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## The Ineludible (Constitutional) Politics of Guns Symposium Article

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## Article

### The Ineludible (Constitutional) Politics of Guns

J. RICHARD BROUGHTON

*The murders at Newtown intensified the American political debate about guns—a debate that often fits within the framework of a larger national conversation about violent crime and the political approaches to addressing it. Yet the gun control debate has resulted in a strange but fascinating intersection of law and politics, particularly law and politics of the constitutional sort, when we consider where the historical political battle lines have been drawn on matters of crime and punishment. This Article explores that intersection, giving special attention to the law and politics of federalism as reflected in the narrative concerning the “overfederalization” of crime. Rather than focusing on gun rights and the Second Amendment, then, this paper focuses on Congress’s power to create federal gun crimes using the authority of the Commerce Clause. The Article traces the relevant Supreme Court and lower court decisions and evaluates the state of Commerce Clause litigation involving federal gun possession crimes. The Article ultimately suggests that, because federalism has become a consistent theme of Roberts Court jurisprudence, firearms-related litigation could be a vehicle for Commerce Clause-based federalism to reemerge as a mechanism for cabining federal criminal law-making power. This would be appealing to those, particularly on the political Right, who favor sensible gun controls and have a comparatively narrow view of gun rights, but who are also troubled by the contemporary scope of federal criminal law powers.*

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# The Ineludible (Constitutional) Politics of Guns

J. RICHARD BROUGHTON\*

## I. INTRODUCTION

“This is not about politics.”<sup>1</sup> Those were the words of President Barack Obama in Hartford, amidst his push for more restrictive gun regulation following the horrific murders at Newtown, Connecticut, in December 2012.<sup>2</sup> And yet, after many years of remaining mostly at the periphery, violent crime has reemerged as a subject of serious national political conversation. In substantial part, that conversation has occurred as a result of the Newtown murders<sup>3</sup> and other recent high-profile crime stories. The trial of George Zimmerman in Florida state court has launched a national debate on self-defense law and policy, as well as the scope of federal hate crimes legislation.<sup>4</sup> The national crime conversation also received a jolt after the Boston Marathon bombings in April 2013 and the capture of Dzhokhar Tsarnaev, whose case—although framed largely in the context of terrorism—is sparking renewed debates about the death

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\* Associate Professor of Law, University of Detroit Mercy School of Law. I am grateful to the *Connecticut Law Review* for hosting an important Symposium and for having me as a participant. I thank Rachael Soren for her many hours of research, comments, and conversation about this Article and gun politics in general. I also thank Conor Fitzpatrick for additional research and editorial assistance. I presented earlier versions of this Article at the Law and Legal Education in the Americas Symposium and the Michigan Academy of Science, Arts and Letters Annual Meeting. I am grateful for the helpful comments I received at those conferences.

<sup>1</sup> Remarks at the University of Hartford in Hartford, Connecticut, 2013 DAILY COMP. PRES. DOC. 227, at 4 (Apr. 8, 2013).

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., Ben Lefebvre, *New NRA President Vows to Take Gun-Control Fight into Next Election*, WALL ST. J. (May 4, 2013), <http://online.wsj.com/news/articles/SB10001424127887324766604578463001022323518> (noting the NRA’s opposition to President Obama’s push for gun regulation following Newtown); Pema Levy, *Six Months After Newtown, Connecticut—A New Political Landscape on Guns*, INT’L BUS. TIMES (June 14, 2013), <http://www.ibtimes.com/six-months-after-newtown-connecticut-new-political-landscape-guns-1307111> (suggesting that Newtown prompted a flood of new legislation).

<sup>4</sup> See, e.g., “Stand Your Ground Laws”: *Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 113th Cong. (Oct. 29, 2013) (statement of Ronald S. Sullivan Jr., Clinical Professor of Law, Director of the Criminal Justice Institute, Harvard Law School) (arguing that Florida’s “Stand Your Ground” law “emboldened Mr. Zimmerman to disregard the command of the 911 dispatcher”); Jay Weaver et al., *Civil-Rights Leaders Call on Justice Department to Act*, MIAMI HERALD (July 14, 2013), [www.miamiherald.com/2013/07/14/3500052/federal-case-against-zimmerman.html](http://www.miamiherald.com/2013/07/14/3500052/federal-case-against-zimmerman.html) (detailing the outcry of civil rights leaders following the Zimmerman verdict).

penalty.<sup>5</sup> These stories all have something in common: they all involved the use of a firearm.<sup>6</sup> Perhaps no issue has pushed crime into the national political conversation more than firearm violence. Whether the issue of controlling gun crime is about politics or something else, evidence suggests that it has been nearly impossible to *remove* politics from the criminal justice policy debate.

Moreover, the politics of firearms are somewhat unusual, at least when one considers the conventional battle lines between the political Left and the political Right on crime and constitutional issues. After all, conventional wisdom held that “liberals” were associated with the effort to achieve expanded individual rights under the Constitution and “conservatives” were generally opposed such expansions—at least where the rights were not enumerated in the Constitution or found in American social and political traditions.<sup>7</sup> In this account, liberals were seen as more skeptical of law enforcement, while conservatives were considered law enforcement’s champions in politics and in the judiciary.<sup>8</sup> Further, in the Supreme Court’s incorporation cases regarding criminal procedure rights, it was conservatives like Justice Harlan who often argued that the states play an important intermediary role in American political structure and

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<sup>5</sup> Rebekah Metzler, *Dzhokhar Tsarnaev Capture Reignites Death Penalty Debate, Top Democrats Call for Death Penalty Following Boston Bombings, Citing Federal Law*, U.S. NEWS & WORLD REP. (Apr. 22, 2013), [www.usnews.com/news/articles/2013/04/22/dzhokhar-tsarnaev-capture-reignites-death-penalty-debate](http://www.usnews.com/news/articles/2013/04/22/dzhokhar-tsarnaev-capture-reignites-death-penalty-debate).

<sup>6</sup> While it is true that Tsarnaev allegedly committed his act with an explosive device, such devices are included in the definition of a “firearm” for the purposes of applying 18 U.S.C. § 924(c), pursuant to which he has now been indicted. 18 U.S.C. § 921(a)(3), (4) (2012).

<sup>7</sup> See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 72–74 (1990) (criticizing the Warren Court’s liberalism and its expansion of rights); DAVID E. MARION, *THE JURISPRUDENCE OF JUSTICE WILLIAM J. BRENNAN JR.: THE LAW AND POLITICS OF “LIBERTARIAN DIGNITY”* 164–67 (1997) (summarizing Justice Brennan’s jurisprudence, as well as his views on individual rights and the role courts play in protecting them); see also J. Harvie Wilkinson III, *Is There a Distinctive Conservative Jurisprudence?*, 73 U. COLO. L. REV. 1383, 1383 (2002) (laying out the conventional distinction between judicial liberals and judicial conservatives).

<sup>8</sup> E.g., Madhavi M. McCall & Michael A. McCall, *Chief Justice William Rehnquist: His Law-and-Order Legacy and Impact on Criminal Justice*, 39 AKRON L. REV. 323, 332 (2006); see also Morgan Cloud, *A Conservative House United: How the Post-Warren Court Dismantled the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 477, 478 (2013) (explaining how the political biases of justices influenced the Supreme Court’s application of the exclusionary rule); Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U. L.Q. 11, 12–16 (1988) (discussing the range of decision-making on the Warren and Burger Courts); cf. Eric J. Miller, *The Warren Court’s Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 3–4 (2010) (arguing that the Warren Court’s criminal procedure cases should be viewed through the lens of civic republican concerns about personal security rather than as rights-expanding cases). This Article duly recognizes that common political terminology is difficult to define precisely, particularly when discussing Supreme Court decision-making.

thus need flexibility to respond to local needs in administering their systems of criminal justice.<sup>9</sup>

Gun rights have turned this usual paradigm on its head, with conservatives joining libertarians in advocating for more expansive interpretations of the Second Amendment and its incorporation into the Fourteenth Amendment—thereby making it enforceable against the states.<sup>10</sup> Meanwhile, liberals are seen as more tolerant of harsh criminal laws and aggressive law enforcement where guns are concerned.<sup>11</sup> It remains unclear exactly why conventional wisdom has evolved to describe the protection of gun rights as an especially conservative posture, as opposed to a libertarian one. It is easy to imagine a world in which prudent controls on gun possession and use would fit more naturally with conservative intuitions about good social order and sensible restraints on human conduct. But perhaps the particular brand of conservatism matters.

In any event, the current Left/Right dynamic on gun control issues may also be part of a broader conflict among those with Right-leaning politics. This conflict has been described as the difference between a judicial conservatism that normally is skeptical of judicial intervention and a new kind of “constitutional conservatism” that more robustly embraces judicial review, particularly to protect certain kinds of rights.<sup>12</sup> A fear among conservatives of the more traditional stripe, though, may be that others associated with the Right are championing constitutional conservatism while simultaneously elevating rights (with respect to guns, in particular) in ways that the Constitution does not.<sup>13</sup> Their somewhat abstract “liberty” talk seems at odds with the more Burkean style of conservatism that is not averse to, but in fact favors, tolerable restraints, respect for old habits and

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<sup>9</sup> See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 174–76 (1968) (Harlan, J., dissenting) (suggesting the Fourteenth Amendment was created with the intent of eventually allowing states to have an intermediary role); *Mapp v. Ohio*, 367 U.S. 643, 680–81 (1961) (Harlan, J., dissenting) (depicting a view that the states should have some control in dealing with their own individual law enforcement problems).

<sup>10</sup> See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010) (showing that Justices Scalia, Kennedy, and Roberts joined the majority opinion written by Justice Alito, which recognized the incorporation of the Second Amendment, and that Justice Thomas concurred in judgment).

<sup>11</sup> See Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective*, 73 *FORDHAM L. REV.* 477, 477–78 (2004) (highlighting the irony of the conservative and liberal agendas regarding the Second Amendment).

<sup>12</sup> A full assessment of this interesting dichotomy is well beyond the scope of this piece. For now, see Josh Blackman, *Epps on Reagan v. The Libertarians on the Supreme Court*, *VOLOKH CONSPIRACY* (Sept. 16, 2013, 4:11 PM), <http://www.volokh.com/2013/09/16/epps-reagan-v-libertarians-supreme-court>, and Garrett Epps, *Reagan’s Court v. The Libertarians*, *AM. PROSPECT* (Sept. 16, 2013), <http://prospect.org/article/reagans-court-v-libertarians>. For a thoughtful discussion of the different types of conservatism as judicial review may reflect them, see Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 *U. COLO. L. REV.* 1139, 1141–42 (2002).

<sup>13</sup> See Young, *supra* note 12, at 1185–86 (highlighting conflicts among conservatives regarding constitutionalism).

institutions, and an appreciation for liberty moderated by good social order.<sup>14</sup> Yet despite their public statements about the scope of Second Amendment protection, many of those same leaders on the political Right have been forced to grapple with two distinct realities: first, that violent crime committed with guns is highly prevalent in this country<sup>15</sup> and demands the attention of the law; and second, that the Second Amendment's protection, however venerable, is limited.

*District of Columbia v. Heller*,<sup>16</sup> which recognized that the Second Amendment protects an individual "right to keep and bear arms,"<sup>17</sup> may have seemed meaningfully libertarian at first blush. But the decision might actually lend little hope to the more libertarian view for which many on the political Right have recently advocated. Ironically, perhaps, this is because *Heller* possesses somewhat conservative qualities. "Somewhat" is an apt qualifier, because there is a compelling argument that *Heller* could have been far more conservative—not by broadening Second Amendment protection, but by actually *rejecting* an individual right to bear arms. Multiple critics of *Heller* have made this argument.<sup>18</sup> Some, like Judge J. Harvie Wilkinson, have even likened *Heller* to *Roe v. Wade*.<sup>19</sup>

That criticism aside, though, whatever more libertarian instincts may have been aroused in the first few pages of *Heller* were mostly squelched later in the opinion. Which is to say, although *Heller* was not especially conservative, neither was it especially libertarian. After all, Justice Scalia's majority opinion not only tries to locate the individual right to bear

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<sup>14</sup> See RUSSELL KIRK, *THE CONSERVATIVE MIND: FROM BURKE TO ELIOT* 8–9 (7th rev. ed. 2001) (enumerating six canons of conservative thought); see also RUSSELL KIRK, *THE POLITICS OF PRUDENCE* 17–25, 156–71 (1993) (discussing conservative principles and distinguishing conservatism from libertarianism). For more on Burkean thought, see generally EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (Liberal Arts Press 1955) (1790).

<sup>15</sup> *Gun Violence*, NAT'L INST. JUST., <http://www.nij.gov/topics/crime/gun-violence/Pages/welcome.aspx> (last updated Apr. 4, 2013).

<sup>16</sup> 554 U.S. 570 (2008).

<sup>17</sup> *Id.* at 595.

<sup>18</sup> See Carl T. Bogus, *Heller and Insurrectionism*, 59 SYRACUSE L. REV. 253, 262 (2008) (suggesting that the *Heller* court, like other modern conservatives, deviated from traditional conservatism); David A. Strauss, *The Death of Judicial Conservatism*, 4 DUKE J. CONST. L. & PUB. POL'Y 1, 11–12 (2009) (arguing that the conservatives on the *Heller* court declined to follow principles of conservatism); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009) (suggesting that *Heller* was a failure for conservatives).

<sup>19</sup> Wilkinson, *supra* note 18, at 254–55. Judge Wilkinson also argued that *Heller* and *Roe* were different in important ways—not the least of which was that *Heller* interpreted the scope of a right that is actually enumerated in the Constitution, whereas the same cannot be said of *Roe*. *Id.* He acknowledged, "So *Heller* is not *Roe*. But to say that *Heller* was marginally more justified than *Roe* is not saying much—surely the bar of justification for judicial intervention has not been set so low." *Id.* at 266. For responses from the Right to Judge Wilkinson's critique, see generally Alan Gura, *Heller and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvie Wilkinson*, 56 UCLA L. REV. 1127 (2009), and Nelson Lund & David B. Kopel, *Unraveling Judicial Restraint: Guns, Abortion, and the Faux Conservatism of J. Harvie Wilkinson III*, 25 J.L. & POL. 1, 2 (2009).

arms in the Constitution's text, history, and structure, but also enumerates several limits on the scope of that right.<sup>20</sup> According to the *Heller* majority, the Second Amendment casts no constitutional doubt upon "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive public places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."<sup>21</sup> The majority identified another limit, drawn from the Court's language in *United States v. Miller*,<sup>22</sup> that the Second Amendment does not protect the carrying of "dangerous and unusual weapons."<sup>23</sup> Justice Scalia was unclear as to the precise scope of this latter limitation, though he gave the example of "M-16 rifles and the like."<sup>24</sup> But in media interviews after the release of his most recent book, Justice Scalia has intimated that such a limit could extend to assault weapons or other types of firearms, and that "locational limitations" may also be valid, thus further constraining the reach of *Heller*.<sup>25</sup> Curiously, then, *Heller* may have pulled the libertarian rug out from under itself.

Moreover, lower courts have generally been adamant about enforcing the limits on the right to keep and bear arms that *Heller* recognized.<sup>26</sup> Consider, for example, the cases attacking federal crimes involving prohibited firearm possession. Pursuant to 18 U.S.C. § 922(g), it is unlawful for certain categories of persons to possess a firearm that enters or affects interstate commerce, or to receive any firearm that has been shipped or transported in interstate commerce.<sup>27</sup> Those prohibited categories of persons include felons and the mentally ill, as described in *Heller*.<sup>28</sup> But there are numerous other categories, including: fugitives, unlawful users of or those addicted to prohibited controlled substances, unlawful aliens, persons dishonorably discharged from the Armed Forces, those who have renounced their citizenship, and persons convicted of misdemeanor domestic violence.<sup>29</sup> Clearly, these categories can venture

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<sup>20</sup> *Heller*, 554 U.S. at 626–27.

<sup>21</sup> *Id.*

<sup>22</sup> 307 U.S. 174, 179 (1939).

<sup>23</sup> *Heller*, 554 U.S. at 627 (internal quotation marks omitted).

<sup>24</sup> *Id.*

<sup>25</sup> John Aloysius Farrell, *Scalia: Guns May Be Regulated*, NAT'L J. (July 29, 2012), [www.nationaljournal.com/scalia-guns-may-be-regulated-20120729](http://www.nationaljournal.com/scalia-guns-may-be-regulated-20120729).

<sup>26</sup> See, e.g., *Powell v. Tompkins*, 926 F. Supp. 2d 367, 380 (D. Mass. 2013) (upholding a proscription on granting gun licenses to people under age twenty-one); *Young v. Hawaii*, 911 F. Supp. 2d 972, 990 (D. Haw. 2012) (finding a statute restricting the public carrying of a firearm to be constitutional); *Schrader v. Holder*, 831 F. Supp. 2d 304, 311–12 (D.D.C. 2011) (upholding a statute prohibiting gun possession by a felon).

<sup>27</sup> 18 U.S.C. § 922(g) (2012).

<sup>28</sup> *Heller*, 554 U.S. at 626.

<sup>29</sup> 18 U.S.C. § 922(g)(2)–(9).

beyond those specifically enumerated in *Heller*. And yet lower federal courts have consistently held that the Second Amendment does not protect the right of a person in one of those categories to possess any firearm, even a handgun or rifle.<sup>30</sup> Courts have also consistently upheld federal criminal laws prohibiting the possession of firearms with an obliterated serial number,<sup>31</sup> the possession of a machine gun,<sup>32</sup> possession by a juvenile,<sup>33</sup> and sale of a firearm to a juvenile<sup>34</sup>—all categories that appear to go beyond the literal terms of *Heller*'s limitations.

It is hard to ignore the parallels between *Heller* and *Lawrence v. Texas*,<sup>35</sup> the Supreme Court's 2003 decision that at least seemed to offer constitutional protection for private, consensual sex between adults.<sup>36</sup> Like its counterpart in substantive due process, *Heller* looks like one of those cases whose libertarian potential seemed strong but waned once lower courts were given the opportunity to interpret its scope.<sup>37</sup> Like *Lawrence*, *Heller* devoted an important paragraph near its conclusion to articulating meaningful limits on the right that it purportedly recognized.<sup>38</sup> And just as

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<sup>30</sup> See, e.g., *United States v. Huet*, 665 F.3d 588, 592 (3d Cir. 2012) (reversing the district court's finding that the statute violated the Second Amendment rights of a person who was charged with aiding and abetting the possession of a firearm by a felon); *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011) (upholding the constitutionality of a law prohibiting illegal aliens from possessing firearms); *United States v. Booker*, 644 F.3d 12, 13–14 (1st Cir. 2011) (refusing to allow individuals convicted of an offense with a mens rea of recklessness to carry a firearm); *United States v. Yancey*, 621 F.3d 681, 687 (7th Cir. 2010) (upholding the constitutionality of the statute as applied against illegal drug users); *United States v. Seay*, 620 F.3d 919, 920, 925 (8th Cir. 2010) (finding the statute to survive a constitutional challenge by a man convicted for possession of two pistols and two shotguns while being an unlawful drug user); *United States v. Skoien*, 614 F.3d 638, 639, 645 (7th Cir. 2010) (finding a man's conviction for possessing a pistol, a rifle, and a shotgun while on probation for his second domestic violence charge to be constitutional).

<sup>31</sup> E.g., *United States v. Marzarella*, 614 F.3d 85, 87 (3d Cir. 2010).

<sup>32</sup> E.g., *United States v. Henry*, 688 F.3d 637, 638 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 996 (2013).

<sup>33</sup> E.g., *United States v. Rene E.*, 583 F.3d 8, 9 (1st Cir. 2009).

<sup>34</sup> See *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 714 F.3d 334, 335 (5th Cir. 2013) (en banc) (indicating that the Court "declined to consider en banc the constitutionality, under the Supreme Court's recent Second Amendment decisions, of federal laws barring licensed gun dealers from selling handguns or handgun ammunition to people less than 21 years old"), *cert. denied*, 134 S. Ct. 1364 (2014).

<sup>35</sup> 539 U.S. 558 (2003).

<sup>36</sup> *Id.* at 578.

<sup>37</sup> For a valuable list of extensive lower court case law that has refused to find rights protected under *Lawrence*, see J. Kelly Strader, *Lawrence's Criminal Law*, 16 BERKELEY J. CRIM. L. 41, 107–11 (2011). For an argument that *Lawrence* is not especially libertarian, see Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140, 1148–49 (2004), and J. Richard Broughton, *The Criminalization of Consensual Adult Sex After Lawrence*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y (forthcoming 2014).

<sup>38</sup> Compare *Lawrence*, 539 U.S. at 578 ("The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution."), with *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008) (stating that "the right secured by the Second

most lower courts have been reluctant to extend the reach of the right recognized in *Lawrence*,<sup>39</sup> so too have lower courts been reluctant to strike down gun restrictions on Second Amendment grounds.

So for all of the political haggling over gun control, current gun politics cannot be understood entirely outside of the legal, or litigation, context. This is not to say, though, that any constitutional challenge to gun control is necessarily libertarian, or otherwise inconsistent with a more Burkean form of conservatism.<sup>40</sup> A challenge to *some* federal gun restrictions that is based on the limits to national legislative power would arguably fit far more comfortably into the conservative's legal toolbox,<sup>41</sup> while still enabling conservatives to support gun control generally and specific gun restrictions that are better suited for state regulation.

It is notable, then, that the existing constitutional and political debates over gun control also implicate a parallel constitutional and political debate: one about the scope of federal power to create criminal law. This is the “overfederalization” problem that many commentators on both the Left and Right have identified.<sup>42</sup> Instead of a debate about the Bill of Rights, the conservative side of the overfederalization debate is concerned with constitutional structure and the proper limits on Congress's authority to define crimes that would traditionally fall within the power of the states to define and punish—that is, if criminalization is desirable in the first place.<sup>43</sup> Not only has overfederalization reared its head in academic circles,<sup>44</sup> but Congress has recently held multiple hearings on

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Amendment is not unlimited” and that there are “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places, such as schools and government buildings, or laws imposing conditions and qualifications on commercial sales of arms”).

<sup>39</sup> See Strader, *supra* note 37, at 107–11 (providing a list of some criminal cases where *Lawrence* was “[i]napplicable”).

<sup>40</sup> See generally Ernest A. Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874 (2006) (reconciling federalism and conservatism, and Burkean conservatism in particular).

<sup>41</sup> *Id.* at 883–85.

<sup>42</sup> See J. Richard Broughton, *Congressional Inquiry and the Federal Criminal Law*, 46 U. RICH. L. REV. 457, 460–64, 466–67 (2012) (describing the overfederalization phenomenon and why reform is a problem for scholars and commentators across the political spectrum).

<sup>43</sup> See John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545, 546 (2005) (asserting that “[t]he constitutional allocation of power which leaves the general police powers in the states should mean that the federal role is much smaller”); J. Richard Broughton, *Some Reflections on Conservative Politics and the Limits of the Criminal Sanction*, 4 CHARLESTON L. REV. 537, 559 (2010) (“While the states still define, investigate, and prosecute the vast majority of crimes, the growth of the federal criminal code remains a subject of concern, especially for conservatives.”).

<sup>44</sup> See JOHN S. BAKER, JR., HERITAGE FOUND., REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES (2008) (presenting a study that examines the correlation of federal crimes with the growth of federal criminal law); Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 801 (1996) (contending that a problem exists “when Congress makes federal crimes of behavior already adequately covered by state law”); Baker, *supra* note 43, at 549–54

overcriminalization and overfederalization,<sup>45</sup> with both Democrats and Republicans expressing concern over the size of federal criminal law and the scope of federal prosecutorial power.<sup>46</sup> In the political Right's view, the overfederalization problem has been stoked by congressional power pursuant to the Commerce Clause, which is used to justify much of federal criminal law.<sup>47</sup> One might imagine that on the political Right, then, the constitutional assertion of primary importance in the gun control debate would focus first on *federal* power to enact and enforce gun restrictions. A

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(presenting an explanation for “the expansion of federal criminal law” and exploring its remedies); Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 842 (1996) (asserting that “Congress continues undaunted down the road to federalize crime” and that “*Lopez* is a counterpoint to that trend”); see also Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 768 (2005) (explaining how overfederalization yields such problems as “nullification of both state procedural protections for criminal defendants and other laws expressing state policy”); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1136, 1172 (1995) (concluding that “[f]ederal duplication of state criminal law unduly burdens the federal justice system, which is ill-equipped to supplant local law enforcement”); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 656 (1997) (indicating that the “duplicative federal criminal legislation is only one step in the process of federalization”); Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1546 (1997) (observing “widespread agreement that Congress and the state legislatures have created too many new regulatory crimes”); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 708 (2005) (describing Congress's adoption of “repetitive and overlapping statutes”); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 507 (1995) (arguing that “[t]he long-term solution to the federalization of state crime will come about through a rechanneling of Congress's and the Executive Branch's energies toward a coordinated effort with the states”). But see Susan R. Klein & Ingrid B. Grobey, *Overfederalization of Criminal Law? It's a Myth*, 28 CRIM. JUST. 23, 24 (2013) (arguing that “[e]mpirical data . . . demonstrates that in spite of the large increase in number of federal criminal statutes during the past several decades, this growth in the federal code has generated little impact on federal resources or on the balance of power between state and federal courts”); Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 249–50 (1997) (arguing that commentators complaining of overfederalization overlook the federal government's steady decline in criminal law enforcement). For a thoughtful take on a related problem—namely, how expansive interpretations of the Commerce Clause have allowed for enactment of some conservative federal policies disfavored by liberals, thus leading some liberals to advocate for judicially-enforced federalism—see Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507, 509–10 (2006).

<sup>45</sup> *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the Comm. on the Judiciary H.R.*, 111th Cong. 1–2, 236–39 (2010) [hereinafter *2010 Over-Criminalization Hearing*]; *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the Comm. on the Judiciary H.R.*, 111th Cong. 1–2 (2009) [hereinafter *2009 Over-Criminalization Hearing*].

<sup>46</sup> See, e.g., *2010 Over-Criminalization Hearing*, *supra* note 45, at 1–2 (statement of Rep. Robert C. Scott) (lamenting the weakening of mens rea and the problem of vague statutes); *2009 Over-Criminalization Hearing*, *supra* note 45, at 3 (statement of Rep. Louie Gohmert) (lamenting that Congress has too often become “the arbiter of criminal conduct”).

<sup>47</sup> E.g., Broughton, *supra* note 42, at 467.

plausible argument exists—and thoughtful scholars have made it—for challenging many federal gun laws on Commerce Clause grounds.<sup>48</sup> Many influential voices on the political Right, however, seem lately to have preferred, at least publicly, a strategy based on expanding Second Amendment rights.<sup>49</sup>

This approach makes some sense, if the goal is to target gun control measures broadly. It can be used to attack a greater number of gun laws, at both the state and federal level. But it is also problematic for traditional conservatives (less so for libertarians), who have placed themselves in the odd political position of arguing for more expansive individual rights and against the interests of those in law enforcement who support stronger gun controls. And, again, it is far from clear that the leading Supreme Court opinions on the Second Amendment reach as far as a libertarian view would extend them. Conservatives, then, could employ Commerce Clause-based federalism to attack some federal gun regulations while leaving others intact, all without ceding ground on aggressive criminal justice policies concerning violent crime. The argument is simply that some gun restrictions are desirable, but that they cannot be imposed by the federal government; rather, they can—and *should*—be imposed by the states.

So the debate about firearms and crime has resulted in a strange but fascinating intersection of law and politics, particularly law and politics of the constitutional sort. This Article explores that intersection, giving special attention to the limits on federal gun control powers pursuant to the Commerce Clause. It traces the relevant Supreme Court cases on federal criminal law, beginning in the 1970s and culminating in the existing battle

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<sup>48</sup> See David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL'Y 107, 115–16 (1998) (discussing the Commerce Clause arguments arising out of *Lopez*); David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously: Lopez and the Partial Birth Abortion Ban Act*, 30 CONN. L. REV. 59, 80–82 (1997) (indicating that in “the context of firearms cases, some courts have strained particularly hard to find an interstate commerce nexus”); Dean A. Strang, *Felons, Guns, and the Limits of Federal Power*, 39 J. MARSHALL L. REV. 385, 386 (2006) (stating that the Court has never considered whether 18 U.S.C. § 922(g)(1) “lies within congressional prerogative under the Commerce Clause”); cf. Michael P. O’Shea, *Federalism and the Implementation of the Right to Arms*, 59 SYRACUSE L. REV. 201, 208 (2008) (observing that “both academic and judicial sources suggest that gun control is a ripe field for pro-federalism arguments”).

<sup>49</sup> Consider, for example, that Republican Senators Ted Cruz, Rand Paul, and Mike Lee recently favored a filibuster of proposed gun control legislation on grounds that the proposals, including expanded background checks, implicated the Second Amendment. Senator Cruz stated, “Any bill that would undermine the Bill of Rights, in my view, should be subject to a 60-vote threshold.” Gregory Korte et al., *Reid Schedules Vote to Break GOP Hold on Gun Bills*, USA TODAY (Apr. 9, 2013), <http://www.usatoday.com/story/news/politics/2013/04/09/reid-mcconnell-guns-filibuster-senate/2067877/> (internal quotation marks omitted). Curiously, Senator Cruz did *not* say that legislation that would undermine the separation of powers or federalism should be subject to a sixty-vote threshold; he only specified the protections of the Bill of Rights (in this case, the Second Amendment) as implicating that threshold.

over the vitality of *United States v. Lopez* and *United States v. Morrison* in light of *Gonzalez v. Raich*. It then examines several lower federal court decisions in gun possession cases to demonstrate how federal judges have viewed the constitutional landscape on wholly intrastate gun possession after *Lopez*. Whether the litigation focuses on the Second Amendment or the Commerce Clause, one truth emerges: the most consistent defenders of robust federal power to regulate guns have not been politicians, but rather, federal judges. The Article thus critiques the state of Commerce Clause litigation involving gun possession crimes and concludes by evaluating the potential for Commerce Clause-based federalism to reemerge as a theme in the Roberts Court for cabining federal criminal law-making power.

## II. GUNS, CRIME, AND FEDERAL POWER

Often overlooked in the post-*Heller* focus on gun rights is an evaluation of the extent to which some federal gun laws could exceed congressional powers enumerated in Article I of the United States Constitution. The constitutional case, based chiefly on the Commerce Clause, against federal gun restrictions is a plausible one, though—again, like *Heller*—it is not one that has found much favor in the lower federal courts. Federal judges, however, have not been uniform in their understanding of Commerce Clause limits, and some have intimated strongly that the Supreme Court should address the confusion. Perhaps the Supreme Court could show renewed interest in limiting the scope not just of federal gun legislation, but also federal criminal law, through a revitalized enforcement of the structural Constitution in federal gun possession cases. The Court has had opportunities to do so and has thus far declined. But there are signs that, if the appropriate opportunity presents itself, the Roberts Court may be poised to pick up where the Rehnquist Court’s judicially-enforced federalism left off. And firearms-related litigation will likely continue to present such an opportunity for the Court.

### A. *Guns and the Commerce Clause: In the Supreme Court*

To assess the strength of a structural challenge to federal gun legislation, it is necessary to distinguish among those federal laws. The comprehensive regulatory scheme set forth in the National Firearms Act, which requires registration of certain firearms and imposition of a modest tax, is based not on the commerce power but rather on Congress’s taxing power.<sup>50</sup> The gun legislation codified at 18 U.S.C. § 924—i.e., the

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<sup>50</sup> 26 U.S.C. § 5801 (2012); *see also* *Sonzinsky v. United States*, 300 U.S. 506, 511, 514 (1937) (indicating that the court upheld the National Firearms Act’s taxing mechanism as a valid exercise of taxing power).

punishment enhancements and mandatory minimum provisions, including the Armed Career Criminal Act<sup>51</sup>—is based on the existence of a predicate crime, either a drug trafficking crime or a federal crime of violence.<sup>52</sup> So long as the statute establishing predicate crime is constitutional, Congress can impose the enhanced punishment where a firearm is used, carried, or possessed in connection with the predicate crime without implicating the Commerce Clause. This is because the punishment is considered necessary and proper for executing the underlying power to define the predicate crime—usually, though not always, based on the commerce power. Consequently, the most plausible structural challenges will be those based on categories of prohibited firearms possession, codified in 18 U.S.C. § 922. These statutes form only a small part of federal gun regulation, but often a substantial part of a federal prosecutor’s work. Moreover, those categories in § 922 should be further understood as distinguishing between gun possession crimes that require proof of a jurisdictional element and those that do not—a distinction that, for Commerce Clause purposes, may well matter. So when discussing a viable Commerce Clause challenge to existing federal gun law, the focus should remain on § 922, which is the focus of the most seriously contested litigation in this area.

A serious structural challenge to federal gun possession laws could be, and repeatedly has been, based upon the Supreme Court’s decision in *United States v. Lopez*.<sup>53</sup> The *Lopez* holding is thoroughly discussed in the relevant commentary and literature, so a brief summary will suffice here. Alfonso Lopez brought a loaded .38 caliber revolver to Edison High School in San Antonio, Texas.<sup>54</sup> Lopez was to be paid forty dollars to give the gun to someone, in anticipation of a gang war.<sup>55</sup> He was eventually prosecuted under the federal Gun Free School Zones Act and, upon his conviction, sentenced to six months.<sup>56</sup> In validating Lopez’s challenge to the constitutionality of the statute, and rejecting the Government’s arguments as to why possession of a gun in a school zone affected interstate commerce, the Court attempted to synthesize its muddled Commerce Clause jurisprudence. The Court identified three broad and

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<sup>51</sup> 18 U.S.C. § 924(e) (2012).

<sup>52</sup> *Id.* § 924(c); see also CHARLES DOYLE, CONG. RESEARCH SERV., R41412, FEDERAL MANDATORY MINIMUM SENTENCING: THE 18 U.S.C. 924(C) TACK-ON IN CASES INVOLVING DRUGS OR VIOLENCE 1 (2013) (indicating that “[m]andatory minimums are found in the Armed Career Criminal Act, which “deals exclusively with recidivists,” and “Section 924(c), [which] attaches one of several mandatory minimum terms of imprisonment whenever a firearm is used or possessed during and in relation to a federal crime of violence and drug trafficking”).

<sup>53</sup> 514 U.S. 549 (1995).

<sup>54</sup> *Id.* at 551.

<sup>55</sup> *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff’d*, 514 U.S. 549.

<sup>56</sup> *Lopez*, 514 U.S. at 551–52.

now-familiar categories of things that could properly be regulated under the Commerce Clause: (1) channels of interstate commerce; (2) instrumentalities of, or persons or things in, interstate commerce; and (3) activities that substantially affect interstate commerce.<sup>57</sup> Lopez's case fell into the third category,<sup>58</sup> and the Court found that possessing a gun in a school zone did not involve a substantial enough connection to interstate commerce to justify federal legislation; that possessing a gun in a school zone was not itself economic or commercial activity; and that the statute was an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."<sup>59</sup> Notably, the legislation lacked a jurisdictional element that would have limited prosecutions to those cases with an effect on interstate commerce.<sup>60</sup> Further, Congress did not adopt findings regarding the effect of gun possession in a school zone on interstate commerce.<sup>61</sup> And any connection to interstate commerce arising from the prohibited conduct was too tenuous to establish a substantial effect.<sup>62</sup> The Court noted that the definition and enforcement of the criminal law is a function in which the states are traditionally sovereign, which only served to strengthen the Court's position that Congress had exceeded its power.<sup>63</sup>

*Lopez* was a remarkable case in 1995 and one of the most significant components of the Rehnquist Court's judicially-enforced federalism. Another major component was *United States v. Morrison*,<sup>64</sup> which did not involve a gun statute, but rather the civil damages provisions of the Violence Against Women Act ("VAWA").<sup>65</sup> In striking down that statute, the Court attempted to further explain its holding in *Lopez* and its new Commerce Clause doctrine.<sup>66</sup> Much like the Gun Free School Zones Act, VAWA did not contain a jurisdictional element, and attempted to regulate non-commercial intrastate criminal conduct—violence against women.<sup>67</sup> Although Congress this time adopted extensive findings related to the effect of domestic violence upon interstate commerce, the Court again concluded that the connection was too attenuated.<sup>68</sup> The Government tried

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<sup>57</sup> *Id.* at 558–59.

<sup>58</sup> *Id.* at 559.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 563.

<sup>62</sup> *See id.* at 567–68 (indicating that “[t]o uphold the Government’s contentions . . . [the Court] 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”).

<sup>63</sup> *Id.* at 561 n.3, 564.

<sup>64</sup> 529 U.S. 598 (2000).

<sup>65</sup> *Id.* at 601–02.

<sup>66</sup> *Id.* at 607–09.

<sup>67</sup> *Id.* at 613.

<sup>68</sup> *Id.* at 614–17.

to argue that the aggregate impact of domestic violence would ultimately create a substantial effect on interstate commerce, but the Court rejected the argument “that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”<sup>69</sup> Repeating again its long-held view that there is no general federal police power, and that the Commerce Clause ought not to be read to create one, the Court stated that “[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”<sup>70</sup> The Court concluded, “we can think of no better example of the 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.”<sup>71</sup>

On its face, the *Lopez/Morrison* framework appeared to have real consequences for an ever-growing body of federal criminal law, which includes substantial gun control legislation. Yet those cases did not explicitly account for two earlier decisions from the 1970s involving federal firearms possession crimes. In the 1977 case *Scarborough v. United States*,<sup>72</sup> the Court held that the federal felon-in-possession statute was satisfied merely by the firearm’s transportation, at some point in time, across state lines.<sup>73</sup> The defendant in *Scarborough* was convicted of a drug crime.<sup>74</sup> A year later, law enforcement officials recovered four firearms while searching the defendant’s home pursuant to a search warrant.<sup>75</sup> The defendant unsuccessfully argued that the government could not establish an adequate nexus between the gun possession and interstate commerce merely by showing that, at some point in the past, the firearm had crossed state lines.<sup>76</sup>

*Scarborough* followed *United States v. Bass*,<sup>77</sup> a 1971 case involving the prosecution of a similar crime under an earlier statute.<sup>78</sup> In *Bass*, the Court held that, in order to preserve the proper balance between federal and state power, there had to be at least some nexus between the possession and the travel in interstate commerce—but did not state precisely what would constitute such a nexus.<sup>79</sup> *Scarborough* then held

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<sup>69</sup> *Id.* at 617.

<sup>70</sup> *Id.* at 618.

<sup>71</sup> *Id.*

<sup>72</sup> 431 U.S. 563 (1977).

<sup>73</sup> *Id.* at 577. The statute at issue in *Scarborough* was a predecessor to the current version of 18 U.S.C. § 922(g)(1).

<sup>74</sup> *Scarborough*, 431 U.S. at 564.

<sup>75</sup> *Id.* at 564–65.

<sup>76</sup> *Id.* at 566.

<sup>77</sup> 404 U.S. 336 (1971).

<sup>78</sup> *Id.* at 337.

<sup>79</sup> *Id.* at 347.

that the firearm's transportation in interstate commerce, *at any point in time*, was sufficient.<sup>80</sup> "Congress," the Court reasoned, "sought to reach possessions broadly, with little concern for when the nexus to commerce occurred. . . . [T]here is no question that Congress intended no more than a minimal nexus requirement."<sup>81</sup>

But neither *Scarborough* nor *Bass* appears to have been based on the scope of the Commerce Clause.<sup>82</sup> And those cases pre-dated *Lopez*, which explicitly cited *Bass* for the proposition that the Court has interpreted the felon-in-possession statute to "reserve the constitutional question whether Congress could regulate, without more, the 'mere possession' of firearms."<sup>83</sup> This statement from *Lopez* seems to make clear that neither *Bass* nor *Scarborough* represents an enforceable precedent as to the constitutional validity of these possession bans.

Another case from the 1970s, though, *Perez v. United States*,<sup>84</sup> did address the commerce power and its relationship to the definition of federal crimes, setting forth the three categories of Commerce Clause regulation that the Court described in *Lopez*.<sup>85</sup> *Perez*, which was decided the same year as *Bass*, involved the application of the Consumer Credit Protection Act of 1964, which punished the extortionate extension of credit (i.e., loan-sharking).<sup>86</sup> But the law in dispute did not explicitly require a connection to commerce.<sup>87</sup> The Court upheld the law, reasoning that these credit transactions were generally within the reach of congressional power.<sup>88</sup> The Court explained that, even if the individual loan-sharking events did not affect commerce, courts could not "excise, as trivial, individual instances" of the class of regulated activity.<sup>89</sup> Rather, Congress could rationally determine that the class of activity—here, loan-sharking—affects interstate commerce.<sup>90</sup> So even if the activity prosecuted in *one case* did not affect commerce, the *class* of activity was within the scope of

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<sup>80</sup> 431 U.S. at 575.

<sup>81</sup> *Id.* at 577.

<sup>82</sup> The Court, however, clearly expressed concerns about the federal-state balance in *Bass* and dropped a footnote in *Scarborough* stating that "Congress was not particularly concerned with the impact on commerce except as a means to insure the constitutionality of [the statute]." *Id.* at 575 n.11.

<sup>83</sup> *United States v. Lopez*, 514 U.S. 549, 562 (1995) (quoting *Bass*, 404 U.S. at 339 n.4).

<sup>84</sup> 402 U.S. 146 (1971).

<sup>85</sup> *Id.* at 150.

<sup>86</sup> *Id.* at 146–47.

<sup>87</sup> 18 U.S.C. § 891 (2012).

<sup>88</sup> *Perez*, 402 U.S. at 153–54.

<sup>89</sup> *Id.* at 154 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)) (internal quotation marks omitted).

<sup>90</sup> *Id.* at 155–56.

congressional power.<sup>91</sup> A court, therefore, could not target this particular instance of the class as having an insufficient connection to commerce.<sup>92</sup>

So how can we account for these pre-*Lopez* cases concerning the scope of federal power to define criminal law? First, let us deal with *Perez*. Not only did the Court cite *Perez* approvingly in *Lopez*,<sup>93</sup> it also relied heavily upon *Perez* in *Raich*, its most recent pronouncement on the enforcement of federal criminal law pursuant to the Commerce Clause.<sup>94</sup> There, the Court upheld the federal effort to enforce the Controlled Substances Act (“CSA”) against persons who used home-grown marijuana that had never traveled in interstate commerce for medicinal purposes.<sup>95</sup> The consumption was legal in California under the state’s compassionate use law,<sup>96</sup> but the federal government stepped in to enforce the CSA. Justice Stevens’s majority opinion relied on *Perez*’s “class of activities” test<sup>97</sup> and determined that because the CSA regulates the interstate economic marketplace for controlled substances like marijuana, a class of activity that was within congressional power, Congress had the power to reach wholly intrastate cultivation and possession of marijuana as part of the CSA’s larger economic regulation.<sup>98</sup> The Court reasoned that it need not conclude whether, in the aggregate, the medicinal use of homegrown marijuana actually affected interstate commerce.<sup>99</sup> All it needed to decide was whether Congress could rationally draw that conclusion—which the Court found it could have.<sup>100</sup> This conclusion was based on the notion that Congress could eliminate the entire interstate market for marijuana through the CSA, and thus could also eliminate all use, possession, and growth of marijuana, no matter how local or noneconomic the activity.<sup>101</sup>

Justice Scalia offered an important concurrence. In his view, the “substantial effects” category of Commerce Clause regulation that the Court described was not justified by the Commerce Clause alone.<sup>102</sup> Rather, it required the assistance of the Necessary and Proper Clause, because, unlike Category One (channels) and Category Two

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<sup>91</sup> *Id.* at 156–57.

<sup>92</sup> *Id.*

<sup>93</sup> *United States v. Lopez*, 514 U.S. 549, 557 (1995).

<sup>94</sup> *Gonzales v. Raich*, 545 U.S. 1, 3 (2005).

<sup>95</sup> *Id.* at 7–8, 32–33.

<sup>96</sup> *Id.* at 5–6.

<sup>97</sup> *Id.* at 17.

<sup>98</sup> *See id.* at 17–21 (reiterating the proposition from *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942), that Congress may regulate intrastate activities that have a substantial economic effect on interstate commerce, and also stating that Congress had a rational basis for concluding that locally grown marijuana intended for local consumption could still have an effect on the interstate market).

<sup>99</sup> *Id.* at 22.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 34 (Scalia, J., concurring).

(instrumentalities, persons or things in) items, activities that substantially affect interstate commerce are not themselves a part of it.<sup>103</sup> Rather, their regulation is necessary and proper to carry the Commerce Clause into execution.<sup>104</sup> Justice Scalia therefore relied almost exclusively upon the notion that the criminalization of wholly intrastate cultivation and possession of marijuana was necessary to enforce the more comprehensive regulatory scheme that the CSA established.<sup>105</sup> In summary, whereas Justice Stevens concluded that the regulation was an essential part of a larger scheme of regulating a class of activity that was itself within the commerce power, Justice Scalia concluded that the regulation of an essential part of a more comprehensive regulatory scheme was justified by the Necessary and Proper Clause as a way of executing that scheme.

There is much to the notion that *Raich* stopped whatever momentum remained of the Rehnquist Court's judicially-enforced federalism and that it meant few, if any, limits could be imposed upon federal criminal laws.<sup>106</sup> *Lopez* and *Morrison* seemed relegated to some judicial receptacle, as quaint tokens of a distant past that now were worthy of being discarded. But *Lopez* and *Morrison* were not overruled. The cultivation of marijuana was economic activity and thus subject to the aggregation theory.<sup>107</sup> Recall that *Lopez* and *Morrison* did not decide whether that theory would apply to non-economic activity.<sup>108</sup> Also, *Raich* did not conceive of the notion that intrastate activity could be subject to regulation if it was part of a national regulatory scheme that would be undermined if Congress could not reach the activity—*Lopez* did.<sup>109</sup> A significant point of comparison is that, in *Lopez*, punishing possession of a gun in a school zone was apparently not

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<sup>103</sup> *Id.* at 33–34.

<sup>104</sup> *See id.* at 35 (“Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.”).

<sup>105</sup> *Id.* at 37.

<sup>106</sup> *See, e.g.,* A. Christopher Bryant, *The Third Death of Federalism*, 17 CORNELL J.L. & PUB. POL’Y 101, 102–05 (2007) (analyzing the history of the Supreme Court’s Commerce Clause jurisprudence and arguing that *Raich* represents the “third death of federalism”); Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 916–18 (2005) (examining the impact of *Raich* on the Rehnquist Court’s attempt to establish judicially-enforced federalism); Somin, *supra* note 44, at 508 (asserting that *Raich* represents a setback in imposing judicial constraints on congressional Commerce Clause power).

<sup>107</sup> *Raich*, 545 U.S. at 19.

<sup>108</sup> *See* *United States v. Morrison* 529 U.S. 598, 617 (2000) (“We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (“The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”).

<sup>109</sup> *See Lopez*, 514 U.S. at 561 (stating that the statute at issue was not “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated”).

part of a larger scheme of commercial regulation.<sup>110</sup> *Raich* also relied on the notion that Congress could eliminate the interstate market for marijuana, yet the same cannot be said for firearms.<sup>111</sup> Unlike possession of marijuana, which has no constitutional protection in the Bill of Rights and thus could be made unlawful everywhere, some firearms possession is constitutionally protected.<sup>112</sup> The problem, though, persisted: for purposes of federal criminal law, what is left of *Lopez* and *Morrison* after *Raich*?

In 2011, the Court rejected an opportunity to add some clarity to this area of law and to better explain what remains of *Lopez*, *Morrison*, and *Scarborough*—particularly in a post-*Raich* world. The Court has rejected many such opportunities,<sup>113</sup> but the denial of certiorari in *Alderman v. United States* drew a particularly strong published dissent.<sup>114</sup> In the underlying case, the government prosecuted Cedrick Alderman after Seattle police found him wearing a bulletproof vest.<sup>115</sup> Alderman had a prior conviction for a robbery.<sup>116</sup> Moreover, the vest had been manufactured in California and its manufacturer sold it to a Washington distributor.<sup>117</sup> Consequently, Alderman’s possession of the vest satisfied the elements of the James Guelff and Chris McCurley Body Armor Act of 2002, codified in the firearms regulation provisions of 18 U.S.C. § 931.<sup>118</sup> The statute makes it a federal crime for a violent felon to possess body armor,<sup>119</sup> which is defined as “any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire.”<sup>120</sup>

The Ninth Circuit upheld Alderman’s conviction against a Commerce Clause challenge, citing *Scarborough*.<sup>121</sup> In the Ninth Circuit’s view, *Scarborough* represented yet another category of permissible Commerce Clause legislation—cases in which Congress had regulated something that

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<sup>110</sup> *Id.*

<sup>111</sup> *Raich*, 545 U.S. at 22.

<sup>112</sup> U.S. CONST. amend. II; see also *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (holding that the Second Amendment protects an individual right to possess firearms in the home for self-defense purposes).

<sup>113</sup> E.g., *Patton v. United States*, 549 U.S. 1213 (2007). In *United States v. Patton*, the Tenth Circuit upheld a federal statute that criminalized body armor possession. 451 F.3d 615, 636 (10th Cir. 2006). The court wrote that it saw tension between *Scarborough* and the more recent Commerce Clause jurisprudence, and expressed its hope that the “Supreme Court will revisit this issue in an appropriate case—maybe even this one.” *Id.*

<sup>114</sup> *Alderman v. United States*, 131 S. Ct. 700, 700 (2011).

<sup>115</sup> *United States v. Alderman*, 565 F.3d 641, 643 (9th Cir. 2009).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 644.

<sup>118</sup> *Id.* at 643.

<sup>119</sup> *Id.* (citing 18 U.S.C. § 931(a) (2006)).

<sup>120</sup> *Id.* at 656 (quoting 18 U.S.C. § 921(a)(35)) (internal quotation marks omitted).

<sup>121</sup> *Id.* at 647–48.

had at one point in time traveled in interstate commerce.<sup>122</sup> Judge Paez dissented from the panel opinion,<sup>123</sup> and Judge O’Scannlain dissented from the court’s denial of rehearing en banc.<sup>124</sup> Alderman sought certiorari, which the Supreme Court denied.<sup>125</sup>

Justice Thomas, joined by Justice Scalia, dissented from the Court’s rejection of Alderman’s petition—writing to lament what he viewed as the death of both *Lopez* and any meaningful limits on Commerce Clause power.<sup>126</sup> Justice Thomas began by asserting that the Court “tacitly accept[ed] the nullification of our recent Commerce Clause jurisprudence.”<sup>127</sup> He repeatedly explained his view that *Scarborough* was merely a statutory interpretation case and did not purport to determine the scope of Congress’s commerce power.<sup>128</sup> He further observed that although the Ninth Circuit acknowledged that *Lopez* and *Morrison* changed the Commerce Clause landscape, that court still felt bound by *Scarborough*.<sup>129</sup> Justice Thomas emphasized that other courts appeared similarly confused about whether *Scarborough* set forth a rule to follow in Commerce Clause challenges—given *Lopez* and *Morrison*—yet felt they had to follow the decision in the absence of further guidance.<sup>130</sup> For that reason, and in light of what he viewed as an irreconcilable conflict between the *Lopez/Morrison* framework and an interpretation of *Scarborough* as a Commerce Clause case, Justice Thomas remarked that it was “difficult to imagine a better case for certiorari.”<sup>131</sup> He concluded his dissent by reiterating themes about limits on federal power that animated his separate opinions in *Lopez* and *Raich*. Allowing the federal government to criminalize the wholly intrastate possession of body armor, where the only connection to interstate commerce was the sale of the vests three years prior from the manufacturer to the distributor, Justice Thomas reasoned, “would trespass on traditional state police powers.”<sup>132</sup> He finished, “[i]f the *Lopez* framework is to have any ongoing vitality, it is up to this Court

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<sup>122</sup> *Id.* at 645–46.

<sup>123</sup> *Id.* at 648 (Paez, J., dissenting). Judge Paez expressed skepticism about the treatment of *Scarborough* in this case and in other circuits, and concluded that although the commerce power is broad, it is also limited. *Id.* at 656–58.

<sup>124</sup> *Alderman v. United States*, 593 F.3d 1141, 1141 (9th Cir. 2010) (O’Scannlain, J., dissenting from denial of rehearing en banc).

<sup>125</sup> *Alderman v. United States*, 131 S. Ct. 700, 700 (2011).

<sup>126</sup> *Id.* at 703 (Thomas, J., dissenting from denial of a petition for a writ of certiorari).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 702.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 703.

to prevent it from being undermined by a 1977 precedent that does not squarely address the constitutional issue.”<sup>133</sup>

Does the Court’s denial of review in *Alderman* suggest that many of the Justices are satisfied with existing Commerce Clause jurisprudence on these possession crimes? Does it demonstrate that *Scarborough* remains good law regarding the scope of the Commerce Clause? It is, of course, hard to know for certain. But a survey of a few lower court decisions indicates two things: first, many federal judges could use greater clarity from the Court; and second, in the absence of additional Supreme Court directions, federal courts are disinclined to strike down federal gun possession restrictions or to use gun restrictions in the effort to constrain federal criminal law.

### B. *Guns and the Commerce Clause: Federal Litigation After Lopez*

Despite the pleas of Justices Thomas and Scalia, and of a few federal judges, lower courts have been generally reluctant to read *Lopez* as requiring judicial invalidation of § 922 offenses. Where the constitutional challenge involved a firearm that was transported across state lines at some point since its manufacture, lower courts have often relied upon the Court’s indeterminate *Scarborough* decision. Where the constitutional challenge involves a firearm that has never traveled interstate, but has remained entirely within one state, lower courts have relied upon *Raich*.<sup>134</sup> *Lopez* itself, then, has proven mostly ineffective as a precedential weapon for limiting the scope and application of federal gun restrictions—and of federal criminal law generally. A survey of a few of the numerous cases will suffice to demonstrate the point.

The felon-in-possession statute, § 922(g), has been subjected to frequent constitutional challenges after *Lopez* and consistently upheld either through explicit reference to *Scarborough*<sup>135</sup> or else by applying *Scarborough*’s rationale to the statute’s jurisdictional hook.<sup>136</sup>

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<sup>133</sup> *Id.*; cf. Conor P. McEvily, Note, *Vested Interests: The Federal Felon Body-Armor Ban and the Continuing Vitality of Scarborough v. United States*, 100 GEO. L.J. 1341, 1343–44 (2012) (arguing that the body armor ban should be considered part of a comprehensive regulatory scheme and governed by *Raich*).

<sup>134</sup> See, e.g., *United States v. Stewart (Stewart II)*, 451 F.3d 1070, 1076–77 (9th Cir. 2006) (reasoning that *Raich* allows the government to regulate an object so long as there is a rational basis that the object could affect the interstate market).

<sup>135</sup> E.g., *United States v. Santiago*, 238 F.3d 213, 216–17 (2d Cir. 2001); *United States v. Bates*, 77 F.3d 1101, 1104 (8th Cir. 1996).

<sup>136</sup> E.g., *United States v. Hill*, 386 F.3d 855, 859 (8th Cir. 2004); *United States v. Mitchell*, 299 F.3d 632, 634–35 (7th Cir. 2002); *United States v. Scott*, 263 F.3d 1270, 1272–74 (11th Cir. 2001); *United States v. Baer*, 235 F.3d 561, 563 (10th Cir. 2000); *United States v. Bostic*, 168 F.3d 718, 723 (4th Cir. 1999); *United States v. Turner*, 77 F.3d 887, 888–89 (6th Cir. 1996). For criticism of the reasoning applied in these cases, see Strang, *supra* note 48, at 408–09.

For example, *United States v. Singletary*<sup>137</sup> squarely raised the question of *Scarborough*'s viability after *Lopez* and *Morrison*. In December 1999, Philadelphia Police saw Singletary, a convicted felon, drive across a sidewalk into a park, exit his truck, fire two shots into the air, and then drive away.<sup>138</sup> During a chase, Singletary threw his .38 caliber revolver out of the passenger side window.<sup>139</sup> According to the evidence at trial, the gun was made in Brazil and imported through Georgia, eventually making its way to a firearms seller in Texas in 1973.<sup>140</sup> There was no evidence as to when the gun came into Pennsylvania.<sup>141</sup> Singletary asked for a jury instruction that would have required the jury to find that the gun possession substantially affected interstate commerce.<sup>142</sup> The district court denied the request and instructed the jury that it need only find that the gun, at some point, traveled in interstate commerce.<sup>143</sup>

Rather than carve out a new category of constitutional dimension for *Scarborough*, the Third Circuit viewed *Scarborough* as a statutory interpretation decision whose rationale—that the gun at some point traveled in interstate commerce—survived *Lopez* and *Morrison*.<sup>144</sup> Neither of those cases explicitly rejected *Scarborough*, the court said, and thus they left intact the understanding that any previous travel in interstate commerce was sufficient to keep the statute within the bounds of the Commerce Clause.<sup>145</sup> The court further distinguished *Lopez* and *Morrison* by holding that those cases were about regulating activities affecting commerce, whereas § 922(g)(1), through its jurisdictional element, “regulates the possession of goods moved in interstate commerce. . . . It addresses items sent in interstate commerce and the channels of commerce themselves, delineating that the latter be kept clear of firearms. Thus, an analysis of the kind utilized in *Lopez* or *Morrison* [was] neither appropriate nor needed.”<sup>146</sup>

The *Singletary* court's explanation, like that of the many other courts that have employed similar explanations, is subject to some question. First, the court failed to address the question of whether mere movement in interstate commerce at some historical moment is sufficient to satisfy *Lopez* and *Morrison*, though it may satisfy *Scarborough*. After all, if the Commerce Clause could be satisfied by mere shipment or transportation of

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<sup>137</sup> 268 F.3d 196 (3d Cir. 2001).

<sup>138</sup> *Id.* at 197.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 198.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 200.

<sup>145</sup> *Id.* at 202–03.

<sup>146</sup> *Id.* at 204.

a gun between states, then the *Lopez* Court should have inquired into the origin of the gun that Lopez brought to the high school, and then upheld the Gun Free School Zones Act if it was made or sold outside of Texas. However, the *Lopez* Court did not make such an inquiry, which suggests that mere travel across state lines at some point is not enough to satisfy the Constitution, even if it satisfies § 922. The *Singletary* court also assumed that it was a *Lopez* Category One case (a channels case), or perhaps even a Category Two case (“persons or things in interstate commerce”), but emphatically *not* a Category Three case (a substantial effects case).<sup>147</sup> But when Congress regulates the mere possession of something that has traveled across state lines *already*, and often at some distant moment in the past, it is questionable whether Congress is really regulating the channels of, or the persons or things *in*, interstate commerce. As Dean Strang notes, “[t]he Commerce Clause does not take Congress back to the future.”<sup>148</sup> Section 922(g)(1) targets persons—felons, whether state or federal—who may not be in interstate commerce, and items that they possess, which often are not actually in interstate commerce any longer.<sup>149</sup> And the regulated activity of mere possession is not itself commercial, nor is it necessary that the regulated person have actually obtained the firearm commercially, as § 922(g)(1) forbids felon possession regardless of how the firearm was obtained.<sup>150</sup> It is hard to read *Lopez*, or any of the channels or “persons or things in” cases, as reaching this far. Indeed, when the Tenth Circuit interpreted the body armor statute—which contains a similar jurisdictional element—in *United States v. Patton*,<sup>151</sup> it rejected the notion that regulation of mere possession, as opposed to regulating the movement or transportation of the item itself, fits into Category One.<sup>152</sup> Nor does such regulation fit within Category Two: body armor is not itself an instrument of commerce; the statute does not regulate the use of body armor in ways that threaten instruments of commerce; and the body armor need not actually be *in* interstate commerce.<sup>153</sup> These very same arguments could be made as to the possession statutes under § 922(g). Therefore, only the substantial effects analysis could save the statute, and that analysis is governed by *Lopez* and *Morrison*, which *Singletary* refused to apply for purposes of § 922(g)(1).<sup>154</sup> On that matter, the *Patton* court, in an opinion from Judge McConnell, found no rational basis for concluding that

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<sup>147</sup> *Id.*; see also *United States v. Lopez*, 515 U.S. 549, 558–59 (discussing three channels of commerce that Congress can regulate under the Commerce Clause).

<sup>148</sup> Strang, *supra* note 48, at 408.

<sup>149</sup> U.S.C. § 922(g)(1) (2012).

<sup>150</sup> *Id.*

<sup>151</sup> 451 F.3d 615 (10th Cir. 2006).

<sup>152</sup> *Id.* at 621.

<sup>153</sup> *Id.* at 622.

<sup>154</sup> *United States v. Singletary*, 268 F.3d 196, 204 (3d Cir. 2001).

possession of body armor substantially affects interstate commerce, and instead—reluctantly, with an implicit plea to the Supreme Court for clarity—relied upon *Scarborough*, finding no meaningful difference between the body armor and felon-in-possession statutes.<sup>155</sup>

*United States v. Stewart (Stewart II)*<sup>156</sup> represents an important post-*Raich* decision as to federal gun statutes that do not contain a jurisdictional element. In *Stewart I*, the Ninth Circuit considered the constitutionality of § 922(o), which makes it a federal crime to possess a machine gun but does not explicitly require that the machine gun, or its possession, be linked to interstate commerce.<sup>157</sup> Prior to *Raich*, the Ninth Circuit held that § 922(o) violated the Commerce Clause.<sup>158</sup> This was a notable holding, as most circuits by that point, including the Ninth Circuit, had repeatedly upheld § 922(o).<sup>159</sup>

In fact, to show the lengths that some lower courts will go to uphold federal gun statutes, consider that the Tenth Circuit found two distinct bases for upholding this law: (1) that § 922(o) regulates things in interstate commerce because a machine gun is “an item bound up with interstate attributes;”<sup>160</sup> and (2) that the statute regulates activities that substantially affect commerce, in part because § 922(o) is an essential part of a larger regulatory scheme and in part because possessing a machine gun is economic activity, understood to include conduct that is “closely linked to commercial transactions.”<sup>161</sup>

However, after *Raich*, *Stewart II* was remanded by the Supreme Court and the Ninth Circuit followed other circuits in holding that the statute satisfied the Commerce Clause—though on much narrower grounds than

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<sup>155</sup> See *Patton*, 451 F.3d at 635–36 (“Like our sister circuits, we see considerable tension between *Scarborough* and the three-category approach adopted by the Supreme Court in its recent Commerce Clause cases, and like our sister circuits, we conclude we are bound by *Scarborough*, which was left intact by *Lopez*.”).

<sup>156</sup> 451 F.3d 1071 (9th Cir. 2006).

<sup>157</sup> *United States v. Stewart*, 348 F.3d 1132, 1134 (9th Cir. 2003), *vacated by United States v. Stewart (Stewart I)*, 545 U.S. 1112 (2005).

<sup>158</sup> *Id.* at 1142.

<sup>159</sup> *E.g.*, *United States v. Haney*, 264 F.3d 1161, 1171 (10th Cir. 2001); *United States v. Franklyn*, 157 F.3d 90, 93–96 (2d Cir. 1998); *United States v. Wright*, 117 F.3d 1265, 1271 (11th Cir. 1997); *United States v. Knutson*, 113 F.3d 27, 31 (5th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 285 (3d Cir. 1996); *United States v. Rambo*, 74 F.3d 948, 952 (9th Cir. 1996).

<sup>160</sup> *United States v. Wilks*, 58 F.3d 1518, 1521 (10th Cir. 1995). The Tenth Circuit cited this precedent approvingly in *Haney*, even though the defendant in that case actually walked into a police station and confessed to possessing automatic and semiautomatic firearms that were unlicensed before claiming that he could not constitutionally be required to obtain a license for them. *Id.* at 1163. He was indicted for possession only, and the court saw no need to analyze whether Category Two required that the statute apply only to firearms actually in interstate commerce, as opposed to firearms that were simply possessed wholly intrastate. *Id.* at 1168.

<sup>161</sup> *Haney*, 264 F.3d at 1170.

the Tenth Circuit.<sup>162</sup> Judge Kozinski's opinion in *Stewart II* suggested that there are differences between the CSA and § 922(o)—for example, the machine gun ban was enacted two decades *after* Congress enacted the regulatory scheme related to firearms<sup>163</sup>—but nonetheless concluded that *Raich* permits Congress to “ban possession of an object where it has a rational basis for concluding that object might bleed into the interstate market and affect supply and demand, especially in an area where Congress regulates comprehensively.”<sup>164</sup>

The Federal Juvenile Delinquency Act, which forbids juvenile possession of a handgun except under limited circumstances and contains no jurisdictional element or hook,<sup>165</sup> has also been treated as part of a larger scheme of commercial regulation (after *Lopez*, but before *Raich*). In *United States v. Michael R.*,<sup>166</sup> for example, the Ninth Circuit explained that although mere possession of a handgun might not be economic activity, the juvenile possession ban of § 922(x)(2) is part of a statutory scheme that begins with a prohibition on the sale, delivery, or transfer of a handgun to a juvenile, as set forth in § 922(x)(1).<sup>167</sup> Therefore, “[r]ead as a whole,” the court said, “922(x) by its terms regulates commerce . . . Congress is in effect regulating interstate commerce by attacking both the supply and demand for firearms with respect to juveniles.”<sup>168</sup> The court also went further, holding that juvenile handgun possession has a substantial effect on commerce.<sup>169</sup> It makes sense, according to the court, to conclude that “regulating the sale, transfer, and possession of handguns by juveniles could have a substantial effect in curbing the illegal flow in commerce of drugs and firearms.”<sup>170</sup> The Ninth Circuit gave almost complete deference to Congress's conclusions about the close connection between drug use and violent crime, and cited other precedent accepting legislative findings about the effects of violence on interstate commerce.<sup>171</sup>

This former portion of the court's opinion is questionable in light of not only *Lopez*, which rejected an inference-upon-inference approach to establishing a nexus between the regulated activity and a substantial effect on interstate commerce,<sup>172</sup> but also in light of *Morrison* (decided four years later), which reaffirmed the *Lopez* approach regarding proof of substantial

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<sup>162</sup> *Stewart II*, 451 F.3d 1071, 1073–78 (9th Cir. 2006).

<sup>163</sup> *Id.* at 1076–77.

<sup>164</sup> *Id.*

<sup>165</sup> 18 U.S.C. § 922(x)(2) (2012).

<sup>166</sup> *United States v. Michael R.*, 90 F.3d 340, 344 (9th Cir. 1996).

<sup>167</sup> *Id.* at 343 n.1.

<sup>168</sup> *Id.* at 344.

<sup>169</sup> *Id.* at 344–45.

<sup>170</sup> *Id.* at 345.

<sup>171</sup> *Id.*

<sup>172</sup> *United States v. Lopez*, 514 U.S. 549, 567 (1995).

effects.<sup>173</sup> It is therefore the “larger regulation” rationale which best supports the holding in *Michael R.*, a holding now bolstered by *Raich*.<sup>174</sup> The First Circuit employed a similar rationale in upholding the same statute in *United States v. Rene E.*,<sup>175</sup> in which a juvenile defendant was charged with possessing drug paraphernalia, stolen goods, hollow point ammunition for a .38 caliber handgun, and a revolver with a wooden grip.<sup>176</sup> Relying on its pre-*Raich* holding in *United States v. Cardoza*<sup>177</sup> and concluding that *Raich* simply reinforced that decision,<sup>178</sup> the First Circuit held that the juvenile possession statute was an essential part of a scheme “designed to ‘control the supply and demand’ of a commodity in the interstate market.”<sup>179</sup> This rationale was enough to save the statute.

But even this rationale is questionable. If possession of a gun in a school zone was not an essential part of a more comprehensive regulatory scheme in *Lopez*, why would a court find that possession by a juvenile was an essential part of a comprehensive regulatory scheme? It would be fair to argue that § 922(q)—the statute in question in *Lopez*—was not really a stand-alone provision. Rather, it was also a part of a broader regulatory scheme that contained provisions related to the sale, delivery, or transfer of guns, only in a different section of the code. Can it really be that the underlying question of whether the regulatory scheme is comprehensive depends upon whether the specific provisions for sale, delivery, or transfer appear in the same subsection of the code? In other words, if § 922 establishes a comprehensive regulatory scheme, then one might reasonably imagine that anything codified in § 922 is a part of that scheme. So if the Ninth Circuit’s argument in *Michael R.* is sound, that same argument should have saved § 922(q) in *Lopez*. But it did not.<sup>180</sup>

One could also raise this same question with respect to *Stewart II*’s holding that the machine gun ban is part of a larger regulatory scheme. Judge Kozinski, though, had a response to this argument in light of *Raich*. He contended that in *Lopez*, the possession of a gun in school zone was “unlikely to affect the supply and demand for guns in the national market,” but that Congress could have rationally concluded that homemade machine guns *would* affect the national market.<sup>181</sup> The basis for this conclusion, though, is unclear from the *Stewart II* opinion. The better questions, then, might be these: what exactly constitutes a “comprehensive regulatory

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<sup>173</sup> *United States v. Morrison*, 529 U.S. 598, 610 (2000).

<sup>174</sup> *Gonzalez v. Raich*, 545 U.S. 1, 26 (2005).

<sup>175</sup> 583 F.3d 8 (1st Cir. 2009).

<sup>176</sup> *Id.* at 9.

<sup>177</sup> 129 F.3d 6, 13 (1st Cir. 1997).

<sup>178</sup> *Rene E.*, 583 F.3d at 17–18.

<sup>179</sup> *Id.* at 18.

<sup>180</sup> *United States v. Lopez*, 514 U.S. 549, 561 (1995).

<sup>181</sup> *Stewart II*, 451 F.3d 1071, 1077 (9th Cir. 2006).

scheme,” and how do we know when something is part of it? Neither *Raich* nor *Stewart II* seem to address these questions.<sup>182</sup>

Nonetheless, *Stewart II*'s rationale persists. Most recently, in *Montana Shooting Sports Ass'n v. Holder*<sup>183</sup> the Ninth Circuit relied upon *Stewart II* to reject a Commerce Clause challenge to the Montana Firearms Freedom Act, a state law that would have prevented the enforcement of federal firearms regulations if the firearm at issue was manufactured, sold, or possessed entirely intrastate.<sup>184</sup> In *Montana Shooting Sports*, the owner of a Montana business that manufactured gun range equipment wanted to manufacture a rifle (known as the “Montana Buckeroo”) and sell it entirely within the state, without being subjected to federal regulation.<sup>185</sup> The Ninth Circuit agreed with the district court that the plaintiff failed to state a claim upon which relief could be granted, reasoning that the Commerce Clause permits federal regulation of firearms and that federal regulation preempts the Montana law.<sup>186</sup> Citing *Stewart II*, Judge Clifton's opinion explained that Congress could rationally conclude that some unlicensed firearms could find their way into the interstate market, notwithstanding efforts by the plaintiff or others to keep them entirely within Montana.<sup>187</sup> Yet even Judge Clifton's opinion seemed lukewarm about the reach of *Raich* and the Court's Commerce Clause doctrine after that decision. Judge Clifton acknowledged the argument there that the Supreme Court's doctrine implicated considerations of state sovereignty, as well as the plaintiff's acknowledgement that the Ninth Circuit's “hands are tied” by *Stewart II*.<sup>188</sup>

The “firearms freedom” legislation—which has been adopted or proposed in many states,<sup>189</sup> and of which Montana's law is a good example—could potentially form the basis for the next generation of gun litigation involving the Commerce Clause.<sup>190</sup> The Supreme Court's recent

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<sup>182</sup> For a discussion of this problem and an argument that the § 922(g) statutes are an essential part of such a scheme, see McEvily, *supra* note 133, at 1383–86. *But see* Strang, *supra* note 48, at 409–10 (arguing that the felon-in-possession statute is not like the CSA).

<sup>183</sup> 727 F.3d 975 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 955 (2014) and 134 S. Ct. 1335 (2014).

<sup>184</sup> *Id.* at 978, 982.

<sup>185</sup> *Id.* at 978.

<sup>186</sup> *Id.* at 981–83.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 981.

<sup>189</sup> As an indication of the momentum for such legislation, one website is devoted entirely to support for “Firearms Freedom” Acts. *The Firearms Freedom Act (FFA) Is Sweeping the Nation*, FIREARMS FREEDOM ACT (June 3, 2010), <http://firearmsfreedomact.com>. According to that website, nine states have passed “firearms freedom” legislation: Alaska, Arizona, Idaho, Kansas, Montana, South Dakota, Tennessee, Utah, and Wyoming. *Id.* Such legislation is pending in twenty-seven other states. *Id.*

<sup>190</sup> See Ilya Shapiro, *Guns and the Commerce Clause: On the Way to the Supreme Court?*, CATO AT LIBERTY (Mar. 18, 2013, 8:57 AM), <http://www.cato.org/blog/guns-commerce-clause-way-supreme-court> (arguing that federal law does not preempt Montana's right to make its own laws

denial of certiorari in *Montana Shooting Sports*, like its recent denials of other high-profile gun issues,<sup>191</sup> suggests that the Court is, for now, content to allow the fate of new gun-related legislation to be determined by others. Those laws often create Supremacy Clause and Tenth Amendment issues as well, which may complicate subsequent litigation. But the *Montana Shooting Sports* decision is likely an indication of the fate that those state laws will meet, which is the same fate as Commerce Clause challenges to federal criminal legislation on guns: *Raich*, and the pre-*Raich* circuit law, will effectively shut the door to the challenge, at least until the Supreme Court is prepared to rethink, or cabin, *Raich*. Indeed, what is especially noticeable is just how many lower courts were well in front of the Supreme Court in using the class of activities/comprehensive regulatory scheme rationale to uphold federal firearms possession laws prior to *Raich*.<sup>192</sup> Now, particularly in a post-*Raich* gun regulation world, it seems difficult to imagine a scenario in which lower courts would invalidate any of these gun possession statutes. And that seems true even if we assume that *Scarborough* does *not* supply the appropriate analysis where the statute requires travel in interstate commerce. For now, even if *Lopez* forbids reliance on *Scarborough* as a constitutional matter, and requires that the government show a substantial effect rather than mere sale, transfer, or travel across state lines at some historical moment,<sup>193</sup> lower courts have read *Raich* so broadly that most any of the possession statutes will constitute an essential part of a comprehensive regulatory scheme.<sup>194</sup> The presence of a jurisdictional element matters far less.

Once again, however, the Tenth Circuit's decision in *Patton* supplies something of a counterweight: there Judge McConnell's opinion said that the body armor legislation could not be justified under *Raich* because it was not part of a comprehensive regulatory scheme.<sup>195</sup> That is, there was no provision of the statute that distinctly regulated commercial activity, in that it criminalized the sale of body armor to a felon or purchase from a

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governing intrastate gun manufacture, sale, and possession). Note, however, that the Supreme Court denied the petitions for a writ of certiorari in *Montana Shooting Sports Association*. 134 S. Ct. 955 (2014) and 134 S. Ct. 1335 (2014).

<sup>191</sup> See, e.g., *Drake v. Jerejian*, 134 S. Ct. 2134 (2014) (denying review of lower court decision upholding New Jersey's "justifiable need" standard for public carry of a firearm).

<sup>192</sup> See, e.g., *United States v. Day*, 476 F.2d 562, 566–67 (6th Cir. 1973) ("Just as Congress made findings that intrastate credit transactions were part of a class of activities amenable to federal regulation, the Act before this court reveals findings of the interrelationship between the business of selling guns and interstate crime and interstate trafficking in guns.").

<sup>193</sup> *United States v. Lopez*, 514 U.S. 549, 565 (1995).

<sup>194</sup> See *Somin*, *supra* note 44, at 525 (recognizing the "ease with which virtually any regulation can be fitted into a 'comprehensive regulatory scheme'").

<sup>195</sup> *United States v. Patton*, 451 F.3d 615, 627–28 (10th Cir. 2006). *But see Somin*, *supra* note 44, at 525 (arguing that *Patton*'s reasoning is hardly a real limit because, after *Raich*, Congress could simply reenact the statute in a different scheme that is comprehensive, like the CSA).

felon.<sup>196</sup> This is distinguishable from the firearm statutes in § 922, which contains provisions barring the sale or transfer of a firearm to a prohibited person.<sup>197</sup> So perhaps this is one useful way to determine what constitutes a comprehensive regulatory scheme: evaluating whether the possession statute is a part of a collection of statutes on the same subject matter that also regulate sale or other commercial transfer of the item.

Notably, though, the body armor statute *does* forbid convicted felons from purchasing body armor,<sup>198</sup> which is defined as a “product” that is “sold or offered for sale in interstate or foreign commerce.”<sup>199</sup> So if Judge McConnell is correct that this is *not* a scheme that regulates a commercial market in which body armor is a fungible commodity, then surely the same would be true for firearm possession crimes under § 922. And yet if the other circuits that have applied *Raich* to uphold § 922 possession statutes are correct, then it seems that all Congress needs to do to justify a statute criminalizing the wholly intrastate possession of an item is to include such a statute in the same code section as a statute that also criminalizes the sale of the item. One might justifiably wonder if this is simply too easy of a requirement, permitting Congress to perform an end-run around the *Lopez/Morrison* Commerce Clause limits and effectively producing the kind of general police power that the Court has so often feared.

### III. GUNS AND THE CONSTITUTIONAL POLITICS OF COMMERCE CLAUSE-FEDERALISM

In light of the overwhelming lower court cases that have rejected Commerce Clause challenges to federal gun restrictions, it is fair to ask: what is the point of even raising such a challenge today? Failure looms. Rejection is inevitable. And it is conventional wisdom that the Rehnquist Court’s judicially-enforced federalism revolution fizzled in the early 2000s, particularly after *Raich* appeared to eliminate whatever wind was left in the Court’s federalism sails.<sup>200</sup> This conventional wisdom might well seem to be reinforced by a Roberts Court that kept federal criminal authority constitutionally broad in *United States v. Kebodeaux*<sup>201</sup> and *Comstock v. United States*,<sup>202</sup> each of which upheld federal criminal laws

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<sup>196</sup> *Patton*, 451 F.3d at 627–28.

<sup>197</sup> 18 U.S.C. §§ 922(d), 922(x)(1) (2012).

<sup>198</sup> *Id.* § 931(a).

<sup>199</sup> *Id.* § 921(a)(35).

<sup>200</sup> See Reynolds & Denning, *supra* note 106, at 933 (noting “the possibility that *Raich* announces a return to the days in which the Bill of Rights is the only judicially-enforced limit on the power of the federal government”); see also Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WISC. L. REV. 369, 371 (discussing lower court approaches to *Lopez*).

<sup>201</sup> 133 S. Ct. 2496 (2013).

<sup>202</sup> 130 S. Ct. 1949 (2010).

pursuant to the Necessary and Proper Clause.<sup>203</sup> Even Chief Justice Roberts and Justice Alito did not join Justice Thomas's dissent in *Alderman*.<sup>204</sup> And the Court has simply refused to grant any of the many certiorari petitions filed in gun possession cases asserting Commerce Clause challenges.<sup>205</sup>

Perhaps, then, there is much to commend the argument that federal criminal law—and commerce power in particular—will remain sufficiently broad in the Roberts Court to maintain a robust scheme of federal firearms regulation. But not so fast. Not unlike the Rehnquist Court, the Roberts Court has proven somewhat uneven on federal power and state sovereignty—yet there are signs that limits on federal power are still on the Roberts Court's mind.

Strange as it may seem in the context of a discussion of federal criminal law, the litigation over federal health care reform offers a cautionary note. Consider, for example, that the political Right had substantial success in employing the federal courts to attack the legality of the Affordable Care Act (popularly known as “Obamacare”).<sup>206</sup> Although the Supreme Court ultimately found constitutional authority for the ACA in Congress's taxing power, five members of the Court rejected the Act's constitutionality under the Commerce Clause—which was the political Right's chief constitutional basis for attacking on the legislation.<sup>207</sup> This theory was heavily criticized, even openly mocked, when first advanced.<sup>208</sup> And yet, after the Court's decision in *National Federation of Independent Business (NFIB) v. Sebelius*,<sup>209</sup> we now have constitutional law embracing the theory of the Commerce Clause that the individual mandate's challengers advanced.<sup>210</sup> Chief Justice Roberts explained that “[t]he Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed

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<sup>203</sup> *Id.* at 1965; *Kebedeaux*, 133 S. Ct. at 2502–04.

<sup>204</sup> *Alderman v. United States*, 131 S. Ct. 700 (2011) (Thomas, J., dissenting from denial of certiorari).

<sup>205</sup> See 60 *Cases and Counting: What Gun Case Will SCOTUS Take Next?*, DAILY KOS (Oct. 28, 2013), <http://www.dailykos.com/story/2013/10/28/1250584/-60-Cases-and-Counting-What-Gun-Case-Will-SCOTUS-Take-Next> (stating that the Supreme Court has turned down requests to review over sixty gun rights cases).

<sup>206</sup> See JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 79–81 (2013) (discussing the beginning of the battle against the Affordable Care Act).

<sup>207</sup> *Id.* at 259–61.

<sup>208</sup> Former House Speaker Nancy Pelosi famously asked (twice), “Are you serious?” when a reporter questioned her about the constitutionality of the ACA. Editorial, “Are You Serious?,” LAS VEGAS REV.-J. (Nov. 11, 2009), <http://www.reviewjournal.com/opinion/are-you-serious>.

<sup>209</sup> 132 S. Ct. 2566, 2608 (2012).

<sup>210</sup> *Id.* at 2589.

to their activities, remains vested in the States.”<sup>211</sup> The joint dissent of Justices Scalia, Kennedy, Thomas, and Alito rejected the Government’s commerce-based theory, citing the Court’s federalism cases from the past decade and concluding that “[t]he lesson of these cases is that the Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not *carte blanche* for doing whatever will help achieve the ends Congress seeks by the regulation of commerce.”<sup>212</sup> In the context of gun crime—perhaps no less than in the context of the political debate over the need for health insurance reform—the joint dissent’s words have force: “Article I contains no whatever-it-takes-to-solve-a-national-problem power.”<sup>213</sup>

Consequently, one should take care not to so easily gloss over the Chief Justice’s opinion, when combined with that of the four dissenters, in *NFIB*. Those portions of the opinion might not tell us much in the way of discerning the continued vitality of *Lopez* and *Morrison* after *Raich*, but they demonstrate at a minimum that the Roberts Court (most importantly the Chief Justice and Justice Alito) are mindful of limits on federal power. While it is true that the ACA’s individual mandate represented an unusual congressional approach to using the commerce power—forcing individuals into a marketplace, where their inaction would have kept them out of it—that appears to be *sui generis*, the fact that the Court was willing to impose yet another limit on the commerce power remains significant.

Add to this the Court’s holding that the Medicaid expansion provisions of ACA could not be sustained pursuant to the Spending Clause,<sup>214</sup> as well as its recent decision in *Shelby County v. Holder*,<sup>215</sup> in which the Court found unconstitutional the provision of the Voting Rights Act that had determined the formula for requiring preclearance under Section Five of the Act.<sup>216</sup> In *Shelby County*, another opinion from the Chief Justice, the Court endorsed the notion of “equal sovereignty,” rigorously scrutinizing the federal government’s efforts to treat different states differently.<sup>217</sup> Add also the Roberts Court’s decisions applying the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”) in federal habeas cases brought by state prisoners, which the Court strictly interpreted in ways that protect state interests in criminal law enforcement and that offer wide deference to

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<sup>211</sup> *Id.* at 2631.

<sup>212</sup> *Id.* at 2646 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

<sup>213</sup> *Id.* at 2650.

<sup>214</sup> *Id.* at 2606–07 (majority opinion).

<sup>215</sup> 133 S. Ct. 2612, 2631 (2013).

<sup>216</sup> *Id.* at 2631.

<sup>217</sup> *Id.* at 2622.

the decisions of state courts, as the statute requires.<sup>218</sup> And then there remains the view that Justices Scalia and Thomas articulated in their *Alderman* dissent from the denial of certiorari<sup>219</sup>—although, again, perhaps it is telling of *something* that neither Chief Justice Roberts nor Justice Alito joined that dissent or the desire to grant certiorari there.

Federalism, it turns out, may be alive after all on the Roberts Court. That could be welcome news to the growing chorus, comprised of commentators across the political spectrum, that has lamented the scope of the existing federal criminal law regime.<sup>220</sup> In light of these movements potentially coalescing, it is not so far-fetched to imagine a challenge to a federal law, like a firearms regulation, that might catch the Court's attention as a vehicle for reviving *Lopez*—or some post-*Raich* version of it—as a real constraint on the federal criminal law.

Still, those on the Right who have been so adamant about defending gun rights and opposing new gun control measures repeatedly say they want to protect the interests of “law abiding citizens” and “keep guns out of the wrong hands in the first place.”<sup>221</sup> So one reason conservatives may shy away from embracing gun possession challenges on structural grounds is that to do so might be seen as aligning them with an unappealing constituency: those accused of serious crimes or acts of violence. But of course that was true in *Lopez* and *Morrison*;<sup>222</sup> it is true when conservatives embrace Second Amendment theories that might inure to the benefit of those accused of, or who have a history of, criminal violence; and it is true any time one argues for limits on governmental powers with respect to the definition or enforcement of criminal law. It is the Supreme Court's conservatives, after all, that have been most likely to take positions on limiting federal criminal law-making power,<sup>223</sup> and it is those same

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<sup>218</sup> See *Cullen v. Pinholster*, 131 S. Ct. 1388, 1410–11 (2011) (applying AEDPA in rejecting state inmate's claim of ineffective assistance of counsel); *Harrington v. Richter*, 131 S. Ct. 770, 785–86 (2011) (same); *Knowles v. Mirzayance*, 556 U.S. 111, 121–22 (2009) (same).

<sup>219</sup> See *Alderman v. United States*, 131 S. Ct. 700, 702–03 (2011) (Thomas, J., dissenting from denial of certiorari).

<sup>220</sup> See sources cited *supra* note 44.

<sup>221</sup> See, e.g., *Sen. Cruz: Constitutional Gun Rights Must Be Protected “Not Just When Popular,”* CBS DC (Feb. 12, 2013), <http://washington.cbslocal.com/2013/02/12/sen-cruz-constitutional-gun-rights-must-be-protected-not-just-when-popular> (quoting Senator Cruz).

<sup>222</sup> See *United States v. Morrison*, 529 U.S. 598, 602 (2000) (involving allegations of rape); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (arising out of an incident where a student carried a loaded, concealed handgun into school).

<sup>223</sup> See, e.g., *United States v. Kebodeaux*, 133 S. Ct. 2496, 2509 (2013) (Scalia, J., dissenting) (“I do not agree that what is necessary and proper to enforce a statute validly enacted pursuant to an enumerated power is not itself necessary and proper to the execution of an enumerated power.”); *id.* at 2510 (Thomas, J., dissenting) (stating that the enactment of “SORNA does not ‘carry into Execution’ any of the federal powers enumerated in the Constitution”); *United States v. Alderman*, 131 S. Ct. 700 (2011) (Thomas, J., dissenting from denial of certiorari) (arguing that in denying certiorari the Court “tacitly accept[ed] the nullification of our recent Commerce Clause jurisprudence” that placed limits on

positions that would inure to the benefit of criminal defendants in the relevant cases.

Another reason to be skeptical about the intellectual consistency of the political Right on this issue is that while bemoaning the scope of federal power generally, and the commerce power specifically, many on the Right have continued to embrace legislation that keeps federal power expansive. For example, many on the Right recently supported legislation that would have made it a federal crime to perform an abortion after twenty weeks of pregnancy.<sup>224</sup> The proposed statute, which passed the House but has received no action in the Senate, contained no jurisdictional hook.<sup>225</sup> And its findings were mainly devoted to demonstrating why the Supreme Court's abortion jurisprudence did not apply to invalidate the law.<sup>226</sup> The legislation's only reference to Article I power was a curt statement that the Supreme Court has given Congress broad powers pursuant to the Commerce Clause.<sup>227</sup> Yet if conservatives and others on the political Right are to be intellectually honest and consistent about the scope of the commerce power, then those who have previously been critical of the expansion of commerce authority should be quick to either reject this kind of legislation or to state more clearly the constitutional basis for Congress's power to adopt it. Consider, on this point, that Justice Thomas intimated a concern in *Gonzales v. Carhart*<sup>228</sup>—which upheld the federal Partial Birth Abortion Ban Act of 2003 against a due process challenge—that the legislation may have presented a Commerce Clause problem had that issue been before the Court.<sup>229</sup> If overfederalization is a problem, surely it cannot be one that is limited only to those substantive policies with which one disagrees.

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federal commerce power); *United States v. Comstock*, 130 S. Ct. 1949, 1970 (2010) (Thomas, J., dissenting) (arguing that the Necessary and Proper Clause does not permit civil commitment of sex offenders released from federal custody because the law does not execute any enumerated power); *see also* *United States v. Stevens*, 130 S. Ct. 1577, 1602 (2010) (holding, per a majority opinion authored by Chief Justice Roberts, that federal law criminalizing depictions of animal cruelty violates the First Amendment); *cf.* *Bond v. United States*, 131 S. Ct. 2355, 2367 (2011) (arguing, per a majority opinion written by Justice Kennedy and joined by all Court conservatives, that the “ultimate issue of the statute’s validity turns in part on whether the law can be deemed ‘necessary and proper for carrying into Execution’”). *But see* Lino Graglia, *The Myth of a Conservative Supreme Court: The October 2000 Term*, 26 HARV. J.L. & PUB. POL’Y 281, 293 (2003) (arguing that the Court’s federalism decisions are unlikely to make much difference, that judicial review has only helped to expand federal power, and that, therefore, the best course is for the Court to leave Congress as the responsible institution).

<sup>224</sup> H.R. 1797, 113th Cong. (1st Sess. 2013) (sponsored by Rep. Franks).

<sup>225</sup> *Id.*

<sup>226</sup> *See id.* § 3 (providing requirements that allow for an abortion when termination of the pregnancy would be medically advisable).

<sup>227</sup> *Id.* § 5.

<sup>228</sup> 550 U.S. 124, 166 (2007).

<sup>229</sup> *Id.* at 168–69 (Thomas, J., concurring). For a unique perspective on this issue, see Brannon P. Denning, *Gonzales v. Carhart: An Alternate Opinion*, 2007 CATO SUP. CT. REV. 167, 184.

Of course, again, much of this may depend upon the kind of conservatism that one embraces. We thus return to the problem identified earlier about the relevant differences among modern conservatism. But it is worth noting that a judicial review that enforces structural limits on federal power is not necessarily the same as one that uses judicial review to expand the reach of the Bill of Rights. Federalism is a notion that fits comfortably in the more traditional brand of conservatism, and though judges of this mold may be *reluctant* to use judicial review to enforce federalism and the structural Constitution, doing so does not instantly consign the judge to the more libertarian camp.<sup>230</sup> William Rehnquist and Sandra Day O'Connor, for example, fully embraced the Court's program of judicially-enforced federalism, and neither is typically characterized as libertarian.<sup>231</sup> Ernest Young offers an excellent explanation of why devotion to a healthy federalism is fully consistent with Burkean conservatism. Conservatives, he notes, believe in fidelity to institutions, traditions, and arrangements that have evolved over time and federalism is long-standing aspect of our constitutional architecture.<sup>232</sup> Federalism allows more readily for experimentation, reform, and incrementalism within the framework of existing institutions, which is consistent with the conservative's recognition of the limits of human reason and the conservative's deep skepticism of human capacity for developing ideal political and social arrangements (prudent change is therefore necessary for preservation).<sup>233</sup> And federalism safeguards the liberty of people who will attach themselves to diverse political communities, which will serve as mediating forces between the individual and the central government.<sup>234</sup> To this persuasive list, we may add the conservative belief in the value of forms in political life. Forms, as Tocqueville knew, slow the process of gratification, the immediate satisfaction of wants which can endanger a democratic people.<sup>235</sup> As Harvey Mansfield explained, forms give dignity and stubbornness to institutions, and create what he calls "constitutional

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<sup>230</sup> Judge Wilkinson, who was critical of *Heller's* gun rights expansion, has defended the conservatism of judicially-enforced federalism. See Wilkinson, *supra* note 7, at 1399.

<sup>231</sup> Chief Justice Rehnquist, of course, wrote the Court's opinions in *Morrison* and *Lopez*, and joined the dissenters in *Raich*. *United States v. Morrison*, 529 U.S. 598, 600 (2000); *United States v. Lopez*, 514 U.S. 549, 550 (1995); *Gonzales v. Raich*, 545 U.S. 1, 3 (2005). Justice O'Connor wrote a powerful dissent in *Raich*, joined the majorities in *Morrison* and *Lopez*, wrote *New York v. United States*, 505 U.S. 144 (1992), and wrote a notable dissent in *South Dakota v. Dole*, 483 U.S. 203, 212 (1987).

<sup>232</sup> Young, *supra* note 40, at 877–80.

<sup>233</sup> *Id.* at 880–83.

<sup>234</sup> *Id.* at 883–86.

<sup>235</sup> See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 673 (J.P. Mayer ed., George Lawrence trans., Perennial Classics 2000) (1835) (discussing how uniformity "does not excite . . . envy").

space” between institutions and the people.<sup>236</sup> And federalism, he says, “gives literal space a constitutional dimension.”<sup>237</sup> Of course, belief in federalism as a valuable political construct is not the same as judicially enforcing it in litigation, but this simply takes us back to the problem of judicial review.

#### IV. CONCLUSION

The potential for a serious Commerce Clause challenge to many of the federal gun possession categories should naturally create some unease among those conservatives who want robust gun restrictions (such people *do* exist) in order to address national problems of crime and violence and who are simultaneously cautious about the exercise of judicial review. But as important as it is to recognize the connection between the legal and the political on the subject of gun control, it is equally important not to unduly conflate the two. Fidelity to constitutional structure, as a conservative may view it, trumps fidelity to a particular public policy, where that policy would create a constitutional conflict. That is true of gun policy as well as abortion policy. By the same token, using courts simply as a tool for ridding the public law of disfavored policies that conservatives could not defeat in the political branches is no better; conservatives have objected to such strategies in other areas of constitutional litigation,<sup>238</sup> and this phenomenon simply reinforces a perception of courts as political institutions by another name.<sup>239</sup> That is true of gun policy as well as health insurance reform policy. So even conservative defenders of federal gun control (they *do*—and they *ought to*—exist), as well as those who oppose it, must see beyond their preferred legislative agendas. But in the tradition of a conservatism that values the role of states in making and enforcing criminal justice policy, pro-gun control conservatives could embrace federal criminal powers where appropriate, as well as the limits of the Commerce Clause, leaving room for greater gun possession restrictions in the states.<sup>240</sup> Litigation of federal gun law thus offers the opportunity to

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<sup>236</sup> HARVEY C. MANSFIELD, JR., *AMERICA'S CONSTITUTIONAL SOUL* 16 (1991).

<sup>237</sup> *Id.*

<sup>238</sup> See Wilkinson, *supra* note 18, at 254 (“*Heller* encourages Americans to do what conservative jurists warned for years they should not do: bypass the ballot and seek to press their political agenda in the courts.”).

<sup>239</sup> See ROGER M. BARRUS ET AL., *THE DECONSTITUTIONALIZATION OF AMERICA* 112 (2004) (“It is now commonplace to refer to the judiciary as merely another political institution and judges as just another class of political actors.”).

<sup>240</sup> See O’Shea, *supra* note 48, at 208–09, 218–19, 222 (creating a taxonomy of “gun cultures” in America and arguing that state gun control policy reinforces the view that such policy could be subject to federalism limitations). O’Shea’s broader contention, made prior to the Court’s decision in *McDonald*, is that a partial incorporation of the Second Amendment would serve both the interests of Second Amendment advocates and gun control advocates. *Id.* at 223.

witness a compelling intersection of constitutional and ordinary politics. And as we undertake a renewed national conversation about crime, guns, and the uses of the criminal law, we should remain appropriately mindful of those politics.