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GUNS, DRUGS, AND FEDERALISM: RETHINKING COMMERCE-ENABLED REGULATION OF MERE POSSESSION

*Marcus Green**

INTRODUCTION

Angel McClary Raich is a California resident who suffers from many serious medical conditions, including an inoperable brain tumor, seizures, and chronic pain.¹ Following her physician's advice, Raich has been using marijuana "for over five years, every two waking hours of every day" to ease her symptoms.² Diane Monson, another California resident, suffers from a "degenerative disease of the spine."³ On her physician's recommendation, Monson cultivates and uses marijuana to treat her ailments.⁴ Since state voters passed Proposition 215, subsequently codified as the Compassionate Use Act of 1996,⁵ cultivation, possession, and use of marijuana for such treatment is legal in California.⁶

Several states have passed similar laws permitting cultivation and use of marijuana for medical purposes.⁷ On the other hand, the federal Controlled Substances Act⁸ ("CSA") provides for criminal penalties for the "simple possession" of marijuana and other "controlled substances."⁹ In August 2002, federal agents from the

*J.D. Candidate, 2005, Fordham University School of Law. Thanks to Professor Nicholas Johnson for his support, Professor Daniel Richman for his searching treatment of federal crimes in the classroom, and to Dr. Shobana Shankar for her strength and unceasing encouragement.

1. *See* Raich v. Ashcroft, 352 F.3d 1222, 1225 (9th Cir. 2003).

2. *Id.*

3. *Id.*

4. *Id.*

5. Cal. Health & Safety Code § 11362.5 (West Supp. 2004).

6. *Id.* § 11362.5(b)(1)(B) (declaring that the Act is intended "[t]o ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction").

7. *Raich*, 352 F.3d at 1229 (listing "Alaska, Arizona, California, Colorado, Hawaii, Maine, Nevada, Oregon, and Washington" as states that had legalized medical marijuana).

8. 21 U.S.C. §§ 801-971 (2000).

9. *Id.* § 844(a) ("It shall be unlawful for any person knowingly or intentionally to possess any list I chemical . . ."). The title of § 844 is "Penalties for simple possession." *Id.*

Drug Enforcement Agency ("DEA"), "after a three-hour standoff" with local law enforcement agents who asserted that the possession was legal in California, seized and destroyed six cannabis plants from the home of Diane Monson.¹⁰

Monson and Raich joined in suit against the United States Attorney General and the Administrator of the DEA seeking declaratory and injunctive relief barring such enforcement action, contending, among other claims, that the application of the CSA to their cultivation and possession exceeded the permissible reach of Congress's commerce power.¹¹ The trial court denied the relief sought.¹²

In December 2003, the U.S. Court of Appeals for the Ninth Circuit, in *Raich v. Ashcroft*, reversed the district court, concluding that the CSA "as applied to the appellants, is likely unconstitutional."¹³ The court of appeals found "a strong likelihood of success" in appellants' claim that the CSA exceeded congressional commerce power and remanded to the district court for entry of a preliminary injunction.¹⁴

The Ninth Circuit relied, in large part, on Commerce Clause doctrine as it has been developed by the Supreme Court in *United States v. Lopez*¹⁵ and *United States v. Morrison*.¹⁶ By restricting regulable activities to those economic in nature or bearing the characteristics of a commercial transaction or enterprise, these cases erected a new limit on Congress's power to regulate activities substantially affecting interstate commerce.¹⁷

In *Lopez*,¹⁸ the Supreme Court invalidated the Gun-Free School Zones Act of 1990,¹⁹ wherein "Congress made it a federal offense 'for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.'"²⁰ The Rehnquist majority²¹ held that the target of the legislation, the possession of a firearm in a school zone, was not itself

10. *Raich*, 352 F.3d at 1225-26.

11. *Raich v. Ashcroft*, 248 F. Supp. 2d 918, 922 (N.D. Cal. 2003).

12. *Id.* at 931 ("Since plaintiffs are unable to establish any likelihood of success on the merits, their motion for preliminary injunction is denied." (emphasis omitted)).

13. *Raich*, 352 F.3d at 1234.

14. *Id.* at 1235.

15. 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act).

16. 529 U.S. 598 (2000) (invalidating the civil remedy provision of the Violence Against Women Act).

17. See *Raich*, 352 F.3d at 1229 (appealing to the holdings of *Lopez* and *Morrison*, noting that "[a]s applied to the limited class of activities presented by this case, the CSA does not regulate commerce or any sort of economic enterprise"); *infra* Part I.C.

18. 514 U.S. at 549.

19. 18 U.S.C. §§ 921-930 (2000).

20. 514 U.S. at 551 (quoting 18 U.S.C. § 922 (q)(1)(A)).

21. The four justices who voted with Rehnquist, along with the Chief Justice, have also been described as the "Federalism Five." See Mark R. Killenbeck, *Madison, M'Culloch, and Matters of Judicial Cognizance: Some Thoughts on the Nature and Scope of Judicial Review*, 55 Ark. L. Rev. 901 (2003) (referring to Rehnquist, O'Connor, Kennedy, Scalia, and Thomas).

economic activity and therefore did not affect interstate commerce substantially enough for Congress's commerce power to reach it.²²

The *Lopez* decision is central to the so-called "new federalism revival"²³ and has generated a great deal of controversy and debate.²⁴ Before *Lopez* and after the Supreme Court began upholding far-

22. See *Lopez*, 514 U.S. at 567-68.

23. E.g., David J. Barron, *A Localist Critique of the New Federalism*, 51 Duke L.J. 377, 411-26 (2001); see also *infra* note 27 and accompanying text.

24. Some commentators have decried the shift as an unprincipled attempt by the Supreme Court to diminish the legitimate role of Congress while pursuing its own conservative agenda. See, e.g., Ruth Colker & James J. Brudney, *Dissing Congress*, 100 Mich. L. Rev. 80 (2001); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 Harv. L. Rev. 4 (2001). Others have moderated by offering careful historical perspective and analyses to assure that the new jurisprudence does not represent a return to a brand of anti-civil rights federalism. See Ronald D. Rotunda, *The Implications of the New Commerce Clause Jurisprudence: An Evolutionary or Revolutionary Court?*, 55 Ark. L. Rev. 795, 797 (2003) ("Modern-day federalism should not be confused with the 'states' rights' slogan that the slave owners adopted in the pre-Civil War era or the Dixiecrats adopted in the 1940s and later."). The more doctrinally-inclined have criticized the Court's rationale, especially the commercial/noncommercial distinction at work in *Lopez*, as unsound and indeterminate. See, e.g., Adam Badawi, *Unceasing Animosities and the Public Tranquility: Political Market Failure and the Scope of the Commerce Power*, 91 Cal. L. Rev. 1331, 1366 (2003) ("[I]n some instances the *Lopez* test will not permit federal jurisdiction even though the theory of political market failure suggests that centralized regulation would be appropriate."); Gil Seinfeld, *The Possibility of Pretext Analysis in Commerce Clause Adjudication*, 78 Notre Dame L. Rev. 1251, 1287 (2003) ("[T]he *Lopez-Morrison* doctrine is at war with itself in the most fundamental of ways."). Still other commentators have thoughtfully probed the invocation of the new federalism for its potential to operate for the political benefit of minority interests and outlier norms. See Nicholas J. Johnson, *Plenary Power and Constitutional Outcasts: Federal Power, Critical Race Theory, and the Second, Ninth, and Tenth Amendments*, 57 Ohio St. L.J. 1555, 1567-68 (1996) ("[In relation to rights discourse,] fidelity to limited power is a conceptually interconnected and equally vital protection of minority interests."); Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 Cal. L. Rev. 1541, 1542-43 (2002) (designating as an "independent norm" a "community's expression of morality" knowable in its relation to its treatment of "generally victimless behavior that local and state governments have determined is blameless, where there is no nationwide consensus (but rather strongly held diametrically opposed views) on the morality of the behavior"). The legalization of marijuana use is an archetypal "independent norm." Whether condemned or celebrated, approaches to the new jurisprudence contain underlying assumptions about the values associated with federalism and the efficacy of legal doctrine, by way of judicial review, in shaping social arrangements. See Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 Vill. L. Rev. 201, 243 (2000) (acknowledging the contemporary reality that concentrated private economic power "is largely unaccountable to any polity whatever" and that in confronting such a reality "we will have to rely on political actors more formidable than our judges and acts of creativity more meaningful than the imposition of artificial doctrinal constraints on Congress' [sic] regulatory powers"). For broader discussion of extra-legal constitutional processes, see Michael Kent Curtis, *Judicial Review and Populism*, 38 Wake Forest L. Rev. 313 (2003). For some comment on the relevant impact of the political party "duopoly," see Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 Wm. & Mary L. Rev. 1939 (2003).

reaching New Deal legislation enacted pursuant to the Commerce Clause,²⁵ “[s]ome commentators concluded that the post-1937 Court would allow Congress to regulate whatever it wanted.”²⁶ However, as evinced by *Lopez* and other decisions, the current majority of the Court has been making a point to rebut that presumption by attempting to impose categorical limits on congressional power.²⁷

Applying the new jurisprudence in *Raich*, the Ninth Circuit declared a likelihood of success for the appellants’ challenge because it found the wholly local cultivation, possession, and medical use of marijuana not to be economic or commercial activity.²⁸ The Ninth Circuit’s conclusion that noncommercial possession of marijuana—for medical use—likely escapes the reach of federal commerce power may be read to put a wide range of federal legislative schemes at significant

25. “The Congress shall have the Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3; see *infra* Part I.B.

26. Rotunda, *supra* note 24, at 800 (citing for example, Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199, 259 (1971)).

27. Three interrelated lines of cases embody the effort to “revive” federalism. First, the Court invoked the Tenth Amendment to proclaim a constitutional prohibition on federal regulatory regimes that single out state legislative and executive apparatuses for direct regulation. See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). Congress “may not conscript state governments as its agents.” *Id.* at 178. Second, relying on the Eleventh Amendment, the Court erected new obstacles to congressional abrogation of states’ immunity. See William E. Thro, *A Question of Sovereignty: A Review of John T. Noonan, Jr.’s Narrowing the Nation’s Power: The Supreme Court Sides with the States*, 29 J.C. & U.L. 745, 749-52 (2003). Lastly, the Court narrowed the class of objects and activities subject to federal Commerce Clause regulation. By distinguishing between the commercial and noncommercial nature of activities in judging whether or not activities “substantially affect” interstate commerce, and by approaching the assessment independently from congressional findings on the correlation between the targeted activity and interstate commerce, the majority began to carve out activities unregulable by Congress under the commerce power. See *United States v. Morrison*, 529 U.S. 598, 609, 614-15 (2000); *Lopez*, 514 U.S. at 566; *infra* Part I.C. See generally Jesse H. Choper, *Taming Congress’s Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 Ark. L. Rev. 731, 731 (2003) (“There is little doubt that the Supreme Court, at least as currently constituted, is really serious about the existence of true limits on Congress’s power under the Commerce Clause, and the justices’ capacity to enforce them.”).

28. *Raich v. Ashcroft*, 352 F.3d 1222, 1231 (9th Cir. 2003) (“[T]he marijuana at issue . . . is . . . non-fungible, as its use is personal and the appellants do not seek to exchange it or to acquire marijuana from others in a market.”). The Ninth Circuit has been the most literal in applying the post-*Lopez* doctrine to as-applied challenges of possession regulations. Shortly before *Raich*, the Ninth Circuit held that the federal prohibition of “the possession of child pornography made with materials that have traveled in interstate commerce” was “unconstitutional as applied to simple intrastate possession of a visual depiction . . . not intended for interstate distribution, or for any economic or commercial use.” *United States v. McCoy*, 323 F.3d 1114, 1115 (9th Cir. 2003). Only a month before rendering the *Raich* opinion, the Ninth Circuit overturned a conviction for possession of a homemade machinegun based on a like rationale. *United States v. Stewart*, 348 F.3d 1132, 1136 (9th Cir. 2003) (“We cannot agree that simple possession of machineguns—particularly possession of homemade machineguns—has a substantial effect on interstate commerce.”).

risk. In addition to the drug laws such as the CSA,²⁹ there are several categories of commerce power-enabled federal laws that purport to reach possession, including stolen goods crimes,³⁰ child pornography laws,³¹ numerous firearm and ammunition possession laws,³² and other criminal and civil regulations of various types.³³

Beyond the immediate realm of possession laws, the federalism debates—in which cases like *Raich v. Ashcroft*³⁴ are deeply immersed—are politically charged, in part, because of anxiety about the erosion of federal plenary power under the Commerce Clause generally.³⁵ For example, the civil rights era decisions upholding legislation prohibiting private racial discrimination in places of public accommodation explicitly depended on a very broad reading of the commerce power.³⁶ Further invalidation of federal laws based on a lack of substantial effects on interstate commerce or the absence of economic activity, even when animated by drug law reform, may be seen as beginning to cast a slim shadow over justifications for commerce-enabled civil rights laws.³⁷

On February 25, 2004, the Ninth Circuit issued an order denying the Justice Department's request for an en banc rehearing of its decision in *Raich*.³⁸ Following the denial for rehearing, the Justice Department petitioned the Supreme Court for writ of certiorari on April 20, 2004.³⁹ The issues at stake and the political alignments of the Justices of the Supreme Court combine to create an expectation that it will reverse

29. 21 U.S.C. §§ 801-971 (2000).

30. *E.g.*, 18 U.S.C. §§ 2314-2315 (2000) (current codification of the National Stolen Property Act of 1948).

31. *E.g.*, *id.* § 2252A.

32. *E.g.*, *id.* § 922(g)(1) (criminalizing gun possession by convicted felons); *id.* § 922(j) (criminalizing possession of stolen guns); *id.* § 922(q)(2)(A) (2000) (criminalizing gun possession in a school zone); *id.* § 929(a)(1) (regulating possession of armor-piercing ammunition).

33. *See, e.g.*, *id.* § 842 (regulating explosive materials); 21 U.S.C. §§ 331, 347 (regulating possession and noncommercial provision of colored margarine).

34. 352 F.3d 1222 (9th Cir. 2003).

35. *See supra* note 24 and accompanying text.

36. *See, e.g.*, *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

37. *E.g.*, Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(a)-(c) (2000); *see Johnson, supra* note 24, at 1556 (noting both the usefulness and the dangers of federal plenary power). “Expanded federal power has yielded the benefits and protections of the civil rights era. But the foundation of that power is a constitutionalism that unbridles collective power and thus invites majoritarian abuses.” *Id.*; *see also infra* notes 120-24 and accompanying text.

38. *See* Dean E. Murphy, *Court Allows Medicinal Use of Marijuana*, N.Y. Times, Feb. 27, 2004, at A22 (“The Bush administration had asked the court . . . to hold a new hearing on [the] ruling, issued by a three-judge panel in December But in an order issued Wednesday [Feb. 25th] and made public on Thursday [Feb. 26th], the court denied the request.”).

39. *See Ashcroft v. Raich*, No. 03-1454 (U.S. filed Apr. 20, 2004), at <http://supremecourtus.gov/docket/03-1454.htm>. The Court's response is due by May 20, 2004.

Raich or a like case.⁴⁰ However, beyond a skeptical prediction of a purely result-driven decision, it is not abundantly clear how the Court can square announced doctrine with federal regulation of mere possession.⁴¹

Federal power to regulate mere possession is often justified under the modern substantial effects doctrine, which authorizes Congress to regulate activities that substantially influence interstate commerce.⁴² The nexus required is between the target of the regulation and its actual effect on, or propensity to substantially affect, interstate commerce.⁴³ As the Ninth Circuit indicated in *Raich*,⁴⁴ the post-*Lopez* economic character criteria for activities substantially affecting interstate commerce would seem to exclude noncommercial possession from the scope of the commerce power.⁴⁵

Justifications for commerce-enabled possession regulations are also based on theories that they are enacted to protect the channels and instrumentalities of interstate commerce.⁴⁶ Numerous federal statutes rely on interstate boundary crossings of one form or another to justify them as permissible exercises of power.⁴⁷ For example, Congress was able to cure the constitutional infirmities of the legislation at issue in

40. See, e.g., Carol M. Ostrom, *Appeals Court Upholds Medical Marijuana Use; 9th Circuit Sides with States that Have Laws Allowing It*, Seattle Times, Dec. 17, 2003, at B1 ("The 9th Circuit has a reputation for being frequently overturned by the Supreme Court."); Josh Richman, *Feds Ordered to Halt Pot Raids; Appellate Judges Rule Case Fighting for Medical Marijuana Has Merit*, Oakland Tribune, Dec. 17, 2003 ("Boston University Law Professor Randy Barnett, who argued the case to the [Ninth Circuit] called [the decision] . . . proof 'that federalism is not just a doctrine for political conservatives.'"), available at 2003 WL 67865442, at *1-*2.

41. Mere possession, in this context, refers to noncommercial possession or use of articles unaccompanied by evidence of receipt from interstate commerce or any intent to distribute commercially.

42. See *infra* Part II.B.

43. See *infra* Part I.B.

44. See *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003).

45. *Id.* at 1229 ("The cultivation, possession, and use of marijuana for medicinal purposes and not for exchange or distribution is not properly characterized as commercial or economic activity.").

46. See *infra* Parts II.A., II.C.

47. Examples include the Dyer Act, 18 U.S.C. §§ 2311-2322 (2000) (prohibiting interstate transport of stolen property); the Lindbergh Law, *id.* §§ 1201-1204 (making kidnapping a federal offense when the victim was transported interstate); the National Stolen Property Act of 1948, *id.* §§ 2314-2315; the Fugitive Felon Act, *id.* §§ 1071-1074; and more recently, the federal carjacking statute which proscribes using force or violence to steal a vehicle "that has been transported, shipped, or received in interstate . . . commerce." See *id.* § 2119. Other statutes base jurisdiction on the interstate transmission of prohibited communications, including the transmission of illegal gambling information, *id.* § 1084, and of extortionate communications or demands for ransom, *id.* § 875. Certain other formulations do not depend on direct boundary crossings, but instead appeal to congressional power to regulate instrumentalities of interstate commerce. The federal criminal prohibition on the use of a telephone or other "instrument of commerce" to make a bomb threat, even if used intrastate, has been upheld as a valid exercise of the commerce power. See *United States v. Gilbert*, 181 F.3d 152 (1st Cir. 1999) (upholding 18 U.S.C. § 844(e)).

Lopez, and essentially reenact it, with a few simple words. Congress amended the Gun-Free School Zones Act in 1996 to restrict the application of criminal penalties to cases in which the government could prove that the firearm possessed in a school zone had, at any time, previously traveled in interstate commerce.⁴⁸ Given modern economic realities, this amended version operates nearly identically to the original.⁴⁹

Despite *Lopez* and the Court's overt attempts to curb the reach of federal power,⁵⁰ the federal government ostensibly maintains the power to criminalize gun possession by anyone in a school zone⁵¹ or by a convicted felon anywhere,⁵² where such gun at any time previous to the possession had moved in interstate or foreign commerce. Congress also has the constitutional authority to criminalize possession by anyone, in a school zone or anywhere else, of stolen guns that had at anytime been "shipped or transported in interstate or foreign commerce."⁵³ As elements of the crimes in these examples, phrases such as "shipped or transported in interstate or foreign commerce" are usually referred to as "jurisdictional nexus requirements"⁵⁴ or "jurisdictional element[s]."⁵⁵ The jurisdictional element of a statute is that which purports to provide the basis for authority to enact it.⁵⁶

48. See Pub. L. No. 104-208, § 657, 110 Stat. 3009-369 (1996) (codified as amended at 18 U.S.C. § 922(q)(2)(A)).

49. Federal prosecutors need only demonstrate that the gun originated outside of the state, or even if manufactured locally, had crossed a state line at any time. See *United States v. Singletary*, 268 F.3d 196, 205 (3d Cir. 2001) ("[W]e conclude that the proof in this case that the gun had traveled in interstate commerce, at some time in the past, was sufficient to satisfy the interstate commerce element . . ."); see also *Scarborough v. United States* 431 U.S. 563 (1977). Like most modern manufacturing, gun production is a centralized process and consolidation in the industry has reduced the number of sources. Likewise, sophisticated distribution and warehousing practices often result in pre-sale interstate movement of goods produced and ultimately sold even in the same jurisdiction. Consequently, the statute will likely apply even in one of the few states that produce firearms, because guns or at least their components, like most commodities, will have traveled interstate at one time or another.

50. See *supra* note 27 and accompanying text.

51. See 18 U.S.C. § 922(q)(2)(A).

52. See *id.* § 922(g)(1); see also *Scarborough*, 431 U.S. at 563.

53. *United States v. Luna*, 165 F.3d 316, 321 (5th Cir. 1999) (upholding 18 U.S.C. § 922(j)) (internal quotations omitted), *cert. denied*, 526 U.S. 1126 (1999).

54. See, e.g., *United States v. Kirk*, 105 F.3d 997, 1009 (5th Cir. 1997) (noting that "*Lopez* illustrated how a jurisdictional nexus requirement could save a statute from Constitutional infirmity," while qualifying that a "jurisdictional nexus requirement does not *ipso facto* validate a statute against an as-applied Commerce Clause challenge, but its existence is reassuring against a facial challenge").

55. See, e.g., Diane McGimsey, *The Commerce Clause and Federalism After Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 Cal. L. Rev. 1675 (2002).

56. See, e.g., L.B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 Law & Contemp. Probs. 64, 79 (1948) ("[T]he use of a particular

Statutory jurisdictional elements used to justify federal enactments providing for criminal or civil penalties for the mere possession of articles having once traveled in interstate commerce—or for a particularized use of such an article—are of a questionable constitutional pedigree.⁵⁷ Such justifications have been variously referred to as loopholes⁵⁸ and legal fictions.⁵⁹

As the Ninth Circuit noted, “[n]o such jurisdictional hook exists in relevant portions of the CSA” that would “limit the reach of the statute to a discrete set of cases.”⁶⁰ Nonetheless, since the marijuana possessed, at issue in *Raich*, was found to be homegrown,⁶¹ the addition of a jurisdictional element requiring proof that the marijuana had previously traveled interstate would be immaterial to the outcome of an as-applied challenge.

If the Supreme Court hears *Raich* or a similar case, it would seem that the current majority would either have to strain to articulate how noncommercial mere possession is an economic activity or invalidate certain classes of commerce power-enabled possession regulations. Alternatively, perhaps the Court will suggest that a range of applications of the CSA could be saved by the inclusion of a jurisdictional element requiring proof that the marijuana, or perhaps even seeds, soil, growing lights, or other items attendant to local cultivation, were introduced into the state from without.

However, this speculation is the result of confining the analysis to the Commerce Clause doctrine and the result of confusion regarding the bases of federal authority to regulate mere possession. In this context, this Note argues that congressional power to regulate possession is based on the effects of possession on the enforcement

jurisdictional circumstance in the definition of a federal crime only very crudely marks off the area in which . . . [federal jurisdiction is justified].”).

57. See *infra* Part II.B.

58. See McGimsey, *supra* note 55, at 1682 (“To understand the significance of the Court’s failure in *Lopez* and *Morrison* to close the jurisdictional-element loophole, it is necessary to consider the importance of federalism in the United States.”).

59. See *United States v. Coward*, 151 F. Supp. 2d 544, 547 (E.D. Pa. 2001) (“[We] analyze post-*Lopez* Supreme Court cases to determine the vitality of continued application of the interstate transport legal fiction to possession cases like *Coward*’s. We conclude that the Supreme Court’s recent decisions in *Morrison* and *Jones* strongly suggest that this legal fiction no longer deserves any vitality . . .”), *rev’d*, 296 F.3d 176, 183 (3d Cir. 2002) (“[P]roof . . . that the gun had traveled in interstate commerce, at some time in the past, was sufficient to satisfy the interstate commerce element of the statute”), *remanded to* No. CRIM 00-88, 2002 WL 31012793 (E.D. Pa. Sept. 4, 2002). Indeed, it is difficult to comprehend a principled federalism that acknowledges the conclusory presumption that the mere possession or use of goods or the behaviors of persons who had previously traveled in interstate commerce remain so engaged, or that the subsequent use or possession of such commodities are economic in nature, and thereby regulable by Congress if they have substantial effects on interstate commerce.

60. *Raich v. Ashcroft*, 352 F.3d 1222, 1231 (9th Cir. 2003) (internal quotations omitted).

61. *Id.* at 1225.

efficacy of valid predicate regulations, usually of the channels of interstate commerce, of things *in* commerce. The required nexus, under this formulation, is not that between the regulated activity and its effects on commerce, but rather between the activity and its relation to the efficacy of enforcing or administering valid regulations of receipt of articles from, or the transport of articles in, interstate commerce.

If the Supreme Court, at least partially, locates authority for laws regulating noncommercial possession in relation to the enforcement of related legislation, rather than in the broad substantial effects doctrine or in an overwrought notion of transport regulation, it will not have to choose between abandoning the *Lopez* economic activities criteria or invalidating a number of federal schemes regulating noncommercial possession. The test for statutes purporting to authorize the regulation of possession or of a particularized intrastate use of an article should not be centered on whether the activity genuinely affects commerce, but rather whether it is genuinely—or at least rationally—tailored to enhance the enforcement efficacy of a valid predicate legislative regime.

This Note demonstrates that the prevailing treatments of relevant possession laws are confused—often tactically—and suggests that a principled justification for federal regulation of noncommercial possession, more consistent with traditional jurisprudence than are most current renditions, is available, and that the doctrine will acknowledge the centrality of enforcement efficacy. To provide background, Part I offers a brief review of constitutional federalism and sketches the major developments in Commerce Clause jurisprudence. Part II traces the origins of the regulation of possession pursuant to the Commerce Clause and highlights a fundamental gap in the doctrine.⁶² Part III introduces a preferred reading of the foundational cases most often cited to defend relevant possession regulations and offers a conceptual architecture for understanding and testing the bases for federal authority to regulate mere possession.

Whatever the merits of the rationale initiated by the Court in *Lopez*, the economic activities requirement represents a particular choice in the current majority's attempt to strike a balance between the local and the national. An appropriate assessment of possession regulations, based on their relation to the enforceability of predicate legislation, is necessary to clarify the conditions for a similar choice. In the context of mere possession, ultimately and perhaps artificially, the jurisprudence will have to explicitly distinguish between regulations of activities that affect commerce and the regulation of activities that affect the enforcement efficacy of valid enactments.

62. See *infra* notes 196-97, 294-96 and accompanying text.

Informed by this framework, the courts may depart from the dubious jurisdictional elements that rely solely on federal authority to regulate the possession or the intrastate use of items that had once crossed an interstate boundary, such as the language of the amended Gun-Free School Zones Act,⁶³ without jeopardizing all federal possession regulation. Such a dialogue will increasingly emerge from judicial treatments of possession regulations and should be of chief concern if the Supreme Court hears *Raich v. Ashcroft*.⁶⁴

I. FEDERALISM AND THE DEVELOPMENT OF COMMERCE CLAUSE JURISPRUDENCE

Spirited by the ideals of eighteenth century political discourse, and—not incidentally—motivated to insulate their interests as propertied elite from feared majoritarian “excesses,”⁶⁵ the Framers tempered democracy with certain counter-majoritarian measures. Constitutional federalism, as such, divides power between the states and federal government by enumerating federal powers and reserving the balance “to the States respectively, or to the people.”⁶⁶ The conventional wisdom is that the Framers dispersed power among the three branches of the federal government and divided power between the states and the federal government to curb the concentration of power and thereby protect freedom.⁶⁷

Federalism also protects a degree of local autonomy and the values attributed to it. These values include “promoting responsive and participatory government by bringing the government closer to the people[,] fostering diversity and experimentation by increasing the fora for expressing policy choices and creating a competition for a mobile citizenry[,] [in addition to] providing a check against tyranny by diffusing power that would otherwise be concentrated.”⁶⁸

Although not undisputed,⁶⁹ the Framers understood that the judiciary would play the central role in defending individual rights as

63. 18 U.S.C. § 922(q)(2)(A) (2000).

64. 352 F.3d at 1222.

65. See generally Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (1990) (providing a reminder that the fear of popular redistributive legislation animated many constitutional provisions).

66. U.S. Const. amend. X.

67. See generally Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 Vand. L. Rev. 507 (1988). While true, the shape of federalism is as much the result of compromise between political actors endowed with existing institutional power as it is the realization of the ideals of any political theory.

68. Barron, *supra* note 23, at 378.

69. See, e.g., Larry D. Kramer, *But when Exactly Was Judicially-Enforced Federalism “Born” in the First Place?*, 22 Harv. J.L. & Pub. Pol’y 123 (1998); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 Wash. & Lee L. Rev. 787 (1999).

well as in sustaining the federalist structure.⁷⁰ Judicial review is the power of the courts to invalidate a congressional enactment.⁷¹ In the range of its exercise, judicial review can additionally be understood as the measure of relative deference that the courts have shown to legislative judgments.⁷² When engaging claims that legislation intrudes into a recognized individual right, deference to the legislature can be quite low and the inquiry into the challenged congressional judgment is more searching than may be expected of the inquiry into the bounds of enumerated powers.⁷³ Even when engaging a claim of intrusion into a protected right, the degree of deference may depend on the right claimed to have been infringed.⁷⁴

70. See Daniel A. Farber, *Judicial Review and Its Alternatives: An American Tale*, 38 Wake Forest L. Rev. 415, 423 (2003). Alexander Hamilton identified the role of the judiciary in maintaining a government of limited powers:

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority Limitations . . . can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void.

The Federalist No. 78, at 403 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001). On sustaining federalism, Madison observed that in “controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government.” *Id.* 39, at 198 (James Madison).

71. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Judicial review itself has long been criticized for being undemocratic or “anti-populist.” See generally William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (1994). There are those who call for its elimination. See, e.g., Mark Tushnet, *Taking the Constitution Away from the Courts* (1999); Jeremy Waldron, *Law and Disagreement* (1999). Judicial review of congressional enactments may certainly be “anti-populist” and undemocratic. Or, judicial review may be seen as necessary to protect democracy from legislation that impairs democratic function. For more on judicial review and democracy, see Curtis, *supra* note 24, at 321 (“But if the people are so degenerate that they reject our most basic national values, it is ‘wildly unlikely’ that courts can save ‘us’ from ‘ourselves’ [anyway].” (quoting Tushnet, *supra*)). If undemocratic laws are passed “at least . . . the people have ‘made their own mistake’ rather than having one foisted on them by unelected and unaccountable judges.” *Id.* at 322 (presenting Waldron’s response, quoting Waldron, *supra*, at 293-94). Judicial review is perhaps undemocratic if the transitory will of “the people”—if the unlikely result of some deliberation and more perfectly identified with elected officials—is somehow better reflected in a piece of legislation than in the values that have been given constitutional expression. Nevertheless, the preferred function of judicial review is to check congressional power in fidelity to constitutional design.

72. See generally Killenbeck, *supra* note 21.

73. See, e.g., *United States v. Carolene Products, Co.*, 304 U.S. 144, 152 n.4 (1938) (“There may be narrower scope . . . of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”).

74. See David L. Hudson, Jr., *Circuits Split Over Prisoners’ Religious Rights*, 2 No. 45 ABA J. E-Report 2, at *1-*3 (2003). Hudson discusses the conflict among the circuits in the degree of deference shown to generally applicable legislation that

When marking the bounds of the enumerated powers, the courts have considered congressional determinations even about the authority to exercise the particular power in a given manner, with varying degrees of deference. In the realm of Commerce Clause jurisprudence, the degree of deference shown to congressional judgments has ranged from nearly total,⁷⁵ to qualified,⁷⁶ and at times to virtually nonexistent.⁷⁷

Although conflicts between federal legislation and state powers have arisen in a range of contexts,⁷⁸ federal laws enacted pursuant to the enforcement powers of the Civil War Amendments,⁷⁹ under the Spending Clause,⁸⁰ and under the Commerce Clause,⁸¹ have drawn the bulk of the doctrine-shaping federalism challenges. Because most of the expansion of the federal government has been enabled by the judicially sanctioned growth of the commerce power, the story of federalism often overlaps with the story of Commerce Clause jurisprudence.⁸²

impacts religious practices that has developed since *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), wherein the Court held that such legislation need only be reasonably related to its object, and *City of Boerne v. Flores*, 521 U.S. 507 (1997), wherein the Court invalidated an attempt by Congress to force the courts to return to a strict scrutiny test as applied against state laws via the Fourteenth Amendment.

75. Congressional enactments will be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Congress did not have to supply the rational basis, or exhibit consciousness of one in particular. "[W]e never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason . . . actually motivated the legislature." *Id.* at 315 (citing *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). "Judicial review under [this] test is tantamount to no review at all." *Id.* at 323 n.3 (Stevens, J., concurring).

76. *See, e.g., United States v. Lopez*, 514 U.S. 549, 563 (1995) ("[T]o 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.").

77. *See, e.g., United States v. Morrison*, 529 U.S. 598, 615 (2000) ("Congress' [sic] findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have . . . rejected.").

78. *See, e.g., United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (striking a state's attempt to impose term limits on federal senators and representatives); *Geofroy v. Riggs*, 133 U.S. 258 (1890) (upholding a treaty provision at the expense of state statutes); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (affirming constitutional authority for Supreme Court review of state court decisions).

79. U.S. Const. amends. XIII, § 2, XIV, § 5, XV, § 2.

80. *Id.* art. I, § 8, cl. 1.

81. *Id.* art. I, § 8, cl. 3.

82. *See, e.g., Anthony B. Ching, Traveling Down the Unsteady Path: United States v. Lopez, New York v. United States, and the Tenth Amendment*, 29 Loy. L.A. L. Rev. 99, 103 (1995) ("Since much of the early expansion of the national government's powers dealt with the Commerce Clause, which delegated to the national government broad power to regulate commerce among the several states, the evolution of

A. Defining Interstate Commerce

In 1824, *Gibbons v. Ogden* presented a challenge to a New York law approving a monopoly over steamboat navigation between New Jersey and New York, brought by an operator excluded by the monopoly, yet duly licensed by the laws of the United States to navigate its waters.⁸³ The parties offered competing conceptions of commerce: The defenders of the monopoly asserted that commerce was limited “to traffic, to buying and selling, or the interchange of commodities”; their rivals in the lucrative market insisted that commerce necessarily included navigation.⁸⁴

When invalidating the New York monopoly, the Court refused to accept the narrow view of commerce and concluded that “[t]he power of Congress . . . comprehends navigation within the limits of every State . . . so far as that navigation may be, in any manner, connected with [interstate commerce].”⁸⁵ The Court found that the Constitution authorized the federal regulation of the navigable waterways, as literal channels of interstate commerce.⁸⁶

Nearly fifty years later, in *The Daniel Ball*, a Michigan steamboat operator challenged federal regulation on the ground that the routes of his operation were wholly internal to the territory of the state.⁸⁷ The Court held that such a steamer was indeed subject to federal regulation because she carried goods destined for other states and received goods from other states and thereby “was employed as an instrument of [interstate] commerce.”⁸⁸ A factual inquiry revealed that the steamboat was directly engaged as an instrument of interstate commerce, that interstate commerce penetrated into the interiors of states and operated through the use of a combination of instrumentalities, and that some instrumentalities of interstate commerce crossed state lines and some, like the steamboat *Daniel Ball*, did not.⁸⁹

Over the following years, the Court struggled with challenges to the application of the Sherman Act⁹⁰ to certain trusts⁹¹ and in determining

Commerce Clause jurisprudence is, in many ways, the evolution of Tenth Amendment jurisprudence.”).

83. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 2 (1824).

84. *Id.* at 189-90.

85. *Id.* at 197.

86. *See id.*

87. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 565 (1870).

88. *Id.*

89. *See id.*

90. Act of July 2, 1890, ch. 647, 26 Stat. 209-10 (current version at 15 U.S.C. §§ 1-7, 15 (2000)).

91. *Compare* *United States v. E.C. Knight Co.*, 156 U.S. 1, 13 (1895) (holding that processing and selling sugar is not interstate commerce), *with* *Swift & Co. v. United States*, 196 U.S. 375, 398-99 (1905) (holding that processing and selling beef is interstate commerce).

congressional power to prohibit the interstate transport of commodities or persons.⁹² After a fact-based inquiry, the processing and sale of beef products was held to constitute interstate commerce,⁹³ yet the processing and sale of sugar was categorically determined not to be interstate commerce.⁹⁴ Legislative prohibitions on the use of the channels of interstate commerce of lottery tickets⁹⁵ and of women for the purpose of prostitution⁹⁶ were upheld—withstanding their demonstrably noncommercial, moral purpose—while regulations on the manufacture of goods produced for eventual use in those channels were invalidated.⁹⁷

The cases from this period, which upheld federal prohibitions on participation in interstate commerce by certain commodities or persons, were based on congressional authority to protect the channels of interstate commerce from undesirable uses. As more activities were undertaken specifically in order to participate in interstate commerce, the reality of the reach of interstate commerce grew faster than the judicial cognizance of its occasions.

This circumstance and the difficulties it produced eventually led the Court to retreat to a factually dubious, reductive formalism which established per se categories of activities unregulable pursuant to the commerce power. By 1921, mining, manufacture, and agriculture had been designated as beyond Congress's authority to regulate.⁹⁸ Despite the fact that production for interstate commerce represented a burgeoning sector of all production, the Court defended the formal distinction between production and commerce until 1937.⁹⁹

92. Compare *Hammer v. Dagenhart*, 247 U.S. 251, 272, 276-77 (1918) (invalidating federal prohibition on interstate shipment of furniture manufactured by child labor within thirty days of manufacture), with *Hoke v. United States*, 227 U.S. 308, 323 (1913) (upholding federal prohibition on interstate transport of women for prostitution), and *Hipolite Egg Co. v. United States*, 220 U.S. 45, 58 (1911) (upholding provisions of the Pure Food and Drug Act of 1906), and *Lottery Case*, 188 U.S. 321, 363-64 (1903) (upholding federal law prohibiting lottery tickets from the channels of interstate commerce).

93. See *Swift*, 196 U.S. at 398-99.

94. See *E.C. Knight*, 156 U.S. at 13.

95. See *Lottery Case*, 188 U.S. at 363-64.

96. See *Hoke*, 227 U.S. at 323.

97. See *Hammer*, 247 U.S. at 272, 276-77.

98. See, e.g., *Newberry v. United States*, 256 U.S. 232, 257 (1921) ("It is settled . . . that the power to regulate interstate and foreign commerce does not reach whatever is essential thereto. Without agriculture, manufacturing, mining, etc., commerce could not exist, but this fact does not suffice to subject them to the control of Congress.").

99. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating portions of the Coal Conservation Act). The Court reasoned:

We have seen that the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade.' Plainly, the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. The employment of men, the fixing of their wages, hours of labor, and working conditions, the bargaining in respect of these things—whether

B. *Reaching Substantial Effects-Producing Activities*

In the years leading up to 1937, the Court struck down, on federalism grounds, several important portions of President Franklin D. Roosevelt's New Deal legislation and was under political and popular pressure to get on board with the economic recovery agenda; Roosevelt even threatened to pack the Court with a majority of sympathetic justices.¹⁰⁰ Before *NLRB v. Jones & Laughlin Steel Corp.*,¹⁰¹ the Court had employed descriptive definitions of commerce, even though functional attributes of particular activities were sometimes cited as evidence to support the descriptive definition.¹⁰²

In *Jones & Laughlin*, the Court abandoned the production/commerce distinction and upheld the National Labor Relations Act¹⁰³ ("NLRA") as applied to the regulation of labor relations in steel manufacturing.¹⁰⁴ The Court held that, "[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."¹⁰⁵ The Court acknowledged congressional

carried on separately or collectively—each and all constitute intercourse for the purposes of production, not of trade.

Id. at 303.

100. See Robert G. McCloskey, *The American Supreme Court* 169 (1960). Roosevelt was elected in 1936 by a large majority. *Id.* at 168.

101. 301 U.S. 1 (1937).

102. See, e.g., *Swift & Co. v. United States*, 196 U.S. 375, 398-99 (1905); *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564 (1870); cf. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 544 (1935).

[I]n dealing with common carriers engaged in both interstate and intrastate commerce, the dominant authority of Congress necessarily embraces the right to control their intrastate operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to secure the freedom of that traffic from interference or unjust discrimination and to promote the efficiency of the interstate service.

Id.

103. 29 U.S.C. §§ 151-170 (2000).

104. *Jones & Laughlin*, 301 U.S. at 41.

[T]he fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern.

Id.

105. *Id.* at 37 (citing *Schechter*, 295 U.S. at 546-47).

power to legislate activities based on how they functioned in relation to interstate commerce, in addition to the traditional power to regulate interstate commerce directly. Comparing the application of the NLRA to the steel industry with that of the Railway Labor Act¹⁰⁶ to the Virginian Railway Company,¹⁰⁷ the Court inquired: "And of what avail is it to protect the facility of transportation, if interstate commerce is throttled with respect to the commodities to be transported!"¹⁰⁸ For the first time, the commerce power reached pre-shipment conditions of manufacture and the production/commerce distinction dissolved.

Shortly thereafter, the Court overruled *Hammer v. Dagenhart*¹⁰⁹ in *United States v. Darby*,¹¹⁰ when it upheld the Fair Labor Standards Act of 1938¹¹¹ ("FLSA")—which required companies engaged in the production of goods for interstate commerce to establish wage and hours requirements and provided for the denial of the use of the channels of interstate commerce for those goods manufactured in violation of the FLSA. The *Darby* opinion emphasized that it was irrelevant whether Congress was motivated to protect interstate commerce, or whether Congress used its power to instead regulate working conditions, "[w]hatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause."¹¹² The Court maintained a clear distinction between the enforcement provision of the enactment and the validity of the application of the wage and hours standards on the lumber manufacturer. The opinion grounded the provision excluding shipment of proscribed goods on congressional power over the use of channels, and applied emerging substantial effects principles to uphold the wage and hours standards.¹¹³

The doctrine was further extended in *Wickard v. Filburn*,¹¹⁴ wherein the Court held that Congress could regulate the consumption of homegrown wheat by a single farmer because, if aggregated through repetition elsewhere, it "would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices."¹¹⁵ Yet, on its own, the activity would not produce significant effects on interstate commerce. After *Wickard*, Congress could

106. 45 U.S.C. §§ 151-163 (2000).

107. See *Virginian Ry. Co. v. Sys. Fed'n* No. 40, 300 U.S. 515 (1937).

108. *Jones & Laughlin*, 301 U.S. at 42.

109. 247 U.S. 251 (1918). For some discussion of *Hammer*, see *supra* note 92 and accompanying text.

110. 312 U.S. 100 (1941).

111. 29 U.S.C. §§ 201-219 (2000).

112. *Darby*, 312 U.S. at 115.

113. See *infra* notes 174-80 and accompanying text.

114. 317 U.S. 111 (1942).

115. *Id.* at 129.

essentially regulate anything that, if sufficiently aggregated, would be deemed to affect interstate commerce, along with any of its instrumentalities and anything traveling in interstate commerce.¹¹⁶

The growth of national regulation during this period was indeed dramatic.¹¹⁷ The expansion of the national government heralded by the New Deal has been attributed, in part, to progressive constitutional theory that "required that the Commerce Clause be interpreted as a constitutional transmitter letting the national government regulate whatever the American people deem[ed] to be a national problem."¹¹⁸ More likely, the role of the judiciary seems to have been somewhere between the measured recognition of a sophisticated and increasingly interconnected economic reality and a recognition of an increasingly hostile political one.¹¹⁹

Given this background, it is not surprising that the Court relied on the commerce power to uphold Title II of the Civil Rights Act of 1964¹²⁰—as against private establishments of public accommodation—after it was immediately tested by a declaratory judgment action brought by a motel operator intent on continuing racial discrimination in letting rooms, in *Heart of Atlanta Motel, Inc. v. United States*,¹²¹ and by an action to enjoin the application of the Act on a small, family-owned restaurant, in *Katzenbach v. McClung*.¹²² The Court upheld the Act as applied to Ollie's Barbecue, a local restaurant serving and employing local people, because it was found to have received a substantial enough portion of the food that it served from out of state suppliers to bring it under federal regulation.¹²³ To be subject to the

116. See, e.g., Badawi, *supra* note 24, at 1343.

117. See, e.g., Shane, *supra* note 24, at 203 ("[The substantial effects doctrine] occurred, of course, during a period of generally expanding national regulatory authority at the expense of the states.").

118. Eric E. Claey's, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause After Lopez and Morrison*, 11 Wm. & Mary Bill Rts. J. 403, 403 (2002) (emphasis omitted).

119. See *supra* note 100 and accompanying text (discussing the impact of the New Deal political climate on the court).

120. 42 U.S.C. § 2000a(a)-(c) (2000).

121. 379 U.S. 241 (1964).

The legislative history of the Act indicates that Congress based the Act on § 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce Congress possessed ample power [pursuant to the Commerce Clause], and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone.

Id. at 249-50.

122. 379 U.S. 294 (1964).

123. *Id.* at 301 (aggregating the effects of similarly situated restaurants and noting "as our late Brother Jackson said for the Court in *Wickard v. Filburn*, 317 U.S. 111 (1942): 'That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as

Act, it need not be proven that a vendor's sale of food had any effect on interstate commerce; Congress had previously legislated a presumption that if a substantial portion of the food served was supplied from out of state, the requisite substantial effects on interstate commerce were present.¹²⁴

Similarly, the Court, in *Perez v. United States*,¹²⁵ accepted Congress's legislated conclusion that loan sharking, per se, had direct and substantial effects on interstate commerce, as expressed in Title II of the Consumer Credit Protection Act of 1968.¹²⁶ The Court affirmed Perez's conviction under the Act against a Commerce Clause challenge.¹²⁷ Here, the Court accepted Congress's conclusion that, as a general matter, such transactions "are carried on to a substantial extent in interstate and foreign commerce" and "[e]ven where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce."¹²⁸ Since Congress included such intrastate activities in a class of activities having previously been determined to affect interstate or foreign commerce, the government needed only to prove that Perez engaged in such transactions, without regard to proof of any particular effects on interstate or foreign commerce.¹²⁹ The Court summarized the state of the doctrine:

The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods or of persons who have been kidnaped [sic]. Second, protection of the instrumentalities of interstate commerce, as, for example, the destruction of an aircraft, or persons or things in commerce, as, for example, thefts from interstate shipments. Third, those activities affecting commerce.¹³⁰

Given the doctrinal acrobatics displayed by the Court since the New Deal to shepherd federal plenary power, it is not surprising that many serious observers considered it settled that the only limit on Congress's commerce power was its own self-restraint.¹³¹ From the 1936 decision in *Carter v. Carter Coal Co.*¹³² until after Alfonso Lopez, Jr. walked onto to a school zone with a pistol nearly six decades

here, his contribution, taken together with that of many others similarly situated, is far from trivial" (citation omitted)).

124. See *id.*

125. 402 U.S. 146, 157 (1971).

126. 18 U.S.C. §§ 891-896 (2000).

127. See *Perez*, 402 U.S. at 146-47.

128. *Id.* at 147 n.1.

129. *Id.* at 154-55.

130. *Id.* at 150 (citations omitted).

131. See, e.g., Rotunda, *supra* note 24, at 800.

132. 298 U.S. 238 (1936).

later,¹³³ the Court did not invoke Commerce Clause limitations to invalidate a single congressional enactment.¹³⁴

C. The New Commerce Clause: Qualifying Substantial Effects-Producing Activities

Lopez was convicted for violating a provision of the Gun-Free School Zones Act of 1990,¹³⁵ wherein "Congress made it a federal offense 'for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.'"¹³⁶ The Fifth Circuit reversed and "held that, in light of what it characterized as insufficient congressional findings and legislative history, [the statute], in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause."¹³⁷ The Fifth Circuit was concerned that Congress did not even pay lip service to a plausible commerce justification in the language of the statute.¹³⁸

In affirming the Fifth Circuit, the Supreme Court, in a five-four decision, held that the target of the legislation—the activity of possession of a firearm in a school zone—did not substantially affect interstate commerce and therefore was beyond Congress's reach under the Commerce Clause.¹³⁹ Because the statute did not contain an express jurisdictional element restricting its application to cases involving guns proven to have had previously traveled interstate, the Court foreclosed the possibility that the statute was enacted pursuant to congressional power to regulate the use of the channels of interstate commerce, to regulate a "thing" in interstate commerce, or to protect an instrumentality of interstate commerce.¹⁴⁰

133. See *United States v. Lopez*, 514 U.S. 549, 551 (1995).

134. See Seinfeld, *supra* note 24, at 1263 ("From the 1936 decision in *Carter Coal* until the *Lopez* decision in 1995, the Court did not deem a single act of Congress invalid on Commerce Clause grounds.").

135. Pub. L. No. 101-647, § 1702, 104 Stat. 4844-45 (1990) (codified as amended at 18 U.S.C. § 922(q) (2000)).

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

137. *Id.* at 552 (internal quotations omitted).

138. See *United States v. Lopez*, 2 F.3d 1342, 1360 (5th Cir. 1993) ("[W]e would note that the source of constitutional authority to enact the legislation is not manifest on the face of the bill." (quoting testimony of officials from the Bureau of Alcohol, Tobacco and Firearms)).

139. *Lopez*, 514 U.S. at 567-68.

140. See *id.* at 559.

[Section] 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can [§] 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if [§] 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

The government argued that the aggregate impact of the regulated activity—gun possession in and around schools—had substantial effects on interstate commerce because it adversely affected the education of the citizenry and, in turn, unfavorably impacted national productivity.¹⁴¹ As the circuit court had noted, the statute did not contain congressional findings correlating the regulated activity with the asserted harm on national productivity, representing a legislative judgment to which the Court may have deferred.¹⁴² Nonetheless, it is doubtful that any such findings would have saved the statute, “[a]lthough as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings . . . Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce.”¹⁴³ The post-1937 Court’s deference to congressional findings, especially regarding congressional determinations regarding the limits of Congress’s own power, was giving way to the *Lopez* majority’s “independent evaluation” of constitutionality.¹⁴⁴

In a departure from previous decisions, the Court established a new requirement for determining whether activities substantially affect interstate commerce. The Court limited those activities that may be deemed to have substantial effects on interstate commerce to those involving commercial transactions; the enactment “cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.”¹⁴⁵ The Court reiterated that “[t]he 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.”¹⁴⁶ This qualification incorporated an economic activities threshold into the substantial effects test.¹⁴⁷

In *United States v. Morrison*,¹⁴⁸ the majority invalidated the civil remedy provision of the Violence Against Women Act of 1994¹⁴⁹

141. *Id.* at 563 (“The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy . . .”).

142. *Id.* at 562 (“[T]he Government concedes that ‘[n]either the statute nor its legislative history contain express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.’”).

143. *Id.* (citations omitted); see *United States v. Morrison*, 529 U.S. 598, 615 (2000) (“Congress’ [sic] findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have . . . rejected . . .”).

144. See *Lopez*, 514 U.S. at 562.

145. *Id.* at 561.

146. *Id.* at 567.

147. See *id.*

148. 529 U.S. 598 (2000).

149. Pub. L. No. 103-322, § 40302, 108 Stat. 1941 (1994) (codified at 42 U.S.C. § 13981 (2000)).

because “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”¹⁵⁰ The Court took the opportunity to articulate the state of the doctrine:

As we observed in *Lopez*, modern Commerce Clause jurisprudence has identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress’ [sic] commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce i.e., those activities that substantially affect interstate commerce.¹⁵¹

Essentially, the elements are identical to those earlier recapped by the Court in *Perez*,¹⁵² except that Rehnquist, writing again for a bare majority, more accurately could have rendered the last sentence as “Congress’s commerce authority includes the power to regulate those intrastate activities, *economic in nature*, having a substantial relation to interstate commerce.”¹⁵³

In another important development, and a marked departure from *Heart of Atlanta*, *McClung*, and *Perez*, the majority in *Morrison* emphasized that it would independently review the purported connection between the targeted activity and interstate commerce.¹⁵⁴ The Court asserted that, although the civil remedy of the Violence Against Women Act of 1994, unlike the Gun-Free School Zones Act in *Lopez*, was supported by numerous congressional findings regarding the serious impact of gender-motivated violence on victims and their families, these “findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that [this Court has] already rejected.”¹⁵⁵ Whereas the Court had previously deferred to congressional determinations of the existence of substantial effects of a class of activities on interstate commerce—if they were evident in the enactment or legislative history—the *Morrison* majority reminded Congress that “[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a

150. 529 U.S. at 613.

151. 529 U.S. at 608-09 (internal quotations and citations omitted).

152. See *Perez v. United States*, 402 U.S. 146, 150 (1971); *supra* note 130 and accompanying text.

153. For original language, see *supra* note 151 and accompanying text; *Morrison*, 529 U.S. at 609.

154. See *Morrison*, 529 U.S. at 614.

155. *Id.* at 615.

legislative question, and can be settled finally only by this Court.”¹⁵⁶ While the *Lopez* opinion had asserted the independence of the Court in determining the scope of the commerce power, leaving open the possibility of accepting relevant congressional findings,¹⁵⁷ the *Morrison* decision strongly asserted the exclusivity of the judiciary in such constitutional determinations.¹⁵⁸

II. THE ORIGINS OF COMMERCE-ENABLED POSSESSION REGULATIONS

The antecedents of federal regulations of the possession or use of articles that had previously been “in commerce or affecting commerce”¹⁵⁹ are those enactments which directly regulated interstate shipment and transport and contained traditional jurisdictional elements.¹⁶⁰ Traditional jurisdictional elements are those statutory invocations of the commerce power used to condition access or to deny access to the channels and instrumentalities of interstate commerce, for use by particular goods or by persons for particular purposes. The first formulations of jurisdictional elements depended on congressional control of interstate shipping or transport across state lines. Congress rendered versions that were calculated to regulate participants, and the conditions of participation, in interstate commerce and interstate travel. Such regulatory schemes were upheld by the Supreme Court and included: 1) the outright denial of use of the channels of interstate commerce for moving undesirable articles;¹⁶¹ 2) the denial of use by persons for identified undesirable purposes;¹⁶² 3) the qualified denial of use for noncompliant participants,¹⁶³ and finally; 4) the maintenance of compliance for

156. *Id.* at 614 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964)).

157. See *supra* note 144 and accompanying text.

158. See *Morrison*, 529 U.S. at 614; *supra* note 156 and accompanying text.

159. See, e.g., Pub. L. No. 90-351, § 1202(a), 82 Stat. 236 (1968) (“Any person who . . . has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.”).

160. See, e.g., The Pure Food and Drug Act of 1906, 21 U.S.C. § 14 (repealed 1938) (upheld in *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911)) (current version at 21 U.S.C. §§ 352-397 (2000)); see also *supra* note 92.

161. See *Lottery Case*, 188 U.S. 321, 363-64 (1903) (upholding federal law prohibiting lottery tickets from the channels of interstate commerce); see also *supra* note 92 and accompanying text.

162. See *Hoke v. United States*, 227 U.S. 308, 323 (1913) (upholding federal criminal prohibition on interstate transport of women for prostitution); see also *supra* note 92 and accompanying text.

163. See, e.g., *United States v. Darby*, 312 U.S. 100, 115 (1941); see also *supra* notes 110-13 and accompanying text.

qualified use throughout the full extent of the length of the channels of interstate commerce.¹⁶⁴

A. Invoking Commerce Power: The Traditional Formulations

There is a long history of congressional attempts to prohibit certain items from interstate commerce by denying them the use of the channels of interstate commerce or by denying them the use of legal instrumentalities flowing through the channels. For example, in the *Lottery Case*, the Supreme Court held that the power to regulate interstate commerce included the power to prohibit the traffic of articles through channels of interstate commerce.¹⁶⁵ The Court upheld the denial of the use of the channels by lottery tickets, not because the traffic in lottery tickets affected interstate commerce, but because it *was* interstate commerce: "We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State . . . is a regulation of commerce among the several States."¹⁶⁶

This power to prohibit was further refined to allow for federal criminal prohibitions on the transportation of articles or people for particular uses. For example, in *Caminetti v. United States*,¹⁶⁷ the Court upheld a conviction, against a Commerce Clause challenge, for a violation of the White Slave Traffic Act of 1910,¹⁶⁸ which "specifically made an offense to knowingly transport or cause to be transported, etc., in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for 'any other immoral purpose.'"¹⁶⁹ Importantly, the requisite mental state required intent to transport for a particular purpose. Therefore, the transport was criminal if the intent to "debauch" motivated it. The mental state of Congress, however, was not terribly important.¹⁷⁰

Congress unsuccessfully attempted to enact particularized prohibitions of articles that were sensitive to the conditions of their production. Sustaining the formal production/commerce distinction, the Court invalidated an enactment that prohibited the interstate shipment of the products of child labor in *Hammer v. Dagenhart*.¹⁷¹

164. See *United States v. Sullivan*, 332 U.S. 689, 696-98 (1948).

165. *Lottery Case*, 188 U.S. at 363-64; see also *supra* note 92 and accompanying text.

166. *Lottery Case*, 188 U.S. at 354.

167. 242 U.S. 470 (1917).

168. 18 U.S.C. § 2421 (2000).

169. *Caminetti*, 242 U.S. at 485.

170. See, e.g., *Hoke v. United States*, 227 U.S. 308, 322 (1913) ("[T]he facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women . . .").

171. 247 U.S. 251, 276-77 (1918).

There, the Court found that the legislation was pretextual for direct regulation of the conditions of production and therefore impermissible.¹⁷² This would be one of the last times that the Court found congressional intent dispositive of an otherwise valid direct exercise of commerce power. The now famous dissent of Justice Holmes predicted the direction of the Court:

It does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil. I may add that in the cases on the so-called White Slave Act it was established that the means adopted by Congress as convenient to the exercise of its power might have the character of police regulations.¹⁷³

In *United States v. Darby*,¹⁷⁴ the Court, in addition to upholding the validity of the wage and hour requirements of the FLSA, addressed its enforcement mechanism: the prohibition of the interstate shipment of goods manufactured under conditions contrary to the FLSA.¹⁷⁵ The Court followed the substantial effects rationale underlying *NLRB v. Jones & Laughlin Steel Corp.*¹⁷⁶ in order to uphold the wage and hour requirements.¹⁷⁷ The Court also expressly overruled *Hammer v. Dagenhart*¹⁷⁸ and found no cause to resort to a consideration of substantial effects with regard to the enforcement provision. "While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce."¹⁷⁹ The Court's approval of the enforcement provision at issue in *Darby* sent a clear message to Congress that its motivation for restricting the use of the channels of interstate commerce was irrelevant, and that it could so condition participation in the national economy on whatever it deemed desirable.¹⁸⁰ After the Court foreclosed inquiry into permissible legislative motives, the focus

172. *Id.* at 271-72 ("The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States.").

173. *Id.* at 279-80 (Holmes, J., dissenting) (citations omitted).

174. 312 U.S. 100 (1941).

175. *Id.* at 125-26.

176. 301 U.S. 1 (1937).

177. *Darby*, 312 U.S. at 118 ("[Congress's commerce power] extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.").

178. *Id.* at 116-17 ("The conclusion is inescapable that *Hammer v. Dagenhart* . . . should be and now is overruled.").

179. *Id.* at 113.

180. *Id.* at 116 ("The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force.").

largely shifted to questions concerning the definition of activities constituting participation in interstate commerce.

In 1943, the Supreme Court, in *Tot v. United States*,¹⁸¹ considered a provision of the Federal Firearms Act.¹⁸² In pertinent part, the statute declared:

It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act.¹⁸³

The government and the lower court agreed that the statute did not attempt to reach mere possession.¹⁸⁴ It rather criminalized the receipt or transport of firearms and ammunition and legislated a presumption that possession constituted requisite evidence of previous receipt or transport.¹⁸⁵ Moreover, the criminal receipt of the article had to have a direct connection with interstate transport: “[T]he Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate.”¹⁸⁶ This was a forthright acknowledgment that direct congressional authority over things in interstate commerce was limited to the extent of interstate commerce.

The Court held the presumption invalid as an evidentiary matter, “the mere possession of a pistol coupled with conviction of a prior crime is no evidence at all that the possessor of the pistol has acquired it in interstate commerce.”¹⁸⁷ Importantly, the statute contained no reference to the substantial effects of possession on interstate commerce.

181. 319 U.S. 463 (1943).

182. Pub. L. No. 785, ch. 850, 52 Stat. 1250-51 (1938) (codified at 15 U.S.C. § 902(f) (repealed 1968)) (current version, the presumption from possession rule omitted, at 18 U.S.C. §§ 922(d), 923(f) (2000)).

183. *Id.*

184. *See Tot*, 319 U.S. at 466.

Both courts below held that the offense created by the Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate. The Government agrees that this construction is correct.

Id.

185. *Id.* (“[The issue is] the question of the power of Congress to create the presumption . . . that, from the prisoner’s prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed that the article was received by him in interstate or foreign commerce.”).

186. *Id.*

187. *Id.* at 473 (Black, J., concurring).

*United States v. Sullivan*¹⁸⁸ is seen as a foundational decision extending federal regulatory power into subsequent intrastate commerce of goods that had first been introduced into the state from without.¹⁸⁹ Sullivan, a pharmacist, was convicted of violating a provision of the Pure Food, Drug, and Cosmetic Act of 1938¹⁹⁰ because he transferred medicine from duly branded containers into unlabeled containers (except by name) before holding them for sale in his pharmacy.¹⁹¹

The statute provided for criminal penalties for misbranding drugs while "held for sale after shipment in interstate commerce."¹⁹² Answering Sullivan's defense that congressional commerce power was limited to the regulation of the conditions of the first sale following importation into the destination state, the Court held that Congress intended to and had the power to "broadly and unqualifiedly prohibit misbranding articles held for sale after shipment in interstate commerce, without regard to how long after the shipment the misbranding occurred, how many intrastate sales had intervened, or who had received the articles at the end of the interstate shipment."¹⁹³ Under *Sullivan*, interstate commerce grasped the post-import sales and re-sales of commodities introduced through interstate commerce without regard to whether the subsequent intrastate activity had effects on the national economy.¹⁹⁴

The Court identified the issue before it: "[T]he question relates to the constitutional power of Congress under the commerce clause to regulate the branding of articles that have completed an interstate shipment and are being held for future sales in purely local or intrastate commerce."¹⁹⁵ Although decided in 1948, the opinion contains no discussion of the substantial effects of Sullivan's misbranding of medicine containers for local sale.

Most commentators trace the advent of the problematic modern jurisdictional elements, those that purport to reach possession, to the decision in *Sullivan*, attributing it to a failure by the Court:

to define how explicit the nexus between the line crossing and the regulated activity must be, open[ing] the door for more expansive interpretations of what Congress could regulate under the channels and instrumentalities rationales Congress eventually began to regulate activity based not on a close connection between a line

188. 332 U.S. 689 (1948).

189. See, e.g., McGimsey, *supra* note 55, at 1698-99.

190. 21 U.S.C. §§ 301-397 (2000).

191. *Sullivan*, 332 U.S. at 691-92.

192. See 21 U.S.C. § 331(k).

193. *Sullivan*, 332 U.S. at 696. "Congress [has the power] under the commerce clause to regulate the branding of articles that have completed an interstate shipment and are being held for future sales in purely local or intrastate commerce." *Id.* at 698.

194. See *supra* notes 188-93 and accompanying text.

195. *Sullivan*, 332 U.S. at 698.

crossing and the regulated activity, but on the fact that a person or good had, at some point, crossed state lines.¹⁹⁶

It is presumed that because the Court upheld regulations on the post-shipment condition of the drugs that Congress, without more, was thereafter able to reach post-sale possession and the conditions of use of articles of interstate commerce.¹⁹⁷

B. The Leap Forward: The Height of Deference and the Substantial Effects of Possession

After the substantial effects principles became increasingly settled, Congress began to add that judicially created basis of authority to the traditional statutory jurisdictional elements. In 1971, the Court heard *United States v. Bass*.¹⁹⁸ Bass was convicted of possessing firearms in violation of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968.¹⁹⁹ The statute provided that “[a]ny person who . . . has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.”²⁰⁰ The Act contained the indiscriminate language “in commerce or affecting commerce” that Congress increasingly began adding to constitutionally marginal enactments.²⁰¹

The government contended that the statute prohibited possession per se, and consequently:

There was no allegation in the indictment and no attempt by the prosecution to show that either firearm had been possessed “in commerce or affecting commerce.” The government proceeded on the assumption that [the statute] banned all possessions and receipts of firearms by convicted felons, and that no connection with interstate commerce had to be demonstrated in individual cases.²⁰²

The Court, instead, construed the “in or affecting commerce” language to refer to receiving, transport, *and* possession, and held that the “conviction must be set aside because the Government has failed to show the requisite nexus [between possession and] interstate commerce.”²⁰³ Importantly, the Court emphasized: “In light of our disposition of the case, we do not reach the question whether, upon

196. McGimsey, *supra* note 55, at 1699.

197. *See id.*

198. 404 U.S. 336 (1971).

199. Pub. L. No. 90-351, §§ 1201-1203, 82 Stat. 236-37 (1968); *Bass*, 404 U.S. at 337.

200. Pub. L. No. 90-351, § 1202(a) (repealed by Pub. L. No. 99-308, § 104 (b), 100 Stat. 459 (May 19, 1986)).

201. *Id.*

202. *Bass*, 404 U.S. at 338.

203. *Id.* at 347.

appropriate findings, Congress can constitutionally punish the 'mere possession' of firearms."²⁰⁴ The Court disposed of the case without sanctioning, nor foreclosing, federal regulation of possession based on the commerce power.²⁰⁵

Unlike the food sold at Ollie's in *McClung*,²⁰⁶ the misbranded medicine peddled in *Sullivan*,²⁰⁷ and the prohibition on receipt of guns and ammunition directly from interstate transport at issue in *Tot v. United States*,²⁰⁸ the opinion of the Court in *Scarborough v. United States*²⁰⁹ tacitly approved a federal statute criminalizing the mere possession of a firearm that at anytime had been transported in or affected interstate commerce, by anyone convicted of a felony under federal, state, or local law.²¹⁰ The decision was based primarily on an exploration of legislative intent for purposes of statutory interpretation and did not extensively consider the constitutionality of the statute. To establish a nexus with interstate commerce, the government needed only to prove that the firearm possessed by the convicted felon traveled at some time in interstate commerce.²¹¹

Scarborough had lawfully obtained his firearms and subsequently pled guilty to a Virginia drug trafficking charge.²¹² The federal law, at the instant of his guilty plea, rendered his possession criminal.²¹³ Unlike the de facto national ban on lottery tickets endorsed by the Court in the *Lottery Case*,²¹⁴ this penalty was not targeted at denying the use of the channels of interstate commerce by a particular article, but at the possession of the commodity by a discrete class of individuals.

To the extent that the constitutional authority for the statute was addressed by the *Scarborough* Court, it is clear that the Justices accepted congressional findings, much as they did in *Perez*,²¹⁵ on the effects of gun possession by felons on interstate commerce. The

204. *Id.* at 339 n.4.

205. *See id.* at 347-51.

206. *See supra* notes 122-24 and accompanying text.

207. *See supra* notes 188-97 and accompanying text.

208. *See supra* notes 182-87 and accompanying text.

209. 431 U.S. 563 (1977).

210. *Id.* at 577-78.

211. *Id.* at 568.

212. *Id.* at 564.

213. *Id.* at 565 ("As a matter of fact, he contended that by the time of his conviction he no longer possessed the firearms. His claim was that, to avoid violating this statute, he had transferred these guns to his wife prior to pleading guilty to the narcotics felony."). The Court did not bite. *Id.* Justice Stewart, in dissent, argued that the statute, Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, could and therefore should be read to apply to only the possession of firearms, by felons, after their conviction and after given reasonable opportunity to dispose of the firearms. *Id.* at 578-80 (Stewart, J. dissenting). Notably, Justice Rehnquist "took no part in the consideration or decision" of the case. *Id.* at 578.

214. 188 U.S. 321 (1903).

215. *See supra* notes 125-29 and accompanying text.

Court accepted the congressional declaration that “the receipt, possession, or transportation of a firearm by felons . . . constitutes . . . a burden on commerce or threat affecting the free flow of commerce.”²¹⁶ In uncritically accepting that substantial effects existed, the Court importantly maintained the difference between sources of authority under the Commerce Clause: “Congress is aware of the distinction between legislation limited to activities ‘in commerce’ and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce.”²¹⁷ The *Scarborough* decision did not explicitly develop the doctrine to bridge the gap between the regulation of post-import, pre-final sale conditions of articles, such as those at issue in *Sullivan*,²¹⁸ and the regulation of intrastate mere possession, but instead matter-of-factly deferred to a conclusory congressional determination that the Commerce Clause authorized such regulation.²¹⁹ The authority for the possession regulation was found exclusively in an expansive, deferential version of substantial effects theory.²²⁰

C. Cultivating Confusion: The New Commerce Clause and Mere Possession

Prior to *Lopez*, activities substantially affecting interstate commerce were measured by their effects on commerce, not explicitly by the commercial nature of the activities themselves.²²¹ The Court held, in *Wickard*, that if

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, and this irrespective of whether such effect is what might at some earlier time have been defined as “direct” or “indirect.”²²²

The fundamental shift in *Lopez* is the examination of the nature of the source of the perceived harm to interstate commerce as some sort of shortcut to determining whether the source actually affects interstate commerce sufficiently to subject it to congressional regulation.²²³ An underlying principle on which the Court depended in upholding the New Deal and the civil rights legislation is that

216. *Scarborough*, 431 U.S. at 571 n.10.

217. *Id.* at 571 (quoting *United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271 (1975)).

218. See *supra* notes 188-97 and accompanying text.

219. See *Scarborough*, 431 U.S. at 575 (“[W]e see no indication that Congress intended to require any more than the minimal nexus that the firearm have [sic] been, at some time, in interstate commerce.”).

220. See *id.*

221. See *supra* notes 135-47 and accompanying text.

222. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

223. See *supra* Part I.C.

federal power "may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten [interstate commerce],'"²²⁴ so long as such sources are found to have substantial effects on it.

In this way, the *Lopez* test, as incorporated into substantial effects doctrine, harkens back to the earlier cases wherein the commercial nature of a particular activity was cited as evidence that it constituted interstate commerce. The opinion of Justice Holmes, for a unanimous Court, in *Swift & Co. v. United States*, is exemplary:

[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce.²²⁵

A factual inquiry into the nature of particular transactions, as in *Swift*, is appropriate to determine whether such transactions *are* interstate commerce, but less helpful in assessing whether local activities that demonstrably *are not* interstate commerce nonetheless affect it. Nevertheless, the *Lopez* majority designated the economic nature of an interstate commerce-affecting activity as evidence that its effects are substantial.

The substantial effects doctrine was developed in response to the realities of a sophisticated, interconnected economy wherein intrastate activities, in and of themselves commercial or otherwise, could easily frustrate desirable national regulation of interstate and foreign commerce. The facts in *Wickard*²²⁶ demonstrate the necessity of regulating ostensibly noncommercial intrastate activity in order to effectively regulate interstate commerce. The dissenters from the *Lopez* majority explained:

In [*Wickard*], this Court sustained the application of the Agricultural Adjustment Act of 1938 to wheat that Filburn grew and consumed on his own local farm because, considered in its totality, (1) homegrown wheat may be "induced by rising prices" to "flow into the market and check price increases," and (2) even if it never actually enters the market, homegrown wheat nonetheless "supplies a need of the man who grew it which would otherwise be reflected

224. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (citing *Mondou v. N.Y., New Haven & Hartford R.R. Co.*, 223 U.S. 1, 51 (1912))).

225. *Swift & Co. v. United States*, 196 U.S. 375, 398-99 (1905).

226. 317 U.S. at 111.

by purchases in the open market” and, in that sense, “competes with wheat in commerce.”²²⁷

In order to take the *Lopez* opinion seriously, one would have to determine whether the intrastate consumption of homegrown products is “economic activity”—as a threshold question—before one could consider its effects on interstate commerce. On one hand, if consumption of homegrown wheat is somehow “economic activity,” it may be regulated if it substantially affects interstate commerce. Alternatively, if consuming homegrown products is deemed not to constitute economic activity, the inquiry is over and the activity unregulable.²²⁸

This indeterminacy was further illustrated by the dissenters again, this time in *Morrison*.²²⁹ They wondered: “[I]f chemical emanations through indirect environmental change cause identical, severe commercial harm outside a State, why should it matter whether local factories or home fireplaces release them?”²³⁰ Under the *Lopez* commercial activities requirement, direct regulation of private fireplaces is beyond congressional authority because their use is not sufficiently economic in nature.

It is doubtful that the majority announced the economic activities rule in denial of the effects that noncommercial activities could have on interstate commerce. Rather, by limiting the consideration of the substantial effects of an activity on interstate commerce to activity that is itself somehow discernibly, qualitatively economic, the doctrine attempts to find the appropriate balance between the local and the national. Perhaps the majority could have reached the same result by an alternate rationale.²³¹ Nonetheless, the Court instructs that only commercial, economic activities have the capacity to affect the national economy sufficiently to warrant federal regulation.²³²

Furthermore, since reaffirming that it would not necessarily defer to congressional findings on an activity’s substantial effects on commerce, in *Morrison*,²³³ the current Court could hardly be expected to accept a legislated presumption that mere possession affects

227. *United States v. Lopez*, 514 U.S. 549, 627 (1995) (Breyer, J., dissenting) (citing *Wickard*, 317 U.S. at 128).

228. *See supra* Part I.C.

229. *United States v. Morrison*, 529 U.S. 598 (2000).

230. *Id.* at 657 (Breyer, J., dissenting).

231. *See, e.g.*, Badawi, *supra* note 24, at 1355-74 (suggesting that centralized regulation, and therefore the substantial effects principles, should embrace activities that are prone to spillovers (e.g., pollution) and be employed to prevent holdouts (e.g., one state withholding acceptance of programs requiring uniformity in order to extract disproportionate value, increasing costs to all), without regard to their “commercial” nature); Seinfeld, *supra* note 24, at 1301-28 (suggesting that the Court employ a purpose-based analysis to discourage pretextual legislating).

232. *See supra* Part I.C.

233. 529 U.S. at 598; *see supra* notes 155-58 and accompanying text.

commerce, a presumption on which the Court relied in *Scarborough*.²³⁴ Having made these choices, if the current majority were to acknowledge that possession-enabling jurisdictional elements were dependent on a theory that possession substantially affected interstate commerce, they consequently would have to apply the economic activities threshold to invalidate a category of regulations of noncommercial mere possession.

Jurisdictional elements are written into many statutes and often include references to both interstate boundary crossings and substantial effects theories.²³⁵ When the *Lopez* majority addressed the absence of a jurisdictional nexus requirement in the Gun-Free School Zones Act, they did not distinguish between "in-commerce" and "affecting commerce" authority: The statute "has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce."²³⁶ The dicta implied that if the Act was amended to restrict its application to cases wherein the government proved that the firearm previously traveled in interstate commerce, then it would be saved from facial invalidation. Congress so amended the Gun-Free School Zones Act in 1996.²³⁷

After *Lopez* and *Morrison*, since the Court reiterated that it would independently determine substantially affecting causes, congressional findings supporting a theory of substantial effects and written into statutes, while perhaps helpful to the Court,²³⁸ did not insulate them from as-applied challenges.²³⁹ The Court demonstrated this soon after deciding *Morrison*, in *Jones v. United States*.²⁴⁰

In *Jones*, the Supreme Court considered an as-applied challenge to a federal enactment providing criminal penalties for arson.²⁴¹ The statute made it a federal crime "to damage or destroy, 'by means of fire or an explosive, any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign

234. *Scarborough v. United States*, 431 U.S. 563, 571 n.10 (1977); see *supra* notes 209-20 and accompanying text.

235. The Hobbs Act provides criminal penalties for "obstruct[ing], delay[ing], or affect[ing] commerce . . . by robbery or extortion." 18 U.S.C. § 1951(a) (2000). The credit card fraud statute criminalizes the use of a stolen credit card in a transaction affecting commerce, 15 U.S.C. § 1644 (2000), and the RICO statute proscribes a range of activities defined as either engaged in or affecting commerce. See 18 U.S.C. § 1962.

236. *United States v. Lopez*, 514 U.S. 549, 562 (1995).

237. See 18 U.S.C. § 922(q)(2)(A).

238. See *Morrison*, 529 U.S. at 612 ("While 'Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce,' the existence of such findings may 'enable us to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye.'" (alterations in original) (citations omitted)).

239. See *supra* note 54.

240. 529 U.S. 848 (2000).

241. 18 U.S.C. § 844(i).

commerce.”²⁴² The Court unanimously vacated Jones’s conviction because the house he burnt down, as an owner-occupied residential dwelling, was not, at the time of the arson, used in interstate commerce or for activities producing substantial effects on interstate commerce.²⁴³

The Court held that, in order for real property—and thereby the activity of burning it down—to be embraced by federal Commerce Clause power, it must, at the time of the arson, be currently used in interstate commerce or currently used in such a way affecting interstate commerce: “We hold that the provision covers only property currently used in commerce or in an activity affecting commerce.”²⁴⁴ The statute, as applied to the facts, especially after *Lopez* and *Morrison*, was invalid; the use of a private noncommercial dwelling, by its terms, is not economic activity and therefore does not substantially affect interstate commerce.²⁴⁵

The jurisdictional element in the federal arson statute does not invoke any direct regulatory authority of the use of the channels of interstate commerce, or of things or persons traveling in interstate commerce. Despite the language of the statute, real property cannot be “in” interstate commerce or cross state lines. Yet, real property certainly can be used to substantially affect interstate commerce, and this type of jurisdictional element is simply a codification of the substantial effects rules, an additional element to be proven by the prosecution.

The substantial effects doctrine only embraces intrastate activities that affect commerce.²⁴⁶ But the Court’s recitation of the statute’s conflation “used in commerce or in an activity affecting commerce,”²⁴⁷ retains the confusion initiated in the *Lopez* dicta. Congress wrote the jurisdictional element as a catch-all to invoke all of the sources of congressional authority previously developed by the courts.

The Third Circuit considered the validity of the felon-in-possession jurisdictional element after *Lopez*, *Morrison* and *Jones* in *United States v. Singletary*.²⁴⁸ The court reexamined the question previously at issue in *Scarborough*:²⁴⁹ whether or not congressional commerce power extended to possession, by a convicted felon, of a gun that had previously traveled in interstate commerce.²⁵⁰

The felon-in-possession statute,²⁵¹ considered in *Singletary*, contains

242. *Jones*, 529 U.S. at 850 (quoting 18 U.S.C. § 844(i)).

243. *Id.* at 856-59.

244. *Id.* at 859.

245. *Id.*

246. *See supra* Part I.B.

247. *Jones*, 529 U.S. at 859.

248. 268 F.3d 196 (3d Cir. 2001), *cert. denied*, 535 U.S. 976 (2002).

249. 431 U.S. 563 (1977).

250. *See Singletary*, 268 F.3d at 196.

251. 18 U.S.C. § 922(g)(1) (2000).

common jurisdictional element language: "It shall be unlawful for [a felon] . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been [so] shipped."²⁵² The statute contains two separate prohibitions with distinguishable sources of authority: 1) the prohibition on shipment and receipt based on Congress's power to regulate the channels of commerce, things "in commerce"; and 2) the prohibition of commerce-affecting mere possession based on a substantial effects theory authorized by *Scarborough*.²⁵³

Singletary's possession qualified as mere possession in that no proof was offered that he shipped the firearm in or received it directly from interstate commerce: "[T]he gun in question was manufactured in Brazil, imported into the United States through Atlanta, Georgia, and eventually sent to a firearms dealer in Texas in 1973 The Government presented no evidence regarding when the gun had come into Pennsylvania."²⁵⁴ Clearly, congressional authority to regulate Singletary's mere possession could only be based on the effects that it may have on interstate commerce, yet "the Government presented no evidence concerning any effect the gun had on interstate commerce."²⁵⁵

If the court were to acknowledge that possession regulation derived from substantial effects rules, it would have had to apply the post-*Lopez* economic activities requirement. Instead, as applied to a jurisdictional element-dependant possession law, the Third Circuit chose to confuse the analysis by partially locating the source of congressional power in traditional "in commerce" justifications. The court observed that the enactment "by its very terms, only regulates those weapons affecting interstate commerce by being the subject of interstate trade . . . [i]t addresses items sent in interstate commerce and the channels of commerce themselves, delineating that the latter be kept clear of firearms."²⁵⁶ Somehow the regulation of mere possession was lifted from its foundation in a congressional presumption of substantial effects—which was questionable in the first instance—and re-formulated in order to uphold the statute as applied, based on congressional authority to protect the use of channels and instrumentalities of interstate commerce.

The Third Circuit's treatment of the issue exemplifies the confusion resulting from the failure to distinguish between substantial effects doctrine and Congress's traditional power to directly regulate the

252. *Id.* § 922(g).

253. *See supra* Part II.B.

254. *Singletary*, 268 F.3d at 198.

255. *Id.*

256. *Id.* at 204 (concluding that "an analysis of the kind utilized in *Lopez* or *Morrison* is neither appropriate nor needed").

channels of, and things in, interstate commerce. The Third Circuit recognized that *Lopez* identified potential jurisdictional elements with both substantial effects and with direct regulation, and then went on to employ the principle of direct regulation of the use of channels in order to find a way to follow *Scarborough*,²⁵⁷ which was wholly dependent on a casual acceptance of a congressional determination of substantial effects. Simply because a gun, as opposed to the house at issue in *Jones*, can actually be shipped “in commerce” does not transform all of the possible incidences of its regulation into “in commerce” shipment regulations. Furthermore, since *Morrison* foreclosed the option, the Court could not uphold the application of the statute based on a congressional finding that the class of activities—the possession—per se affects commerce sufficiently to warrant federal regulation.²⁵⁸

The Supreme Court declined to hear the appeal from the Third Circuit’s decision in *Singletary*.²⁵⁹ In denying certiorari, the Court sustained confusion in analyses of jurisdictional elements purporting to authorize possession regulations—confusion between the limits of regulatory power and the limits on the incidences of its operation.²⁶⁰ The failure to clearly identify mere possession regulations as professed exercises of authority to regulate substantial effect-producing activities, by suggesting that they in part derive from direct “in commerce” regulatory power, obscures the otherwise obvious contradiction between the current formulation of substantial effects and justifications for possession-based federal regulation.²⁶¹ The

257. *See id.*

Missing from Singletary’s analysis, however, is the recognition that, while *Lopez* and *Morrison* were questions concerning the power of Congress to regulate activities substantially affecting interstate commerce, [§] 922(g)(1) regulates the possession of goods moved in interstate commerce. The jurisdictional element in [§] 922(g)(1) distinguishes it from the statutes considered in *Lopez* and *Morrison*.

Id.

258. *See supra* Part I.C.

259. 535 U.S. 976 (2002).

260. In 1851, Justice Curtis provided a rendition:

In construing [the Constitution], and in determining the extent of one of its important grants of power to legislate, we can make no such distinction between the nature of the power and the nature of the subject on which that power was intended practically to operate, nor consider the grant more extensive by affirming of the power, what is not true of its subject.

Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 320 (1851).

261. Traditional regulations of the channels of interstate commerce are inapplicable to the regulation of mere possession, as are all interstate transport-dependent regulations. Arguably, the outside boundary of the permissible regulation of possession to protect the channels of commerce is marked by a requirement that the possession be shown an incident of interstate traffic. That is to say, *mere* possession is not sufficient to give rise to federal regulation of transport. In order for the commerce power itself to reach possession, it must be coupled with proof of receipt from interstate commerce or proof of intent to distribute interstate. The fact

confusion is perhaps tactical; there are both political and public policy concerns implicated in the contemplation of calling into question, if not invalidating, a broad category of federal laws of possession.²⁶²

If the Supreme Court hears *Raich v. Ashcroft*,²⁶³ it may become more difficult to sustain this confusion because the CSA does not contain an express jurisdictional element of the type relied on by the Third Circuit in *Singletary*.²⁶⁴ Like *Lopez*, *Raich* requires a straightforward consideration of the effects of the possession on interstate commerce. If the Supreme Court agrees with the Ninth Circuit and characterizes the particular possession of marijuana as “intrastate, noncommercial cultivation and possession,”²⁶⁵ it can be expected to apply the substantial effects test as developed in *Lopez* and *Morrison*.²⁶⁶ If the Court suggests that the statute could be saved by the addition of a jurisdictional element that limits prosecutions to cases of mere possession that “affect commerce,” it will be forced to articulate why noncommercial possession should warrant exception from the economic activities qualifier.

III. THE CASE FOR PREDICATE LEGISLATION-ENFORCEMENT EFFICACY RATIONALE

Congress has used jurisdictional elements in statutes to justify possession regulations by purporting to limit their application to items or people, or activities dealing with items that had been “in or affecting commerce.”²⁶⁷ The courts have required that the government demonstrate that the item in question had in fact traveled interstate.²⁶⁸ The 1996 amendment to the Gun-Free School Zones Act demonstrates how Congress can employ jurisdictional elements to save an enactment from facial unconstitutionality while retaining the operative force of the original legislation.²⁶⁹

that articles may have at one time previous to the possession traveled in interstate commerce neither establishes a per se conclusion that the possession affects interstate commerce, nor is it evidence that the articles retain a sufficient relationship with the channels of commerce to claim the regulation as a piece of transport legislation. The addition of a jurisdictional element requiring proof that an article previously traveled interstate should not be sufficient to somehow transform the regulation of mere possession into a transport regulation.

262. See *supra* notes 29-37 and accompanying text.

263. 352 F.3d 1222 (9th Cir. 2003).

264. See *id.* at 1231 (“No such jurisdictional hook exists in relevant portions of the CSA.”).

265. *Id.* at 1228.

266. See *supra* Part I.C.

267. See *supra* notes 241-42 and accompanying text (discussing the federal arson statute, 18 U.S.C. § 844(i) (2000)).

268. See, e.g., *United States v. Singletary*, 268 F.3d 196, 205 (3d Cir. 2001) (“[W]e conclude that the proof in this case that the gun had traveled in interstate commerce, at some time in the past, was sufficient to satisfy the interstate commerce element . . .”).

269. See *supra* notes 48-49 and accompanying text.

Judicial explanations of the source of power behind such enactments have been unclear. Some decisions have articulated congressional authority in terms of a conclusion that such items by definition have substantial effects on interstate commerce. Others have located the authority in congressional power over the channels of interstate commerce, presumably because of some residual connection that adheres to the items even after they cease to be articles of trade. The current decisions conflate and interchange these two theories, thereby retaining the expansive reach of the substantial effects rationale while excepting its application to possession laws from the more stringent economic activities analysis announced in *Lopez*.²⁷⁰

Possession laws that do not contain express jurisdictional elements, but are rather justified by generalized findings of substantial effects, such as the CSA at issue in *Raich*,²⁷¹ confront the economic activities analysis head-on.²⁷² In either case, the professed source of constitutional authority for the regulations is the commerce power.²⁷³

The CSA criminalizes possession of certain drugs except as authorized by the statute.²⁷⁴ Federal authority to enact the possession element of the CSA is based on a theory that “[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances,”²⁷⁵ as well as on findings that “controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution,”²⁷⁶ and that “controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.”²⁷⁷ Here, Congress attempted to codify a presumption that certain objects have the attributes of articles of interstate commerce and that they somehow consequently substantially affect interstate commerce.

As repeated in every relevant case, the commerce power is generally described as reaching the regulation of the channels of interstate commerce, and things or persons in it, the instrumentalities of interstate commerce, and those activities that substantially affect interstate commerce.²⁷⁸ Congressional authority to regulate this field

270. See *supra* notes 248-62 and accompanying text (discussing *Singletary*, 268 F.3d at 196).

271. 21 U.S.C. §§ 801-971 (2000).

272. See *Raich v. Ashcroft*, 352 F.3d 1222, 1229 (9th Cir. 2003) (“As applied to the limited class of activities presented by this case, the CSA does not regulate commerce or any sort of economic enterprise.”).

273. See, e.g., *id.* at 1227 (“Congress passed the CSA based on its authority under the Commerce Clause of the Constitution.”); *Singletary*, 268 F.3d at 205.

274. See 21 U.S.C. §§ 841(a)(1), 844(a).

275. *Id.* § 801(4).

276. *Id.* § 801(3)(b).

277. *Id.* § 801(3)(c).

278. See, e.g., *United States v. Morrison*, 529 U.S. 598, 608-09 (2000).

of objects, people, and behaviors is usually attributed to the Commerce Clause directly, but substantial effects rationales also seem to be derived in part from an under-appreciated combination of commerce power and power granted by the Necessary and Proper Clause.²⁷⁹

A reevaluation of the line of cases, however, suggests that federal regulation of noncommercial mere possession has its origin in a power even more closely allied with the Necessary and Proper Clause. The Court, in *Darby*, explained of Congress's power:

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, and the exercise of the granted power of Congress to regulate interstate commerce [directly].²⁸⁰

The Court designated two types of "effects": those activities affecting commerce and those activities affecting the exercise of power over commerce.²⁸¹

Congress certainly has the power to enact legislation that is "necessary and proper" to the effective execution of one of its enumerated powers.²⁸² Most first year law students learn Chief Justice Marshall's famous line from *M'Culloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."²⁸³ When approaching the possession cases with this distinction in mind it becomes clear that the source of power authorizing the laws is located in an enforcement efficacy rationale.

A. *Re-Reading the Commerce Clause Possession Cases*

Scarborough v. United States stands as the key Supreme Court decision upholding federal regulation of mere possession based on a jurisdictional element invoking the post-1937 substantial effects

279. U.S. Const. art. I, § 8, cl. 18; see Seinfeld, *supra* note 24, at 1290-91 (citing Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 Tex. L. Rev. 795, 807-11 (1996)). "As Professor Gardbaum points out, the role played by the Necessary and Proper Clause in the evolution of Commerce Clause doctrine has been underappreciated." *Id.*

280. *United States v. Darby*, 312 U.S. 100, 118 (1941) (echoing and citing Marshall's famous line from *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819)).

281. *See id.*

282. See Seinfeld, *supra* note 24, at 1292-97 (discussing the possibility of employing a pretext analysis to Commerce Clause review, derived from jurisprudential traditions developed in the evaluation of enactments pursuant to the Necessary and Proper Clause).

283. 17 U.S. at 420.

rationale.²⁸⁴ The Court, in its opinion, was preoccupied with statutory interpretation to resolve a temporal sequence question,²⁸⁵ and did not vigorously examine the constitutionality of the felon-in-possession statute. Moreover, the Court un-judiciously accepted a congressional declaration of the substantial effects of felons-in-possession on the national economy:

While Congress' choice of tenses is not very revealing, its findings and its inclusion of the phrase "affecting commerce" are somewhat more helpful. In the findings at the beginning of Title VII, Congress expressly declared that "the receipt, possession, or transportation of a firearm by felons . . . constitutes . . . a burden on commerce or threat affecting the free flow of commerce."²⁸⁶

Aside from this case and the subsequent cases straining to follow it,²⁸⁷ the Court's treatment of federal regulation of possession, by way of jurisdictional elements, is better understood in terms of the effects of possession on the ability of federal authorities to enforce predicate regulations on the shipment, transport, or receipt of articles in or from interstate commerce.

In 1943, in one of its first considerations of the question, the Court, in *Tot v. United States*, reviewed a statute that was explicitly targeted at the receipt of guns and ammunition, by a certain class of felons or by fugitives, from interstate commerce.²⁸⁸ The Court considered and then rejected a congressional presumption that possession constituted requisite evidence of such receipt: "[The issue is] the question of the power of Congress to create the presumption . . . that, from the prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed . . . that the article was received by him in interstate or foreign commerce."²⁸⁹ Congress's obvious concern was with the ability to enforce its prohibition on such persons' participation in the interstate commerce of guns and ammunition.

It is difficult to prove the conditions of receipt after the fact. Congress addressed this practical problem by declaring that possession was per se evidence of receipt of the articles from

284. *Scarborough v. United States*, 431 U.S. 563 (1977); see *supra* Part II.B.

285. See *Scarborough*, 431 U.S. at 570 ("While it is true that Congress did not choose the precise language . . . to indicate that a present nexus with commerce is not required, neither did it use the language . . . to indicate that the gun must have a contemporaneous connection with commerce at the time of the offense.").

286. *Id.* at 571.

287. See, e.g., *United States v. Singletary*, 268 F.3d 196 (3d Cir. 2001), *cert. denied*, 535 U.S. 976 (2002).

288. *Tot v. United States*, 319 U.S. 463 (1943) (discussing Pub. L. No. 785, ch. 850, 52 Stat. 1250-51 (1938) (codified at 15 U.S.C. § 902(f) (repealed 1968)) (current version, the presumption from possession rule omitted, at 18 U.S.C. §§ 922(d), 923(f) (2000)).

289. *Id.* at 466.

interstate commerce. The Court rejected the presumption, in part, because possession by way of receipt from interstate commerce was indistinguishable from possession by other means.²⁹⁰ The Court affirmed that congressional commerce power extended over all the incidences of interstate transport and even receipt therefrom, but did not reach the regulation of possession where such possession did not necessarily indicate *interstate* receipt.

While not embracing possession, the provision at issue in *United States v. Sullivan* was animated by the same efficacy of enforcement rationale.²⁹¹ Sullivan had been convicted of violating the Pure Food, Drug, and Cosmetic Act because he broke down duly labeled packages of drugs into small containers for sale, but failed to retain the original mandated labels.²⁹² The underlying legislation was enacted pursuant to congressional authority to prevent the interstate shipment of misbranded medications. To sustain the efficacy of the plan, Congress needed to provide for penalties for altering the articles.

The *Sullivan* opinion reached to find the terminus of the channels of interstate commerce, extending federal power up until the sale of the articles to the end-user, the consumer.²⁹³ It is very difficult to police such a provision, however, because it requires distinguishing between intermediary traders and noncommercial mere possessors.

As previously noted, most commentators trace the presumption that the commerce power reaches possession of articles that had been introduced through interstate commerce to the *Sullivan* opinion's extension of authority over post-import sales and re-sales.²⁹⁴ However, attributing possession laws to the *Sullivan* rationale fails to adequately appreciate the distinction between the regulation of the conditions associated with pre-final sale and the regulation of conditions of mere possession. This distinction is not so easily overcome.

Sullivan was a harmful articles protective case, seeking to maintain the labeling requirements of the Pure Food, Drug, and Cosmetic Act until the last sale. That basis for the decision echoes that of the early cases:²⁹⁵ Duly branded articles are good, misbranded articles are bad, and Congress wishes to deny the use of the channels of interstate commerce to bad articles. But, in order to maintain the scheme,

290. *Id.* ("[T]he Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an *intrastate transaction*, of such articles which, at some prior time, have been transported interstate." (emphasis added)).

291. 332 U.S. 689 (1948).

292. *See id.* at 690-91.

293. *See id.* at 696.

294. *See supra* notes 196-97 and accompanying text.

295. *See, e.g.,* Lottery Case, 188 U.S. 321 (1903); *see also supra* note 92 and accompanying text.

Congress had to discourage misbranding because, in this case, it was all too easy to change a good article into a bad one.

Hence, the regulation had to reach a prohibition on a particularized use of the article, and prohibited behaviors in relation to the article other than transport itself. Denial of access could not prevent Sullivan from misbranding drugs since access had already been granted, but only to duly labeled articles. The decision affirmed that Congress could regulate to maintain the conditions under which a regulated article was granted entry into interstate commerce.

Furthermore, *Sullivan* is a federal anti-tampering case as applied to retailers who participate directly in interstate commerce. Because the Act addressed only the conditions of final sale, notably not receipt, it was a regulation of retailers and commercial participants generally. Modern regulations of possession can find no direct authority in *Sullivan*, except insofar as it began to expand the imagined community of participants in interstate commerce.

Rather than conditioning access to interstate commerce, for example by requiring drugs to be properly labeled, the regulations implicating mere possession go to the enforcement efficacy of one form of outright denial of access to interstate commerce or another. The predecessor to the felon-in-possession statute barred felons, not from possessing, but from transporting guns in, or receiving guns from, interstate commerce.²⁹⁶

Having enacted such a restriction on the use of the channels of interstate commerce by felons to obtain guns, squarely within its power, Congress needed to reach the conditions that could render the legislation unenforceable. Unless law enforcement personally witnesses or has direct evidence of the receipt of an article from out of state, one of the few and most practical means of enforcing the prohibition is to proscribe possession. Congress attempted to address the problem by legislating a presumption that possession of a gun by a felon evinced the felon's receipt of the gun from interstate commerce.²⁹⁷ The Court thwarted this tactic in *Tot v. United States*.²⁹⁸

Congress responded by drafting the modern felon-in-possession statute, at issue in *Scarborough*,²⁹⁹ which purported to hinge federal authority on a finding that "the receipt, possession, or transportation of a firearm by felons . . . constitutes . . . a burden on commerce or threat affecting the free flow of commerce."³⁰⁰ Decided during a

296. See *Tot v. United States*, 319 U.S. 463 (1943) (discussing Pub. L. No. 785, ch. 850, 52 Stat. 1250-51 (1938) (codified at 15 U.S.C. § 902(f) (repealed 1968) (current version, the presumption from possession rule omitted, at 18 U.S.C. §§ 922(d), 923(f) (2000)); *supra* Part II.B.

297. See Pub. L. No. 785, ch. 850, 52 Stat. 1250-51.

298. See *supra* note 289 and accompanying text.

299. See *supra* note 286 and accompanying text.

300. *Scarborough v. United States*, 431 U.S. 563, 571 (1977) (citing Pub. L. No. 90-351, § 1201(1), 82 Stat. 236 (1968)).

period of nearly unlimited deference to congressional determinations, *Scarborough* emerged as the sole source of authority for the clumsy proposition that mere possession affects interstate commerce.³⁰¹

Although the impulse to effectively regulate receipt from interstate commerce—by regulating possession—is the genuine basis for a class of possession laws, the rationale has been overrun by the dominance of substantial effects doctrine in evaluating all commerce-enabled legislation. As a result, the dialogue of judicial review of possession laws has been largely confined to “in or affecting commerce” analyses.

In applying the post-*Lopez* economic activities requirement in order to cast serious doubt on the constitutionality of the application of the CSA on intrastate cultivators and consumers of medical marijuana, the Ninth Circuit, in *Raich*, had to distinguish the facts from *Wickard v. Filburn*.³⁰² Recall that the legislation at issue in *Wickard*³⁰³ dealt with wholly intrastate activity: The consumption of homegrown wheat.³⁰⁴ The Court determined that such consumption, if duplicated elsewhere, would substantially affect wheat prices and therefore interstate commerce.³⁰⁵ The substantial effects doctrine, fortified by the aggregation principle, enabled congressional regulatory power to embrace the intrastate, arguably noncommercial, price-affecting conditions directly.³⁰⁶

Restrained to the substantial effects analysis, the constitutionality of such possession laws turns first on the threshold determination of whether the possession is or is not economic activity, and second, on an assessment of the extent that it affects interstate commerce. Dissenting from the *Raich* opinion, Eighth Circuit Judge Beam, sitting by designation on the three-judge Ninth Circuit panel,³⁰⁷ confessed that “[i]t is simply impossible to distinguish the relevant conduct surrounding the cultivation and use of the marijuana crop at issue in this case from the cultivation and use of the wheat crop that affected interstate commerce in *Wickard v. Filburn*.”³⁰⁸ It is far from ideal that vital federalism values seemingly occupy the space between homegrown wheat and homegrown pot.

In this context, an enforcement efficacy rationale is more

301. Although it is often cited in conjunction with *Scarborough* to support the notion that previous interstate transport of an article is sufficient to give rise to congressional authority to regulate subsequent possession, the Court did not approve of the extension of the commerce power over possession in *United States v. Bass*, 404 U.S. 336 (1971). See *supra* note 204 and accompanying text.

302. See *Raich v. Ashcroft*, 352 F.3d 1222, 1230 (9th Cir. 2003) (“As the regulated activity in this case is not commercial, *Wickard*’s aggregation analysis is not applicable.” (citation omitted)).

303. *Wickard v. Filburn*, 317 U.S. 111 (1942).

304. See *supra* notes 114-15 and accompanying text.

305. See *supra* note 115 and accompanying text.

306. See *supra* notes 114-16 and accompanying text.

307. See *Raich*, 352 F.3d at 1223.

308. *Id.* at 1235 (Beam, J., dissenting) (citation omitted).

appropriate. Although it is argued here that possession laws owe the bulk of their constitutional authority to the enforcement efficacy of interstate transport and receipt regulations, even *Wickard* remains instructive. The Court held:

The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.³⁰⁹

In contemporary jurisprudence, the *Wickard* opinion has come to represent the aggregation principle and a reaffirmation of the Court's abandonment of the earlier production/commerce distinction. While the last sentence of this excerpt is oft-quoted, the fact that the rationale depended on the effects of consumption of homegrown wheat on a greater regulatory scheme to prop up national wheat prices, not on a notion that such consumption affected commerce regardless, is often under-appreciated.

Congressional findings associated with the CSA that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people"³¹⁰ certainly appear insufficient to sustain the legislation as applied to mere possession after *Lopez* and *Morrison*.³¹¹ Because the jurisprudence is so bound up with substantial effects principles, the government presumably did not raise, and the Ninth Circuit did not adequately address, possible enforcement efficacy justifications.³¹²

However, there are findings that explicitly summon an enforcement efficacy rationale and are more appropriate to an evaluation of the permissibility of regulating mere possession under the CSA: "Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic."³¹³ In the first instance, Congress may outright deny access to the channels of interstate commerce to controlled substances. If thereafter possession regulations are determined to be plainly adapted to substantially enhance the enforcement efficacy of the interstate transport regime, then such

309. *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (citations omitted).

310. 21 U.S.C. § 801(2) (2000).

311. See *supra* notes 135-58 and accompanying text.

312. See *Raich*, 352 F.3d at 1222.

313. 21 U.S.C. § 801(6).

possession laws should be upheld. Of course, applying such a test does not necessitate a particular outcome for cases such as *Raich*. There are fact-based determinations at the heart of the enforcement efficacy question.

The Ninth Circuit's decision in *Raich* depended on distinguishing between the limited use of marijuana for medical purposes and the possession attendant thereto, and "the broader illicit drug market," by finding that the marijuana at issue "is not intended for, nor does it enter, the stream of commerce."³¹⁴ This conclusion is meant to answer the government's theory that the appellants' use, by affecting demand for marijuana, thereby affected the interstate market for it substantially enough to bring such use under federal authority.³¹⁵ Because the possession neither proceeded sale nor followed purchase, medical use of homegrown marijuana was found by the Court to be "significantly different from the findings relating to the effect of drug trafficking, generally, on interstate commerce."³¹⁶ The theory seems to be that the appellants would not be using or possessing marijuana but for their medical needs, and therefore their possession bears no relation to the interstate market in illicit drugs, or at least a too-attenuated relation.³¹⁷ The line between the class of activities at issue and other uses, such as religious, or even some types of recreational uses of homegrown marijuana, will be difficult to determine.³¹⁸

However, this sensitivity to the particularized use of the possessed article—the reason for possession—is in essence closer to an attempt to determine the relationship of the possession to the efficacy of enforcement of prohibitions on participation in interstate commerce. That is to say, the court did not implicate the absence of or the insufficiency of a nexus between interstate commerce and the possession in the first instance, but rather found that the nexus between illicit drug traffic generally (an acknowledgment of predicate regulations criminalizing the traffic) and the appellants' possession was too attenuated.³¹⁹ The Court was not explicit in this rhetorical move and did not contemplate possible sources of congressional power beyond the substantial effects doctrine.³²⁰

Again, articulating an enforcement efficacy rationale will not

314. *Raich*, 352 F.3d at 1228.

315. *See id.*

316. *Id.* at 1232.

317. *See id.* at 1233 ("Presumably, the intrastate cultivation, possession and use of medical marijuana on the recommendation of a physician could, at the margins, have an effect on interstate commerce by reducing the demand for marijuana that is trafficked interstate. It is far from clear that such an effect would be substantial.").

318. If the fatal problem with the application of the CSA to possession of marijuana for medical use is limited to the fact that such possession is not in any way economic activity, it would seem equally invalid as applied to a range of factual circumstances.

319. *See supra* note 316 and accompanying text.

320. *See Raich*, 352 F.3d at 1222.

determine the outcome of cases such as *Raich*. It is merely suggested that the discourse surrounding determinations of the constitutionality of federal regulations of possession be informed by considerations of enforcement efficacy. Theoretically, the Court could maintain certain current commerce-enabled possession laws while invalidating others, depending on a principled assessment of enforcement efficacy.

B. Towards Application

When evaluating a statute including a jurisdictional element or one that purports to regulate possession otherwise, the courts need to first determine whether or not it is an invocation of judicially created substantial effects principles, by way of operation if not declared purpose, such as the jurisdictional element at issue in *Jones v. United States*,³²¹ or whether it purports to be an instance of some direct regulation of interstate shipment and/or receipt, such as the prohibition at issue in the *Lottery Case*.³²² If an invocation of substantial effects formulations, the Court may proceed to apply that doctrine. As it stands currently, this includes the economic activities qualifier. The Court so applied the doctrine in *Jones* to invalidate the federal arson statute as applied.³²³ If the jurisdictional element is a regulation of transport and its operation is so limited to prohibitions on shipment, transmission or receipt, or participation conditions on interstate shipment or transmission, and therefore incapable of reaching mere possession, then it ought to be evaluated accordingly. The confusion arises when the language of the statutory element includes references to previous shipment or transmission as evidence of substantial effects.

Jurisdictional element-dependent regulation of possession, such as the federal gun possession statutes, should only be upheld when predicate legislation exists that directly regulates the articles in the channels of interstate commerce, i.e., regulations of interstate transport and receipt therefrom, and when the operation of the possession regulation is plainly adapted to enhance the efficacy and enforceability of the predicate scheme. In approaching jurisdictional elements, the courts need to untangle evaluations of the direct exercise of enumerated power, and enactments necessary to its execution, from modern substantial effects doctrine.

Statutory invocations of the substantial effects rules where the required nexus is conceived to be between the target of the regulation and its effects on interstate commerce should be treated no differently than any other enactment evaluated based on substantial effects. If the Court continues to apply the economic activity criteria of review,

321. 529 U.S. 848 (2000); see *supra* notes 240-46 and accompanying text.

322. 188 U.S. 321 (1903).

323. See *Jones*, 529 U.S. at 856-59.

congressional utterances of jurisdictional elements including "shipped in or affecting commerce" language should not magically insulate enactments from such review. Statutory renditions of substantial effects rules operate, if nothing else, to telegraph to the courts the constitutional marginality of the enactment and its susceptibility to as-applied challenges. In short, substantial effects rules should have no bearing on review of jurisdictional element-dependent laws regulating mere possession. Of course, they would be applied to determine the validity of a predicate scheme that depends on the jurisdictional element-dependent enactment in order to be effectively carried out.

Although there are numerous commerce-enabled possession laws,³²⁴ the application of an enforcement efficacy rationale may be illustrated by reference to three varieties of gun possession laws, if for no other reason than because they have been frequently tested in the courts. The fact that they are guns, and the existence of the Second Amendment, bears no relation to the discussion.

As long as Congress first, or contemporaneously, enacted predicate legislation prohibiting stolen guns from interstate transport and prohibiting receipt of stolen guns from interstate transport, regulating possession of stolen guns would be upheld under the proposed test. It is well established that Congress has the power to deny access to the channels of interstate commerce for whatever reason it wants.³²⁵ Because Congress can regulate access to interstate commerce and the conditions of participation through its entirety (recall the *Tot* and *Sullivan* cases³²⁶), it can legislate to prohibit access and prohibit receipt: "At all events it is established by the *Lottery Case* and others that have followed it that a law is not beyond the regulative power of Congress merely because it prohibits certain transportation out and out."³²⁷ Because of the aforementioned enforcement difficulties in proving receipt from interstate transport and in distinguishing between stolen guns that have traveled interstate from other stolen guns, and the fact that one cannot tell a stolen gun by looking at it, it would be rational to regulate the possession of stolen guns by anyone, in order to substantially enhance the enforceability of the predicate legislation proscribing receipt from, or shipment in, interstate commerce. As in the misbranded drugs at issue in *Sullivan*,³²⁸ a good or at least neutral commodity (without getting into the gun-control debate) is capable of being modified at any time into an undesirable commodity, by being subject to theft. Therefore, the most rational

324. See *supra* notes 29-33 and accompanying text.

325. See *Lottery Case*, 188 U.S. at 363-64 (upholding, in 1903, a federal law prohibiting lottery tickets from the channels of interstate commerce).

326. See *supra* notes 288-96 and accompanying text.

327. *Hammer v. Dagenhart*, 247 U.S. 251, 278 (1918) (Holmes, J., dissenting) (citations omitted).

328. See *supra* notes 291-92 and accompanying text.

and cost-effective way to prohibit stolen guns from the channels of interstate commerce is to regulate possession of stolen guns.

The amended Gun-Free School Zones Act provides a counter-example. There is no valid predicate legislation prohibiting all guns from interstate commerce. Congress cannot legislate, in the first instance, to prohibit interstate transport of something that is predicted to take a particular course, for example to end up in a school zone. Such a notion depends on an imagined subsequent possession, and is not, therefore, regulation of interstate transport. Moreover, if predicate legislation existed which purported to prohibit all guns from interstate transport and receipt, limiting prohibitions on possession to a school zone is not rationally related to enhancing enforcement of the prohibition on transport. The jurisdictional element-dependent possession regulation would have to reach all possession, everywhere, in order to be a legitimate exercise of power.

It might seem, under this formulation, that Congress could reach schoolyard possession by prohibiting receipt of a gun from interstate commerce in a schoolyard. But the problem persists. The regulations on conditions of receipt need to be rationally related or reasonably calculated to enhance the enforceability of the regulation of the channels of interstate commerce. Narrowing the scope of conditions of receipt to particular types of locations does not so enhance enforceability of the predicate legislation banning all guns from interstate commerce.

Congress could only reach schoolyard possession incidentally. Under the preferred formulation, Congress could enact predicate legislation denying participation in the interstate commerce of guns to all schoolchildren. Regulation of possession of guns by schoolchildren, without regard to where they possessed the gun of course, would then enhance enforceability of the valid predicate enactment. The predicate legislation, in this example, is not dependent on the imagined course of a gun, but is rather a regulation on participation by children in interstate gun commerce. Such participation could include transport, transmission, and receipt from interstate commerce of a gun, the regulation of which is greatly enhanced by possession regulations. Likewise, the felon-in-possession statutes could validly operate by first excluding all felons from participation in the interstate commerce of guns, and then regulating receipt and possession of guns by felons in order to effectively enforce the denial of participation.

Of course, this depends on interstate commerce of a particular commodity or participation in interstate commerce by particular classes of individuals reaching a significant enough level of activity to support a finding that the regulation of intrastate receipt by individuals or intrastate possession of certain articles reasonably operates to enhance the efficacy of enforcement of the predicate

regulations on shipment or participation in interstate commerce. For example, in the absence of substantial interstate commerce in a commodity, say of snow-cones—even if Congress legislated to bar snow cones from interstate commerce—regulations on the mere possession of them would not be sufficiently related to the enforcement efficacy of the predicate regime because possession would be more likely to evince local receipt than interstate participation.

The relationship of the possession regulation to the enforcement efficacy of a valid regulatory regime requires fact-intensive inquiry. In *Raich v. Ashcroft*, the question to ask is whether regulating the class of activities at issue, cultivation and consumption of marijuana on the advice of a physician, substantially enhances the enforcement efficacy of an outright prohibition on the particular controlled substance from interstate commerce. This is a difficult question to be sure, but arguably more determinate and of greater predictive value than an attempt to distinguish use of homegrown marijuana from that of homegrown wheat, or an attempt to distinguish between the effects on interstate commerce of marijuana by possession attendant to medical use and that of possession attendant to religious use or otherwise, by consideration of their effects on demand.

Congress could regulate possession by anyone of an article prohibited from interstate commerce and could deny participation in interstate commerce by classes of persons, so long as the secondary legislation be plainly adapted and narrowly tailored to enhance enforcement efficacy. Congress could not reach particularized intrastate uses of commodities. For example, Congress would be unable to federally criminalize violence perpetrated by an individual wielding an object as a weapon that had been received from interstate commerce. By dispensing with the need to articulate absurd theories that subsequent possession or use of a commodity—such as committing a battery with a weapon that had traveled interstate—somehow necessarily affects interstate commerce, the courts may approach the operative target of the legislation without recourse to pretext analysis, but rather by testing the statutory possession hook for its relation to the enforceability of legitimate regulations on the shipment and receipt of commodities.

Additionally, the fact that particularization may only be incidental to broader regulatory regimes protects vital political process safeguards. In order to incidentally regulate schoolyard gun possession, Congress would have to first enact an outright prohibition on the receipt of guns by children from interstate commerce. The broader the applicability of legislation, the more likely political pressure will be brought to bear on the negotiation of important norms.

CONCLUSION

Explicitly acknowledging an enforcement efficacy rationale requires the maintenance of a fairly rigorous, and perhaps artificial, distinction between modern substantial effects rules and legislation enacted pursuant to authority to support direct regulations with those measures necessary and proper to effectively facilitate their exercise.³²⁹ However, it is clear that the *Scarborough* decision, by accepting a substantial effects rationale for a possession law,³³⁰ is incompatible with the great weight of authority, before and since, employed by the Court to locate the bases for commerce-enabled possession regulations. Whatever the most desirable formulation of the details, it is equally clear that the more coherent explanation for commerce-enabled possession laws lies in a consideration of the enforcement efficacy of predicate regulations of the channels of interstate commerce.

The Supreme Court will ultimately have to confront the *Scarborough* presumption³³¹ in light of its recent federalism decisions. This confrontation may or may not occur explicitly if the Court hears *Raich* (the CSA is not an explicitly jurisdictional element-dependent statute),³³² but when it does, the doctrine will increasingly acknowledge an enforcement efficacy rationale in order to square justifications for some possession regulations with contemporary Commerce Clause doctrine. Focusing on the question of the necessity of reaching possession in order to effectively regulate valid restrictions on receipt from, or transport of articles in, interstate commerce, could impose meaningful limits on congressional power while sustaining essential legislative tools.

Moreover, by acknowledging that possession laws are enacted pursuant to a second-order implied power to effectively execute the commerce power, the resultant judicial treatment of cases such as *Raich*³³³ will not implicate the validity of the vast array of substantial effects-dependent enactments, including the federal civil rights regimes.³³⁴ Conceived as second-order “necessary and proper” enactments, controversies implicating possession laws—professed to

329. Admittedly, there are difficulties at the margins. A consideration of regulations of “mere” possession of commodities that somehow have a close relationship to commerce, but are not formally instrumentalities, can devolve into problematic conflations of the enforcement of transport and receipt regulations with substantial effects or instrumentality doctrines. However, the construction and careful maintenance of interpretive guidelines can manage the risk of unacceptable indeterminacy.

330. See *supra* note 216 and accompanying text.

331. See *supra* Part III.A.

332. See 21 U.S.C. §§ 801-971 (2000).

333. *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003).

334. See *supra* notes 34-37 and accompanying text.

have been enacted pursuant to the commerce power—perhaps are not Commerce Clause cases at all.³³⁵

335. Of course, Madison's warning remains especially relevant: "[I]t must be wholly immaterial, whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution, limited powers." James Madison, *The Report of 1800*, in 17 *The Papers of James Madison* 303, 335 (David B. Mattern ed., 1991).