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FELONS, GUNS, AND THE LIMITS OF FEDERAL POWER

DEAN A. STRANG*

INTRODUCTION

Lester Lemons was like many. His federal troubles began literally by accident: a fender-bender in West Allis, Wisconsin. Lemons had bullets in his pocket when frisked after the accident. Local police then searched the car in which he had been a passenger and found a foreign-made gun. A man at the scene said Lemons earlier flashed the gun in his waistband. Officers arrested Lemons for possessing the gun and the bullets.

Lemons was a convicted felon. The police jailed him in local custody and referred him to state prosecutors. Later, federal prosecutors decided to file federal felon-in-possession charges as part of the "Operation Ceasefire" initiative in that district.

The ensuing federal indictment charged that Lemons merely possessed one gun and twelve bullets. The government did not contend that Lemons acquired the gun or the bullets in interstate commerce, or that he engaged in any commercial activity. Typical of other federal felon-in-possession cases, Lemons' indictment charged that the gun and the bullets "had prior to his possession been transported in interstate commerce, and the possession of which was therefore in and affecting commerce." The government never claimed to know with whom, under what circumstances, when, or how the gun and the bullets earlier passed in interstate commerce. But the manufacturer made the gun outside Wisconsin, so it necessarily crossed a state line at some time before it reached Lemons. Ditto the bullets. The government did not contend that Lemons even knew that the gun and bullets had passed in interstate commerce.¹

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1. Lester Lemons' case is typical of many. The United States Court of Appeals for the Seventh Circuit recited its details at *United States v. Lemons*, 302 F.3d 769, 770 (7th Cir.), *cert. denied*, 537 U.S. 1049 (2002). The Seventh Circuit affirmed Lemons' conviction. The author represented Lemons in the district court and on appeal.

Like thousands of felons in recent years before him and since, Lester Lemons unwittingly became part of an experiment. Often collaboratively with states and local governments, the federal government in select districts has sought to impose longer federal prison terms on some felons with guns than state law provides for those crimes, thoroughly local in their commission. Two effects of this experiment are to press federal jurisdiction to (or past) its limits, and to trump state legislative choices about punishment with federal choices in a small percentage of cases chosen by federal prosecutors on largely undisclosed criteria. That second effect raises challenging practical and philosophical questions about federalism and invites serious inquiry into who loses this federal lottery and why.

But this article principally focuses on the first effect. The jurisdictional question lies in many of the felon-in-possession cases that the federal government prosecutes in every district in the nation. Yet, no federal appellate court ever has found a felon-in-possession case beyond the reach of the federal government. Indeed, only rarely have federal courts taken a jurisdictional challenge seriously.

At first blush, this is surprising. The Supreme Court's view of the Commerce Clause has changed since the Court last briefly considered the constitutionality of a federal law punishing felons with guns in 1971. But the Court never has considered whether the current statute, 18 U.S.C. § 922(g)(1), lies within congressional prerogative under the Commerce Clause.

The issue is ready for a fresh and searching look. With the exception of the very short discussion in the 1971 case, Supreme Court decisions only have assumed the constitutionality of felon-in-possession laws. At the very least, time and more recent decisions have overtaken that assumption. Today, most felon-in-possession prosecutions in federal court appear practically to rest on a Crossing State Lines Clause that appears nowhere in the Constitution, rather than on the Commerce Clause that does.²

In one respect, this article does what appellants and courts have not done. It starts at the beginning of federal efforts to keep firearms from felons. That proves an interesting place to start.

I. INTERPRETING THE REACH OF THE COMMERCE CLAUSE

A. *Commerce Clause History*

Congress first prohibited certain felons from possessing guns in the Federal Firearms Act of 1938.³ The timing of that Act is

2. U.S. CONST., art I, § 8, cl. 3.

3. Ch. 850, No. 785, 52 Stat. 1250 (codified at 18 U.S.C. §§ 901-909 (1940) (repealed 1968)). As relevant here, that Act made it unlawful for "any person

important. It came less than one year after the Supreme Court averted President Roosevelt's "court-packing" plan by a change of one vote on the scope of the Commerce Clause.

Until 1937, a slim majority of the Supreme Court often read the Commerce Clause narrowly enough to strike down signature New Deal enactments. One after another, usually on 5-4 votes, they fell to a restrictive understanding of Congress's authority under Article I, Section 8, Clause 3 of the United States Constitution: first the oil regulation efforts of the National Recovery Administration,⁴ then the Railroad Retirement Act of 1934,⁵ the National Industrial Recovery Act,⁶ the Federal Farm Bankruptcy Act,⁷ the Agricultural Adjustment Act,⁸ and finally the Bituminous Coal Conservation Act.⁹

In February 1937, a frustrated President Roosevelt proposed adding one Supreme Court justice for each sitting justice over the age of 70. The Court would have swelled to 15 under that plan, with a New Deal majority. President Roosevelt met resistance in Congress, but he persisted. In a fireside chat on March 9, 1937, he went directly to the public.¹⁰

Then, in the landmark case of *NLRB v. Jones & Laughlin Steel Corp.*,¹¹ Justice Owen J. Roberts switched sides¹² and the

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 chapter." 15 U.S.C. § 902(f) (1940)(repealed 1968).

4. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935).

5. *R.R. Retirement Board v. Alton R.R. Co.*, 295 U.S. 330, 374 (1935).

6. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935).

7. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-02 (1935).

8. *United States v. Butler*, 297 U.S. 1, 63-64 (1936).

9. *Carter v. Carter Coal Co.*, 298 U.S. 238, 302-03 (1936).

10. See Franklin Roosevelt, Fireside Chat on Reorganization of the Judiciary, March 9, 1937, available at <http://www.fdrlibrary.marist.edu/030937.html> (setting forth the transcript of President Roosevelt's plea to the public).

11. 301 U.S. 1, 37 (1937).

12. This was the famous "switch in time that saves nine," a phrase that a now-forgotten journalist likely coined. *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 234 (Kermit L. Hall ed., 2005). President Hoover appointed Justice Roberts, a Philadelphia lawyer, in 1930. *Id.* at 860. He generally sided with the conservative "Four Horsemen" of the Court on business regulation issues before *Jones & Laughlin*. *Id.* at 358. More accurately, though, the decision just weeks earlier in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), started the Court's accession to New Deal policies.

National Labor Relations Act of 1935 stood by a 5-4 vote. What had fallen by one vote now stood by one.

That decision, and Justice Van Devanter's retirement soon after, meant that New Dealers no longer saw a political need to change the Court by packing it. The Court had changed itself.

As subsequent Roosevelt appointees took their seats on the Supreme Court, the Commerce Clause quickly reached its high-water mark, arguably spilling over the levees the Framers engineered. In *United States v. Darby Lumber Co.*,¹³ the Court approved the 1938 Fair Labor Standards Act's wage controls on intrastate commerce as an "appropriate means to the attainment of a legitimate end" because the intrastate activities "so affect[ed]" interstate commerce.¹⁴

The crest came with *Wickard v. Filburn*.¹⁵ That case concerned the Second Agricultural Adjustment Act of 1938. It asked whether an Ohio farmer's wheat, which never left his farm because his family and his livestock ate it, fell within the marketing quotas that the 1938 Act established. Roscoe Filburn's unauthorized crop yielded just 239 bushels. By a 9-0 vote, the Supreme Court held that the wheat quotas applied to Filburn and lay within Congress's authority under the Commerce Clause. Consuming their own wheat, farmers like Filburn, in the aggregate, depressed the market price of grain. That affected interstate commerce. The Court acknowledged that the purely local character of an activity "may help in a doubtful case to determine whether Congress intended to reach it."¹⁶ But, *Wickard* went on to hold that, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"¹⁷

Filburn engaged at least generally in economic activity when he grew his own winter wheat. He fed it to his chickens, and in turn, sold them and their eggs. He saved some wheat for seed. Presumably, that spared him from the line of seed buyers at the local co-op before the growing season started, just as his family's own consumption probably meant he left less money at the grocer's counter. Only collectively could Filburn and his fellow wheat-growers have produced any appreciable impact on interstate

13. 312 U.S. 100, 118 (1941).

14. *Id.*

15. 317 U.S. 111 (1942).

16. *Id.* at 124.

17. *Id.* at 125.

commerce, and by their absence at that. The Court admitted as much.¹⁸

Never before had the Court viewed the Commerce Clause as reaching quite so far. Justice Jackson suggested that the decision in *Gibbons v. Ogden*¹⁹ swept more broadly still,²⁰ but invoking Chief Justice John Marshall and the Court's first significant Commerce Clause decision seemed more rhetorical flourish than serious claim.

B. *Tot v. United States*

There at *Wickard's* limits stood the Supreme Court's rendering of the Commerce Clause when a challenge to the Federal Firearms Act of 1938 arrived at the Court in 1943. Significantly, Justice Roberts — the reluctant fifth vote for a more expansive congressional role under the Commerce Clause — wrote the decision in *Tot v. United States*.²¹ The statute at issue was narrower than today's felon-in-possession law: the 1938 Act prohibited only receipt of a firearm or ammunition that moved in interstate or foreign commerce. It did not reach possession, shipment, receipt, or transport of a firearm as 18 U.S.C. § 922(g) does now. Instead, the 1938 Act provided that a prohibited person's possession of a firearm or ammunition "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."²²

The question *Tot* presented was whether Congress constitutionally could create that presumption. Congress could not.²³ *Tot* did not address directly the Commerce Clause question. One reason it did not lies in an important government concession:

Both courts below held that the offense created by the Act is confined to 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.²⁴

In other words, the government agreed in *Tot* that the theory it has used against Lester Lemons and a legion of others was impermissible under the original felon-in-possession statute. Even

18. See *id.* at 127-28 (noting that where many farmers practice as Filburn does, the effect "is far from trivial").

19. 22 U.S. (9 Wheat.) 1 (1824).

20. *Wickard*, 317 U.S. at 120.

21. 319 U.S. 463, 464 (1943).

22. *Id.* at 464 (quoting § 2(f) of the Federal Firearms Act, Ch. 850, 52 Stat. 1250, 1251, 15 U.S.C. § 902(f) (1940)(repealed 1968)).

23. *Id.* at 466-72.

24. *Id.* at 466.

in the heyday of federal regulation under the Commerce Clause and *Wickard*, the government apparently viewed this popular current theory of prosecution — that a past crossing of state lines establishes the interstate commerce element — as beyond the first statute's reach.

More than sixty years after *Tot*, it would be hard to know whether the government endorsed the narrower construction as a constitutional imperative or merely as a matter of legislative purpose. But, the words of the 1938 statute ("receive any firearm . . . which has been shipped" in interstate commerce) would have borne a broader construction reaching an intrastate receipt long after the gun crossed state lines, even if the Commerce Clause would not have.

In sum, the government disavowed its current favorite theory when the reasoning in *Wickard* held full sway, and when the Supreme Court would have been most likely to accept that theory. The concession meant no call to decide a Commerce Clause question in *Tot*.

C. Recent Felon-In-Possession Cases

There Commerce Clause jurisprudence stood almost thirty years later, when the Supreme Court next turned to a law punishing felons with guns in 1971. This time, in *United States v. Bass*,²⁵ the Court confronted the Commerce Clause question. It had to face the question, for in the years since *Tot*, the government had drifted a great distance from its concession that past receipt in interstate commerce would not do. By 1971, the government viewed a new statute²⁶ as banning all gun possessions by felons. In the government's opinion, the statute required no proven connection with interstate commerce in individual cases.²⁷

Still, the Supreme Court's short discussion of the Commerce Clause appeared only at the very end of its opinion in *Bass*, as if an afterthought. *Bass* principally presented the question whether Congress intended to require proof of a connection to interstate commerce in possession cases. As a matter of legislative intent, the government argued that Congress intended proof of the interstate commerce link only under the 'receives' or 'transports'

25. 404 U.S. 336, 347 (1971).

26. 18 U.S.C. app. § 1202(a)(1970)(repealed 1968). That provision read:

Any person who — (1) 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, after the date of enactment of this Act, any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

Id.

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

parts of the statute.²⁸ *Bass*, then, sought primarily to ascertain legislative intent, not to discern the constitutional limits of legislative power.

Finding that “the statute does not read well under either view,”²⁹ the Supreme Court favored the narrower reading after a thorough discussion of this ambiguous provision. The phrase “in commerce or affecting commerce” applied to all three methods of committing the crime: possession, receipt, or transport.³⁰ The Court appreciated that, “[a]bsent proof of some interstate commerce nexus in each case, § 1202(a) dramatically intrudes upon traditional state criminal jurisdiction.”³¹

Having reached that conclusion, the Court then added in the last paragraph of the opinion “a final word about the nexus with interstate commerce that must be shown in individual cases.”³² In full, the Court wrote:

The Government can obviously meet its burden in a variety of ways. We note only some of these. For example, a person “possesses . . . in commerce or affecting commerce” if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce. Significantly broader in reach, however, is the offense of “receiv[ing] . . . in commerce or affecting commerce,” for we conclude that the Government meets its burden here if it demonstrates that the firearm has previously traveled in interstate commerce. This is not the narrowest possible reading of the statute, but canons of clear statement and strict construction do “not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature.” *United States v. Bramblett*, 348 U.S. 503, 510 (1955). We have resolved the basic uncertainty about the statute in favor of the narrow reading, concluding that “in commerce or affecting commerce” is part of the offense of possessing or receiving a firearm. But, given the evils that prompted the statute and the basic legislative purpose of restricting the firearm-related activity of convicted felons, the readings we give to the commerce requirement, although not all narrow, are appropriate. And consistent with our regard for the sensitive relation between federal and state criminal jurisdiction, our reading preserves as an element of all the offenses a requirement suited to federal criminal jurisdiction alone.³³

With that one paragraph, offering but a single citation on a general canon of statutory construction, *Bass* implicitly suggested that the Commerce Clause permitted the statute’s reach, upon a showing of a link to interstate commerce. Without explanation,

28. *Id.* at 339, 341-42.

29. *Id.* at 339.

30. *Id.* at 347-50.

31. *Id.* at 350.

32. *Id.* at 350.

33. *Id.* at 350-51 (internal citations omitted).

the Court construed one verb, "receives," as allowing a looser link to interstate commerce than another verb in the same statute, "possesses." It never addressed the third verb, "transports." *Bass* hardly bespoke searching consideration of the Commerce Clause.

The Supreme Court's next two, and most recent, encounters with felon-in-possession statutes never addressed the Commerce Clause or the statutes' constitutionality at all. Both *Barrett v. United States*³⁴ and *Scarborough v. United States*³⁵ limited their consideration to statutory construction and legislative intent.

The earlier case, *Barrett*, was the first to consider the Gun Control Act of 1968,³⁶ which amended the Omnibus Crime Control and Safe Streets Act of 1968.³⁷ *Barrett* decided, in a case apparently charging receipt of a gun, that the statute applied to the defendant's intrastate purchase of a gun that previously moved in interstate commerce, apart from the defendant's receipt.³⁸ Noting that *Barrett* conceded Congress's authority under the Commerce Clause "to regulate interstate trafficking in firearms,"³⁹ the majority treated the case as resting entirely on legislative intent. *Barrett* examined the terms and structure of the statute closely, as well as its legislative history, and drew a reasonable conclusion about congressional intent.⁴⁰ But the decision never considered whether that intent was within

34. 423 U.S. 212 (1976).

35. 431 U.S. 563 (1977).

36. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968).

37. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 § 972 (1968). *Bass* and *Scarborough v. United States*, 431 U.S. 563 (1977) (the case after *Barrett*), both concerned 18 U.S.C. app. § 1202(a), which the Firearm Owners' Protection Act of 1968 repealed. The two statutes are different and the differences may be material. See *United States v. Kuban*, 94 F.3d 971, 977 (5th Cir. 1996) (DeMoss, J., dissenting)(stating that the changes in the laws reveal a different statutory intent for each). Further, Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, unlike the present version, treated shipping and transporting under one subsection, 18 U.S.C. § 922(g) (1964 & Supp. V. 1970), and receiving under another. § 922(h) (1964 & Supp. V. 1970). The 1970 versions provided:

(g) It shall be unlawful for any person — (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . to ship or transport any firearm or ammunition in interstate or foreign commerce. (h) It shall be unlawful for any person — (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Id. at §922 (g)-(h).

38. *Barrett*, 423 U.S. at 213.

39. *Id.* at 215.

40. See *id.* at 216-25 (holding that it would be inconsistent to construe the statute as applying "[T]o the receipt of the firearm as part of an interstate movement").

Congress's constitutional power under the Commerce Clause.

Along the way, the *Barrett* Court dismissed the government's concession in *Tot*. That was "merely a recital as to what the District Court and the Court of Appeals in that case had held and a further statement that the Government had agreed that the construction by the lower courts was correct."⁴¹ The majority admitted that the government's stance in *Tot* did not help it in *Barrett*. Still, there is "no rule of law to the effect that the Government must be consistent in its stance in litigation over the years," the majority apologized.⁴²

Only two justices dissented in *Barrett*. Yet that dissent proved important more than a quarter century later, if only because then-Justice Rehnquist joined it. Justice Stewart wrote the dissent.⁴³ He argued that *Tot* adopted the government's concession, rather than just noted it, and that the 1968 law, in turn, retained what he saw as *Tot*'s requirement that a defendant actually receive the gun in the course of an interstate shipment.⁴⁴ While a felon's possession of a loaded revolver was "offensive to those who believe in law and order,"⁴⁵ Justices Stewart and Rehnquist concluded that the defendant committed no federal crime where, "[t]he prosecution submitted no evidence of any kind that the petitioner had participated in any interstate activity involving the revolver, either before or after its purchase."⁴⁶ Chief Justice Rehnquist's views evidently never changed in the intervening years — judging by *United States v. Lopez*, *Jones v. United States*, and *United States v. Morrison*⁴⁷ (or his dissenting vote in *Gonzales v. Raich*⁴⁸) — so until his death, there was at least one potential vote for limiting the reach of § 922(g) to true interstate commercial activity.

41. *Id.* at 221-22.

42. *Id.* at 222 n.6.

43. *Id.* at 228-31 (Stewart, J., dissenting).

44. *Id.* at 229 n.3, 230-31.

45. *Id.* at 228.

46. *Id.*

47. *United States v. Morrison*, 514 U.S. 549, 551 (1995) (stating that the Gun-Free School Zones Act of 1990 does not regulate commercial activity or relate to interstate commerce); *See United States v. Lopez*, 529 U.S. 848, 850-51 (2000) (stating that an owner-occupied residence not used for any commercial purpose will not be regulated under the text of the commerce clause); *See Morrison*, 529 U.S. 598, 613 (2000) (stating that gender-motivated violence does not translate into economic activity).

48. 125 S. Ct. 2195, 2221 (2005). (O'Connor J., dissenting) Although Chief Justice Rehnquist did not write in *Raich*, he joined most of Justice O'Connor's dissent, which viewed "the case before us [as] materially indistinguishable from *Lopez* and *Morrison* when the same considerations are taken into account." *Id.* at 2222 (O'Connor, J., dissenting).

The year after *Barrett*, the Supreme Court decided *Scarborough*. That case seems the foundation of the government's modern theory: a felon's mere possession of a gun that previously traveled in interstate commerce means guilt. Because *Scarborough* again addressed only a question of statutory construction, the case pours no explicit constitutional foundation.

As the Court framed it, the issue in *Scarborough* was "whether proof that the possessed firearm previously traveled in interstate commerce is sufficient to satisfy the statutorily required nexus between the possession of a firearm by a convicted felon and commerce."⁴⁹ The Court then considered both the "text of the statute"⁵⁰ and the "legislative history in its entirety,"⁵¹ concluding that Congress intended no more "than the minimal nexus that the firearm have been, at some time, in interstate commerce."⁵²

Scarborough nowhere addressed what nexus the Constitution might set as the minimum. It came no closer to the Commerce Clause than acknowledging that the legislative history revealed "some concern about the constitutionality of such a statute [proscribing mere possession]."⁵³ That ambivalence, the *Scarborough* Court explained, is what "made us unwilling in *Bass* to find the clear intent necessary to conclude that Congress meant to dispense with a nexus requirement entirely."⁵⁴

So *Scarborough* betrayed a tacit assumption that perhaps Congress could have omitted any requirement that the government prove a nexus to interstate commerce when felons possess guns. That notable, if unstated, assumption may account for the Court's treatment of the statute's scope as no more than a matter of legislative intent.

A footnote also reveals this inattention to possible constitutional limits on federal legislative reach into local conduct and policing. *Scarborough* there retracted the suggestion in *Bass* that possession might require a stricter nexus with interstate commerce than does receipt.⁵⁵ While such a requirement continued to make sense, the Court mused in the footnote, "further consideration" persuaded the Court that Congress meant no such difference. "Congress was not particularly concerned with the impact on commerce except as a means to insure the constitutionality" of the statute, the note closed.⁵⁶

49. *Scarborough*, 431 U.S. at 564.

50. *Id.* at 569-71.

51. *Id.* at 572.

52. *Id.* at 575; see also *id.* at 577 (stating that Congress intended a broad construction to allow any intersection with interstate commerce to be sufficient).

53. *Id.* at 575.

54. *Id.*

55. *Id.* at 575 n.11.

56. *Id.*

The Court left the Commerce Clause unexamined in *Scarborough*, then, and that decision scraped no deeper than the meaning of the statute. Showing a “minimal nexus” to interstate commerce sufficed, the Court held, because Congress intended no more. *Scarborough* neither decided nor even considered in passing what standard the Commerce Clause might set for “minimal.”

Justice Stewart dissented again in *Scarborough*.⁵⁷ Although Justice Rehnquist did not join that dissent, he did not join the majority, either. He took no part in the case.

In any event, neither *Barrett* nor *Scarborough* fairly suggested that the current felon-in-possession statute comports with the Commerce Clause. Those decisions implicitly assumed constitutionality but never addressed the question, let alone decided it.

In the Supreme Court, all considered, the constitutional footing of a felon-in-possession statute like 18 U.S.C. § 922(g)(1)⁵⁸ is as precarious as the single concluding paragraph in *Bass*. Indeed, the footing is that paragraph. Thirty-five years have passed since; more time than between the *Tot* and *Bass* decisions.

II. LOPEZ, MORRISON, AND RAICH

A. Lopez

More than a decade ago, the Supreme Court's decision in *United States v. Lopez*⁵⁹ ignited a flashfire of academic and judicial comment and, a step back from the heat, drew thousands of prisoners and criminal defendants hoping to light an array of likely and unlikely personal candles by the same spark. Almost all of these prisoners the courts turned back to the dark. Now familiar, *Lopez* concerned the Gun-Free School Zones Act of 1990.

57. This time, the dissent was as narrow as the Court's opinion. Justice Stewart also looked no further than the statute's meaning. Justice Stewart preferred a narrower construction under the rules of lenity because he was troubled by a statute that would make a person who already owned guns guilty of a second felony — possession of the guns — immediately upon his conviction for some first felony, and thought Congress's intentions ambiguous. *Scarborough*, 431 U.S. at 578-80 (Stewart, J., dissenting). He argued that the statute should apply only to persons who first come into possession of a firearm after a felony conviction. *Id.* at 578.

58. This is the current felon-in-possession provision. It reads:

(g) It shall be unlawful for any person — (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . 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 shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922 (g)(2000).

59. 514 U.S. 549 (1995).

That statute made a federal offense of possessing a firearm in a place the person knew, or should have known, was within a 1000-foot "school zone."⁶⁰ It required no connection to interstate commerce.⁶¹

Lopez struck down that provision as exceeding Congress's authority to regulate interstate commerce:

Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It 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.⁶²

Narrowly understood, the 5-4 decision invalidated but one statutory subsection. Most of *Lopez* discussed first principles, though. Chief Justice Rehnquist wrote the majority opinion. He noted initially that, "[t]he Constitution creates a Federal Government of enumerated powers."⁶³ Further, the Supreme Court acknowledged long ago "that limitations on the commerce power are inherent in the very language of the Commerce Clause."⁶⁴

The *Lopez* majority observed specifically that the Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation."⁶⁵ Instead, "[u]nder our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'"⁶⁶ "When Congress criminalizes conduct already denounced as criminal by the States," Chief Justice Rehnquist continued, "it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'"⁶⁷

Analyzing the scope of the Commerce Clause, the Court reviewed the history of that clause from the beginning.⁶⁸ The majority appreciated that cases like *Wickard* were expansive. *Lopez* explained:

60. At the time, the statute was 18 U.S.C. § 922(q)(1)(A).

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

62. In 1996, Congress re-enacted that prohibition in § 922(q)(2)(A). *Lopez*, 514 U.S. at 561.

63. *Id.* at 552.

64. *Id.* at 553 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

65. *Id.* at 566.

66. *Id.* at 561 n.3 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)).

67. *Id.* (quoting *United States v. Enmons*, 410 U.S. 396, 411-12 (1973)).

68. *Id.* at 552-58.

But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power “must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create completely centralized government.” Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.⁶⁹

From that history, the Court distilled “three broad categories of activity that Congress may regulate under its commerce power.”⁷⁰ First, “Congress may regulate the use of the channels of interstate commerce.” Second, Congress may “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.”⁷¹ Third, Congress has authority to regulate activities “having a substantial relation to interstate commerce,” or, in other words, “those activities that substantially affect interstate commerce.”⁷²

Considering § 922(q), the Court quickly discarded the first two categories, for a law banning mere possession of a gun in a school zone clearly fell outside both of them. Section 922(q) could stand only if it was within the third category, “regulation of an activity that substantially affects interstate commerce.”⁷³

Lopez then applied two qualifications to that third category. First, conduct within that realm implicitly must be “economic activity.”⁷⁴ The majority noted that even *Wickard v. Filburn*, “which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not.”⁷⁵

Second, the Court thought it relevant to ask whether a statute examined under the third category contains a jurisdictional element “which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.”⁷⁶ Section 922(q) required no such proof of interstate

69. *Id.* at 556-57 (internal citations omitted).

70. *Id.* at 558.

71. *Id.*

72. *Id.* at 559.

73. *Id.*

74. *Id.* at 559-60.

75. *Id.* at 560.

76. *Id.* at 561.

commerce. "Unlike the statute in *Bass*," the Court commented, "§ 922(q) 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."⁷⁷

Lacking both relation to economic activity and a jurisdictional element, § 922(q) fell outside the third category. It was not a regulation of "activities that substantially affect interstate commerce." The Court conceded that determining whether intrastate activity is commercial or non-commercial may result occasionally in legal uncertainty.⁷⁸ It was willing to accept this. Uncertainty about the outer edge of Congress's authority under the Commerce Clause comes with the fact that there is an outer edge, and one that is judicially enforceable.⁷⁹ A practical boundary problem does not mean abandoning altogether the idea of a constitutional limit.

"To uphold the Government's contentions here," the Court concluded, "we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."⁸⁰ Rather than do that, the Court recalled that the Constitution's enumeration of powers presupposes some powers not enumerated (and thus not given to Congress), and a remaining "distinction between what is truly national and what is truly local."⁸¹

Perhaps because the Supreme Court split 5-4 in *Lopez*, most federal appellate judges have treated that decision as a "constitutional freak," to repeat Judge Samuel A. Alito's colorful term.⁸² But, a few judges and commentators, including Judge Edward R. Becker of the Third Circuit, saw *Lopez* instead as a "sea change."⁸³ Which of those starkly contrasting and caricatured

77. *Id.* at 562.

78. *Id.* at 566.

79. *Id.*

80. *Id.* at 567.

81. *Id.* at 567-68.

82. *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (Alito, J., dissenting). Judge Alito would have struck down the federal law banning transfer or possession of a machine gun, 18 U.S.C. § 922(o). In a case involving a home-made machine gun, a divided panel of the Ninth Circuit, with Judge Alex Kozinski writing for the majority, later did exactly that. *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003) (2-1 decision). The Ninth Circuit denied the government's request for *en banc* rehearing. However, on the government's petition for a writ of certiorari, the Supreme Court summarily granted the writ, vacated the Ninth Circuit's judgment and remanded for reconsideration in light of *Raich*. *United States v. Stewart*, 125 S. Ct. 2899 (2005). The case remains pending in the Ninth Circuit.

83. *United States v. Bishop*, 66 F.3d 569, 591 (3d Cir. 1995) (Becker, J., concurring in part, dissenting in part). See Randy E. Barnett, *The Original*

descriptions comes closest to historical truth remains an open question.

Neither is exactly right or even close enough to boast. All but committed scholars missed most of the richness and unpredictability of Commerce Clause jurisprudence for almost two centuries before *Lopez*; collectively, those cases at least add missing nuance to the “sea change” claim. For their part, the cases that have followed refute the “constitutional freak” claim.

B. Morrison

More than ten years have passed since *Lopez*. The Supreme Court’s Commerce Clause and Tenth Amendment decisions in those years still suggest not a sea change, but a meaningful revival of attention to limits on congressional power. The *Lopez* majority remains just one vote, but it likely remains — with some further complexity or qualification, perhaps, after *Raich* and the death of Chief Justice Rehnquist. When the Court avoids potential Commerce Clause infirmities by construing a statute narrowly, the idea of limiting congressional control of local conduct even picks up votes.

Six years ago, and just five years after *Lopez* reasserted the Commerce Clause’s limits, the Court struck down part of a second federal statute as exceeding the scope of the Commerce Clause. The decision in *United States v. Morrison*⁸⁴ held a particular civil remedy under the Violence Against Women Act⁸⁵ unconstitutional.

Meaning of the Commerce Clause, 68 U. CHI. L. REV. 101, 103-04 (2001) (“Now that in *United States v. Morrison* the Court has found another statute to be unconstitutional because it exceeded Congress’s power under the Commerce Clause, it appears that the Court is serious about finding some limit on the power to regulate commerce among the states.”); Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167 (1996) (“*United States v. Lopez* may turn out to be a flash in the pan or it may usher in a new age of constitutional restraint. Either way, it stands as the most important Commerce Clause decision since the Civil Rights cases of thirty years ago.”). See Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695 (1996) (arguing that the Commerce Clause must have a more permanent construction consistent with the intent of the Framers and that the decision in *Lopez* is a positive step in that direction). Further, at least one hybrid, judge as commentator, also welcomed *Lopez* as an historically important decision. See David B. Sentelle, *Lopez Speaks, Is Anyone Listening?*, 45 LOY. L. REV. 541, 548 (1999) (stating that for the first time since the New Deal, the Court resurrected the Tenth Amendment). Judge Sentelle, of the District of Columbia Circuit, regrets that, “Much of the academy, and unfortunately of the bench, seem stuck in the past. They seem to believe that if they ignore this specter of change, it will go away.” *Id.*

84. 529 U.S. 598, 602 (2000).

85. Pub. L. 103-322, Title IV, 108 Stat. 1796, 1902-55 (September 13, 1994). The specific provision at issue, § 40302 of the Act, 108 Stat. 1941-42, was codified at 42 U.S.C. § 13981.

At the outset, Chief Justice Rehnquist, again writing for a five-member majority, asserted that the question was “controlled by” *Lopez* and two 19th-century decisions.⁸⁶ That dry and unremarkable phrase in fact gave *Lopez* remarkable breadth, for superficially a statute allowing civil money damages to victims of gender-motivated violence shared few similarities with a criminal statute punishing possession of a gun in a school zone. Certainly the felon-in-possession statute is closer in kind to *Lopez*’s statute than was the relevant section of the Violence Against Women Act. Moreover, claiming dominion for two century-old decisions without a jot on the New Deal shift that produced *Wickard* was a deceptively important pen stroke.

Morrison acknowledged that due respect for Congress permits the Supreme Court to invalidate a congressional enactment only upon a plain showing that Congress exceeded constitutional bounds.⁸⁷ But there Congress did.

Reviewing *Lopez*, the Court reiterated “that the noneconomic, criminal nature of the conduct at issue [in *Lopez*] was central to our decision in that case.”⁸⁸ “*Lopez*’s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce,” the Court wrote, “the activity in question has been some sort of economic endeavor.”⁸⁹ Again echoing *Lopez*, the *Morrison* majority also affirmed the importance of a jurisdictional element that might limit a statute’s reach “to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.”⁹⁰

Turning to violent crime as an object of congressional regulation, the majority noted that “thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”⁹¹ Accordingly, the Court rejected the argument “that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.”⁹² “Indeed,” the majority wrote emphatically, “we can think of no better example of the

86. *Morrison*, 529 U.S. at 602. The two 19th Century decisions are: *United States v. Harris*, 106 U.S. 629 (1883), and the *Civil Rights Cases*, 109 U.S. 3 (1883).

87. *Morrison*, 529 U.S. at 607.

88. *Id.* at 610.

89. *Id.* at 611.

90. *Id.* at 611-12 (quoting *Lopez*, 514 U.S. at 562).

91. *Id.* at 613.

92. *Id.* at 617-18.

police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”⁹³

If violent, but local and non-economic, crimes provide no occasion for congressional intervention, as *Morrison* held, it is difficult to insist that non-violent, local, and non-economic crimes, like passive possession of a gun, can invite congressional regulation. *Morrison* appears to leave little or no room for that, unless perhaps a jurisdictional element limits the statute’s reach to a discrete set of firearm possessions affecting interstate commerce.⁹⁴ But the jurisdictional element would not make activity economic. That element itself is slippery, if the term “commerce” is every bit as important as the term “interstate.” *Morrison*’s import is that it is. Even positing an atypical “interstate” rape,⁹⁵ when would such a rape also be “commercial”?⁹⁶

The jurisdictional element seems in the end an odd, and not very helpful, practical marker. It does not signal clearly what Congress can do. However, it may be a helpful rhetorical marker in another place: it may serve to deflect a charge that the Court changed constitutional course radically. It lends an appearance of

93. *Id.* at 618.

94. *Id.* at 611-12 (quoting *Lopez*, 514 U.S. at 562).

95. Congress has addressed something very close, interstate domestic violence. See 18 U.S.C. § 2261 (a)(1)(2000) (providing that “[a] person who travels in interstate [commerce] with the intent to kill, injure, harass, or intimidate . . . and who, in the course of or as a result of such travel, commits or attempts to commit a crime of violence against that spouse or intimate partner, shall be punished . . .”). Without much imagination, that statute could encompass a rape committed by someone who traveled in interstate commerce with that purpose, if the rape injured or intimidated the victim in the course of or as a result of the travel.

96. A possible answer is that rape might be both interstate and commercial, in some sense, if it fell within the scope of the Mann Act, 18 U.S.C. § 2421 (2000). That act concerns prostitution primarily, but obviously the line of consent between prostitution and rape can be blurry. In any event, the Supreme Court struggled for three decades with the reach that the Commerce Clause allowed Congress in fashioning that statute. See, e.g., *Caminetti v. United States*, 242 U.S. 470 (1917) (holding that the transportation of women in interstate commerce to engage in the act of “debauchery” fell within the provisions of the Act was constitutional since Congress had authority to keep interstate commerce free from immoral acts). See *Mortensen v. United States*, 322 U.S. 369 (1944) (holding that husband and wife who operated a prostitution establishment and took two prostitutes on an out-of-state trip, did not violate the Mann Act since there was no evidence that the defendants transported the prostitutes for the purpose of debauchery); *United States v. Beach*, 324 U.S. 193 (1945) (holding that the Mann Act applies not only to transportation in and out of the District of Columbia, but also to transportation that takes place in the District of Columbia); *Cleveland v. United States*, 329 U.S. 14 (1946) (holding that the Mann Act applies to transportation of wives by polygamists). Taken together, the Mann Act cases at best have a strange harmony.

modest adjustment and the promise of continuity that may correspond to the *Lopez/Morrison* majority's intentions on outcome, and surely corresponded to its intentions on appearances.

Whether one agrees substantively with Judge Becker that these cases worked a "sea change" or not, likely the Supreme Court majority would shrink from that description as caretakers of the Court's institutional stability and appearances. Even flattering caricatures threaten the self-image of those caricatured. The rhetorical proviso for a jurisdictional element serves as a defense even to a friendly "sea change" claim.

Whatever its cosmetic and rhetorical value, the jurisdictional element in § 922(g)(1) today does not provide a real limitation, as the lower federal courts understand it. In most states essentially every felon possessing a gun falls within the statute under the government's view, for all commercially-manufactured guns cross at least one state line to get to non-manufacturing states.⁹⁷ For that matter, a gun manufactured in, say, New Hampshire might travel out of state and back again in the many years that it remains serviceable. The jurisdictional element does almost nothing to limit the set of firearm possessions that the statute punishes.⁹⁸

97. Many states produce few guns, and major manufacturers of different firearm types appear loosely clustered in other states. For example, Arizona, California, Connecticut, Florida, Massachusetts, and New Hampshire produced almost sixty-nine percent of all pistols and revolvers made in America in 2001 (649,482 of 943,213). ANNUAL FIREARMS MANUFACTURING AND EXPORT REPORT, (2001), available at <http://www.atf.gov/firearms/stats/afmer/afmer2001.pdf>. On the other hand, New York alone (which produces few handguns) produced more than twenty-eight percent of all rifles and shotguns made in America in 2001 (553,528 of 1,964,367). *Id.*

98. Consider some numbers from a recent year. Although there surely is no tally of how many guns pass innocently across state lines every year, the Bureau of Alcohol, Tobacco and Firearms does tabulate the number of firearms imported to the United States every year. Those firearms fall within the scope of the Commerce Clause, which encompasses both foreign and interstate commerce. In 2000 alone, a total of 1,096,782 firearms were imported. BATF, FIREARMS COMMERCE IN THE UNITED STATES 2001/2002, Exhibit 3 at E-3. In 1993, according to the same exhibit, the United States imported more than 3,000,000 firearms. The ATF writes that "imports over the past ten years have averaged one million per year." *Id.* at 3.

The ATF also tracks the source of "crime guns," that is, firearms used in a crime that law enforcement agencies later recover. In 2000, 41.7% (25,279 of 60,643) of crime guns with known originating locations were not first sold in the state in which the firearms were recovered. BATF, CRIME GUN TRACE REPORTS IN 2000, at 41-42 & Table 16 (July, 2002), available at <http://www.atf.gov/firearms/ycgii/2000/index.htm>. Of course, no one knows how many felons passively possess guns every year without using those guns in a crime. How many crime guns are not recovered also remains unknown. Likewise, researchers cannot know how many firearms leave the state of their manufacture or initial sale, but later return to that state before someone uses

Further, as the government now reads the statute, the jurisdictional element does not assure that gun possessions have the necessary connection with or effect on commerce. The government and federal courts say today that a long-past trip across a state line, for reasons not provably commercial and probably unknown altogether, suffices to meet this statute's jurisdictional element. Yet the Supreme Court twice has written that the "firearm *possessions*" themselves must have an explicit connection with or effect on interstate commerce.⁹⁹ The federal courts of appeal apparently grasp no limiting effect in that jurisdictional element, so it is little wonder that no one else does.

C. Raich

The history in the preceding ten-plus years makes *Gonzales v. Raich*¹⁰⁰ even more challenging. Whatever else it did, *Raich* clouded, rather than clarified, the reach of *Lopez* and *Morrison*. Confronting California's medical-use allowance for intrastate manufacture or possession of marijuana, *Raich* held that the federal Controlled Substances Act brooked no such exception to its blanket ban on marijuana and, more importantly here, that Congress permissibly could punish the local activity California sought to shield.¹⁰¹

Students of the three cases might do well to start where they end, and in so doing, end where they start: *Lopez* and *Morrison* survive *Raich*. Taken on its own terms, *Raich* did not displace the earlier cases. Rather, it distinguished them. *Raich* claimed consistency with, even fealty to, *Lopez* and *Morrison*. The fact that Justice Kennedy, in the Congress-limiting majority in both *Lopez* and *Morrison*, joined the Congress-empowering majority in *Raich*, offers at least some corroboration of the *Raich* majority's sincerity (if not necessarily its logical consistency). Justice Scalia, too, who voted to strike down federal action in *Lopez* and *Morrison*, concurred in the *Raich* majority's judgment that the federal government acted permissibly there. He likewise confessed no second thoughts about the earlier cases.

Below this superficial starting (and ending) plane, difficulty lurks. If *Lopez*, *Morrison*, and *Raich* now are a trilogy, they are anything but triune. Just as *Raich* employed *Lopez*'s three categories of congressional competence under the Commerce

them in a crime. Clearly, though, just the number of recovered crime guns that crossed a state line at some point would far outstrip the capacity of federal prosecutors and federal courts to handle the potential scope of federal jurisdiction under the current construction of the Commerce Clause.

99. *Morrison*, 529 U.S. at 611-12 (emphasis added)(quoting *Lopez*, 514 U.S. at 562).

100. 125 S. Ct. 2195 (2005).

101. *Id.* at 2204-15.

Clause¹⁰² and otherwise suggested allegiance to *Lopez*,¹⁰³ it also endorsed the reasoning and reach of *Wickard v. Filburn*. Indeed, the *Raich* majority apparently viewed *Wickard v. Filburn* as controlling the case on all fours.¹⁰⁴ While intellectually *Lopez* and *Wickard v. Filburn* can be squared — and *Lopez* certainly did not renounce the earlier case — practically and attitudinally it is hard to square the broadest Commerce Clause case (*Wickard v. Filburn*) with the first case that sought to re-establish functional limits on the clause (*Lopez*). In other words, the *Lopez* majority conceived one corral that ostensibly pens both horses, but did not make it easier to ride the two at once. Little wonder that three justices who endorsed the majority opinions in *Lopez* and *Morrison*, including the author of both, dissented from *Raich*'s holding that purported to honor both *Lopez* and *Wickard v. Filburn* at once.¹⁰⁵

More than that, the three dissenters understood *Raich* as reducing *Lopez* to “nothing more than a drafting guide”¹⁰⁶ for Congress, not as honoring the earlier case. Justice O'Connor argued that,

[t]oday's decision suggests that the federal regulation of local activity is immune to Commerce Clause challenge because Congress chose to act with an ambitious, all-encompassing statute, rather than piecemeal. In my view, allowing Congress to set the terms of the constitutional debate in this way, *i.e.*, by packaging regulation of local activity in broader schemes, is tantamount to removing meaningful limits on the Commerce Clause.¹⁰⁷

In doing so, the principal dissent contended, the majority adopted a definition of ‘economic’ so capacious that it threatened “to sweep all of productive human activity into federal regulatory reach.”¹⁰⁸

The critique has force. But most of its force lies not in attacking the definition of ‘economic,’ or even in mapping how Congress might evade the limits of the Commerce Clause. Rather, most of its force lies in Justice O'Connor's observation that the *Raich* majority missed (or masked) the point: the “real problem” is “drawing a meaningful line between ‘what is national and what is local.’”¹⁰⁹

102. *Id.* at 2205.

103. *See e.g., id.* at 2205, 2209-10, 2211 (referencing *Lopez* as a controlling case).

104. *See id.* at 2205-09, 2215 (“The similarities between this case and *Wickard* are striking.”).

105. Justices O'Connor and Thomas, and Chief Justice Rehnquist, all dissented in *Raich*. *Id.* at 2220.

106. *Id.* at 2223 (O'Connor, J., dissenting).

107. *Id.* at 2222 (O'Connor, J., dissenting).

108. *Id.* at 2224 (O'Connor, J., dissenting).

109. *Id.* (O'Connor, J., dissenting) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

Two points follow. First, that the “real problem” is not legislative; it is judicial. The Supreme Court, as the line-drawer, bears responsibility for giving its lines meaning, in the sense of providing discernible animating principles that allow Congress, courts, and the public at large both to understand and respect (even if not like or agree with) the line’s placement and to predict confidently where the line next will extend. The Court has not done that in its Commerce Clause jurisprudence in the last ten years, or ever. *Lopez* only was a good first step.

Second, Justice O’Connor’s dissent added little to a solution. She ceded her best argument by assuming, for the sake of discussion, that intrastate marijuana cultivation and possession for personal use was economic.¹¹⁰ Parenthetically, her concession for argument’s sake if nothing else raised an interesting future question. With Justice O’Connor choosing not to defend the economic requirement of *Lopez* and *Morrison*, with Justice Scalia possibly now willing to abandon that requirement,¹¹¹ and with the

110. *Id.* (O’Connor, J., dissenting).

111. Justice Scalia’s concurrence in the judgment may signal a strange journey. He of course joined the majority opinions in *Lopez* and *Morrison*, which lay heavy emphasis on the condition that intrastate activity be economic to be eligible for federal regulation within the third category of permissible legislation under the Commerce Clause. Now, his *Raich* concurrence argued that when viewed from the perspective of the Necessary and Proper Clause, “[C]ongress’s authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce.” *Id.* at 2217 (Scalia, J., concurring in the judgment). To Justice Scalia, this meant that, “[w]here necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.” *Id.* at 2216. He untethered Congress’s powers as amplified by the Necessary and Proper Clause from its powers solely under the Commerce Clause. *See id.* at 2218 (noting that the nature of the Necessary and Proper Clause allows Congress to make laws that it could not make acting only under one of its enumerated powers). Implicitly, because in Justice Scalia’s view the *Lopez/Morrison* third category evidently is not in play at all for purposes of the Necessary and Proper Clause, there would be no limitation to economic activity.

The real intrigue in Justice Scalia’s concurrence, then, comes with his interpretation of the Necessary and Proper Clause. That merits serious scholarly consideration elsewhere. For present purposes, it suffices to say that his expansive understanding of the Necessary and Proper Clause as something that adds substantively to the scope of other powers when exercised “in conjunction” with them was surprising — and surprisingly free of cited authority. *Id.* at 2218.

Justice Scalia relied almost exclusively on *McCulloch v. Maryland* for his interpretation. 17 U.S. (4 Wheat.) 316 (1819). That case, involving the establishment of a national bank, more comfortably fits with an ancillary, rather than an expansive, understanding of the Commerce Clause. That is, under a limited ancillary view conforming to the structure of a federal government with enumerated powers only, Congress might take as necessary and proper only those ancillary measures necessary to execute some

four *Lopez/Morrison* dissenters never having accepted the economic requirement in the first place, what will shifting blocs of the Court do next with that cornerstone of *Lopez* and *Morrison*?

At present, though, Justice O'Connor's concession left her to fight it out over substantial effects — a mushy, even contentless, term¹¹² that carried with it vulnerabilities to the consumable nature of marijuana (and thus the regular need to replace it), the potential expansion of any personal use exception to all personal uses (why not? Why would medical use be significant to the Constitution?),¹¹³ and even the obvious possibility that other states would adopt similar or broader personal use exceptions and so increase an indirect impact on the interstate market for marijuana.¹¹⁴

The dissent could have made progress in articulating principles by which to distinguish local from national — or, more precisely, to distinguish local and even national (in the sense of

regulation within its substantive powers. For example, if Congress wishes a new Commission to regulate some aspect of interstate commerce, in executing that wish it might be necessary and proper also to fix terms and numbers of commissioners, enable the president to appoint or remove them, provide a budget and a staff, and arrange for suitable quarters. Another example is *McCulloch's*, the incorporation of a national bank as “incidental or implied” *Id.* at 406, to the “great powers” to lay and collect taxes, borrow money, regulate commerce and so forth. *Id.* at 406-9. Rhetorically sweeping though his language was in *McCulloch*, Chief Justice Marshall did not underwrite Justice Scalia's expansively substantive view of the Necessary and Proper Clause. Conceivably, Justice Scalia might have found more support for his vision of the Necessary and Proper Clause in the *Legal Tender Case*, *Julliard v. Greenman*, 110 U.S. 421, 440-47 (1884)(listing some implied powers of Congress emanating from the enumerated rights). But he cited neither that decision nor anything else on the point. Justice Scalia probably is no fan of penumbral rights, notwithstanding the Ninth Amendment's express assertion that unenumerated rights remain. See *Burnham v. Marin County Superior Court*, 495 U.S. 604, 627 n.5 (1990) (writing for the majority, Justice Scalia noted, “[t]he notion that the Constitution, through some penumbra emanating from the Privileges and Immunities Clause and the Commerce Clause, establishes this Court as a Platonic check upon the society's greedy adherence to its traditions can only be described as imperious”); see also *Lawrence v. Texas*, 539 U.S. 558, 594-95 (2003) (Scalia, J., dissenting) (noting that the Court in *Griswold v. Connecticut* based its “right to privacy” on the “penumbras of constitutional provisions” in addition to the Due Process Clause). Yet it would be fair, even if provocative, to suggest that Justice Scalia's concurrence in *Raich* invites recognition of penumbral powers, notwithstanding the Tenth Amendment's express assertion that unenumerated powers do not remain with the federal government. Again, though, that is for another day.

112. See discussion *supra* of the fifth point in Part V.A. (discussing the meaning of the terms “minimal” and “substantial”).

113. The majority called her on that weakness in the dissent's argument. *Raich*, 125 S. Ct. at 2212.

114. *Id.* at 2214-15 (noting that at least nine states now allow medical use of marijuana, which Justice O'Connor's dissent “conveniently disregards”).

recurrent in many locales) from *federal* — had it instead contended seriously with the question of commerce.¹¹⁵ All nine justices agreed, or conceded implicitly, that the medical marijuana users were not engaged in commerce, let alone interstate commerce — not by any definition. That would have provided a starting point for the dissenters. As its proponents saw it in the 1780's, the general purpose of the Commerce Clause was to give Congress control over trade and commerce among the states and with foreign nations, so that a national economy might develop and be regulated nationally rather than thwarted, burdened, or complicated by state-to-state interventions, especially by import-receiving and export-sending states to the detriment of those without ports.¹¹⁶ But to posit a national economy or to envision one as an achievement of an agglomerated people more powerful in their unity was not to deny that local economies, local commerce, and local non-commercial behavior all would continue to exist and to lie below congressional reach.

Moreover, to assign Congress the power to regulate the commercial interconnections among the states and their people was not to give Congress the power to regulate the cultural interconnections (in the sense of shared values, interests, and personal behavior). The former topic invokes a specific enumerated power and should be understood at a high level of specificity because of its assignment to the one sovereign in our federalist system with limited, specific powers that were vetted extensively in their design and adoption. The latter topic concerns general police powers, reserved by default to the states and the people, and correspondingly warrants understanding at a high level of generality.

It was the latter topic at issue in *Raich*. If a Coloradoan sells marijuana to a Californian, even to a sick Californian who might benefit from its consumption and has her doctor's blessing, no one disputes Congress' power to regulate (even prohibit) that commercial transaction. But if a Coloradoan uses homegrown marijuana just as a Californian does, and for that matter if one thousand other Coloradoans and Californians do the same, they

115. Although most of Justice Thomas's separate dissent addressed the Necessary and Proper Clause, he correctly understood that the scope of the Commerce Clause must turn on the meaning of commerce, not even on the meaning of the related but broader concept of economic. *Id.* at 2230, 2235-36 (Thomas, J., dissenting). Note, too, that Justice Thomas relied on *McCulloch* in understanding the Necessary and Proper Clause just as did Justice Scalia — but drew opposing conclusions. *See id.* at 2230-34 (Thomas, J., dissenting) (finding that the CSA was not a valid exercise of Congressional power).

116. *See, e.g.,* ALEXANDER HAMILTON, THE CONTINENTALIST NO. V., (1782) IN SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON 55-60 (Morton J. Frischel, ed., 1985)(discussing the power of Congress); THE FEDERALIST NO. 42,(James Madison) (January 22, 1788)(discussing the Executive power).

demonstrate only a cultural interconnectedness, not commercial behavior. Congress has no power to regulate this. Behavior that is widely recurrent may make it *national* in the sense of being observable from coast to coast. But it does not make the behavior commercial, and therefore in this context does not make it *federal*.

A focus on commerce and on defending the need for a high level of specificity in that context (or, put another way, a low level of generality), would have led the *Raich* minority to a more confident answer to the majority's warning that there would prove no logical distinction in federal power between allowing medical use and allowing recreational use. The answer would have been that the majority was right; and so what? No dissenting justice questioned a state's power to punish the local possession or use of marijuana if it chose, for one purpose or for any purpose. At least as to the Commerce Clause and the Necessary and Proper Clause, no justice could have entertained that question. The proper question was not whether marijuana's local possession and use is punishable. The question was punishable by whom.

Both majority and minority opinions in *Raich* also left untouched a specific, practical problem in reconciling a jurisdictional element, like that in § 922(g), with the concept of intrastate conduct that has a substantial effect on regulated interstate commerce. Federal courts have viewed a gun's past trip across a state line as sufficient connection to interstate commerce to support federal intervention. At the same time, and inconsistently, they have appreciated that it is the current intrastate conduct — the possession of the gun — that Congress actually regulates, and that must have the substantial effect on interstate commerce. The temporal dissonance between a completed past act and a current act leads to logical dissonance. If it is the past trip across state lines that establishes federal jurisdiction, then substantial effect ought not matter: the past conduct was not intrastate in any event. By definition, it involved a passage in interstate commerce.

So, if the past trip across state lines — the jurisdictional nexus — is what matters for purposes of the Commerce Clause, then felons with guns are not in *Lopez*'s third category at all. The felon-in-possession statute instead is a second-category regulation of things in interstate commerce. But if that is so, then most present possessions cannot be regulated conduct, for they are not concerned with things in interstate commerce. Rather, they are concerned with things that once were in interstate commerce, and neither *Lopez*, *Morrison*, nor the Supreme Court's earlier decisions support that retrospective extension of congressional power. The Commerce Clause does not take Congress back to the future. If § 922(g) rightly should be understood as a second-category regulation of things or people in interstate commerce, then only

the felon who himself possesses a gun as he travels in interstate commerce should fall within the statute's reach. The possessor of a thing that only long ago was in interstate commerce should fall outside the statute.

In sum, the minority in *Raich* forfeited a chance to improve the clarity and predictability of the line that should separate federal power from residual state and local power under the Commerce Clause, or to address the disconnection between the view that a past trip across a state line establishes federal jurisdiction and the view that the current possession's substantial effect on interstate commerce remains the overarching issue. The forfeiture came in bypassing the issue of commerce, and its extension of the economic. By making its stand instead on the mushy ground of substantial relation, the minority was left only to insist that the majority dishonored *Lopez* and *Morrison*, with the majority insisting just as stoutly that it did not. On the present terms of the debate, only the accretion of the next case, the one after that, and so on, will reveal gradually who was right and who wrong on the continued vitality of *Lopez* and *Morrison*.

Meanwhile, ending by circling back to the beginning, lower courts and lawyers must reconcile *Raich* with *Lopez* and *Morrison* when considering felons in possession of guns, if only because the *Raich* Court insisted that the three cases continue to co-exist. In simplest terms, then, the practical question is whether guns in a felon's nightstand table are more like guns in a schoolchild's locker and women attacked by men, or instead are more like marijuana in a sick woman's nightstand. In several ways, the felon's gun is more akin to the schoolchild's gun or to the assault than to the marijuana.

First, Congress certainly did not undertake a broad, blanket ban on guns as it did marijuana. To the contrary, guns in the main are permissible; prohibited persons and guns are the exception. And there are exceptions to the exceptions: even a felon, for example, lawfully may possess an antique firearm under federal law.¹¹⁷ This spotty and specific regulatory scheme is different than the "comprehensive framework" of the Controlled Substances Act, as *Raich* painted it.¹¹⁸

Second, the fact that guns are a durable consumer good, not a perishable or consumable good like marijuana, also distinguishes them from *Raich's* claim that "the activities regulated by the CSA [Controlled Substances Act] are quintessentially economic."¹¹⁹ Marijuana fell comfortably within *Raich's* definition of economic ("the production, distribution, and consumption of

117. See 18 U.S.C. §§ 921(a)(3), (a)(16) (stating that guns manufactured before 1898 are not "firearms" within the meaning of the act).

118. *Raich*, 125 S. Ct. at 2210.

119. *Id.* at 2211.

commodities”¹²⁰ at least because it must be consumed to be useful and often because even the local possessor produces it. Not so for the possession of a gun. The gun’s value lies in large part in not being consumed; in retaining its good working order and apparent wholeness. Likewise, almost no individual possessors of a gun have produced that gun. It is true that the gun probably passed in commerce at least once (intrastate or often interstate), but that may have been a very long time ago and without connection to today’s possessor.¹²¹ The long-lasting, durable quality of guns, though, means that they do not so clearly “have a significant impact on both the supply and demand sides of the market”¹²² as did marijuana in *Raich*.

Third, the only activity arguably outside Congress’ reach under the felon-in-possession statute really is just simple possession. Justice O’Connor’s observation remains true: “*Lopez* makes clear that possession is not itself commercial activity.”¹²³ It does, and if the *Raich* majority’s acquiescence to *Lopez* and *Morrison* can be taken as sincere, then that remains the rule.

Applying that simple possession rule to *Raich* is hard, but perhaps not impossible. In *Raich*, today’s mere possessor almost surely is tomorrow’s user or transferor, given the nature of marijuana. That puts the marijuana possessor repeatedly close to the market for the drug. Production also may draw on supplies purchased in interstate markets and may do so repeatedly. The gun possessor, by contrast, well may be a possessor only, forever. He is a potential user, of course, but use of a gun does not follow possession inevitably like the use of marijuana. The gun possessor also is a potential transferor, but even the *Raich* majority presumably would not suggest that Congress may regulate everything potentially transferable locally.

D. Related Cases

At least twice in recent years, the Supreme Court also has construed statutes narrowly to avoid Commerce Clause problems. In 2001, the decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*¹²⁴ produced the

120. *Id.* (quoting WEBSTER’S INTERNATIONAL DICTIONARY 720 (3d ed. 1966)).

121. For opponents of federal regulation of simple possession of firearms, the most directly troubling passage of *Raich* is the Court’s approving comment that, “[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational [and commonly utilized] means of regulating commerce in that product.” *Id.* The Court did not cite § 922(g) as an example, though. Instead, it reached for exotica like eagles and nuclear material. *See id.* at 2211 n.36 (citing 16 U.S.C. §68(a)(2000) and 18 U.S.C. §831(a)(2000)).

122. *Id.* at 2213.

123. *Id.* at 2225 (O’Connor, J., dissenting).

124. 531 U.S. 159, 161 (2001).

same 5-4 majority as *Lopez* and *Morrison* (again with Chief Justice Rehnquist writing for the Court). *Solid Waste Agency* held that a Corps of Engineers' regulation implementing a Clean Water Act provision did not fairly interpret the Act and could not be enforced. By striking the "Migratory Bird Rule" that way, *Solid Waste Agency* avoided a Commerce Clause question.¹²⁵

Commenting on the significant constitutional question it avoided, the Court wrote that "[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use."¹²⁶ The Court read the statute to avoid those "significant constitutional and federalism questions."¹²⁷

Although *Solid Waste Agency* produced the familiar 5-4 split, the Court's decision a year earlier to avoid a Commerce Clause contest led to a unanimous opinion in *Jones v. United States*.¹²⁸ There, the Court construed the federal arson statute¹²⁹ not to apply to owner-occupied homes unused for commercial purposes. Writing for the Court, Justice Ginsburg argued that *Lopez* "reinforced" a narrow construction.¹³⁰

Specifically, *Jones* concluded that an Oklahoma mortgage, a Wisconsin insurance policy, and out-of-state natural gas did not mean that an Indiana home was "used" in interstate commerce, as the statute required.¹³¹ "Were we to adopt the Government's expansive interpretation of § 844(i), hardly a building in the land would fall outside the federal statute's domain," the Court warned.¹³² With an express concluding nod to *Lopez*, the Court thought it "appropriate to avoid the constitutional question that would arise were we to read § 844(i) to render the 'traditionally local criminal conduct' in which petitioner Jones engaged 'a matter for federal enforcement.'"¹³³

Justice Stevens concurred in *Jones*, with Justice Thomas joining him. He noted the Court's "reluctance to 'believe Congress intended to authorize federal intervention in local law enforcement in a marginal case such as this.'"¹³⁴

125. See *id.* at 162 (holding that the Clean Water Act does not extend to the "abandoned sand and gravel pit" in Illinois that is a "habitat for migratory birds").

126. *Id.* at 174.

127. *Id.*

128. 529 U.S. 848-49 (2000).

129. 18 U.S.C. § 844(i)(2000).

130. *Jones*, 529 U.S. at 851.

131. *Id.* at 854-57.

132. *Id.* at 857.

133. *Id.* at 858 (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)).

134. *Id.* at 859 (Stevens, J., concurring) (quoting *United States v. Altobella*, 442 F.2d 310, 316 (7th Cir. 1971)).

Then, in words that could apply as well to federal prosecution initiatives targeting felons with guns, Justice Stevens wrote, "[t]he fact that petitioner received a sentence of 35 years in prison when the maximum penalty for the comparable state offense was only 10 years . . . illustrates how a criminal law like this may effectively displace a policy choice made by the State."¹³⁵ In closing, he restated his "firm belief that we should interpret narrowly federal criminal laws that overlap with state authority unless congressional intention to assert its jurisdiction is plain."¹³⁶

The unanimous decision in *Jones* demonstrates that all members of the Court share a measure of concern for the limits of federal legislative authority to reach local crimes. Justice Stevens had filed a dissenting opinion in *Lopez*, joined two dissents in *Morrison* and wrote for the majority in *Raich*, but he expressed the greatest concern about second-guessing state criminal justice policy in *Jones*. He well might have that same concern in cases involving prohibited persons with guns, where many states provide a significantly lower prison term for felons in possession of guns than the ten years¹³⁷ that federal law presently allows.¹³⁸

135. *Id.*

136. *Id.* at 860.

137. Worse, federal law provides a 15-year minimum mandatory sentence, with a maximum of life imprisonment, when the Armed Career Criminal Act applies. 18 U.S.C. § 924(e)(2000).

138. Other recent Tenth Amendment decisions also bear on the issue. In a sense, those cases are the other side of the same jurisprudential coin. While regulating interstate commerce is one of Congress's limited, enumerated powers, the Tenth Amendment explicitly reserves to the states the powers not extended to Congress by enumeration. That amendment makes explicit what Article I, § 8 leaves implicit. See *Sentelle*, *supra* note 83, at 556 (stating "[a]t least twice in the five-year period next preceding *Lopez*, the Supreme Court had given strong signal[sic] that the principle of the Tenth Amendment, and therefore the concomitant doctrine of the limited power of the federal government, was alive, if not alive and well"); See also *Printz v. United States*, 521 U.S. 898, 919 (1997) stating

[r]esidual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People'.

Not surprisingly, given the doctrinal relationship, the 5-4 split in the Commerce Clause cases appeared again in *Printz*. See also *New York v. United States*, 505 U.S. 144, 148 (1992) (resulting in a 6-3 split, with Justice Souter also joining the majority). But the majority has held now for nine years, and on occasion has grown.

III. OPPOSITION TO PREVAILING VIEW THAT §922(g)(1) LIES WITHIN THE COMMERCE CLAUSE

To date, no federal court of appeals has found § 922(g)(1) unconstitutional, facially or as applied. The appellate courts have ruled the other way, and after *Lopez* at that.¹³⁹ However, since 1995 at least three federal appellate judges have authored critiques of the prevailing conclusion that § 922(g)(1) (and, in Judge Becker's case, the carjacking statute, 18 U.S.C. § 2119) lies within ambit of the Commerce Clause. A district judge also added his voice in an Operation Ceasefire case. Each of those opinions merits consideration.¹⁴⁰

Judge Becker's opinion came first, in *United States v. Bishop*.¹⁴¹ His partial dissent addressed the carjacking statute, but

139. Every circuit except the District of Columbia has rejected the argument that federal prosecution of local, non-commercial and simple possession of a firearm exceeds the reach of the Commerce Clause. *United States v. Cardoza*, 129 F.3d 6, 10-11 (1st Cir. 1997); *United States v. Santiago*, 238 F.3d 213, 216-17 (2d Cir.) (per curiam), *cert. denied*, 532 U.S. 1046 (2001); *United States v. Singletary*, 268 F.3d 196, 200-05 (3d Cir. 2001), *cert. denied*, 535 U.S. 976 (2002); *United States v. Wells*, 98 F.3d 808, 811 (4th Cir. 1996) (*see also* *United States v. Gallimore*, 247 F.3d 134, 137-39 (4th Cir. 2001)); *United States v. Daugherty*, 264 F.3d 513, 518 (5th Cir. 2001), *cert. denied*, 534 U.S. 1150 (2002); *United States v. Napier*, 233 F.3d 394, 399-402 (6th Cir. 2000); *United States v. Stuckey*, 255 F.3d 528, 529-30 (8th Cir. 2001), *cert. denied*, 534 U.S. 1011 (2001); *United States v. Davis*, 242 F.3d 1162, 1162-63 (9th Cir.) (per curiam), *cert. denied*, 534 U.S. 878 (2001); *United States v. Dorris*, 236 F.3d 582, 584-86 (10th Cir. 2000), *cert. denied*, 532 U.S. 986 (2001); *United States v. Scott*, 263 F.3d 1270, 1273-74 (11th Cir. 2001), *cert. denied*, 534 U.S. 1166 (2002). These decisions generally rest on the "jurisdictional," or nexus, element that § 922(g) includes. Or they cite the fact that a gun passed in commerce at some earlier time. Recently though, a panel of the Ninth Circuit held that Congress has no power under the Commerce Clause to prohibit the mere possession of homemade machine guns, under 18 U.S.C. § 922(o). *Stewart*, 348 F.3d at 1142 (2-1 decision). Judge Alex Kozinski wrote the majority opinion. Although Stewart also was convicted under § 922(g)(1) as a felon in possession of guns, he challenged that conviction only on Second Amendment grounds that the Court rejected quickly. *Id.* The government eventually filed a petition for a writ of certiorari, which the Supreme Court granted. It vacated summarily and remanded for reconsideration in light of *Raich*. *United States v. Stewart*, 125 S. Ct. 2899 (2005). The case is pending in the Ninth Circuit.

140. At least two other dissenting judges have argued that *Lopez* requires sustaining Commerce Clause challenges to other federal statutes or regulations less similar to § 922(g)(1). *See United States v. Wall*, 92 F.3d 1444, 1454-85 (6th Cir. 1996) (Boggs, J., concurring in part, dissenting in part)(finding that 18 U.S.C. § 1955 does not regulate an instrumentality of interstate commerce or a channel of interstate commerce, nor does it have a substantial effect on interstate commerce); *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1060-67 (D.C. Cir. 1997) (Sentelle, J., dissenting) (discussing why Endangered Species Act § 9(a)(1)(b) does not regulate commerce, like the statute in *Lopez* does).

141. *Bishop*, 66 F.3d at 569 (3d Cir. 1995).

an important segment concerned *Scarborough*. He argued persuasively that Congress's real concern was violent crime, not effect on interstate commerce, when it enacted federal penalties for carjacking.¹⁴² A textual reference to interstate commerce provided a handy jurisdictional link, Congress may have thought, but it did not reflect the real cause of congressional action.

Judge Becker was sympathetic to the true motivation. "Carjacking is a heinous offense — violent and extremely frightening," he acknowledged.¹⁴³ But he had systemic concerns. *Lopez* worked a "sea change in the Supreme Court's approach" to the Commerce Clause, in his view,¹⁴⁴ and fidelity to that case barred federal encroachment into state law enforcement even for serious crimes. "[U]nder the majority's broad definition of commercial transaction," Judge Becker explained, "Congress could constitutionally federalize all intrastate car-theft, all intrastate crimes of theft, and perhaps nearly all criminal activity occurring within a state."¹⁴⁵

To that list, Judge Becker added:

[f]or instance, the majority's logic would permit a federal law outlawing the theft of a Hershey kiss from a corner store in Youngstown, Ohio by a neighborhood juvenile on the basis that the candy once traveled in interstate commerce to the store from Hershey, Pennsylvania. Similarly, the majority's broad reading would vest Congress with power under the Commerce Clause to enact a federal law requiring students in private schools to read their homework assignments, so long as the government establishes that the textbooks were published in another state. The majority's reasoning destroys any "distinction between what is truly national and what is truly local."¹⁴⁶

Rhetorical excess? Probably. But the majority had no principled answer and other judges have not.¹⁴⁷ Judge Becker's dissent noted that Judge Richard A. Posner of the Seventh Circuit offers a definition of most common-law crimes as "represent[ing] a pure coercive transfer of wealth or utility from victim to wrongdoer."¹⁴⁸ Abstractly or as a matter of economic theory, that definition serves. But if the Commerce Clause reaches local conduct that is "economic" or commercial only in Judge Posner's very general sense, then it "includes within its scope a broad array

142. *Id.* at 600-01 (Becker, J., concurring in part, dissenting in part).

143. *Id.* at 590.

144. *Id.* at 591.

145. *Id.* at 592.

146. *Id.* at 596.

147. *See id.* at 601-03 (Becker, J., concurring in part, dissenting in part) (discussing the majority's "substantial effects" arguments and why they run afoul of the *Lopez* Court requirements).

148. *Id.* at 602 (quoting RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 217-18 (4th ed. 1992)).

of criminal activity, which “[u]nder our federal system, the States possess primary authority for defining and enforcing”¹⁴⁹ It is unlikely that the Framers, trying at once to create a cohesive union among thirteen small states still wobbling from war and to allay deep suspicions that the states would lose their primary sovereignty, intended future judges to interpret interstate commerce at that high level of generality.

In the end, Judge Becker saw a carjacking statute that did not regulate the instrumentalities of interstate commerce (for example, cars traveling interstate), but rather regulated bad things that criminals do locally to people in cars.¹⁵⁰ The statute did not demonstrably address activity that substantially affects interstate commerce.¹⁵¹ It also offered no jurisdictional element limiting its reach to the three commercial areas of congressional authority under the Commerce Clause.¹⁵² That being so, “I believe that non-commercial intrastate crimes, even ones receiving publicity in the national media, are a matter of state and not federal concern,” Judge Becker summed up. His critique fits as well a felon’s local possession of a gun as it fits a carjacking.

Several months after *Bishop*, Judge Alice M. Batchelder filed her opinion in *United States v. Chesney*.¹⁵³ While she concurred in the result, affirming a § 922(g)(1) conviction, her opinion made clear that she concurred only because she thought the Sixth Circuit was bound by its own recent decision.¹⁵⁴ Judge Batchelder disagreed strongly with her colleagues’ view of the Commerce Clause.

Her concurrence challenged directly the conventional notion that a jurisdictional element relating to interstate commerce saves § 922(g). That jurisdictional element, which § 922(g) contains, is the principal reason appellate courts have upheld the statute after *Lopez*.

Judge Batchelder argued that a federal criminal statute must satisfy one of two threshold questions to fit within *Lopez*’s third category of Congress’s commerce power (regulating those activities having substantial relation to interstate commerce).¹⁵⁵ She explained:

A federal criminal statute must either (1) by its terms have something to do with “commerce” or some sort of economic enterprise, or (2) be an essential part of a larger regulation of

149. *Id.* (quoting *Lopez*, 514 U.S. at 561 n.3).

150. *Id.* at 597–600.

151. *Id.* at 600.

152. *Id.* at 594.

153. 86 F.3d 564, 574 (6th Cir. 1996), *cert. denied*, 520 U.S. 1282 (1997).

154. *Id.* (Batchelder, J., concurring)(believing the court bound by *United States v. Turner*, 77 F. 3d 887, 889 (6th Cir. 1996)).

155. *Id.* at 575.

economic activity “in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” If either (1) or (2) is satisfied, two additional inquiries must be made in order to determine whether a statute falls within the third category of activities Congress can regulate under its interstate commerce power.¹⁵⁶

Those two additional inquiries are whether the statute contains a jurisdictional element and whether the regulated activity substantially affects interstate commerce.¹⁵⁷

In short, Judge Batchelder urged that *Lopez* does not mean that a federal criminal statute withstands scrutiny under the Commerce Clause merely because it contains a jurisdictional element. The jurisdictional element is an issue only if the statute first concerns “commerce” or plays an essential part in a broader economic regulatory scheme that would be at risk without some control of intrastate activity. In other words, the jurisdictional element is necessary if the statute meets one of the first two tests, but it never is sufficient if the statute does not.¹⁵⁸ However capacious, the Commerce Clause still limits the federal government’s reach to *commercial* activity that spans more than one state. Both terms in “interstate commerce” matter.¹⁵⁹ It is not merely the Crossing State Lines Clause.

Judge Batchelder then discussed why § 922(g)(1) neither concerns commercial activity (any more than possession of a gun in a school zone did in *Lopez*) nor fills an essential role in broader regulation of economic activity.¹⁶⁰ For the sake of argument, she reasoned, shipping or receiving guns in interstate commerce might concern broader regulation of economic activity, but banning mere possession is not an essential part of such a scheme.¹⁶¹

That brought Judge Batchelder to her most powerful point, again concerning the common belief that a jurisdictional element salvages § 922(g):

[A] statute that regulates non-commercial activity cannot be converted into a statute that regulates commercial activity by dint of clever legislative craftwork. But in holding that the inclusion of a jurisdictional element in § 922(g)(1) transforms that statute into regulation of commercial activity, . . . , the majority reduces the *Lopez* analysis to a single question: Does a challenged statute contain a jurisdictional element? When the answer to this question is “yes,” according to the majority, both *Lopez*’s “regulation of

156. *Id.* at 575-76 (internal citations omitted).

157. *Id.* at 576 & 576 n.4.

158. *See id.* at 576 (discussing the findings of the Court in *Lopez*).

159. As does “foreign,” of course, when that is the stripe of commerce at issue. “Interstate commerce” is short for both foreign and interstate here.

160. *Id.* at 578.

161. *Id.*

commercial activities" test and its "jurisdictional element" test are satisfied.¹⁶²

Federal legislators cannot number alchemy among their constitutional powers, in other words. *Lopez* did not permit Congress "magically to produce a commercial activity (possession of a firearm 'in or affecting commerce') out of a non-commercial one (possession of a firearm) by conferring a jurisdictional credential on the non-commercial activity."¹⁶³ Commerce may be gold, but what is not commerce remains a baser metal not in the congressional vault. A jurisdictional element will not turn non-commercial possession into commercial activity, or give Congress power under the Commerce Clause it does not have.¹⁶⁴ Again, it is not a Crossing State Lines Clause; it is a Commerce Clause, concerning interstate and foreign economic intercourse.

Judge Harold DeMoss wrote his dissent later that summer in *United States v. Kuban*.¹⁶⁵ He looked closely at the textual differences between the present felon-in-possession statute, § 922(g)(1), and former § 1202(a), which the Firearms Owners' Protection Act of 1986 repealed.¹⁶⁶

Unlike § 1202(a), the current statute uses the term "in or affecting commerce" to modify only the verb "possess."¹⁶⁷ Further, Judge DeMoss observed, only the offense of receiving guns or

162. *Id.* at 579 (internal citations omitted). Although she did not address directly the tension in relying solely on a jurisdictional element to approve a statute, on the one hand, while addressing intrastate activity with a substantial effect on interstate commerce on the other hand, Judge Batchelder in fact reconciled the two by proposing the jurisdictional element as an additional filter on congressional regulation of intrastate economic activity. Other courts have treated it as the only filter, which again makes meaningless a discussion of *Lopez's* third category because functionally it treats a statute as in the second category.

163. *Id.* at 580.

164. *Bishop*, 66 F.3d at 593-96, (Becker, J., concurring in part, dissenting in part). Judge Batchelder also took the majority to task for treating the Supreme Court's silence on a constitutional question as constitutional approval. *Chesney*, 86 F.3d at 581 (Batchelder, J., concurring). She noted correctly that the Supreme Court never has ruled on the constitutionality of the former § 1202(a), let alone on the constitutionality of the current § 922(g)(1). *Id.* Incidentally, this is not the only time that Judge Batchelder has shown a strong interest in the limits of congressional power under the Commerce Clause. She authored the panel opinion in *United States v. Faasse*, 227 F.3d 660 (6th Cir. 2000), that struck down the Child Support Recovery Act of 1992 as unconstitutionally applied there, and also wrote the dissent when the en banc Sixth Circuit overruled the *Faasse* panel. *United States v. Faasse*, 265 F.3d 475, 494 (6th Cir. 2001) (en banc).

165. 94 F.3d 971, 976 (5th Cir. 1996).

166. *Id.* at 976-79. Again, *Scarborough* and *Bass* concerned the former felon in possession statute, § 1202(a).

167. *Id.* at 977 (DeMoss, J., dissenting in part).

ammunition now uses the phrase "has been shipped or transported in interstate or foreign commerce."¹⁶⁸

He reasoned next that *Lopez* means a felon's possession of a gun "must now 'substantially affect interstate commerce.'"¹⁶⁹ "The mere fact that a felon possesses a firearm which was transported in interstate commerce years before the current possession," Judge DeMoss continued, "cannot rationally be determined to have a 'substantial impact on interstate commerce' as of the time of current possession."¹⁷⁰

Judge DeMoss then reached the constitutionality of § 922(g)(1) in *Kuban* "because the facts are so compellingly local in nature."¹⁷¹ With local police officers, initial local custody, and state charges at first, *Kuban's* case was entirely local.¹⁷² The statute, he

168. *Id.* Here the lineage of felon-in-possession statutes matters. The Federal Firearms Act of 1938 made it 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;" possession then was presumptive evidence of the shipment, transportation, or receipt. 15 U.S.C. § 902(f) (1940) (repealed 1968).

The Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, repealed the 1938 Act. Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 extended the prohibition to all felons (and others, but not fugitives) "who receive[], possess[], or transport[] in commerce or affecting commerce" any firearm (but not ammunition). 18 U.S.C. app. § 1202(a)(1968). However, Title IV of the same Act made it unlawful for felons, fugitives, and others both "to ship or transport any firearm or ammunition in interstate or foreign commerce," 18 U.S.C. § 922(g) (1964 & Supp. V 1970), or "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(h). See generally *Bass* 404 U.S. at 342-44 & nn. 9-10 (finding that the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, amended both § 922 and § 1202(a), but not materially for present purposes, meaning Title IV of the Omnibus Act was a modified version of the 1938 Act, while Title VII of the Omnibus Act punished possession directly for the first time).

In 1986, Congress repealed § 1202(a) with the Firearms Owners' Protection Act, Pub. L. 99-308, § 102(6)(D), 100 Stat. 449, 452.. The 1986 Act also combined the old Title IV provisions, former § 922(g) and § 922(h), into one subsection, § 922(g).

The current version then, is a melange of the old laws (setting aside the new groups of prohibited persons added over time). In short, shipping and transporting "in interstate or foreign commerce" is a crime; that rings of Title IV. Possessing "in or affecting commerce" also is a crime; that rings of Title VII in part. All of those acts (shipping, transporting, and possessing) are in the present tense as they relate to commerce. Finally, receiving any firearm or ammunition "which *has* been shipped or transported in interstate or foreign commerce" is a crime; note the emphasis on the past tense as to the receipt offense. Only this last receipt offense is a relic of the 1938 Act. Federal Firearms Act, § 902(f).

169. *Kuban*, 94 F.3d 978.

170. *Id.*

171. *Id.*

172. *Id.*

concluded, was unconstitutional as applied to Kuban. The government offered no proof that Kuban's possession of weapons "had any effect whatsoever, much less a substantial effect, on interstate commerce."¹⁷³

Perhaps the most interesting insight in the *Kuban* dissent was Judge DeMoss' observation that, "[i]f the government is correct that all it takes to get a conviction under § 922(g)(1) is to show that a felon possessed a firearm which at some time in past history was shipped in interstate commerce, then all of the other elements of § 922(g)(1) are rendered surplusage and meaningless."¹⁷⁴ He was right as to receipt, and almost right as to shipping or transporting. Every receipt of a gun made in another state would be an illegal possession, under the government's theory. The only shipping or transporting that would not be an illegal possession as well would concern a felon who obtains a gun manufactured in his own state before it crosses state lines, and then ships it out of state.

This insight strengthened Judge DeMoss' argument that, "Congress chose not to rely upon the 'minimal nexus' of *Scarborough*, but rather crafted § 922(g) to have clear and unambiguous connections with interstate commerce."¹⁷⁵ Perhaps the judge was too polite in assessing Congress's attention to the problem. But whatever Congress chose, the Commerce Clause creates independent demands. Many felon-in-possession prosecutions today present no 'minimal nexus' to interstate commerce, even collectively, absent a rhetorical revision of these words that wholly wrests them from their common meanings.

Finally, a district court opinion, Judge Stewart Dalzell's in the Eastern District of Pennsylvania, warrants attention. That district's anchor city, Philadelphia, was an Operation Ceasefire locale. A convicted felon, Alfonzo Coward, faced indictment in federal court after the Philadelphia Police Department stopped his car and found a loaded 9mm gun under the passenger seat.¹⁷⁶ A jury convicted Coward of "knowingly possess[ing] in and affecting interstate commerce, a loaded firearm . . . loaded with eighteen rounds of ammunition," as the indictment charged.¹⁷⁷

Judge Dalzell sustained the conviction, but "in the expectation of a reversal" he obviously hoped would follow.¹⁷⁸ He

173. *Id.* at 979.

174. *Id.*

175. *Id.* at 977.

176. *United States v. Coward*, 151 F. Supp.2d 544 (E.D. Pa. 2001), *aff'd*, 296 F.3d 176 (3d Cir. 2002).

177. *Id.*

178. *Id.* at 555. The Third Circuit did not reverse; it upheld § 922(g)(1) against Coward's Commerce Clause challenge. *Coward*, 296 F.3d at 183-84. However, the Third Circuit also remanded the case on Coward's suppression motion to permit the district court to determine discretionarily whether to

upheld the § 922(g)(1) possession conviction even though, in his view, Coward “committed no federal crime.”¹⁷⁹

The Coward district court argued that *Lopez* and *Morrison* mean the end of the *Scarborough* “legal fiction” that a gun’s earlier trip through interstate or foreign commerce forever after links its mere possession to commerce. Specifically, Judge Dalzell wrote:

Simply phrased, *Scarborough*’s legal fiction is that the transport of a weapon in interstate commerce, however remote in the distant past, gives its present intrastate possession sufficient interstate aspect to fall within the ambit of the statute. This fiction is indelible and lasts as long as the gun can shoot. Thus, a felon who has always kept his father’s World War II trophy Luger in his bedroom has the weapon “in” commerce. The question now is whether this legal fiction can survive as a statutory construct in the shadow of the edifice the Supreme Court has built upon *Lopez*’s foundation.¹⁸⁰

The district court in *Coward* concluded that this aspect of *Scarborough* does not survive. Local possession of a gun, without any factual suggestion of a “commercial or transactional context” to the possession,¹⁸¹ is not a federal offense, the *Coward* district court reasoned.

Judge Dalzell decided, however, that acquitting Coward would require overruling *Scarborough* and Third Circuit precedent on § 922(g)(1). In the federal judicial hierarchy, he could not do that.¹⁸²

The Third Circuit could have overruled its own precedent on Coward’s appeal, but did not. In the last three decades, gun prosecutions have proven a persistent illustration of the truth that judges often value the familiar wrong answer over the unfamiliar right one.¹⁸³ In practice, federal courts adhere as much to a

permit the government to reopen the suppression hearing, after holding that the district court failed to require the government to prove reasonable suspicion for the traffic stop. *Id.* at 184. Effectively, that left the district court free to thwart the prosecution by suppressing all evidence of the crime. That is exactly what the district court did on remand, after bemoaning the fact that the United States Attorney for the Eastern District of Pennsylvania “has elected to make his office, and therefore this Court, an adjunct of state law enforcement through Operation Ceasefire. Thus, far from presenting a professional disability, the prosecutor’s state court experience makes her doubly qualified to represent the Government in its chosen role as an arm of the local District Attorney.” *United States v. Coward*, No. CRIM. 00-88, 2002 WL 31012793, at *2 (E.D. Pa. Sept. 4, 2002) (unpublished opinion on remand).

179. *Coward*, 151 F. Supp. 2d at 554-55.

180. *Id.* at 549.

181. *Id.* at 554.

182. *Id.* at 554-55.

183. Regardless whether one approves or disapproves of the outcome, the decision in *Dickerson v. United States*, 530 U.S. 428 (2000), is a striking example of the judicial preference for stability over intellectual consistency and even constitutional accuracy. That opinion, upholding *Miranda v.*

doctrine of *stabile decisis* as to *stare decisis*.

IV. GUN POSSESSION: A NATIONAL INTEREST, BUT NOT A FEDERAL ONE

In the same way that Lester Lemons' and Alfonzo Coward's unremarkable cases were local, most other federal prosecutions of felons who possess guns are local, too. To be sure, in all corners of the nation there is wide interest in firearm proliferation and gun-related violence. It is a general policing interest. That so, this national interest is decidedly not a federal interest. On the whole, both Congress and the federal courts have seemed unconcerned with the difference between national and federal when thinking about use or possession of guns.

Oddly, the same federal actors (and federal prosecutors) appear to give less thought to actual interstate and international commerce in guns: manufacture, importation, exportation, and large-scale distribution of firearms. There lies a legitimate federal interest, all but ignored in the effort to address a national but non-federal problem of post-market local possession of guns.¹⁸⁴ Congress and the Department of Justice largely abjure a constitutionally sound policy of 'separating the gun from the man' with a broad, commerce-based approach to the manufacture of, and trade in, firearms. Instead, and in spite of the comparatively trivial number of federal prosecutors, judges, and federal criminal justice dollars, they continue to pursue a constitutionally questionable policy of 'separating the man from his gun,' one imprisoned man at a time.

Felon-in-possession prosecutions continue to flourish in and, in some places, flood federal courts. Some judicial reconciliation of these prosecutions with the limits of federal power would be a modest step in preserving the resources and role of federal courts.

Arizona, 384 U.S. 436 (1966), and asserting *Miranda*'s constitutional roots in the face of a plausible argument that Congress attempted to overrule that decision with 18 U.S.C. § 3501, was authored by Chief Justice Rehnquist. *Dickerson* 530 U.S. at 431-44. Only Justices Scalia and Thomas dissented. *Id.* at 444. Had he served on the Supreme Court in 1966, Chief Justice Rehnquist likely would not have authored or joined *Miranda* in the first instance.

184. According to a May 2003 report of the Americans for Gun Safety Foundation, 20 of the 22 major federal gun statutes were largely unused during the three fiscal years ending September 30, 2002. AMERICANS FOR GUN SAFETY FOUNDATION, *THE ENFORCEMENT GAP: FEDERAL GUN LAWS IGNORED* 2-3 (2003). The report concludes that during this three-year period, 85% of federal gun prosecutions were for violations of just two statutes: illegal possession of a firearm by a felon or other prohibited person (18 U.S.C. § 922(g)), and using or carrying a firearm during a violent or drug-related crime (18 U.S.C. § 924(c)). *Id.* at 34. The Americans for Gun Safety Foundation presents itself as a centrist organization. It is a project of the Tides Center, which promotes social change. Some see the Tides Center as left-leaning.

Practical reconciliation of the Commerce Clause's limits and the felon-in-possession statute lies in avoiding the constitutional question (and the statute's possible infirmity) by construing § 922(g)(1) to require that the government prove as a matter of adjudicative fact that gun possessions were commercial or economic activity, and as a matter of legislative fact that such possessions in the aggregate have a substantial effect on interstate commerce. Five steps produce that reconciliation, without dramatic change that would alarm courts savoring social and legal stability.

A. *Reconciliation in Five Steps*

First, while § 922(g) comes clothed in presumed constitutionality, Congress clad it in little more than that presumption. The statute itself includes no congressional findings of the impact of firearm possession by felons on interstate commerce. It also addresses unmistakably local conduct, at least under the possession prong of § 922(g). So there are no congressional findings that courts might hesitate to dispute.

Second, *Bass* concerned a different felon-in-possession statute. Moreover, the jurisdictional element in the old § 1202(a) was different than the wording in the current § 922(g). In the current statute, the possession version of the crime explicitly requires that the defendant possess the gun "in or affecting commerce." That is present tense. Only the receipt version of the crime uses the past tense to describe the acceptable link to interstate shipment. Judge DeMoss made a powerful argument in his *Kuban* dissent that this distinction suggests a congressional purpose to draft a statute requiring "clear and unambiguous connections with interstate commerce," at least as to simple possession.¹⁸⁵

At a minimum, *Bass* does not fairly establish the constitutionality of this statute, which *Bass* never considered. It offers scant enough support for the constitutionality of the old statute. Even viewed charitably, thirty-five years later *Bass* fares poorly against *Lopez*. In sum, no Supreme Court decision binds federal courts to accept the constitutionality of a felon-in-possession prosecution under § 922(g).

Third, the jurisdictional element in § 922(g) does almost nothing to winnow the field of gun possessions illegal under federal law, let alone down to those with an "explicit" effect on interstate commerce as *Lopez* contemplated.¹⁸⁶ Because most states manufacture relatively few firearms, and the United States

185. *Kuban*, 94 F.3d at 977 (DeMoss, J., dissenting).

186. See *Lopez*, 514 U.S. at 562 (explaining that the statute has no express jurisdictional element or connection with interstate commerce)..

annually imports in the range of one million,¹⁸⁷ practically every felon holding a gun in many states falls within the statute's jurisdictional element, as the government and federal courts construe that element. With that construction, the federal statute strangely begins to resemble varying state laws after all: it reaches identical conduct (for example, a felon holding a Smith & Wesson .38) differently in different states. In states where companies make guns, felons may possess those brands without fear of § 922(g); in states where companies do not, felons face greater restriction. With that lack of uniformity, one of the best reasons for federal intervention fades.

Further, the simple act of possessing a gun usually does not provide a link to interstate commerce. In *Lopez*, neither the justices in the majority nor most of the dissenters looked to possession of the gun as the connection to commerce. They looked instead to the school zone, or more accurately, to the potential effect on activity (education) occurring in the school.¹⁸⁸ That was the arguable link to commerce.¹⁸⁹

With a felon merely possessing a gun anywhere, the statute offers not even the possible linkage to interstate commerce that the school zone suggested in *Lopez*. As presently understood, § 922(g)(1) requires only status as a felon — hardly commercial — and the simple possession of a gun that once crossed a state line for any reason. And because guns are durables (valuable in their preservation, not in their consumption or destruction), unlike the evanescent, consumable marijuana in *Raich*, mere possession of a gun does not present the same constantly looming threat of an impact on interstate commercial markets that marijuana does. The marijuana user ever must be looking for more if she is to continue use, and that fact raises at least the possibility that she will venture into the interstate market.

187. See *supra* notes 97 and 98 (detailing statistics that show which states make certain guns and the United States importation of guns).

188. The government also argued that the threat of violent crime carries national economic effect, and therefore the necessary impact on interstate commerce exists. But the Court rejected that contention quickly. *Lopez*, 514 U.S. at 563-64. That argument should be no more persuasive as to felons with guns than it was in *Lopez*. Moreover, *Morrison* lay to rest the notion that violent crime is a sufficient commercial link to support federal legislation. Most violent crime simply is not economic behavior, by pragmatic or practicable definition. *Morrison*, 529 U.S. at 612-19. More abstractly or theoretically, it may be. See note 148, *supra* (referring to the dissent in *Bishop* in which Judge Posner's theory is explained).

189. See *Lopez*, 514 U.S. at 563-66 (explaining the arguable link to commerce); *id.* at 618-25 (Breyer, J., dissenting). But see *id.* at 602-03 (Stevens, J., dissenting) (arguing that gun "possession is the consequence, either directly or indirectly, of commercial activity. In my judgment, Congress's power to regulate commerce in firearms includes the power to prohibit possession of guns at any location . . .").

Fourth, the "minimal nexus" test that *Bass* presaged and that *Scarborough* minted flowed from statutory construction, not from consideration of constitutional limitations. Even assuming, safely, that the Supreme Court meant implicitly that the nexus would not fall below a constitutional floor, *Scarborough* made no effort to determine where that floor lies. That is exactly what *Lopez* did, albeit with a different § 922 subsection.¹⁹⁰

Fifth, whatever the statutory requirement of a "minimal" linkage to interstate commerce meant in *Scarborough*, it cannot trump the constitutional imperative in *Lopez*. For activities in the third category of congressional competence under the Commerce Clause, like § 922(g) if it fits anywhere, the aggregate effect on interstate commerce must be "substantial" to satisfy the Constitution.¹⁹¹

Moreover, "minimal" and "substantial" are relational terms, empty of content without reference to something. One hundred pounds indeed is a "minimal" amount of topsoil, but it also is a locally noteworthy amount of cocaine and a globally urgent amount of missing plutonium. The term is a rhetorical device that requires context: topsoil or plutonium?

Here that context is the constitutional plan of federal power. Both *Lopez* and *Raich* preserve the sensible rule of *Perez v. United States*¹⁹² and earlier cases that courts measure effects on interstate commerce in the aggregate.¹⁹³ What other than the aggregate would Congress rightly consider in enacting legislation? It would risk the evils of attainder if it focused on individual situations, rather than on collective problems. It also would ensure defeat by the criminal, any one of whom could point to the pettiness of his spoils when considered in isolation.

But *Lopez* also requires that this aggregate effect be "substantial."¹⁹⁴ Again, that is a relational term, but it places proper emphasis on broad concerns that go to the harmonious working of the union of states, rather than just on recurrent issues affecting each of them singly.¹⁹⁵ In this sense, the "substantial"

190. And of course, *Scarborough* and *Bass* concerned a different statute. So the different subsection of § 922 at issue in *Lopez* hardly provides justification to distinguish that case while relying on the two earlier decisions.

191. *Lopez*, 514 U.S. at 559.

192. 402 U.S. 146 (1971).

193. *Perez*, 402 U.S. at 151-54. The Court in *Perez* wrote of the "class of activities" in affirming congressional power to punish loan sharking, even though any one loan shark's undertakings may be local.

194. *Lopez*, 514 U.S. at 559.

195. Consider Chief Justice Marshall's opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) at 195:

The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to

effect that *Lopez* demands not only is consistent with *Perez*'s aggregate approach, but a logical corollary to it.

If *Scarborough* and *Lopez* are to co-exist, then the interpretive standard of a "minimal nexus" must require proof of a present substantial effect on interstate commerce, in the aggregate. In other words, *Lopez* gives meaning and content to *Scarborough*'s statutory test, if a court seeks to make the two cases compatible.

With that compatible reading, federal courts might follow the path of *Jones* and *Solid Waste Agency* and construe § 922(g)(1) to avoid a serious risk of constitutional infirmity. They could adopt a saving construction that, consistent with *Lopez* and *Morrison*, requires the prosecution to prove both that this gun possession was commercial activity and that as a class, possessions like it have a substantial effect on interstate commerce. Judge DeMoss' dissent in *Kuban* provides a partial framework for that reconciliation, by distinguishing the old § 1202(a) from the current § 922(g).

B. The Lopez Legacy

Lopez was not the fluke that many judges and academics assume. The progression of cases following, from *Jones* to *Morrison* to *Solid Waste Agency*, proves otherwise. Even *Raich*, which in the end upheld a federal effort where *Lopez* and *Morrison* struck down such an effort, relied upon *Lopez* and used its analytical framework. With its different majority, *Raich* instead might have abandoned (or at least ignored) *Lopez* were the earlier case a fluke. It did not.

Still, more than ten years after *Lopez*, the lower federal courts resist as grittily as ever its arrival. The problem may lie partly in the stark, even polar, contrast in perceptions of *Lopez* and *Morrison*. Each common assessment is too extreme, even overheated: those cases neither are 'constitutional freaks' nor harbingers of 'sea change.' More likely they instead are adjustments in a long and meandering line of Commerce Clause cases stretching back to *Gibbons v. Ogden*, not so rigid as decisions immediately before Justice Roberts' 1937 switch, but not so loose as several that followed shortly after 1937.

In the long view, the polar descriptions of *Lopez* and *Morrison* must be wrong, for the history of the Commerce Clause is a history of judicial adjustment by familiar process of reasoning by analogy — a process that itself adjusts to changing social norms.¹⁹⁶ *Raich*

those which are completely within a particular State, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.

196. Happily, the late Professor and Dean Edward H. Levi chose the Commerce Clause to illustrate this broad point in his examination of constitutional adjudication. That discussion, like the whole slim book that

is the latest example of this process, and a good one. Commerce Clause jurisprudence reflects a history of incremental, if often uncertain, realignment, not polar pronouncements. The common reactions to *Lopez* and *Morrison* are not just historically inaccurate, or improbable at best; they also needlessly scare off federal judges who crave a moderated, practical stability in federal-state relations much more than they seek philosophical purity in federalism.

From that longer historical viewpoint, the judicial reluctance to give *Lopez* and cases following their due, particularly in felon-in-possession prosecutions, takes on added irony. Few courts mention *Tot* today, and none on this point.¹⁹⁷ Yet there, at the very moment when the Supreme Court afforded Congress its greatest reach under the Commerce Clause, *Tot* readily accepted the Justice Department's concession that the first federal statute punishing felons with guns did not extend to receipt of firearms that traveled in interstate commerce only at some prior time.¹⁹⁸ *Tot* surely makes *Lopez* seem not so radical at all, but smoothly of a piece with Commerce Clause jurisprudence over the last 65 years.

Practical considerations remain, and in the end likely will control the development of the Supreme Court's view of the Commerce Clause, as they always have. Given their own caseloads, federal courts might reconsider whether by an expansive construction of § 922(g) they foster in state and local law enforcement officials an indolent and short-sighted reliance on the limited resources of those federal courts to solve common, local law enforcement problems.¹⁹⁹ Indulging such reliance, federal judges

contains it, remains a classic. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 41-72, 57-102 (U. Chicago Press 1949).

197. Lawyers and judges remember *Tot* for its discussion of presumptions on elements of an offense. See, e.g., *Pigee v. Israel*, 670 F.2d 690, 695 n.10 (7th Cir. 1982)(citing *Tot* in a footnote following a discussion of basic and elemental facts).

198. *Tot*, 319 U.S. at 466.

199. Almost every state punishes at least some criminals who possess firearms. Statutes vary, appropriately and just as one would expect with fifty different states. ALA. CODE 1975 § 13A-11-72 (Supp. 1994)(limiting scope to crimes of violence, drug addicts and habitual drunkards); ALASKA STAT. § 11.61.200 (LexisNexis 2004); ARIZ. REV. STAT. § 13-3102 (Supp. 2005); ARK. CODE ANN. § 5-73-103(a)(1) (Michie Supp. 2005); CAL. PENAL CODE § 12021 (West Supp. 2005); COLO. REV. STAT. § 18-12-108 (2004); CONN. GEN. STAT. ANN. § 53a-217 (West Supp. 2005); DEL. C. ANN. tit. 11, § 1448 (2001); D.C. CODE ANN. § 22-4503 (2001); FLA. STAT. ANN. § 790.23 (West Supp. 2006); GA. CODE ANN. § 16-11-131 (2003); HAW. REV. STAT. § 134-7 (Supp. 2004); IDAHO CODE § 18-3316 (2004); 720 ILL. COMP. STAT. ANN. § 5/24-1.1 (West Supp. 2004); IND. CODE ANN. § 35-47-4-5 (LexisNexis 2004); IOWA CODE ANN. § 724.26 (2004); KAN. STAT. ANN. 21-4204 (Supp. 2004); KY. REV. STAT. ANN. § 527.040 (LexisNexis 1999); LA. REV. STAT. ANN. § 14:95.1 (2004); ME. REV. STAT. ANN. tit. 15, § 393 (2003); MD. CODE ANN., [Criminal] § 5-622 (Supp.

may write a check that the executive cannot cover and imply a line of credit that the Supreme Court, with any eye to the real limitations of the federal executive branch and the judiciary itself, may conclude the legislature constitutionally cannot extend. The truth is that widely scattered federal courts, with a comparatively light sprinkling of judges, never have been an effective forum in which to address frequently recurring, pedestrian, local malefactions even when those suggest a national phenomenon. For good reasons, the Constitution does not assign federal courts that task.

A decision now more than sixty years old, *Tot*, should reassure federal courts in a reconciling adjustment in course. The Commerce Clause can remain limited to true interstate and foreign commerce, or at least to intrastate economic activities greatly affecting actual interstate commerce, even when felons have guns. That provision need not devolve permanently into a fanciful Crossing State Lines Clause. For now it has.

2005); MASS. GEN. LAWS ch. 140, § 129B (2005) (requiring persons to obtain license before possessing firearm, and does not allow persons who were convicted of felony within five years of application to receive license); MICH. COMP. LAWS § 750.224f (2004); MINN. STAT. § 624.713 (Supp. 2004); MISS. CODE ANN. § 97-37-5 (2000); MO. REV. STAT. § 571.070 (2003) (prohibiting possession of concealable firearms); MONT. CODE ANN. § 45-8-313 (2005); NEB. REV. STAT. § 28-1206 (2003); NEV. REV. STAT. § 202.360 (2003); N.H. REV. STAT. ANN. § 159:3 (2002); N.J. STAT. ANN. § 2C:39-5 (West 2004) (all persons without permit prohibited from possessing firearms, and felons cannot get permit); N.M. STAT. ANN. § 30-7-16 (LexisNexis 2001); N.Y. PENAL LAW § 265.01(4) (McKinney 2002); N.C. GEN. STAT. § 14-415.1 (2003); N.D. CENT. CODE § 62.1-02-01 (Supp. 2005); OHIO REV. CODE ANN. § 2923.13 (LexisNexis Supp. 2005); OKLA. STAT. tit. 21, § 1283 (Supp. 2006); OR. REV. STAT. § 166.270 (Supp. 2005); 18 PA. CONS. STAT. ANN. § 6105 (West Supp. 2005); R.I. GEN. LAWS 1956 § 11-47-5 (2002) (crime of violence); S.C. CODE ANN. 1976 § 16-23-30 (Law. Co.-Op. 2002); S.D. CODIFIED LAWS § 22-14-15 (2004); TENN. CODE ANN. § 39-17-1307 (2003); TEX. PENAL CODE ANN. § 46.04 (Vernon Supp. 2005); UTAH CODE ANN. § 76-10-503 (Supp. 2001); VA. CODE ANN. § 18.2-308.2 (LexisNexis 2005); WASH. REV. CODE § 9.41.040 (Supp. 2005); W. VA. CODE § 61-7-7; Wis. Stat. § 941.29 (2005); WYO. STAT. ANN. § 6-8-102 (2005). Vermont punishes the commission of a felony while carrying a firearm, VT. STAT. ANN. tit. 13, § 4005 (1998), but apparently not a felon's mere possession of a firearm.

