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Commerce Clause Challenges After United States v. Lopez

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CASENOTE

COMMERCE CLAUSE CHALLENGES AFTER *UNITED STATES v. LOPEZ*

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* To my wife, Alisa, and my children–Beauty, Mercy, and A.J. Thank your for the constant love, abundance of smiles, and the needed reality checks that kept my law school career in perspective.

I. INTRODUCTION

On the night of September 21, 1994, Christy Brzonkala's life changed forever.[1] An undergraduate student at Virginia Polytechnic and State University, Christy spent that evening in her dormitory with a female friend.[2] They had just met two male students—members of the university's football team.[3]

When her friend left her alone with one of the players, he requested that Christy engage in sexual intercourse with him.[4] After Christy rejected his

1. This account is based on the facts of *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779, 782 (W.D. Va. 1996) *rev'd sub nom.* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949 (4th Cir. 1997), *vacated, reh'g granted en banc*, (Feb. 5, 1998).

2. *See id.*

3. *See id.* at 781.

4. *See id.* at 782.

invitations twice, the man overpowered and raped her.[5] Discovering the rape in progress, the other player took his own turn with her.[6] Finally, the first rapist forced intercourse a second time.[7]

When the university's complaint process failed her, Christy filed a civil complaint in the Western District of Virginia on March 1, 1996.[8] She sued both rapists, charging that the acts "were motivated wholly by discriminatory animus toward her gender and were not random acts of violence."[9] The claim relied primarily on Title III of the Violence Against Women Act (VAWA).[10]

The defendants' counsel argued that, in passing the VAWA, Congress had exceeded its powers under the Commerce Clause[11] because domestic violence did not substantially affect interstate commerce.[12] Defense counsel's argument rested on a revolutionary 1995 United States Supreme Court decision: *United States v. Lopez*.[13]

The district judge agreed with the defense, noting that "constitutional limits must be respected if our federal system is to survive."[14] The judge dismissed the VAWA claims with prejudice and declined to exercise

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5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.* at 781.
9. *Id.* at 782.
10. The civil rights prong of the Violence Against Women Act (VAWA), provides in relevant part:

> (a) Purpose: . . . [T]o protect the civil rights of victims of gender-motivated violence . . . .
> (b) . . . All persons within the United States shall have the right to be free from crimes of violence motivated by gender . . . .
> (c) Cause of action. A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate . . . .
> (e) . . . Nothing in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender . . . .

42 U.S.C.A. § 13981 (West 1995).

11. U.S. CONST. Art. I, § 8. This section provides, in relevant part: "[1] The Congress shall have Power . . . [3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
12. *See Brzonkala*, 935 F. Supp. at 801.
13. 514 U.S. 549 (1995).
14. *Brzonkala*, 935 F. Supp. at 801.

supplemental jurisdiction over the state claims.[15]

Brzonkala is unusual in the annals of challenges to Congress' commerce power because it succeeded.[16] This initial success flowed from the controversial *Lopez* decision.[17]

This casenote explores the practical ramifications of *Lopez*.[18] It examines the key arguments asserted in post-*Lopez* Commerce Clause challenges, and recounts the responses to those arguments by federal circuit courts. With that perspective, this casenote outlines a workable methodology for evaluating the merits of a Commerce Clause challenge to a federal statute.

Part II of this casenote succinctly highlights the evolution of Commerce Clause jurisprudence.[19] Part III briefly analyzes the *Lopez* decision, and surveys the legal community's predictions of its impact.[20] Parts IV and V examine the continued challenges[21] to congressional use of the Commerce Clause in the wake of *Lopez*. These sections analyze why the courts have seemingly responded inconsistently to the decision.[22] Finally, Part VI outlines a suggested approach for evaluating the merits of a Commerce Clause challenge.[23]

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15. *See id.*

16. A three-judge panel of the Fourth Circuit reversed the district court's decision on appeal; however, that opinion has been vacated and an en banc rehearing granted. *See infra* Part V.E. (reviewing challenges to the civil prong of the VAWA).

17. *Lopez* was the first—and last—time since *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (striking down the Bituminous Coal Conservation Act of 1935), that the United States Supreme Court used the Commerce Clause to overturn an act of Congress. *See The Lopez Watch*, 21 ADMIN. & REG. L. NEWS, Winter 1996, at 4 (discussing the minimal impact of over 35 *Lopez*-type challenges in 1995).

18. Many articles deal with the *Lopez* decision on more philosophical levels, especially in light of the Supreme Court's renewed emphasis on federalism. *See infra* notes 64-67 and accompanying text (citing articles). *See generally, e.g.*, Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921 (1997).

19. Law review articles abound recounting the history of the Commerce Clause. *See generally, e.g.*, Molly E. Homan, Comment, United States v. Lopez: *The Supreme Court Guns Down the Commerce Clause*, 73 DENV. U. L. REV. 237 (1995).

20. At the time of *Lopez*, some commentators viewed it as insignificant, while other likened it to a new war over federalism. *See* Litman & Greenberg, *supra* note 18, at 921.

21. I have conducted an extensive review of federal decisions citing *Lopez* through the beginning of September 1998.

22. Not all lower courts are interpreting *Lopez* with the same focus. For instance, courts disagree over whether or not *Lopez* limits federal legislation to purely economic activities. *See infra* note 417.

23. Success in a commerce challenge is exceedingly rare. Many lower courts seem to take "the path of least resistance" and simply uphold statutes rather than rely on the shaky foundation of *Lopez*. *See* Eric Grossman, Comment, *Where Do We Go From Here? The Aftermath and Application of* United States v. Lopez, 33 HOUS. L. REV. 795, 801 (1996).

II. COMMERCE CLAUSE JURISPRUDENCE

A. *Early Jurisprudence*

Article I, Section 8, Clause 3 of the United States Constitution[24]—the Commerce Clause—delegates to Congress the power to regulate commerce among the several states. It is the vehicle Congress has used to regulate a diverse variety of items and activities.[25]

In the landmark case of *Gibbons v. Ogden*,[26] Chief Justice Marshall first explored the nature of the commerce power. While extolling Congress' power to regulate "commercial intercourse,"[27] Justice Marshall also acknowledged that there are inherent limits on that power.[28] In the next century, the Supreme Court concentrated on state efforts to regulate internal commerce. It often upheld regulations as proper,[29] unless the state statutes "discriminated against or burdened interstate commerce."[30]

In 1887, the focus shifted when Congress began to affirmatively regulate commerce through means such as the Interstate Commerce Act and the Sherman Antitrust Act of 1890.[31] Prior to 1937 the Court limited this expanding regulatory power with devices such as the "direct/indirect" test, which only allowed regulation of activities that directly affected interstate commerce.[32]

The Court often found that the effect of a regulated activity on interstate

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24. *See supra* note 11 (providing text of the commerce clause).

25. *See* Deborah J. Merritt, *Federalism as Empowerment*, 47 FLA. L. REV. 541, 553 & n.69 (1995) (noting that *Lopez* has only placed a minor restraint on Congress' commerce power).

26. 22 U.S. (1 Wheat.) 189 (1824). The Court held that New York's grant of exclusive navigation of its waters conflicted with a license granted under the laws of the United States. *See id.*

27. Chief Justice Marshall contended that "[the commerce power] is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.* at 196.

28. Marshall's view of commerce was not as expansive as his definition implied. "[The commerce power] may very properly be restricted to that commerce which concerns more States than one .... The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State." *Id.* at 194-95.

29. *See* Kidd v. Pearson, 128 U.S. 1, 17-18 (1888) (allowing Iowa to ban the intrastate manufacture of alcohol under its police power); Veazie v. Moor, 55 U.S. (1 How.) 568, 574 (1853) (allowing Maine's intrastate steamboat monopoly).

30. Wickard v. Filburn, 317 U.S. 111, 121 (1942).

31. *See* Leonard P. Strickman, *Schools, Guns and the Future of the Commerce Clause*, 1995 ARK. L. NOTES 77 (discussing the emergence of the commerce power).

32. *See* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (using the "direct/indirect" test to strike down federal New Deal regulations).

commerce was too remote. In general, this strict application of the Commerce Clause flowed from the Court's rigorous view of federalism, which rejected congressional attempts to intrude into spheres of traditional state action.[33]

B. *Modern Pre-*Lopez *Expansion*

In 1937, the Supreme Court began a steady march toward accepting congressional expansion of the commerce power. This came in the wake of the Great Depression and President Roosevelt's threats to "pack the court" in order to uphold key New Deal legislation.[34]

In *N.L.R.B. v. Jones & Laughlin Steel Corp.*,[35] the Court upheld the National Labor Relations Act and replaced the "direct/indirect" test with an easier-to-satisfy "close and substantial relation to interstate commerce" test.[36] Over the next fifty-eight years, the Court continued to accept an expanded commerce power.[37]

The crucial principle used to uphold previously untenable legislation emerged in *Wickard v. Filburn*'s[38] "aggregate effects" test. In *Wickard*, the Court upheld amendments to the Agricultural Adjustment Act, and allowed federal regulation of wheat production even where it was grown at home for purely personal consumption.[39] Using the "aggregate effects" test, the Court reasoned that local activities could affect demand for wheat and substantially affect interstate commerce when "taken together with that of many others similarly situated."[40]

Notably, the Court began to show great deference to congressional

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33. *See Wickard*, 317 U.S. at 119-24 & n.21 (fully discussing the history of the Commerce Clause).

34. *See* Grossman, Comment, *supra* note 23, at 821 n.173 (explaining Roosevelt's court-packing plan, and the apparent capitulation of the Supreme Court to his wishes).

35. 301 U.S. 1, 37 (1937). The Court explained that intrastate labor-related activities are so substantially related to interstate commerce that "their control is essential or appropriate to protect that commerce from burdens. . . ." *See id.*

36. For more on the "direct/inderect" and "substantial relation" tests, see Homan, Comment, *supra* note 19, at 250-56.

37. Even as the Court allowed the expansion of congressional power, however, it warned:

> [T]he scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

Jones & Laughlin, 301 U.S. at 37.

38. Wickard v. Filburn, 317 U.S. 111, 127-28 (1942).

39. *See id.*

40. *Id.*

findings. In some instances, the Court did not even require any congressional findings. This expansion of the commerce power reached its apogee with the Court's support of Title II of the Civil Rights Act of 1964, which prohibited racial discrimination in places of public accommodation.[41] In *Heart of Atlanta Motel, Inc. v. United States*,[42] the Court upheld Title II where a motel discriminated against interstate travelers.[43]

This early line of cases culminating in the *Heart of Atlanta* decision, showed no practical limit on Congress' power under the Commerce Clause.[44]

III. *UNITED STATES V. LOPEZ* AND ITS PREDICTED IMPACT

A. *The Decision*

Police arrested Alfonso Lopez, Jr., a senior in a San Antonio high school, for firearm possession on school premises—a violation of Texas law.[45] The state dropped charges the next day, and a federal grand jury

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41. The relevant portion of Title II provides:

> All persons shall be entitled to the full and equal enjoyment of . . . any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin.
> (b)(1) [This applies to] any inn, hotel, motel, or other establishment which provides lodging to transient guests . . . ;
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises . . . ;
> (c) The operations of an establishment affect commerce . . . [if] it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce . . . .

42 U.S.C.A. § 2000a (West 1994).

42. 379 U.S. 241 (1964).

43. *See id.* at 261; *see also* Katzenbach v. McClung, 379 U.S. 294, 304-05 (1964) (upholding Title II where a discriminating restaurant purchased a substantial portion of food that had moved in interstate commerce).

44. *See* Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695, 701 (1996) (commenting that "by the 1980s the Commerce Clause game seemed about over"). Prior to *Lopez*, in *National League of Cities v. Usery*, 426 U.S. 833, 840-41 (1976), the Court prohibited Congress from mandating minimum wages and maximum hours, due to the "affirmative limitations" contained in the Tenth Amendment. However, this case was expressly overruled in *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 557 (1985), when Justice Blackmun changed his position on the issue. For a discussion on these two cases in relation to *Lopez*, see Ann Althouse, *Enforcing Federalism After* United States v. Lopez, 38 ARIZ. L. REV. 793, 808-12 (1996).

45. *See Lopez*, 514 U.S. at 551. For a full discussion on the facts and opinions in the case,

indicted Lopez under the Gun Free School Zones Act of 1990,[46] which created a federal criminal offense for possessing a firearm in a school zone.

Lopez challenged the statute on the ground that it exceeded Congress' commerce power because it attempted to "'legislate control over our public schools.'"[47] The district court disagreed, however, and *Lopez* was convicted of the offense following a bench trial.[48] The Fifth Circuit Court of Appeal reversed, noting insufficient congressional findings and stating that Congress had exceeded its commerce power.[49]

On review in 1995, the United States Supreme Court affirmed the Fifth Circuit's decision and struck down the Act. Chief Justice Rehnquist's majority[50] opinion delivered a federalism-based message, noting that the Act moved in two areas of historical state sovereignty:[51] criminal law and education.[52] Justice Kennedy's concurring opinion, joined by Justice O'Connor,[53] provided a more cautious, but equally federalism-based, analysis of the issue. The dissenting opinions characterized the decision as an aberration.[54]

The *Lopez* majority identified three broad categories of activity within which Congress may exercise its Commerce Clause power. These categories have proved key in subsequent lower court jurisprudence.

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see generally Grossman, Comment, *supra* note 23, at 808-14.

46. The Gun Free School Zones Act of 1990, 18 U.S.C.S. § 922(q) (Law. Co-op. 1996), *amended by* 18 U.S.C.S. § 922(q) (Law. Co-op. Supp. 1997), made it unlawful "knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q).

47. *Lopez*, 514 U.S. at 552.

48. *See id.*

49. *See* United States v. Lopez, 2 F.3d 1342, 1367-68 (5th Cir. 1993), *aff'd* 514 U.S. 549 (1995). The Fifth Circuit focused primarily on the lack of legislative findings and the different type of regulation present in the Gun Free School Zones Act of 1990. *See id.* at 1366.

50. In the 5-4 decision, Justices O'Connor, Scalia, Kennedy and Thomas concurred. *See Lopez*, 514 U.S. at 550.

51. In dissent, Justice Souter balked at the notion that traditional state regulation should factor into the analysis. *See id.* at 608-09 (Souter, J., dissenting); *see also* Charles E. Ares, Lopez *and the Future Constitutional Crisis*, 38 ARIZ. L. REV. 825, 825-26 (1996) (speculating that Rehnquist "opened the floodgates" for lower courts to dismantle intrusions on federalism).

52. In a lengthy footnote, Chief Justice Rehnquist identified criminal law as an area traditionally left to the states. *See Lopez*, 514 U.S. at 561 n.3. Moreover, he frowned upon the logical extension of the government's reasoning, which would possibly allow Congress to mandate a federal school curriculum. *See id.* at 565.

53. Justice Thomas, while joining the majority, also concurred on his own to argue for further limitation of the Commerce Clause. *See id.* at 584 (Thomas, J., concurring). He attacked the substantial effects test, noting that it "appears to grant Congress a police power over the Nation." *Id.* at 599-600 (Thomas, J., concurring).

54. Both Justice Stevens and Justice Souter dissented alone, while Justice Breyer's dissent was joined by Justices Stevens, Souter, and Ginsburg. *See id.* at 550. This section will present the dissenters' rebuttals of the majority's reasoning point by point in the footnotes.

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce. . . .[55]

The majority, being careful to clear up confusion over the final category, stated that a regulated intrastate activity must do more than simply "affect" interstate commerce; it must "*substantially* affect" it.[56]

The majority quickly disposed of the first two *Lopez* categories by reasoning that firearm possession did not implicate channels or instrumentalities of interstate commerce.[57] In the third category, however, the majority identified four major problems with the Act.

First, mere firearm possession had nothing to do with commerce and was "not an essential part of a larger regulation of economic activity."[58] Second, the Act had "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."[59] Third, although congressional findings are not required, they were notably absent[60] in the Act's "sharp break" from prior firearms legislation. The

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55. *Lopez*, 514 U.S. at 558-59 (citations omitted).

56. *Id.* at 559 (emphasis added). While accepting that the proper test was "substantial" or "significant" effects on interstate commerce, the dissenters stressed that it is necessary to look to the cumulative effect of all similar instances to make that determination. *See id.* at 615-16 (Breyer, J., dissenting).

57. *See id.* at 559. In dissent, Justice Stevens alone argued that guns were articles of commerce whose possession in any market were a consequence of commercial activity. *See id.* at 602-03 (Stevens, J., dissenting).

58. *Id.* at 561. In the major dissent, Justice Breyer argued that distinguishing commercial from noncommercial was irrelevant and not in line with precedent. *See id.* at 627-28 (Breyer, J., dissenting). Justice Souter argued the distinction was a step backwards towards the "direct/indirect" test. *See id.* at 608 (Souter, J., dissenting).

59. *Id.* at 561-62. Justice Breyer responded that no jurisdictional element had ever been required in the past, as with 18 U.S.C. § 922(o)(1)'s ban on the mere possession of machine guns. *See id.* at 630 (Breyer, J., dissenting).

Moreover, the majority itself minimized the impact of requiring such a jurisdiction element when it stated, "'[W]here a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Id.* at 558 (citations omitted). The lower courts have focused on this language in upholding subsequent statutes under the Commerce Clause.

60. *See* Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez Seminole Tribe Decisions*, 96 COLUM. L. REV. 2214, 2223-24 (1996) (suggesting

absence of congressional findings prevented the Court from finding a substantial relation to interstate commerce.[61] Finally, the government's expansive reasoning, if accepted, "convert[ed] congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[62]

While joining the majority, Justices Kennedy and O'Connor concurred separately to emphasize the delicate balance required when the Court makes difficult choices on federalism principles. They warned that the Court should not return to an outdated understanding of commerce.[63]

B. *Post*-Lopez *Predictions*

In the wake of *Lopez*, scholars disagreed as to its impact. Some viewed the decision as revolutionary: "one of the opening cannonades in the coming constitutional revolution."[64] For many, it was confirmation that federalism was not dead, and that Congress' powers under the Commerce Clause were not plenary.[65]

Yet, as time passed and courts had a chance to absorb *Lopez*, many saw the impact of the decision as modest.[66] Regardless of the speculated

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that Congress may have simply become "careless" in not making findings due to popular support).

61. *See Lopez*, 514 U.S. at 563. The dissenters agreed that absence of findings might deprive a law of deference; however, Justice Breyer argued that it made no difference since the Act had not interfered with state authority. *See id.* at 617-18 (Breyer, J., dissenting). Justice Souter contended that the statute, itself, implied sufficient findings. *See id.* at 612 n.2 (Souter, J., dissenting).

62. *Id.* at 567. Chief Justice Rehnquist feared there would be no limit to congressional authority, and maintained that Justice Breyer was unable to find one activity beyond the scope of federal regulation. *See id.* at 565-66.

63. *See id.* at 577-78 (Kennedy, J., concurring). Justice Kennedy's restrained opinion balances what otherwise might be seen as truly revolutionary. For a deeper analysis of his position, see Althouse, *supra* note 44, at 801-04.

64. Bruce Ackerman, *Supreme Court Rules Ban on Guns Near Schools Invalid* (National Public Radio broadcast, Apr. 27, 1995) *available in* 1995 WL 2958158; *see also* Ares, *supra* note 51, at 827 (suggesting that *Lopez* could reverse sixty years of Commerce Clause analysis); Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 752 (1995) (hailing the decision as "revolutionary" and "long overdue"). *See generally* Litman & Greenberg, *supra* note 18, at 921-22 (summarizing scholarly positions on the impact of *Lopez*).

65. *See* Strickman, *supra* note 31, at 81 (contending that *Lopez* shifted the burden from the challenger to the government); Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After* Lopez, 46 CASE W. RES. L. REV. 801, 842-43 (1996) (emphasizing the federalism view of *Lopez*).

66. *See, e.g.*, Jesse H. Choper, *Did Last Term Reveal "A Revolutionary States' Rights Movement Within the Supreme Court?,"* 46 CASE W. RES. L. REV. 663, 664 (1996) (considering *Lopez* a very limited decision); Peter A. Lauricella, *The Real "Contract with America": The Original Intent of the Tenth Amendment and the Commerce Clause*, 60 ALB. L. REV. 1377, 1379-80 (1997) (arguing that the holding in *Lopez* may be limited); Merritt, *supra* note 25, at 553 n.69 (1995) (classifying *Lopez* as a "minor restraint" on congressional power).

impact, however, *Lopez* has had a practical effect on how Congress passes legislation[67] and what types of challenges are raised in an area that just a few years ago seemed clearly to lack challenges.[68]

IV. CHALLENGES TO CONGRESS' COMMERCE POWER AFTER *LOPEZ*: THE JURISDICTIONAL ELEMENT CONNECTION

After *Lopez*, challenges to statutes generally targeted two areas: (1) the lack of a jurisdictional element within the statute; and (2) the weakness of the link between the regulated activity and commerce. Practitioners have attacked legislative attempts to regulate a vast array of activities, from firearms possession to child support enforcement.

This section and section V examine recent Commerce Clause challenges across a broad spectrum, and discuss how federal courts have responded to them.[69] This section explores statutes with jurisdictional elements. Section V analyzes those statutes upheld solely due to their commercial connection.

A. *Firearms Acts*

The purpose of a jurisdictional element is to ensure, on a case-by-case basis, that the regulated activity has a substantial relation to interstate commerce.[70] The following firearms statutes have withstood constitutional scrutiny based on the fact that each possessed a jurisdictional element.

1. Possession of Firearms by Felons and Misdemeanants—18 U.S.C. § 922(g)(1) and § 922(g)(9)

The current version of 18 U.S.C. § 922(g)(1) ("the Felon Act") makes it unlawful for any felon to ship, transport, receive, or possess—"in or affecting commerce"—any firearm or ammunition.[71] The most widely

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67. *See* Candice Hoke, *Arendt, Tushnet, and* Lopez: *The Philosophical Challenge Behind Ackerman's Theory of Constitutional Moments*, 47 CASE W. RES. L. REV. 903, 913 (1997) (outlining the new version of the Gun Free School Zones Act); *see also* Hovenkamp, *supra* note 60, at 2226 (arguing that Congress can fix *Lopez* with "boilerplate" language).

68. Criminal defense lawyers began raising challenges to "what seems to be every federal criminal statute in the United States Code." Choper, *supra* note 66, at 665.

69. While some statutes have been highly litigated, the same arguments recur throughout the circuits, as lower courts have attempted to settle the law.

70. *See Lopez*, 514 U.S. at 561-62.

71. This statute provides, in relevant part:

> It shall be unlawful for any person—
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to

challenged of all firearms legislation, this statute has been attacked both facially and as applied.

Without exception, post-*Lopez* facial challenges to the Felon Act argue that Congress cannot criminalize mere possession of firearms because mere possession does not substantially affect commerce.[72] This argument flows easily from the *Lopez* holding that mere gun possession in a school zone does not substantially affect commerce. However, the federal circuit courts[73] have relied on precedent to overwhelmingly reject this assault. The courts have distinguished *Lopez* based on the presence of the Act's jurisdictional element—the statute in *Lopez* lacked this.[74]

While facially attacking the Act seems "hopeless,"[75] practitioners have put forth various "as applied" challenges as a second front. The key "as applied" argument questions the nexus between firearms possession and interstate commerce. In *Scarborough v. United States*,[76] the Supreme Court ruled that the Felon Act's predecessor statute only required a *de minimis* nexus:[77] a showing that at some point in time the firearm had merely

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> receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

18 U.S.C. § 922(g)(1) (1996).

72. Justice Kennedy's concurrence addressed the inadequacy of regulating the mere possession of firearms: "In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

73. The following list includes the leading cases from each circuit that have rejected facial challenges to the statute due to the jurisdictional element: *United States v. Crump*, 120 F.3d 462, 465 (4th Cir. 1997) (citing to *United States v. Wells*, 98 F.3d 808, 811 (4th Cir. 1996)); *United States v. Murphy*, 107 F.3d 1199, 1212 (6th Cir. 1997) (citing *United States v. Turner*, 77 F.3d 887, 889 (6th Cir. 1996)); *United States v. Williams*, 128 F.3d 1128, 1133 (7th Cir. 1997) (citing *United States v. Bell*, 70 F.3d 495, 498 (7th Cir. 1995)); *United States v. Blais*, 98 F.3d 647, 649 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1000 (1997); *United States v. Garcia*, 94 F.3d 57, 65 (2d Cir. 1996); *United States v. Gateward*, 84 F.3d 670, 371-72 (3d Cir.), *cert. denied*, 117 S. Ct. 268 (1996); *United States v. Rawls*, 85 F.3d 240, 242 (5th Cir. 1996); *United States v. Bates*, 77 F.3d 1101, 1104 (8th Cir.), *cert denied*, 117 S. Ct. 215 (1996); *United States v. Farnsworth*, 92 F.3d 1001, 1006 (10th Cir.), *cert. denied*, 117 S. Ct. 596 (1996); and *United States v. McAllister*, 77 F.3d 387, 390 & n.4 (11th Cir.), *cert. denied*, 117 S. Ct. 262 (1996); *United States v. Hanna*, 55 F.3d 1456, 1462 & n.2 (9th Cir. 1995).

74. This may indicate that by boilerplate language Congress can regulate virtually any activity. Or it could simply mean that since *Lopez* did not explicitly overrule these precedents, the lower courts have been hesitant to do so. *See generally* Hovenkamp, *supra* note 60, at 2226 (discussing the ease of satisfying the *Lopez* requirement).

75. United States v. Bennett, 75 F.3d 40, 48-49 (1st Cir.), *cert. denied*, 117 S. Ct. 130 (1996) ("claims made by appellants [that section 922(g)(1) is unconstitutional] . . . seem to us hopeless on . . . the law"); *see supra* note 73 and accompanying text.

76. 431 U.S. 563 (1977).

77. *See id.* at 564 (citing the prior statute). In *Scarborough*, a felon was convicted for possessing a firearm. *See id.* at 564-65. While not addressing the law's constitutionality, the Court

crossed a state line.[78] Many other statutes relied on similar *de minimis* connections.[79]

After *Lopez*, therefore, many argued that the Court had heightened *Scarborough*'s *de minimis* nexus. Under this view, the government must prove that each individual defendant's possession of a firearm "substantially affected" interstate commerce. Unlike the *de minimis* approach, the mere crossing of a state line would not meet this heightened standard.[80]

Refusing to discard *Scarborough*, no circuit has accepted the argument that *Scarborough's de minimis* nexus should be heightened. In the Fifth Circuit Court of Appeal, however, the position has received judicial support by the concurring opinion in *United States v. Rawls*[81] and the dissenting opinion in *United States v. Kuban*.[82] Of note, attempts to heighten jurisdictional elements in non-firearms legislation have met with modest success.[83]

A related "as applied" attack contends that a timing requirement is built

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stated that Congress intended to require that the firearm have moved in interstate commerce. *See id.* at 575 & n.11.

78. The Court explicitly rejected the argument that the gun must have a "present connection" to interstate commerce. *Id.* at 568, 575; *see also* Carlo D'Angelo, Note and Comment, *The Impact of* United States v. Lopez *Upon Selected Firearms Provisions*, 8 ST. THOMAS L. REV. 571, 583-84 (1996) (suggesting that *Lopez* may have put this holding in jeopardy, since "most goods have at one time or another traveled in interstate commerce" and this would "invite federal regulation of almost all state activities").

79. This is significant, since lower courts have held consistently that *Lopez* did not disturb prior Commerce Clause holdings. *See infra* Part IV.D.1. and accompanying text for another example of this principle in action.

80. For an example of this argument, see *United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996) (rejecting defense arguments to heighten the *de minimis* nexus and find a firearm transport from California to South Carolina as insufficiently affecting commerce).

81. 85 F.3d 240, 243 (5th Cir. 1996). Rawls, a twice-convicted felon, attempted to purchase a handgun by lying on a government application. *See id.* at 241. The Fifth Circuit rejected the defense argument to heighten the *de minimis* nexus. *See id.* at 242. But Judges Garwood, Wiener, and Garza expressed regret: "[O]ne 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." *Id.* at 243 (Garwood, J., concurring).

82. 94 F.3d 971, 976 (5th Cir. 1996) (DeMoss, J., dissenting), *cert. denied*, 117 S. Ct. 716 (1997). Kuban, a thrice-convicted felon, used a 9mm pistol to threaten teenagers to find out the whereabouts of his fourteen-year-old daughter. *See id.* at 972-73. A majority of the Fifth Circuit again refused to heighten the standard. The dissent argued that *Scarborough* was "in fundamental and irreconcilable conflict with the rationale of [*Lopez*] . . . [T]he 'minimal nexus' of *Scarborough* can no longer be deemed sufficient under the *Lopez* requirement . . . ." *Id.* at 977-78 (DeMoss, J., dissenting).

83. *See infra* notes 127-37 and accompanying text (describing a challenge to the Federal Arson Statute).

into the Felon Act. In *United States v. Casterline*,[84] the defendant argued that, after *Lopez*, a conviction for firearms possession could stand only if its interstate transport had occurred reasonably close in time to the possession.[85] Defendant's derringer pistols had crossed from Connecticut and New York to Oregon at some indeterminate time in the past.[86] The Ninth Circuit, while recognizing the argument's validity, felt constrained by *Scarborough* and precedent within the circuit which had previously rejected this timing requirement.[87]

A final "as applied" challenge to the Felon Act will likely be successful, but only under the rarest fact scenarios. If a defendant is prosecuted for possession of a firearm with components manufactured solely within the borders of a single state, the statute may not apply. For example, in *United States v. Mosby*,[88] a federal district court set aside a defendant's conviction based on his possession of a firearm cartridge manufactured entirely in Minnesota.[89] The Eighth Circuit reversed, however, finding that the district court had erroneously excluded the cartridge's individual components—manufactured outside of Minnesota—from the definition of "ammunition."[90]

In 1996, Congress amended 18 U.S.C. § 922(g) by adding 18 U.S.C. §§ 922(g)(8) and (9). The new sections outlaw mere firearm possession by persons under court orders related to domestic violence, or convicted of misdemeanors in domestic violence.[91] Although they contain a

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84. 103 F.3d 76 (9th Cir. 1996), *cert. denied*, 118 S. Ct. 106 (1997).

85. *See id.*; *see also* Lopez, 514 U.S. at 567 ("recently moved in interstate commerce"); United States v. Pappadopoulos, 64 F.3d 522, 527 (9th Cir. 1995), *cert. denied*, 117 S. Ct. 1328 (1998) ("[C]ongress's power to regulate articles or goods in commerce may not permit it to regulate an item for eternity simply because it has once passed state lines.").

86. *See Casterline*, 103 F.3d at 77.

87. *See id.* at 77; *see also* United States v. Hanna, 55 F.3d 1456, 1462 n.2 (9th Cir. 1995) (quoting *Scarborough*, 431 U.S. at 575).

88. 60 F.3d 454 (8th Cir. 1995).

89. *See id.* at 457.A convicted felon, Mosby possessed 89 ammunition cartridges manufactured in Minnesota from out-of-state components. *See id.* at 455. Strictly applying the statutory language, the district court agreed with the defendant that "ammunition" only referred to completed cartridges, and did not include their individual components. *See id.* at 457. Since they were manufactured in Minnesota, the government could not prove that Mosby's possession was "in or affecting" commerce in ammunition. *See id.*

90. *See id.*

91. 18 U.S.C. §§ 922(g)(8) and (9) provide, in relevant part:

> [It shall be unlawful for any person] (8) who is subject to a court order that—
> (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily

jurisdictional element, these new laws for the first time single out a class of non-felons and take away their right to bear arms.[92] Unlike all other firearm disabilities in section 922(g), these sections also apply to law enforcement officers.

The Fifth Circuit upheld 18 U.S.C. § 922(g)(8) in *United States v. Pierson*,[93] affirming the conviction of a man under a court order related to domestic violence who mailed a bomb to his ex-wife at her work.[94] The court relied wholly on the presence of a jurisdictional element in rejecting the defendant's argument that court orders related to domestic violence did not affect interstate commerce.[95]

Similarly, a D.C. district court upheld 18 U.S.C. § 922(g)(9) in *Fraternal Order of Police v. United States*.[96] The district court denied a preliminary injunction against the statute's enforcement, upholding the statute based solely on the presence of its jurisdictional element.[97] Without disturbing the district court's commerce clause analysis, the Fourth Circuit recently reversed that decision on Fifth Amendment equal protection grounds.[98]

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injury to the partner or child; and
(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury, or
(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C.S. §§ 922(g)(8) and (9) (Law. Co-op. Supp. 1997).

92. *See id.*

93. 139 F.3d 501 (5th Cir.), *cert. denied*, 119 S. Ct. 220 (1998).

94. *See id.* at 502-03.

95. *See id.* at 503.

96. 981 F. Supp. 1 (D.D.C. 1997), *rev'd on other grounds*, 152 F.3d 998 (D.C. Cir.), *reh'g granted*, (No. 97-5304)(D.C. Cir. Nov. 12, 1998). The United States moved for summary judgement, arguing that plaintiffs had not stated a valid claim. *See id.* at 2-3.

97. *See id.* at 4. Moreover, the court brushed aside both Equal Protection and Due Process claims. *See id.* at 2.

98. *See Fraternal Order of Police*, 152 F.3d at 1002-03.

2. Miscellaneous Firearms Statutes—18 U.S.C. §§ 922(k) (Obliterated Serial Numbers); 922(u) (Stolen from Firearms Business Inventory); and 924(c) (Gun Use in Crime of Violence/Drug Trafficking)

Although the Felon Act comprises the majority of post-*Lopez* firearms challenges, other firearms statutes with jurisdictional elements have also been attacked. First, under 18 U.S.C. § 922(k),[99] it is unlawful to transport, ship, receive, or possess any firearm with obliterated serial numbers that has passed in interstate commerce "at any time." This infrequently-challenged statute has met two post-*Lopez* facial attacks.

In *United States v. Diaz-Martinez*,[100] the earlier attack, the First Circuit distinguished the recent *Lopez* decision since the statute had a jurisdictional element.[101] Rejecting the defendant's contention that his possession of firearms with obliterated serial numbers was a simple state matter, the court noted that they had been manufactured in Brazil and altered in Miami.[102] In the later challenge, *United States v. Hernandez*,[103] the Second Circuit upheld the law, finding no real difference between the Felon Act and 18 U.S.C. § 922(k).[104]

A second statute, 18 U.S.C. § 922(u), generally prohibits the unlawful taking of a firearm from the inventory of a firearms business.[105] Once again, the statute's jursidictional element has saved it from attack.[106]

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99. This statute makes it unlawful

> knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

18 U.S.C.S. § 922(k) (Law. Co-op. 1996).

100. 71 F.3d 946 (1st Cir. 1995). Defendant was convicted on two identical counts after participating in a street shoot out in Puerto Rico, firing 13 rounds from two firearms with obliterated serial numbers. *See id.* at 948.

101. *See id.* at 953.

102. *See id.*

103. 85 F.3d 1023 (2d Cir. 1996). This case involved multiple defendants in a heroin distribution conspiracy. *See id.* at 1026-27. The firearm with serial numbers obliterated was found in a search of one of the defendant's apartment. *See id.*

104. *See id.* at 1031.

105. This statute makes it unlawful "to steal or unlawfully take or carry away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm . . . that has been shipped or transported in interstate or foreign commerce." 18 U.S.C.S. § 922(u) (Law. Co-op. 1996).

106. Three federal appeals courts have reviewed this statute after *Lopez*, with two relying on the jurisdictional element to uphold it. *See* United States v. Hardy, 120 F.3d 76, 77-78 (7th Cir. 1997) (per curiam); United States v. Miller, 74 F.3d 159, 159-60 (8th Cir. 1996) (per curiam).

The defendant in *United States v. Snow*[107] challenged 18 U.S.C. § 922(u)-based jury instructions that did not require proof that the handgun he had stolen from a Wyoming hardware store had been part of a commercial transaction.[108] Approving the jury instructions, the Tenth Circuit noted no abuse of discretion.[109] "[W]hether the firearm in question was transported for commercial or personal reasons is irrelevant; simply by crossing state lines the firearm traveled in interstate commerce."[110]

Notably, no defendant has challenged section 922(k) or (u) for lack of a timing requirement—that *Lopez* requires the firearm to travel in interstate commerce close to the time of possession.[111]

A final statute, 18 U.S.C. § 924(c),[112] creates a separate offense for carrying a firearm while committing a crime of violence or drug trafficking that "may be prosecuted in a court of the United States." In *United States v. Crump*,[113] the Fourth Circuit upheld 18 U.S.C. § 924(c). The court determined that the statute had an express jurisdictional element since the predicate crimes were prosecutable in federal court.[114] Moreover, Crump's predicate drug offense—he unloaded a 12 gauge shotgun on a drug dealer while robbing cocaine—"not only substantially affects commerce; it is commerce."[115]

The Eighth Circuit has used similar reasoning to uphold 18 U.S.C. § 924(c).[116] The Ninth Circuit does not even require that the predicate crime be charged.[117] Moreover, the underlying "crime of violence" need not be

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107. 82 F.3d 935 (10th Cir. 1996).

108. *See id.* at 938.

109. The court found a sufficient interstate commercial nexus by making it a question of fact whether the firearm had crossed a state line. *See id.* at 939.

110. *See id.* at 940.

111. It would seem that such a challenge would likely fail, however. *See supra* text accompanying notes 84-87.

112. 18 U.S.C. § 924(c) provides, in relevant part:

> (1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment [of five to thirty years] . . .

18 U.S.C.S. § 924(c) (Law. Co-op. 1996).

113. 120 F.3d 462, 462-65 (4th Cir. 1997).

114. *See id.* at 465-66.

115. *Id.* at 465; *see also infra* Part V.C.1., dealing with the Controlled Substances Act.

116. *See* United States v. Bell, 90 F.3d 318, 321 (8th Cir. 1995) (per curiam); United States v. Brown, 72 F.3d 96, 97 (8th Cir. 1995) (per curiam).

117. *See* United States v. Staples, 85 F.3d 461, 463 (9th Cir.) (holding that Staples could be

a drug or firearms offense.[118]

With or without *Lopez*, federal courts refuse to strike down firearms laws with even minimal jurisdictional elements.[119] Facial challenges stand almost no chance of success.[120] "As applied" challenges also face stiff odds,[121] except where no portion of the firearm or ammunition has ever crossed a state line.[122]

One explanation for the acceptance of minimal jurisdictional requirements is found in the *Lopez* majority's own words: "'[W]here a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'"[123] Firearms legislation may, indeed, fit this description.

B. *Federal Arson Statute—18 U.S.C. § 844(i)*

In contrast to the overwhelming judicial support of firearms laws, the oft-challenged Federal Arson Statute (the Arson statute) has encountered judicial upheaval. This statute makes it a crime to use explosives or fire to damage property "used in" or "affecting" interstate or foreign commerce.[124]

While the facial validity of the Arson statute has never been in question,[125] its jurisdictional element—a typical *de minimis* nexus—has met resistance "as applied." As discussed above, courts have refused to heighten a similar nexus in firearms legislation.[126]

The case which began the controversy—*United States v. Pappadopoulos*[127]—closely followed on the heels of the *Lopez* decision. Prosecuting Katherine Pappadopoulos for arson of her private residence,[128]

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convicted for carrying a firearm while distributing cocaine, even if the crime of distributing cocaine was never charged), *cert. denied*, 117 S. Ct. 318 (1996).

118. For an example of a "crime of violence" as the predicate, see *United States v. Yian*, 905 F. Supp. 160, 162 (S.D.N.Y. 1995) (upholding a conviction under § 924(c) where the Hostage Taking Act—18 U.S.C. § 1203—provided the underlying connection to interstate commerce), *aff'd sub nom.* United States v. Lue, 134 F.3d 79 (2d Cir. 1998).

119. *See infra* Part V.A. (discussing firearms laws without jurisdictional elements).

120. *See supra* notes 72-75 and accompanying text.

121. *See supra* notes 76-87 and accompanying text.

122. *See supra* notes 88-90 and accompanying text.

123. *See Lopez*, 514 U.S. at 558 (quoting Maryland v. Wirtz, 392 U.S. at 197 n.27).

124. The Federal Arson Statute, provides, in relevant part: "Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned . . . ." 18 U.S.C.S. § 844(i) (Law. Co-op Supp. 1997).

125. *See* United States v. Sherlin, 67 F.3d 1208, 1213-14 (6th Cir. 1995).

126. *See supra* Part IV.A.

127. 64 F.3d 522, 522 (9th Cir. 1995).

128. Experiencing financial problems, Pappadopoulos and her husband conspired with a third party to burn their roomy Sacramento residence while they visited Greece. *See id.* at 524. Upon

the government could connect her home to interstate commerce only through the natural gas utilities it partially derived from out of state sources.[129] The Ninth Circuit concluded that this connection to interstate commerce was insufficient. The court found that after *Lopez*, the government must always show a "substantial" connection between the damaged property and interstate commerce.[130] In essence, it heightened the *de minimis* nexus.

In the pre-*Lopez* case of *Russell v. United States*,[131] the United States Supreme Court had upheld the Arson statute, presumably indicating that the statute's *de minimis* nexus was valid.[132] The Ninth Circuit, however, found that *Lopez* changed the legal landscape. Since the statute did not fit the first or second broad *Lopez* categories,[133] its validity rested on the third category's requirement of a "substantial" relation to interstate commerce.[134]

The court rejected the government's "aggregate effects" argument,[135] which would have relieved them of proving a "substantial" interstate relation in individual cases. Instead, the court found that the private residence's tenuous connection to out-of-state natural gas was insufficient.[136] Moreover, the court determined that arson was a noncommercial activity traditionally regulated by the states.[137]

Since *Pappadopoulos*, the circuits have been in disarray on whether or not *Lopez* heightened the *de minimis* nexus. While not overruling *Pappadopoulos*, the Ninth Circuit has since accepted the "aggregate effects" argument when applied to business property, reserving the individualized analysis to cases involving purely private property.[138] The

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conviction for the crime, her husband fled the country, prior to sentencing. *See id.*

129. *See id.* at 525.

130. *See id.* at 527.

131. 471 U.S. 858 (1985).

132. *See id.* at 859-60 (stating that Congress intended to exercise its full commerce power in enacting the Arson statute). The *Pappadopoulos* court, however, was addressing an area left untouched by *Russell*—whether a private residence affected interstate commerce.

133. *Lopez* described three broad categories where Congress could legislate: (1) "channels" and (2) "instrumentalities" of interstate commerce, as well as (3) activities with a "substantial relation" to interstate commerce. *See supra* text accompanying note 55.

134. *See Pappadopoulos*, 64 F.3d at 526.

135. The government's argument, based on *Wickard*, is the same reasoning accepted by courts to uphold firearm possession laws. *See supra* Part IV.A.1.

136. *See Pappadopoulos*, 64 F.3d at 527.

137. *See id.* at 527.

138. *See* United States v. Serang, 156 F.3d 910 (9th Cir. 1998) ("[A]ll business property has a per se substantial effect on interstate commerce."); United States v. Gomez, 87 F.3d 1093, 1095-96 (9th Cir. 1996) (reaffirming *Pappadopoulos*, but finding that the arson of an apartment building substantially affected interstate commerce); United States v. Camacho, 87 F.3d 1323, 1996 WL 327094, at *2 (9th Cir.) (unpublished table decision) (limiting *Pappadopoulos* to private residences only, while upholding the conviction of a defendant who had set and apartment building ablaze

Sixth Circuit has adopted an almost identical approach.[139]

The Fifth Circuit, in *United States v. Corona*,[140] wholeheartedly followed *Pappadopoulos* in heightening the *de minimis* nexus and rejecting the "aggregate effects" view. Ironically, that court found for the government anyway, since the fire had spread to a nearby leased commercial building.[141]

The Eleventh Circuit's mixed signals—initially following the Ninth Circuit, but now abandoning that position—starkly illustrates the confusion in the circuit courts.[142] Likewise, the Eighth Circuit, which at first rejected *Pappadopoulos*, has now left open the possibility of a heightened nexus.[143]

The Third Circuit implicitly chose not to heighten the nexus in *United*

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with a molotov cocktail), *cert. denied*, 117 S. Ct. 411 (1996).

139. *See* United States v. Latouf, 132 F.3d 320, 325 (6th Cir. 1997) (using the "aggregate effects" argument to affirm a conviction for the arson of a restaurant that purchased out-of-state supplies, but acknowledging that the government is always required to prove that the property has a substantial relation to interstate commerce), *cert. denied*, 118 S. Ct. 1572 (1998).

140. 108 F.3d 565 (5th Cir. 1997).

141. *See id.* at 570-71. *But see* United States v. Nguyen, 117 F.3d 796, 798 (5th Cir.) (affirming conviction where an arsonist bombed a van that also damaged several nearby buildings with rental property and business offices), *cert. denied*, 118 S. Ct. 455 (1997).

142. The Eleventh Circuit followed *Pappadopoulos* in *United States v. Denalli*, 73 F.3d 328, 329 (11th Cir.) (reversing a Florida man's conviction for arson of his neighbor's house), *amended in part by* 90 F.3d 444 (11th Cir. 1996). *Denalli* was cited with approval in *United States v. Utter*, 97 F.3d 509, 515-16 (11th Cir. 1996) (upholding conviction for arson of a public restaurant). While not expressly overruling *Denalli*, the Eleventh Circuit indicated only lukewarm support for the decision in *United States v. Chowdhury*, 118 F.3d 742, 745-46 (11th Cir. 1997) (affirming conviction for arson of business property with interstate connections, but failing to cite *Denalli* for support).

The Eleventh Circuit further threw confusion on *Denalli*'s interpretation in *Belflower v. United States*, 129 F.3d 1459 (11th Cir. 1997) (affirming a conviction for bombing a deputy sheriff's car), *cert. denied*, 118 S.Ct. 2308 (1998). The court left open whether the government, under *Denalli*, must prove an interstate commerce nexus in each and every case. *See id.* at 1461-62 & n.4. Recently, the Eleventh Circuit has apparently abandoned *Denalli* officially. *See* United States v. Dascenzo, 152 F.3d 1300, 1302-03 (11th Cir. 1998) (explaining why *Denalli* should not be followed).

143. In the related cases of *United States v. Flaherty*, 76 F.3d 967 (8th Cir. 1996) and *United States v. Melina*, 101 F.3d 567 (8th Cir. 1996), the Eighth Circuit brushed aside *Lopez* challenges to 18 U.S.C. § 844(i) as inapplicable, pointing to the statute's jurisdictional element and regulation of business property. *See Flaherty*, 76 F.3d at 974; *Melina*, 101 F.3d at 573. The court accepted an out-of-state natural gas connection as a sufficient link to interstate commerce when a restaurant—not a private residence—had been arsoned. *See Flaherty*, 76 F.3d at 973-74; *Melina*, 101 F.3d at 572-73. However, in *United States v. McMasters*, 90 F.3d 1394, 1399 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 783 (1997), the court expressly left open the possibility that *Lopez* had heightened the nexus. While affirming convictions for torching a private residence, the *McMasters* court stated that the property's status as a rental unit provided a substantial relation to interstate commerce. *See McMasters*, 90 F.3d at 1398-99.

States v. Gaydos.[144] Despite the *de minimis* nexus, however, the court reversed the defendant's arson conviction because her house was nonrental property.[145] The court found that no activity at the uninhabitable house affected interstate commerce.[146] The First,[147] Fourth,[148] and Tenth[149] Circuits have evaded the issue, leaving their positions unclear.

The Seventh Circuit, while not citing *Pappadopoulos*, seemingly rejected its holding in *United States v. Martin*.[150] Affirming the conviction of an apartment arsonist,[151] the court maintained the *de minimis* nexus and emphasized that the property was rented.[152] The Seventh Circuit continues to accept the *de minimis* reasoning.[153]

Although there is no true consensus in the circuit courts in regard to *Lopez's* affect on the Arson statute, some conclusions may be drawn. No circuit will find the Arson statute facially unconstitutional; however, some have heightened the *de minimis* nexus. In the circuits taking this approach, the government is forced to prove a "substantial effect" on interstate commerce as an element in every arson prosecution. Ironically, these same courts have refused to find that nearly identical language in firearms legislation demands a heightening of the *de minimis* nexus. The apparently inconsistent handling of the issue may be explained by the long history of congressional findings that firearms, in and of themselves, substantially affect interstate commerce.[154] Regardless, only those arsons of unrented,

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144. 108 F.3d 505, 508 (3d Cir. 1997).

145. *See id.* at 510-11.

146. *See id.* at 511.

147. The First Circuit addressed the question in *United States v. DiSanto*, 86 F.3d 1238 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1109 (1997), with mixed signals. The court found that an arsoned restaurant—located on rental property, with supplies and natural gas obtained through interstate commerce—was property "used" in interstate commerce. *See id.* at 1247-48. Strangely, the court quoted with approval both *Pappadopoulos* and *Denalli*, but in dicta left open the possibility that a minimum nexus to interstate commerce may be constitutional. *See id.* at 1248 n.8.

148. The Fourth Circuit, in *United States v. Hinds*, 125 F.3d 849, 1997 WL 636810, at *1 (4th Cir. 1997) (unpublished table decision), *cert. denied*, 118 S. Ct. 1100 (1998), did not indicate the required nexus, simply saying that the arsoned church "affected interstate commerce *to the degree necessary* to support Hinds' conviction." *Id.* (emphasis added).

149. The Tenth Circuit recently ignored the issue in affirming the conviction of a racist teenager who bombed the dormitory of two black students in *United States v. Little*, 132 F.3d 43, 1997 WL 767765, at *1 (10th Cir. 1997) (unpublished table decision). The court relied on the fact that the students rented the dorm rooms. *See id.* at *3-4.

150. 63 F.3d 1422 (7th Cir. 1995).

151. *See id.* at 1424. Martin arsoned an unoccupied Illinois apartment building—unrented for three months, with no utilities—in the early morning hours; however, two firefighters died when one of the walls collapsed on them. *See id.* at 1424, 1426.

152. *See id.* at 1427-28.

153. *See* United States v. Wing, 104 F.3d 986, 992 (7th Cir.) (criticizing *Pappadopoulos*' approach to private residences), *cert. denied*, 117 S. Ct. 2425 (1997).

154. For an example of this principle, see *infra* text accompanying notes 244-52.

private residences will potentially fall beneath the higher nexus requirement.

C. *Clean Water Act*

The Clean Water Act (CWA), 33 U.S.C. §§ 1311, prohibits the discharge of pollutants into "navigable waters" except under proper permits issued by the Army Corps of Engineers (the Corps).[155] Congress defined "navigable waters" to mean "the waters of the United States,"[156] but the Corps responded to environmentalist pressure and significantly expanded that definition in 1975. The modified Corps definition allowed regulation of waters where their use "could affect" interstate commerce.[157]

The two CWA-related commerce challenges after *Lopez* both come from the Fourth Circuit, with mixed results. First, the CWA survived a facial challenge in *United States v. Hartsell.*[158] Facing fifty-one months in prison and stiff fines for knowingly violating pollutant discharge permits, Hartsell argued that under *Lopez* the CWA was an unconstitutional exercise of congressional power.[159] The Fourth Circuit dismissed the argument in a footnote without explanation, citing precedent.[160]

The courts are not likely to discard the CWA because long-standing

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155. *See* 33 U.S.C. §§ 1311. Congress passed the Clean Water Act in 1972, with the intent "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C.A. § 1251(a) (West Supp. 1997). The CWA prohibits discharge, without a permit, of pollutants into "navigable waters." 33 U.S.C.A. §§ 1311(a) & 1362(12)(A) (West 1986); *see also* 33 U.S.C.A. § 1362(7) (West 1986) (defining "navigable waters"). Congress intended "to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985). *See generally* Elaine Bueschen, *Do Isolated Wetlands Substantially Affect Interstate Commerce?*, 46 AM. U. L. REV. 931 (1997).

156. 33 U.S.C.A. § 1362(7) (West 1986).

157. 33 C.F.R. § 328.3(a)(3)(1997) defines "waters of the United States" to include "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mud flats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the sue, degradation or destruction of which could affect interstate or foreign commerce. . . ."

For further discussion, see Lori J. Warner, *The Potential Impact of* United States v. Lopez *on Environmental Regulation*, 7 DUKE ENVTL. L. & POL'Y F. 321, 343-55 (1997); Stephen M. Johnson, United States v. Lopez: *A Misstep, but Hardly Epochal for Federal Environmental Regulation*, 5 N.Y.U. ENVTL. L.J. 33, 67-74 (1996).

158. 127 F.3d 343 (4th Cir.), *habeas corpus denied sub nom. In re* Eidson, 129 F.3d 1259 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 1321 (1998).

159. *See id.* at 348 n.1. As vice-president of Cherokee Resources, Inc., Hartsell oversaw a wastewater treatment and oil reclamation business in Charlotte, North Carolina. *See id.* at 346. Hartsell, the corporation, and Eidson—its president—were defendants for multiple CWA violations. *See id.* at 346. The discharges severely exceeded their permits, at times resorting to illegal "bypass methods" to secretly discharge pollutants into the sewer line. *See id.* at 347. Although the first trial ended in a hung jury, a second jury convicted the defendants. *See id.* at 347.

160. *See id.* at 348 n.1.

precedent supports the regulation of activities that cause water pollution.[161] Challenges of regulations authorized by the CWA, however, have been somewhat successful.

In *United States v. Wilson*,[162] defendants challenged the Corps definition of "navigable waters," as well as the district judge's jury instructions based on that definition.[163] The jury instructions required only that the government prove the waters had "some potential connection with interstate commerce" and that their use, degradation or destruction "could affect" interstate commerce.[164]

The Fourth Circuit found that, after *Lopez*, this language did not provide the necessary close nexus to interstate commerce.[165] The court struck down the Corps definition of the statutory phrase "navigable waters," noting that the regulations did not require that water use have a "substantial affect on interstate commerce."[166] The court stated that "[w]ere this regulation a statute, duly enacted by Congress, it would present serious constitutional difficulties, because, . . . it would appear to exceed congressional authority under the commerce Clause."[167]

The Fourth Circuit's analysis may not be universally accepted, however.[168] With few post-*Lopez* challenges to the CWA, this area is ripe for future litigation. Thus far, the Fourth Circuit has accepted a heightened nexus for jurisdictional purposes under the CWA but rejected it under the firearms acts.[169] The issue has been left open for speculation under the Federal Arson Statute.[170] Other circuits could follow the Fourth's lead.

The inconsistency is explainable by the "could affect" language of the

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161. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 282-83 & n.21 (1981) (citing early cases that "uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution . . . .").

162. 133 F.3d 251 (4th Cir. 1997).

163. *See id.* at 255-56. A jury convicted James J. Wilson, CEO of a land development company, of felony violations of the CWA for knowingly discharging fill and excavated material into wetlands of the United States without a permit, under 33 U.S.C. §§ 1319(c)(2)(A) and 1311(a). *See id.* at 254. He was sentenced to 21 months imprisonment, one year supervised release and a $1 million fine. *See id.*

164. *Id.* at 256.

165. *See id.* at 256-57.

166. *See id.* at 257 (finding that the Corps "exceeded its congressional authorization under the [CWA]").

167. *Id.* The court nullified the erroneous jury instructions and ordered a new trial, since the jury may not have decided the issue in accordance with the proper jurisdiction of the CWA. *See id.* at 266.

168. *See* Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 998 F. Supp. 946, 951 (N.D. Ill. 1998) (disagreeing with the Fourth Circuit analysis, and upholding the Migratory Bird Rule without resort to the Corps definition).

169. *See supra* notes 113-15 and accompanying text.

170. *See supra* note 143.

Corps definition. Those words invite a more tenuous connection to interstate commerce than the narrower language of firearms and arson legislation. Likewise, while firearms may be substantially related to commerce on their own, the mere presence of a body of water may not.

D. *Racketeering and Money Laundering*

Federal statutes prohibiting racketeering and money laundering contain jurisdictional elements. Moreover, they also concern a quintessentially "commercial" area. This sub-section treats these statutes broadly, since no court has ever seriously questioned them.

1. RICO—18 U.S.C. § 1962

The Racketeer Influenced and Corrupt Organization (RICO) statute makes it unlawful for a person who participates in a "pattern of racketeering activity or collection of unlawful debt," to invest such money in, hold an interest in, or be employed by any enterprise which is "engaged in" or "affects" interstate or foreign commerce.[171] Courts have deemed this *de minimis* jurisdictional nexus as constitutionally sufficient.[172]

Outlining the accepted argument in support of RICO, the Second

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171. 18 U.S.C.S. § 1962 (Law. Co-op. 1991). This statute provides, in relevant part:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . .
> (b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Id.

172. The facial validity of RICO and related racketeering statutes is easily supported by the mere existence of a jurisdictional element. *See* United States v. Torres, 129 F.3d 710, 717 (2d Cir. 1997) (rejecting a facial challenge to 18 U.S.C. § 1959, which made it a crime to receive consideration from a racketeering enterprise that is "engaged in" or "affects" interstate commerce, in return for an agreement to commit a variety of crimes).

Circuit upheld the statute recently in *United States v. Miller*.[173] Considering the RICO conviction of a narcotics trafficker, the court rejected the defendant's attack on the jury instructions, which only required a minimal effect be found on interstate commerce.[174] Noting that Congress had found narcotics trafficking to have a substantial effect on interstate commerce, the court tracked the language in *Lopez* that apparently required only a *de minimis* effect on commerce in such instances.[175] Therefore, the court found it "constitutionally irrelevant" whether Miller's individual drug conspiracies substantially affected interstate commerce.[176] Other circuits have reasoned likewise.[177]

2. Money Laundering—18 U.S.C. § 1956

Generally, 18 U.S.C. § 1956 (the Laundering statute) makes it unlawful to conduct a financial transaction involving unlawfully obtained monetary funds or property, where the person is aware that the proceeds were obtained unlawfully, and the financial transaction "in any way or degree affects interstate or foreign commerce."[178] Various courts have reasoned

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173. 116 F.3d 641 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 2063 (1998). Gerald Miller, as a member of a narcotics trafficking enterprise, aided in the planning and commission of various crimes and murders. *See id.* at 652-54. This involvement with murder also placed him within the scope of 18 U.S.C. § 1962's definition of racketeering. *See id.* at 654.

174. *See id.* at 674.

175. *See id.*

176. *See id.*

177. For cases applying similar reasoning, see *United States v. Thomas*, 114 F.3d 228, 235 (D.C. Cir.) (rejecting arguments from participants in a PCP and marijuana distribution network), *cert. denied*, 118 S. Ct. 635 (1997); *United States v. Juvenile Male*, 118 F.3d 1344, 1348-49 (9th Cir. 1997) (upholding convictions of gang members who had committed murder and armed robbery); *United States v. Griffith*, 85 F.3d 284, 288 (7th Cir.) (affirming conviction of a prostitution enterprise manager), *cert. denied*, 117 S. Ct. 272 (1996); and, *United States v. Maloney*, 71 F.3d 645, 663-64 (7th Cir. 1995) (upholding conviction of a Chicago judge who took bribes and fixed cases).

178. 18 U.S.C.A. § 1956 (West Supp. 1997). This statute provides, in relevant part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, [wrongfully] conducts or attempts to conduct such a financial transaction . . . ; [or]
> (2) Whoever [wrongfully] transports, transmits, or transfers . . . a monetary instrument or funds from a place in the United States to or through a place outside the United States or [vice versa] . . . ; [or]
> (3) Whoever, [wrongfully] . . . conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined . . . or imprisoned.
> . . . (c)(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement

that the Laundering statute's *de minimis* nexus survives scrutiny in the same way as RICO.[179]

Explaining the rationale most convincingly, the Second Circuit, in *United States v. Leslie*[180] upheld the *de minimis* nexus. Convicted for conspiracy and laundering drug money through a real estate business,[181] Leslie argued that, after *Lopez*, every federal criminal statute required a substantial connection to interstate commerce.[182] The court disagreed, however, and reasoned that money laundering in and of itself would "have ramifications in interstate commerce when taken in the aggregate."[183] This being so, the statute's *de minimis* nexus did not facially violate the Commerce Clause.[184]

Leslie further argued that, "as applied," the evidence in the case did not support a minimal connection to interstate commerce, since the two money laundering transactions—$20,000 and $750,000—were purely local transactions.[185] The court first found that Leslie's mere belief that the money came from out-of-country druglords would support his conspiracy convictions.[186] Next, it upheld the $750,000 transaction's connection to interstate commerce because the money involved both a multi-state bank and rental property.[187]

The court refused to find that the $20,000 transaction affected interstate

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> of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree.

Id.

179. *See* United States v. Westbrook, 119 F.3d 1176, 1191-92 (5th Cir. 1997) (upholding convictions of those who ran a chain of crack houses, and used the money to purchase two Mercedes), *cert. denied sub nom.*, People v. United States, 118 S.Ct. 1059 (1998); United States v. Griffith, 85 F.3d at 288 (upholding a money laundering conviction involving prostitution "massage parlors"); United States v. Jensen, 69 F.3d 906, 910 (8th Cir. 1995) (affirming conviction of car dealer who knowingly sold cars for cash to drug dealers); United States v. Grey, 56 F.3d 1219, 1224-25 (10th Cir. 1995) (upholding *de minimis* nexus in Money Laundering Statute, while vacating conviction because the government failed to prove any connection).

180. 103 F.3d 1093 (2d Cir.), *cert. denied*, 117 S. Ct. 1713 (1997).

181. *See id.* at 1096. The money laundering scheme was exposed when an FBI informant arranged a $20,000 "test case" and a subsequent $750,000 full "drug money" deal as part of a sting operation. *See id.* at 1096-97.

182. *See id.* at 1099.

183. *Id.* at 1100.

184. *See id.*

185. *See id.*

186. *See id.*

187. *See id.* at 1102.

commerce, however.[188] In that smaller transaction, the government did not produce any evidence to show that the bank or "conduit business" involved had engaged in interstate commerce.[189] Even the *de minimis* nexus was not satisfied.[190] The court chastised the prosecutors for failing to provide the minimal evidence that would have supported this light burden.[191]

The *de minimis* nexus standard has withstood attacks in racketeering and money laundering statutes because the underlying activities had an aggregate effect on interstate commerce. Considering the nature of these activities, that conclusion is not surprising.

As the cases in Part V of this casenote demonstrate, courts have gone out on tenuous limbs to uphold legislation regulating arguably noncommercial activities.[192] What stands as remarkable, then, is the Second Circuit's conclusion in *Leslie* that banking activities of an *intra*state financial institution do not, *per se*, have a minimal effect on interstate commerce.[193] This clear inconsistency may have simply been the method the Second Circuit chose to teach prosecutors the consequences of poor case presentation.

E. *Miscellaneous Federal Crimes*

The wealth of federal statutes that possess *de minimis* jurisdictional elements makes it inevitable that practitioners can raise *Lopez* challenges in myriad settings. This sub-section details several of the ever-growing number of statutes challenged on the basis of insufficient jurisdictional elements.

1. Hobbs Act—18 U.S.C. § 1951

One of the most frequently challenged federal statutes, the Hobbs Act, prohibits "in any way or degree" the obstruction, delay, or affecting of any article in commerce, through robbery, extortion, physical violence, or its threat.[194] Since this *de minimis* standard has survived challenges in the

188. *See id.*

189. *See id.*

190. *See id.*

191. *See id.* at 1103; *see also* United States v. Grey, 56 F.3d 1219, 1220-21 (10th Cir. 1995) (vacating money laundering conviction because government failed to prove connection to interstate commerce).

192. For an example, *see infra* notes 330-41 and accompanying text.

193. *See supra* text accompanying notes 188-91.

194. *See* The Hobbs Act, 18 U.S.C.S. § 1951 (Law. Co-op. 1991 & Supp. 1997). This statute provides, in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or

federal circuit courts time and time again,[195] it has served as the basis for finding other similarly-worded statutes constitutional after *Lopez*.[196]

In *United States v. Castleberry*,[197] the Eleventh Circuit recognized the underlying reasoning for the statute's survival. Castleberry was convicted of extortion and conspiracy to violate the Hobbs Act for "fixing" DUI cases while practicing as a private attorney.[198] Challenging the *de minimis* nexus, Castleberry argued that *Lopez* had heightened the standard to require a "substantial" connection to interstate commerce in each individual incident.[199] The court rejected Castleberry's argument and upheld the Hobbs Act, contrasting it to the statute in *Lopez*, which contained no jurisdictional element at all.[200]

The Hobbs Act targets conduct which, by definition, has some relation

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> attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
> (b) As used in this section . . . (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Id.

195. *See* United States v. Farrish, 122 F.3d 146, 147 (2d Cir. 1997) (affirming a conviction for stealing cars), *cert. denied*, 118 S. Ct. 1056 (1998); United States v. Robinson, 119 F.3d 1205, 1208 (5th Cir. 1997) (upholding Hobbs Act where defendants robbed store owners), *cert. denied*, 118 S. Ct. 1104 (1998); United States v. Valenzeno, 123 F.3d 365, 368 (6th Cir. 1997) (affirming conviction for extortion under Hobbs Act); United States v. Woodruff, 122 F.3d 1185, 1186 (9th Cir. 1997) (overruling district court which had heightened *de minimis* nexus to "substantial"), *cert. denied*, 118 S. Ct. 886 (1998); United States v. Romero, 122 F.3d 1334, 1340 (10th Cir. 1997) ("[A] construction requiring only a *de minimis* effect . . . is consistent with *Lopez*"), *cert. denied*, 118 S.Ct. 1310 (1998); United States v. Harrington, 108 F.3d 1460, 1465 (D.C. Cir. 1997) ("[T]he 'substantiality' requirement does not apply in the context of determining what quantum of evidence is required to satisfy statutory interstate commerce jurisdictional elements."); United States v. Stillo, 57 F.3d 553, 558 n.2 (7th Cir. 1995) (finding Hobbs Act valid since it is aimed at an economic activity).

196. For instance, the money laundering cases frequently cite to the reasoning supporting this Act. *See supra* cases cited at note 179.

197. 116 F.3d 1384 (11th Cir.), *cert. denied*, 118 S. Ct. 341 (1997).

198. *See id.* at 1385-86. The Atlanta attorney extorted money from his clients and bribed an Assistant Solicitor in the Atlanta Traffic Court to fix his clients' case files in order to dispose of their DUI cases. *See id.*

199. *See id.* at 1386.

200. *See id.* at 1387.

to interstate commerce. Using the "aggregate effects" reasoning[201] it becomes simple deduction that repetitive interference with articles moving in interstate commerce will substantially affect such commerce. Courts have an easy way to uphold the legislation.[202] Despite the obvious validity of the Hobbs Act, defendants continue to put forth weak defenses.[203]

2. Violence Against Women Act (Criminal Prong)

Responding to national concern over domestic violence, Congress passed the Violence Against Women Act (VAWA), which comprised a civil prong[204] and a criminal prong. Codified at 18 U.S.C. § 2262,[205] the criminal prong makes it unlawful to violate a state protection order by either crossing a state line with that intent, or by causing injury to a spouse or intimate partner after causing them to cross a state line. Once again, the

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201. *See supra* notes 39-40 and accompanying text (explaining "aggregate effects" test).

202. For a demonstration of this principle, see *United States v. Sirois*, 87 F.3d 34 (2d Cir.), *cert. denied*, 117 S. Ct. 328 (1996). Sirois had photographed the sexual activity of teenage boys, violating 18 U.S.C. § 2251. *See id.* at 37 & n.1. That statute criminally punished those who involved minors in "sexually explicit conduct for the purpose of producing any visual depiction of such conduct." *See id.* Guilt also required that the "visual depiction ha[d] actually been transported in interstate or foreign commerce or mailed," or that the person knew of a future transportation. *See id.* The Second Circuit did not require that the defendant's photography be for commercial gain, but upheld the statute based solely on the presence of its jurisdictional element. *See id.* at 40.

203. For an illustration of the "nit-picking" of some "insufficiency" challenges, see *United States v. Clayton*, 108 F.3d 1114 (9th Cir.), *cert. denied*, 118 S. Ct. 233 (1997). Clayton was convicted under 18 U.S.C. § 1029 for possessing 15 illegally "cloned" cellular telephones—the statutory language required a minimum of 15 phones before a violation would occur. *See id.* at 1116. Clayton argued the government must prove that the individual possession of each of the 15 phones substantially affected interstate commerce. *See id.* Not impressed, the court explained that telephones were "instrumentalities" of interstate commerce that are regulated under the second *Lopez* category. *See id.* at 1117.

204. *See infra* section V. (discussing civil prong).

205. The criminal prong of the VAWA provides, in relevant part:

> (a) Offenses.—(1) Crossing a State line.—A person who travels across a State line or enters or leaves Indian country with the intent to engage in conduct that—(A)(i) violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued . . . shall be punished as provided in subsection (b).
> (2) Causing the crossing of a State line.—A person who causes a spouse or intimate partner to cross a State line or to enter or leave Indian country by force, coercion, duress, or fraud, and, in the course or as a result of that conduct, intentionally commits an act that injures the person's spouse or intimate partner in violation of a valid protection order issued by a State shall be punished as provided in subsection (b).

18 U.S.C.A. § 2262 (West Supp. 1997).

mere crossing of a state line provides federal jurisdiction.

While the Second Circuit has upheld the law,[206] a Nebraska district court struck it down in *United States v. Wright*.[207] Violating a state court protection order, Wright followed a woman from Nebraska to Iowa, entered her premises, threw a brick through her window, and followed her back to Iowa.[208] The district court found no jurisdiction, however, refusing to accept mere line-crossing as satisfying the third *Lopez* category.[209]

The Eighth Circuit reversed and upheld the statute.[210] While agreeing with the district court that the language did not satisfy the third category of *Lopez*, the Eighth Circuit reasoned that the requirement for interstate travel directly implicated interstate commerce—the second *Lopez* category.[211] The court implied that the activity of a person crossing a state line is subject to regulation as interstate commerce.[212]

Moreover, the court expressed concern that invalidating the VAWA could lead to the downfall of various other statutes that regulated mere line-crossing.[213] Finally, the court expressly recognized the legislation as preventing the use of the channels of interstate commerce for immoral purposes—the first *Lopez* category.[214]

The Eighth Circuit took a novel approach by upholding the VAWA without relying on the jurisdictional element. By doing so, however, the court left open the question whether the mere crossing of a state line can ever satisfy the third *Lopez* category.

3. Transport or Possession of Stolen Goods

Two related statutes, 18 U.S.C. §§ 2314[215] and 2315,[216] prevent the sale,

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206. *See* United States v. Gluzman, 154 F.3d (2d Cir. 1998) (affirming the VAWA where a woman conspired to murder her husband, which took place after the murderer and victim crossed from New Jersey to New York).

207. 965 F. Supp. 1307 (D. Neb.), *rev'd*, 128 F.3d 1274 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1376 (1998).

208. *See id.* at 1309.

209. *See id.* at 1313-14.

210. United States v. Wright, 128 F.3d 1274, 1276 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1376 (1998).

211. *See id.* at 1275.

212. *See id.*

213. "If crossing state lines for noncommercial purposes is not interstate commerce, however, the validity of a number of statutes besides § 2262(a)(1) would be in doubt." *Id.*

214. *See id.* at 1276.

215. This statute provides, in relevant part: "Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . [s]hall be fined . . ." 18 U.S.C.S. § 2314 (Law. Co-op 1991).

216. This statute provides, in relevant part:

transportation, or possession of stolen goods which have crossed state or federal boundaries. The very nature of these offenses—stealing articles and transporting them to other states—seems to indicate a relation to interstate commerce.[217]

Both of these statutes have recently been upheld against *Lopez* challenges for reasons quite apart from their jurisdictional elements, however. The Ninth Circuit, in *United States v. Veatch*,[218] upheld 18 U.S.C. § 2314 under the first *Lopez* category, since transportation of stolen goods would, in effect, subject the channels of interstate commerce to immoral purposes.[219]

Likewise, in *United States v. Trupin*,[220] the Second Circuit upheld 18 U.S.C § 2315 under the first *Lopez* category.[221] Trupin, convicted of possessing a stolen Chagall painting worth over $100,000, argued that federal prosecution for mere possession of stolen goods offended the principles outlined in *Lopez*.[222] The court, however, looked to the requirement that the stolen goods cross a state line, and concluded that this, too, regulated the "channels" of interstate commerce.[223]

Regarding the third *Lopez* category, the court stated that 18 U.S.C. §

> Whoever [knowingly] receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, . . . which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, . . .; or Whoever [knowingly] receives, possesses, conceals, stores, barters, sells, or disposes of any falsely make, forged, altered, or counterfeited securities or tax stamps, . . . moving as, or which are a part of, or which constitute interstate or foreign commerce, . . . ; or
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> Whoever [knowingly] receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, . . . [s]hall be fined [under this title] or imprisoned not more than ten years, or both.

18 U.S.C.S. § 2315 (Law. Co-op. 1991).

217. Once a court defines activity as "commercial" it has virtually accepted that it can be federally regulated using an "aggregate effects" reasoning. For an example, *see infra* Part V.F.

218. 121 F.3d 719, 1997 WL 418886 (9th Cir. 1997) (unpublished table decision) (emphasizing the broad language of the law and the obvious effect on commerce).

219. *See id.* at *1-3.

220. 117 F.3d 678 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 699 (1998). Trupin, a wealthy businessman, had made the acquaintance of a down-and-out artist, who he employed for various projects. *See id.* at 680. However, Trupin knowingly purchased a stolen painting—"Le Petit Concert" by Chagall—for $100,000 from the artist. *See id.* When Trupin attempted to sell the stolen painting years later, a suspicious buyer tipped off the FBI, leading to Trupin's arrest and conviction. *See id.* at 681.

221. *See id.* at 684.

222. *See id.* at 682.

223. *See id.* at 682-84.

2315 concerned commerce by seeking to "eradicate the interstate . . . traffic in stolen goods . . . to protect legitimate trade."[224] The *de minimis* nexus withstood scrutiny, with the court noting that some valid statutes possessed no jurisdictional element at all.[225]

The statutes in this section use similar jurisdictional elements; yet, the courts employ a diversity of methods to uphold them. In the Hobbs Act, courts simply accept the *de minimis* nexus as sufficient.[226] In the VAWA[227] and stolen goods laws, courts sometimes ignore the jurisdictional element and rely on the first and second *Lopez* categories, instead.[228]

The lesson is clear: statutes with jurisdictional elements are almost impervious to facial challenge. When the jurisdictional element may not suffice, a court can turn to one of the other available arguments, as explored in section V of this casenote.

V. CHALLENGES TO CONGRESS' COMMERCE POWER AFTER *LOPEZ*: THE COMMERCIAL CONNECTION

A. *Firearms Acts*

As seen in section IV of this casenote, if a firearms law contains a jurisdictional element, courts usually uphold it without further discussion. However, as this sub-section explores, when the jurisdictional element is missing, courts use various other means to uphold this type of legislation.

1. Disposal of Firearms to Felons—18 U.S.C. § 922(d)(1)

In passing 18 U.S.C. § 922(d)(1), Congress criminalized the sale or disposal of firearms or ammunition to felons.[229] Unlike most firearms legislation, Congress did not limit enforcement of this statute with a jurisdictional element.[230]

In *United States v. Monteleone*,[231] the Eighth Circuit upheld the law and

224. *See id.* at 684.

225. *See id.* at 685.

226. *See supra* Part IV.E.1.

227. *See supra* Part IV.E.2.

228. *See supra* Part IV.E.3.

229. *See* 18 U.S.C.S. § 922(d)(1) (Law. Co-op. 1996). This statute provides, in relevant part, for the punishment of those who sell or dispose of "any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." *Id.*

230. *See generally* Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 249-50 (1997) (arguing that the federal government is not as involved as it should be to control street crime).

231. 77 F.3d 1086 (8th Cir. 1996).

Monteleone's conviction for entrusting a firearm to his felon half-brother.[232] Targeting the lack of a jurisdictional element, Monteleone argued the statute could be applied unconstitutionally to purely intrastate conduct.[233] This reasonable argument flowed from language in *Lopez*.[234]

On de novo review, the Eighth Circuit evaluated the statute under the third *Lopez* category.[235] First, the court concluded that firearm "disposal" was inherently commercial.[236] Second, the court found 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."[237] Finally, the court used the *Wickard* "aggregate effects" reasoning to conclude that, when repeated elsewhere, this type of commercial activity would substantially affect interstate commerce.[238]

The Eighth Circuit's key finding, that "disposal" was inherently commercial, directly led to the result.[239] Once a court deems a regulated activity "commercial," the *Wickard* "aggregate effects" test becomes a powerful tool.

2. Youth Handgun Safety Act—18 U.S.C. § 922(x)

The Youth Handgun Safety Act (the Youth Act) prohibits possession

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232. A veteran Missouri firefighter, Monteleone foolishly entrusted his misfiring .45 caliber handgun for repairs to his half-brother, who happened to be a convicted felon and who attempted to sell the handgun to an undercover agent. *See id.* at 1088. When Monteleone petitioned for the return of his seized handgun, he revealed his own crime. *See id.* The court reversed his conviction, however, due to improper questions by the prosecution. *See id.* at 1089.

233. *See id.* at 1091.

234. *See supra* notes 59-60 and accompanying text.

235. *See Monteleone*, 77 F.3d at 1092. The third category requires that the regulated activity have a substantial relation to interstate commerce. *See supra* notes 55-56 and accompanying text.

236. *See Monteleone*, 77 F.3d at 1092. The court also noted explicit findings to support the conclusion. *See id.*

237. *Id.* The statute, as originally worded, had limited its scope to licensed dealers and manufacturers. This allowed easy circumvention by simply having a third party purchase the firearm, and then distribute it to the felon. Congress amended it, therefore, to cover disposals by "any person." 18 U.S.C.S. § 922(d)(1) (Law. Co-op. 1996).

Connecting a regulation to a national scheme is a common approach the courts use to uphold various laws. For example, 18 U.S.C.S. § 842(h)—which has no jurisdictional element and prohibits the theft of explosives—was upheld in this way by the Ninth Circuit in *United States v. Mikels*, 110 F.3d 71, 1997 WL 143965, at *2 (9th Cir.) (unpublished table decision), *cert. denied*, 118 S. Ct. 136 (1997).

238. *See Monteleone*, 77 F.3d at 1092. The *Lopez* majority contended that the expansive reasoning in *Wickard* was the furthest point that the Commerce Clause analysis should reach. *See Lopez*, 514 U.S. at 560.

239. *See id.* Once an activity is seen as "commercial," its regulation under a *Wickard*-type analysis is simply a matter of multiplying the effect until the cumulative whole becomes "substantial." *See Wickard*, 317 U.S. at 125-28.

or transfer of handguns or ammunition to juveniles.[240] It resembles the statute struck in *Lopez* because it regulates "mere possession" and lacks a jurisdictional element.

In *United States v. Michael R.*,[241] a juvenile challenged the Youth Act after police discovered his pistol during an investigatory stop.[242] Noting the lack of a jurisdictional element, the defendant argued that Congress had exceeded its powers in passing a noncommercial criminal statute.[243]

The Ninth Circuit upheld the statute for two reasons. First, the court found that the statute was part of a larger regulation of the "sale, delivery, or transfer of firearms to a juvenile."[244] Thus, it regulated commerce by targeting the supply and demand for firearms among juveniles.[245] Next, the court found that mere juvenile possession of firearms substantially impacted interstate commerce for three reasons: (1) the movement of firearms across state lines; (2) the deterrent effect of violent crime on interstate travel; and (3) the relation of the activity to Congress' attempts to control firearms and drug trafficking.[246]

Similarly, the First Circuit upheld the Youth Act in *United States v. Cardoza*.[247] Convicted of causing the transfer of a firearm to a juvenile,[248]

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240. *See* 18 U.S.C.S. § 922(x) (Law. Co-op. 1996). This statute provides, in relevant part:

> (1) It shall be unlawful for a person to sell, deliver, or otherwise transfer [to] . . . a juvenile—
> (A) a handgun; or
> (B) ammunition that is suitable for use only in a handgun.
> (2) It shall be unlawful for any person who is a juvenile to knowingly possess—
> (A) a handgun; or
> (B) ammunition that is suitable for use only in a handgun.
> (3) This subsection does not apply to—[exceptions].

Id.

241. 90 F.3d 340 (9th Cir. 1996).

242. *See id.* at 343. Tucson police made an investigatory stop of a pickup truck after Lt. Kidd, an undercover police officer investigating gang-related activity, claimed that the occupants had "mad dogged" him—a stern look commonly given by gang members as a prelude to violence—and had recklessly attempted to pass his undercover police vehicle. *See id.* at 342-43. Michael R., one of three juveniles hiding in the back of the pickup, dropped a small .22 caliber Jennings pistol as he stepped down. *See id.* at 343.

243. *See id.*

244. *Id.* at 344.

245. *See id.*

246. *See id.* at 344-45. The *Lopez* majority rejected similar arguments regarding interstate travel, and found significant the absence of a jurisdictional element which would ensure that a particular firearm had crossed state lines. *See supra* notes 58-62 and accompanying text.

247. 129 F.3d 6 (1st Cir. 1997).

248. *See id.* at 8. Cardoza arranged the sale of a 9 mm handgun and nine rounds of ammunition to a juvenile friend. *See id.* at 8. Cardoza held one round of ammunition in his hand as the two

Cardoza argued that the transfer did not affect interstate commerce.[249] Using the third *Lopez* category, the First Circuit found that it regulated an economic activity: firearms transfers.[250]

As with the Ninth Circuit, the court justified the regulation of mere firearm possession by linking it to a larger regulatory scheme.[251] Congress had found that handguns often originate from out-of-state; supply and demand within a single state could substantially affect interstate commerce.[252]

3. Distributor Licensing of Firearms—18 U.S.C. §§ 922(a) and 924(m)

The brunt of the *Lopez* analysis focused on its third broad category. Therefore, if the regulated activity can fit into the first or second *Lopez* categories,[253] some lower courts avoid *Lopez* entirely.[254] Courts have taken this approach in evaluating 18 U.S.C. § 922(a)(1)(A)[255] and § 924(m).[256] In combination, these two statutes prohibit unlicensed persons from engaging in the firearms business—§ 922(a)(1)(A)—or from traveling across state lines to attempt illegal firearms dealings—§ 924(m).

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walked down the street, and inadvertently revealed it to a police officer during a subsequent discussion while gesturing with his hand. *See id.* at 8-9.

249. *See id.* at 11.

250. *See id.* at 12.

251. *See id.*

252. *See id.* at 13.

253. *See supra* note 55 and accompanying text.

254. To avoid *Lopez*, those courts simply conclude that the *Lopez* analysis is inapplicable to its first or second categories. Courts prefer this technique because it avoids the sometimes-difficult search for a substantial relation to interstate commerce.

255. This statute provides, in relevant part:

> (a) It shall be unlawful—
> (1) for any person—
> (A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce. . . .

18 U.S.C.S. § 922(a)(1)(A) (Law. Co-op. 1996).

256. This statute provides, in relevant part:

> A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempt to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

18 U.S.C.S. § 924(n) (Law. Co-op. Supp. 1997) (renumbered from 18 U.S.C.S. § 924(m) (Law. Co-op. 1996)).

In *United States v. Boone*,[257] the northern district of Indiana and the Seventh Circuit[258] heard challenges to both statutes. Convicted for illegally dealing in firearms,[259] Boone argued that dealing in firearms was a non-economic activity that had no substantial relation to interstate commerce.[260] First, the district court dismissed Boone's challenge to section 924(m).[261] Finding that the statute required the crossing of a state line, the court determined that it clearly implicated the first *Lopez* category—the use of the "channels" of interstate commerce.[262]

In a separate order, the district court also dismissed the challenge to § 922(a)(1)(A).[263] The court found that Congress meant to establish a nationwide licensing requirement.[264] Moreover, since interstate firearms trafficking was a serious problem, the court concluded that it substantially affected interstate commerce.[265]

In affirming the order, the Seventh Circuit took a simpler approach. The court simply stated that "dealing in firearms epitomizes commercial activity" and that the legislative history of the Gun Control Act of 1968 clearly showed how such dealing affects interstate commerce.[266]

4. Machine Gun Ban—18 U.S.C. § 922(o)

An oft-challenged firearms statute, 18 U.S.C. § 922(o) (the Machine Gun Ban) simply bans the possession of machine guns after the effective date of the legislation—May 18, 1986.[267] There is no jurisdictional

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257. 904 F. Supp. 866 (N.D. Ind. 1995), *aff'd*, 108 F.3d 1380 (7th Cir. 1997); 904 F. Supp. 868 (N.D. Ind. 1995), *aff'd*, 108 F.3d 1380 (7th Cir. 1997).

258. 108 F.3d 1380, 1997 WL 117266, at *1 (7th Cir. 1997) (unpublished table decision).

259. After having his *Lopez* argument rejected at the trial court, Boone pled guilty to the unlicensed firearms dealing of 200 handguns in a single year—purchasing them in Indiana and re-selling them in Illinois. *See id.*

260. *See id.*

261. *See Boone*, 904 F. Supp. at 867-68.

262. *See id.* at 868.

263. *See id.* at 869.

264. *See id.*

265. *See id.* at 870.

266. *See Boone*, 108 F.3d, 1997 WL 117266 at *1.

267. The Machine Gun Ban provides, in relevant part:

> (1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machine gun.
> (2) This subsection does not apply with respect to—
> (A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or
> (B) any lawful transfer or lawful possession of a machine gun that was lawfully possessed before the date this subsection takes effect.

element. Of all firearms laws, this one has raised the most controversy and come closest to being struck down after *Lopez*.

In the first post-*Lopez* challenge to this statute, *United States v. Wilks*,[268] the Tenth Circuit affirmed the conviction of a gun shop owner.[269] The court found that machine guns, themselves, were articles of interstate commerce to be regulated as "instrumentalities"—the second *Lopez* category.[270] Moreover, the court examined the legislative history of various gun control measures[271] and determined that Congress intended to regulate the interstate machine gun market.[272]

The Fifth Circuit almost struck this statute in *United States v. Kirk*.[273] Charged with selling unregistered machine guns,[274] Kirk argued that the statute unconstitutionally regulated mere intrastate possession of machine guns.[275] A three-judge panel, citing *Wilks*, found that the law closely resembled a market control of the "channels" of commerce—the first *Lopez* category.[276] A strong dissent,[277] however, disagreed, terming the law a congressional intrusion into a noncommercial intrastate activity.[278]

Vacating the panel opinion and accepting a rehearing of the case *en*

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18 U.S.C.S. § 922(o) (Law. Co-op. 1996).

268. 58 F.3d 1518 (10th Cir. 1995). Decided in July 1995, this decision closely followed on the heels of *Lopez*.

269. Wilks operated a gun shop in Tulsa, Oklahoma. *See id.* at 1519. He sold three machine guns to undercover ATF agents, who later found two other machine guns during a search of his home. *See id.*

270. *See id.* at 1521.

271. Specifically, the court discussed the Omnibus Act, Gun Control Act of 1968, and Firearm Owners' Protection Act. *See id.* at 1521-22.

272. *See id.* at 1522.

273. 70 F.3d 791 (5th Cir. 1995), *aff'd en banc by an equally divided court*, 105 F.3d 997 (5th Cir.), *cert. denied*, 118 S. Ct. 47 (1997).

274. Between September 1988 and February 1989, Kirk sold multiple unregistered machine guns to Donald Mueller, some personally converted from semi-automatic firearms. *See id.* at 792. After the ATF monitored Kirk's meetings through a third party informant, they arrested him in November 1989 and charged him under § 922(o). *See id.* at 792-93.

275. *See id.* at 796, 797 n.9.

276. *See id.* at 796.

277. *See id.* at 798 (Jones, J., dissenting) (Judge Edith Jones wrote the panel dissent and the "dissent" in the en banc rehearing of this appeal).

278. Judge Jones agreed that *Lopez* did not control the case, but disagreed with the majority and *Wilks* reasoning, finding no distinction between § 922(o) and the fallen *Lopez* statute. *See id.* Her dissent emphasized that the legislative history and plain language of the statute revealed that it punished mere possession. *See id.* at 799 (Jones, J., dissenting). As such, it could not be supported under the first or second categories. *See id.* Looking to the legislative history of prior firearms laws, Judge Jones faulted the majority's characterization of it as market regulation. *See id.* at 800-01 (Jones, J., dissenting).

banc,[279] the Fifth Circuit split down the middle, thus affirming the conviction by default.[280] Those judges supporting the Machine Gun Ban argued, despite few congressional findings, that Congress could rationally connect machine guns with narcotics trafficking and other federal crimes.[281] Those in opposition[282] argued that machine guns are not "channels"[283] or "instrumentalities" of interstate commerce.[284] Further, they stated that the ban failed under the third *Lopez* category; mere possession is neither an economic activity nor part of a larger commercial regulation.[285]

One year later, the Fifth Circuit addressed this question again in *United States v. Knutson*.[286] Decided by three *Kirk* supporters of the law, the court upheld the statute under the third *Lopez* category. Its effect on interstate commerce was "obvious 'to the naked eye.'"[287]

The Third Circuit faced disagreement on the same issue in *United States v. Rybar*.[288] Making a federalism-based argument, Rybar contended that the Machine Gun Ban unduly infringed on Pennsylvania's machine gun laws.[289] As with other circuits,[290] however, the majority looked to the commercial nature of the activity to hold that the statute could be sustained

279. 105 F.3d 997 (5th Cir. 1996) (en banc) (per curiam), *cert. denied*, 118 S. Ct. 47 (1997).

280. *See id.* at 998.

281. *See id.* at 1000-01.

282. The eight *en banc* judges supporting reversal included Judge Garwood, the author of the Fifth Circuit's *Lopez* decision. *See id.* at 1005. Judge King, the other remaining judge from the original *Lopez* decision, joined those supporting the conviction. *See id.* at 997.

283. Other circuits have found the first *Lopez* category best fits § 922(o). *See* United States v. Rambo, 74 F.3d 948, 952 (9th Cir. 1995) (holding that § 922(o) regulates "channels" of interstate commerce by regulating interstate trafficking of machine gun commodities).

284. *See* Kirk, 105 F.3d at 1013.

285. *See id.* at 1013-16.

286. 113 F.3d 27 (5th Cir. 1997). Steven Scott Knutson possessed a .45 caliber Spitfire assault rifle, which he acquired after May 19, 1986. *See id.* at 28.

287. *See id.* at 30. The three-judge panel relied on prior congressional firearms findings, and refused to negate the statute based on the rare occurrence when a machine gun may be manufactured entirely intrastate. *See id.* at 30-31.

288. 103 F.3d 273 (3d Cir. 1996), *cert. denied*, 118 S. Ct. 46 (1997). Rybar, a federally-licensed firearms dealer, sold two unlawful machine guns and two unregistered firearms at a Pennsylvania gun show. *See id.* at 275.

289. *See id.* at 277-78.

290. *See* United States v. Kenney, 91 F.3d 884, 889-91 (7th Cir. 1996) (agreeing with the *Kirk* dissent that § 922(o) does not fit into the first or second category because it is a larger regulation of economic activity and is well-supported by prior legislative findings). The Eleventh Circuit has also upheld § 922(o) under the third category of *Lopez* twice in 1997. *See* United States v. Wright, 117 F.3d 1265, 1270 (11th Cir.) (upholding the law because the total demand-side market control of machine guns constituted part of a larger scheme to regulate trade in them), *cert. denied*, 118 S.Ct. 584 (1997); United States v. Bailey, 123 F.3d 1381, 1393 (11th Cir. 1997) (citing *Wright* in upholding the conviction of a federally-licensed firearms dealer who crafted an elaborate scheme to purchase machine guns allegedly for use by law enforcement agencies).

under the third *Lopez* category as a "demand-side measure to lessen . . . commerce in machine guns."[291]

The dissent contended that the statute could not fall into the first or second category of *Lopez* since it neither required an interstate transfer nor attempted to prevent harm to people or goods traveling interstate.[292] Regarding the third category, the dissent pointed out that *Lopez* denied Congress the expansive power to regulate every item that has an interstate market.[293] Moreover, no study had been produced, substantially linking machine gun possession with interstate crimes.[294]

Finally, a Sixth Circuit panel in *United States v. Beuckelaere*[295] upheld the Machine Gun Ban using the arguments already discussed,[296] but also drew a dissent that articulated the typical counter-arguments.[297] While the market-control argument is novel, the Machine Gun Ban is not the only criminal statute that has been upheld in this manner.[298]

As discussed in section IV, courts can uphold firearms laws using a variety of means. Even where Congress has criminalized mere possession of firearms—the sin of *Lopez*—courts defer to congressional findings.[299] This leaves little room for "as applied" sufficiency attacks, and forces challengers to target the noncommercial aspects of the regulated activity. Thorough research into the legislative history of the statute, and of other firearms statutes, is essential.

B. *Environmental Acts*

As discussed in section IV, the Clean Water Act has suffered minor setbacks after *Lopez*. Environmental acts without jurisdictional elements

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291. *See Rybar*, 103 F.3d at 283.

292. *See id.* at 288-90 (Alito, J., dissenting).

293. *See id.* at 292 (Alito, J., dissenting).

294. *See id.*

295. 91 F.3d 781 (6th Cir. 1996). Thomas Beuckelaere's brother informed police of illegal assault weapons at the defendant's residence. Some of the parts were purchased in Kentucky and transferred to Ohio. *See id.* at 782, 786.

296. First, the court found that the law regulated the national market for machine guns by prohibiting their transfer and possession. *See id.* at 784. Second, machine guns are "things" in interstate commerce that flow interstate for profit. *See id.* at 786. Finally, the majority tried to allay the fears in *Lopez*, noting that the law (1) did not limit its reach to a specific geographical area, such as a school zone; (2) ensured that only machine guns transferred illegally would be covered; and (3) only interfered with possession of the most dangerous firearms. *See id.* at 787.

297. *See id.* at 787-88 (Suhrheirich, J., dissenting). The dissent relied on arguments made against the statute in *Kirk*. *See id.*; *supra* notes 277-78 and accompanying text.

298. On 18 U.S.C. § 842(i)'s prohibition of shipping explosives, the Ninth Circuit upheld the statute as a market regulation in *United States v. Hermanson*, 91 F.3d 156, 1996 WL 387654, at *2 (9th Cir.) (unpublished table decision), *cert. denied*, 117 S. Ct. 446 (1996).

299. *See supra* note 60 and accompanying text.

have also been challenged, including the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[300] the Lacey Act,[301] the Endangered Species Act (ESA),[302] and the Bald Eagle Protection Act (BEPA).[303]

1. CERCLA—42 U.S.C. §§ 9601 et seq.

A major piece of environmental legislation, CERCLA creates civil liability among polluters to help fund the clean-up of improper hazardous waste disposal.[304] In *United States v. Olin Corp*,[305] the first post-*Lopez* challenge to CERCLA, the district court invalidated the use of the statute.[306] Charged with over $10 million in clean-up costs after years of alleged wastewater contamination, Olin challenged CERCLA when the EPA refused to allow Alabama's environmental agency permission to oversee the clean-up.[307]

Considering CERCLA under the third *Lopez* category, the court noted that the contamination of Olin's property was not an economic activity.[308] Further, the government had not clearly shown that CERCLA regulated activity with a substantial relation to interstate commerce.[309] Therefore, CERCLA, at least as applied to the facts of that case, exceeded Congress' commerce power.

On appeal, the Eleventh Circuit reversed.[310] The court held that a regulated activity need not be economic in nature, as long as it substantially affected interstate commerce.[311] Looking to CERCLA's scant

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300. *See infra* Part V.B.1.

301. *See infra* notes 320-24 and accompanying text.

302. *See infra* notes 330-41 and accompanying text.

303. *See infra* notes 325-29 and accompanying text.

304. CERCLA, 42 U.S.C.A. § 9601-9675 (West 1995 & Supp. 1997), was amended by the Superfund Amendments and Reauthorization Act of 1986.

305. 927 F. Supp. 1502 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997).

306. *See id.* at 1533.

307. *See id.* at 1504-05. The Justice Department alleged Olin's chemical production plants in McIntosh, Alabama released wastewater containing mercury and chloroform onto wetlands bordering the Tombigbee River from 1952 until 1974. *See id.* at 1504. The plants ceased operation in 1982; however, most of the damage was allegedly done prior to 1980, making CERCLA's application retroactive. *See id.* Both parties signed a consent decree making all associated with Olin liable for over $10 million in clean-up costs. *See id.* at 1505.

308. *See id.* at 1532-33. The court also recognized CERCLA did not contain a jurisdictional element. *See id.* at 1533.

309. *See id.*

310. *See* United States v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997). The Eleventh Circuit stated that the district court had erroneously interpreted *Lopez* as requiring statutes to possess a jurisdictional element and to directly regulate economic activity. *See id.* at 1510.

311. *See id.* This particular issue, left unclear in *Lopez*, has resulted in differing interpretations by the lower courts. Some, as here, hold that *Lopez* did not mandate that every federally-regulated

legislative history, the court determined that Congress could regulate intrastate pollution as part of its larger scheme to protect interstate industry and commerce.[312] Therefore, whether Olin's personal activity affected interstate commerce was irrelevant.[313]

Following the decision in *Olin*, CERCLA was upheld again in *United States v. NL Industries, Inc.*[314] NL Industries contested the degree of clean-up required to bring residential soil lead levels back within healthy parameters as exceeding congressional power.[315] However, the court rejected the argument, contending that CERCLA could be upheld under both the second and third *Lopez* categories.[316]

Regarding the second category, the court determined that pollution, itself, moves in interstate commerce through the air, soil, and water.[317] Regarding the third category, the court used *Wickard*'s "aggregate effects" test to find that improper hazardous waste disposal was an economic activity with a substantial interstate impact when considered in the aggregate.[318] The reasoning of the *N.L. Industries* court has proved persuasive.[319]

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activity be economic in nature. Others cite Chief Justice Rehnquist's language in discussing *Wickard* to mean that activities that fall in the third category of *Lopez* must be commercial. *See infra* notes 418-19 and accompanying text.

312. *See Olin*, 107 F.3d at 1511 & n.10.

313. *See id.* at 1511.

314. 936 F. Supp. 545, 552 (S.D. Ill. 1996). NL Industiries (NLI) operated a lead smelter facility in Granite City, Ill. from 1903 to 1983, which resulted in the emission of lead onto the site and into approximately 55 acres of surrounding residential area. *See id.* at 547. The unhealthy soil lead levels exceeded 1000 parts per million (ppm) in some areas; the EPA determined to reduce that to 500 ppm. *See id.* & n.1. NLI sought to enjoin the clean-up, contesting the "arbitrary" 500 ppm goal, and arguing that 1000 ppm would be safe. *See id.* at 547.

315. *See id.*

316. *See id.* at 557-58.

317. *See id.* at 557.

318. *See id.* at 563. The court found that CERCLA regulated an economic activity because improper hazardous waste disposal was often a commercial activity. *See id.*

319. Three other United States district courts have affirmed CERCLA, citing to *N.L. Industries* for their reasoning. *See* Cooper Indus. v. AGWAY, Inc., No. 92-CV-0748, 1996 WL 550128, at *10-11 (N.D.N.Y. Sep. 23, 1996); United States v. Alcan Aluminum Corp., Nos. 87-CV-920 and 91-CV-1132, 1996 WL 637559, at *5-6 (N.D.N.Y. Oct. 28, 1996); Nova Chem., Inc. v. GAF Corp., 945 F. Supp. 1098, 1105-06 (E.D. Tenn. 1996). The United States Supreme Court interpreted CERCLA in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 5 (1989), *overruled on other grounds*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

2. Other Environmental Regulation: The Lacey Act—16 U.S.C. §§ 3372 et seq.; The Bald and Golden Eagle Protection Act—16 U.S.C. § 668; The Endangered Species Act—16 U.S.C. §§ 1531, et seq.

There have been few post-*Lopez* attacks on environmental laws; however, those dealing with wildlife have drawn the most fire. The Lacey Act[320] prohibits traffic in wildlife taken, possessed, transported or sold in violation of any state, federal, or foreign law. A district court, in *United States v. Romano*,[321] considered the Act in affirming the conviction of a hunter who violated Alaskan law by failing to obtain a license.[322]

The court found the Act valid under the first *Lopez* category, since Congress intended to remove contraband wildlife from the "channels" of interstate commerce.[323] The court also upheld the Act under the third *Lopez* category because, by preventing extinction, the Act would ensure future commercial exploitation of the species and its availability for use in Alaska's manufacturing industry.[324]

Similarly, in *United States v. Bramble*[325] the Ninth Circuit upheld the Bald and Golden Eagle Protection Act (BGEPA),[326] which makes it illegal to possess, transport or deal in bald or golden eagles or their parts.[327]

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320. 16 U.S.C.A. §§ 3372 et seq. (West 1985 & Supp. 1998). The Lacey Act makes it unlawful to import, export, transport, sell receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold:

> (a)(1) . . . in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law;
> . . . .
> (2)(A) . . . in violation of any law or regulation of any State or in violation of any foreign law . . .
> (3) . . . within the special maritime and territorial jurisdiction of the United States
> . . .
> . . . .
> (b) It is unlawful for any person to import, export, or transport in interstate commerce any container or package containing any fish or wildlife unless the container or package has previously been plainly marked, labeled, or tagged in accordance with the regulations . . . ."

Id.

321. 929 F. Supp. 502, 503-04 (D. Mass. 1996), *rev'd*, 137 F.3d 677, 678 (1st Cir. 1998).

322. *See id.*

323. *See id.* at 507.

324. *See id.* at 508.

325. 103 F.3d 1475 (9th Cir. 1996). Bramble was prosecuted after showing illegal bald and golden eagle parts to two undercover agents. *See id.* at 1477.

326. 16 U.S.C.A. § 668 (West 1985).

327. *See id.* This statute provides, in relevant part:

> (a) Whoever . . . shall . . . take, possess, sell, purchase, barter, offer to sell,

Setting aside Bramble's contention that the BGEPA had nothing to do with commerce, the court explained that the prevention of the eagle's extinction substantially affected interstate commerce.[328] Conservation allowed "future commerce in eagles or their parts; future interstate travel for the purpose of observing or studying eagles; or future commerce in beneficial products derived either from eagles or from analysis of their genetic material."[329]

The Endangered Species Act (ESA),[330] which makes it unlawful to take, possess, transport, or sell endangered species, has not garnered the same judicial support.[331] In *National Association of Home Builders v. Babbitt*,[332]

> purchase or barter, transport, export or import, at any time or in any manner, any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles . . . shall be fined not more than $5,000 or imprisoned not more than one year or both . . .
> (b) [C]ivil penalties . . . [may be assessed] of not more than $5,000 for each such violation.

Id.

328. *See Bramble*, 103 F.3d at 1481. The federal district of Oregon used similar reasoning in upholding the BGEPA, influencing the court in Bramble. *See id.* at 1481-82; United States v. Lundquist, 932 F. Supp. 1237, 1241 (D. Or. 1996).

329. *Bramble*, 103 F.3d at 1481.

330. 16 U.S.C.S. §§ 1531-1543 (Law. Co-op 1984 & Supp. 1998). This statute provides, in relevant part:

> 1538. Prohibited acts. (a) . . . (1) Except as provided in sections [1535(g)(2) and 1539 of this title] . . . it is unlawful for any person subject to the jurisdiction of the United States to—
> (A) import . . . or export any such species from the United States;
> (B) [the "Take" Provision:] take any such species within the United States or the territorial sea of the United States;
> (C) take any such species upon the high seas;
> (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);
> (E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;
> (F) sell or offer for sale in interstate or foreign commerce any such species; or
> (G) violate any regulation pertaining to such species or to any [listed] threatened species of fish or wildlife . . .

Id.

331. See Warner, *supra* note 157, at 356-64, for a discussion of ESA vulnerabilities to *Lopez* challenges, especially where the inadvertent modification of a habitat occurs during a non-economic intrastate activity. *But see* Building Indus. Ass'n of Superior Cal. v. Babbitt, 979 F. Supp. 893, 907-08 (D.D.C. 1997) (upholding the ESA over an as-applied challenge to the listing of fairy shrimp as an endangered species, due to the potential effects of species extinction on industries and commerce).

332. 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 118 S. Ct. 2340 (1998).

a divided panel barely upheld the Act when the ESA prevented a county from improving road access to a hospital, since the road access would destroy the habitat of an endangered fly.[333]

The opinion of the court, comprising only one judge's analysis, found the ESA justifiable under the first *Lopez* category.[334] In that view, the ESA enabled the government to stop immoral and injurious uses of "channels" of interstate commerce.[335] The judge also found the Act tenable under the third *Lopez* category because it protected the commercial benefits of biodiversity, such as the future potential medical uses of the species' genetic makeup.[336] Finally, the opinion argued that the activity would have destructive effects on other states through interstate competition.[337]

The concurring opinion disagreed, however, finding that the purely intrastate species could not fall under the first *Lopez* category.[338] Further, while rejecting part of the court's biodiversity explanation, the concurrence concluded that the ESA's regulation of land development—a commercial activity—offered the sufficient nexus to interstate commerce under the third *Lopez* category.[339]

Finding the biodiversity and ecosystem rationales of the other judges far too speculative, the dissent feared that an expansive reading of the Commerce Clause would grant Congress unstoppable power.[340] Further, the dissent stated that killing flies was a noncommercial activity with no

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333. *See id.* at 1048.

334. *See id.* Judge Wald, the author of the opinion, relied on *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 241 (1964) and explained that Congress could prevent the immoral uses of these channels.

335. *See National Ass'n of Home Builders*, 130 F.3d at 1048.

336. *See id.* at 1054. Judge Wald used reasoning borrowed from the *Romano, Lundquist,* and *Bramble* courts on the issue of biodiversity. *See id.*

337. Judge Wald also compared the ESA to the Surface Mining Act which was upheld by the Supreme Court in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981), due to its effect on interstate competition. *See National Ass'n of Home Builders*, 130 F.3d at 1055; *see also* Johnson, *supra* note 157, at 74-82, for articulated reasons why the courts should uphold the ESA in the face of *Lopez* challenges.

338. *See National Ass'n of Home Builders*, 130 F.3d at 1057-58 (Henderson, J., concurring opinion).

339. *See id.* at 1058-59 (Henderson, J., concurring opinion). Judge Henderson disagreed that the incalculable effects of a species' economic value could serve as the basis for a substantial effect on interstate commerce. *See id.* at 1058. However, Judge Henderson also found that the actual loss of biodiversity substantially affected our ecosystem, which in turn affected interstate commerce. *See id.* at 1058.

340. *See id.* at 1060-64 (Sentelle, J., dissenting). Judge Sentelle could see no meaningful distinction between the two biodiversity rationales, since both required speculation as to future economic effect. *See id.* at 1063. He also found that Judge Henderson's ecosystem argument was flawed because habitats were not "commerce" and to allow Congress to regulate every factor that affected a habitat would give it unlimited power. *See id.* at 1064-65.

substantial effect on interstate commerce.[341]

Overall, the nature of pollution regulation has inevitably led to judicial support. Not only can pollution spread over state lines, but clean-up may involve out-of-state industry. Wildlife-related statutes, on the other hand, rely on more tenuous support. Those statutes requiring that a species cross a state line have not been seriously doubted. However, support withers when courts must rely on the more speculative biodiversity argument, especially where a species' habitat exists solely in one state.

C. *Controlled Substances Acts*

Another active area of *Lopez* challenges, controlled substances acts have shown as much resilience as their alter egos, the firearms acts. Courts have readily accepted congressional findings that drug trafficking has a substantial effect on interstate commerce.

1. The Controlled Substances Act—21 U.S.C. §§ 801 et seq.

The Controlled Substances Act[342] (the Drug Act), prohibits the manufacture, distribution, or dispensation of controlled or counterfeit substances, under penalty of jail.[343] The Ninth Circuit, in *United States v. Tisor*,[344] illustrated the typical argument courts use to uphold this statute.

Caught in a drug sting,[345] Tisor argued that intrastate drug trafficking did not substantially affect interstate commerce.[346] Citing legislative findings of the Controlled Substances Act, the court disagreed. The court emphasized that intrastate drug sales contributed to the "swelling" of interstate narcotics trafficking, and found federal control of such activity "essential."[347] Further, the court held that the Drug Act was part of a larger regulatory scheme aimed at criminalizing all commerce in illicit drugs,

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341. *See id.* at 1064-67 (Sentelle, J., dissenting).

342. 21 U.S.C.S. §§ 801-841 (Law. Co-op. 1997).

343. This statute provides, in relevant part:

> 841(a) Unlawful acts . . . it shall be unlawful for any person knowingly or intentionally—
> (1) to manufacture, distribute, or dispense, a controlled substance; or
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Id. at § 841.

344. 96 F.3d 370 (9th cir. 1996), *cert. denied*, 117 S. Ct. 1012 (1997).

345. *See id.* at 373. Tisor fell prey to a Drug Enforcement Agency ("DEA") undercover operation, uncovering him as the source of an informant's methamphetamine purchase. *See id.*

346. *See id.*

347. *See id.* at 374.

resulting in the required substantial effect.[348] A host of other courts have used substantially similar reasoning to consistently uphold the Drug Act.[349]

2. Drug-Free School Zones Act—21 U.S.C. § 860

Popularly known as the School Yard Statute, the Drug Free School Zones Act[350]—counterpart to the Gun Free School Zones Act struck in *Lopez*—extends harsher sentences to individuals violating controlled substances laws within one thousand feet of a school zone.[351]

Courts have surprisingly upheld this *Lopez* alter ego with relative ease. For instance, in *United States v. McKinney*,[352] the Seventh Circuit upheld the convictions of a cocaine dealer who had argued that the Act contained no jurisdictional element and lacked any legislative history linking drug dealing to interstate commerce.[353] The court responded by noting the explicit congressional findings in the Controlled Substances Act, and

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348. *See id.* at 375.

349. The following cases show widespread acceptance of this reasoning: *United States v. Westbrook*, 125 F.3d 996, 1009 (7th Cir.) (finding that drug trafficking affects interstate commerce), *cert. denied*, 118 S.Ct. 643 (1997); *United States v. Eidson*, 132 F.3d 43, 1997 WL 768304, at *1 (10th Cir. 1997) (unpublished table decision) (upholding conviction for marijuana production under § 841(a)); *United States v. Lerebours*, 87 F.3d 582, 584 (1st Cir. 1996) (affirming conviction for crack distribution, since cocaine traffic is "hûge interstate economic enterprise"), *cert. denied*, 117 S. Ct. 694 (1997); *United States v. Genao*, 79 F.3d 1333, 1337 (2d Cir. 1996) (affirming cocaine conviction, since narcotics trafficking substantially affects interstate commerce); *United States v. Edwards*, 98 F.3d 1364, 1369 (D.C. Cir. 1996) (noting that Congress made findings to support Drug Act), *cert. denied*, 117 S. Ct. 1437 (1997); and, *United States v. Leshuk*, 65 F.3d 1105, 1112 (4th Cir. 1995) ("Congress made detailed findings that intrastate manufacture, distribution, and possession of controlled substances . . . requires the regulation of both intrastate and interstate activities.").

350. 21 U.S.C.A. § 860 (West Supp. 1997).

351. This statute provides, in relevant part:

> (a) Penalty. Any person who violates section 841(a)(1) or section 856 of this title by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one-thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility, is (except as provided in subsection (b) of this section) subject to . . . [at least double punishments plus an optional additional fine] . . . [A] person shall be sentenced under this subsection to a term of imprisonment of not less than one year.

Id.

352. 98 F.3d 974 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1119 (1997).

353. *See id.* at 979. McKinney had been videotaped selling crack cocaine "right next door" to a public elementary school and "within 158 feet" of a high school. *See id.* at 976-77.

contending that the link to interstate commerce is "readily apparent."[354]

McKinney also attacked the punishment-enhancing nature of the Act, specifically targeted against school zones.[355] The court brushed this argument aside, however, explaining that drugs sold within school zones were equally likely to have traveled in interstate commerce as other drugs.[356] The court found no reason to prevent Congress from punishing validly-regulated conduct in a school zone more harshly than when that same conduct occurred elsewhere.[357]

Finally, the court distinguished the statute in *Lopez* by emphasizing that it had regulated mere firearm possession—a constitutional non-economic activity—while the Schoolyard Statute regulated the illegal economic enterprise of drug trafficking.[358] The other federal circuits have expressed similar reasoning in upholding this oft-challenged Act.[359] The Controlled Substances Act has never faltered, and the Drug Free School Zones Act has not gone the way of the Gun Free School Zones Act. Indeed, challengers to these laws face almost unbeatable odds. Facially, the drug laws are virtually impenetrable due to judicial acceptance of findings that possession is linked to interstate narcotics trafficking. "As applied," the absence of jurisdictional elements means that the government has no burden to prove that the individual possession substantially affected interstate commerce.[360]

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354. *Id.* at 979.

355. *See id.*

356. *See id.* at 979-80. One may argue that the court misinterpreted *Lopez*. Would not the Supreme Court have come to the same conclusion with regard to firearm possession?

357. *See id.* at 980.

358. *See id.* The court may have gone out of its way to escape the shadow of the Gun Free School Zones Act.

359. Several cases illustrate the popularity of this reasoning. *See* United States v. Henson, 123 F.3d 1226, 1233 (9th Cir. 1997) ("It would be highly illogical to believe that [drug] trafficking somehow ceases to affect commerce when carried out within 1000 feet of a school."); United States v. Jackson, 111 F.3d 101, 102 (11th Cir.) ("We adopt the reasoning of our sister circuits."), *cert. denied*, 118 S. Ct. 200 (1997); United States v. Hawkins, 104 F.3d 437, 440 (D.C. Cir.) ("While mere possession . . . may be noncommercial . . . the schoolyard statute [punishes] possession only when it is incident to a commercial activity."), *cert. denied*, 118 S. Ct. 126 (1997); United States v. Zorilla, 93 F.3d 7,8 (1st Cir. 1996) (affirming convictions for distributing 2 kg of cocaine within 1000 feet of a school zone, since drug trafficking is economic enterprise substantially affecting interstate commerce); United States v. Orozco, 98 F.3d 105, 107 (3d Cir. 1996) ("Drug trafficking is an inherently commercial activity; the mere possession of a firearm is not."); United States v. Tucker, 90 F.3d 1135, 1140 (6th Cir. 1996) ("Each individual instance of cocaine dealing . . . represents the end point of a manufacturing, shipping, and distribution network that is interstate—and international—in nature.").

360. As long as the activity has a substantial relation to interstate commerce, the jurisdictional element is not necessary. *See supra* note 59 and accompanying text.

D. *Child Support Recovery Act*

The Child Support Recovery Act (CSRA)[361] of 1992 made it a crime punishable by up to two years imprisonment for parents in a separate state to willfully fail to pay past due, state-ordered child support. An early target of *Lopez* challenges, the CSRA[362] experienced a rocky road to acceptance in the judicial community.[363] Despite being struck down by four district courts,[364] the CSRA has rebounded at the appellate level, where it has been upheld using all three broad *Lopez* categories.

The winning arguments against the CSRA at the district level targeted four areas. First, since criminal and family law are traditionally state functions, the CSRA could unacceptably open the underlying state child support orders to federal review.[365] Second, nonpayment of child support primarily affected parents, not outside commercial actors.[366] Third, child support did not fit into either the first or second *Lopez* categories.[367] Fourth, the CSRA contained no jurisdictional element.[368]

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361. 18 U.S.C.S. § 228 (Law. Co-op. 1993).

362. *See id.* This statute provides, in relevant part:

> (a) Offense. Whoever willfully fails to pay a past due support obligation with respect to a child who resides in another State shall be punished as provided in subsection (b).
> (b) Punishment . . . [ranging from a fine to no more than 2 years imprisonment].

Id.

363. For a detailed discussion of the CSRA in relation to the three *Lopez* categories, see generally Nicole M. Raymond, Comment, *The Child Support Recovery Act of 1992—Is the Federal Government's Involvement in the Criminal Enforcement of Child Support at an End After* United States v. Lopez?, 101 DICK. L. REV. 417 (1997).

364. *See* United States v. Bailey, 902 F. Supp. 727, 728-29 (W.D. Tex. 1995) (striking down the CSRA and holding that Congress' attempt to regulate the family law marital relationship offended concepts of federal-state "comity"), *rev'd*, 115 F.3d 1222 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 866 (1998); United States v. Mussari, 894, F. Supp. 1360, 1367 (D. Ariz. 1995) (finding the CSRA unconstitutional because its application would "force federal courts to review and apply orders of state courts in violation of principles of federalism and comity"), *rev'd*, 95 F.3d 787 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1567 (1997); United States v. Schroeder, 894 F. Supp. 360, 364 (D. Ariz. 1995) (finding that many states already had relevant criminal laws), *rev'd sub nom.* United States v. Mussari, 95 F.3d 787 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1567 (1997).

For criticism of the *Schroeder* and *Bailey* decisions, see Jeanne M. Tanner, Comment, *Constitutionality of the Child Support Recovery Act in the Wake of* United States v. Lopez, 5 GEO. MASON L. REV. 267, 280-84 (1997).

365. *See Mussari*, 894 F. Supp. at 1367.

366. In *United States v. Parker*, 911 F. Supp. 830, 835-838 (E.D. Pa. 1995), *rev'd*, 108 F.3d 28 (3d Cir.), *cert. denied*, 118 S.Ct. 111 (1997), the district court struck down the CSRA because it fit under none of the *Lopez* categories.

367. *See Parker*, 911 F. Supp. at 842-43.

368. *See Schroeder*, 894 F. Supp. at 365 ("a finding that because parent and child live in

Many circuits have upheld the CSRA under the first or second *Lopez* category, thus avoiding full *Lopez* analysis.[369] In *United States v. Bailey*,[370] over a sharp dissent, the Fifth Circuit overturned a district court's ruling striking down the CSRA.[371] Bailey had relocated from Texas to Tennessee and ceased paying court-ordered support for his four-year-old son.[372] The majority reasoned that Bailey's failed payments necessarily would have moved in the "channels" of interstate commerce, thus implicating the first *Lopez* category.[373] Moreover, since the payment would be a "thing" in interstate commerce, the second *Lopez* category applied.[374]

Further, the majority rejected the argument that Congress had bootstrapped federal jurisdiction to a state order, noting that Congress only became involved when an individual moved out of state with the pre-existing state-created obligation to pay.[375] Addressing the federalism argument, the court insisted that the CSRA simply enforced state court orders, without reviewing them.[376] Thus, any congressionally-mandated intervention fell squarely within the parameters of the Constitution.[377]

The lengthy dissent attacked the characterization of child support as "commerce."[378] Unilateral child support payments did not meet the original definition of commerce as "trade."[379] Further, the dissent balked at the "metaphysical" notion that a mere obligation to pay could be a "thing" that moves in commerce.[380] Finally, the dissent accused the majority of

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different states establishes the necessary interstate nexus for Commerce Clause authority would in essence give Congress carte blanche to regulate any area it deemed appropriate").

369. Many circuits have relied on the second *Lopez* category to avoid *Lopez* and uphold the CSRA. *See* United States v. Williams, 121 F.3d 615, 619 n.5 (11th Cir. 1997) (speculating that even under the third category, Congress' extensive findings would support the substantial relation to interstate commerce), *cert. denied*, 118 S.Ct. 1398 (1998); United States v. Bongiorno, 106 F.3d 1027, 1033 (1st Cir.) (acknowledging the CSRA could probably be upheld under the other categories, also), *reh'g denied*, 110 F.3d 132 (1997); United States v. Johnson, 114 F.3d 476, 479 (4th Cir.) (noting that "the Act requires . . . the obligated parent and the dependent child reside in different states"), *cert. denied*, 118 S.Ct. 258 (1997); United States v. Black, 125 F.3d 454, 460 (7th Cir. 1997) (following other circuits in treating *Lopez* as significant only under the third category), *cert. denied sub nom.* Davis v. United States, 118 S.Ct. 1821 (1998); United States v. Sage, 92 F.3d 101, 107 (2d Cir. 1996) ("[T]he transaction the parent is obligated to consummate is . . . in interstate commerce."), *cert. denied*, 117 S. Ct. 784 (1997).

370. 115 F.3d 1222 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 866 (1998).

371. *See id.* at 1224.

372. *See id.*

373. *See id.* at 1227.

374. *See id.* at 1228.

375. *See id.* at 1230.

376. *See id.* at 1232.

377. *See id.* at 1232-33.

378. *See id.* at 1236 (Smith, J., dissenting).

379. *See id.*

380. *See id.* at 1237 n.10 (Smith, J., dissenting).

transforming the jurisdictional nexus into a diversity requirement, emasculating the "Interstate Commerce Clause" into simply an "Interstate Clause."[381]

Responding to the dissent in a footnote, the majority attempted to allay the dissent's concerns. "[Not] all interstate financial obligations are subject to federal regulation[;]" however, "congressional attempts at the federal enforcement of [interstate financial] obligations *are* [subject to federal regulation] . . . ."[382]

The Ninth Circuit used similar reasoning in *United States v. Mussari*[383] while overruling two district court decisions using the second *Lopez* category.[384] In a lengthy decision, the court explained how, through wire, mail, electronic transfer, or personal delivery, debt payment involved interstate commerce.[385]

Some courts have addressed the *Lopez* analysis squarely under the third category. In *United States v. Parker*,[386] the Third Circuit reversed a district court's decision to strike down the CSRA.[387] The court saw the accumulation of child support debt as a local commercial activity with a substantial national impact.[388] Moreover, the court implied a jurisdictional element because the CSRA always dealt with parents in separate states.[389] Few other circuits have attempted this approach.[390]

The opportunity to facially overturn the CSRA no longer offers fighting prospects: nine circuits have foreclosed that argument. Moreover, with no true jurisdictional element, "as applied" challenges are unavailable. The struggle over the CSRA illustrates how different courts, working from various viewpoints, can uphold a statute using *Lopez*.

E. *Violence Against Women Act (Civil Prong)*

The civil prong of the Violence Against Women Act (VAWA)—passed

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381. *Id.* at 1237, 1239 (Smith, J., dissenting).

382. *See id.* at 1229 n.8 (emphasis added).

383. 95 F.3d 787, 791 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1567 (1997).

384. *See id.* at 790. Prior to the district court dismissal, Mussari had been indicted for willfully failing to pay court-ordered child support for his two children living in Arizona. *See id.* at 788. On that same day Donald Schroeder was similarly charged for his failure to support his four children in Arizona. *See id.*

385. *See id.*

386. 108 F.3d 28 (3d Cir.), *cert. denied*, 118 S. Ct. 111 (1997).

387. *See id.* at 30. Parker, a resident of Florida, had been accused of willfully failing to pay past-due child support to his two children living in Pennsylvania. *See id.* at 29.

388. *See id.* at 31.

389. *See id.* at 30-31.

390. *See* United States v. Crawford, 115 F.3d 1397, 1400-01 (8th Cir.) (upholding the CSRA under both the second and third *Lopez* categories), *cert. denied*, 118 S. Ct. 341 (1997); United States v. Hampshire, 95 F.3d 999, 1003 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 753 (1997).

under both the Commerce Clause and Section 5 of the Fourteenth Amendment—creates a cause of action for victims of gender-based felonies.[391]

While a handful of district courts have upheld the VAWA in various settings,[392] in *Brzonkala*,[393] one district court found it unconstitutional.[394] With a particularly disturbing set of facts—described in detail in this casenote's introduction[395]—a college student filed a civil suit under the VAWA after two male students allegedly raped her on a Virginia campus.

The district court first determined that the VAWA did not fit under the first or second *Lopez* categories, since the mere interstate travel of women and their abusers was not sufficient to "qualify for the commerce power."[396] Under the third category, the court acknowledged congressional findings on spousal abuse,[397] but considered the matter one for judicial determination.[398]

The court noted similarities to *Lopez*, since the VAWA civil remedy vindicated a criminal act, regulated a non-economic activity, and had no jurisdictional element.[399] Moreover, the court refused to apply the *Wickard* "aggregate effects" reasoning to the inherently non-economic activity of gender-based violence.[400]

On appeal,[401] a three-judge panel of the Fourth Circuit overturned the district court, but only over a strong dissent. The panel relied heavily on Congress' "detailed and extensive" findings to determine that Congress

391. *See supra* note 10 and accompanying text.

392. *See* Anisimov v. Lake, 982 F. Supp. 531, 540 (N.D. Ill. 1997) (upholding the civil prong of the VAWA by an employee against her employer); Seaton v. Seaton, 971 F. Supp. 1188, 1194 (E.D. Tenn. 1997) (upholding the civil VAWA prong in a suit by a wife against her husband); Doe v. Hartz, 970 F. Supp. 1375, 1423 (N.D. Iowa. 1997) (allowing a VAWA civil cause of action by a parishioner against her priest), *rev'd in part on other grounds*, 134 F.3d 1339 (8th Cir. 1998); Doe v. Doe, 929 F. Supp. 608, 614 (D. Conn. 1996) (upholding civil portion of act by wife against her husband); *see also* Melanie L. Winskie, Note, *Can Federalism Save the Violence Against Women Act?*, 31 GA. L. REV. 985, 1006-08 (1997) (criticizing *Doe* for ignoring post-*Lopez* changes in commerce clause analysis).

393. *See Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779 (W.D. Va. 1996), *rev'd sub nom. Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949 (4th Cir. 1997), *vacated, reh'g granted en banc*, (Feb. 5, 1998).

394. *See id.* at 801.

395. *See supra* notes 1-11 and accompanying text.

396. *Brzonkala*, 935 F. Supp. at 786.

397. *See id.* at 788.

398. *See id.* at 788-89.

399. *See id.* at 789-90.

400. *See id.* at 791-93. For an argument that the district court interpreted *Lopez* too broadly, *see* Winskie, *supra* note 392 at 1008-09.

401. *See Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949 (4th Cir. 1997), *vacated, reh'g granted en banc* (Feb. 5, 1998).

had acted rationally in passing the VAWA.[402] Further, the court found that the VAWA did not interfere with areas of state control; instead, the statute harmonized and protected state laws.[403]

The dissent disagreed, arguing that the majority had not conducted the independent investigation required after *Lopez*.[404] Further, it accused the majority of giving undue deference to pre-*Lopez* findings of a congressional committee, ignoring changes in Commerce Clause analysis brought on by *Lopez*.[405] The panel's opinion has since been vacated, and the Fourth Circuit has granted a rehearing en banc.

Most federal circuits have not yet settled the VAWA's constitutionality. Arguments still worth making emphasize the lack of a jurisdictional element and that violence based on gender is a non-economic activity. Especially in this area of family law, where states have traditionally regulated, challengers should "wave the federalism banner." Despite an arsenal of practicality and policy, the great deference for congressional findings may ultimately save this law.

F. *Freedom of Access to Clinic Entrances Act*

Codified at 18 U.S.C. § 248, the Freedom of Access to Clinic Entrances Act (FACE) prohibits the intentional injury, intimidation, and interference "by force or threat of force or by physical obstruction" of reproductive health services facilities or places of religious worship.[406] Signed by

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402. *See id.* at 966.

403. *See id.* at 970.

404. *See id.* at 974 (Luttig, J., dissenting opinion).

405. *See id.* at 974-76 (Lutting, J., dissenting opinion). For an analysis applying *Lopez* to the VAWA civil prong and finding that it exceeds Congress' commerce power, see Jennifer C. Philpot, Note, *Violence Against Women and the Commerce Clause: Can This Marriage Survive?* 85 KY. L.J. 767, 792-800 (1996).

406. The Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C.S. § 248 (Law. Co-op Supp. 1997). This statute provides, in relevant part:

> (a) Prohibited activities. Whoever—
> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with . . . any person because that person is . . . obtaining or providing reproductive health services;
> (2) [or because that person is] lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or
> (3) intentionally damages or destroys the property of a facility . . . because such facility provides reproductive health services, or . . . [is] a place of religious worship, shall be [penalized] . . . .
> (c) Civil remedies.—(1)Right of action.—
> (A) In general. Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action . . . (B) . . . including temporary, preliminary or permanent injunctive relief and compensatory and punitive

President Clinton in 1994, the Act provides criminal and civil penalties.[407] As with other legislation challenged after *Lopez*, FACE received a mixed review by the district courts, but strong support at the appellate level.

To date, the Seventh Circuit in *United States v. Wilson*[408] has provided the most thoroughly reasoned defense of FACE. Charged with criminal activity for blocking a Milwaukee abortion clinic, the defendant raised both Commerce Clause and First Amendment arguments.[409] Disagreeing with the magistrate, the district court dismissed the charges.[410] The district court found FACE failed to satisfy the first and third *Lopez* categories because the congressional rationale could be applied to "any human activity."[411]

While agreeing that the first *Lopez* category did not support FACE, the Seventh Circuit did find a substantial effect on interstate commerce under the third category.[412] The court emphasized four "plainly rational" congressional findings: (1) the abortion clinic operated in the stream of interstate commerce by purchasing interstate supplies; (2) interstate travelers sought abortions at clinics; (3) clinic obstructions decreased nationwide availability of abortion; and (4) the problem had evaded state efforts.[413]

The court also found that the Act regulated a commercial activity: "the provision of reproductive health services."[414] This differed from the defendant's argument that the actual activity being regulated was noncommercial: "protesting at abortion clinics."[415] Finally, the court refused to make a ruling regarding the second *Lopez* category, waiting for further guidance from the Supreme Court.[416] The majority reasoning in

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> damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses .... [T]he plaintiff may elect, at any time prior to the rendering of final judgement, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.

Id.

407. *See id.* at § 248(b) and (c).

408. 73 F.3d 675 (7th Cir. 1995).

409. *See id.* at 677. Wilson and other defendants used elaborate methods to blockade the Milwaukee Wisconsin Women's Health Care Center in the hopes of saving the unborn children. *See id.* Wedging a car into the front entrance, they welded themselves into the car, with another car similarly blocking a rear entrance. *See id.* Firefighters worked almost five hours to extricate the defendants, preventing twelve patients from receiving abortions that day. *See id.*

410. *See id.* at 677-78.

411. *Id.* at 678, 680.

412. *See id.* at 680, 681.

413. *Id.* at 680-82.

414. *Id.* at 683.

415. *Id.* at 684.

416. *See id.* at 688.

Wilson sums up the arguments other courts have used to save FACE.[417]

The *Wilson* dissent argued that federal statutes without jurisdictional elements must only regulate actual economic activity.[418] The key interpretative difference between dissent and majority was whether the statute regulated the protesting (noncommercial) or the abortions (commercial).[419] Moreover, the dissent noted that extensive state laws regulating the same conduct as FACE, added to the intrusiveness of a federal law.[420]

FACE, by its own terms, regulates the conduct of private individuals and not the actual activity of abortion.[421] However, Congress and the courts have agreed that those private actions substantially impact interstate commerce. Therefore, if this seemingly innocuous conduct—blocking an entrance to a private facility—can be regulated by the federal government under the Commerce Clause, some wonder why Congress cannot regulate every human activity.[422]

G. *Miscellaneous Criminal Statutes*

Emboldened by judicial success, Congress has little incentive to restrict legislation with jurisdictional elements, in spite of *Lopez*. This last subsection provides a diverse sampling of other statutes without jurisdictional limits, which were upheld due to their relation to commerce.

1. Illegal Gambling Business—18 U.S.C. § 1955

The conducting, financing, or managing of an illegal gambling business

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417. *See* Hoffman v. Hunt, 126 F.3d 575, 587 (4th Cir. 1997) (finding that the noncommercial activity was directly connected to commercial), *cert. denied*, 118 S.Ct. 1838 (1998); United States v. Bird, 124 F. 3d 667, 682 (5th Cir. 1997) (affirming conviction under FACE where man threatened abortionist doctor's life while he attempted to enter a Houston abortion clinic), *cert. denied*, 118 S.Ct. 1189 (1998); United States v. Dinwiddie, 76 F.3d 913, 920-21 (8th Cir.) (using both the second and third *Lopez* categories to uphold FACE conviction for woman obstructing entrance to Planned Parenthood abortion clinic), *cert. denied*, 117 S. Ct. 613 (1996); Terry v. Reno, 101 F.3d 1412, 1416-17 (D.C. Cir. 1996) ("Congress' failure to use the magic word 'substantial' is not fatal... since Congress passed the Access Act prior to *Lopez*."), *cert. denied*, 117 S.Ct. 2431 (1997); Cheffer v. Reno, 55 F.3d 1517, 1520 (11th cir. 1995) (rejecting challenge of pro-life women who felt their freedom of expression chilled after passage of FACE).

418. *See Wilson*, 73 F.3d at 690 (Coffey, J., dissenting).

419. *See* Benjamin W. Roberson, *Abortion as Commerce: The Impact of* United States v. Lopez on Freedom of Access to Clinic Entrances Act of 1994, 50 VAND. L. REV. 239, 264-68 (1997) (arguing that FACE's regulation of non-economic protesting activity gives Congress a national police power).

420. *See Wilson*, 73 F.3d at 693-94 (Coffey, J., dissenting).

421. To illustrate, consider that FACE also prohibits obstruction of places of religious worship. If FACE regulates abortion, it must also regulate religious worship.

422. *See supra* notes 51-52 and accompanying text.

is prohibited under 18 U.S.C. § 1955.[423] Courts have upheld this legislation with little hesitation.[424]

In *United States v. Zizzo*,[425] the Seventh Circuit articulated the common rationale for the constitutionality of the law, in the context of a Chicago organized crime syndicate.[426] The defendants unsuccessfully argued that Congress could not regulate their "purely local" operation.[427] The court found that the statute's requirements ensured that it only reached commercial activity.[428] Moreover, the court cited congressional findings linking illegal gambling to organized crime—which, in turn, substantially affects interstate commerce.[429] Indeed, the facts of the case indicated that Congress was correct: the defendant's operation was supporting organized crime.[430] Courts use identical arguments when upholding other laws that

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423. 18 U.S.C.S. § 1955 (Law. Co-op. 1991 & Supp. 1997). This statue provides, in relevant part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.
> (b) As used in this section—
> (1) "illegal gambling business" means a gambling business which—
> (i) is a violation of the law of a State or political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day . . . .
> (d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States.

Id.

424. *See* United States v. Boyd, 149 F.3d 1062 (10th Cir. 1998) (finding none of the defects of the *Lopez* statute); United States v. Joplin, 122 F.3d 1064 (4th Cir. 1997) (unpublished table decision) (finding it immaterial that gambling enterprise was purely intrastate activity), *cert. denied*, 118 S. Ct. 870 (1998); United States v. Wall, 92 F.3d 1444, 1452 (6th Cir. 1996) (refusing to strike law "[u]ntil the Supreme Court provides a clearer signal or cogent framework," citing extensive congressional findings), *cert. denied*, 117 S.Ct. 690 (1997).

425. 120 F.3d 1338 (7th Cir.), *cert. denied*, 118 S. Ct. 566 (1997).

426. Defendants were members of the "Chicago Outfit," a crime syndicate engaged in loan sharking and gambling. *See id.* at 1343. Opening bets "on credit," the crew often used muscle to collect. *See id.* at 1344.

427. *Id.* at 1350.

428. *See id.*

429. *See id.*

430. *See id.* at 1351.

regulate financial transactions[431] or crimes.[432]

2. Federal Carjacking Statute—18 U.S.C. § 2119

The Federal Carjacking Statute[433] provides: "Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall [be fined or imprisoned]." While this statute possesses a minimal jurisdictional element, the courts have not relied on that detail, upholding it on commercial grounds.[434]

Using all the *Lopez* categories, the Tenth Circuit upheld the statute in *United States v. Carolina*.[435] The court brushed aside defendant's commerce power challenge, finding three justifications to uphold the statute.[436] First, the *Carolina* court noted that the statute regulated the "channels" of commerce because carjacking affected both foreign and interstate travel.[437] Next, the court stated two reasons why the law fit within the second and third *Lopez* categories: carjacking resulted in higher vehicle insurance premiums, and stolen vehicle parts were sold in interstate commerce.[438]

Providing a more detailed analysis, the Fifth Circuit, in *United States v. Coleman*,[439] upheld the law using primarily the third *Lopez* category.[440]

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431. *See, e.g.*, Brown v. Investors Mortgage Co., 121 F.3d 472, 475-76 (9th Cir. 1997) (using these arguments to uphold 12 U.S.C. § 1735f-7a's modification of state usury laws limiting mortgage rates, where a woman lost her house after desperate multiple re-financing at over 16%).

432. *See, e.g.*, Pic-A-State Pa., Inc. v. Reno, 76 F.3d 1294, 1302-03 (3d Cir.) (upholding 18 U.S.C. § 301's prohibition on interstate transmission of data to procure lottery tickets), *cert. denied*, 116 S.Ct. 2504 (1996).

433. 18 U.S.C.S. § 2119 (Law. Co-op. Supp. 1997).

434. *See* United States v. Hutchinson, 75 F.3d 626, 627 (11th Cir.) (refusing to revisit post-*Lopez* circuit precedent upholding the statute), *cert. denied*, 117 S.Ct. 241 (1996); United States v. McHenry, 97 F.3d 125, 129 (6th Cir. 1996) (relying on second and third *Lopez* categories), *cert. denied*, 136 L. Ed. 2d 873 (1997); United States v. Randolph, 93 F.3d 656, 660 (9th Cir. 1996) (using second category); United States v. Robinson, 62 F.3d 234, 236-37 (8th Cir. 1995) (using second category to uphold statute).

435. 61 F.3d 917, No. 94-6439, 1995 WL 422862, at *1 (10th Cir. 1995) (unpublished table decision).

436. *See id.*

437. *See id.*

438. *See id.*

439. 78 F.3d 154 (5th Cir.), *cert. denied*, 117 S. Ct. 230 (1996). After two previous unsuccessful attempts with different vehicles, Donald Ray Coleman carjacked a Mercedes Benz belonging to a Texas couple while in their driveway. *See id.* at 155. Coleman's companion, Beasley, shot at the couple, missing the wife but hitting the husband; Beasley fired a second shot into the man's head, killing him. *See id.*

440. *See id.* at 158.

Noting the broad intent of Congress,[441] the court detailed some of the findings linking carjacking to interstate commerce: (1) it was often part of a vast, illicit interstate business; (2) consumers suffered "direct economic losses" through theft and insurance increases; and (3) it required a "comprehensive, national response."[442] The court compared the statute with the Gun Free School Zones Act and found little similarity.[443] The carjacking statute involved a commercial activity, was supported by adequate congressional findings, and possessed a minimal jurisdictional element.[444]

3. Federal Bank Robbery Statute

Codified at 18 U.S.C. § 2113, the Federal Bank Robbery Statute criminalizes the taking of any thing of value from a bank, credit union, or savings and loan association by use of force, violence, or intimidation.[445] In *United States v. Harris*,[446] the Ninth Circuit upheld this statute over the

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441. The court recounted some of the broader provisions of the Anti-Car Theft Act, of which the carjacking statute was simply one piece:

> [T]he Act not only criminalizes carjacking, but also increases the sentences for importation, exportation, and interstate transportation of stolen vehicles, and possession of such vehicles; establishes a national information system to check motor vehicles; establishes a national information system to check motor vehicle titles; decreases illicit trafficking in stolen auto parts by increasing the requirements on manufacturers to identify auto parts and by establishing a national information system for stolen auto parts; and tightens the supervision of customs on exported autos.

Id.

442. *Id.*

443. *See id.* at 159.

444. *See id.*

445. *See* The Federal Bank Robbery Statute, 18 U.S.C.A. § 2113 (West Supp. 1997). This statute provides, in relevant part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any [of these institutions] . . . with the intent to commit . . . any felony affecting such [institution] . . . and in violation of any statute of the United States, or any larceny—Shall be fined under this title or imprisoned not more than twenty years, or both.

Id.

446. 108 F.3d 1107(9th Cir. 1997).

challenge of a defendant who had conditionally pled guilty to the offense.[447] The court found an implicit jurisdictional element in the statute, since the statute required the financial institution to be federally insured.[448] Moreover, the court held that financial institutions were "instrumentalities and channels of interstate commerce."[449] This being the case, the court rejected the defendant's challenge.

Where Congress has made rational findings that link an activity to interstate commerce, courts allow federal regulation. Ultimately, findings may make the difference between a valid and invalid exercise of the commerce power.

VI. A SUGGESTED APPROACH TO EVALUATING COMMERCE CLAUSE CHALLENGES AFTER *UNITED STATES V. LOPEZ*

Reading *United States v. Lopez*, one might think that the Supreme Court has opened the floodgates of successful commerce challenges. This is not the case. Lower courts have easily avoided the decision's idealistic language. A comprehensive study of lower court decisions reveals key factors one should consider when challenging a statute passed under the auspices of the Commerce Clause.

A. *The Jurisdictional Element*

The key threshold factor one should consider is whether the statute contains a jurisdictional element. A jurisdictional element expressly requires the government to prove, as an element of a criminal offense, that an individual defendant's activity has affected interstate commerce. This element comes in various phrases, but it will always require that the activity "affect commerce," or that something "cross a state line." It may be found either on the face of the statute or hidden in the definitions section.

1. Facial Constitutional Challenges

If a statute contains a jurisdictional element, that fact alone almost guarantees that it will survive a facial constitutional challenge. Courts have traditionally accepted the presence of a jurisdictional element as sufficient to establish the federal right to regulate in an area. Moreover, *Lopez* did not

447. *See id.* at 1109. The court found that Harris robbed a bank insured by the FDIC, since he plead guilty to the crime and all its elements. *See id.*

448. *See id.*

449. *Id.* Contrast this view with the Second Circuit, which found that transactions with an intrastate bank did not even meet a minimal nexus to interstate commerce. *See supra* notes 189-90 and accompanying text.

squarely address the issue. In fact, Congress simply modified the Gun Free School Zones Act struck down in *Lopez* and added a jurisdictional element; all other language remained the same.[450]

Facial challenges against statutes with jurisdictional elements have utterly failed in the lower courts. Federal courts since *Lopez* have rejected every facial challenge brought against statutes regulating firearms,[451] arson,[452] water pollution,[453] racketeering,[454] money laundering,[455] articles in commerce,[456] and stolen goods.[457]

The only facial challenge that met with any initial success attacked the criminal prong of the Violence Against Women Act (VAWA).[458] Using the third *Lopez* category, the district court struck down that law because the mere crossing of a state line did not "substantially" affect interstate commerce.[459] That argument may be the only hope for challengers of these statutes. However, the Court of Appeals relied on the first and second *Lopez* categories and reversed that decision.[460]

2. "As Applied" Challenges

"As applied" challenges to statutes with jurisdictional elements come in three varieties: (1) raising the required level of connection (the nexus) between the regulated activity and interstate commerce; (2) questioning the sufficiency of the evidence to satisfy that nexus; and (3) challenging the time-frame of that nexus.

The first key "as applied" challenge explores how significantly an activity must affect interstate commerce before the government can establish jurisdiction in federal court. *Lopez* indicates that federally-regulated activities must have a "substantial relation to" or "substantial effect on" interstate commerce.[461] Does the statute expressly require this "substantial" nexus on its face, or does it require only a *de minimis* nexus?[462]

A *de minimis* nexus, by its own terms, recognizes jurisdiction when an activity affects interstate commerce in the slightest way. For example,

450. *See* 18 U.S.C.S. § 922(q) (Law. Co-op. Supp. 1998).
451. *See supra* notes 72-75, 100-06, 112-14 and accompanying text.
452. *See supra* note 125 and accompanying text.
453. *See supra* notes 158-61 and accompanying text.
454. *See supra* note 172 and accompanying text.
455. *See supra* notes 179-84 and accompanying text.
456. *See supra* notes 194-96 and accompanying text.
457. *See supra* notes 218-25 and accompanying text.
458. *See supra* Part IV.E.2.
459. *See supra* note 209 and accompanying text.
460. *See supra* note 206 and accompanying text.
461. *See Lopez*, 514 U.S. at 559.
462. *See supra* notes 78-79 and accompanying text.

jurisdiction may be established if the activity merely "affects commerce" or does so "in any way or degree."

If the law contains a *de minimis* nexus, challengers may argue that *Lopez* implicitly requires more—a "substantial" nexus to establish federal jurisdiction. This higher nexus would force the government to prove, as an element of the offense, that the defendant's activity affected interstate commerce in a significant way.

Challengers have unsuccessfully leveled attacks on *de minimis* elements in firearms statutes, garnering judicial support only in minority opinions.[463] Similarly, this argument has completely failed against statutes regulating racketeering,[464] money laundering,[465] and articles in commerce.[466]

However, challengers have achieved limited success against the Federal Arson Statute, with many circuits finding that *Lopez* raised the *de minimis* nexus to "substantial" in crimes of arson.[467] There are two apparent distinctions between arson and crimes that require only a *de minimis* nexus. First, the other crimes are supported by more extensive congressional findings that link them to interstate commerce, such as with firearms. Second, some crimes by their very nature involve commerce, such as with racketeering or money laundering.

Challengers have also achieved success against the Clean Water Act regulations that attempted to establish federal jurisdiction over an activity with the "potential" to affect interstate commerce.[468] Apparently, the federal government stretches its advantage too far when it blatantly regulates activity that does not affect interstate commerce at all.

The limited success in this first "as applied" area must be tempered with one important caveat: *Lopez* clearly does not require that every *de minimis* nexus be raised.[469] Using the *Wickard* "aggregate effects" reasoning, the *Lopez* majority acknowledged that if an activity substantially affects interstate commerce when repeated time and time again, then a *de minimis* nexus is appropriate.[470]

A second "as applied" challenge attacks the sufficiency of the evidence used to establish federal jurisdiction. This assault hopes that the government has not produced enough evidence to establish the required nexus between a defendant's conduct and interstate commerce. The

463. *See supra* notes 76-83 and accompanying text.
464. *See supra* Part IV.D.1.
465. *See supra* notes 178-84 and accompanying text.
466. *See supra* Part IV.E.1.
467. *See supra* Part IV.B.
468. *See supra* notes 161-68 and accompanying text.
469. *See Lopez*, 514 U.S. at 558.
470. *See id.*

argument can work even against a *de minimis* nexus.[471]

The Second Circuit accepted this type of challenge against the Money Laundering Statute where all of the laundering occurred within the border of one state.[472] Even with a firearms statute, this argument may succeed if the defense can show that a firearm and all of its component parts were manufactured within the state's borders.[473]

A third "as applied" attack focuses on the time-frame of the interstate activity. This argument contends that if an item's interstate movement occurred significantly earlier than the prohibited activity, then the effect on interstate commerce is too remote to establish federal jurisdiction. For instance, if a firearm crossed a state line years ago and has just recently been used illegally, its border crossing was arguably too remote in the past to have any effect on interstate commerce. While not yet successful, some judicial recognition of this argument's logic leaves it open as a possible option.[474]

B. *"Channels" and "Instrumentalities"*

The *Lopez* decision focused on its third broad category: whether an activity "substantially affects" interstate commerce. However, the Court also mentioned a first and second broad category that apply when a statute regulates "channels" or "instrumentalities" of interstate commerce.[475] In order to be constitutional, a statute need only satisfy one of these three broad categories. If a court determines that either of the first two *Lopez* categories apply, it can avoid the more difficult third category analysis.

Regarding the first broad *Lopez* category, Congress may regulate the "channels" of interstate commerce. Courts interpret this category in four ways. First, when a statute involves use of a transportation route, the "channels" of commerce are clearly implicated. This is the case with firearms laws that require the crossing of a state line.[476] Environmental statutes that prohibit "traffic" in wildlife, such as the Lacey Act and Endangered Species Act, also fit under this category.[477] In the same way, the effect of carjacking on interstate travel necessarily affects these "channels" of commerce.[478]

Second, when an activity requires the use of electronic routes or the mail, it must use a "channel" of interstate commerce. For instance, with the

471. *See supra* notes 208-09 and accompanying text.
472. *See supra* notes 188-91 and accompanying text.
473. *See supra* notes 88-90 and accompanying text.
474. *See supra* notes 84-87 and accompanying text.
475. *See supra* notes 55-57 and accompanying text.
476. *See supra* Part V.A.3.
477. *See supra* Part V.B.2.
478. *See supra* note 437 and accompanying text.

CSRA, child support payments from a parent in one state to a parent in another state use some "channel" of commerce.[479] Likewise, electronic transfers of money—the touchstone of modern banking[480]—use routes that support domestic and international commerce.

Third, when a law attempts to control the market of a product—"trade" in its most basic sense—it affects the "channels" of commerce. For instance, Congress intended to affect the supply and demand of machine guns through tight regulation.[481] These market controls fundamentally altered "trade" in machine guns, and thus regulated the "channels" of commerce, since "trade" *is* commerce.

Fourth, when legislation seeks to prevent the "channels" of interstate commerce from immoral or injurious uses, Congress acts squarely within the first category. This was the purpose behind the statute prohibiting transportation of stolen goods.[482]

Regarding the second broad *Lopez* category, Congress may regulate the "instrumentalities" or "things" that travel in interstate commerce. This category includes articles that regularly travel across state lines, and all vehicles.

Congressional findings usually identify those articles that often travel in interstate commerce. They include such items as machine guns,[483] resulting in the machine gun ban, and stolen vehicle parts, prompting the federal carjacking law.[484] Even people may be considered "things" that move in interstate commerce, as in the criminal prong of the VAWA.[485] Most clearly, the Hobbs Act regulates articles that, by definition, move in interstate commerce.[486]

Some "instrumentalities" of interstate commerce are less clear. For instance, courts upheld CERCLA because pollution moves in commerce through nature.[487] Moreover, payments that move across interstate wires or the mail fall into the second category, as in the Child Support Recovery Act,[488] and with banking laws.[489]

If a court finds that either of these two broad *Lopez* categories are satisfied, it may simply avoid any discussion of *Lopez*. This technique is an effective way for courts to distinguish *Lopez*, which focused on the third

479. *See supra* notes 373-74 and accompanying text.
480. *See supra* note 449 and accompanying text.
481. *See supra* notes 271-78 and accompanying text.
482. *See supra* note 219 and accompanying text.
483. *See supra* notes 268-70 and accompanying text.
484. *See supra* note 438 and accompanying text.
485. *See supra* Part IV.E.2.
486. *See supra* note 194.
487. *See supra* notes 316-17 and accompanying text.
488. *See supra* notes 374, 380, 385 and accompanying text.
489. *See supra* note 449 and accompanying text.

category.

C. *Commercial Activity*

If a statute contains no jurisdictional element and cannot be justified under either of the first two broad *Lopez* categories, a full *Lopez* analysis of the third broad category may be in order. This entails determining whether the law regulates an activity that substantially affects interstate commerce.

A statute, on its face, may regulate a financial transaction, business practice, or other activity that can be interpreted as "commercial" or "economic." If it clearly regulates an economic activity it will most likely survive a *Lopez* challenge, due to the *Wickard* "aggregate effects" test. Courts will reason that, when repeated many times, the activity will inevitably have a substantial relation to interstate commerce.[490] Even the *Lopez* Court would not hesitate to uphold a statute that regulates a commercial activity on its face.

In this way, courts have upheld statutes regulating the disposal or transfer of firearms, finding that these are "commercial" acts.[491] Likewise, since child support involves a financial transaction, some courts conclude that the CSRA must survive attack.[492]

However, not every statute passed under the Commerce Clause clearly regulates an economic activity on its face. If one can convince a court that Congress has attempted to regulate a non-economic activity, the chances of success increase greatly. Examples of these successes are seen in challenges to CERCLA,[493] the CSRA,[494] the civil prong of the VAWA,[495] and the FACE.[496] In each of these instances, the regulated activity—for instance, protesting at an abortion clinic—was not obviously economic, and required explanation to the court.

Of course, a court might find that a regulated activity that is not clearly economic still affects interstate commerce. The crucial factor that will support this conclusion is the presence of *adequate congressional findings*. Congress may have made the sound determination that a non-economic activity has a substantial relation to interstate commerce. Courts merely require that Congress could rationally make that determination from the findings before it.

Courts tend to give extreme deference to congressional findings. The

490. *See supra* note 38-40.
491. *See supra* notes 235-37 and Part V.A.2.
492. *See supra* notes 386-90 and accompanying text.
493. *See supra* notes 308-09 and accompanying text.
494. *See supra* note 366 and accompanying text.
495. *See supra* notes 399-400 and accompanying text.
496. *See supra* notes 411, 419-21 and accompanying text.

findings can exist at any level, including committee reports and debates, or they may come from prior legislation. It is not necessary that Congress re-invent the wheel each time it legislates, as even the *Lopez* majority acknowledged.[497] If Congress has built up the institutional expertise to make a rational determination about an activity, it makes no difference if those findings occurred in 1968 or 1998.

Findings have been the key factor in upholding many statutes challenged after *Lopez*. Findings saved the machine gun ban by identifying it as a form of market regulation.[498] Moreover, extensive findings that linked drugs with interstate commerce rescued various drug statutes.[499] The civil prong of the VAWA, struck down as non-economic at the district level, was revived at the appellate level due to findings.[500]

Likewise, when lower courts struck down FACE because protests against abortion were not economic in nature, appellate courts relied on congressional findings to link the activity with interstate commerce.[501] Findings have also factored in to court decisions upholding regulations of illegal gambling[502] and carjacking.[503]

In short, challengers cannot become too hopeful even when a statute regulates a non-economic activity, does not contain a jurisdictional element, and does not fit under the first two broad *Lopez* categories. Unless Congress has utterly neglected to make adequate findings, a court will uphold that statute because the findings rationally support the conclusion that the activity substantially affects interstate commerce.

D. *Traditional Areas of State Regulation*

The final, and least persuasive, area worth considering is whether Congress has traditionally left a particular area to state regulation. As Chief Justice Rehnquist emphasized in *Lopez*, the concerns of federalism should be part of any court's consideration of a statute.[504]

If Congress has made a "sharp break" with past trends of legislation, that may well add fuel to the challenger's fire. On the other hand, if Congress has tread into this area time and time again, that will likely be one more reason to uphold the law. Even if the legislation tramples on state-trod grounds, Congress has every right to do so when the law is supported by adequate findings.

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497. *See Lopez*, 514 U.S. at 563.
498. *See supra* notes 280-81, 290-93 and accompanying text.
499. *See supra* notes 346-47, 354 and accompanying text.
500. *See supra* notes 402-05 and accompanying text.
501. *See supra* notes 408-20 and accompanying text.
502. *See supra* note 429 and accompanying text.
503. *See supra* Part V.G.2.
504. *See supra* notes 51-52 and accompanying text.

Lower courts have almost completely ignored this consideration. While some courts have paid lip service to the concept, most await a clearer sign by the United States Supreme Court that this concern is serious enough to strike down an act of Congress.

VI. CONCLUSION

After discussing almost thirty statutes challenged between the 1995 *Lopez* decision and Fall 1998—with some minor challenges omitted—several trends emerge.

First, federal district courts are slightly more willing to accept *Lopez* challenges than are the federal circuits, themselves. Every time a district court has struck a statute based on the Commerce Clause, a federal circuit has reversed. Naturally, these frequent reversals will deter district courts from overturning acts of Congress in the future.

Second, without further guidance from the Supreme Court the federal courts are extremely hesitant to overturn acts of Congress under the auspices of *Lopez* alone. The *Lopez* opinion, itself, is written in a way that makes it easy to distinguish. While some language may indicate a changing view of the Commerce Clause, that is unclear until further cases substantiate it. For now, lower courts have limited reliance on *Lopez* to a very narrow range of facts.

Third, those who choose to mount commerce challenges face an uphill battle. Aside from *Lopez*, no significant commerce victory has survived the appeals process.

Will the Supreme Court reinforce *Lopez* with yet another surprising bite off the limits of the commerce power? If so, for such reinforcement to be effective the Court must take one of two actions. Either it must overturn much of the Commerce Clause principles adopted over the past fifty years, significantly limiting the power of the federal government. Or it must make it perfectly clear that application of the *Wickard* aggregate effects test—the greatest tool for expansion—is limited to solely commercial activities.

Without such reinforcement, the lower courts will continue to largely ignore the spirit of *Lopez* with impunity. And if reinforcement does not come soon, *Lopez* may very well go down in history as yet another fuss that was "much ado about nothing."