67]

This principle of constitutional interpretation is recognised by Chief Justice Rehnquist in his judgment, when he states:

> The commerce power like all others vested in Congress, is complete in itself, and may be exercised to its utmost extent, and acknowledges no limitations, other than as are prescribed in the Constitution.[68]

However, the point of departure between the majority and minority judgments in this respect is the practical workings of this principle of constitutional interpretation, as is evidenced by the second limb of Chief Justice Rehnquist's statement: "other than as are prescribed in the Constitution".[69] Whilst the minority argue that the Commerce Clause must be interpreted in the abstract, the majority argue that first, the place of each enumerated power within the constitutional document as a whole must be considered, and second, the basic understanding of the operation of the enumerated powers that would have informed the constitutional framers must be borne in mind when interpreting the constitutional document. As Justice Thomas noted after reviewing the political, social and legal background to the Commerce Clause:

> ...interjecting a modern sense of commerce into the Constitution generates significant textual and structural problems... Put simply, much, if not all of Art 1 §8 (including parts of the Commerce Clause itself) would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl 3 that makes the rest of §8 superfluous simply cannot be correct...[70]

Surely Justice Thomas' argument is correct. Any other interpretation of the Commerce Clause would be inconsistent with the overall context of the constitutional document. If Congress can validly legislate to prohibit guns in a school, then what rational basis could there be to stop Congress from legislating directly on the content of the educational syllabus, or, as one commentator points out:

> ...[to] make it a federal crime for the schoolyard bully to pick fights with other children and steal their lunch money... If poor performance in school is the immediate cause of the effect on interstate commerce, the Congress, as the majority noted, could easily skip regulating gun possession and go directly to the regulation of the educational process itself by establishing a federal school curriculum...[71]

Plainly, in interpreting a clause contained in a constitution, the clause must be interpreted so as to make sense not only of that clause itself, but of the entire constitutional document, as the majority judgments in *Lopez* emphasise.

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67 *Ibid* at 4358-9, refer to Justice Stevens judgment.

68 Note 2 *supra* at 4344.

69 *Ibid* at 4348.

70 *Ibid* at 4354-6.

71 PD Kamenar; "*United States v Lopez*; The Feds Lose a Piece of Their Rock" *Legal Times*, 8 May 1995, p 25.

The minority judgments do not fully or adequately explore the implication of their ruling that gun-control in schools, although quite remotely connected to interstate commerce, nevertheless falls within the scope of the Commerce Clause. Ultimately, the minority decisions suffer from precisely the criticism that Chief Justice Rehnquist makes of them: they are willing to pile inference upon inference to reach their desired result.

However, despite this flaw, the minority judgments raise interesting jurisprudential issues in relation to the rational basis test. The minority judgments expressly endorsed and relied on the rational basis test, whereas the majority judgments did not give this issue much weight.

It was on the ground, of the rational basis test that the minority were able to hold that the *Guns-Free School Zones Act* was not beyond the scope of the Commerce Clause: the empirical evidence surrounding guns at US public schools indicated that the possession of firearms *could* substantially effect interstate trade, and therefore Congress, on one view, could be said to have had a rational basis for passing the *Guns-Free School Zones Act* in reliance an the Commerce Clause.

Whilst the majority did not frame their judgments in terms of rational basis analysis, it is quite clear from the overall tone of the majority judgments that their answer to a rational basis argument would have been clear: the links between guns in schools and interstate trade are extremely tenuous, and Congress could not possibly have had a rational basis for legislating in this area under the Commerce Clause.

What both the majority and minority judgments lack, however, is a clear focus on how the rational basis test is to be applied in future cases. Both majority and minority merely answer the rational basis question in the context of the *Lopez* case but do not lay down principle guidelines to inform the future use of the rational basis test.

This is somewhat unfortunate, as the rational basis test is a preferable means of assessing constitutional validity, primarily because it accords a court with a more judicial function: rather than substituting the view of the court for that of Congress, the rational basis test places the court in the position of reviewing basis upon which the law makers came to form the view that a particular enactment was within power.

B. Legislative Findings

(i) Legislative Findings in US Constitutional Law

In the United States (as in Australia), it is for the courts to make the ultimate determination, as part of the process of judicial review of legislation, as to whether the requisite constitutional facts exist for the legislation being reviewed to come within a valid head of power. Any fact which is a prerequisite to constitutional validity must ultimately fall to the courts for determination. The Legislature cannot deem the existence of constitutional facts.

In cases where the existence of a requisite constitutional fact is at issue, the courts are always very sensitive to avoid being seen to be usurping the role of the Legislature. There is a tendency to exercise judicial restraint, by deferring to the

view of the Legislature, except in cases where the Legislature has plainly exceeded its power.

This issue is of particular significance in Commerce Clause cases, since to legislate under the Commerce Clause, the subject matter which Congress seeks to regulate must sufficiently affect interstate commerce. This issue is the principle constitutional fact which must be satisfied in Commerce Clause cases: the existence of the connection between the regulated activity and interstate trade is a prerequisite to Congressional power.

In Commerce Clause cases, the Supreme Court has traditionally relied upon the Legislature to determine the relevant constitutional facts, with the Court merely serving as a 'sanity test' for the Legislature's findings. The Supreme Court would only 'second-guess' Congress if it could be shown that Congress did not have a rational basis for finding the requisite constitutional facts. [72]

The practical effect of this position is that the Supreme Court has effectively deferred to Congressional judgment in determining whether or not subject matter which Congress purported to regulate came legitimately within any given head of constitutional power. Congress has the onus of establishing a rational basis for the nexus between the regulated activity and the constitutional power being invoked, by means of Congressional findings. Once these Congressional findings are made, the Supreme Court will generally accept that the express findings bring the regulated activity within the scope of Congress's legislative competence.

(ii) Legislative Findings in Lopez

As considered above, in Commerce Clause cases the Court has traditionally focused on the question of whether a "rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce". [73]

In the present case, however, Congress failed to adduce legislative findings which explicitly established the requisite nexus between gun-control and interstate commerce. Plainly, for the majority, this deficiency comprised a significant part of their holding that there was not the sufficient nexus between the subject matter which the *Gun Free School Zones Act* sought to regulate and interstate commerce.

Chief Justice Rehnquist noted that:

> ...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. [74]

Professor Lawrence H Tribe provides support for Chief Justice Rehnquist's view, noting that Congress failed to point to a link between interstate commerce and the dangers of guns in schools, nor did Congress establish any basis to distinguish the law from similar State regulations. [75]

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72 *Hodel v Virginia Surface Mining and Reclamation Association Inc*, note 65 *supra* at 274; see also discussion of rational basis test above.

73 Note 2 *supra* at 4345.

74 *Ibid* at 4347.

75 J Biskupic, "Bans on Guns near Schools Rejected" *Washington Post*, 27 April 1995, p A01.

In dissenting, Justice Souter argued that the majority opinion contradicts the rule of judicial restraint that has underscored Commerce Clause decisions since 1937 with the decision in *NLRB v Jones & Laughlin Steel Corp.*[76]

Justice Souter suggested that in reviewing legislation, the Court should "defer to what is often a merely implicit congressional judgment that its regulation addresses a subject substantially affecting interstate commerce"[77] if there is "any rational basis for such a finding".[78]

According to Justice Souter's judgment, if the legislation passes that test, then the only remaining hurdle is for the Court to determine "whether the means chosen by Congress [are] reasonably adapted to the end permitted by the Constitution".[79]

Justice Souter criticises the Court of Appeals for finding[80] that the absence of congressional findings may well have affected the outcome of the case. He asks rhetorically:

> Might a court aided by such findings have subjected this legislation to less exacting scrutiny (or...should a court have deferred to such findings if Congress had made them)? The answer must be no...[81]

Justice Breyer's argument is similar:

> ...it would seem particularly unfortunate to make the validity of the statute at hand turn on the presence or absence of findings.[82]

In Justice Souter's view the legislation itself implies a Congressional finding that the subject matter of the legislation affects interstate commerce. This is simply a matter of common sense: if Congress legislates in relation to a matter, purporting to exercise its power under the Commerce Clause, by implication Congress must have established (at least to its own satisfaction) that the subject matter actually came within the power which it sought to exercise.

Since there is no reason to suspect, in Justice Souter's view, that Congress intentionally acted *ultra vires*, the only question remaining for the Court is whether the "legislative judgment is within the realm of reason".[83] He argues, that on the basis of Justice Breyer's evidence in dissent, plainly the judgment of Congress was rational.

The fundamental problem with following the approach suggested by Justice Souter is that the effect would be that Congress itself would have the power to define the scope of its own power under the Commerce Clause. For it seems likely that Congress *could* come up with rational arguments to continue to vastly widen the scope of the Commerce Clause. Indeed, in any subject area, Congress could come up with rational arguments to continue linking the regulated subject matter with a constitutional head of power. As the majority opinion points out, this would effectively be giving Congress an almost unlimited police power which

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76 301 US 1 (1937).
77 Note 2 *supra* at 4359.
78 Note 72 *supra* at 276.
79 *Ibid* at 276, quoting *Heart of Atlanta Motel, Inc v United States*, note 62 *supra* at 262.
80 2 F.3d 1342 (1993) at 1363-8.
81 Note 2 *supra* at 4361.
82 *Ibid* at 4363.
83 *Ibid* at 4362.

would clearly not be appropriate, nor consistent with the remainder of the body of the US Constitution.

Instead, on the majority view, it is for the court to determine the 'outer limits' of Congressional power.[84] The majority view is right in arguing that on Justice Breyer's formulation, Congress could even regulate child-rearing under the Commerce Clause on the ground that it:

> ...fall[s] on the commercial side of the line...because it provides a valuable service - namely to equip [children] with the skills they need to survive in life, and, more specifically, in the workplace.[85]

It is difficult to say whether the existence of Congressional findings in the *Lopez* case would have led the majority to take a more favourable view of the legislation. Plainly their absence made it easier for the majority to reach the decision that they did. If Congress had made explicit findings, the majority would have been placed in the potentially more uncomfortable position of having to determine that the express Congressional findings were beyond the realm of reason.

IV. AUSTRALIAN PERSPECTIVES

A. The Trade and Commerce Power

(i) History of s 51(i)

The Australian Constitution provides, in s 51, that:

> The Parliament shall...make laws...with respect to:
>
> (i) Trade and commerce with other countries, and among the States...[86]

The Trade and Commerce Power in the Australian Constitution was largely modelled on the Commerce Clause in the US Constitution.[87]

Like its US counterpart, the Australian Trade and Commerce Power has had a chequered history. However, whereas the American Commerce Clause has been given an extremely wide reading (prior to the *Lopez* case) the Australian High Court has preferred to restrict the scope and reach of the Australian Trade and Commerce Power.

The High Court's first significant statement on the scope of the Trade and Commerce Power was shortly after Federation, in the *Railway Servants'* case,[88] where Chief Justice Griffith, reading the Judgment of the Court, held that:

> ...we think that the power of the Commonwealth Parliament to regulate interstate trade and commerce, although unlimited in its ambit, cannot as a mere matter of construction, be held to have so wide an ambit as to embrace matters the effect of which upon that commerce is not direct, substantial and proximate. And in our opinion, the general conditions of employment are not of this character.[89]

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84 *Ibid* at 4348.

85 *Ibid.*

86 Australian Constitution 1901, s 51(i).

87 L Zines, *The High Court and the Constitution*, Butterworths (3rd ed, 1992) p 46.

88 (1904) 4 CLR 488.

89 *Federated Amalgamated Government Railway and Tramway Service Association v NSW Railway Traffic Employees Association* ("*Railway Servants*" case) (1906) 4 CLR 488 at 545.

Thus, in setting the framework for future Trade and Commerce Power jurisprudence in Australia, the High Court adopted the same basic tests that the United States Supreme Court adopted: direct versus indirect effects and the substantial effect test. However, using the same tests, the High Court reached an opposite conclusion to its American counterpart - whereas in *Jones & Laughlin Steel* the Supreme Court held that labour disputes and employment conditions had a significant effect on interstate trade, in the *Railway Servants'* case the High Court held that employment conditions did not have a direct, proximate or substantial effect on interstate trade and commerce.

This restricted reading of the trade and commerce power in Australia was developed in a series of later cases. Firstly, in *Huddart Parker Ltd v Commonwealth,*[90] the High Court held that legislation relating to employment of transport workers was only within the ambit of s 51(i) if those workers were directly engaged in interstate or overseas trade. The implication of this view was that legislation dealing with employment of workers generally was not a proper subject of the Trade and Commerce Power.

In the case of *R v Burgess; ex parte Henry,*[91] the scope of s 51(i) was again in issue. Justice Dixon laid down what has become a frequently cited understanding of the reach of the Trade and Commerce Power. He held that the mere connection or intermingling of interstate and intrastate trade and commerce was not sufficient to attract the operation of s 51(i):

> The express limitation of the subject matter of the [trade and commerce] power to commerce...among the States compels a distinction, however artificial it may appear...[92]

On this basis, Justice Dixon held that the Commonwealth could not legislate on an airline service which was entirely intrastate in nature, and he rejected the argument that the mere fact that interstate and intrastate air travel were co-mingled meant that intrastate air travel could be legislated on under the Trade and Commerce Power.[93] Similar sentiments were expressed by Justices Evatt and McTiernan in their joint judgment.[94]

Further, in the *Burgess* case, Justice Dixon considered US Commerce Clause jurisprudence, and expressly rejected it:

> In the United States it seems to be regarded as a sufficient ground for including commerce confined to a State in a Federal regulation of inter-State commerce if it appears that the measures taken in reference to the latter would not achieve their purpose unless the former were also controlled... But I think it would be a matter of regret if the application of this principle to s 51(i) of the Commonwealth Constitution led to the adoption of so indefinite a standard of validity as that enunciated in [the United States].[95]

90 (1931) 44 CLR 492.
91 (1936) 55 CLR 608 at 672.
92 *Ibid* at 672.
93 *Ibid* at 673-4.
94 *Ibid* at 677.
95 *Ibid* at 671-2.

A series of cases dealing with the scope of the trade and commerce power followed the *Burgess* case,[96] and the High Court consistently maintained a restrictive approach to the Trade and Commerce Power. Thus, for example, in *Redfern v Dunlop Rubber Australia Ltd*,[97] Justice Menzies observed:

> It is, of course, clear that Commonwealth power over trade and commerce only extend to such intra-state trade and commerce as is inseparably connected with interstate trade and commerce.

It was not until the seminal case of *Airlines of NSW Pty Ltd v NSW (No 2)*[98] that the High Court laid down a clear exposition of the precise limits of the Trade and Commerce Power. While the High Court had not categorically ruled out the prospect of s 51(i) being used to regulate intrastate trade and commerce,[99] it had tightly defined the category of intrastate matters which are so closely connected to interstate trade and commerce that their regulation is necessary for the effective regulation of interstate trade and commerce. However, the High Court had not yet clearly endorsed a basic test as to the general operation of s 51(i).

In the *Airlines of NSW* case, the High Court was called upon to consider the constitutionality of legislation regulating air navigation, both interstate and intrastate. After considering evidence relating to the "interlocking" of interstate and intrastate air navigation, the High Court held that as intrastate air navigation could directly and causally affect the safety and operation of international and interstate flights, it could properly be legislated on under s 51(i).

The High Court adopted a direct versus indirect effect test, which is considerably narrower than the "significant effect" test that the US Supreme Court had adopted as its basic rule. Some members of the Court even expressly rejected the American significant effect test.[100]

The *Airlines of NSW* reasoning was consolidated in *Attorney-General (WA); ex rel Ansett Transport Industries (Operations) Pty Limited v Australian National Airlines Commission*.[101] In this case, the High Court held that a law permitting the Commonwealth to transport passengers by air within a State boundary was beyond the scope of the Trade and Commerce Power, despite the Commonwealth's argument that intrastate transport of passengers was essential to the efficient and profitable functioning of interstate aviation.

Thus, for example, Chief Justice Barwick said:

> I agree with my brother Stephen that there is no power in the Parliament in exercise of the legislative power granted by s 51(i) to authorise acts to be performed by the [Commonwealth Airlines] Commission in the cause of intrastate trade. The fact...that the performance of these acts are by the interstate carrier by air would conduce to the efficiency, competitiveness and profitability of the interstate activity, it would not

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96 *Australian National Airways Pty Ltd v Commonwealth* (1946) 71 CLR 29; *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55; *Wragg v NSW* (1953) 88 CLR 353.

97 (1964) 110 CLR 194 at 221.

98 (1965) 113 CLR 54.

99 *Ibid*, per Menzies J; *Grannall v Marrickville Margarine Pty Ltd*, note 96 *supra* at 77 - "every legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose".

100 *Airlines of NSW Pty Ltd v NSW (No 2), ibid*, per Kitto J at 113-15; Taylor J at 127 and Menzies J at 149-50.

101 (1976) 138 CLR 492.

warrant the conclusion that legislative power to authorise such acts is involved as an incident of the legislative power granted by s 51(i).[102]

Justices Gibbs and Stephens delivered judgments to similar effect.[103] Justice Mason did not need to make a finding on this issue, while Justice Murphy made extensive reference to American case law, and adopted the much wider American substantial effect test.[104]

The result of this decision was a rejection of the substantial effect test in favour of the more restrictive direct versus indirect test. The High Court made plain the Australian position that a demonstrable economic effect of intrastate trade on interstate trade does not of itself bring that intrastate trade within the scope of the Trade and Commerce Power.

(ii) Lopez and the Trade and Commerce Power

As discussed in Part III, American Commerce Clause interpretation prior to *Lopez* was extremely expansive: areas such as civil rights, domestic farming, employment and credit transactions were all held to fall within the ambit of the Commerce Clause.[105]

Australian Trade and Commerce Power jurisprudence, on the other hand, has taken a diametrically opposed position, restricting the scope of the Trade and Commerce Power to a very narrow category of activities that had a direct and proximate effect on trade and commerce between the States.

The *Lopez* case, in ruling that gun-control at schools does not substantially effect commerce among the States of the US Federation, has effectively narrowed the gap between the Australian and American positions. In holding that local gun-control legislation does not substantially effect commerce, the US Supreme Court seems to have moved a step closer to the Australian understanding of the Trade and Commerce Power - namely, that a merely tangential economic connection between the regulated intrastate activity and interstate trade is insufficient to invoke the Commerce Clause.

If indeed the US Supreme Court continues to follow the *Lopez* case reasoning, and further contracts the scope of the Trade and Commerce Power, it may be that US constitutional cases will be more frequently relied on as Australian authority in this area.

The *Lopez* case also raised issues in relation to the rational basis test, and in relation to notions of 'federal balance'. These are issues with which the High Court of Australia has recently been grappling.[106]

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102 *Ibid* at 499.

103 *Ibid*, per Gibbs J at 502 and Stephens J at 510.

104 *Ibid* at 529-31.

105 See Part III.

106 These issues have arisen in Australia largely in the context of the interpretation of the External Affairs power. On rational basis analysis see *Richardson v Forestry Commission* (1988) 164 CLR 261, per Mason CJ and Brennan J at 296; per Dawson J at 304; per Toohey J at 336; per Gaudron J at 345-6. On 'federal balance' issues see *The Commonwealth v Tasmania* (the *Tasmanian Dam* case) (1984) 158 CLR 1, per Gibbs CJ at 99; per Mason J at 126; per Murphy J at 168; per Brennan J at 208-16.

B. Legislative Findings

In Australian constitutional law the leading case on the theory of constitutional fact - that "the stream cannot rise above its source" - remains the *Australian Communist Party* case.[107] The High Court has been clear that neither the Executive nor the Legislature can make a conclusive determination of a question of law or issue of fact upon which constitutionality depended. Such a question must always be ultimately determined by the courts. The rationale for this rule is plainly to avoid Parliament legislating so as to bring itself within a constitutional head of power by virtue of deeming subject matter ordinarily beyond power to be within power.

While the *Communist Party* case doctrine that the court has the ultimate task of reviewing constitutional facts has parallels in US Constitutional law,[108] US and Australian courts differ in their approach to the issue of fact determination.

The principle difference between the US and Australian jurisprudence on this issue lies in the approach that is taken to judicial review of the facts, and the weight that is accorded the finding of the Legislature.

In *Stenhouse v Coleman*, Justice Dixon attempted to outline the High Court's approach:

> ...ordinarily the court does not go beyond matters of which it may take judicial notice. This means that for its facts the court must depend upon matters of general public knowledge. It may be that in this respect the field open to the court is wider than has been commonly supposed.[109]

Susan Kenny argues that the High Court's approach has been motivated by its belief that "fact-dependent standards are conducive to uncertainty and inefficiency in the administration of the law and that they are likely to lead it to trespass on areas of parliamentary and legislative responsibility".[110]

The High Court's reluctance to usurp the role of the Legislature had led to its frequent deferral to *de facto* legislative findings,[111] although the High Court has yet to develop a clear and consistent approach to the issue. The approach to the issue of legislative findings which the High Court had taken to date provides little guidance as to the manner in which the court would treat a constitutional challenge to legislation which has been the subject of express legislative findings of constitutional facts.

It is likely that the High Court, when confronted with this difficult issue, will follow the US approach and review any legislative finding of fact in terms of a rational basis test. In doing so, the court will have to steer a fine line between usurping the role of the Legislature and merely acting as a rubber stamp for Parliament.

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107 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1; see also S Kenny, "Constitutional Fact Ascertainment" (1990) 1 *Public Law Review* 134; G Winterton ,"The Significance of the Communist Party Case" (1992) 18 *MULR* 630.

108 See for instance *Norris v Alabama* 294 US 587 (1934).

109 (1944) 69 CLR 457 at 469.

110 S Kenny, note 107 *supra*.

111 *Ibid* at 164 (n221).

An interesting test for the High Court may arise with the Phillip Morris challenge to the *Tobacco Advertising Prohibition Act 1992* (as amended), likely to come before the High Court early in 1996. In the Canadian case of *RJR MacDonald v Canada (Attorney-General),*[112] the constitutional fact necessary to determine whether the Canadian equivalent of the *Tobacco Advertising Prohibition Act* breached the freedom of expression guarantee in the Canadian Charter of Rights and Freedoms was the central issue of the case. The case turned upon consideration of whether or not the subject legislation was sufficiently adapted to a legitimate end to justify the restriction on free speech. The tobacco company argued that it was not, because the Government could not establish a causal connection between tobacco advertising and increased smoking. The tobacco companies argued that tobacco advertising merely caused consumers to switch brands, not to take up smoking. At first instance the tobacco company won, while this was reversed 2-1 on appeal. The final appeal to the Canadian Supreme Court is yet to be heard. No doubt when the *Phillip Morris* case comes before the Court similar issues will arise.

V. CONCLUSION

While most of the publicity that the *Lopez* case has generated may have been largely due to the controversial nature of the subject matter, the case is of great importance in constitutional law.

The US Supreme Court has finally signalled that there is a limit on the extent to which Congress can stretch the meaning of the Commerce Clause to encompass its particular legislative purpose.

Having found that Congress has finally taken the Commerce Clause too far, there is now scope for US Courts to strike down more laws on the same basis, or even place further restrictions on the interpretation of the Commerce Clause, but only time will tell whether the courts choose to do so.[113] Proposed wetlands and similar environmental regulations are seen as particularly open to attack following the *Lopez* decision. The *Lopez* decision may also prompt challenges to 60 years of Commerce Clause legislation, while the prospect of direct legislative action to overrule the *Lopez* decision cannot be discounted: President Clinton has asked Attorney-General Janet Reno to find a way to make the Gun Free School Zones legislation constitutionally valid.[114]

The issues raised in the *Lopez* case will, no doubt, come before the Australian High Court in various guises in the near future. In particular, the High Court will soon have to grapple with the need to find a clear and consistent way of dealing with the determination of constitutional facts and the significance to be accorded legislative findings. The High Court will also need to clarify its approach to the rational basis test, and to concepts of 'federal balance'. It will be interesting to see

112 102 DLR (4th) 307 (1993)

113 See, for example, *The Economist*, 6 May 1995, p 29.

114 *Time*, 8 May 1995, p 14.

to what extent US law, and in particular the *Lopez* case, influences the High Court's deliberations.

All that is certain is that for Alfonso Lopez, whose possession of a gun at school gave rise to this legal and constitutional quagmire, the law will no longer be an impediment to his use of firearms; he has decided to join the Marines.[115]

115 *Ibid.*