THE SIGNIFICANCE OF BORDER CROSSINGS: *LOPEZ, MORRISON* AND THE FATE OF CONGRESSIONAL POWER TO REGULATE GOODS, AND TRANSACTIONS CONNECTED WITH THEM, BASED ON PRIOR PASSAGE THROUGH INTERSTATE COMMERCE

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INTRODUCTION

From our Constitutional beginnings to the present day, it has been recognized that the federal government is one of limited, enumerated powers, while only the states possess general police powers.[1] This means that any federal statute must, in some reasonably convincing way, trace its authority to a grant of power listed in the Constitution.[2] Between 1937 and 1995, however, this limit was honored mainly in form.[3] During those years, one specific source of federal

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1. The Constitution lists, in great detail, powers of the federal legislature in Article 1, Section 8, suggesting that such powers are limited to those listed. U.S. CONST. art. I, § 8. Chief Justice Marshall, in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), stated that such a limitation was a premise of the Constitution:

> This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist.

Id. at 405; *see also* United States v. Lopez, 514 U.S. 549, 566 (1995) (stating that the authority of Congress "is limited to those powers enumerated in the Constitution . . ."); THE FEDERALIST No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) (stating that the powers of the federal government are "few and defined," those of the states "numerous and indefinite").

2. The requirement is no more than that it be *reasonably* implied from specific grants of power. In this respect *McCulloch* is the foundational case holding that the structure of the Constitution and its Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, demonstrate that Congress must have those subsidiary powers plainly adapted to exercising the powers that are listed. *McCulloch*, 17 U.S. (4 Wheat.) at 421.

3. For cases vastly expanding Congress's powers under the Commerce Clause during this era, see *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that Congress acted within its power under the Commerce Clause when it extended coverage of Title II to include restaurants serving food that had moved in interstate commerce); *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that Congress may regulate even trivial contributions to

legislative powers, the Interstate Commerce Clause (the Commerce Clause),[4] was read so broadly by the Supreme Court as to provide the near equivalent of general federal police powers.[5] In 1995, in *United States v. Lopez*,[6] the Supreme Court held unconstitutional the Gun-Free School Zones Act of 1990 (the Gun Law).[7] A five-justice majority of the Court, already active in protecting states' rights in other ways, thus began paring back Congress's powers to regulate the conduct of private parties under the Commerce Clause.[8] Five years later, in *United States v. Morrison*,[9] the Court invalidated provisions of the Vio-

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the wheat market if that contribution in combination with others has a nontrivial effect on commerce); *United States v. Darby*, 312 U.S. 100 (1941) (holding that the Interstate Commerce Clause authorizes Congress to exclude anything of its choosing from such commerce as long as no other constitutional limits are violated).

4. U.S. CONST. art. I, § 8, cl. 3. Under this provision, Congress has the power to regulate "commerce with foreign nations, and *among the several States*, and with the Indian tribes." The second, italicized portion is the Interstate Commerce Clause. The first and third portions are referred to as the Foreign and Indian Commerce Clauses respectively.

5. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-4, at 816 (3d ed. 2000). As Professor Tribe has summarized:

> The Court's application of its substantial effect and aggregation principles in the period between 1937 and 1995, combined with its deference to congressional findings, placed it in the increasingly untenable position of claiming the power to strike down invocations of the Commerce Clause, while at the same time applying a set of doctrines that made it virtually impossible actually to exercise this power. . . . While all of these precepts were operating at full tilt, striking down a congressional attempt to invoke the commerce power as outside the affirmative scope of that power was a *de facto* impossibility.

Id. (footnotes omitted); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 190 (1997) (stating that under the tests that the Court used between 1937 and 1995, "it is difficult to imagine anything that Congress could not regulate under the commerce clause so long as it was not violating another constitutional provision").

The case law supports these conclusions. From 1936 until *Lopez* in 1995, the Supreme Court struck down no law on the ground that it exceeded Congress's power under the Commerce Clause. *Id.* at 190, 194.

6. 514 U.S. 549 (1995).

7. *Id.* at 567-68; *see also* 18 U.S.C. § 922(q)(2)(A) (1990) (criminalizing possession of firearms near or on school property).

8. The majority opinion in *Lopez* was written by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy, and Thomas. *Lopez*, 514 U.S. at 550. Previously, in *New York v. United States*, 505 U.S. 144 (1992), those same five justices, joined by Justice Souter, had invalidated federal regulation of states that required states to either enact laws having content specified by Congress or to assume large monetary liabilities. *Id.* at 180. That decision was based primarily on a concern for states' rights. *See id.* The Court's renewed interest in protecting states' rights becomes clear when *New York* is compared with an earlier case, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556-57 (1985) (concluding that, with rare exceptions, the Court should not invalidate federal legislation, otherwise within congressional power, simply because states are the objects of regulation; and finding states' representation in the national political process usually a sufficient protection of their interests).

9. 529 U.S. 598 (2000).

lence Against Women Act[10] on the basis of similar reasoning.[11] In *Morrison*, the same five-justice majority reiterated and somewhat clarified *Lopez*.[12]

Part I, below, provides a brief survey of *Lopez* and *Morrison*. It explores how the majority opinion in *Morrison* reaffirms and clarifies *Lopez*, while leaving some of the latter's ambiguities untouched.

Part II, below, is the focus of this Article. It explores a variety of Commerce Clause regulation for which *Lopez* and *Morrison* have strong implications, but which they addressed only indirectly. That variety is federal regulation of goods, and of transactions involving them, solely on the ground that the goods once crossed states lines. While *Lopez* and *Morrison* contain holdings as to the power of Congress to regulate activities based solely on their effects on interstate commerce,[13] in dicta both recognize that regulation may be authorized under the Commerce Clause on grounds other than effect.[14] Many earlier Supreme Court cases recognize such alternative grounds.[15] Below, I argue that the recent Supreme Court cases ultimately are incompatible with broad congressional power to regulate events solely on the grounds of interstate border crossings preceding those events. Some recognition of this incompatibility is already appearing in decisions of lower federal courts.[16]

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10. 42 U.S.C. § 13981 (1994) (creating a federal civil action for victims of federal and state violent crimes motivated by the victim's gender).

11. *Morrison*, 529 U.S. at 602, 613.

12. *Id.* at 609-13. "Since *Lopez* most recently canvassed and clarified our case law governing this third category of Commerce Clause regulation, it provides the proper framework for conducting the required analysis of § 13981." *Id.* at 609. *Morrison* somewhat clarified *Lopez* by making clear that certain noneconomic activities are almost certainly beyond Congress's regulatory authority under the Commerce Clause even if Congress presents comprehensive and cogent findings that the matters regulated substantially affect interstate commerce. *See infra* notes 35-39 and accompanying text (discussing *Morrison*).

13. *Morrison*, 529 U.S. at 613-15 (invalidating provisions of the Violence Against Women Act as beyond Congress's power over interstate commerce); *Lopez*, 514 U.S. at 567 (holding that Congress's powers to regulate interstate commerce do not extend to noneconomic activities that do not substantially affect commerce).

14. *Morrison*, 529 U.S. at 608-09; *Lopez*, 514 U.S. at 559.

15. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941) (holding that the Commerce Clause authorizes Congress to exclude anything of its choosing from such commerce without respect to any level of effect on interstate commerce and as long as no other constitutional limits are violated).

16. As this Article went to press, a Federal District Court narrowly construed a federal law regulating the interstate shipment, possession, and use of firearms by felons not to apply to cases in which the sole connection with interstate commerce was prior interstate shipment. United States v. Coward, 151 F. Supp. 2d 544, 554 (E.D. Pa. 2001). It so construed the law in order to avoid what it saw as the serious likelihood that a law supported solely by such a connection would exceed Congress's powers under the Commerce Clause.

Below, I argue that, ultimately, the appropriate ground for regulation of an activity under the Commerce Clause must be its effect on interstate commerce; although, it is possible that congressional prohibition of specified interstate border crossings, without regard to effect, is also legitimate. What is not permissible, although it finds some support in the case law, is the use of a past, nonprohibited border crossing to justify future regulation of the materials that crossed along with transactions involving those materials. Some United States Court of Appeals cases, and arguably some United States Supreme Court cases, have allowed federal criminalization of possession of a firearm by a felon on the ground that the weapon previously moved between states.[17] If federal law follows materials transported across state lines, like bubble gum stuck to a shoe, then there is little in modern American life that Congress cannot regulate, including events having no future effect on interstate commerce. Such regulation simply is not intelligible as a regulation of interstate commerce.

I. THE *MORRISON* AND *LOPEZ* CASES

In *Lopez*, the Supreme Court, for the first time in nearly sixty years, found that a federal statute regulating private activity exceeded Congress's powers under the Commerce Clause.[18] The provision of the Gun Law that the Court struck down in 1995 prohibited the possession of a firearm on the premises or within one thousand feet of any school.[19] Five years later in *Morrison*, the Court invalidated the Violence Against Women Act,[20] which provided federal civil remedies against those who commit crimes of violence (whether defined by federal or by state criminal law) when those crimes were motivated, at least in part, by the gender of the victim.[21] The United States defended the constitutionality of each of these statutes using a justification for regulation under the Commerce Clause that the Court had

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Id. For a fuller discussion of *Coward* and the similarities and differences between that court's analysis and the position taken in this Article, see *infra* note 157.

17. *See, e.g.*, United States v. Sorrentino, 72 F.3d 294, 296-97 (2d Cir. 1995) (finding that a weapon's previous border crossing is enough to justify federal regulation of its possession under the Commerce Clause); *see also infra* note 86 (describing post-*Sorrentino* cases taking the same position).

18. *Lopez*, 514 U.S. at 567-68 (holding that certain provisions of the Gun Law exceeded Congress's power under the Commerce Clause).

19. 18 U.S.C. § 922(q)(1)(A) (1990).

20. United States v. Morrison, 529 U.S. 598, 602 (2000).

21. 42 U.S.C. § 13981 (1994).

previously recognized.[22] More particularly, the argument was that each was a regulation of activities that affected interstate commerce sufficiently to warrant federal legislation.[23] The Violence Against Women Act, but not the Gun Law, was accompanied by voluminous congressional findings supporting a conclusion that violence against women substantially affected interstate commerce.[24]

In the process of holding the Gun Law unconstitutional, the *Lopez* majority narrowed the scope of Congress's powers to regulate activities based on their effect on interstate commerce—one of several ways regulation can be justified under the Commerce Clause.[25] Most clearly, it rejected the possibility, arguably suggested by some previous Supreme Court opinions, that an activity which affects commerce can be regulated as a result of that effect alone, even though the effect is less than substantial.[26] *Lopez* clarified requirements for regulation under the effects test by leaving no doubt that a regulated set of activities must, in the aggregate, substantially affect interstate commerce in order to justify federal regulation under that test.[27] In this respect, the majority opinion in *Morrison* can be read only as a continuing endorsement of *Lopez*.[28]

In other ways, however, the *Lopez* majority unsettled Commerce Clause jurisprudence under the effects test by apparently deciding that there exists a class of "noneconomic" (also referred to as "noncommercial") activities whose regulation under the effects test either: (1) cannot be justified at all or (2) requires greater justification than that required for activities which the Court would classify as economic or commercial.[29] Does *Lopez* reject regulation of noneconomic activi-

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22. *Morrison*, 529 U.S. at 609; *Lopez*, 514 U.S. at 563; *see also* Brief for the United States at *9-17, United States v. Lopez, 514 U.S. 549 (1995) (No. 93-1260), *available at* 1993 U.S. Briefs 1260 (LEXIS).

23. *Morrison*, 529 U.S. at 609; *Lopez*, 514 U.S. at 563; *see also* Brief for the United States at *9-10, *Lopez* (No. 93-1260).

24. *Morrison*, 529 U.S. at 614 ("In contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 *is* supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families."); *see also Lopez*, 514 U.S. at 562-63 (indicating the lack of congressional findings).

25. *Lopez*, 514 U.S. at 565-66.

26. *Id.* at 559 ("Within this final category, admittedly, our case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause.").

27. *Id.* ("We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce.").

28. *Morrison*, 529 U.S. at 608-09 (endorsing the *Lopez* framework).

29. *Lopez*, 514 U.S. at 561-62.

ties altogether or does it merely require greater proof of their effect on commerce?

Some statements in *Lopez* suggest that the defects in the Gun Law might have been cured by Congressional findings persuasively demonstrating the substantial aggregate effect on interstate commerce of the many individual instances of gun possession near schools.[30] On this view, the significance of the economic versus noneconomic distinction is presumptive, not conclusive. If some activity seems noneconomic on the surface (or as *Lopez* says, "to the naked eye"), then the burden is on the federal government to establish a substantial effect on interstate commerce by very persuasive evidence: "But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was *visible to the naked eye*, they are lacking here."[31]

Other passages from the *Lopez* opinion suggest that some activities, including the activity regulated by the Gun Law, are categorically noneconomic, and thus no set of Congressional findings could validate their regulation under the Commerce Clause's substantial effects test:

> The possession of a gun in a local school zone is *in no sense an economic activity that might*, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.[32]

Read literally, this is not an evidentiary proposition that a case has not been made, but rather a substantive one that a case could not be made based on effects, no matter how strong the evidence. On this view, the substantial effects of noneconomic activity on interstate com-

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30. *Id.* at 562. In the words of the Court:

> Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce, the Government concedes that "[n]either the statute nor its legislative history contain express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce.

Id. (internal citations omitted).

31. *Id.* at 563 (emphasis added).

32. *Id.* at 567 (emphasis added).

merce can never justify federal regulation. In its apparently categorical exclusion of certain activities from Commerce Clause regulation, the *Lopez* Court takes a position resembling one taken by the pre-New Deal Court and strongly repudiated by subsequent Supreme Courts.[33]

The majority opinion in *Morrison* does not quite resolve whether protection for noneconomic activities from regulation under the effects test is absolute, but it comes close to doing so.[34] At a minimum, the opinion suggests that the burden on a supporter of such regulation will be large:

> Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While *we need not adopt a categorical rule* against aggregating the effects of any noneconomic activity *in order to decide these cases*, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.[35]

Perhaps announcement of a categorical rule is just postponed for another day, but, according to the *Morrison* majority, everything the Court has done so far is consistent with such a rule.[36] In other passages, the Court acknowledges that congressional findings, of the sort missing from *Lopez*, were amply present to support the Violence Against Women Act.[37] But it turns out that while the absence of findings was fatal in *Lopez*, their presence is not constitutionally sufficient to validate regulation of noneconomic activities.[38] In short, even persuasive findings did not validate the Violence Against Women Act and would not have saved the Gun Law. The Court takes this position, not

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33. This was the position that certain productive activities, such as mining and manufacturing, are per se local and cannot be federally regulated no matter the magnitude of their effects on interstate commerce. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895). As the Court explained:

> Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it.

Id. While *Lopez* would allow much of the regulation forbidden in *Knight*, its own apparent categorical exclusion from regulation under the Commerce Clause is for noneconomic activities. *Lopez*, 514 U.S. at 567.

34. United States v. Morrison, 529 U.S. 598, 613 (2000).

35. *Id.* (emphasis added).

36. *Id.*

37. *Id.* at 614.

38. *Id.* ("[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.").

because of its view that Congress was wrong about such effects, but rather because such effects have no constitutional significance.[39] Why? Because allowing such effects to determine Congress's power would unbalance constitutional federalism, as the majority sees it, by leaving nothing significant outside of federal legislative power:

> [T]he concern . . . expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. The reasoning that petitioners advance seeks to follow the but-for causal chain . . . to every attenuated effect upon interstate commerce . . . . [Their] reasoning would allow Congress to regulate any crime as long as [its] nationwide, aggregated impact . . . has substantial effects on employment, production, transit, or consumption.
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> [Their] reasoning . . . will not limit Congress to regulating violence but may . . . be applied equally . . . to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.[40]

Certainly this partial passage might be read both as rejecting only the method (of summing a set of "attenuated" effects) employed by Congress, and as consistent with the Court's claim that it has not yet resolved whether noneconomic activity is categorically beyond regulation under the effects test. The remainder of the passage, however, strongly suggests a looming categorical rejection of regulation of noneconomic activity under the effects test: "We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce."[41] There can be little doubt of the current majority's belief in a categorical rule.[42]

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39. *See id.* (stating that the decision as to whether Congress may constitutionally regulate an activity under the Commerce Clause is a judicial question, not a legislative one).

40. *Id.* at 615-16 (internal citation omitted).

41. *Id.* at 617.

42. *See id.* at 608-09, 617 (describing the three categories of conduct that Congress may regulate under the Commerce Clause and upholding the Violence Against Women Act under the third category—affecting interstate commerce).

II. REGULATING GOODS AND TRANSACTIONS INVOLVING THEM ON GROUNDS THAT THEY ONCE CROSSED STATE LINES

A. Commerce Clause Regulatory Justifications Other than the Substantial Effects Test

Both *Lopez* and *Morrison* recognize that the effect of activities on interstate commerce is not the only justification for regulation under the Commerce Clause:

> [W]e have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce.[43]

While some statements in these cases suggest that regulation of channels and instrumentalities of interstate commerce and persons and things *in* such commerce are dependent on an effects test, it seems more probable that the Court currently sees these three justifications as mutually independent.[44]

Beyond this, the Court, before *Lopez*, had recognized a justification for regulation that may or may not fit comfortably within the three mentioned in the *Lopez-Morrison* description of Commerce Clause powers. This is regulation of goods and of transactions connected with them *after* the goods have crossed an interstate border *solely* on grounds that they once crossed. Some post-*Lopez* United States Court of Appeals cases, and arguably some pre-*Lopez* United States Supreme Court cases, have allowed federal criminalization of possession of a firearm by a felon on the ground that it previously moved between states.[45]

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43. United States v. Lopez, 514 U.S. 549, 558-59 (1995) (internal citations omitted); *see Morrison*, 529 U.S. at 608-09 (quoting, with approval, large portions of this passage from *Lopez*).

44. This view is consistent with the Court's use of the word "categories" to describe the justifications for congressional regulation under the Commerce Clause. *See Morrison*, 529 U.S. at 608; *Lopez*, 514 U.S. at 558.

45. *See, e.g.*, Scarborough v. United States, 431 U.S. 563, 566-67 (1977); United States v. Sorrentino, 72 F.3d 294, 296-97 (2d Cir. 1995).

Remotely this sort of regulation fits within the first justification recognized by *Lopez* and *Morrison*—regulation of "the channels of interstate commerce."[46] However, only with great liberality can such regulation be viewed as regulation *of* commerce, regulation to protect *it*, or even regulation of *its channels*. Immediately below, I examine the origins of the justification for regulation of activities connected with a border crossing solely on grounds of the previous crossing. Later, I offer criticism.

B. History of Border Crossing Justifications for Regulation

The Court's cases defining Congress's powers over interstate commerce recognize justifications for regulation that, I believe, can be most usefully sorted into two main categories. The first are regulations based on Congress's power to control and facilitate reasonably identifiable border crossings.[47] The second are regulations based on the regulated activity's effect on interstate commerce.[48] These categories are obviously not entirely distinct. Anything that affects commerce ultimately affects future border crossings; although, as we will see, the converse is not always true: regulation of something based on the fact that it once crossed a border is no guarantee of any particular future effect on such commerce.[49]

These imperfectly distinct types of regulation developed precisely because the Supreme Court, during the period from the late nineteenth century to 1935, wished to allow states some enclaves of sover-

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46. *Morrison*, 529 U.S. at 609; *Lopez*, 514 U.S. at 558. The argument would be that such regulation is a regulation of the channels of interstate commerce, the first regulatory technique recognized by *Lopez*. 514 U.S. at 558-59. The more specific argument for this only remotely plausible way of harmonizing *Lopez* with recognition of the validity of regulating based on a past border crossing would be that, in such regulation, Congress chooses to allow things to pass through the channels of interstate commerce on condition that they are regulated by federal law after they cross. I reject this justification below. *See infra* notes 136-151 and accompanying text.

47. *See Scarborough*, 431 U.S. at 566-67 (upholding a federal law criminalizing a felon's possession of a firearm that had previously crossed state lines arguably based on the firearm's prior movement in interstate commerce); Katzenbach v. McClung, 379 U.S. 294, 304-05 (1964) (upholding a federal law prohibiting racial discrimination by restaurants arguably based on the fact that the food they served had previously crossed state lines).

48. *See Morrison*, 529 U.S. at 613 (invalidating provisions of the Violence Against Women Act as beyond Congress's power over interstate commerce); Wickard v. Filburn, 317 U.S. 111, 125 (1942) (upholding congressional regulation of wheat production because of the effect such production has on interstate commerce); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41-43 (1937) (upholding Congress's power to regulate labor relations in industries where work stoppages would have a serious effect on interstate commerce).

49. *See infra* notes 109-110 and accompanying text.

eignty in which they alone could regulate private conduct.[50] Thus, despite some earlier cases to the contrary, the Court, during this period, concluded that the effect of certain activities on interstate commerce alone, no matter how substantial, would not by itself warrant federal regulation of activities that were characterized as per se local.[51] These insulated activities included basic productive activities such as mining, farming, and manufacture.[52] The most dramatic example of the ensuing impotence in the face of national economic problems was the Court's conclusion that the activities of the sugar trust could not be regulated despite its control of over ninety percent of the United States sugar production[53] and thus its powerful effect on interstate commerce.[54]

What did suffice to justify regulation at the time was that the matter regulated pertained more directly (or perhaps more identifiably) to a state border crossing.[55] The creation of such power was, after all, a main impetus for and object of the efforts to create a constitution supplanting the ineffective Articles of Confederation.[56]

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50. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 11 (1895) (discussing the difference between the states' general police power and Congress's power to regulate interstate commerce).

51. *Id.* at 17 (holding that an attempt to monopolize had only an indirect effect on commerce and thus was not subject to regulation by Congress). The *Knight* majority quoted from an earlier case:

> If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry . . . . A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine.

Id. at 14-15 (quoting Kidd v. Pearson, 128 U.S. 1, 21-22 (1888)).

52. *Id.* at 14.

53. *See id.* at 9 ("By the purchase of the stock of the four Philadelphia refineries, with shares of its own stock, the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States.").

54. *Id.* at 17.

55. *See infra* notes 57-59 and accompanying text. Because borders were infinitely thin and articles of commerce generally are "on" borders for a very short time, it is inconceivable that Congress's commerce power was intended to apply only to events occurring on borders.

56. Justice Rutledge's extra-judicial writings provide an especially clear statement of the centrality of the Commerce Clause, and the concerns prompting it, to the framing of the Constitution:

> If any liberties may be held more basic than others, they are the great and indispensable democratic freedoms secured by the First Amendment. But it was

As a result, what was intelligible as a regulation of commerce was limited. First, it was possible for Congress to prohibit specified things from crossing state lines and to punish those responsible for prohibited movement.[57] Second, it was possible to facilitate border crossings by protecting the regular channels (the most concrete examples of which were railroad tracks) and instrumentalities (the most concrete example of which were railroad cars) of interstate commerce.[58]

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not to assure them that the Constitution was framed and adopted. Only later were they added, by popular demand. It was rather to secure freedom of trade, to break down the barriers to its free flow, that the Annapolis Convention was called, only to adjourn with a view to Philadelphia. Thus the generating source of the Constitution lay in the rising volume of restraints upon commerce which the Confederation could not check. These were the proximate cause of our national existence down to today.

As evils are wont to do, they dictated the character and scope of their own remedy. This lay specifically in the commerce clause. No prohibition of trade barriers as among the states could have been effective of its own force or by trade agreements. It had become apparent that such treaties were too difficult to negotiate and the process of securing them was too complex for this method to give the needed relief. Power adequate to make and enforce the prohibition was required. Hence, the necessity for creating an entirely new scheme of government. . . .

. . . So by a stroke as bold as it proved successful, they founded a nation, although they had set out only to find a way to reduce trade restrictions. So also they solved the particular problem causative of their historic action, by introducing the commerce clause in the new structure of power.

WILEY RUTLEDGE, A DECLARATION OF LEGAL FAITH 25-26 (1947) (footnote omitted).

57. For a broad statement from early last century describing this prohibition technique, see *Hoke v. United States*, 227 U.S. 308, 323 (1913) (upholding, as within Congress's powers over interstate commerce, a prohibition on the transportation of women between states for "immoral purposes"). In *Hoke* the Court stated:

> The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation "among the several States"; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations. We have no hesitation, therefore, in pronouncing the act . . . a legal exercise of the power of Congress.

Id. (internal citation omitted); *see also* Hipolite Egg Co. v. United States, 220 U.S. 45, 57-58 (1911) (upholding, as within Congress's powers over interstate commerce, a prohibition of specified mislabeled foodstuffs); Champion v. Ames, 188 U.S. 321, 363 (1903) (upholding, as within Congress's powers over interstate commerce, a prohibition on the transportation of lottery tickets between states).

In some cases before 1936, however, the Court took a narrower view of Congress's powers. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (holding unconstitutional an act of Congress prohibiting the transportation of goods made by children under a certain age or who worked more than a specified number of hours per week).

58. *See* S. Ry. Co. v. United States, 222 U.S. 20, 27 (1911) (permitting congressional regulation, under the Commerce Clause, of intrastate rail car coupling devices to lessen accidents that threatened interstate use of the same track); *cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 417 (1819) (inferring from the explicitly granted power of Congress

Third, less concrete analogs to these became recognized: some businesses, such as stock yards that regularly moved material in interstate commerce, were described as part of currents of commerce.[59] Thus, they resembled railroad tracks, cars, and stations that, while predominately located off state border lines, were regularly instrumental in achieving border crossings.

These possibilities turned into accepted rationales as they developed into what the Court has termed the "current of commerce" and "prohibition" rationales for federal regulation. In its strongest form, as embraced by Justice Holmes and apparently later by a majority of the Court, the prohibition technique recognizes congressional power under the Commerce Clause to stop the movement of anything across a border, unless the prohibition violates some specific right, such as those rooted in "equal protection" or the First Amendment.[60] On this

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"to establish post-offices and post-roads," U.S. CONST. art. I, § 8, cl. 7, the power to punish those who "rob" the mails).

59. Swift & Co. v. United States, 195 U.S. 375, 398-99 (1905). In a famous passage Justice Holmes explained:

> When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce.

Id.

60. United States v. Darby, 312 U.S. 100, 115 (1941). In *Darby*, the Court explained:

> The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.

Id. at 114 (internal citation omitted) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824)).

Holmes's earlier espousal of this position came in a dissent. In his dissent in *Hammer v. Dagenhart*, Justice Holmes wrote:

> The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given the power to regulate such commerce in unqualified terms. . . . Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid.

247 U.S. at 277-78 (Holmes, J., dissenting).

view, Congress could stop the movement of almost any thing or any class of things if it had some thin rational basis for doing so.[61]

Once Franklin Roosevelt had appointed a sufficient number of Justices who rejected a narrow view of Congress's powers, it once again became possible for Congress to regulate an activity based on its significant effects on interstate commerce.[62] After the New Deal, that technique proved so extraordinarily potent that it seemed to provide police power to the federal government without practical limits.[63] Still, the other techniques of commerce regulation involving border crossings, and particularly the technique of prohibition of movement, persisted and grew alongside an invigorated effects test. In *United States v. Darby*, the Court seemed to return to the view of earlier Courts that Congress possesses plenary power to prohibit the movement of goods across state lines:

> Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.
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> Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of

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61. Since approximately 1938, *see* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938), the Supreme Court has generally conducted probing judicial review (including strict and intermediate scrutiny) only in cases involving governmental interference with some fundamental right, such as freedom of speech, or involving a governmental classification based on fully or partially suspect classifications such as race or gender. *See* CHEMERINSKY, *supra* note 5, at 414-17 (discussing the levels of scrutiny courts apply in evaluating constitutional claims). In all other cases, at least officially, the Court has applied a rational basis test that almost never results in the invalidation of governmental action. *See id.* at 415 (discussing the rational basis test, and observing that "only rarely has the Supreme Court invalidated laws as failing rational basis review").

62. *See* Wickard v. Filburn, 317 U.S. 111, 128-29 (1942) (upholding, as within Congress's interstate commerce powers, an act regulating small amounts of crop production for consumption on a small farm on the theory that it, along with similar production on other farms in the aggregate, had a substantial effect on interstate commerce). By the time *Wickard* was decided, President Roosevelt had succeeded in changing the composition of the Supreme Court so that a strong majority of the Justices recognized federal regulatory powers that were more expansive than the Court was willing to recognize less than a decade before. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 183-85 (13th ed. 1997); *see also id.* at 185 n.10 (describing President Roosevelt's seven appointments to the Court from 1937 to 1941).

63. *See supra* note 5 and accompanying text (discussing the Court's tendency to uphold federal regulations under the Commerce Clause).

> destination; and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.[64]

While in at least some doubt as to its scope after *Lopez* and *Morrison*, Congress's power to prohibit the movement of things in interstate commerce is historically interesting because it reflects a particular view of what (at least at a minimum) a regulation of commerce *is*. It is a view that seems to go back to the John Marshall Court. In an early opinion, Chief Justice Marshall suggested that if something were a regulation of interstate commerce it was per se valid or at least unreviewable by the Court.[65] In asking what is the power to regulate commerce, he concluded:

> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power . . . is complete in itself . . . and acknowledges no limitations, other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce . . . among the several States, is vested in Congress as absolutely as it would be in a single government . . . . *The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess . . . are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse.* They are the restraints on which the people must often rely solely, in all representative governments.[66]

On the surface it may seem strange that Marshall wrote the above passages, abjuring judicial review of regulation of commerce, while at the same time concluding that the Court did have a role in assuring the constitutionality of any federal regulation that attempted to base itself on the Commerce Clause:[67]

> Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the gov-

64. *Darby*, 312 U.S. at 114 (internal citations omitted).
65. *See Gibbons*, 22 U.S. (9 Wheat.) at 196-97.
66. *Id.* (emphasis added).
67. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

> ernment; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.[68]

The most plausible way of harmonizing these apparently discordant passages is to conclude that Marshall believed that only some questions were appropriate for the Court. It is most likely he believed that the Court had the "painful duty" to determine only whether the activity a particular statute regulated *was interstate commerce* but should not decide whether any particular regulation of commerce was within regulatory powers as contemplated by the Commerce Clause.[69] In short, if the activity regulated was commerce, then the regulation was per se valid under the Commerce Clause, or at least unreviewable, unless it offended one of the very few individual rights then guaranteed under the Constitution.[70] This was true whether the regulation imposed certain requirements on or completely prohibited such commerce. This is a natural reading of "the sovereignty of Congress, though limited to specified objects, is plenary as to those objects . . . ."[71]

I believe that it is this view—coupled with the view that if anything is commerce an interstate border crossing certainly is—which led Justice Holmes, and then later the entire Court, to endorse the broadest view of Congress's powers to prohibit the movement of things in interstate commerce:

> Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.[72]

This broad view thus seems based on one historical position as to what interstate commerce *is*. Or perhaps it is a position on what such regulation is *at a minimum*, leaving room for other kinds of regulation based on "effect" and thus indirectly on border crossings. The view

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68. *Id.*

69. *See Gibbons*, 22 U.S. (9 Wheat.) at 196-97.

70. *See id.*

71. *Id.* at 197.

72. United States v. Darby, 312 U.S. 100, 114 (1941); *see also* Hammer v. Dagenhart, 247 U.S. 251, 277-78 (1918) (Holmes, J., dissenting) ("Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid.").

that control of border crossings is part of the commerce power is easily harmonized with *Lopez*'s language recognizing power to regulate the channels of interstate commerce, arguably without a separate showing that the activity regulated substantially affects interstate commerce.[73]

The holdings of *Lopez* and *Morrison* somewhat limited Congress's power to regulate activities based on their effect on interstate commerce, which is just one of several justifications that the Court recognizes for regulation under the Commerce Clause.[74] However, the spirit of those cases seems to sweep more broadly, possibly presaging limits on other techniques that have been used to justify regulation under the Commerce Clause. For example, the vision of *Lopez* and *Morrison* might lead to a narrowing of Congress's powers to prohibit movement in interstate commerce or to regulate goods and transactions involving them, based on the prior movement of the goods in interstate commerce. The prohibition technique is not the most problematical, for it is generally an unwieldy way of evading the spirit of *Lopez*'s new attempt to protect states from federal regulation of noneconomic activity or economic activity not substantially affecting interstate commerce. Prohibition-style regulation comes at the price of stopping the movement of certain goods, a price that Congress often will be unwilling to pay.

However, a second, quite different regulatory technique, also based on border crossings, does raise substantial possibilities for evasion of *Lopez*. It also does not fit as comfortably within the meaning of "regulation of interstate commerce" as do congressional powers to prohibit movement across borders. This is the technique of regulating transactions based on their connections with goods that have previously moved in interstate commerce. For example, in *Katzenbach v. McClung*,[75] the Court allowed Congress to regulate provisions of service by a restaurant arguably based solely on the restaurant's use of food that had previously crossed a border.[76] It is inconceivable that Congress would prohibit the movement of food across state lines. Allowing federal regulatory power to sweep into states along with the movement of goods offers, at its broadest, a breathtaking increase in the power of the federal government that seems incompatible not

73. United States v. Lopez, 514 U.S. 549, 558 (1995) (stating "Congress may regulate the use of the channels of interstate commerce").

74. *See* United States v. Morrison, 529 U.S. 598, 613 (2000); *Lopez*, 514 U.S. at 567.

75. 379 U.S. 294 (1964).

76. *Id.* at 304.

only with the *Lopez-Morrison* view of federalism[77] but also with any reasonable view. More formalistically, such regulatory power seems outside the ordinary language bounds of the words "regulation of commerce." Consequently, immediately below I focus on the probable fate, after the recent Supreme Court cases, of the technique arguably in play in *McClung*.

C. *Regulation of the Future Life of Goods on the Grounds That They Once Crossed a Border*

1. Cases and Arguments in Support of Broad Congressional Power: Scarborough v. United States *and* United States v. Sorrentino*: Their Support for the Broad Reading of Congress's Powers to Use the Border-Crossing Technique.*—There are Supreme Court cases suggesting that the movement of goods across a state border justifies substantial federal regulation of the future circumstances and use of such goods, even without a showing that the goods continue to affect interstate commerce.

In *Scarborough v. United States*,[78] the Court considered the validity, under the Commerce Clause, of a federal law[79] that made it a crime for a felon to possess a firearm that had once moved in interstate commerce.[80] On the surface, the majority in *Scarborough* found the federal law was supported by the commerce power solely on the basis of the jurisdictional element—the firearm's prior movement in interstate commerce.[81] The issue seems squarely framed and resolved in *Scarborough*, for it upheld the conviction of a defendant who possessed firearms that had previously crossed state lines after the Court had granted certiorari limited to the following question:

> Whether the Court erred in holding that a conviction under 18 U.S.C. App. § 1202(a) for possession of a firearm in commerce or affecting commerce by a convicted felon is sustainable merely *upon a showing that the possessed firearm has previously at any time however remote traveled in interstate commerce.*[82]

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77. *See supra* note 8 (describing the *Lopez-Morrison* majority's renewed interest in protecting states' rights).

78. 431 U.S. 563 (1977).

79. The Court examined Title VII of the Omnibus Crime Control and Safe Streets Act of 1968. 18 U.S.C. App. §§ 1201-1203 (1976) (repealed 1986).

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

81. *Id.* at 566-67 (upholding the Fourth Circuit Court of Appeals's decision that a firearm's prior movement in interstate commerce gave the necessary nexus to justify federal regulation).

82. *Id.* at 567 n.5 (emphasis added).

In *United States v. Sorrentino*,[83] a post-*Lopez* United States Court of Appeals case, the court read *Scarborough* that way, upholding a later version of the firearm possession law on the basis of a prior border crossing.[84] In doing so, *Sorrentino* distinguished *Lopez* as a case where lack of commerce was found because neither an affecting commerce rationale nor a jurisdictional element provided support:

> The statute before us avoids the constitutional deficiency identified in *Lopez* because it requires a legitimate nexus with interstate commerce . . . . In *Scarborough* . . . [the Supreme Court] *further concluded that 18 U.S.C. § 1202(a), the predecessor statute to Section 922(g), was a legitimate exercise of Congress's powers under the Commerce Clause because the Constitution requires only a "minimal nexus that the firearm have been, at some time, in interstate commerce."*[85]

Other circuits agree that a prior border crossing validates at least much, if not all, regulation under the Commerce Clause, both in the context of possession of weapons and in other contexts as well.[86] Both *Lopez* and *Morrison* offer some statements that could be seen as supporting the broad view of Congress's powers. Both cases distinguished the statutes that they invalidated from statutes containing jurisdictional elements:

> Like the . . . Act at issue in *Lopez*, § 13981 [the Violence Against Women Act] contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce. Although *Lopez* makes clear that such a jurisdictional element would

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83. 72 F.3d 294 (2d Cir. 1995).

84. *Id.* at 296.

85. *Id.* at 267 (emphasis added) (quoting *Scarborough*, 431 U.S. at 575).

86. United States v. Rawls, 85 F.3d 240, 242 (5th Cir. 1996):

> Today we join all other circuits that have considered the issue post *Lopez* and hold that neither the holding in *Lopez* nor the reasons given therefor [sic] constitutionally invalidate § 922(g)(1).
>
> . . . .
>
> . . . The "in or affecting commerce" element can be satisfied if the firearm possessed by a convicted felon had previously traveled in interstate commerce.

Id. The following cases from other circuits follow or precede *Scarborough* (2d Cir.) and *Rawls* (5th Cir.) in upholding, as a valid exercise of Congress's commerce power, 18 U.S.C. § 922(g)(1)'s prohibition of possession of a firearm by a convicted felon: United States v. Chesney, 86 F.3d 564, 572 (6th Cir. 1996); United States v. Gateward, 84 F.3d 670, 672 (3d Cir. 1996); United States v. Bradford, 78 F.3d 1216, 1223 (7th Cir. 1996); United States v. Bates, 77 F.3d 1101, 1104 (8th Cir. 1996); United States v. McAllister, 77 F.3d 387, 390 (11th Cir. 1996); United States v. Hinton, No. 95-5095, 1995 U.S. App. LEXIS 30755, at *5 (4th Cir. Oct. 25, 1995); United States v. Bolton, 68 F.3d 396, 400 (10th Cir. 1995); United States v. Collins, 61 F.3d 1379, 1383-84 (9th Cir. 1995).

> lend support to the argument that § 13981 is sufficiently tied to interstate commerce, Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime.[87]

One other Supreme Court case seems to go even further in permitting regulation of activities under the Commerce Clause based solely on the connection of those activities with an earlier border crossing. In *Katzenbach v. McClung*,[88] the Court found that the Commerce Clause supported portions of the Civil Rights Act of 1964 prohibiting racial discrimination by certain restaurants.[89] The way the Court framed the issue in *McClung* suggests that the use by those restaurants of substantial amounts of food that had moved in interstate commerce was sufficient justification for that regulation: "The sole question, therefore, narrows down to whether Title II, as applied to a restaurant annually receiving about $70,000 worth of food which has moved in commerce, is a valid exercise of the power of Congress."[90]

Despite the Court's reasoning in *Scarborough* and *McClung*, there are substantial arguments against congressional power to regulate what would otherwise be interstate activities based solely on their connection with some earlier crossing of a state line. These begin with a recognition that *Scarborough* and *McClung* may not be what they seem.

2. The Case Against Regulation of Activities Based Solely on Their Connections with Past Border Crossings.—While *Lopez* and *Morrison* note the lack of jurisdictional elements,[91] the Court is never clear about what these elements are and to what extent the elements might justify regulation of an activity despite its lack of a substantial effect on interstate commerce. Perhaps the statements made by the Court in *Morrison* and *Lopez* were simply acknowledgments that the significance of such elements was not then before the Court.

Supporting the case against continuing federal power based on past border crossings alone are: (1) tensions between such justifica-

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87. United States v. Morrison, 529 U.S. 598, 613 (2000); *see also* United States v. Lopez, 514 U.S. 549, 561-62 (1995).

88. 379 U.S. 294 (1964).

89. *Id.* at 304 (stating that Congress "had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce").

90. *Id.* at 298.

91. *Morrison*, 529 U.S. at 613 (stating that the challenged law "contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress's power to regulate interstate commerce"); *Lopez*, 514 U.S. at 561 (stating that the challenged law "contains no jurisdictional element which would ensure" that the activity in question "affects interstate commerce").

tions and the view of federalism driving *Lopez* and *Morrison*, and (2) the difficulty of finding any connection between such a technique and an intelligible purpose of the Commerce Clause. Before examining such difficulties, it is worthwhile to determine how much support the post-crossing technique truly has in precedent. On closer examination, *Scarborough* and *McClung* are much more equivocal than they at first seem.

a. The Equivocal Nature of Scarborough *and* McClung.—The Court's statements in *Scarborough* indicating that the prior passage of a weapon across a state border offers a sufficient ground for a federal law criminalizing its possession by a felon[92] are perhaps ultimately dependent on what was then the prevailing view of the affecting commerce technique. The *Scarborough* majority noted that Congress was not concerned with the movement of weapons across borders, but, more generally, with the possession of weapons by felons—a state of affairs that Congress believed affected interstate commerce negatively.[93]

The majority opinion in *Scarborough* seems unconcerned with Congress's ability to reach post-crossing possession of weapons by felons. Instead, the opinion seems premised on Congress's constitutional power to regulate all possession of weapons by felons under the broad affecting commerce view that then prevailed.[94] While never saying so expressly, the whole opinion seems to limit the crime to weapons that have crossed state lines, not because the Constitution so requires, but because Congress itself imposed such a limit in an attempt to avoid what were, most likely at the time, imaginary constitutional difficulties:

> In this case, the history is unambiguous and the text consistent with it. Congress sought to reach possessions broadly, with little concern for when the nexus with commerce occurred. *Indeed, it was a close question in [a previous case] whether*

92. Scarborough v. United States, 431 U.S. 563, 566-67 (1977) (affirming the Fourth Circuit's finding that a border crossing was sufficient to satisfy the "nexus requirement" of interstate commerce).

93. *Id.* at 572. As the Court explained:

> The legislative history in its entirety, while brief, further supports the view that Congress sought to rule broadly—to keep guns out of the hands of those who have demonstrated that "they may not be trusted to possess a firearm without becoming a threat to society." There is simply no indication of any concern with either the movement of the gun or the possessor or with the time of acquisition.

Id. (quoting 114 CONG. REC. 14773 (1968)).

94. *See id.* at 571-72 (discussing Congress's reliance on the affecting commerce rationale in passing Title VII of the Omnibus Crime Control and Safe Streets Act of 1968).

> *§ 1202(a) even required proof of any nexus at all in individual cases. The only reason we concluded it did was because it was not "plainly and unmistakably" clear that it did not.* But there is no question that Congress intended no more than a minimal nexus requirement.[95]

Presumably, had there been constitutional doubts about Congress's ability to reach all possession by felons, regardless of a "nexus," that would have been a second reason for construing the statute as requiring a "nexus." Nowhere in *Scarborough*, however, does the Court even hint that serious constitutional difficulties would have presented themselves had Congress eliminated all nexus requirements and relied solely on effect.

This probable premise of the Court—that the greater (a federal power to forbid all firearm possession by felons) includes the lesser (the power to do so when the gun has crossed state lines)—worked well in 1977. At that time the greater power was not in doubt. The Court was willing to rubber stamp almost any congressional conclusion that a set of activities had a sufficient effect on interstate commerce to justify federal regulation.[96] Specific findings were not then necessary to support even very attenuated claims that regulated activities had sufficient effects on interstate commerce.[97] It is very clear after *Lopez* and *Morrison* that the implicit premise of the *Scarborough* Court is no longer true.[98] Today, under *Lopez*, federal regulation of

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95. *Id.* at 577 (emphasis added) (internal citation omitted).

96. *See* 1 TRIBE, *supra* note 5, at 816 (describing the Court's deference to Congress in Commerce Clause cases between 1937 and 1995).

97. *Id.* Professor Tribe describes the Court's deference to Congress between 1937 and 1995 as follows:

> Where Congress had provided findings linking the challenged regulation of an activity to its power to regulate interstate commerce, the Court would defer to these findings unless they had no "rational basis"; if no findings accompanied the legislation, the Court demonstrated that it would nevertheless uphold the regulation if it could on its own imagine the articulation of some rational basis for locating the legislative act within the commerce power or for describing the legislative act as a necessary and proper means of effectuating that power, and such a rational basis would exist whenever the requisite effect on interstate commerce could be thought to result from the aggregation of all instances of an activity, or of all activities falling into a still broader class of actions. While all of these precepts were operating at full tilt, striking down a congressional attempt to invoke the commerce power as outside the affirmative scope of that power was a *de facto* impossibility.

Id.

98. *See id.* at 819 ("*Lopez*'s discussion of the 'substantial effects' test reveals that, rather than focusing on the quantity of the regulated activity's effects, the Court was attempting to reconfigure its precedents to focus more attention on the *nature of the underlying activity* . . . .").

all gun possession without reference to some border crossing would certainly not be permitted.[99] From the perspective of the *Lopez* majority, Congress does not regulate an economic activity when it regulates gun possession (as opposed to gun sales). At the time of *Scarborough*, however, it is likely that the availability of the affecting commerce technique powerfully influenced the conclusion of constitutionality, while the border crossing added only apparent depth to the reasoning.

The second case offering surface support for an independent justification based on past crossings, *Katzenbach v. McClung*,[100] turns out to be similar to *Scarborough* when viewed under the microscope. Admittedly, the Court briefly discussed features of the statute it upheld, which prohibited racial discrimination in restaurants that served food that had previously crossed borders.[101] However, the Court's analysis focused entirely on the *effect* of racial discrimination on interstate commerce, not the fact that the food had crossed a border:

> We noted in *Heart of Atlanta Motel* that a number of witnesses attested to the fact that racial discrimination was not merely a state or regional problem but was one of nationwide scope. Against this background, we must conclude that while the focus of the legislation was on the individual restaurant's relation to interstate commerce, Congress appropriately considered the importance of that connection with the knowledge that *the discrimination was but "representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce."*[102]

This language ultimately rests Commerce Clause justification on the harm to commerce from discrimination—an effects justification. While the Court occasionally weaves the nexus requirement into its

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99. United States v. Lopez, 514 U.S. 549, 567 (1995). In *Lopez* the Court stated:

> The possession of a gun in a local school zone is *in no sense an economic activity that might*, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

Id. (emphasis added). Of course if a statute regulating gun possession in school zones exceeds Congress's commerce powers, then a fortiori, one which extended to the entire United States would as well.

100. 379 U.S. 294 (1964).

101. *Id.* at 298-99.

102. *Id.* at 301 (emphasis added) (quoting Polish Nat'l Alliance v. NLRB, 322 U.S. 643, 648 (1944)).

discussion,[103] a fair reading of the opinion is that it rests primarily on effects.[104]

The statute at issue in *McClung* itself, viewed as based upon effects on commerce, would probably survive *Lopez* and *Morrison*. The sale of food is commercial, so a liberal effects test would apply.[105] However, any endorsement *McClung* gives to future regulation of both commercial and noncommercial activities grounded solely on a past border

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103. *See id.* at 304 ("The only remaining question . . . is whether the particular restaurant either serves or offers to serve interstate travelers or serves food a substantial portion of which has moved in interstate commerce.").

104. In passages set forth below the Court describes and evaluates the legislative history of the Civil Rights Act:

> [T]here was an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes. This resulted, it was said, because discriminatory practices prevent Negroes from buying prepared food served on the premises while on a trip, except in isolated and unkempt restaurants and under most unsatisfactory and often unpleasant conditions. This obviously discourages travel and obstructs interstate commerce for one can hardly travel without eating. Likewise, it was said, that discrimination deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be reluctant to establish there.
>
> We believe that this testimony afforded ample basis for the conclusion that established restaurants in such areas sold less interstate goods because of the discrimination, that interstate travel was obstructed directly by it, that business in general suffered and that many new businesses refrained from establishing there as a result of it. Hence the District Court was in error in concluding that there was no connection between discrimination and the movement of interstate commerce. The court's conclusion that such a connection is outside "common experience" flies in the face of stubborn fact.

Id. at 300 (internal citation omitted). The passage quoted above explores the effect of discrimination generally on interstate commerce. It does not explore any connection between the prior movement of goods and the effect on interstate commerce, but rather the effect of discrimination on commerce in the future. Put another way it explores the tendency of discrimination to deter desired border crossings. Indeed it does not mention any negative effect of the prior crossings themselves. In fact, it does not deal with such crossings at all. The passage continues, for the first time alluding to the crossing element of the statute:

> It goes without saying that, viewed in isolation, the volume of food purchased by Ollie's Barbecue from sources supplied from out of state was insignificant when compared with the total foodstuffs moving in commerce. But, as our late Brother Jackson said for the Court in *Wickard v. Filburn*: "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."

Id. at 300-01 (internal citations omitted) (quoting Wickard v. Filburn, 317 U.S. 111, 127-28 (1942)). But the discussion of the prior movement seems tied to an effects test by the quotation from *Wickard*, a case where the Court shifted its focus to the effects on commerce of the regulated activity. *See supra* note 48 and accompanying text.

105. *McClung*, 379 U.S. at 303-04 (stating that only a rational basis is needed to justify regulation of commerce).

crossing seems more apparent than real; for the real rationale seems ultimately dependent on a broad view of federal power to regulate actions affecting commerce that existed before the decisions in *Lopez* and *Morrison*.[106]

The basis on which *Scarborough* and *McClung* most likely permitted regulation of weapons that crossed borders and of restaurants that used materials that had crossed—the effects test—is now a significantly limited justification. Despite some confusing language, both seem to have really decided that the effects test would so clearly permit the regulation at issue that any lesser and included regulation was not suspect. Today, when there seems to be a significant set of activities (i.e., noneconomic activities) that cannot be regulated under the effects test, it is necessary to carefully rethink and attempt to justify post-crossing regulation based solely on the prior crossing.

b. Arguments Against Federal Regulation of Activities Based Solely on Their Connections with Past Border Crossings.—Read carefully, *Lopez* itself contains passages that suggest a dependence of the post-crossing technique on the substantially-affecting technique. Put another way, some passages in *Lopez* suggest that jurisdictional elements may not be independently sufficient justifications, separate and apart from the affecting commerce justification. In striking down the Gun-Free School Zones Act, the Court said: "[the statute] contains no jurisdictional element *which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.*"[107] Similar statements appear in *Morrison*.[108] Based on these statements, do we conclude that a jurisdictional element—particularly prior movement in interstate commerce—is just a proxy for affecting commerce? Or is it an alternative and independent method of justifying a law under Congress's commerce powers? And if it is the latter, does that make analytic sense?

While the passage just quoted suggests that the crossing technique is dependent on effect, that reading is filled with analytic

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106. *See supra* notes 96-97 and accompanying text (describing the broad view of federal power to regulate actions affecting commerce).

107. United States v. Lopez, 514 U.S. 549, 561 (1995) (emphasis added).

108. United States v. Morrison, 529 U.S. 598, 613 (2000). As the Court stated:

> Like the Gun-Free School Zones Act at issue in *Lopez*, § 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce. Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that § 13981 is sufficiently tied to interstate commerce, Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime.

Id.

problems. For example, once something crosses a border, there is no guarantee, or even an increased probability, that it will continue to affect interstate commerce. Ultimately it seems likely that the Court will have to acknowledge this problem. In turn, that will force it to determine if regulating activities based solely on their connection with prior border crossings serves any purposes that can plausibly be attributed to the Commerce Clause. That, in turn, forces the question of what, if any, federal police powers can be so attributed.

First, it should be clear that a past crossing of a state line has no necessary correlation with a future effect on interstate commerce.[109] Imagine a pistol shipped into Texas finding its way to a small town at the center of the state. Many years later it is possessed by a felon who, let us say, does some isolated physical and psychic damage with it. Perhaps there is a slight effect on commerce by every act of violence (or of violence with firearms) which, when summed with other similar instances, is substantial enough to meet the effects test however adjusted by *Lopez*. This seems remote because bare possession will almost certainly be classified as a noncommercial activity, which is likely to be per se excluded from Congress's commerce powers.[110] Assuming the unlikely—that the effects test is met—the border crossing adds nothing of any significance. The Court's post-*Lopez* effects test has been met: the pistol could have been regulated even if it had been made in Texas, by Texans from Texas materials and had never left and reentered the state.

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109. As this Article was prepared for press, a single Federal District Court reached similar conclusions as to some of the arguments about the compatibility of *Lopez* with a broad border crossing justification for regulating interstate commerce. United States v. Coward, 151 F. Supp. 2d 544, 554 (E.D. Pa. 2001). For the differences and similarities of my analysis with *Coward*, see *infra* note 157 and accompanying text. I suppose that in light of *Lopez*'s facts it should not be surprising that the one federal court opinion to consider these issues should employ a similar gun-based hypothetical:

> Thus, a felon who has always kept his father's World War II trophy Luger in his bedroom has the weapon "in" commerce. The question now is whether this legal fiction can survive as a statutory construct in the shadow of the edifice the Supreme Court has built upon *Lopez*'s foundation.

Coward, 151 F. Supp. 2d at 549.

110. This seems to be the whole basis of the Court's summary rejection of Commerce Clause justifications offered by the government in *Lopez*:

> The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

Lopez, 514 U.S. at 567.

Suppose instead, as is more likely, that none of the above is true. Perhaps, there is no effect on interstate commerce. Perhaps there is a small effect, which when summed together with other similar transactions, still fails to meet the *Lopez* substantiality test.[111] More likely, the matter regulated is deemed noncommercial and the Court follows its leanings, expressed particularly in *Morrison*, by holding that noncommercial status flatly precludes federal regulation.[112] In other words, let us assume that the effect of the thing on interstate commerce is not sufficient to justify regulation without regard to its history of border crossing. How does the fact that the pistol once crossed a border sufficiently create or amplify an effect? Generally, it does not do this at all. Consequently, to understand and appraise the appeal of border crossings as a justification for regulating goods, one must identify a regulatory goal fairly attributable to the Commerce Clause that makes sense independent of the substantial effects test.

Some have read the cases that deal with the scope of Congress's Commerce Clause power to prohibit the interstate transit of goods as indicating that Congress has the power to do so to prevent "pollution" of interstate commerce.[113] The majority in *Champion v. Ames* uses these words.[114] *Hammer v. Dagenhart* might be read this way.[115] For the reasons stated below, however, I do not believe that either case intended the full implications of this characterization.

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111. *See id.* at 558-59 (concluding that Congress's authority under the Commerce Clause includes the power to regulate those activities having a substantial effect on interstate commerce).

112. *See supra* notes 25-42 and accompanying text (discussing the near certainty that *Lopez* and *Morrison* together wholly exclude a class of noneconomic activities from the possibility of justifiable federal regulation).

113. Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (finding unconstitutional a federal statute that prohibited shipment of certain goods made by child labor through interstate commerce); Champion v. Ames, 188 U.S. 321, 327 (1903) (upholding a federal statute prohibiting the passage of certain lottery tickets through interstate commerce).

114. The *Champion* majority stated:

> If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be *polluted* by the carrying of lottery tickets from one State to another?

Champion, 188 U.S. at 356 (emphasis added).

115. Taking advantage of the statements in *Champion*, while arguing in favor of child labor laws in *Hammer*, the United States Solicitor General stated:

> The act also protects the health of children in the producing State. The Fifth Amendment imposes no obstacle to the denial by Congress of facilities of interstate transit for the prevention of injury to children in the shipping State. Congress can outlaw such goods to prevent *pollution* of the interstate stream.

Hammer, 247 U.S. at 257 (emphasis added).

The *Hammer* majority stressed that all of the things prohibited from interstate commerce under previously upheld laws were inherently harmful, such as lottery tickets, adulterated food, and people intended to engage in immoral sexual activity.[116] Thus they distinguished the child labor law at issue, which in their view prohibited not an inherently dangerous or corrupting thing, but rather a thing whose prohibition was based on its production history.[117]

Surely the *Hammer* majority recognized the following problem. If interstate commerce were a place, a lake or a mountain range, prohibiting "pollution" of interstate commerce would have a natural meaning. But interstate commerce is not a place. Certainly it is not the sum of the infinitely thin spaces over state boundary lines. As a result, I do not believe that the Court viewed congressional authority as the authority to prevent the pollution *of* commerce. Rather, I believe the Court viewed congressional authority as the authority to prevent pollution *by* commerce:

> In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the *use of the facilities of interstate commerce to effect the evil intended.*[118]

Surely they intended their formula to go beyond harm to instrumentalities and channels of interstate commerce or to people and things using them. Examples of these would be bombs in trains or train stations, or using pollution more metaphorically, gambling in either a train or a train station.

Most of the harm contemplated by the *Hammer* majority as within Congress's reach occurs after the goods come to rest in a state.[119] The notion seems to be that Congress has a valid regulatory role in stopping interstate commerce from polluting *the states*, not just literally a role in prohibiting pollution of interstate commerce itself. But does regulation of this sort simply mean that Congress can regulate anything that threatens a federally defined "good," implying the existence

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116. *Id.* at 270-71. The Court discussed three cases to support this proposition: *Champion*, 188 U.S. 321; Hipolite Egg Co. v. United States, 220 U.S. 45 (1911) (sustaining Congressional regulation of impure foods and drugs); Hoke v. United States, 227 U.S. 308 (1913) (upholding federal regulation of the transportation of women for the purpose of prostitution).

117. *Hammer*, 247 U.S. at 271-72.

118. *Id.* at 271 (emphasis added).

119. *See id.* at 271-74 (noting that the production of articles destined for interstate commerce is in itself innocuous).

of a federal police power? Or does it mean regulation of things that states have independently determined to be negative?

The latter view presents many difficulties and it has never been the Court's view that Congress's Commerce Clause powers (as opposed to the farthest reaches of the Spending Clause powers) depend on state consent.[120] The former view of independent congressional power to define police protections for states from harmful commerce would provide an intelligible, as opposed to formalistic, rationale for the position taken in the prohibition cases. This is seen in Supreme Court cases, particularly *United States v. Darby*, holding that Congress has the power under the Commerce Clause to stop anything from crossing a state border.[121]

This idea might also find support in an argument that Congress can condition its allowing anything to cross a border on its retaining at least substantial regulatory power over the item and transactions involving it after it crosses. Arguably this is demonstrated in weapons possession cases, such as *Scarborough*, and in *McClung*; although, above I have shown that a narrower reading of these cases is plausible.[122]

Put another way, the view under discussion is that Congress's regulatory power includes power to insure that interstate commerce not become a delivery system for harm, *however Congress defines harm*, anywhere in the United States. Given this view of what it is to regulate commerce, the chronological problem perhaps disappears, or at least changes. The focus is not solely on what happens *after* a border crossing, but also on the fact that a border crossing enabled it to happen. In other words, when Congress views items as generally harmful, it can stop them from crossing borders.[123] When it views items as innocent in a wide variety of, but not all, circumstances, it can allow them to

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120. *See* United States v. Darby, 312 U.S. 100, 114 (1941) (noting that Congress's power over interstate commerce "can neither be enlarged nor diminished by the exercise or non-exercise of state power"). State consent, however, is crucial to the operation of many of Congress's powers under the Spending Clause. There are many state regulatory and enforcement outcomes beyond Congress's power to compel, but within its power to achieve by purchasing compliance from willing states. *See* South Dakota v. Dole, 483 U.S. 203, 206-07, 210-13 (1987) (allowing Congress to condition a federal highway funds grant to the states on a state's passage of a minimum drinking age without regard to whether Congress itself could have passed such a law under the Commerce Clause).

121. *Darby*, 312 U.S. at 114.

122. *See supra* notes 93-106 and accompanying text (discussing possible readings of *Scarborough* and *McClung*).

123. *See* Hipolite Egg Co. v. United States, 220 U.S. 45, 57-58 (1911) (prohibiting mislabeled food from crossing state borders); Champion v. Ames, 188 U.S. 321, 363 (1903) (prohibiting lottery tickets from crossing state borders).

cross borders while forbidding future harmful use.[124] This view of Congress's regulatory powers, while disputable and troubling, makes sense of cases such as *United States v. Sorrentino*.[125] However, it is in tension with language in *Lopez*[126] and in great tension with the *Lopez* majority's object of creating meaningful and exclusive regulatory space for states.[127]

There are two ways of attacking such regulation. The first and more difficult one would be to successfully attack earlier cases apparently holding that Congress's Commerce Clause powers give it complete power to stop anything from crossing a state border as long as the prohibition does not offend some specific provision of the Constitution, such as the equal protection component of the Fifth Amendment[128] or the First Amendment.[129] On this view, a prohibition itself

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124. *See* Scarborough v. United States, 431 U.S. 563, 566-67 (1977) (upholding congressional power to regulate gun possession under the Commerce Clause arguably on the basis that the gun previously traveled in interstate commerce); Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (prohibiting racial discrimination by restaurants that served food that had previously crossed state borders).

125. 72 F.3d 294 (2d Cir. 1995) (upholding a gun possession law as a legitimate exercise of congressional power when the law requires that the gun have traveled in interstate commerce).

126. It is not clear that regulation of goods after they have crossed state lines is within *Lopez*'s description of Congress's interstate commerce power:

> [W]e have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the thread may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.

United States v. Lopez, 514 U.S. 549, 558-59 (1995) (internal citations omitted).

127. In *Morrison*, the Court explained:

> [T]he concern . . . expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. The reasoning that petitioners advance seeks to follow the but-for causal chain . . . to every attenuated effect upon interstate commerce. [Their] reasoning would allow Congress to regulate any crime as long as [its] nationwide, aggregated impact . . . has substantial effects on employment, production, transit, or consumption. . . .
>
> [Their] reasoning . . . will not limit Congress to regulating violence but may . . . be applied equally . . . to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.

United States v. Morrison, 529 U.S. 598, 615-16 (2000) (internal citation omitted).

128. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954). In *Bolling*, the Court found in the Fifth Amendment's Due Process Clause a requirement similar to that of the Equal Protection Clause of the Fourteenth Amendment. *Id.* As a consequence, wholly irrational distinctions between what can and cannot cross borders would be unconstitutional:

would have to be a reasonable way of furthering Commerce Clause values in order to be valid.[130] If this revisionist view were accepted, Congress would not have complete freedom to condition its allowance of *any* border crossing on its continuing to have power in the future to regulate that which crossed. Put another way, Congress cannot charge a price—maintaining a post-crossing regulatory power—to forgo a prohibition that it had no power to impose in the first place.

These are interesting and difficult arguments. They are interesting because they would require some theory about the permissible ends of regulation under the Commerce Clause that could be used to sustain a regulation that is a rational means to those ends. Could one plausibly argue that the only such end is to promote the flow of trade between states? On this view, Congress could prohibit shipment across state lines only if the transportation of the goods or the goods themselves pose a threat *to interstate commerce* by virtue of shipment or after shipment. Or is another permissible end of regulation under the Commerce Clause protecting the states from local harms that the states themselves are disabled from fully regulating as a result of limitations on state regulation of interstate commerce—limitations such as the restrictions of the "dormant Commerce Clause,"[131] Privileges and Immunities Clause,[132] and the Equal Protection Clause?[133] This view is particularly interesting because, under it, the Commerce Clause would be about more than regulating commerce and would include a federal police power aimed at making up for state disabilities under federalism. Under this view, federal power to prohibit transportation of certain goods may permit Congress to exercise police power for states that are disabled from stopping their entry.

There are great difficulties with such a direct attack on plenary congressional power to halt commerce of any sort at state borders.

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602, 637 (1993) (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)).

129. *See* Kingsley Int'l Pictures v. Regents, 360 U.S. 684, 688-90 (1959) (finding that a law regulating motion pictures, directly or indirectly based on their content, would be unconstitutional under the First Amendment).

130. *See supra* note 128.

131. The Supreme Court has interpreted the Commerce Clause as imposing an implicit restraint on state power, even when Congress has not acted. 1 TRIBE, *supra* note 5, at 1030.

132. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

133. *Id.* amend. XIV, § 1.

First, a number of cases oppose such an attack. *Darby* seems a clear holding that such congressional power exists.[134] It follows Justice Holmes's generally praised opinion in *Hammer*, which, in turn, is very likely based on Justice John Marshall's views.[135] Beyond this, there are great problems in sensibly working out the limits of a federal police power to occupy areas of state impotence under federalism.

These controversial arguments are for another article.[136] It is not necessary to attack the plenary view of Congress's powers to prohibit interstate transportation in order to argue against the validity of many laws which permit such transportation on the condition that Congress regulate the aftermath of the border crossing, as was arguably done in *McClung* and *Sorrentino*.[137] In many cases, such regulation is the product of an unconstitutional condition or something very much like it. The doctrine of unconstitutional conditions holds that a government that is free to grant benefits is not always free to grant them in exchange for a waiver of a constitutional right.[138] One can waive one's

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134. United States v. Darby, 312 U.S. 100, 115 (1941) (upholding congressional regulations of commerce, no matter what the motive or purpose, that do not infringe upon a constitutional prohibition).

135. *See id.* at 115-16 (citing Justice Holmes's dissent in *Hammer*).

136. In spite of arguments that the Constitutional Convention rejected such an approach, one author indorses it:

> The kernel of my positive suggestion is so obvious that I would be embarrassed to offer it, if it did not seem necessary that someone should: when we are trying to decide whether some federal law or program can be justified under the commerce power, we should ask ourselves the question, "Is there some reason the federal government must be able to do this, some reason why we cannot leave the matter to the states?" Federal power exists where and only where there is special justification for it . . . .

Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 555 (1995).

The argument to the contrary is that the Constitutional Convention ultimately rejected substitute language that would have covered the same area as the Commerce Clause and probably much more:

> That the National Legislature ought to possess the Legislative Rights vested in Congress by the Confederation; and moreover, to legislate in all cases for the general interests of the union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.

Id. at 555-56 (quoting JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 380 (W.W. Norton & Co. ed., 1966)). Regan believes that rejection of this language is not inconsistent with reading its spirit into the existing Commerce Clause. *Id.* at 556. Of course the opposite conclusion easily could be drawn.

137. *See supra* notes 83-90 and accompanying text (discussing *McClung* and *Sorrentino*).

138. Kathleen M. Sullivan, *Unconstitutional Conditions,* 102 HARV. L. REV. 1415, 1415 (1989). As Professor Sullivan explains:

> The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the

right to a trial in exchange for a relatively light sentence, but not one's right to general freedom of political speech in exchange for a government grant.[139] The doctrine is not clear and mechanical, yet it is necessary to preserve balanced constitutional power.[140] The issue is whether the condition is a reasonable way for the government to exercise the power granted or is, instead, a way of using one granted power as a lever for expanding other powers not fairly contemplated by the Constitution. Plea bargains—conditioning a lighter sentence than might be obtained after trial on a waiver of constitutional rights to assert innocence—are constitutional.[141] This is presumably because they are necessary for the criminal process to work and are not seen as unduly coercive.[142] Using governmental wealth to buy citizens' silence on political matters is unconstitutional.[143] It allows the taxing power[144] to prop up a government that perpetuates itself through elimination of criticism.

> triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt.

Id. In border crossing cases, the benefit would be congressional permission for things to cross the border. Stated better, it would be Congress's refraining from exercising the congressional power, recognized since *Darby*, to prohibit the passage of anything across state lines unless the prohibition violates some separate provision of the Constitution, such as the First Amendment (for prohibiting the shipping of ordinary books and newspapers) or the equal protection component of the Fifth Amendment (absolutely senseless congressional distinctions concerning what can and cannot cross). The benefit withheld would be granted only for a waiver of what would otherwise be restrictions on regulation under the Commerce Clause; specifically the restriction on regulating something not otherwise falling into the categories of permissible regulation such as regulation of those things that substantially affect interstate commerce.

139. *See id.* at 1423 (noting that the government cannot condition a constitutional guarantee on a government benefit).

140. *See id.* at 1419 ("[The unconstitutional conditions doctrine] identifies a characteristic technique by which government appears not to, but in fact does burden . . . liberties, triggering a demand for especially strong justification by the statute.").

141. *See* Mabry v. Johnson, 467 U.S. 504, 507 (1984) (stating that plea bargains do not deprive one of constitutional rights).

142. *See* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.1 (1999).

143. As Professor Sullivan has stated:

> The view that government must treat speakers evenhandedly underlies the Court's consistent statements in unconstitutional conditions challenges that benefit conditions predicated on viewpoint discrimination are void: government may not "'"ai[m] at the suppression of dangerous ideas"'" by buying them out any more than by punishing them.

Sullivan, *supra* note 138, at 1496 (quoting Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983) (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959) (quoting Speiser v. Randall, 357 U.S. 513, 519 (1958)))).

144. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have the Power to lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general welfare of the United States . . . .").

Even if Congress has the power to prohibit anything from crossing a state line (subject to the Bill of Rights and Fourteenth Amendment), its purporting to forego the exercise of that power in exchange for powers to regulate related post-crossing transactions raises questions akin to those posed under the unconstitutional conditions doctrine. There are differences. Here there is no deal to scrutinize for coercion. States are not asked to consent to federal assumption of regulatory powers over transactions in exchange for Congress's restraint in not prohibiting interstate traffic leading up to such transactions. But, if anything, this difference counsels more skepticism than under the doctrine as it usually applies. And the similarities are striking. In both cases more is at stake than the interests of those consenting. Even if the speaker finds it a fair deal to bargain his speech away for federal money, we do not want to live in a world in which the federal government has the power to stop people from speaking to us. States do not want to live in a world in which a power to stop goods from crossing state borders, although unexercised and often politically unexercisable, can be transmuted into one to regulate transactions that do not continue to have a substantial effect on interstate commerce.

One important feature of constitutional law worth observing is how doctrine uses natural features of the world and legal rules together to limit governmental power. Even if Congress can stop virtually everything from crossing state lines, in the real world this power is subject to great practical and political limitations. The latter limitations could easily be evaded if bluffing the use of such power can be used as a lever to extend the scope of Congress's regulatory powers. It is not likely that the gun at issue in *Sorrentino* would be denied entry into interstate commerce. It is nearly unimaginable that the food at issue in *McClung* would have been excluded. Congress would have to have performed the impossible task of predicting which guns would be possessed by felons and which food would be used by racially discriminatory establishments and then ban only those guns and that food. The only possible choice was politically impractical: banning all interstate transportation of guns or food. To base Congress's power to regulate in *Sorrentino* or *McClung* on a power to stop transportation that clearly would not have been exercised is to so expand that power as to transmute it into a qualitatively different power.

The notion of limited federal government as expressed in *Lopez* and *Morrison*[145] is inconsistent with a prohibition technique that can

145. *See supra* notes 39-40 and accompanying text.

be so freely transmuted into a much more potent power than prohibition-style regulation itself. Had the law struck down in *Lopez* prohibited the possession, within one thousand feet of a school, of any weapon all or any part of which had moved in interstate commerce, the law would have been nearly coextensive with the one actually struck. But it would have had strong claims to constitutionality under both *Sorrentino* and a surface reading of the Supreme Court cases it cites dealing with border crossings.[146] Had the law rebutably, or conclusively, presumed that any weapon had so moved, it would have approached or achieved functional identity with the law struck down in *Lopez*, and yet would seem more likely than not to be constitutional under techniques approved by the Supreme Court starting in the late 1930s and not repudiated by *Lopez*.[147] Indeed, these techniques can be made to fit within the vague "channels and instrumentalities" regulation approved by *Lopez* as justifying regulation independently of any effect on commerce.[148] It is hard to imagine that the *Lopez-Morrison* majority would tolerate this.

The hypothetical discussed above looks tame in comparison with those that might be based on *Katzenburg v. McClung*.[149] That case, in some ways though not in others, seems to go farther than *Scarborough* and *Sorrentino*. It appears to allow regulation not simply of the use and immediate circumstances of the previously moved material but also of other aspects of activities of entities that have made use of the previously moved material. Some passages in *McClung* suggest that, under its commerce powers, Congress can penalize discrimination against customers of a restaurant based solely on the fact that a substantial amount of the goods it served moved in interstate commerce.[150] Pushed as far as it might go, *McClung* would allow Congress to impose police power regulation over any business, entity, or person,

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146. *See* United States v. Sorrentino, 72 F.3d 294, 296-97 (2d Cir. 1995) (stating that, unlike *Lopez*, the statute at issue in *Sorrentino* contained the element of previous travel in interstate commerce).

147. *See supra* Part II.A; *see also* Perez v. United States, 402 U.S. 146, 156-57 (1971) (allowing federal regulation of loan sharking because loan sharking, while predominantly an intrastate activity, is part of a class of activities that substantially affects interstate commerce).

148. United States v. Lopez, 514 U.S. 549, 558 (1995) (affirming that Congress has the power to regulate channels and instrumentalities of commerce).

149. 379 U.S. 294 (1964). For a discussion of *McClung*, see *supra* notes 88-90, 100-106 and accompanying text.

150. *See McClung*, 379 U.S. at 302 ("We think . . . that Congress acted well within its power to protect and foster commerce in extending the coverage of Title II only to those restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce.").

sustained to the requisite degree by interstate commerce. Intuitively it is obvious that the *Lopez-Morrison* majority would not allow federal power to reach so far. But if *McClung* is grounded on the border crossing justification,[151] then the Court must either abandon it or engage in a difficult process of line-drawing in order to be true to *Lopez*'s states' rights philosophy. Where will the Court draw the line on a continuum between a federal prohibition of discrimination at restaurants and a federal criminal code that applies to those who eat regularly at McDonalds?

The Court may reject the technique entirely, by claiming (as I suggest above) that *Scarborough* and *McClung* never clearly endorsed future regulation based solely on a past crossing[152] or by overruling them, if it reads them that broadly. More likely, the Court will retain the technique while limiting the circumstances in which such a crossing can be used to gain future regulatory control.

One possibility is adaptation of the economic/noneconomic distinction for use in limiting this technique as well as the affecting commerce technique. Perhaps the Court will allow a border crossing to support regulation of future economic activity bound up with it, but not regulation of future noneconomic activity.[153] Such a view would allow regulation of a commercial establishment on the basis of the border crossing in a case resembling *McClung*, but not of all crimes of violence committed with a weapon that once crossed state lines. That view might even more easily dispatch the extreme examples presented above. However, even as to them, more limitation might be necessary. It seems probable that none of the Justices would allow federal regulation of all aspects of economic life of persons simply because the people have crossed state lines or sustained themselves with articles of commerce. Perhaps the Court will resort to use of the unsatisfying direct and indirect distinction,[154] allowing regulation of all activities directly or substantially supported by a border crossing. Perhaps instead the Court will require each single statute based on border crossings to regulate distinct and homogeneous sorts of economic activity, although such limits would be avoidable by writing a series of statutes.

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151. *But see supra* notes 100-106 and accompanying text (discussing the strong arguments in favor of *McClung*'s grounding on the affecting commerce justification rather than one based on a border crossing).

152. *See supra* notes 92-106 and accompanying text.

153. *See supra* notes 19-42 and accompanying text (discussing *Lopez*'s and *Morrison*'s almost certain limitation of the affecting commerce justification to regulation of "economic activity").

154. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895) (authorizing congressional regulation of only those activities having a direct effect on commerce).

These all seem like mindless limits. The real question is why, given the Court's general views of federalism, do prior border crossings, which do not have aggregate substantial future effects on interstate commerce, warrant future regulation, even of noneconomic activities?

Symbolism of a balanced federalism might be an answer, but this is circular: identifying the correct balance is precisely the issue. Framers' intent might be another answer, but it does not seem adequate to make a case for post-crossing regulation. As discussed above, it is possible that the Constitution contemplated congressional power to control the passage of anything through interstate commerce.[155] This is one plausible meaning of regulation of interstate commerce, and, in practical terms, giving Congress broad powers to prohibit transit across borders poses a limited threat to federalism, even as the *Lopez-Morrison* majority defines it.

It is, however, a huge step from congressional power to stop the transit of specified things across state lines to power to control things and people who have previously crossed. To look at one of many influences on interpretation, it seems unlikely that the Framers would have been anything but appalled at a system that potentially federalizes all things, and the transactions that they touch, solely on such grounds.[156] If some form of balanced federalism survives today, it seems incompatible with a post-crossing technique.[157] The latter is legalism unconnected with rational policy.

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155. *See supra* notes 57-65 and accompanying text.

156. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 545-46 (1969) (describing the emerging view of federalism in the late 1700s as one where "both the state and federal legislatures were equally representative of the people at the same time").

157. As this Article went to press, a Federal District Court narrowly construed a federal law regulating the interstate shipment, possession, and use of firearms by felons not to apply to cases in which the sole connection with interstate commerce was prior interstate shipment. United States v. Coward, 151 F. Supp. 2d 544, 554 (E.D. Pa. 2001). It so construed the law in order to avoid what it saw as the serious likelihood that a law supported solely by such a connection would exceed Congress's powers under the Commerce Clause. *Id.* In doing so, the Court parted company with cases in other circuits that had found prior interstate shipment of a firearm a sufficient connection with interstate commerce to warrant a federal criminal prohibition of its possession by felons. *See, e.g.*, United States v. Sorrentino, 72 F.3d 294, 296 (2d Cir. 1995) (concluding that a border crossing is sufficient to justify regulation and citing cases in other circuits doing so as well). For other federal cases finding prior interstate passage a sufficient basis for regulation, see *supra* note 86.

The Constitution-based arguments for narrow construction in Coward are significantly different from the argument in this Article. First, the *Coward* court takes seriously suggestions in some opinions that passage through interstate commerce may guarantee a continuing effect on interstate commerce and correctly denounces any such view as an indefensible legal fiction. *Coward*, 151 F. Supp. at 554. While agreeing with that position,

CONCLUSION

The use of jurisdictional elements—particularly border crossings—as independent and sufficient grounds for regulation under the Commerce Clause can be seen in two ways. If not based on some theory of federal police power, allowing Congress to determine what are and are not acceptable results of border crossings causally far downstream, it has the quality of formalism or "gotcha" jurisprudence, connected to no policy that is in turn remotely related to a believable purpose of the Commerce Clause. But, if based on a far-reaching power to define ill effects and regulate any of those effects resulting from the use of commerce, the tension with *Lopez* and *Morrison's* philosophy of federalism is unbearable.

Scarborough, as understood in *Sorrentino,* is unsatisfying and, perhaps, dishonest. In an economically unified nation, the federal government must be able to regulate anything that affects interstate commerce, at least if it does so substantially. *Lopez,* with its new fuzzy enclaves for noncommercial activity, undermines that necessity. Presumably the Framers, in abandoning the Articles of Confederation, wanted federal regulation of national economic problems.[158] But, at the time, that result was compatible with at least presumptive enclaves for most productive activity because the economy was predominately local.[159] Additionally, they lived in a world in which it would have been unthinkable to analyze all aspects of life in terms resembling

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this Article goes on to recognize, discuss, and reject another argument that might be offered in favor of the border crossing justification. It is that Congress may have the power to condition passage across state lines on continued federal and regulatory power over that which passes. *See supra* notes 136-151 and accompanying text. Second, while I ultimately agree with the *Coward* court that prior shipment *by itself* is a constitutionally insufficient ground for regulation and that it is inconsistent with the spirit of the *Lopez* line of cases, I reach a different conclusion as to the scope of Congress's regulatory powers under the Commerce Clause based on an activity's effect on interstate commerce. The *Coward* court embraced *Lopez*'s new limits on regulation of activities based on their effect on interstate commerce. *Coward,* 151 F. Supp. 2d at 551-54. I disagree with this. I believe that *Lopez* is too restrictive and that the invalidity of the prior shipment as a ground for regulation is not dependent on accepting the Court's position in *Lopez.* I would allow the regulation of activities that seem on the surface to be noneconomic in *Lopez*'s sense, but which have a reasonably demonstrable substantial effect on interstate commerce. This argument is discussed in the conclusion to this Article.

158. *See* RUTLEDGE, *supra* note 56, at 25-26; *see also* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 313 (1993) ("Even at the outset of the Revolution some Americans glimpsed the significance of buying and selling among themselves, which in turn had contributed to the reform of the Articles of Confederation and the creation of a more unified country.").

159. *See* WOOD, *supra* note 158, at 311-12 (describing the economy in the early American republic as primarily local and agricultural). It is worth noting that even in the early 1800s the American economy was rapidly growing and becoming more unified. *See id.* at 312-16.

those of market economics. Today, influenced by reductionist economic theories, it is harder to avoid seeing (often while trying to suppress) an economic analysis of all aspects of life—even those involving friendship, family, and other relationships.[160]

I believe that, politically or psychologically, the jurisdictional element rationales survive, to the extent that they do, as the product of an uneasy truce, allowing some federal enclaves in the world rearranged by *Lopez* to protect the states in areas that are hard to define. By this compromise, the unsettling of federalism is ameliorated (and much federal power is retained) in cases where it should be, but only because the techniques have been used in a relatively restrained way and happen to overlap with regulation that should be, but no longer is, sustainable on an affecting commerce theory. Should the federal government be able to regulate fraud or kidnapping because of a single telephone call over what are inevitably interstate telephone lines? No. It should be able to regulate fraud because of the collective effect of fraud and kidnapping on the economy, and perhaps where state lines have been crossed after the crime.

It would be more honest, and in other ways better, to abandon talismanic border crossings as justifications for the future regulation of that which crosses and restore a more flexible view of Congress's power to regulate matters that, in the aggregate, affect commerce. One limited way would be for the Court to abandon what is apparently its current trajectory and take the position that noncommercial activities occupy no absolute enclaves, but simply require, for their regulation, that Congress make a stronger case demonstrating substantial effect on interstate commerce. Better still would be not to shift the burden at all, but to restore the Commerce Clause test as a

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160. This presents what some might see as the irony of the economic/noneconomic distinction drawn by conservative Justices in *Lopez* being somewhat undermined by a largely conservative economic movement. The more likely reading of *Lopez* is that there exists a category of noneconomic activity that is beyond Congress's regulatory powers under the Commerce Clause even if such activities substantially affect interstate commerce. *See supra* notes 29-42 and accompanying text. This is in tension with recent writings in economics and "law and economics" that tend to view all activities as economic in the sense that they are driven by market-like forces. As Professor James White has summarized:

> It is hard to exaggerate the magnitude of the claims that have been made for economics. . . . Gary Becker says that in his view "the economic approach provides a united framework for understanding behavior that has long been sought by and eluded Bentham, Comte, Marx, and others." Judge Easterbrook says that "economics is applied rationality." Or take this remark by George J. Stigler: "All of man's deliberative, forward-looking behavior follows the principles of economics."

James Boyd White, *Economics and Law: Two Cultures in Tension*, 54 TENN. L. REV. 161, 172 n.8 (1986) (internal citations omitted).

rational basis test, but perhaps one with real bite. Once one recognizes that the regulation of commerce is regulation of that which affects it, early Marshall Court opinions, and indeed by analogy opinions of the Rehnquist Court, suggest that the Court must greatly defer to Congress.

Where this is not true should be in those areas, if any, in which the independence of the states might suggest the importance of state diversity notwithstanding costs to the national economy. Perhaps education and marriage, concerns of the *Lopez* Court,[161] are such areas in which federal regulation under the Commerce Clause (as opposed to human rights regulation under Section 5 of the Fourteenth Amendment) ought to be backed by substantiality and necessity as opposed to a rational basis. This has the virtue of avoiding the contradiction of calling something noncommercial even though it substantially affects commerce. However, it would leave the Court with the very difficult task of justifying this view of federalism on grounds plausibly connected with either the Tenth Amendment or the original structure and understanding of the Constitution.

I am not one who believes that an attempt to hold a séance with the Framers is the first step in Constitutional interpretation; although, I do believe that we are lost and unmoored if constitutional law cannot be connected in some reasonable way with the text of the Constitution or with unstated assumptions that were part of the original understanding. Certainly the Framers never imagined that almost everything would be of legitimate federal regulatory concern, but then it is certain that they never imagined their Constitution functioning in a world like today's tightly connected economic world. Perhaps less so than texts requiring "due process," but to some significant extent, text granting Congress the power "to regulate commerce among the several states" is sufficiently flexible, linguistically, to adapt to our world. As for the intent of the Framers, for what it is worth, my guess is that today they would somewhat sadly live with the pre-*Lopez* effects test and perhaps even more easily with a *Lopez* that presumes against, but does not categorically exclude regulation of things that appear on the surface to be "noneconomic." But *Scarborough*, as explicated in *Sorrentino*, would have appalled them.

161. *See* United States v. Lopez, 514 U.S. 549, 564 (1995).