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Close Enough for Government Work: Proving Minimal Nexus in a Federal and Firearms Conviction: United States v. Corey

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CLOSE ENOUGH FOR GOVERNMENT WORK: PROVING MINIMAL NEXUS IN A FEDERAL FIREARMS CONVICTION: *UNITED STATES V. COREY*

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I. INTRODUCTION

In *United States v. Corey*,[1] Alvin Scott Corey was found guilty of possessing a firearm as a felon. Although Corey's possession of a Smith and Wesson shotgun violated Maine law,[2] Corey was prosecuted in the United States District Court under the federal statute 18 U.S.C. § 922(g)(1)[3] and its penalty statute, § 924(e).[4] On appeal, Corey argued that one of the requirements for his conviction, proof of the statute's jurisdictional element, had not been satisfied because that proof rested on expert testimony based, in part, on hearsay.[5] The First Circuit Court of Ap-

1. 207 F.3d 84 (1st Cir. 2000).

2. ME. REV. STAT. ANN. tit. 15, § 393 (Supp. 2002). Section 393 reads:

> 1. Possession prohibited. A person may not own, possess or have under that person's control a firearm, unless that person has obtained a permit under this section, if that person:
>
> A-1. Has been convicted of committing or found not criminally responsible by reason of mental disease or defect of committing:
>
> (1) A crime in this State that is punishable by imprisonment for a term of one year or more;
>
> (2) A crime under the laws of the United States that is punishable by imprisonment for a term exceeding one year;
>
> (3) A crime under the laws of any other state that, in accordance with the laws of that jurisdiction, is punishable by a term of imprisonment exceeding one year. This subparagraph does not include a crime under the laws of another state that is classified by the laws of that state as a misdemeanor and is punishable by a term of imprisonment of 2 years or less;
>
> (4) A crime under the laws of any other state that, in accordance with the laws of that jurisdiction, does not come within subparagraph (3) but is elementally substantially similar to a crime in this State that is punishable by a term of imprisonment for one year or more; or
>
> (5) A crime under the laws of the United States, this State or any other state or the Passamaquoddy Tribe or Penobscot Nation in a proceeding in which the prosecuting authority was required to plead and prove that the person committed the crime with the use of:
>
> (a) A firearm against a person; or
>
> (b) Any other dangerous weapon.

Id.

3. 18 U.S.C. § 922(g)(1) (Supp. 2000) provides: "It shall be unlawful for any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce . . . any firearm or ammunition." *Id.*

4. 18 U.S.C. § 924(e)(1) (Supp. 2000). Section 924(e)(1) reads:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25, 000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

Id.

5. United States v. Corey, 207 F.3d at 89.

peals, in a split decision, affirmed Corey's conviction, finding ample precedent for allowing expert testimony based in part on hearsay to prove that Corey's Smith and Wesson traveled in interstate commerce, establishing federal jurisdiction over its possession.[6] The dissenting judge strongly objected to the lack of rigor with which that evidence had been admitted by the trial court, and reviewed by the majority on appeal.[7] Noting that Corey's shotgun could have been made at a Smith and Wesson factory in Houlton, Maine and so might never have traveled in interstate commerce, the dissent argued that a higher standard of reliability and review was particularly in order for evidence establishing federal jurisdiction.[8]

This Note examines how a remarkably low standard for asserting federal jurisdiction over felon firearm possession evolved in the United States Supreme Court, how that standard has been interpreted in the lower courts and challenged by recent Supreme Court Commerce Clause jurisprudence, and how a fundamental unfairness inherent to that standard played out in *Corey*. Part II of this Note reviews the direct line of cases that set a "minimal nexus" with commerce requirement for federal regulation of felon gun possession, including the pivotal holding in *Scarborough v. United States*.[9] Part II also examines two waves of lower court challenges to that minimal nexus standard, following the Supreme Court's interpretation of related federal criminal statutes in *United States v. Lopez*[10] and *Jones v. United States*.[11] Part III of this Note analyzes the majority decision in *Corey* and the extended dissenting opinion. This part concludes that the rigorous judicial scrutiny urged by the dissenting judge on behalf of Mr. Corey is understandable given issues of fundamental fairness raised by § 922(g)(1)'s low jurisdictional threshold. Part III will argue that § 922(g)(1)'s jurisdictional threshold is so easily met and so difficult to challenge that the statute unfairly reaches almost every firearm possession. This Part will also argue that the broad reach of § 922(g)(1) is coupled today with prosecutorial powers and sentencing consequences not contemplated when the statute was enacted by Congress and first interpreted by the Supreme Court. This Note concludes with a prediction of how challenges to the dangerously low jurisdictional standard of § 922(g)(1) may arise and may fare in the future.

II. THE JURISDICTIONAL ELEMENT OF § 922(g)(1)

Like thousands of federal statutes regulating criminal behavior, § 922(g)(1) bases its federal jurisdictional authority in Congress's power to regulate under the Commerce Clause.[12] The jurisdictional element of a federal criminal statute is included to ensure that what the defendant did was within the power of the United States Congress to regulate.[13] The jurisdictional element of a statute differs from

6. *Id.* at 91.
7. *Id.* at 105.
8. *Id.* at 97-98.
9. 431 U.S. 563 (1977).
10. 514 U.S. 549 (1995).
11. 529 U.S. 848 (2000).
12. U.S. CONST. art. I, § 8, cl. 3, stating "Congress shall have the power to . . . regulate commerce with foreign nations, and among the several states, and with Indian tribes."
13. Richard W. Smith, Note, *Interpreting the Constitution From Inside the Jury Box: Affecting Interstate Commerce as an Element of the Crime*, 55 WASH. & LEE L. REV. 615, 620 n.30 (1998).

its substantive elements, which define the scope of the conduct that is prohibited. Both jurisdictional and substantive elements must be proved beyond a reasonable doubt.[14] Although jurisdictional elements involve issues of both fact and law,[15] the jury decides whether the prosecution has established the required statutory connection between interstate commerce and the defendant, or the jurisdictional element of a crime.[16] In the felon firearm possession statute § 922(g)(1), the jurisdictional language appears in the statutory requirement that a firearm possessed by a felon be "in or affecting commerce."[17] However, defining exactly which firearms possessed by felons were "in or affecting commerce" required two detailed statutory analyses by the United States Supreme Court.

A. Setting the Standard

Federal regulation of felon firearm possession began in 1968, when the statutory predecessor of § 922(g)(1), § 1202(a) of Title VII,[18] was included as an amendment to the Omnibus Crime Control and Safe Streets Act.[19] Congressional interest in regulating the flow of firearms into and within the country had grown after 1963, when an assassin killed President Kennedy using a mail-order military surplus rifle.[20] The Senate Judiciary Committee did not report out the bill until 1968, after almost five years of findings, debate, amendment, and the strong opposition of the National Rifle Association.[21] On May 23, 1968, the full Senate added § 1202(a) to the Act by voice vote without any of the hearings or committee consideration that preceded the other amendments to the Act.[22] Section 1202(a) forbade

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14. *Id.*

15. *See, e.g.*, United States v. Parker, 73 F.3d 48, 52 (5th Cir. 1996) (finding harmless error when a judge ruled as a matter of law on the interstate nexus element).

16. United States v. Gaudin, 515 U.S. 506, 510 (1995) (finding that the jury must decide every element in a criminal prosecution).

17. 18 U.S.C. § 922(g)(1) (Supp. 2000). The relevant text of the statute appears *supra* note 3.

18. At the time, § 1202(a) read:

> (a) Any person who
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony or
> (2) has been discharged from the Armed Forces under dishonorable conditions, or
> (3) has been adjudged by a court of the United States of a State or any political subdivision thereof of being mentally incompetent, or
> (4) having been a citizen of the United States has renounced his citizenship, or
> (5) being an alien is illegally or unlawfully in the United States, who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. App. § 1202(a) *repealed by* Pub. L. 99-308, § 104(b) (May 19, 1986). The question of whether "receives" and "possesses" or only "transports" were modified by the phrase "in commerce or affecting commerce" was the subject of considerable parsing and debate when the Court interpreted the statute in United States v. Bass, 404 U.S. 336, 339 (1971).

19. Pub. L. No. 90-351, 82 Stat. 197 (1968).

20. *See* William J. Vizzard, *The Gun Control Act of 1968*, 18 ST. LOUIS U. PUB. L. REV. 79, 80 (1999).

21. *Id.* at 83. The "political dynamics in the Judiciary Committee" changed to allow passage following the 1968 assassinations of Senator Robert Kennedy and Dr. Martin Luther King, Jr. *Id.*

22. *Id.* at 84.

felons and other categories of questionable individuals from receiving, possessing or transporting firearms in or affecting commerce. It also "suffered from poor drafting which would bedevil its enforcers and confound the courts."[23] In fact, when deciding the first interpretive challenge to § 1202(a) in *United States v. Bass*,[24] the Supreme Court noted that the statute was "a last-minute Senate amendment . . . hastily passed with little discussion, no hearings, and no report."[25] The *Bass* Court also noted that "the legislative history [of § 1202(a)] hardly speaks with that clarity of purpose which Congress supposedly furnishes courts."[26] Even the government in *Bass*, arguing for an expansive interpretation for § 1202(a), conceded that the statute "is not a model of logic or clarity."[27]

What was unclear in § 1202(a) was whether the jurisdictional requirement that a firearm be "in or affecting commerce" applied to firearms possessed by felons, or applied only to firearms transported or received by them. In prosecuting Mr. Bass, the government had not attempted to show any connection between Bass's firearm and commerce, and contended it was not required to do so because § 1202(a) banned felon firearm possession of any kind.[28] Bass maintained that without some requirement of a link between his particular possession and interstate commerce, Congress, in enacting the law, "had overstepped its constitutional powers under the Commerce Clause."[29]

The *Bass* Court chose to avoid the constitutional issue of Congressional overreaching, and instead, set about resolving ambiguity in the statute's language by first examining the intent of Congress in enacting it.[30] The government argued that a connection between a felon's gun possession and commerce need not be proved for each conviction under § 1202(a) because the connection had been generally established for all felon firearm possessions by congressional findings before the statute was enacted.[31] However, the *Bass* majority was wary of reading the jurisdictional language of § 1202(a) so broadly: the sanctions imposed by the statute were criminal and carried serious criminal penalties.[32] Furthermore, such a broad interpretation of the statute's reach would represent a sizeable federal incursion into an area of criminal law traditionally regulated by states.[33] The *Bass*

23. *Id.* (citing United States v. Bass, 404 U.S. 336 (1971)). Senator Russell Long, who proposed the amendment, stated on the Senate floor that the purpose of the amendment was to address simple possession of firearms at the federal level for the first time. *Id.* Some thought this new legislation that was "intended to significantly alter federal policy became law with little analysis largely as a political favor to improve its author's image as tough on crime." *Id.*

24. 404 U.S. 336 (1971).

25. *Id.* at 344 (footnote omitted).

26. *Id.* at 346 (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 483 (1951)).

27. *Id.* at 347 (citation omitted).

28. *Id.* at 338.

29. *Id.* (citing United States v. Bass, 308 F. Supp. 1385 (S.D.N.Y. 1970)).

30. *See id.* at 339.

31. *Id.* at 338.

32. *Id.* at 339.

33. *Id.* "Because its sanctions are criminal, and because, under the Government's broader reading, the statute would mark a major inroad into a domain traditionally left to the States, we refuse to adopt the broad reading in the absence of a clearer direction from Congress." *Id.* The majority position contradicted the holdings in five of six United States courts of appeals who had addressed the issue of whether § 1202(a)'s jurisdictional element must be proved in individual cases. *Id.* at 351-52 (Blackmun, J., dissenting) (citing decisions in the Second, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits).

dissent vigorously maintained that a connection or nexus with commerce need not be proved in individual instances.[34] The *Bass* majority chose to interpret § 1202(a) as requiring proof of a nexus between a particular gun's possession and commerce for each conviction.[35]

The question of how much or what kind of evidence might establish a particular firearm possession's nexus with commerce was not before the *Bass* Court. The *Bass* majority speculated that standards for such evidence would be permissive, "given the evils that prompted the statute and the basic legislative purpose of restricting the firearm-related activity of convicted felons."[36] A concurring Justice declined to join the majority in predicting "the quantum of evidence necessary to establish . . . [a] prima facie case," preferring to wait for "a case properly presenting that question before deciding it."[37] Six years later, in 1977, the question was properly presented to the Court in *Scarborough v. United States*.[38]

In *Scarborough*, the Court granted certiorari to decide whether federal jurisdiction over felon firearm possession under § 1202(a) "is sustainable merely upon a showing that the possessed firearm has previously at any time however remote travelled in interstate commerce."[39] The Fourth Circuit was satisfied with that minimal showing,[40] but other circuits were split on whether the statute required a

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34. *Id.* at 353 (Blackmun, J., dissenting). Justice Blackmun maintained that Congress, in the findings section of Title VII, § 1201, clearly stated its intention to reach every possession of a firearm by a felon; that all such possessions, interstate or intrastate, affected interstate commerce; and "that Congress did not conclude that intrastate possession was a matter of less concern to it than interstate possession." *Id.* Justice Blackmun unsuccessfully urged the majority to address the constitutionality of § 1202(a) under the Commerce Clause. *Id.* at 356.

35. *Id.* at 347. The majority identified two interpretive principles applied in its decision. One was the principle of lenity, that requires ambiguity in criminal law to be resolved in favor of the defendant. Lenity reflects two policies: first, that clear language and fair notice must be given to the public about what behavior is and is not proscribed by law; and two, that "legislatures, not courts should define criminal activity." *Id.* at 348. The second interpretive principle requires that, unless clearly directed otherwise by Congress, courts will not read statutes in a way that significantly alters the balance of state and federal power. *Id.* at 349. At the conclusion of the opinion, the majority restated its "regard for the sensitive relation between federal and state criminal jurisdiction." *Id.* at 351.

36. *Id.* The majority suggested the Government could meet its burden in a number of ways:

> For example, a person "possesses . . . in commerce or affecting commerce" if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce. Significantly broader in reach, however, is the offense of "receiv[ing] . . . in commerce or affecting commerce," for we conclude that the Government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce. This is not the narrowest possible reading of the statute . . . .

Id. at 350-51.

37. *Id.* at 351 (Brennan, J., concurring in part).

38. 431 U.S. 563 (1977).

39. *Id.* at 567 n.5. The petitioner, who had a felony conviction for narcotics possession with intent to distribute, was found with four firearms in his bedroom by police officers executing a search warrant for narcotics. All four firearms had traveled in interstate commerce but all had done so before the petitioner's felony conviction. *Id.* at 564-65. At Mr. Scarborough's trial, the judge rejected jury instructions which required the Government to prove a present nexus between Scarborough's guns and interstate commerce. The judge instead chose to instruct the jury that, to meet its burden of proof, the prosecution must only show that the guns had previously traveled in interstate commerce. *Id.* at 566 (citations omitted).

40. *See* United States v. Scarborough, 539 F.2d 331 (4th Cir. 1976), *cert. granted*, 429 U.S. 815 (1976), *aff'd*, 431 U.S. 563 (1977).

felon's firearm possession to have a present connection with commerce.[41] In affirming the Fourth Circuit's decision, the Supreme Court revisited its decision in *Bass*, noting that it had been a close call whether a federal prosecution under § 1202(a) required any proof of nexus at all.[42]

The *Scarborough* Court, like the Court in *Bass*, looked for Congress's intent in the findings preceding enactment of § 1202(a).[43] The Court concluded that Congress intended to prohibit possession of firearms by dangerous persons, including felons and political assassins,[44] and to "reach possessions broadly."[45] The Court saw the jurisdictional language "in commerce and affecting commerce" as an assertion by Congress of its broadest powers under the Commerce Clause.[46] The majority concluded that Congress was not particularly concerned with the effect of felon gun possession "on commerce except as a means to insure . . . constitutionality."[47] Therefore, the Court reasoned, there was "no basis for contending that a weapon acquired after a [felony] conviction affects commerce differently from one acquired before and retained."[48] Although some nexus with commerce was required for each conviction, the majority found "no indication that Congress intended to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce."[49]

The majority in *Scarborough* was certain their reading of § 1202(a) was correct; there was "no question that Congress intended no more than a minimal nexus requirement."[50] The Court's interpretation "captures the essence of Congress' in-

41. Scarborough v. United States, 431 U.S. at 567 n.4. The Sixth and Tenth Circuit Courts agreed with the Fourth Circuit that proof a firearm traveled in commerce at any time in the past was adequate to establish nexus for a possession offense. *Id.* The Second, Seventh, and Eighth Circuits found that proof of any past interstate movement was sufficient to establish a receipt offense, but that a concurrent nexus with commerce must occur for a possession offense. *Id.*

42. *Id.* at 577 (citing United States v. Bass, 404 U.S. 336, 348 (1971)).

43. *See id.* at 570-74.

44. *Id.* at 571-73 (citing 114 CONG. REC. 13868-69, 14773-74, 16286 (1968)).

45. *Id.* at 577.

46. *Id.* at 571. The majority noted that Congress knew enough about Commerce Clause legislation to distinguish limited regulation of activities "in commerce" from "'an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce.'" *Id.* (quoting United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 280 (1975)).

47. *Id.* at 575 n.11. The Court found it important that Senator Long, in arguing for passage of Title VII on the Senate floor stated:

> [M]any of the items and transactions reached by the broad swath of the Civil Rights Act of 1964 were reached by virtue of the power of Congress to regulate matters affecting commerce, not just to regulate interstate commerce itself. . . . Congress simply [should find] that the possession of these weapons by the wrong kind of people is either a burden on commerce or a threat that affects the free flow of commerce.

Id. at 572 (quoting 114 CONG. REC. 13868-69 (1968)).

48. *Id.*

49. *Id.* at 575 (footnote omitted).

50. *Id.* at 577. In response to the argument for a *Bass*-like application of lenity and caution in the face of changes to the federal-state balance, the Court reasoned that those two principles were needed only when Congressional intentions were uncertain:

> Here, the intent of Congress is clear. We do not face the conflicting pull between the text and the history that confronted us in *Bass*. In this case, the history is unambiguous and the text consistent with it. Congress sought to reach possessions broadly, with little concern for when the nexus with commerce occurred. Indeed, it was a close question in *Bass* whether § 1202(a) even required proof of any nexus at all in

tent."[51] Under the minimal nexus standard, it would be enough for federal prosecutors to assert federal jurisdiction by showing that a gun possessed by a felon in one state was manufactured in a different state, and thus, at some point in time, had traveled in interstate commerce. The eight-to-one *Scarborough* decision set the threshold for bringing federal charges for felon firearm possession from that point forward.

B. Challenges to the Jurisdictional Element

In deciding *Scarborough*, the Court did not decide whether, in enacting a felon firearm statute with a broad jurisdictional reach and low jurisdictional threshold, Congress had overstepped its constitutional authority under the Commerce Clause.[52] Eighteen years after *Scarborough*, that possibility was suggested when a similar federal firearm possession statute[53] came under attack, in *United States v. Lopez*.[54]

In *Lopez*, the Supreme Court appeared to change course after decades of allowing Congress broad power to regulate criminal behavior under the Commerce Clause.[55] In a five-to-four decision, the Court held that the Gun-Free School Zones Act was an improper exercise of Congress's Commerce Clause authority because firearm possession in or near schools had no connection with commerce "or any sort of economic enterprise, however broadly one might define those terms."[56] The *Lopez* majority found that, to be subject to federal jurisdiction under the Commerce Clause, a regulated criminal activity must have a "substantial relation to interstate commerce."[57] A dissenting Justice cautioned that at least twenty-five sections of the United States Criminal Code contained statutes with jurisdictional elements requiring far less than a "substantial" nexus with commerce, and predicted the majority decision in *Lopez* would create considerable "legal uncertainty" in areas "that, until this case, seemed reasonably well settled" law.[58]

The *Lopez* decision gave rise to predictions that firearms possession statutes with minimal nexus requirements, like § 1202(a), now recodified as § 922(g)(1),

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> individual cases. The only reason we concluded it did was because it was not "plainly and unmistakably" clear that it did not. But there is no question that Congress intended no more than a minimal nexus requirement.

Id. (citation omitted).

51. *Id.*

52. Brent E. Newton, *Felons, Firearms and Federalism: Reconsidering* Scarborough *in Light of* Lopez, 3 J. APP. PRAC. & PROCESS 671, 677 n.36 (2001). Briefs submitted for both sides in *Scarborough* agreed Congress had the authority under the Commerce Clause to penalize possession of a firearm by a felon if the firearm had ever traveled in interstate commerce—the issue in dispute was whether the language in § 1202(a) could be interpreted as explicitly exercising that authority. *Id.*

53. The Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (1990), *amended by* 18 U.S.C. § 922(q) (1997) prohibited "knowingly...possess[ing] a firearm at a place that the individual knows or has reasonable cause to believe, is a school zone."

54. 514 U.S. 549 (1995).

55. *See* Newton, *supra* note 52, at 671; Andrew Weis, Note, *Commerce Clause in the Cross Hairs: The Use of* Lopez*-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 STAN. L. REV. 1431, 1432 (1996).

56. United States v. Lopez, 514 U.S. at 561 (footnote omitted).

57. *Id.* at 559 (citing Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

58. *Id.* at 630 (Breyer, J., dissenting).

might not withstand the newly articulated Commerce Clause jurisprudence of *Lopez*.[59] A wave of lower court challenges by defendants convicted under § 922(g)(1) followed.[60] Some defendants reasoned that *Lopez* had invalidated the minimal nexus standard of *Scarborough* so that prosecutors now were required to prove a substantial relationship, not a minimal nexus, between a felon's gun possession and interstate commerce.[61] Others argued that firearm possessions by felons, like Mr. Lopez's firearm possession in or near a school, had no nexus whatsoever with any economic activity, and that § 922(g)(1) was therefore, facially unconstitutional.[62]

The *Lopez* opinion itself supplied lower courts with the answer to the facial challenges.[63] The *Lopez* Court noted with approval the *Bass* Court's holding that a nexus with commerce must be proved in each individual possession of a firearm by a felon.[64] The *Lopez* Court reasoned that the presence of a jurisdictional element in the statute at issue in *Bass* protected defendants by limiting federal jurisdiction to only some offenses particularly linked to commerce, whereas the firearm statute invalidated in *Lopez* "has no *express jurisdictional element* which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce."[65] The presence of the jurisdictional requirement in § 922(g)(1) was seen, in the lower courts, to immunize the statute from further facial challenge.[66] By early 1996, the First Circuit declared claims that § 922(g)(1) was facially unconstitutional, following *Lopez*, "hopeless on . . . law."[67]

Circuit courts continued to rely on the holding in *Scarborough* when rejecting "as applied" challenges to the minimal nexus standard of § 922(g)(1) following *Lopez*.[68] By "[r]efusing to discard *Scarborough*, no circuit has accepted the argument that *Scarborough*'s *de minimis* nexus should be heightened."[69] In fact *Lopez*, without specifically mentioning *Scarborough*, suggested that when a "regulatory

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59. *See, e.g.*, Carlo D'Angelo, Note and Comment, *The Impact of* United States v. Lopez *Upon Selected Firearms Provisions of Title 18 U.S.C. Section 922*, 8 ST. THOMAS L. REV. 571 (1996).

60. Antony Barone Kolenc, Note, *Commerce Clause Challenges After* United States v. Lopez, 50 FLA. L. REV. 867, 877-78 (1998) (identifying § 922(g)(1) as the most widely challenged of federal firearms legislation following *Lopez*, both facially and as applied).

61. *See, e.g.*, United States v. McAllister, 77 F.3d 387, 390 (11th Cir. 1996); United States v. Kuban, 94 F.3d 971, 976 (5th Cir. 1996) (DeMoss, J., dissenting).

62. Kolenc, *supra* note 60, at 878 n.73 (listing leading cases in every circuit raising and rejecting facial challenges to § 922(g)(1)).

63. *Id.*

64. United States v. Lopez, 514 U.S. 549, 561-62 (1995).

65. *Id.* at 562 (emphasis added).

66. *See, e.g.*, United States v. Rawls, 85 F.3d 240, 242 (5th Cir. 1996) (collecting cases from every circuit that has considered the constitutionality of § 922(g)(1) after *Lopez*).

67. United States v. Bennett, 75 F.3d 40, 48-49 (1st Cir. 1996).

68. Kolenc, *supra* note 60, at 879. "As applied challenges" to § 922(g)(1) argued, to no avail, that the minimal nexus standard of *Scarborough* should be heightened; that a timing requirement for possession was required; or that a firearm was manufactured in the state of possession. In one case, where a gun had been manufactured in the state of possession, a conviction was reinstated by the court of appeals because some components of the defendant's ammunition had been made in another state. *Id.* at 878-80 (footnotes omitted) (discussing United States v. Mosby, 60 F.3d 454 (8th Cir. 1995)).

69. *Id.* at 879.

statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under the statute is of no consequence."[70]

Nevertheless, circuit court judges, in dissenting and concurring opinions, questioned whether the minimal nexus standard of § 922(g)(1) was not somehow foreclosed by the *Lopez* requirement of "substantial relation" with commerce. The Fifth Circuit decision in *United States v. Rawls*[71] was one example. After rejecting Rawls's facial argument that § 922(g)(1) exceeds Congress's authority under the Commerce Clause,[72] the Fifth Circuit turned to his "as applied" argument that his possession "had no connection to channels or instrumentalities of interstate commerce."[73] Citing *Scarborough*, the court concluded that because Mr. Rawls's gun was manufactured in Massachusetts and possessed in Texas, the minimal nexus standard had been met.[74] However, in a concurring opinion joined by the other judges, Judge Garwood observed that if § 922(g)(1) were newly enacted, "one might well wonder how it could rationally be concluded that mere possession of a firearm in any meaningful way concerns interstate commerce simply because the firearm had, perhaps decades previously before the charged possessor was even born, fortuitously traveled in interstate commerce."[75] Judge Garwood wondered "how a statute construed never to require any but such a *per se* nexus could 'ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.'"[76] The judge then proceeded to defer to *Scarborough* and affirm Rawls's conviction because "[i]t is not for us to say that following what seems to be implicit in *Scarborough* is to proceed . . . down the road closed by *Lopez*."[77]

C. *Further Challenges*

A second wave of challenges to the minimal nexus standard of § 922(g)(1) followed in 2000, with the Supreme Court's unanimous decision in *Jones v. United States*.[78] Seven days before deciding *Jones*, the Court reiterated and strengthened the "substantial relation" to commerce requirement of *Lopez* by invalidating a fed-

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70. United States v. Lopez, 514 U.S. at 558 (emphasis omitted) (quoting Maryland v. Wirtz, 392 U.S. 183, 197 (1968)).

71. 85 F.3d 240 (5th Cir. 1996).

72. *Id.* at 242. The *Rawls* Court stated that "[c]entral to the Court's holding in *Lopez* was the fact that [the firearm statute at issue] contained 'no jurisdictional element which would ensure, through a case-by-case inquiry, that the firearm possession in question affects interstate commerce.'" *Id.*

73. *Id.*

74. *Id.* at 242-43.

75. *Id.* at 243 (Garwood, J., concurring).

76. *Id.* (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)).

77. *Id.* Judge Garwood observed:

> [T]he opinion in *Scarborough v. United States* . . . requires us to affirm denial of relief here. While *Scarborough* addresses only questions of statutory construction, and does not expressly purport to resolve any constitutional issue, the language of the opinion and the affirmance of the conviction there carry a strong enough implication of constitutionality to now bind us, as an inferior court, on that issue in this essentially indistinguishable case . . . .

Id. (citations omitted).

78. 529 U.S. 848 (2000).

eral criminal statute[79] because of its remote connection to economic activity. In *United States v. Morrison*,[80] the Court reaffirmed that Congress's regulatory authority under the Commerce Clause did not extend to criminal conduct that was not economic in nature.[81] In spite of considerable Congressional findings on the cumulative economic effects of the regulated criminal activities,[82] the Court rejected the argument that Congress established a sufficient nexus to commerce in the aggregated cost to national productivity of individual, noneconomic crimes,[83] reminding Congress that a similar aggregated and "attenuated" connection to commerce was rejected in *Lopez*.[84] The Court warned that, under such aggregation, no conduct or object falls outside Congress's jurisdictional reach.[85] The *Morrison* Court also confirmed its preference for federal criminal statutes with express jurisdictional elements;[86] that such elements "lend support to the argument that . . . [the statute at issue] is sufficiently tied to interstate commerce."[87] Unless the reach of federal criminal regulation under the Commerce Clause was limited by these express jurisdictional requirements, a concurring Justice warned, "we will continue to see Congress appropriating state police powers under the guise of regulating commerce."[88]

A week later, the Court reversed and remanded Dewey Jones's arson conviction under a federal statute that included just such an express jurisdictional element.[89] Finding that the house Jones destroyed was neither "used in" nor "affecting" commerce, the Court concluded its destruction was therefore "not subject to federal prosecution."[90] In limiting the jurisdictional reach of the arson statute, the

79. 42 U.S.C. § 13981 (2000) was part of the Violence Against Women Act of 1994, § 40302, 108 Stat. 1941-1942 (1994). The section authorized a civil remedy for criminal acts of violence motivated by gender. *Id.*

80. 529 U.S. 598 (2000).

81. *Id.* at 610 (citing United States v. Lopez, 514 U.S. 549, 551(1995)).

82. *Id.* at 614. "As we stated in *Lopez*, '[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'" *Id.* (quoting United States v. Lopez, 514 U.S. at 557, n.2) (citation omitted).

83. *Id.* at 617. The Court stated: "We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local." *Id.* at 617-18 (citing United States v. Lopez, 514 U.S. at 568 (citations omitted)).

84. *Id.* at 615.

85. *Id.* The Court stated:

> In these cases, Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable. . . . If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.

Id.

86. *Id.* at 613.

87. *Id.* The Court stated a jurisdictional element would "establish[] that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce." *Id.*

88. *Id.* at 627 (Thomas, J., concurring).

89. Jones v. United States, 529 U.S. 848, 853, 859 (2000) (citing 18 U.S.C. § 844(i) (1994)). The jurisdictional language in § 844(i) required that a building or property destroyed or damaged by fire or explosion be "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i) (1994).

90. Jones v. United States, 529 U.S. at 850-51.

Jones Court appeared to suggest that statutes like § 922(g)(1) containing express jurisdictional elements were vulnerable to "as applied" challenges if the nexus between a particular criminal activity and commerce seemed attenuated or absurd. Avoiding constitutional questions, the *Jones* Court interpreted the arson statute as "not soundly read to make virtually every arson in the country a federal offense."[91] Judges were expressly advised by the *Jones* Court to examine the language of statutes for words limiting the jurisdictional reach of a statute, especially, the Court warned, "when the words describe an element of a criminal offense."[92]

The *Jones* Court worried about, but declined to decide, whether the arson statute in question intruded upon "traditionally local criminal conduct" by making it "a matter for federal enforcement."[93] This same concern about the intrusion of federal regulations into state prerogatives was raised, but also not decided, in *Bass* and *Lopez*. As in *Bass* and *Lopez*, the *Jones* Court followed the interpretive rule that "constitutionally doubtful constructions should be avoided"[94] and restricted its inquiry to how the federal arson statute applied to the particular building destroyed by Mr. Jones. Nonetheless, Justice Stevens acknowledged an important danger inherent in "federal pre-emption of state law."[95] Jones had received a thirty-five year sentence under the federal arson statute, when the same state offense carried a maximum penalty of ten years, demonstrating, Justice Stevens noted, "how a [federal] criminal law . . . may effectively displace a policy choice made by the State."[96]

A second wave of lower court challenges to § 922(g)(1) convictions followed the *Morrison* and *Jones* decisions.[97] Facial attacks were rejected in the lower courts, as they had been following *Lopez*, by citing the presence in § 922(g)(1) of an express jurisdictional element not found in the statutes at issue in *Lopez* or *Morrison*.[98] However, defendants now argued that broadly drafted jurisdictional language, such as § 922(g)(1)'s, could be narrowly interpreted, and even invalidated, in the wake of *Jones*.[99] Some judges argued that the minimal nexus stan-

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91. *Id.* at 859. The Court warned elsewhere in the opinion:

> Were we to adopt the Government's expansive interpretation of § 844(i), hardly a building in the land would fall outside the federal statute's domain. Practically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate commerce connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce.

Id. at 857.

92. *Id.* (quoting Ratzlaf v. United States, 510 U.S. 135, 140-41 (1994)).

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

94. *Id.* at 851. The Court applied both interpretive doctrines used to resolve the statutory ambiguity in *Bass*: the doctrine of lenity and of constitutional doubt. *See supra* text accompanying note 35, and Jones v. United States, 529 U.S. at 857-59.

95. *Id.* at 859 (Stevens, J., concurring).

96. *Id.*

97. *See* George D. Brown, *Constitutionalizing the Federal Criminal Law Debate:* Morrison, Jones, *and the ABA*, 2001 U. ILL. L. REV. 983 (2001) (examining the surprisingly small effect of the *Morrison* and *Jones* decisions on decisions in the lower courts).

98. *See, e.g.*, United States v. Santiago, 238 F.3d 213, 216 (2d Cir. 2001) (finding that the jurisdictional element in § 922(g)(1) limited its "'reach to a discrete set of firearm possessions,'" as required by *Lopez*).

99. *See* Newton, *supra* note 52, at n.48 (citing United States v. Daugherty, 264 F.3d 513 (5th Cir. 2001); United States v. Santiago, 238 F.3d at 216).

dard of § 922(g)(1), set in *Scarborough* in 1977, improperly federalized felon gun possession on the slightest pretext of past interstate movement. In *United States v. Coward*,[100] District Judge Dalzell referred to the minimal nexus standard of *Scarborough* as a legal fiction, stating:

> *Scarborough* may fairly be read to establish the legal fiction that has prevailed in these cases since it was announced. . . . Simply phrased, *Scarborough*'s legal fiction is that the transport of a weapon in interstate commerce, however remote in the distant past, gives its present intrastate possession sufficient interstate aspect to fall within the ambit of the statute. This fiction is indelible and lasts as long as the gun can shoot. Thus, a felon who has always kept his father's World War II trophy Luger in his bedroom has the weapon "in" commerce. The question now is whether this legal fiction can survive as a statutory construct in the shadow of the edifice the Supreme Court has built upon *Lopez*'s foundation.[101]

Nonetheless, while lower courts observed that *Lopez*, *Morrison*, and *Jones* cast doubt on the validity of the minimal nexus standard of § 922(g)(1), they were unable to ignore the direct application and unambiguous language interpreting that standard in *Scarborough*.[102] After concluding that a defendant's gun "was neither 'used in commerce' nor did it have any present or imminent interstate aspect" and that "[h]is conviction therefore should not stand, as he committed no federal crime,"[103] the *Coward* court nonetheless upheld Mr. Coward's conviction under § 922(g)(1) because "we must respect . . . *Scarborough*,"[104] and must leave to the Supreme Court "the prerogative of overruling its own decisions."[105] Every lower court faced with a challenge to federal jurisdiction under the minimal nexus standard of § 922(g)(1) concluded that their hands were tied as long as "the Supreme Court's analysis . . . in *Scarborough* remains good law."[106]

III. *UNITED STATES V. COREY*

In 1997, an Easterfield 916-A, Smith and Wesson 12-gauge pump shotgun was seized from the Maine home of convicted felon Alvin Scott Corey by officers of the sheriff's department.[107] Corey was convicted of possessing a firearm that had traveled in interstate commerce under the federal statute 18 U.S.C. § 922(g)(1) and its penalty statute § 924(e).[108] At Corey's trial in the United States District Court,[109] a single firearms enforcement officer from the Bureau of Alcohol, Tobacco and Firearms (ATF) provided evidence that Mr. Corey's shotgun traveled in interstate commerce.[110] The agent testified, as an expert, that Corey possessed

100. 151 F. Supp. 2d 544 (E.D. Pa. 2001).

101. *Id.* at 549.

102. *See* United States v. Torres, 149 F. Supp. 2d 199, 201-02 (E.D. Pa. 2001) (collecting cases from circuits upholding the constitutionality of § 922(g)(1) and the Supreme Court's analysis of its nexus standard in *Scarborough*).

103. United States v. Coward, 151 F. Supp. 2d at 554-55.

104. *Id.* at 555.

105. *Id.* (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989)).

106. United States v. Nelson, No. 00-06-P-C, 2001 WL 883640, at *2 (D. Me. Aug. 3, 2001).

107. United States v. Corey, 207 F.3d 84, 85 (1st Cir. 2000).

108. *Id. See supra* notes 3-4.

109. Corey was convicted in a jury trial in the United States District Court for the District of Maine, Hon. Morton A. Brody presiding. 207 F.3d at 84.

110. *Id.* at 85.

[while in Maine] a shotgun manufactured in Springfield, Massachusetts.[111]

Corey objected to the agent's qualifications as an expert and to the agent's reliance on hearsay as a basis for his conclusion that Corey's gun was made in Massachusetts.[112] On voir dire, the agent attested to his experience and qualifications as an expert in matters relating to firearm manufacture.[113] The agent acknowledged that Smith and Wesson had manufacturing facilities in Houlton, Maine, the state of possession, as well as in Ohio and Massachusetts.[114] The agent said he based his conclusions about Corey's gun on in-house ATF files containing information provided to ATF by gun manufacturers and historians.[115] Corey renewed his objection to the agent's testimony, claiming it relied on hearsay, and demanded that the government cure the problem by producing "business records from these [firearm] factories."[116] The government successfully argued that the Federal Rules of Evidence allowed experts "to formulate an opinion based on facts of a type reasonably relied upon by experts in the particular field."[117]

On direct examination, the agent testified that he had concluded Corey's gun was not made in Maine after a telephone conversation with Smith and Wesson historian Roy Jinks.[118] During cross-examination, the agent added that he also relied on in-house ATF files and an ATF library, as well.[119] Corey was found guilty of being a felon in possession of a firearm that had traveled in interstate commerce under § 922(g)(1).[120]

On appeal, Corey sought to set aside his conviction on the grounds that the district court abused its discretion when it admitted evidence from the ATF agent to show that Corey's shotgun had traveled in interstate commerce.[121] The First Circuit, in a two-to-one decision, found that the district court did not abuse its discretion in allowing a single ATF expert to present testimony based partly on hearsay and partly on ATF's own records to prove interstate nexus, the jurisdictional element of Corey's offense.[122] Arguing from precedent, the majority cited a line of cases from several circuits in which the nexus element of § 922(g)(1) was established by relying on equivalent evidence or less.[123] After examining the language of Federal Rules of Evidence 702[124] and 703,[125] the majority also found

111. *Id.* at 86.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 86-87.

117. *Id.* at 87. The government cited Federal Rules of Evidence 702 and 703. *See infra* notes 124-25.

118. United States v. Corey, 207 F.3d at 87.

119. *Id.*

120. *Id.* at 85.

121. *Id.*

122. *Id.* at 92. The abuse of discretion standard for appellate review of evidentiary rulings originated in 1879, in the Supreme Court's decision in *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879). For a discussion of the standard's history see *General Electric Co. v. Joiner*, 522 U.S. 136, 141-42 (1997).

123. United States v. Corey, 207 F.3d at 88.

124. Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an

that the agent's expert opinion was based on information reasonably relied upon by experts and conformed to the plain meaning of the evidence rules.[126]

The majority declined to apply a less deferential standard of review to the evidentiary decisions of the district court, choosing instead to construe the issue on appeal as only whether the trial court abused its discretion when admitting the ATF agent's evidence.[127] The majority held that the standard of review for lower court rulings on evidence proving the jurisdictional element of § 922(g)(1) was "highly deferential"[128] and that such rulings were "reversed only if 'manifestly erroneous.'"[129] The majority also declined to consider arguments not raised in Corey's clearly inadequate appellant's brief.[130] The court identified two arguments that might have shown promise for the defendant had they been raised: first, that the expert testimony based on hearsay was insufficient proof of the jurisdictional element of Corey's offense, and second, that Corey's constitutional protections were violated.[131] The majority declined to consider whether one agent's testimony, based partly on hearsay, sufficiently established the element of § 922(g)(1) conferring federal jurisdiction.[132] Instead, the court noted that the jury

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> expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

125. Rule 703. Bases of Opinion Testimony by Experts.

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Fed. R. Evid. 703.

126. United States v. Corey, 207 F.3d at 88-90.

127. *Id.* at 88. The majority stated: "we . . . will not reverse [the ruling on admissibility] unless the ruling at issue was predicated on an incorrect legal standard or we reach a 'definite and firm conviction that the court made a clear error of judgment.'" *Id.* (quoting United States v. Shay, 57 F.3d 126, 132 (1st Cir. 1995)).

128. *Id.* at 88 (quoting United States v. Gresham, 118 F.3d 258, 266 (5th Cir. 1997)).

129. *Id.* (quoting United States v. Ware, 914 F.2d 997, 1002 (7th Cir. 1990)).

130. *See id.* at 88 n.3. The majority remarked that "the entire legal argumentation in appellant's fifteen-page brief consists of less than two pages, in which he neither cites Evidence Rule 702 or 703, nor articulates any Sixth Amendment Confrontation Clause claim." *Id.*

131. *See id.* at 92. The constitutional issue raised by the dissent was whether hearsay testimony by the ATF agent violated Corey's protection under the Confrontation Clause of the Sixth Amendment. In declining to address potentially promising issues not raised by Corey on appeal, the majority said:

> [W]e need not consider whether the [agent's] testimony would have been admissible under Rule 703 had he relied exclusively on the telephone conversation to Smith and Wesson employees. Moreover, given the categorical formulation of the argument presented by Corey on appeal, there is no need to determine whether [the agent's] partial reliance on the telephone conversation . . . somehow rendered his otherwise well-supported expert opinion suspect under either the Federal Rules of Evidence or the Confrontation Clause.

Id. (emphasis omitted).

132. *See id.*

which convicted Corey, "[o]bviously . . . remained free to discredit" the interstate nexus evidence and affirmed Corey's conviction.[133]

Chief Judge Torruella, in a lengthy dissent, argued strongly for judicial activism on behalf of the defendant, including on issues the majority said were "not properly before us."[134] Judge Torruella first urged that a more rigorous standard of review was in order for expert evidence of a jurisdictional element, whether or not it was strictly necessary or was called for in the defendant's appellant brief.[135] Judge Torruella urged the court to thoroughly review admission of the government's interstate nexus evidence when the "evidence was used to establish a jurisdictional fact absent which there is no triable federal crime."[136] Second, he argued that the majority's deference was particularly inappropriate when there was an actual possibility that Corey's gun was made in Maine.[137] Third, Judge Torruella found the majority's deference to an ATF agent's testimony wrong as a matter of policy when direct evidence could establish the jurisdictional element with "relatively little effort on the part of the prosecution"[138] and when the basis for the evidence was expedient and "self-serving."[139] Judge Torruella urged that such deference to the prosecution in admitting hearsay evidence violated Corey's constitutional protections under the Confrontation Clause.[140]

Judge Torruella first noted that Corey's appeal did not present "a pure evidentiary question" subject to an abuse of discretion standard of review.[141] The judge argued that when evidentiary questions raise issues of fact and law, or are so intertwined with substantive law, a much less deferential standard of review is appropriate.[142] Allowing expert testimony by a single government agent based on the agency's own files and the agent's phone conversations to establish federal jurisdiction under § 922(g)(1) was just such an evidentiary issue, and was subject to a higher standard of review.[143] "Here, [the agent] was the sole source of the prosecution's evidence on interstate nexus, and the question . . . is whether . . . admitting this testimony was proper as a matter of law."[144]

Judge Torruella next noted that the question of whether expert testimony may be used to establish interstate nexus under § 922(g)(1) was a matter of first impression in the First Circuit. The judge acknowledged that other circuits had found

133. *Id.*

134. *Id.* at 88 n.3.

135. *Id.* at 105 (Torruella, J., dissenting).

136. *Id.* at 93.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 92. U.S. CONST. amend. VI states, in pertinent part: "[T]he accused shall enjoy the right . . . to be confronted with the witnesses against him."

141. United States v. Corey, 207 F.3d at 94 (Torruella, J., dissenting).

142. *Id.* (citing Salas v. Carpenter, 980 F.2d 299, 305 (5th Cir. 1992)).

143. *Id.* at 95. Judge Torruella reminded the majority that "'experts, not only explain evidence, but are themselves sources of evidence.'" *Id.* at 94 (quoting In re Air Crash Disaster at New Orleans, 795 F.2d 1230, 1233 (5th Cir. 1986)). Because a judge deciding admissibility where the expert is a source of evidence draws less on the immediate facts of the case, and more on substantive law, Judge Torruella argued, agreeing with the Fifth Circuit, that such admissibility rulings on appeal are issues of fact and law, and should require "'a much closer look.'" *Id.* (quoting In re Air Crash Disaster at New Orleans, 795 F.2d 1230, 1233 (5th Cir. 1986)).

144. *Id.* at 95.

expert testimony proving nexus under § 922(g)(1) to be permissible.[145] However, Judge Torruella found most of these cases distinguishable on the facts because, in most, there was no possibility whatsoever that the gun in question had been manufactured in the state of possession.[146] He found holdings in other cases to be "contrary to the dictates of Rules 702 and 703."[147] The judge disagreed that the court need not consider the sufficiency of the prosecution's nexus evidence, as well as its admissibility,[148] maintaining that courts allow firearms experts to rely on personal knowledge "only where based on the brand it was a physical impossibility that the weapon was manufactured in the state of possession."[149] Judge Torruella argued it was not reasonable to rely solely on a single law enforcement officer's hearsay evidence to establish so crucial an element of the crime when that element was susceptible to doubt.[150] "Here, Smith & Wesson has a manufacturing plant in Maine, the state of possession. Under these circumstances, it is axiomatic that a higher degree of proof should be required to opine that appellant's . . . firearm was not manufactured . . . in Maine."[151]

Judge Torruella finally warned that the majority had set a dangerous precedent by its "reflexive deference to the ATF," allowing the Bureau to rely on "its own hearsay compilation as a basis for expert opinion."[152] The judge questioned the reliability of information neither published nor subject to peer review, and relied upon "by an investigating officer after criminal proceedings ha[d] begun," especially when objective information of interstate nexus was available.[153] The judge found it "difficult to imagine that in any other context the Court would allow an agent of one party to rely on that party's own self-serving, internal documents as a basis for his so-called expert opinion."[154] The judge deplored permitting "a government agency to rely on its own internal manuals and post-indictment telephone calls to establish a basic element of a crime."[155] Judge Torruella concluded by noting that producing "non-hearsay evidence on the jurisdictional requirement of § 922(g)(1) is hardly a major burden on the prosecution. . . . [I]t is a minor bureaucratic inconvenience . . . . The resources of the government can hardly be strained by requiring such direct proof of interstate nexus."[156]

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145. *Id.* (citing cases in the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits).

146. *Id.* at 101.

147. *Id.* at 95.

148. *Id.* at 100-01.

149. *Id.* at 101.

150. *Id.*

151. *Id.*

152. *Id.* at 103.

153. *Id.* at 100. Such objective evidence, Judge Torruella suggested, might include trace reports which are filled out and returned by gun manufacturers stating where a particular gun was made; markings on some weapons indicating the place of manufacture, and business records or testimony supplied by firearms manufacturers themselves. *Id.* at 102-03. Providing such direct evidence would, Judge Torruella argued, be more consistent with the protections guaranteed to Mr. Corey by the Confrontation Clause. *Id.* at 104.

154. *Id.* at 100. Judge Torruella reiterated "I do not believe that a law enforcement officer may reasonably rely on hearsay evidence to establish an element of a crime simply because he is deemed an expert witness." *Id.* at 101.

155. *Id.* at 105.

156. *Id.*

IV. ANALYSIS

The passion and persistence of Judge Torruella's activist argument on behalf of Mr. Corey makes sense given the advantage to the prosecution of the minimal nexus standard of § 922(g)(1) and the limited avenues available to the defense for challenging that standard. This imbalance may be attributed first, to the standard's history, which set the low minimal nexus standard and foreclosed most challenges to it, and second, to the consequences to individual defendants of federal jurisdiction over their criminal offense. Although the *Corey* majority stuck closely to its deferential standard of review and narrow identification of the issues on appeal, Judge Torruella's argument expressed both stated and unstated concern for the ease with which the prosecution established federal jurisdiction over Mr. Corey's offense and the consequences to Mr. Corey of that jurisdiction.

A. The Broad Jurisdictional Reach of § 922(g)(1)

Judge Torruella was correctly concerned with the majority's reflexive deference to the prosecution under the facts in *Corey*, when the firearm in question might have been made in the state of possession, freeing its possession from even a minimal nexus with commerce. "Here, Smith & Wesson has a manufacturing plant in Maine .... Under these circumstances, it is axiomatic that a higher degree of proof should be required ...."[157] Judge Torruella urged a higher degree of evidentiary rigor from prosecutors and review from appellate courts for the rare case when a firearm possession might escape the "*Scarborough* fiction"—that crossing any state line at any time places a felon's firearm "in commerce" for purposes of a federal crime.[158] Because § 922(g)(1)'s jurisdictional threshold presents almost no barrier to prosecutors bringing federal charges, Judge Torruella was determined to use the interpretive latitude of the Federal Rules of Evidence and standards of appellate review to hold the prosecution to its proof in Mr. Corey's case.[159]

In fact, Mr. Corey was pursuing the only avenue available to him for successfully challenging the jurisdictional reach of § 922(g)(1): challenging the sufficiency and admissibility of prosecution nexus evidence when interstate nexus was open to doubt. The First Circuit was not free to decide on Mr. Corey's behalf that the minimal nexus of § 922(g)(1) reached too broadly, or failed to require a "substantial effect" on commerce, making it constitutionally questionable after *Lopez*, as long as *Scarborough* applied directly and remained good law.[160] Judge Torruella conceded that the minimal nexus standard set in *Scarborough* was "well settled."[161] However, the First Circuit was free to consider Corey's challenge to the quality and quantity of the prosecution's nexus evidence. Judge Torruella repeatedly distinguished the *Corey* fact pattern from those of most defendants prosecuted under § 922(g)(1), emphasizing that Mr. Corey's potentially successful challenge to the

157. *Id.* at 101.

158. *See id.*

159. *See id.*

160. See Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989), where the Supreme Court expressly directed courts of appeals to follow the precedent that directly applies to their cases, even when the Supreme Court appears to suggest, as it did in *Lopez*, that it was rejecting the reasoning used to establish that precedent. *Id.* at 484. The Court instructed courts of appeals to leave to the Supreme Court "the prerogative of overruling its own decisions." *Id.*

161. United States v. Corey, 207 F.3d at 93.

minimal nexus with commerce was "rare" and "exceptional."[162] Just how rarely felon firearm possession falls outside the scope of federal jurisdiction under § 922(g)(1) is startling and raises important questions about its fairness.

In theory, the benefit of including a jurisdictional element in a federal firearms statute, according to the *Lopez* Court, lies in that element's limitation of federal prosecutions to offenses involving "a discrete set of firearm possessions that . . . have an explicit connection with or effect on interstate commerce."[163] The jurisdictional element "ensure[s], through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[164] In fact, experts on firearms manufacture estimate that the vast majority, perhaps ninety-five percent, of firearms in the United States, or their ammunition, or component parts, have, at some time, crossed a state line, meeting § 922(g)(1)'s minimal nexus standard.[165] In spite of the Supreme Court's reliance on the presence of a jurisdictional element to distinguish federal from non-federal offenses, the set of firearms possessions criminalized under § 922(g)(1) could hardly be called discrete.[166]

Because the jurisdictional scope of § 922(g)(1) typically reaches almost every firearm possession,[167] Judge Torruella correctly insisted that minimal nexus be proved by direct and unambiguous evidence once it was susceptible to reasonable doubt.[168] In a true case-by-case inquiry, the judge argued, even so minimal a nexus should not be established by minimally reliable evidence from "federal law enforcement officers testifying regarding a self-serving subject matter."[169] Judge Torruella rejected the majority argument that Rule 703 relaxes "best evidence" requirements for reasons of efficiency, noting that providing direct, trustworthy evidence was "hardly a major burden" for the prosecution, especially when meeting the minimal nexus standard of § 922(g)(1) typically presented the prosecution with almost no burden at all.[170]

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162. *Id.* at 101-03.

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

164. *Id.* at 561.

165. *See, e.g.*, Newton, *supra* note 52 at 684 nn.52-53. Special Agent George Michael Taylor, a thirty-year veteran of the ATF, also cautioned that this percentage was national and would be higher in states with no firearms manufacturers, and lower in states like New York and Connecticut, with many. *Id.*

166. The large percentage of firearms included under § 922(g)(1)'s jurisdiction would certainly seem to raise a concern about firearms similar to the concern raised about buildings in *Jones*, when the Court worried that, given the broad interpretation of the jurisdictional element of an arson statute, "hardly a building in the land would fall outside the . . . statute's domain." Jones v. United States, 529 U.S. at 848, 857 (2000).

167. *See, e.g.*, Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf?,"* 50 SYRACUSE L. REV. 1317, 1370 (2000). *See also* Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967 (1995). The authors, two senior Department of Justice Attorneys, argue that a law making "it a federal offense to use a gun that had passed in interstate commerce in any crime of violence . . . would have federalized . . . virtually any crime committed with a gun. The Department opposed that measure . . . [which was] breathtaking in scope." *Id.* at 974.

168. United States v. Corey, 207 F.3d 84, 103-04 (1st Cir. 2000) (stating that the facts in *Corey* are unique because Smith and Wesson actually has a factory in Maine, the state of possession).

169 . *Id.* at 93. This writer was able to find such independent evidence at her local library in nine minutes. Corey's Smith and Wesson Model 916, slide action, 12-gauge shotgun was manufactured in Springfield, Massachusetts. S. P. FJESTAD, BLUE BOOK OF GUN VALUES, 1149, 1185 (21st ed. 2000) (thanking Smith and Wesson historian, Roy Jinks).

170. United States v. Corey, 207 F.3d at 105.

B. The Jurisdictional Result of § 922(g)(1)

A second, stated concern of Judge Torruella was that allowing the disputed prosecution evidence, in "reflexive deference to the ATF," set "a dangerous precedent."[171] The questionable evidence was used to prove the jurisdictional element in particular, the element that federalized Mr. Corey's offense and that "absent which there is no triable federal crime."[172] The nexus with commerce, once proved, subjected Mr. Corey's conduct to federal prosecution, where his prosecutors enjoyed significant advantages in addition to the broad and easily met jurisdictional element of the statute.

The prosecution had two particularly important advantages once federal jurisdiction was established over Mr. Corey's gun possession. First, subjecting Mr. Corey's conduct to both state and federal charges gave prosecutors a considerable advantage in charging him. Like other statutes federalizing a large area of criminal activity, § 922(g)(1) is broadly written and purposefully over-inclusive.[173] While the large-scale criminal activity Congress sought to regulate, possession of firearms by dangerous persons, falls under the statute, so does a good deal of "mundane, local" activity.[174] One example of a "mundane, local situation" reached by § 922(g)(1) arose in the Eighth Circuit, where a defendant was convicted under § 922(g)(1) and sentenced to fifteen years in prison under § 924(e) after a game warden found him in possession of a firearm as the defendant returned from duck hunting.[175] Such federalizing of mundane conduct is expected to be limited, not through narrow readings of the statutes in the lower courts, but through the exercise of prosecutorial discretion in bringing federal charges.[176] Nonetheless, the

171. *Id.* at 103.

172. *Id.* at 93.

173. Maroney, *supra* note 167, at 1370-71.

174. *Id.* at 1370 (quoting NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 79-80 (3d ed. 2000). Federal criminal legislation is frequently overbroad and follows a recurrent pattern when it is first passed and later interpreted as described in this analysis:

> Congress is presented with information suggesting that there is a type of serious crime problem of sufficient magnitude and occurring on a national scale so as to warrant federal intervention through the legislating of a new federal crime. Congress . . . proceeds to legislate a statute that is drafted in terms that extend more broadly than the kind of [large-scale] criminal activity that was the perceived reason for the legislation . . . .
>
> Subsequently, a prosecution is brought under the new statute, involving a mundane, local situation rather than the type of large-scale criminal activity that was the perceived national crime problem. Because of the absence of limiting language in the statute, the prosecution appears to be a permissible invocation of the statute, and the defendant is convicted. The defendant appeals, claiming that the statute should be limited to the purposes . . . delineated in the legislative history. The court upholds the broad interpretation of the statute consistent with its actual language, concluding that while the statute was 'primarily' aimed at the indicated large scale criminal activity, the plain meaning of its express language is controlling.

Id.

175. United States v. Bates, 77 F.3d 1101, 1103 (8th Cir. 1996).

176. Maroney, *supra* note 167, at 1371 (citing Gorelick & Litman, *supra* note 167, at 973). The author argues that the decision in *Jones* represents an attempt by the Court to cut an overbroad federal criminal statute down to size "by employing a mix of doctrines of statutory construction: lenity, federal-state balance, and avoiding constitutional questions." *Id.* at 1378.

easy availability of federal charges gives prosecutors leverage in plea bargaining, and takes from defendants like Corey the ability to negotiate favorable treatment in exchange for a guilty plea.[177]

The "awesome" and largely unreviewable charging discretion of prosecutors concerned the American Bar Association's Task Force on the Federalization of Criminal Law.[178] The Task Force expressed alarm at the power of federal prosecutors and the absence of a principled basis for their "selection of crimes and defendants from among a very long (and lengthening) list of candidates."[179] Judge Torruella was correct, though unsuccessful, when he argued that judicial deference to the prosecution's expert witness was "unwarranted as matter of policy," particularly when evidence was provided by a government agent, was collected after-the-fact, was self-serving, and where the added disadvantage to the defendant of an inadequate appellate argument was apparent to all.[180]

A second consequence of Mr. Corey's "triable federal offense" under § 922(g)(1) was suggested in Judge Torruella's policy argument, but remained unstated. Neither the majority nor the dissent in *Corey* expressly addressed how much the defendant had at stake in the outcome of his jurisdictional challenge. The dramatically different and mandatory sentencing imposed under § 924(e) for Corey's conviction under § 922(g)(1) fully justifies the urgency and detail of Judge Torruella's argument for higher standards of admissibility and review of the prosecution's jurisdictional evidence.[181]

Authors Gorelick and Litman are senior attorneys from the Justice Department. In a symposium on federal criminal jurisdiction, they assert:

> It is exceedingly difficult to draft a statute in a way that includes only those crimes that are sophisticated, inter-jurisdictional, or sensitive enough to require a federal solution. In order to allow sufficient flexibility to bring federal prosecution when an aspect of a law enforcement problem requires it, federal criminal legislation will inevitably have to be overinclusive. It will have to be drafted in a way that includes criminal activities that state and local criminal justice systems can handle, as well as activities that they cannot . . . . The exercise of prosecutorial discretion, then, becomes the most important and effective brake on the federalization of crime.

Gorelick & Litman, *supra* note 167, at 972-73.

177. James E. Hooper, Note, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 MICH. L. REV. 1951, 1959-60 (1991). "Ideally, prosecutors would exercise their discretion to seek enhanced sentencing in federal court for only a few of their cases. The *threat* of prosecution under the ACCA, however, would inspire all *potential* . . . defendants to agree to [state] guilty pleas with stiffer sentences." *Id.* at 1960 (footnote omitted). "Congress expected prosecutorial discretion to limit significantly the number of cases actually prosecuted under the ACCA. Congress envisioned only the more egregious cases as proper federal fodder." *Id.* (citing Congressional hearings). *See also* Brown, *supra* note 97, at 995-96 (describing how defendants prosecuted for firearms violations under "Project Exile" were "whipsawed between the two jurisdictions."). *Id.*

178. TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, CRIMINAL JUSTICE SECTION, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 31-32 (1998).

179. *Id.* at 35. *See also* United States v. Lopez, 514 U.S. 549, 551 (1995).

180. United States v. Corey, 207 F.3d 84, 93 (1st Cir. 2000).

181. *See* Gorelick & Litman, *supra* note 167. The Department of Justice attorneys defend the allocation of criminal justice resources according to what they call "the comparative advantage approach," that is, "each agency or level of government ideally should handle those aspects of a law enforcement problem that it is best equipped to handle." *Id.* at 976. The attorneys acknowledge that "[t]he availability of stiffer penalties in the federal system is also a potential comparative advantage, particularly in multiple-offender cases, where the prospect of a long sentence may induce a low-level figure to plead guilty and cooperate in the prosecution of the most culpable offenders." *Id.* at 976-77.

Between 1977, when the Supreme Court set a minimal nexus standard for felon firearm possession in *Scarborough*, and Mr. Corey's conviction in 1997, Congress passed the Armed Career Criminal Act,[182] including § 924(e), imposing a mandatory minimum sentence on persons convicted under § 922(g)(1) who had three previous criminal convictions.[183] The Act was intended to punish violent repeat offenders who were found by Congress to be responsible for the majority of crimes involving theft and violence.[184] "By increasing the sentence for career criminals and by involving the federal law enforcement system, Congress anticipated a major reduction in the crime rate."[185]

When convicted under § 922(g)(1) for firearm possession, and sentenced under § 924(e), Corey faced a mandatory minimum sentence of fifteen years in prison, and a fine of up to $25,000.[186] The equivalent state conviction in Maine carried a three- to five-year sentence and a maximum $5,000 fine.[187] Under § 924(e), a judge sentencing Mr. Corey had no authority to mitigate the sentencing consequences, even if Mr. Corey's possession was a mundane, local offense.[188] In addition to requiring a fifteen-year minimum sentence,[189] § 924(e) did not permit the judge sentencing Mr. Corey to grant him probation or to suspend any part of his sentence. The statutory requirements for Mr. Corey's past convictions alone identified him as a career criminal for purposes of § 924(e). A judge was not permitted to find that, in spite of those convictions or because of the less serious nature of those convictions, Mr. Corey did not fit the profile of a dangerous career criminal and should not be subjected to harsh penalties under the statutes.[190] Prosecutors

182. Armed Career Criminal Act of 1984, Pub. L. No. 98-473, 98 Stat. 2185 (1984). The Act was part of a larger enactment, The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984).

183. *See supra* text accompanying note 4.

184. Congressional hearings relied on a number of studies showing that a small percentage of criminals committed a disproportionately high percentage of crimes. *See* Hooper, *supra* note 177, at 1959-62 (citing studies and Congressional remarks). The act was originally conceived as a way to help state prosecutors "leverage" guilty pleas with felons while "[i]deally, prosecutors would exercise their discretion to seek enhanced sentencing in federal court for only a few of their cases." *Id.* at 1960.

185. Melanie Popper, Note, *Retrospective Application of State Firearm Prohibitions Triggering Enhanced Sentencing Under Federal Law: A Violation of the Ex Post Facto Clause? The Circuits Split*, 27 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 307, 312 (2001) (citations omitted). *See also*, Jill C. Rafaloff, Note, *The Armed Career Criminal Act: Sentence Enhancement Statute or New Offense?* 56 FORDHAM L. REV. 1085, 1091-98 (1988). Like other statutes that are aimed at recidivists, § 924(e) has been challenged "as violating due process, double jeopardy, equal protection, and cruel and unusual punishment provisions of the Constitution, but the Supreme Court has recognized them as constitutional." *Id.* at 1094 (citations omitted).

186. 18 U.S.C. § 924 (Supp. 2002).

187. *See* 17-A M.R.S.A. §§ 393, 1301 (Supp. 2002).

188. In the duck hunter's conviction upheld in the Eighth Circuit, the court noted that "Congress has tied our hands and removed a much-needed measure of judicial discretion through its enactment of the fifteen year mandatory minimum provision of § 924(e)(1)." United States v. Bates, 77 F.3d 1101, 1106 (1996).

189. Section 924(e) has no upward limit. A judge may sentence a defendant to life imprisonment.

190. Hooper, *supra* note 177 at 1956-58 (noting how some judges balk at sending a defendant to jail for fifteen years under § 924(e) when his record leaves serious doubt that he is a career criminal, while other judges employ "overly mechanical definitions that lead to draconian sentences for . . . [defendants] who are almost certainly outside the small class of 'career criminals'

retained a considerable advantage over Mr. Corey given the threat of this dramatically harsher sentencing. Indeed, Mr. Corey's presence at trial might easily have been the result of his having little or no ability to help himself by pleading guilty.[191]

In spite of the prosecution's advantage, the *Corey* majority declined the opportunity to rigorously review the admissibility of the prosecution's jurisdictional evidence or raise the standard for admitting such evidence, even where the consequences of federal charges were so grave and the jurisdictional requirements of § 922(g)(1) so easily established. Judge Torruella argued unsuccessfully that the court, at the very least, should require the prosecution to go beyond government "internal manuals and post-indictment telephone calls"[192] and provide "direct proof of interstate nexus"[193] where the consequence of finding that nexus was a draconian and mandatory federal sentence.

V. CONCLUSION

Prosecutions under § 922(g)(1) and § 924(e) bring together the minimal nexus standard of *Scarborough* with sentencing consequences and reduced judicial discretion not contemplated by the Supreme Court at the time the low jurisdictional threshold of § 922(g)(1) was established. However, nothing in the history of § 922(g)(1) suggests that its minimal nexus standard will be altered without an explicit decision from the Supreme Court, overturning its statutory interpretation in *Scarborough.*

Facial constitutional challenges to § 922(g)(1), suggested by the Supreme Court's holding in a similar firearm possession statute in *Lopez*, appear to be foreclosed by the Court's continued preference, established in *Bass* and restated in *Lopez*, for statutes with express jurisdictional elements. "As applied" challenges to the broad reach of § 922(g)(1)'s minimal nexus will continue to go nowhere, in spite of the narrowing of a broad jurisdictional element in a federal arson statute in *Jones*, as long as *Scarborough* applies directly in § 922(g)(1) prosecutions and remains settled law.

Defendants in the lower courts, like Mr. Corey, are left with few avenues for challenging broad federal jurisdiction under § 922(g)(1). One avenue remaining is to attack the sufficiency of government nexus evidence, the avenue argued unsuccessfully in *Corey.* Courts and attorneys seeking to protect defendants from a deadly combination of a minimal jurisdictional requirement and maximum sentencing consequences, may wish to forcefully take issue with the quality and quan-

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which Congress targeted in the ACCA."). The author makes a strong case that Congress did not envision the routine application of § 924(e), but instead imagined "only the more egregious cases as proper federal fodder." *Id.* at 1960. Once convicted in federal court, a defendant like Mr. Corey can not hope that a judge might find that "the 'mere' fact of three prior felonies, without more, does not a career criminal make." *Id.* at 1961 (footnotes omitted) (citing cases where the federal judge's questioning of the government's proof was understandable in part because mandatory sentences were so severe).

191. *See* Dick Thornburgh et al., *The Growing Federalization of Criminal Law*, 31 N.M. L. REV. 135, 144-45 (2001) (describing how prosecutors use federal venues to "whack" defendants with much longer sentences). *See also* Jones v. United States, 529 U.S. 848, 859 (2000) (Stevens, J., concurring) (citing a twenty-five year difference in state and federal sentences for identical offenses).

192. United States v. Corey, 207 F.3d 84, 105 (1st Cir. 2000).

193. *Id.*

tity of government nexus evidence in those rare instances, as in *Corey*, where § 922(g)(1)'s minimal nexus is susceptible to doubt.

Finally, the constitutionality of § 922(g)(1)'s jurisdictional element remains undecided under modern Supreme Court Commerce Clause jurisprudence. Neither of the cases setting the minimal nexus standard for jurisdiction, *Bass* or *Scarborough*, addressed whether the broad reach of § 922(g)(1) exceeded Congress's authority to regulate felon gun possession under the Commerce Clause. The Court has failed to address the constitutionality of the thirty-two-year-old statute even when its nexus standard does not comport with the "substantial effect on commerce" required in *Lopez* or with Supreme Court jurisdictional standards for newer statutes in *Morrison* and *Jones*. It is reasonable to wonder how long the mere presence of § 922(g)(1)'s jurisdictional element can continue to immunize the statute from scrutiny in the present climate of Commerce Clause jurisprudence.[194]

Apart from the question of its constitutionality, the jurisdictional language of § 922(g)(1) may be vulnerable to a more narrow interpretation by the Supreme Court in the same way the scope of the federal arson statute was narrowed in *Jones* without addressing the statute's constitutionality. A fresh look by the Court at which felon firearm possessions are meaningfully "in or affecting commerce" could rewrite the "legal fiction" of *Scarborough* and raise the minimal nexus standard of § 922(g)(1).

As early as 1971, the Supreme Court worried about the unfairness to defendants of reflexively federalizing essentially local felon firearm possessions.[195] The same unfairness was cited in 2000 by justices concerned with how federal criminal statutes were displacing policy choices made by states.[196] Given the lethal combination of high penalties, limited judicial discretion, and a minimal jurisdictional threshold governing felon firearm regulation, defense counsel and lower courts may need to vigorously and repeatedly call on the Supreme Court to reexamine the unfairness to defendants that has evolved since its holding in *Scarborough*, and to extend either the heightened standard of nexus with commerce in *Lopez* and *Morrison*, or the narrow interpretive latitude of *Jones* to felon firearm possessions prosecuted under § 922(g)(1).

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194. Weis, *supra* note 55, at 1454. The author found that not only were lower courts "unduly influenced" by the presence of the jurisdictional element when determining the constitutionality of § 922(g)(1) but the reasoning in their opinions was "nonrigorous and unsatisfying." *Id.*

195. United States v. Bass, 404 U.S. 336, 348-49 (1971).

196. Jones v. United States, 529 U.S. at 859 (Stevens, J., concurring).