The Commerce Power and Criminal Punishment: Presumption of Constitutionality or Presumption of Innocence?

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The Constitution requires that the facts that expose an individual to criminal punishment be proved to a jury beyond a reasonable doubt. In recent years, the Supreme Court has taken pains to ensure that legislatures cannot evade the requirements of proof beyond a reasonable doubt and jury presentation through artful statutory drafting. Yet current Commerce Clause jurisprudence permits Congress to do just that. Congress can avoid application of the reasonable-doubt and jury-trial rules with respect to certain critical facts—the facts that establish the basis for federal action by linking the prohibited conduct to interstate commerce—by finding those facts itself rather than providing for case-by-case proof to a jury. As the Court's decision last Term in Gonzales v. Raich *illustrates, such findings-based statutes are subject to a presumption of constitutionality and will be sustained so long as the underlying legislative judgment was rational.*

The conflict between legislative findings and the constitutional requirements for criminal prosecutions is ignored in the vast literature on the commerce power, which focuses overwhelmingly on whether Congress can reach certain activities (and whether courts can or should impose meaningful limits on Congress's legislative authority) but pays scant attention to how Congress legislates. Commentators assume that since Congress's power to act on the basis of its own findings regarding the connection between the regulated conduct and interstate commerce is well established in the civil sphere, it must be equally clear in the criminal context. As this Article demonstrates, however, findings-based statutes generate unique costs in criminal prosecutions by depriving defendants of procedural protections designed to make it harder for the government to send an individual to jail than to regulate her conduct by civil means. The common justifications for leaving questions of commerce largely to Congress's discretion, moreover, ring hollow when considered in the context of criminal law. Given the considerable costs of findings-based criminal prohibitions and the absence of any countervailing benefits, I argue that legislative findings should not serve as the basis for criminal punishment. Instead, courts should require case-by-case proof of the facts that demonstrate the necessary connection between the defendant's conduct and interstate commerce.

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I. Introduction

In *Gonzales v. Raich*,[1] the Supreme Court held that Congress can use its power to regulate interstate commerce to prohibit intrastate possession of marijuana that is grown in-state and permitted for medical use under state law.[2] *Raich* is the latest of a series of cases in which the Court has grappled with its role in enforcing the bounds of Congress's enumerated powers, including the commerce power.[3] The cases are widely understood as cases about constitutional structure, about the relationships between the federal government and the states and between federal courts and Congress.[4]

This Article proposes a different way of thinking about cases like *Raich*, one that focuses less on questions of structure and more on questions of individual right. Like *United States v. Lopez*[5] before it, *Raich* involved a

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1. 125 S. Ct. 2195 (2005).

2. At issue in *Raich* was a provision of the Controlled Substances Act, 21 U.S.C. §§ 801–971 (2000), which prohibits, among other things, possession of marijuana. Angel Raich and Diane Monson, both California residents, challenged the Act as applied to their possession of marijuana for medical uses permitted under California's Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 1991 & Supp. 2006). *Raich*, 125 S. Ct. at 2199–200.

3. *See* Sabri v. United States, 541 U.S. 600 (2004) (holding that the federal bribery statute, 18 U.S.C. § 666(a)(2) (2000), is a valid exercise of Congress's power under the Spending Clause); Tennessee v. Lane, 541 U.S. 509 (2004) (holding that Title II of the Americans With Disabilities Act, 42 U.S.C. § 12132 (2000), is a valid exercise of Congress's power under Section Five of the Fourteenth Amendment as applied to cases implicating the right of access to the courts); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (holding that the Family and Medical Leave Act of 1993, 29 U.S.C. § 2612 (2000), is a valid Section Five enactment); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that Title I of the Americans With Disabilities Act, 42 U.S.C. § 12112 (2000), exceeds Congress's power under Section Five); United States v. Morrison, 529 U.S. 598 (2000) (striking down portions of the Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994), as outside Congress's power under the Commerce Clause and Section Five); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding that the Age Discrimination in Employment Act, 29 U.S.C. § 626 (1994), is not a valid exercise of Congress's power under Section Five); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savs. Bank, 527 U.S. 627 (1999) (holding that the Patent and Plant Variety Protection Remedy Clarification Act, 35 U.S.C. §§ 271, 296 (1994), is not a valid Section Five enactment); City of Boerne v. Flores, 521 U.S. 507 (1997) (concluding that the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb to bb-4 (1994), exceeded Congress's Section Five power); United States v. Lopez, 514 U.S. 549 (1995) (striking down the Gun Free School Zones Act, 18 U.S.C. § 922(q) (1994), as outside Congress's power under the Commerce Clause).

4. For post-*Lopez* discussions about judicial review on Commerce Clause issues, see, for example: William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001); Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752 (1995); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695 (1996); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002); Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of* United States v. Lopez, 46 CASE W. RES. L. REV. 757 (1996); Harold J. Krent, *Turning Congress Into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731 (1996); and Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674 (1995).

5. 514 U.S. 549 (striking down a statute that made it a federal crime to possess a firearm within a school zone).

criminal statute that prohibited certain conduct based on its presumed effects on interstate commerce. Elsewhere in the law, criminal prohibitions are treated differently from civil regulations; we recognize that criminal punishment is worse than civil sanction and that it therefore triggers distinct rights and duties.[6] Not so under the Commerce Clause. Focused as they are on federalism, cases and commentary about the commerce power tend to treat all federal laws alike, ignoring the differences between criminal and civil legislation. The result is that the protections normally governing criminal prosecutions have been subtly eroded in the context of the Commerce Clause. The absence of those protections is felt most immediately by individuals charged with a crime, but it also has important implications for the scope of federal power. Yet, as long as criminal Commerce Clause statutes are understood to present only questions of federalism and separation of powers, the problem is hidden from view.

At the heart of protections for criminal suspects is the presumption of innocence. The defendant is presumed not to have committed the offense charged unless and until the prosecution can prove his guilt to the jury beyond a reasonable doubt. Generally speaking, the requirements of presentation to the jury and proof beyond a reasonable doubt apply to every fact that is essential to the defendant's punishment.[7]

When legislating under the commerce power, however, Congress is able to avoid the reasonable-doubt and jury-trial requirements with a simple statutory drafting choice. Some criminal Commerce Clause statutes contain what is known as a "jurisdictional element"[8]—an element of the offense that

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6. That is not to say that every criminal punishment is always or obviously worse than every civil sanction. A very short period of imprisonment, for example, may in some circumstances be preferable to an enormous, bankruptcy-inducing fine, and the difference between a criminal and civil fine often is difficult to discern. The claim here is not that the existing line between civil and criminal is perfect but simply that it exists—that is, that there are some punishments that we as a legal system take special pains to ensure are not imposed erroneously. Under present law, all criminal punishments—and only criminal punishments—fall within that category. If in the future we treat some purportedly "civil" sanctions to the same protections, the arguments herein will apply to statutes that prescribe those sanctions as well. *See, e.g.*, Note, *Civil RICO Is a Misnomer: The Need for Criminal Procedural Protections in Actions Under 18 U.S.C. § 1964*, 100 HARV. L. REV. 1288, 1291–94 (1987) (arguing that the civil provisions of Title IX of the Organized Crime Control Act of 1970, 18 U.S.C. § 1964, are punitive in effect and purpose and therefore should be treated as if they were criminal in nature).

7. *See* United States v. Booker, 543 U.S. 220, 231 (2005) (reviewing recent precedent requiring that every essential element of a defendant's punishment must be found by a jury beyond a reasonable doubt). In federal prosecutions, the reasonable-doubt and jury-trial requirements are supplemented by the requirement that offense elements must be charged in the indictment and presented to a grand jury. *See* United States v. Cotton, 535 U.S. 625, 627 (2002).

8. The term "jurisdictional element" is something of a misnomer. As several courts have recognized, "the nexus with interstate commerce . . . is 'jurisdictional' only in the shorthand sense that without that nexus, there can be no federal crime. . . . It is not jurisdictional in the sense that it affects a court's subject matter jurisdiction." United States v. Martin, 147 F.3d 529, 531–32 (7th Cir. 1998); *accord* United States v. Ratigan, 351 F.3d 957, 963 (9th Cir. 2003); United States v. Prentiss, 256 F.3d 971, 982 (10th Cir. 2001) (en banc); United States v. Johnson, 194 F.3d 657, 659 (5th Cir. 1999), *vacated on other grounds*, 530 U.S. 1201 (2000); United States v. Rea, 169 F.3d

establishes the basis for federal power by demonstrating a connection between the defendant's conduct and interstate commerce. The Hobbs Act, for example, prohibits robbery and extortion that "affects commerce."[9] In prosecutions under the Act, the government must persuade the jury beyond a reasonable doubt both that the defendant committed robbery or extortion and that his conduct affected interstate commerce.

But Congress is under no obligation to include a jurisdictional element in every criminal Commerce Clause statute. Rather than provide for proof of the connection to commerce in each case, Congress can decide for itself that the activity in question bears the requisite relation to interstate commerce. That is what Congress did when it enacted the Controlled Substances Act, the statute at issue in *Raich*: it prohibited all possession, distribution, and manufacture of marijuana and other controlled substances based on its own finding, described in the preamble to the statute, that such activities are connected to an interstate market for illegal drugs.[10] Accordingly, in federal prosecutions for illegal possession of marijuana, the only fact that the prosecution must prove and the jury must find is that the defendant knowingly possessed marijuana. Congress's findings regarding the typical commercial effects of marijuana possession take the place of case-specific proof of the link between the defendant's conduct and interstate commerce.

Although the difference between jurisdictional elements and congressional findings is largely ignored in the debates about the Commerce Clause, Congress's choice between the two drafting models has real consequences for those charged with a crime, and ultimately for the extent of federal power. By substituting its own findings for a jurisdictional element, Congress can eliminate the protections of the reasonable-doubt and jury-trial guarantees—protections designed to make conviction less likely. The upshot is that it can impose criminal punishment on individual defendants who would be acquitted if the connection to commerce had to be proved at trial. And because Congress's judgment need not be correct as to each individual who falls within the sweep of the statute so long as it is "rational" as to the class of prohibited activity,[11] findings-based prohibitions enable Congress to reach more conduct, including conduct that in fact had no meaningful connection to interstate commerce.

I will argue that findings-based Commerce Clause legislation, even if valid in the civil sphere, should not be permitted when criminal punishment is at stake. Instead, a link between the defendant's conduct and interstate

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1111, 1113 (8th Cir. 1999); Hugi v. United States, 164 F.3d 378, 381 (7th Cir. 1999); United States v. Robinson, 119 F.3d 1205, 1212 n.4 (5th Cir. 1997).

9. 18 U.S.C. § 1951 (2000).

10. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 801–890 (2000)). For Congress's findings, see 21 U.S.C. § 801(3).

11. *See infra* text accompanying notes 45–49, 58–62 (describing the rational basis standard of review for congressional findings).

commerce should be proved in every prosecution. The argument proceeds in four parts. Part II describes in more detail the different options Congress has at its disposal for establishing the interstate commerce nexus and the standards of review associated with each option. Part III explains why the differences between jurisdictional elements and legislative findings matter: findings-based prohibitions represent a move away from the procedural protections—in particular, the reasonable-doubt and the jury-trial requirements—that serve to differentiate criminal prosecutions from civil cases. A shift from jurisdictional elements to findings-based legislation generates unique costs in criminal cases, costs that must be factored into any persuasive defense of current Commerce Clause jurisprudence.

Parts IV and V examine, respectively, the costs and benefits of findings-based criminal prohibitions. Part IV demonstrates that the purposes of the reasonable-doubt and jury-trial requirements apply with full force to facts that serve to establish the basis for federal action rather than to prove that the defendant did something criminal. Although most federal criminal defendants could be prosecuted under state law as well, the consequences of federal conviction often are much more harsh. Moreover, given broad prosecutorial discretion at both the state and federal levels, the possibility of prosecution should not be equated with certain conviction. Because the facts that bring an individual within the jurisdiction of the federal government may have a direct link to the severity of punishment to which he is exposed, a defendant has a significant interest in minimizing the risk of error as to such facts and in requiring that the critical determination be made by a jury drawn from the local community. Those interests get lost when Congress relies on its own findings as the basis for prohibiting certain categories of activities. As Part V explains, the costs of findings-based prohibitions are not balanced by their perceived benefits. To the contrary, the conventional justifications for deference to Congress on matters of commerce are unconvincing when one focuses on the distinctive features of criminal law and criminal prosecutions. They are plainly insufficient to trump the interests of criminal defendants.

I argue in Part VI, therefore, that a nexus to interstate commerce should be treated as an essential element of any criminal offense based on the commerce power. Rather than relying on its own judgment that the prohibited activity is related to interstate commerce, Congress should require federal prosecutors to prove to the jury beyond a reasonable doubt in each case that the defendant's conduct had the necessary connection to interstate commerce. In the absence of express jurisdictional elements, courts should interpret criminal Commerce Clause statutes to require such proof.

II. Federal Criminal Law Under the Commerce Clause

The commerce power permits Congress to address three different categories of problems. First, Congress can control the use of the channels of

interstate commerce by regulating or prohibiting the movement of certain things or people across state lines.[12] Examples of statutes in that category include the Dyer Act, which prohibits interstate transportation of stolen vehicles,[13] and the Travel Act, which makes it a federal crime to travel between states or to use any facility in interstate commerce in order to engage in racketeering activities.[14] Second, Congress can protect the instrumentalities of interstate commerce, or people and things in commerce, by prohibiting certain dangerous activities.[15] The "instrumentalities" category includes statutes that target the destruction of airplanes[16] and theft from interstate shipments.[17] Finally, Congress can regulate activities that have a substantial effect on interstate commerce, even if they occur wholly intrastate.[18] Both the Hobbs Act[19] and the Controlled Substances Act[20] fall into the "substantial effects" category, together with statutes like the Money Laundering Control Act, which makes it a crime to launder the proceeds of an illegal financial transaction that "in any way or degree affects interstate commerce,"[21] and the Consumer Credit Protection Act, which prohibits loan sharking on the basis of Congress's findings regarding the relationship between extortionate credit transactions and organized crime and interstate commerce.[22]

The three categories of commercial regulations have defined the bounds of Congress's commerce power since the famous "switch in time"[23] when the

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12. Perez v. United States, 402 U.S. 146, 150 (1971).

13. 18 U.S.C. § 2312 (2000).

14. *Id.* § 1952(a).

15. *Perez*, 402 U.S. at 150.

16. *Id.* (citing 18 U.S.C. § 32).

17. *Id.* (citing 18 U.S.C. § 659).

18. *See* Gonzales v. Raich, 125 S. Ct. 2195, 2205 (2005). The "effects" category has been the subject of most of the controversy about the scope of the commerce power and courts' role in enforcing it, in part because—unlike the first two categories—Congress's authority to reach activities that are not *part of* interstate commerce but nevertheless affect it derives from the Commerce Clause in conjunction with the Necessary and Proper Clause. *See id.* at 2208–09; *id.* at 2216 (Scalia, J., concurring); *id.* at 2221 (O'Connor, J., dissenting). A second reason for the preoccupation with the effects category is that, to date, it is the only home for statutes based on Congress's own findings regarding the connection between the regulated conduct and interstate commerce rather than case-by-case proof by means of a jurisdictional element. It is important to recognize, however, that there is nothing in current law that prevents Congress from employing the same mechanism in the channels or instrumentalities categories.

19. *See supra* note 9 and accompanying text.

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

21. 18 U.S.C. § 1956.

22. *Id.* § 892; *see also* Consumer Credit Protection Act of 1968, Pub. L. No. 90-321, § 201, 82 Stat. 146, 159 (detailing Congress's findings regarding the interstate effects of loan sharking).

23. The source of the phrase "the switch in time that saved nine"—describing the Court's apparent change of heart in the face of President Roosevelt's Court-packing scheme—is a matter of some controversy. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 974 n.9 (2000) (describing the uncertainty regarding proper attribution).

Supreme Court abandoned its efforts to limit state and federal economic legislation through a theory of substantive due process and a restrictive view of the Commerce Clause.[24] The Court's 1937 decision in *NLRB v. Jones & Laughlin Steel Corp.*[25] not only secured the place of the "substantial effects" category in Commerce Clause jurisprudence but also set the stage for judicial deference to Congress on commerce issues.[26] After *Jones & Laughlin* the Court did not strike down a federal statute on Commerce Clause grounds for more than fifty years—not until *United States v. Lopez*, in which it invalidated a criminal prohibition on gun possession in school zones.[27] In the meantime, federal criminal law had grown in leaps and bounds, abetted both by the Court's increasingly broad view of what sorts of effects count as a qualitative matter and by its willingness to defer to Congress on the factual predicate for Commerce Clause-based legislation.[28]

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24. For a discussion of the Court's jurisprudence both pre- and post-switch, see Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891 (1994). For an argument that the Court did not actually reverse its course in 1937, see Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089 (2000); and Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from* Swift *to* Jones & Laughlin, 61 FORDHAM L. REV. 105 (1992).

25. 301 U.S. 1, 37 (1937).

26. At issue in *Jones & Laughlin* was a provision of the National Labor Relations Act that gave the National Labor Relations Board authority "to prevent any person from engaging in any unfair labor practice . . . affecting [interstate] commerce." *Id.* at 30. The Court held that the provision properly could be applied to employees engaged in manufacturing, abandoning its earlier distinctions between direct and indirect effects on interstate commerce and between sales (which were held to be part of interstate commerce) and manufacturing and production (which were not). "The question," the Court explained, "is necessarily one of degree," and courts should defer to Congress's answer:

> Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and to meet it.

Id. at 37 (quotation marks omitted).

27. 514 U.S. 549 (1995).

28. Discussions of the growth of federal criminal law abound. *See, e.g.*, Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 799–805 (1996) (analyzing the intrusion on state criminal law and the marginalization of federal civil suits caused by the expansion of substantive federal criminal law); John S. Baker, Jr., *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?*, 16 RUTGERS L.J. 495, 502–18 (1984) (recounting the transformation of federal criminal jurisdiction that has occurred over the past two centuries); Kathleen F. Brickey, *The Commerce Clause and Federalized Crime: A Tale of Two Thieves*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 27, 28 (1996) ("In contrast with the 17 crimes that formed the entire body of federal criminal law two centuries ago, there are now more than 3000 federal crimes on the books today."); Sanford H. Kadisb, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 970–74 (1999) (discussing the creation of federal criminal statutes dealing with corruption, governmental regulations, and drugs); Robert L. Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271, 273, 277–80 (1973) (describing the use of the commerce power to create federal criminal laws covering wholly intrastate acts).

Lopez seemed to signal a break from the tradition of deference[29] and inspired a great debate over the role courts should play in enforcing limits on the commerce power. Most everyone agrees that there are limits, at least in theory; the questions of the hour are what the limits are[30] and whether they are judicially enforceable.[31] The Court's decision in *Raich*, which marked a retreat from *Lopez* and a reaffirmation of deference to Congress on economic issues,[32] reflects those preoccupations.

Here, the focus is different. I take the substance of existing Commerce Clause law largely as I find it.[33] Thus, I take as a given that the commerce

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29. For detailed descriptions of *Lopez*, see, for example, Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After* Lopez, 46 CASE W. RES. L. REV. 801 (1996); and Merritt, *supra* note 4. For present purposes, it is sufficient to note that *Lopez* suggested that the Court was becoming uneasy with the notion that it should defer to Congress on the question of whether the activity in question substantially affects interstate commerce, at least where Congress did not establish a legislative record to support its empirical judgment. *See Lopez*, 514 U.S. at 562–63 (noting that "[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone" (quotation marks omitted)); *id.* at 563–68 (rejecting the government's contentions regarding the economic effects of gun possession in school zones). It is less clear what the Court intended to do about that perceived problem. Some commentators argued that the Court simply wanted to send a message to Congress that the Commerce Clause is not a blank check. *See, e.g.*, *Guns in Schools: A Federal Role?: Hearing on S. 890 Before the Subcomm. on Youth Violence of the S. Comm. on the Judiciary*, 104th Cong. 95 (1995) (statement of Larry Kramer) (describing the decision in *Lopez* as a "sort of 'signaling device'—a reminder to Congress that the Court is still out there, willing (however reluctantly) to intervene if federal legislators become too complacent about extending their authority"); Brickey, *supra*, at 839 (suggesting that "Congress could (and perhaps should) view *Lopez* as a warning shot across the bow"). Others maintained that the Court had in mind what some have called "due process of lawmaking"—that is, that while the Court was prepared to defer to Congress's judgment, it wanted to make sure that Congress took into account the limitations on its power and actually examined the relevant facts. *See, e.g.*, Frickey, *supra* note 4, at 720 & n.130; Frickey & Smith, *supra* note 4, at 1718–27. Still others argued that the Court was establishing a new substantive limitation on Congress's power by restricting the category of relevant "effects" to those that are direct rather than attenuated. *See, e.g.*, Friedman, *supra* note 4, at 772.

30. *See, e.g.*, Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921 (1997); Diane McGimsey, *The Commerce Clause and Federalism After* Lopez *and* Morrison*: The Case for Closing the Jurisdictional-Element Loophole*, 90 CAL. L. REV. 1675 (2002); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554 (1995); Andrew St. Laurent, *Reconstituting* United States v. Lopez*: Another Look at Federal Criminal Law*, 31 COLUM. J.L. & SOC. PROBS. 61 (1997).

31. *See* sources cited *supra* note 4; *see also* H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849 (1999); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

32. *See infra* notes 45–49, 58–62 and accompanying text (describing the deferential approach used in *Raich*).

33. Distinctions between substance and procedure tend to be slippery, and this one is no exception. To be clear, what I mean by "substance" is the body of law that speaks to the proper *subjects* of Commerce Clause legislation. Accordingly, I set to the side the many interesting questions about the proper boundaries of the channels, instrumentalities, and substantial-effects categories. Rather than asking, for example, what sorts of commercial effects do or should bring a given activity within the substantial-effects category, my focus is on how courts should determine whether the activity at issue has the requisite effect (whatever that is) on interstate commerce. *Cf.*

power extends only to conduct that has some connection to interstate commerce—whether it is movement in commerce, use of the instrumentalities of commerce, or a substantial effect on commerce. My focus is not on the character of the requisite connection but on how it is established in criminal prosecutions.

Early federal criminal statutes all contained jurisdictional elements, so the facts that brought the defendant's conduct within the scope of the commerce power had to be proved to a jury beyond a reasonable doubt in each case.[34] Today we have a mix. Most statutes still contain jurisdictional elements, but others define the prohibited conduct without reference to interstate commerce, based on Congress's determination that such conduct bears the requisite connection to commerce as a categorical matter.[35] Still other statutes occupy a middle ground between those two approaches: they contain both a jurisdictional element and an explicit presumption that obviates the need for proof of the nexus to interstate commerce absent some contrary evidence from the defendant.[36] This Part will describe the three options in more detail.

A. Proving the Interstate Commerce Nexus: Three Versions of an Anti-widget Statute

Suppose Congress wants to prohibit interstate traffic in widgets. Suppose further that widgets are produced in all parts of the country; some

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Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 51 (2004) (distinguishing between "constitutional operative propositions (essentially, judge-interpreted constitutional meaning) and constitutional decision rules (rules that direct courts how to decide whether a given operative proposition has been, or will be, complied with")).

34. *See, e.g.*, Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1352, 100 Stat. 3207 (codified as amended at 18 U.S.C. § 1956 (2000)) (regulating commerce-affecting conduct by prohibiting, among other things, laundering the proceeds of illegal financial transactions that "in any way or degree affect[] interstate commerce"); Larceny Act of 1913, ch. 50, 37 Stat. 670 (codified as amended at 18 U.S.C. § 2117 (2000)) (regulating instrumentalities of interstate commerce by prohibiting breaking the seals of railroad cars containing interstate or foreign shipments); National Stolen Property Act, ch. 333, 48 Stat. 794 (1934) (codified as amended at 18 U.S.C. § 2314 (2000)) (regulating the use of the channels of interstate commerce by making it a crime knowingly to transport stolen property in interstate commerce).

35. Examples of findings-based criminal statutes include the Consumer Credit Protection Act of 1968, Pub. L. No. 90-321, § 201, 82 Stat. 146, 159 (codified as amended at 18 U.S.C. § 892 (2000)) (prohibiting extortionate credit transactions, or loan sharking, on the hasis of Congress's findings that organized crime derives a substantial chunk of its income from extortionate credit transactions, that such transactions are carried on "to a substantial extent in interstate and foreign commerce," and that even when such transactions occur purely intrastate, "they nevertheless directly affect interstate and foreign commerce"), and the Gambling Enterprises Act, Pub. L. No. 91-452, Tit. VIII, 84 Stat. 936, 936–37 (1970) (codified as amended at 18 U.S.C. § 1955 (2000)) (prohibiting "illegal gambling business[es]" based on Congress's finding that "illegal gambling involves widespread use of, and has an effect upon, interstate and foreign commerce and the facilities thereof").

36. *See, e.g.*, Lindbergh Kidnapping Act, ch. 271, 47 Stat. 326 (1932) (codified as amended at 18 U.S.C. § 1201 (2000)) (prohibiting the interstate transportation of kidnapping victims but also providing that evidence that the victim was not returned within 24 hours will establish a rebuttable presumption of interstate movement).

people produce them for personal use, but the vast majority of widgets are bought and sold, often across state lines. Many states prohibit production and possession of widgets, but enforcement in the more restrictive states is undermined by traffic with states in which widgets are legal. In an effort to facilitate enforcement of anti-widget laws, Congress enacts a statute that prohibits possession of widgets "in or otherwise affecting interstate or foreign commerce."

Some time passes, and the federal government discovers to its dismay that it is difficult to prove that possession of any particular widget "affect[s] . . . commerce." Nevertheless, Congress believes that the number of widgets produced for personal intrastate use is vanishingly small and that most widgets bought and sold in intrastate transactions are in fact part of a well-organized and pernicious interstate market for widgets. Congress makes findings to that effect.

Congress now has several options. First, the federal government can continue to rely on the statute as drafted, investigating and prosecuting widget possession where the nexus to interstate commerce is fairly strong and leaving other cases to state enforcement. Second, Congress can try to solve the difficulties of proof by enacting a statutory presumption,[37] based on the findings it has made, that "possession of a widget shall be deemed sufficient evidence to authorize conviction unless the defendant can establish that the possession had no effect on interstate commerce." Finally, relying on the same findings regarding the effects of widget possession on interstate commerce, Congress can amend the statute to remove the "in or affecting commerce" jurisdictional element from the statute and prohibit possession outright.

The first variation of the anti-widget statute is the narrowest; it allows conviction only if the defendant's conduct almost certainly occurred in or affected commerce. The Due Process Clause requires the prosecution to prove beyond a reasonable doubt "every fact necessary to constitute the

37. The word "presumption" has many possible meanings. I use it here to refer to situations in which the legislature or a court has determined that proof of a certain fact (the "basic fact") has some effect in cstablishing another fact (the "ultimate fact"). *See generally* Gerald H. Abrams, *Statutory Presumptions and the Federal Criminal Law: A Suggested Analysis*, 22 VAND. L. REV. 1135, 1135–36 (1968) (using a similar definition of presumption while discussing the improper uses of certain types of presumptions in federal criminal law). The effect of proof of the basic fact on proof of the ultimate fact depends on the type of presumption at issue. A presumption might be conclusive, in which case proof of the basic fact, without more, *must* be taken as proof of the ultimate fact. Or a presumption might be mandatory but rebuttable, meaning that proof of the basic fact must be taken as proof of the ultimate fact unless the defendant produces some evidence to support the contrary inference. Presumptions also may be permissive rather than mandatory, meaning that proof of the basic fact may be taken to prove the ultimate fact, but it need not be—even in thc absence of any contrary evidence. *See generally* Shari L. Jacobson, *Mandatory and Permissive Presumptions in Criminal Cases: The Morass Created by* Allen, 42 U. MIAMI L. REV. 1009 (1988) (defining and exploring both mandatory and permissive presumptions in the criminal law context).

crime with which [the defendant] is charged,"[38] and the Sixth Amendment gives the defendant the right to insist that those facts be found by a jury.[39] Because the first version of the statute makes the connection to interstate commerce an element of the offense (and therefore "necessary to constitute the crime . . . charged"), the prosecution must introduce enough evidence in each case to persuade the jury beyond a reasonable doubt that the defendant's possession occurred in or affected interstate commerce.[40]

The second version of the statute—jurisdictional element plus statutory presumption—is somewhat more broad. Although the addition of the presumption would not make simple possession of widgets a crime, Congress's findings regarding the effect of widget possession on interstate commerce would make it unnecessary for the prosecution to introduce any evidence on the jurisdictional element as part of its case in chief. So long as the prosecution proved possession, the jury would be obliged to find that the possession occurred in or affected commerce unless the defendant could present some evidence showing, for example, that he produced the widgets himself for personal use and possessed them only intrastate. Upon such a showing, the burden of persuasion would return to the prosecution, which would have to prove beyond a reasonable doubt that the defendant's conduct in fact affected commerce.

Although a statutory presumption might ease the prosecution's burden in cases in which the defendant did not present any evidence in rebuttal, the second option is not as attractive as it first might appear. Because the hypothetical presumption would shift the burden of production to the defendant on an element of the offense,[41] it would be subject to searching judicial scrutiny. The Supreme Court has recognized that presumptions must be analyzed in light of the requirements of the Fifth and Sixth Amendments to ensure that they do not "undermine the factfinder's responsibility at trial, based on evidence adduced by the [prosecution], to find the ultimate facts beyond a reasonable doubt."[42] The critical question is whether the presumption at issue would allow the government to obtain a conviction without presenting enough evidence to carry its burden of proof on every

38. *In re* Winship, 397 U.S. 358, 364 (1970).

39. Sullivan v. Louisiana, 508 U.S. 275, 277 (1993).

40. That is not to say that the effect on interstate commerce must be *substantial* in the individual case. Like actual statutes with "affects commerce" jurisdictional elements, the first version of the hypothetical widget statute requires only that each defendant's conduct have *some* effect on interstate commerce. *See infra* notes 137–38 (discussing requirements of proof for the Hobbs Act and similar money laundering statutes).

41. Presumptions may "merely shift the burden of production to the defendant, following the satisfaction of which the ultimate burden of persuasion returns to the prosecution; [or may] entirely shift the burden of proof to the defendant." County Court of Ulster County v. Allen, 442 U.S. 140, 157 n.16 (1979). The Court in *Allen* intimated that presumptions of the latter type are per se unconstitutional. *Id.* at 157–58.

42. *Id.* at 156.

element of the offense.[43] Thus, the widget presumption would survive a constitutional challenge only if evidence that a defendant possessed widgets would be sufficient to permit a reasonable jury to find beyond a reasonable doubt that the defendant's conduct affected interstate commerce.[44]

Congress need not rely on an explicit statutory presumption to establish the link between widget possession and interstate commerce, however. It can amend the statute to prohibit the entire category of widget possession outright, in effect creating a conclusive presumption that such possession affects commerce. Like the statutory presumption described above, a categorical prohibition would be based on Congress's findings regarding the commercial effects of widget possession. In prosecutions under both versions of the hypothetical statute, those findings would take the place of affirmative proof that the defendant's conduct affected interstate commerce, permitting the prosecution to obtain a conviction based solely on proof of possession.

Although the same dynamic—substitution of congressional findings for defendant-specific proof—would be at work in both the second and third versions of the statute, the corresponding standard of review would be quite different. Whereas explicit statutory presumptions are tested for compliance with the presumption of innocence, categorical prohibitions based on legislative findings are treated to the presumption of constitutionality.[45] In marked contrast to the situation at trial, a defendant challenging a findings-based prohibition on constitutional grounds bears the burden of proving the statute's invalidity. Courts review findings-based statutes under the deferential rational basis standard, upholding the challenged prohibition so long as Congress reasonably could have concluded that the activity in question, when considered in the aggregate, has a substantial effect on

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43. *See Allen*, 442 U.S. at 167 ("[S]ince the prosecution bears the burden of establishing guilt [on every element of the offense], it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt."); Patterson v. New York, 432 U.S. 197, 215 (1977) ("[A] State must prove every ingredient of an offense beyond a reasonable doubt, and . . . it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense.").

44. The test described in the text applies to presumptions that are mandatory in the sense that the jury must find the ultimate fact if the government proves the basic fact and the defendant does not introduce any evidence to call into question the truth of the presumed fact. *See Allen*, 442 U.S. at 157–58, 166–67. Because such presumptions make proof of the basic fact a "sole and sufficient basis for a finding of guilt," *id.* at 167, their validity must be tested without regard to the particular facts of the challenger's case but rather "based on the presumption's accuracy in the run of cases," *id.* at 159. A different test applies to permissive presumptions. *See id.* at 162–63, 165 (explaining that the validity of permissive statutory presumptions rests on "an evaluation of the presumption as applied to the record before the Court" and that such presumptions are constitutional so long as there is a "rational connection" between the fact or facts to be presumed and the facts the prosecution proved at trial).

45. *See* Gonzales v. Raich, 125 S. Ct. 2195, 2212 (2005) (explaining that Congress's judgment underlying the categorical prohibition on marijuana possession "is entitled to a strong presumption of validity").

interstate commerce.[46] Congress need not make any express findings on the issue, whether in the text of the statute or the legislative history; it is enough that rational legislators *could have* found the requisite connection between the prohibited conduct and interstate commerce.[47] Nor need Congress's resolution of the issue be correct—and certainly not demonstrably correct beyond a reasonable doubt. When findings-based statutes are at issue, mere rationality will suffice.[48] The focus of the judicial inquiry, moreover, is not on the connection between the defendant's own conduct and interstate commerce but on the features of the prohibited activity *as a class*.[49]

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46. *See id.* at 2208 (explaining that the Court "need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding"). The Court's decisions in *Lopez* and *Morrison* indicated that the regulated activity also must be "economic"—meaning, apparently, that it must have some connection to interstate commerce—and that the question whether a particular activity falls within that category is one of law for the Court. *See* United States v. Morrison, 529 U.S. 598, 611 (2000) ("[I]n those cases where we have sustained federal regulation of intrastate activity based on the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."); United States v. Lopez, 514 U.S. 549, 561 (1995) (reasoning that the Gun Free School Zones Act cannot be sustained under "substantial effects" theory because it regulated conduct that "has nothing to do with 'commerce' or any sort of economic enterprise"); *id.* at 566–67 (indicating that aggregation is available only when the activity is "economic"). *Raich* weakened the "economic" requirement by holding that possession of marijuana is "quintessentially economic" and defining the term "economics" to mean "'the production, distribution, and consumption of commodities.'" 125 S. Ct. at 2211 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)). Nevertheless, the Court's failure to disavow that aspect of *Lopez* and *Morrison* suggests that the "economic" modifier retains some force, at least in theory, as a threshold limitation on the aggregation principle.

47. *See Raich*, 125 S. Ct. at 2208 (dismissing as irrelevant the absence of explicit congressional findings on the question of whether intrastate possession of homegrown marijuana affects interstate commerce and explaining that the Court "ha[s] never required Congress to make particularized findings in order to legislate").

48. *Id.*

49. *See id.* at 2205–06 ("When Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class."); *see also* Perez v. United States, 402 U.S. 146, 154 (1971) (rejecting a defendant's claim that the loan sharking statute could not validly be applied to him because there was no proof that his conduct had any interstate effect, explaining that if "the *class* of activities regulated" falls within Congress's power, "the courts have no power 'to excise, as trivial, individual instances' of the class" (quoting Maryland v. Wirtz, 392 U.S. 183, 193 (1968))); *cf. Wirtz*, 392 U.S. at 196 n.27 ("[W]here a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence."). That feature of current practice effectively erases the distinction between facial and as-applied challenges, removing the traditional means by which courts can grant individual exemptions from otherwise valid laws. *See Raich*, 125 S. Ct. at 2237–38 (Thomas, J., dissenting) (criticizing the majority's approach to respondents' as-applied challenge). *See generally* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994) (discussing the general distinction between facial and as-applied litigation); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000) (same); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1 (1981) (same). Indeed, *Raich* appears to confirm what some commentators suggested prior to the Court's decision—that as-applied challenges do not constitute a distinct mode of inquiry in the Commerce Clause context. *See* Peter J. Henning, *Misguided Federalism*, 68 MO. L. REV. 389, 432–33 (2003); Nathaniel Stewart, Note, *Turning the Commerce Clause Challenge "On Its Face": Why Federal Commerce Clause Statutes Demand Facial Challenges*, 55 CASE W. RES. L. REV. 161, 175 (2004); *see also*

B. Explicit and Implicit Presumptions: The Court's Response

The difference between the judicial approach to explicit statutory presumptions and categorical prohibitions can be observed in the Court's varied responses to federal statutes dealing with the problem of illegal drug use. Congress initially tried to regulate drugs by targeting movement into the country.[50] The early drug statutes prohibited possession but only as a way to give teeth to the primary prohibition on importation. Thus, drug possession was not illegal unless the drugs in question in fact had been imported illegally and the defendant knew it—which might be difficult to prove. Congress addressed that potential problem by including in the importation statutes the proviso that proof of possession "shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."[51]

That presumption came under attack almost immediately on the ground that it permitted conviction without adequate proof of an element of the offense. The Supreme Court sustained the presumption as applied to opium and heroin, reasoning that because neither drug was produced in the United States, proof that the defendant possessed opium or heroin was functionally equivalent to proof that the defendant knowingly possessed illegally imported opium or heroin.[52] The presumption was more problematic when applied to marijuana and cocaine, however, because both drugs could be produced in the United States.[53] Given the possibility that any marijuana or cocaine in the defendant's possession was domestically produced, the Court

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infra note 217. *But see* Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 929–30 (2005) (arguing that the class-of-activities test for Commerce Clause legislation does not preclude the as-applied approach).

50. Beginning with opium, and steadily expanding its reach to cocaine, synthetic opiates like methadone and heroin, and marijuana, the Narcotic Import and Export Act made it a federal crime knowingly to import or assist in the importation of the targeted drugs, or to "receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such [drugs], knowing the same to have been imported contrary to law." Narcotic Drugs Import and Export Act of 1914, Pub. L. No. 63-230, 38 Stat. 275 (repealed in 1970 and replaced by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 801–890 (2000))).

51. 21 U.S.C. § 174 (1964) (repealed 1970). Congress used a similar approach when it first sought to regulate firearms by means of the commerce power. An early firearms statute prohibited, among other things, interstate shipment or transportation to or receipt by violent criminals and other specified groups, but it provided that "the possession of a firearm or ammunition by any [prohibited person] shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this [Act]." National Firearms Act of 1938, ch. 850, 52 Stat. 1250, 1250–51 (codified as amended at 18 U.S.C. § 922(h) (2005)).

52. *See* Turner v. United States, 396 U.S. 398, 408, 415–16 (1970) (upholding the presumption with respect to heroin); Yee Hem v. United States, 268 U.S. 178, 184–85 (1925) (upholding the presumption with respect to opium).

53. Although the Court found that most domestically consumed marijuana was of foreign origin, that was not true across the board. *See* Leary v. United States, 395 U.S. 6, 39–43 (1969). As for cocaine, coca leaves could be legally imported for processing into cocaine for medicinal purposes. Indeed, the Court found that "much more cocaine is lawfully produced in this country than is smuggled into this country." *Turner*, 396 U.S. at 418.

concluded that to convict on proof of mere possession of one of those drugs would relieve the prosecution of its obligation to prove every element of the offense beyond a reasonable doubt.[54]

Enter the Controlled Substances Act, which was passed shortly after the Court's decision striking down the statutory presumption as applied to possession of cocaine.[55] The Act did away with presumptions in favor of a sweeping prohibition of drug possession and sale.[56] Congress sought to justify the breadth of the new statute with its findings, explaining that "a major portion of the traffic in controlled substances flows through interstate and foreign commerce" and that "[i]ncidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce."[57]

The Court in *Raich* upheld the Controlled Substances Act as applied to possession of homegrown marijuana for medical use permitted under state law.[58] The Court was unconcerned that Congress had not made any findings with respect to the commercial effects of such possession and that the record of the case was devoid of any evidence regarding the effects on interstate commerce of respondents' use of medical marijuana.[59] The critical point for the Court was that there is a vibrant national market for marijuana and

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54. *See Turner*, 396 U.S. at 419 ("[T]hefts from legal sources, though totaling considerably less than the total smuggled, are still sufficiently large to make the . . . presumption invalid as applied to Turner's possession of cocaine."); *Leary*, 395 U.S. at 52–53 ("[A] not inconsiderable proportion of domestically consumed marihuana appears to have been grown in this country . . . . In short, it would be no more than speculation were we to say that even as much as a majority of possessors 'knew' the source of their marihuana."). The firearm-related presumption fared no better. *See* Tot v. United States, 319 U.S. 463, 469 (1943) (holding that "the presumptions created by the [National Firearms Act]" are "violent, and inconsistent with any argument drawn from experience" because it was possible that many defendants charged under the Act received their firearms from intrastate transactions or obtained them prior to the Act's effective date).

55. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 801–890 (2000)).

56. *See* 21 U.S.C. § 812 (establishing five schedules of controlled substances); *id.* § 841(a)(1) (making it unlawful for any person knowingly or intentionally to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance"); *id.* § 844 (prohibiting the simple possession of controlled substances). For a more detailed discussion of the Controlled Substances Act and the history of federal drug regulation, see Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1148–54 (1995); and Thomas M. Quinn & Gerald T. McLaughlin, *The Evolution of Federal Drug Control Legislation*, 22 CATHOLIC U. L. REV. 586, 605–14 (1972).

57. 21 U.S.C. § 801(3). That is so, Congress found, because "controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution"; "controlled substances possessed commonly flow through interstate commerce immediately prior to such possession"; "[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances"; and "it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate." *Id.*

58. 125 S. Ct. 2195 (2005).

59. *Id.* at 2207–08.

Congress reasonably could have concluded that "the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market."[60] Writing for the majority, Justice Stevens emphasized that, "[i]n assessing the scope of Congress' authority under the Commerce Clause, . . . the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding."[61] He stressed, moreover, that the Court has "never required Congress to legislate with scientific exactitude. When Congress decides that the total incidence of a practice poses a threat to a national market, it may regulate the entire class."[62]

The difference between *Raich* and the presumption cases is striking. When faced with an explicit statutory presumption, the Court understood the case to present a question of individual right, not (or not *only*) federal power, and it responded accordingly. To be sure, the Court took into account Congress's judgment regarding the interstate commerce nexus, and it considered any empirical evidence in the legislative history supporting that judgment.[63] In contrast to *Raich*, however, the question for the Court in the presumption cases was not whether Congress rationally could have found a connection between drug possession and interstate commerce but whether the requisite connection was sufficiently clear as to permit conviction without any defendant-specific evidence—that is, whether the relationship between the basic and ultimate facts was such that a reasonable jury could find the ultimate fact beyond a reasonable doubt based solely on proof of the basic fact.[64]

The mismatch between the two standards for judicial review is even more remarkable when one recognizes that an explicit statutory presumption

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60. *Id.* at 2208.

61. *Id.*

62. *Id.* at 2206.

63. *See* Leary v. United States, 395 U.S. 6, 38–40 (1969) (assessing evidence in the legislative record indicating that most marijuana is of foreign origin); United States v. Gainey, 380 U.S. 63, 67 (1965) ("The process of making the determination . . . is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it.").

64. According to Charles Alan Wright and Kenneth Graham, Jr.:

> [W]hen [a presumption] statute is challenged, all deference to the power of the legislature to prescribe crimes is dropped. The Court will look at the statute as a legislative attempt to intrude on the power of the courts to find facts in a particular case, applying to it the [reasonable doubt] test rather than the less restrictive test of whether the legislature could reasonably suppose that the evidence supported the statute.

21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5148 (2d ed. 1977); *see also* Abrams, *supra* note 37, at 1145 (noting that the Court has not deferred to Congress in presumption cases).

is actually far better for the defendant than a categorical findings-based prohibition. A statutory presumption is rebuttable; it gives the defendant an opportunity to make an individualized showing that his own conduct had no effect on commerce. An explicit presumption also ensures that the *jury* will resolve any factual disputes about the presumption's accuracy as applied to the defendant.

A categorical prohibition is far more difficult to challenge, and it removes the jury from the picture altogether. Because a findings-based statute defines the prohibited conduct without reference to interstate commerce, the defendant has no opportunity to raise the issue of commercial effects with the jury. Although the defendant can challenge the statute on constitutional grounds, his argument will be addressed to the judge rather than the jury, and he will bear the burden of proving that his conduct had no effect on interstate commerce. Indeed, even if the defendant can prove his innocence, so to speak, he still may not prevail in a constitutional challenge. As noted above, the question for the court is whether there is a rational basis for Congress's judgment that the class of prohibited conduct has the requisite connection to interstate commerce, not whether that judgment is correct with respect to the individual defendant.[65]

III. A Distinction with a Difference: The Gap Between Findings-Based Statutes and Jurisdictional Elements

Under current Commerce Clause jurisprudence, Congress's decision about how to draft the relevant statute can determine the requirements of proof for the facts that establish the interstate commerce nexus. By opting for a categorical prohibition rather than a jurisdictional element (or a jurisdictional element paired with an explicit statutory presumption), Congress can avoid the procedural requirements that normally apply to criminal prosecutions in three ways. First, in a criminal prosecution the government must prove every element of the offense *beyond a reasonable doubt.* In a challenge to a findings-based statute, however, courts require only that Congress's judgment with respect to the factual predicates for the legislation be rational. Second, the requirement of proof beyond a reasonable doubt in a criminal prosecution means proof *as to the defendant.* Accordingly, in cases involving jurisdictional elements, the government must prove that the defendant's conduct had the requisite connection to interstate commerce. In challenges to findings-based statutes, by contrast, courts focus on the class of prohibited conduct and eschew any inquiry into the specifics of the defendant's case. Third, in criminal prosecutions the question whether the defendant did all the things for which the government seeks to punish him must be submitted to the *jury.* But the jury has no role in finding the

65. *See supra* note 49 and accompanying text.

connection between the defendant's conduct and interstate commerce when Congress chooses to rely on its own findings.

As a practical matter, then, a categorical prohibition based on congressional findings is broader in scope than a statute with a jurisdictional element. A findings-based statute permits Congress to reach more conduct, including conduct that itself has no effect on interstate commerce. To be sure, the difference may be visible only at the margins, in cases where the question of interstate effects is subject to reasonable dispute. But that is precisely the class of cases in which the reasonable-doubt and jury-trial requirements are most important. Those procedural protections are designed to ensure that we err on the side of the defendant when it is unclear what the "right" answer is or where different decisionmakers might answer the same question differently.[66]

The point is not merely theoretical. Defendants *do* walk free from prosecutions under all manner of "elements" statutes on the ground that the prosecution cannot establish the requisite connection to interstate commerce.[67] As *Raich* demonstrates, the same defendants likely would be convicted had Congress opted to rely on its own findings rather than a jurisdictional element.

Given the very real differences between jurisdictional elements and legislative findings, it is surprising how little attention has been paid to

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66. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 157 & n.26 (1968) ("[W]hen juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed."); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 18–19 (1955) ("Juries fairly chosen from different walks of life bring into the jury box a variety of different experiences, feelings, intuitions and habits. Such juries may reach completely different conclusions than would be reached by specialists in any single field . . . ." (citations omitted)); *cf.* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 245 (1986) (discussing studies of cases in which judges and juries disagreed); HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 115 (1966) (same).

67. *See, e.g.*, United States v. Perrotta, 313 F.3d 33 (2d Cir. 2002) (reversing a Hobbs Act conviction for insufficient evidence of a connection to interstate commerce); United States v. Turner, 272 F.3d 380 (6th Cir. 2001) (same); United States v. Peterson, 236 F.3d 848 (7th Cir. 2001) (same); United States v. Wang, 222 F.3d 234 (6th Cir. 2000) (same); United States v. Frost, 61 F.3d 1518 (11th Cir. 1995) (same), *as modified*, 77 F.3d 1319 (11th Cir. 1996), *vacated on other grounds*, 520 U.S. 1226 (1997); United States v. Collins, 40 F.3d 95 (5th Cir. 1995) (same); United States v. Buffey, 899 F.2d 1402 (4th Cir. 1990) (same); United States v. Mattson, 671 F.2d 1020 (7th Cir. 1982) (same); United States v. Merolla, 523 F.2d 51 (2d Cir. 1975) (same); United States v. Critchley, 353 F.2d 358 (3d Cir. 1965) (same); *see also* United States v. Leslie, 103 F.3d 1093 (2d Cir. 1997) (reversing a conviction under the money laundering statute for insufficient evidence of a connection to interstate commerce); United States v. Pinckney, 85 F.3d 4 (2d Cir. 1996) (same, for a conviction under Anti Car Theft Act of 1992, 18 U.S.C. § 2322 (2000)); United States v. Quigley, 53 F.3d 909 (8th Cir. 1995) (affirming a judgment of acquittal entered after the jury returned a guilty verdict on Hobbs Act charges on the ground that the robbery of individuals who patronized a liquor store did not affect interstate commerce); United States v. Garcia, 68 F. Supp. 2d 802 (E.D. Mich. 1999) (dismissing an indictment charging a violation of the Violent Crime in Aid of Racketeering Act, 18 U.S.C. § 1959 (2000), because the allegations were insufficient to show a sufficient connection to commerce); United States v. Blair, 762 F. Supp. 1384 (N.D. Cal. 1991) (entering a judgment of acquittal on Hobbs Act charges where the evidence was insufficient to prove beyond a reasonable doubt that the defendant's conduct affected interstate commerce).

Congress's choice among the available drafting models. Commentators have devoted a great deal of attention to the question of how courts should review findings-based statutes,[68] yet rarely does anyone ask the prior question whether Congress *ever* should be able to rely on its own findings in lieu of case-by-case proof of the connection between the defendant's conduct and interstate commerce. There are several possible explanations for that silence. This Part will examine two of the most likely culprits and will explain why Congress's power to impose criminal punishment nnder the Commerce Clause based on its own findings rather than proof at trial is not so obvious as is generally assumed.

A. Crime Definition in a Government of Limited Power

If courts and commentators have not attempted to justify the use of congressional findings in the criminal sphere, it may be because the differences between jurisdictional elements and findings-based statutes are hidden by what might be described as conceptual tunnel vision with respect to Commerce Clause issues. When Congress relies on jurisdictional elements and explicit statutory presumptions to make certain conduct illegal, courts (and commentators) focus on what happens at trial; we conceive of this as an issue of criminal procedure, so we are alert for incursions against the procedural rights of individual criminal defendants.[69] But when Congress defines the prohibited conduct without reference to interstate commerce, criminal trials and criminal defendants fade from view. The matter is transformed from a question of individual right into a structural question of federal power, so we are no longer concerned about proof with respect to a particular criminal defendant.[70]

The perceived conceptual disconnect between questions of criminal procedure and questions of federal power reflects a similar divide within criminal law between questions of criminal procedure, which are understood as the province of courts and the Constitution,[71] and questions of substantive

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68. See *supra* notes 4, 30 for a list of such articles.

69. *See supra* notes 50–64 and accompanying text (describing the Court's treatment of explicit statutory presumptions contained in early drug and firearm statutes).

70. *See, e.g.*, Unitcd States v. Darby, 312 U.S. 100, 120–21 (1941) ("In passing on the validity of [findings-based Commerce Clausc legislation] the only function of courts is to detcrmine whether the particular activity rcgulated or prohibited is within the reach of the federal power."); Henning, *supra* note 49, at 448 (contending that as-applied challenges to findings-based statutes raise only "federalism claim[s]" and "do[] not involve an alleged violation of the defendant's constitutional rights" and that "[f]ederalism protects the states directly, not individuals, from the misuse of authority by the federal government, so it is hard to understand how it can furnish to an individual a defense to criminal charges for violating a statute that Congress has the authority to enact"). *But cf.* Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 63 (1998) (noting critically the "near-complete separation between the jurisprudence of congressional power and the jurisprudence of individual rights").

71. *See* William J. Stuntz, *Substance, Process, and the Civil–Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES I, 1 (1996) ("Legislatures decide what is and is not a crime .... But courts alone

crime definition, which are left largely to the discretion of the legislature.[72] The Constitution requires that all facts "necessary to constitute the crime . . . charged" must be proved to the jury beyond a reasonable doubt,[73] but it does not itself identify which facts constitute the "necessary" ingredients of any given offense. Instead, the designation of "necessary" facts and the procedural protections that follow from that designation turn on how the legislature chose to define the relevant offense. Generally speaking, a fact is "necessary" for purposes of the reasonable-doubt and jury-trial requirements if (and only if) the legislature treated it as an element of the offense.[74]

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decide what the law of criminal procedure looks like, since courts are the system's constitutional lawmakers and criminal procedure is the province of constitutional law.").

72. *See* Harris v. United States, 536 U.S. 545, 557 (2002) ("[D]efining criminal conduct is a task generally left to the legislative branch . . . ."). Although legislatures typically may define crime as they choose, the Supreme Court has recognized some substantive limitations. For example, the Court has held that the legislature cannot criminalize mere status but must include some actus reus in the definition of the offense. Robinson v. California, 370 U.S. 660, 667 (1962) (striking down a state statute making it a crime for a person to be addicted to narcotics). Similarly, in some circumstances the legislature must define the offense to include a particular mens rea. *See* Lambert v. California, 355 U.S. 225, 229 (1957) (holding that a criminal provision requiring felons residing in Los Angeles to register with the city violates the Due Process Clause of the Fourteenth Amendment as applied to a convicted felon with no knowledge of the requirement). Other constitutional limitations, while not specific to criminal law, likewise constrain the power of the legislature to attach criminal punishment to certain activities. For example, in cases involving anti-obscenity statutes, the First Amendment requires the government to prove that the material at issue was not merely pornographic but obscene and that the defendant did not merely possess it but distributed or intended to distribute it. *See* Miller v. California, 413 U.S. 15, 25 (1973) (holding that the First Amendment does not permit the government to criminalize the distribution of sexually explicit materials unless they qualify as obscene); Stanley v. Georgia, 394 U.S. 557, 559 (1969) (holding that the First Amendment does not permit the government to criminalize the mere possession of obscene materials).

73. *In re* Winship, 397 U.S. 358, 364 (1970); *see also* Sullivan v. Louisiana, 508 U.S. 275, 277 (1993) (applying the jury-trial requirement to the same category of facts as the requirement of proof beyond a reasonable doubt).

74. *See* Patterson v. New York, 432 U.S. 197, 210 (1977) ("[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged."). That is not to say that the legislature must have *labeled* the fact as an element of the offense. In a series of sentencing cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court has made clear that any fact (other than a prior conviction) that the government must prove in order to establish a prima facie case sufficient to expose the defendant to a particular maximum punishment must be proved to the jury beyond a reasonable doubt. *Id.* at 476 (applying the reasonable-doubt and jury-trial requirements to a state hate-crime statute that authorized an increase in the maximum sentence based on the judge's finding by a preponderance of the evidence a fact not included in the jury's verdict); *see also* United States v. Booker, 543 U.S. 220, 231 (2005) (same, with respect to the mandatory sentence enhancements contained in the Federal Sentencing Guidelines); Blakely v. Washington, 542 U.S. 296, 301 (2004) (same, with respect to a state sentencing scheme); Ring v. Arizona, 536 U.S. 584, 589 (2002) (same, with respect to facts that expose a defendant to a death sentence). The legislature cannot evade those requirements by calling necessary facts something other than offense elements; what matters is the function that the relevant fact serves in the statutory scheme, not its label. *See Apprendi*, 530 U.S. at 494 (noting that "labels do not afford an acceptable answer" to "the constitutionally novel and elusive distinction between elements and sentencing factors" (quotation marks omitted)). But while the *Apprendi* rule rejects a slavish devotion to

A consequence of legislative supremacy in the area of crime definition is that the same fact may be subject to different requirements of proof depending on how the legislature opts to treat it.[75] For example, if the legislature makes malice aforethought an element of the crime of murder, the prosecution must prove that fact beyond a reasonable doubt.[76] But the

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labels, it still depends heavily on the legislature's drafting choices. The rule operates on whatever facts the legislature recognized as "essential to [the defendant's] punishment." *Booker*, 543 U.S. at 231 (quotation marks omitted). It does not speak to what those facts must be.

75. The disconnect between the abundant procedural constitutional protections and the relative scarcity of corresponding substantive requirements regarding what counts as a "crime" has been the subject of a great deal of commentary. Several commentators have argued that it makes no sense to attach heightened requirements of proof to offense elements if the Constitution does not require the relevant facts to be part of the offense. *See, e.g.*, Ronald J. Allen, *The Restoration of* In Re Winship*: A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30, 46 (1977) (contending that so long as "a given punishment is not disproportional to what the state has proved beyond a reasonable doubt notwithstanding the presence or absence of any mitigation factors, . . . the mere addition of an affirmative defense, which after all could constitutionally be ignored," raises no constitutional problem); George C. Christie & A. Kenneth Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L.J. 919, 934–38 ("If the legislature has constitutional power to make an offense out of elements A and B, it is ridiculous to say that it cannot make another element, C, an exculpatory factor unless it is highly probable, more probable, or even probable that not –C is the case or that the defendant will be able to prove C, if in fact C is the case."); John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1348–49 (1979) (arguing that "constitutional insistence on [the reasonable doubt] standard should take account of the scope of legislative authority over the definition of crimes" and that the standard is constitutionally required only with respect to "those matters that the state is constitutionally required to establish"). *But see* Harold A. Ashford & D. Michael Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 188–93 (1969) (rejecting the "greater includes the lesser" rationale for permitting the legislature to shift the burden of proof to the defendant on some facts so long as the government constitutionally could punish the defendant for the offense without recognizing those facts at all). Others have argued that the existing procedural protections are inadequate or counterproductive without any substantive requirements to back them up and have proposed substantive theories of offense definition to fill that void. *See, e.g.*, Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CAL. L. REV. 1665, 1666 (1987) ("[D]ue process of law imposes on the government the burden of proving the defendant's guilt beyond a reasonable doubt, whether the legislature has classified, or might constitutionally classify, the exculpatory facts at issue as relating to an element of the crime or to an affirmative defense."); Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CAL. L. REV. 335, 341, 371–82 (2000) (arguing that there is a need for a substantive theory of offense definition and describing one such theory, known as the harm principle); Stuntz, *supra* note 71, at 1, 29–38 (asserting that "without substantive limits, important parts of the law of criminal procedure seem likely to fall apart" and exploring possible substantive limits based on mens rea requirements and the principle of desuetude); Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1305–06 (1977) (arguing that the reasonable-doubt rule should apply to all facts that affect a defendant's guilt, including affirmative defenses). *But cf.* Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1300 (1998) (arguing that academic preoccupation with the need for substantive criminal law obscures a "quite different process narrative—a story of a Constitution engaged in a considered and established relationship with the substance of criminal law, but a relationship founded on understandings of process").

76. *See* Mullaney v. Wilbur, 421 U.S. 684, 692 (1975) (striking down a Maine statute that defined murder as killing with malice aforethought but placed the burden on the defendant to prove "by a fair preponderance of the evidence" the provocation required to reduce the offense to manslaughter, such that malice would be assumed absent proof to the contrary from the defendant).

legislature has no constitutional obligation to restrict the category of "murder" to killings committed with malice. It can instead treat all intentional killings as murders, in which case malice need not be proved at all and the jury will not consider it.[77] And because the legislature is free to ignore the question of malice altogether, it also can take the more modest step of deciding how malice (or its absence) may be proved.[78] The greater power includes the lesser. Thus, the legislature can treat the absence of malice as an affirmative defense, in which case the defendant will bear the burden of production or persuasion on that issue.[79] Or it can treat malice aforethought as a sentencing factor that will subject the defendant to a mandatory minimum sentence within the range prescribed by the murder statute, in which case the fact can be found by a judge under the preponderance-of-the-evidence standard.[80]

Congress's choice to rely on its own findings regarding the effects of prohibited conduct on interstate commerce rather than making a commercial effect an element of the offense may appear to be yet another consequence of legislative supremacy in crime definition. On that understanding, it should not be surprising that the facts that establish the connection between the defendant's conduct and interstate commerce must be proved to a jury beyond a reasonable doubt if Congress opts to include them in the definition of the offense, but that neither the reasonable-doubt nor the jury-trial requirement applies to such facts if Congress decides to omit a jurisdictional element. Just as a legislature can prohibit all intentional killings as murders, the view suggests, Congress can prohibit all possession of marijuana (for example) rather than limiting the offense to those acts that have some effect on interstate commerce.

The difficulty with that understanding is that legislative supremacy is at best incomplete in the context of the Commerce Clause. The precise boundaries of the commerce power are the subject of great debate, but few commentators and judges—and certainly not the majority of the current

77. *See* Patterson v. New York, 432 U.S. 197, 205 (1977) (rejecting a challenge to a New York statute that treated all intentional killings as murders, making the absence of malice an affirmative defense).

78. *See id.* at 209 ("[I]n each instance of a murder conviction under the present law New York will have proved beyond a reasonable doubt that the defendant has intentionally killed another person, an act which . . . the State may constitutionally criminalize and punish. If the State nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonable certainty.").

79. *See id.* at 205–06 (rejecting a due process challenge to the New York statute, which placed the burden on the defendant to prove the absence of malice by a preponderance of the evidence); *see also* Jeffries & Stephan, *supra* note 75, at 1329–31 & nn.8–12 (discussing and citing various state-law affirmative defenses that place the burden of production, persuasion, or both on the defendant with respect to particular issues).

80. *See* Harris v. United States, 536 U.S. 545, 557 (2002) (rejecting a Sixth Amendment challenge to 18 U.S.C. § 924(c), which prohibits carrying a firearm in relation to a drug trafficking offense and imposes a mandatory minimum sentence based on evidence of the additional fact that the defendant "brandished" a firearm).

Court—believe that Congress can regulate conduct that has no plausible effect on interstate commerce.[81] That is not to say that current Commerce Clause doctrine requires Congress to "legislate with scientific exactitude."[82] As a practical matter, the rational basis test applied in cases like *Raich* permits Congress to regulate or prohibit conduct that *in fact* has no effect on interstate commerce. Such slippage, however, is best understood as a function of deference—a consequence of the difference between a requirement of rationality and a requirement of truth in fact—not evidence of a conscious judgment on the part of the majority to permit Congress to reach activities that concededly have no connection to interstate commerce.

To put the point somewhat differently, it is notable that none of the Justices in *Raich* suggested that Congress's power to prosecute possession of medical marijuana could be sustained solely on the basis of the facts that would be proved in a prosecution under the Controlled Substances Act. Instead, the Court's decision rested on additional facts about marijuana possession and its link to interstate commerce.[83] One can debate what sort of a showing is or should be required to justify a federal prohibition, but one thing is clear: the facts that establish the nexus between the prohibited

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81. *See* Gonzales v. Raich, 125 S. Ct. 2195, 2208–09 (2005) (rejecting a challenge to the Controlled Substances Act because "Congress had a rational basis for believing" that a failure to prohibit the possession of home-grown marijuana would have a substantial aggregate effect on the interstate market for marijuana); *id.* at 2224 (O'Connor, J., joined by Rehnquist, C.J. and Thomas, J., dissenting) (arguing that Congress lacks the authority to prohibit "the personal cultivation, possession, and use of marijuana for medical purposes" because "it has not been shown that such activity substantially affects interstate commerce"). In his separate opinion concurring in the judgment in *Raich*, Justiee Scalia suggested a more capacious understanding of the commerce power, one that might permit Congress to reach conduct with no connection to interstate commerce. *See id.* at 2216 (Scalia, J., concurring) ("Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce."); *id.* at 2217 ("Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."). Although the merits of Justice Scalia's opinion—which was joined by no other Justice—are beyond the scope of this Article, one point bears mention: it is difficult to imagine an intrastate activity, the regulation of which is necessary for the proper functioning of a broader economic regulation, that does not itself have any effect on interstate commerce (or *would not* have such an effect if excluded from the regulation). Indeed, the principal reason Justice Scalia provided for concluding that Congress's comprehensive regulation of the interstate market for illegal drugs "could be undercut" by excluding home-grown medical marijuana was that drugs are fungible and home-grown medical marijuana could easily leak into the interstate market in ways that would be difficult to detect. *Id.* at 2219–20. That is precisely the same reason given by the majority for its conclusion that Congress rationally could have found that home-grown marijuana, if unregulated, would have a substantial effect on interstate commerce. Thus, it is not clear that even Justice Scalia believes that the Commerce Clause permits Congress to reach conduct with no connection to interstate commerce.

82. *Id.* at 2206.

83. *See, e.g., id.* at 2207–09 (discussing reasons why Congress rationally could find that "leaving home-consumed marijuana outside federal control would . . . affect price and market conditions," including the characteristics of the market for marijuana, the "likelihood that the high demand in the interstate market will draw such marijuana into that market," and the difficulty in distinguishing home-grown marijuana from marijuana grown elsewhere).

conduct and interstate commerce are not gratuitous from a constitutional perspective in the same way as malice aforethought. Congress cannot simply deem such facts irrelevant to criminal punishment; they have to be found somehow, by someone.

Thus, while it is true that legislatures typically can avoid the reasonable-doubt and jury-trial requirements by removing a given fact from the definition of the relevant offense, it does not necessarily follow that Congress can circumvent those procedural protections by removing from the offense definition the facts that establish the nexus to interstate commerce and *finding those facts itself.* Such facts—I will call them "jurisdictional facts" for the sake of convenience[84]—are not constitutionally gratuitous in the sense that Congress can take them off the table altogether. Accordingly, the traditional "greater includes the lesser" justification for permitting the legislature to adjust the requirements of proof is not available in the context of the Commerce Clause. If findings-based statutes are to be defended, it must be on some other ground.

B. The Distinctive Features of Criminal Law

A second possible explanation for the failure of courts and commentators to offer any justification for reliance on congressional findings in the criminal arena is that they assume that findings-based statutes merely substitute one finding of fact for another comparable finding. As the discussion thus far should make clear, such an assumption is deeply mistaken. Findings-based statutes change the question being asked in a fundamental way—from an inquiry focused on the facts of a particular case to a generalized assessment of the typical characteristics of a broad class of activity—and reduce the level of certainty from proof beyond a reasonable doubt to mere rationality. As explained in more detail in the following Parts,

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84. By adopting that shorthand, I do not mean to invoke the moribund "jurisdictional fact doctrine" under which courts would engage in de novo review of the findings of administrative agencies regarding the facts that brought a regulated party within their statutory jurisdiction. *See* Crowell v. Benson, 285 U.S. 22, 60–61 (1932); *see also* Louis L. Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953 (1957) (describing the jurisdictional fact doctrine); Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1449 (2001) (describing the demise of the doctrine); *cf.* Buzbee & Schapiro, *supra* note 4, at 91 & n.32 (suggesting that the Court's failure to defer to Congress in *Lopez*, *Morrison*, and recent Section Five cases has parallels with the jurisdictional fact doctrine). Nor do I rely on the closely related doctrine of "constitutional fact," which provides for heightened judicial review of facts that establish the basis for the *legislature's* power to regulate certain conduct. *See* Jaffe, *supra*, at 971. My use of the term "jurisdictional fact" is simply descriptive; I mean to refer to any facts that establish the basis for a particular sovereign's power over a particular defendant. My focus is on a particular type of jurisdictional fact—facts that establish the basis for an exercise of the commerce power—but the category could be drawn more broadly. For example, the facts that place a particular crime in State *A* rather than State *B* are relevant to the territorial jurisdiction of State *A*, and might be called "jurisdictional facts" for that reason.

moreover, federal legislators and local jurors have very different mandates and incentives; they are not automatically interchangeable.

The failure of Commerce Clause jurisprudence to heed the differences between congressional findings and jurisdictional elements is tied to its failure to distinguish between criminal and civil legislation. I suspect that most legal scholars, if asked to name an example of a findings-based statute that illustrates why Congress should be permitted to legislate on the basis of its own understanding of the commercial effects of certain activities, would identify a civil statute. As noted above, until relatively recently criminal Commerce Clause statutes tended overwhelmingly to contain jurisdictional elements; the first criminal statutes that prohibited conduct defined entirely without reference to interstate commerce, based solely on congressional findings, were enacted in the late 1960s.[85] Accordingly, it was primarily in the *civil* sphere that courts and Congress tussled over the need for Congress to be able to address broad economic problems with broad regulations.[86] Those precedents were then applied, without much reflection, to the new breed of findings-based criminal laws.[87]

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85. *See* Robert L. Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271, 273 (1973) (noting that the loan sharking statute, together with other legislation enacted in late 1960s and early 1970s, went "further [than previous criminal enactments] in prohibiting all conduct of a specific type, whether or not an interstate connection o[r] effect is established for the particular crime"); *see also* NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 34 (2d ed. 1993) (noting that "the broadest jurisdictional peg in the pre-1960s [criminal] commerce power statutes was found in the Hobbs Act").

86. Think of the paradigmatic cases, the cases that established and confirmed the tradition of deference to Congress—*Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)—all of them involved civil statutes. The possible exception is *United States v. Darby*, 312 U.S. 100 (1941), in which the Court overruled *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and rejected a challenge to the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2000), which created wage and hour requirements for certain classes of employees and imposed criminal sanctions on employers who willfully violated those requirements. *Darby* is a difficult case to classify. By today's standards, the statute *does* have a jurisdictional element—the wage and hour requirements apply only to employees "engaged in . . . the production of goods for [interstate] commerce." 29 U.S.C. § 206(a) (codifying the minimum wage provisions); *id.* § 207(a) (codifying the maximum hour provisions). But the Court sustained the provision as an exercise of Congress's power to regulate intrastate activities that substantially affect interstate commerce on the view that Congress rationally concluded that the production, under substandard labor conditions, of goods intended for interstate sale would affect the interstate market through competition with goods produced under better (and more costly) labor conditions. *Darby*, 312 U.S. at 122–23.

87. In *Perez v. United States*, the Court rejected a challenge to the loan-sharking statute largely on the ground of civil precedents such as *Wickard*, *Heart of Atlanta Motel*, and *Katzenbach v. McClung*. 402 U.S. 146, 156–57 (1971). The Court also cited *Darby* as support for a findings-based criminal prohibition, *id.* at 152–53, though it ignored the fact that the offense at issue in *Darby* was defined in part by reference to interstate commerce, *see supra* note 86. *Cf.* Baker, *supra* note 28, at 530 ("Although it interpreted the 'affecting commerce' rationale expansively in economic matters, the Court generally took a much more restrictive view in criminal cases prior to 1970 when it decided *Perez v. United States*."). Interestingly, the Court's opinion in *Perez* suggests that the only criminal law-specific objection to a findings-based statute would be grounded in vagueness. *See Perez*, 402 U.S. at 153 ("[*Darby*] is particularly relevant here because it involved a

But criminal prohibitions are different from civil regulations, and there are reasons to think differently about the propriety of findings when they serve as the basis for criminal punishment. Consider the advantages that findings-based statutes have over statutes with jurisdictional elements. First, if activity *X* has an effect on interstate commerce in the vast run of cases, it is easier for Congress to make a categorical finding with respect to that connection rather than to require proof of economic effects in each case. Second, because Congress can look at the problem holistically rather than one case at a time, it may be able to discern effects on commerce that are visible only on a panoptic view. Jurisdictional elements, in other words, may let some commerce-affecting conduct slip through the cracks.

Neither of those considerations—promoting efficiency or avoiding underinclusiveness—holds much sway when criminal punishment is on the line. Criminal prosecutions are not supposed to be easy or costless.[88] The consequences of a criminal conviction—stigma and loss of liberty—are different, and typically much worse, than those that follow from an unfavorable verdict in a civil case.[89] Given the significance of those consequences, our society has made "a fundamental value determination . . . that it is far worse to convict an innocent man than to let a guilty man go free."[90] That determination reflects a critical distinction between civil and criminal cases. Whereas in civil cases there is no reason ex ante to err on the side of the defendant or the plaintiff, in criminal cases the costs of error are asymmetrical in the sense that a pro-prosecution error is less tolerable and more costly than a pro-defendant error.[91] Criminal cases therefore are governed by procedures designed not to promote accuracy as

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criminal prosecution, a unanimous Court holding that the Act was 'sufficiently definite to meet constitutional demands.'" (quoting *Darby*, 312 U.S. at 125)).

88. *See* United States v. Booker, 543 U.S. 220, 244 (2005) ("[T]he interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly."); Blakely v. Washington, 542 U.S. 296, 313 (2004) ("Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice."); *see also* United States v. Freed, 401 U.S. 601, 608 (1971) ("The fact that the ordinance [in *Lambert v. California*, 335 U.S. 225 (1957),] was a convenient law enforcement technique did not save it.").

89. *See* Stuntz, *supra* note 71, at 24–27; *see also* HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 134 (1968) (arguing that criminal punishment is different from civil sanction because it is "imposed to express community condemnation of the original offense").

90. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

91. *See* MCCORMICK ON EVIDENCE § 341 (John W. Strong ed., 5th ed. 1999) ("[I]n a civil case a mistaken judgment for the plaintiff is no worse than a mistaken judgment for the defendant. However, this is not the case in a criminal action."); Stuntz, *supra* note 71, at 25 ("Whether or not the guilty defendant goes to jail, the victim's harm will still exist; the only injury from letting the defendant off is the loss of deterrence coupled with any intangible harm occasioned by the unjust result. That cannot equal the injury inflicted on the wrongly punished innocent defendant.").

such but to "promote one-way accuracy" so as to avoid unwarranted convictions.[92]

Primary among the defendant-protective procedures in criminal cases is the requirement that the prosecution prove every element of the offense beyond a reasonable doubt. By resolving any uncertainty in the defendant's favor, the reasonable-doubt rule responds to the asymmetrical costs of error by minimizing the risk of erroneous convictions.[93] Civil cases typically are governed by the very different preponderance-of-the-evidence standard.[94] And in civil cases the burden of proof may be shifted from one party to another based on considerations of convenience and efficiency—for example, where one party has better access to the relevant information.[95] Efficiency and comparative convenience are largely irrelevant in criminal prosecutions, however, which are governed by rules whose very purpose is to make it harder to convict than to acquit.[96]

Criminal prosecutions also differ from civil cases with respect to the unique strength of the institution of the criminal jury. The criminal jury has the power to decide not only the facts of the case, but also the law, by acquitting the defendant even though the evidence proves that he is guilty of

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92. Stuntz, *supra* note 71, at 24–25; *see* Jackson v. Virginia, 443 U.S. 307, 315 (1979) ("[B]y impressing upon the factfinder the need to reach a subjeetive state of near certitude of the guilt of the accused, the [reasonable-doubt] standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself."); *Winship*, 397 U.S. at 363 ("'[A] person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.'" (quoting *In re* Samuel W., 24 N.Y.2d 196, 205 (1969))).

93. *See Winship*, 397 U.S. at 363 ("The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error."); Speiser v. Randall, 357 U.S. 513, 525–26 (1958) ("Where one party has at stakc an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.").

94. *See* MCCORMICK ON EVIDENCE, *supra* note 91, § 339.

95. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 209 (1973) ("There are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, 'is merely a question of policy and fairness based on experience in the different situations.'" (quoting 9 J. WIGMORE, EVIDENCE § 2486, at 275 (3d ed. 1940))); MCCORMICK ON EVIDENCE, *supra* note 91, § 337 (explaining that "there is no key principle governing the apportionment of the burdens of proof" but rather there are several factors to consider, including fairness to the party who must bear the burden, the likelihood of facts to be proved, and whether the party is advaneing a judicially disfavored contention); Fleming James, Jr., *Burdens of Proof*, 47 VA. L. REV. 51, 66 (1961) (observing that in civil cases "[a]ccess to evidence is often the basis for creating a [burden-shifting] presumption" on the grounds of convenience, fairness, and public policy).

96. *See* Mullaney v. Wilbur, 421 U.S. 684, 702 (1975) ("[A]lthough intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not, as the Court has long recognized, justify shifting the burden to him."); Tot v. United States, 319 U.S. 463, 469 (1943) (explaining that, in criminal cases, considerations of comparative convenience do not justify shifting the burden of proof to the defendant on an element of the offense).

the crime charged.[97] The trial judge cannot direct a verdict for the prosecution no matter how strong the evidence of guilt,[98] and an acquittal by a criminal jury is shielded absolutely from appellate review.[99] Matters are different in the civil arena. "[T]he civil jury can be *confined* to the province of fact-finding" through the devices of "directed verdicts, judgments notwithstanding the verdict, special verdicts, partial directed verdicts, interrogatories to accompany general verdicts, the ordering of new trials for inconsistent verdicts, judicial comment on the evidence, issue preclusion based on previous fact-finding, and appeals and new trial orders based on legal errors affecting verdicts"—all of which are permissible in civil cases but not criminal prosecutions.[100]

The same procedural protections that differentiate civil trials from criminal prosecutions also serve to differentiate findings-based statutes from jurisdictional elements. Recall the three points of difference outlined above: rationality versus proof beyond a reasonable doubt; congressional judgment versus that of a jury; and a generalized inquiry versus an individualized one. All implicate requirements peculiar to the criminal law: the requirement that the prosecution prove beyond a reasonable doubt that the defendant committed the acts for which the government seeks to punish him; the defendant's right to insist that a local jury[101] determine his guilt; the rule that a jury's verdict of not guilty cannot be challenged on appeal; and the refusal

97. In criminal cases the jury is responsible both for finding the facts relevant to criminal punishment and for applying the law to those facts and drawing the ultimate conclusion of guilt or innocence. United States v. Gaudin, 515 U.S. 506, 513 (1995). If the jury returns a verdict of not guilty, its decision cannot be reviewed on appeal—not even for obvious error. Sullivan v. Louisiana, 508 U.S. 275, 277 (1993); United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). As a result, juries have the power (if not the right, *see* Sparf v. United States, 156 U.S. 51, 71–72 (1895)) to nullify the law in the defendant's favor. *See, e.g.*, Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 48–49 (2003) ("Because the Double Jeopardy Clause shields *absolutely* a jury's general verdict of acquittal from review, the jury has necessarily been given the power to decide the law as well as the facts in criminal cases.").

98. *See* Jackson v. Virginia, 443 U.S. 307, 317 n.10 (1979); *Martin Linen Supply Co.*, 430 U.S. at 572–73 (stating that the criminal jury's "overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government" and, thus, a trial judge may not convict a criminal defendant or direct a jury to convict no matter "how overwhelmingly the evidence may point in that direction").

99. *See* Peter Westen, *Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1006–07 (1980) ("[T]he jury-acquittal rule . . . accords absolute finality to jury acquittals . . . even where the acquittals are known to be 'egregiously erroneous.'" (quoting Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam))).

100. *Id.* at 1013–15 & nn.42–50; *cf. Gaudin*, 515 U.S. at 522 (refusing to rely on a civil precedent holding that the jury's role could be confined to pure factfinding, explaining that "nonentitlement under the Sixth Amendment to a jury determination cannot possibly be thought to follow *a fortiori* from [the Court's approval of such a rule in a civil case]").

101. The Sixth Amendment requires that the jury be drawn from the "district wherein the crime shall have been committed." U.S. CONST. amend. VI; *see also infra* notes 133–34 (discussing the vicinage requirement). The Seventh Amendment contains no such limitation, providing only that "[i]n suits at common law, . . . the right of trial by jury shall be preserved." U.S. CONST. amend. VII.

of the criminal justice system to permit potential gains in efficiency to trump the procedural protections for individual defendants.

The gap between legislative findings and case-by-case proof therefore is different—and much larger—in criminal prosecutions than in civil cases because findings permit Congress to avoid procedural protections that apply only in criminal cases. As such, it makes no sense to say that Congress should be permitted to rely on findings in the criminal sphere simply because findings-based statutes are valid, and valuable, in the civil sphere. To rely on civil precedents as support for the same power in criminal cases is akin to saying that criminal prosecutions should be governed by the preponderance-of-the-evidence standard because that standard works well in civil litigation. Both statements ignore the fact that criminal prosecutions are subject to distinctive rules designed quite self-consciously to make it harder for the government to send someone to jail than to regulate her conduct by civil means. If a persuasive case for findings-based criminal prohibitions is to be made, it must take account of the difference between criminal punishment and civil sanction.

IV. The Costs of Categorical Findings: Jurisdictional Facts and the Purposes of the Reasonable-Doubt and Jury-Trial Guarantees

The decision to permit Congress to legislate by means of categorical prohibitions generates distinctive costs in the criminal context. By diluting the requirements of proof, excluding the jury from the decisionmaking process, and promoting efficiency over error-avoidance, findings-based statutes allow Congress to establish the predicate for federal action free from the procedural requirements that protect individual defendants from unwarranted criminal punishment.

Arguably, however, avoidance of the reasonable-doubt and jury-trial requirements ought not to be cause for concern when the facts at issue are jurisdictional in nature. Courts and commentators long have struggled with the sense that jurisdictional facts somehow are *different* from other facts relevant to criminal punishment, prompting some to suggest that such facts can and should be exempted from the procedural protections that apply to traditional offense elements such as actus reus and mens rea.[102] That

102. For example, beginning in the late 1960s and continuing through the early 1980s, Congress seriously considered a wholesale revision to the federal criminal code that, among other things, would have distinguished the jurisdictional requirements of federal statutes from the other offense elements, specifying that jurisdiction was a legal issue to be resolved by the trial judge rather than a factual element of the crime to be decided by the jury. *See* S. REP. NO. G5-605, at 620 (1977). For a thorough description of the reform effort, see Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 92–129 (1998).

If enacted today, the proposed federal code reform almost certainly would founder on the shoals of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny—at least as a formal matter. As explained above, *supra* note 74, the rule established in *Apprendi* and confirmed in later cases requires the prosecution to prove to the jury beyond a reasonable doubt any fact that the statute in

intuition suggests a possible defense for findings-based criminal prohibitions. Legislative findings seem problematic only to the extent that they depart from what the Constitution would require if the relevant jurisdictional facts were included in the definition of the offense. If jurisdictional elements could be excused from the requirements of proof beyond a reasonable doubt and presentation to the jury without any violence to the values served by those rules, the problem would disappear.

This Part will seek to show that jurisdictional facts *do* implicate the purposes of the reasonable-doubt and jury-trial guarantees. Individual defendants have a significant interest in accurate, individualized proof of the facts that make them eligible for federal punishment and in a jury finding with respect to those facts. The costs of a move from jurisdictional elements to findings-based statutes are quite real, therefore, and warrant consideration in any meaningful inquiry into the proper implementation of the commerce power.

A. Incarceration, Stigma, and the Reasonable-Doubt Rule

As explained above, the requirement that the prosecution prove every element of a criminal offense beyond a reasonable doubt is designed to minimize the risk of erroneous convictions.[103] Application of the rule in

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question "makes essential to [the defendant's] punishment." United States v. Booker, 543 U.S. 220, 231 (2005) (quotation marks omitted); *see also Apprendi*, 530 U.S. at 499 (Scalia, J., concurring) ("[T]hc guarantee that [i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury, has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury." (quotation marks omitted)); *id.* at 501 (Thomas, J., concurring) ("[A] 'crime' includes every fact that is by law a basis for imposing or increasing punishment . . . ."). The Court applied that rule in the *Apprendi* line of cases to invalidate sentencing schemes that "expose[d] the criminal defendant to a penalty *exceeding* the maximum [sentence] he would receive if punished according to the facts reflected in the jury verdict alone." *Apprendi*, 530 U.S. at 483 (invalidating a sentence of two years over the statutory maximum); *see also Booker*, 543 U.S. at 226 (involving a sentence of eight years and two months above the maximum permitted by the jury's verdict); Blakely v. Washington, 542 U.S. 296, 299 (2004) (disallowing a sentence of three years and one month over the statutory maximum). The rule would seem to apply *a fortiori* to jurisdictional facts that establish the interstate commerce nexus, since a connection to commerce is essential not merely to the duration of punishment but to the availability of *any* punishment at the hands of the federal government. *See* William M. Carter, Jr., *'Trust Me, I'm a Judge': Why Binding Judicial Notice of Jurisdictional Facts Violates the Right to Jury Trial*, 68 MO. L. REV. 649, 653 (2003) (making a similar point with respect to facts that establish territorial jurisdiction). Nevertheless, *Apprendi* is not a complete answer to the questions of how and to whom jurisdictional elements ought to be proved in criminal prosecutions because the sentencing cases provide no answer to the charge that jurisdictional facts are so different from other facts relevant to criminal punishment that the same rules do not (or should not) apply.

103. *See supra* notes 89–93 and accompanying text. It is worth emphasizing that the requirement of proof beyond a reasonable doubt is a requirement of proof *as to the defendant*. Evidence about conduct *like* the defendant's may be relevant to the issues at trial—for example, the prosecution in a drug-distribution case may seek to prove an intent to distribute by introducing evidence that drugs packaged like those in the defendant's possession tend to be destined for sale. *See* Turner v. United States, 396 U.S. 398, 420 (1970) (discussing circumstantial evidence that tended to show an intent to distribute, including possession of heroin "packaged to supply

criminal cases, but not civil ones, is based on a judgment that the consequences of criminal conviction—incarceration and stigma—are especially dire. By reducing the risk of pro-prosecution errors, the reasonable-doubt rule protects against unfair imposition of those pains.[104]

At first blush, jurisdictional facts may not seem to implicate the traditional concerns about erroneous convictions in the same way or to the same degree as other offense elements. If jurisdictional facts are relevant only to determining which sovereign can prosecute the defendant, it may be hard to see why the presence of such facts would increase the stigma that attaches to a particular offense. And as for loss of liberty, the relevant concerns are *whether* the defendant will be incarcerated and for *how long*, not whether he will be in state or federal prison.

In some circumstances, however, mistakes as to jurisdiction can bear a direct connection to loss of liberty and stigma. It is largely for that reason that the overwhelming majority of state courts have held that facts relevant to *territorial* jurisdiction must be proved beyond a reasonable doubt.[105] Their reasoning applies with equal force to questions concerning the scope of Congress's legislative authority under the Commerce Clause.[106]

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individual demands"); United States v. Hamilton, 978 F.2d 783, 786 (2d Cir. 1992) (discussing the use of circumstantial evidence to support an inference of distribution). Nevertheless, the ultimate question for the jury is not whether drugs packaged in a particular way usually are intended for distribution but whether the defendant in fact possessed drugs with an intent to distribute them. The difference matters: one might conclude beyond a reasonable doubt that drugs packaged in small bags usually are intended for distribution yet find that evidence of similar packaging is not enough to prove beyond a reasonable doubt that a particular defendant had an intent to distribute, given all of the facts of his case. Thus, the individualized nature of the inquiry further guards against the risk of error as to any defendant.

104. *See Apprendi*, 530 U.S. at 484 ("Prosecution subjects the criminal defendant both to 'the possibility that he may lose his liberty upon conviction and . . . the certainty that he would be stigmatized by the conviction.' We thus require [proof beyond a reasonable doubt], among other, procedural protections in order to 'provide concrete substance for the presumption of innocence,' and to reduce the risk of imposing such deprivations erroneously." (citations omitted)); *see also* Allen, *supra* note 75, at 38 ("The value protected [by the reasonable-doubt rule] is the policy of preferring errors benefiting the accused over those favoring the prosecution. . . . [T]he interests that this value preference protects [include] the accused's interest in liberty and his good name . . . .").

105. *See* WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIMINAL LAW § 4.1 (2d ed. 2003) (explaining that "the more recent cases have quite consistently held that [territorial] jurisdiction is a matter which must be proved beyond a reasonable doubt").

106. *See, e.g.*, McKinney v. State, 553 N.E.2d 860, 863 (Ind. Ct. App. 1990) ("To establish that a court acts with authority when it convicts a defendant, it is necessary that it demonstrate its authority employing the highest standard of proof."); State v. Baldwin, 305 A.2d 555, 559 (Me. 1973) (explaining that the requirement that territorial jurisdiction must be proved beyond a reasonable doubt "reflects the gravity of the effect upon the judicial process and upon the rights of defendants of an erroneous factual determination of the issue of jurisdiction"); State v. Butler, 724 A.2d 657, 665 (Md. 1999) ("[T]erritorial jurisdiction, although not an element of the crime, is a necessary and fundamental element of the broader concept of jurisdiction."); People v. McLaughlin, 606 N.E.2d 1357, 1359 (N.Y. 1992) (stressing the importance of the determination "[w]hether any conduct has been committed which the State has the power to criminalize and for which it can commence prosecution against the defendant").

First, and most obviously, a particular act may be a crime in one jurisdiction but not another.[107] Where that is true, an erroneous finding with respect to a jurisdictional fact implicates both of the concerns that underlie the reasonable-doubt and jury-trial rules.

Second, even if the same act is a crime in both of the relevant jurisdictions, there is no guarantee that it will be prosecuted to the same extent. Prosecutors, both state and federal, enjoy vast amounts of discretion.[108] As a result, one jurisdiction cannot predict whether another jurisdiction will attempt to prosecute the defendant at all, and—if so—how the defendant will be charged, whether he will be permitted to plead to a lesser charge, and so on.

Third, even if one could predict that the same offense would be prosecuted the same way in both jurisdictions, the degree of loss of liberty and stigma resulting from conviction might be quite different.[109] It is well known, for example, that the federal government attaches far more severe penalties to drug offenses than do many states.[110] The drug statutes are not outliers; federal sentences generally tend to be longer than state sentences for equivalent crimes.[111] Indeed, the likelihood of receiving *any* sentence of

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107. Although the majority of federal offenses also are prohibited under state law, *see infra* note 177 and accompanying text, that is not always the case. *Raich* is an example of a case where the conduct in question was prohibited under federal law but legal in the state in which it occurred. *See* Gonzales v. Raich, 125 S. Ct. 2195, 2199–3000 (2005) (explaining that the respondents' possession of medical marijuana was permitted under California state law).

108. *See* AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 18 (1998) ("The selection of which crimes to investigate and prosecute . . . requires a decisionmaking process which reflects highly selective prioritizing by investigative agencies and federal prosecutors."); Dennis E. Curtis, *The Effect of Federalization on the Defense Function*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 85, 88 (1996) ("In practice, individual United States Attorneys differ widely both in the selection of offenders to prosecute and in the choice of which crimes to charge."); Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155 (2005) (discussing prosecutors' charging discretion).

109. The error-minimization goal of the reasonable-doubt rule applies not only to questions of guilt versus innocence but also to questions of degree—more stigma, longer incarceration. *See Apprendi*, 530 U.S. at 484 ("[W]e have made clear beyond peradventure that *Winship*'s due process and associated jury protections extend, to some degree, to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." (quotation marks omitted)); Mullaney v. Wilbur, 421 U.S. 684, 698 (1975) ("The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty.").

110. In 2002, the most recent year for which comprehensive data is available, the average drug sentence in state court was 32 months, while the average sentence in federal court was 76 months. MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, BULLETIN: FELONY SENTENCES IN STATE COURTS, 2002, at 3 tbl. (2004) [hereinafter DOJ, FELONY SENTENCES]. The numbers are even more striking when one compares sentences for drug *possession*: an average of 22 months in state court versus an average of 79 months in federal court. *See id.*

111. In 2002, the average sentence for a felon convicted in state court was 36 months; the average sentence for a felony conviction in federal court was 58 months. *See id.*; *see also* Ashdown, *supra* note 28, at 811 ("Due to the federal sentencing guidelines, defendants in federal court are treated much more harshly than their counterparts charged under state law, even though the nature of the crimes are identical."); Rachel E. Barkow, *Federalism and the Politics of*

incarceration is significantly greater in federal court than it is in state court.[112] And the collateral consequences of a federal offense—such as the loss of the right to vote, to serve on a jury, to hold public office, or to possess firearms—may in some instances be worse than those associated with an equivalent offense under state law.[113]

Even when the same act could give rise to prosecution and exposure to similar sentences in state or federal court, a federal conviction may carry a greater stigma. Federal statutes often are passed because of a perception that a particular crime is particularly serious or morally blameworthy.[114] Similarly, "the public may think federal defendants are worse" than state offenders because "[i]n other fields, federal intervention often signals that a case is particularly important."[115] It therefore is "natural for the public to think that, if the federal government prosecutes five percent of all felonies,

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Sentencing, 105 COLUM. L. REV. 1276, 1312–13 & nn.170–72 (2005) (discussing the disparity between state and federal sentences). Moreover, the available evidence suggests that a key factor in federal prosecutors' decisions whether to prosecute a given offense federally is whether state or federal law carries the higher sentence. *See* Brickey, *supra* note 56, at 1163–64 (discussing the Justice Department's policy and noting that "[p]rosecutors may be making decisions on the basis of which jurisdiction will put the defendant in the most disadvantageous position").

112. In 2002, the proportion of state defendants sentenced to prison was 41%, compared to 75% of defendants in federal court. *See* U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL CASE PROCESSING: WITH TRENDS 1982–2002, at 12 fig.3 (2005); DOJ, FELONY SENTENCES, *supra* note 110, at 3 tbl. The numbers are closer for felony convictions: 69% of state felons were sentenced to incarceration in 2002, compared with 83% of felons convicted in federal court. *See* DOJ, FELONY SENTENCES, *supra* note 110, at 3 tbl.

113. The collateral consequences that attach to a federal felony conviction typically mirror those that would attach to an equivalent state conviction because both federal and state laws imposing such consequences tend not to distinguish between federal and state convictions. *See, e.g.*, FLA. CONST. ART. VI § 4 ("No person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights or removal of disability."); 28 U.S.C. § 1865(b)(5) (2000) (providing that a conviction in federal or state court of a crime punishable by imprisoument for more than one year disqualifies an individual from serving on a federal grand or petit jury if "his civil rights have not been restored"); 18 U.S.C. §§ 921(a)(20), 922(g)(1) (2000) (prohibiting firearm possession by anyone convicted in "any court" of a crime punishable by imprisonment for more than one year unless he "has been pardoned or has had his civil rights restored"). The difference between a federal and state conviction is in how long those consequences apply, which in turn depends on the mechanisms available for restoration of a convicted felon's civil rights. The only way to restore civil rights after a federal felony conviction is to obtain a presidential pardon. *See* U.S. DEP'T OF JUSTICE, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION, http://www.usdoj.gov/pardon/collateral_consequences.pdf. Although twelve states follow a similar procedure (requiring a pardon from the Governor), others have a more streamlined administrative procedure for restoration of civil rights, and still others automatically restore civil rights to convicted felons upon the completion of their sentences. *See id.*

114. *See* AM. BAR ASS'N, *supra* note 108, at 15 ("Observers have recognized that a crime being considered for federalization is often 'regarded as appropriately federal because it is serious . . . .'"); William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL'Y 139, 147 (1998) (noting the common perception that to federalize an issue is to recognize its importance); *cf.* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 531–32 (2001) (describing the genesis of the federal car-jacking statute, 29 U.S.C. § 2119 (2004), and explaining that federal legislators can generate significant political returns from such "symbolic legislation" aimed at crimes that have captured the public's attention).

115. Stuntz, *supra* note 114, at 544.

they are probably the worst five percent."[116] Whether that perception is correct,[117] the result may be that the facts that establish federal jurisdiction, although not *themselves* stigmatizing, expose the defendant to greater stigma simply by virtue of converting the crime into a federal offense.[118]

Thus, criminal defendants have a very real interest in avoiding federal conviction even in situations in which they could be charged with a similar offense at the state level. Any move that increases the risk of federal conviction—like the move from jurisdictional elements to findings-based statutes—registers as a cost to individual defendants.

B. Moral Culpability, Nullification, and the Function of the Jury in Criminal Cases

The jury-trial requirement also is designed to protect against unfair imposition of the pains of criminal conviction, but the protection is different. We do not vest decisionmaking responsibility in twelve laypersons because we think they necessarily are better—more efficient, more accurate—than a solitary judge at finding the facts relevant to criminal punishment.[119] Rather, the jury-trial guarantee "reflect[s] a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and

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116. *Id.*

117. *See id.* (explaining that "federal defendants may well be, on average, less culpable than local defendants"); *see also* Curtis, *supra* note 108, at 90 (noting the disconnect between the public perception that federal prosecutions are saved for drug kingpins and the fact that 36% of sentenced drug offenders in federal system are "low-level . . . offenders").

118. It is worth noting that the argument that jurisdictional facts should be treated differently because they do not affect the severity of the sentence or the attendant stigma is not only overinclusive—because jurisdictional facts can and often do implicate both concerns—but also grossly underinclusive. It has never been suggested that the reasonable-doubt requirement applies only when a particular number of prison years is on the line, such that it can be ignored when, for example, the defendant is already facing a life sentence. Nor has anyone seriously argued that the requirement applies only to those offense elements that affect the defendant's moral blameworthiness. Countless state and federal statutes prohibit conduct that few people think of as "criminal" in the same sense as common law offenses such as robbery, murder, and the like. Such statutes create what are commonly known as "regulatory offenses," Baker, *supra* note 28, at 538, and prohibit conduct ranging from failing to keep accurate records of the wages paid to one's employees, 29 U.S.C. § 215(a)(5) (2000), to tearing the tag off a mattress, 15 U.S.C. § 70c (2000). One might debate whether such offenses should be subject to criminal penalties. But where they are, there is no question that their elements must be proved beyond a reasonable doubt, even though a conviction for such an offense rarely is particularly stigmatizing. *See* Baker, *supra* note 28, at 538–39 ("While it may be 'criminal' to violate the Fair Labor Standards Act, such a violation is not generally thought of as a 'crime.' It lacks the moral turpitude of a crime such as fraud.").

119. United States v. Booker, 543 U.S. 220, 244 (2005) (recognizing that "in some cases jury factfinding may impair the most expedient and efficient sentencing of defendants"); Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) (emphasizing that "the jury-trial guarantee . . . has never been efficient"); *see also* David C. Brody, Sparf *and* Dougherty *Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89, 97 n.78 (1995) (noting that "[n]either efficiency nor technical accuracy provide a rationale for reliance on juries").

liberty of the citizen to one judge or to a group of judges."[120] The jury provides a mechanism for interposing "the people" between the individual accused and the power of government.[121] Thus, the individual cannot be convicted simply because the government and its officials believe he should be punished; he "can forfeit his liberty . . . only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came."[122]

Given that jurisdictional facts determine whether the defendant falls within the power of the prosecuting sovereign, such facts plainly implicate the purpose of the jury-trial guarantee. That is so even if jurisdictional facts do not implicate the defendant's moral culpability.[123] A good number of crimes (both state and federal) involve conduct that few people consider to be morally culpable *at all*.[124] There is a rich debate over whether morally

120. Carella v. California, 491 U.S. 263, 268 (1989) (Scalia, J., concurring) (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."); *Duncan*, 391 U.S. at 155 ("A right to jury trial is guaranteed to criminal defendants in order to prevent oppression by the Government.").

121. *Booker*, 543 U.S. at 237; Blakely v. Washington, 542 U.S. 296, 306 (2004) ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."); Williams v. Florida, 399 U.S. 78, 100 (1970) ("[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."); *see also* Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L. REV. 641, 682 (1996) ("At root, jury trials were, in Thomas Jefferson's words, 'trials by the people themselves.'" (quoting a letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789), *reprinted in* THE PAPERS OF THOMAS JEFFERSON, 1788–89, at 676, 678 (Julian P. Boyd ed., 1958))).

122. United States *ex rel.* McCann v. Adams, 126 F.2d 774, 775–76 (2d Cir. 1942) (Hand, J.).

123. A distinction between guilt in a formal sense and guilt in a moral sense was at the heart of the efforts at federal code reform described above. *See supra* note 102; *see also* NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, PROPOSED NEW FEDERAL CRIMINAL CODE § 103 cmt. (1971) ("Jurisdiction is not an element of an offense . . . , because jurisdiction goes only to the power of a government to prosecute. Whether or not it is proper for the *federal* government to prosecute is a separate question from whether or not the defendant has done something criminal."); Roger A. Pauley, *An Analysis of Some Aspects of Jurisdiction Under S. 1437, the Proposed Federal Criminal Code*, 47 GEO. WASH. L. REV. 475, 480 (1978) ("[T]he fundamental purpose of the jury trial guarantee . . . does not require the jury to determine all factual issues in a criminal case. . . . The jury instead plays an indispensable role, for constitutional purposes, only in the determination of guilt."). *But see* AM. BAR ASS'N, AMERICAN BAR ASSOCIATION POLICY REGARDING S. 1—THE PROPOSED FEDERAL CRIMINAL CODE (94TH CONGRESS) 3–4 (1975) (arguing that the proposed revision would have infringed on the jury's constitutional responsibilities); John Quigley, *The Federal Criminal Code Revision Plan: An Epitaph for the Well-Buried Dead*, 47 GEO. WASH. L. REV. 459, 464 (1978) (same).

124. *See supra* note 118; *cf.* Bilionis, *supra* note 75, at 1280–82 (noting that criminal law often "sacrifices moral precision" and that cases involving strict liability offenses "leave considerably less room for moral input from lay jurors" and instead confine the jury's role "to determining whether the conduct and circumstantial elements of the offense are satisfied").

innocent conduct should give rise to criminal penalties,[125] but where jail time is at stake no one believes that juries should be removed from the picture simply because resolution of the facts in question does not require moral judgment.[126] The purpose of the jury is not to determine whether the defendant did something criminal but to determine whether he did the particular act or acts that expose him to a particular criminal punishment.[127]

Just as jurors usefully can bring their common-sense judgment to bear on questions relevant to whether the defendant qualifies for a sentence enhancement,[128] they can offer a distinct viewpoint with respect to whether the defendant's conduct was sufficient to bring it within an area of federal concern.[129] Local jurors, after all, may be more sensitive to federal overreaching than are federal judges. The point is amplified if one compares local jurors to federal legislators. The comparison rarely is made since most disputes about the jury-trial guarantee involve the division of labor between judges and juries; findings-based statutes are unique in the sense that they substitute the judgment of *Congress* for that of juries on the factual predicate for federal action. But that move is if anything more troubling than a shift from jury to judge. The jury is set up as a check against governmental overreaching precisely because we recognize that legislatures—both state and federal—often pass broad laws whose application in individual cases

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125. *See generally* John Shepard Wiley, Jr., *Not Guilty by Reason of Moral Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999).

126. It is not immediately clear, moreover, that jurisdictional facts are morally irrelevant. Consider the Dyer Act, 18 U.S.C. § 2312 (2004), which prohibits knowingly transporting a stolen car across state lines. One might plausibly take the view that interstate movement is an additional moral wrong since it suggests an attempt to avoid detection and prosecution.

127. *See* Blakely v. Washington, 542 U.S. 296, 306–07 (2004) ("The jury could not function as circuitbreaker in the [government's] machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the [government] *actually* seeks to punish.").

128. *See* Apprendi v. New Jersey, 530 U.S. 466, 478–85 (2000) (describing the jury's historical role in finding facts that expose the defendant to a higher degree of punishment).

129. *See* Duncan v. Louisiana, 391 U.S. 145, 156 (1968) ("The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. . . . If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it."); Barkow, *supra* note 97, at 58 (describing the Framers' concern that "judges would favor the government over the people themselves" because, "in order to be nominated and confirmed, federal judges would have to be well-connected to government officials" and "would not necessarily have any connection to the community in which they would sit"); *cf.* Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 571–82 (1998) (discussing factors that can distort judges' decisionmaking as compared to jurors'); Anne Bowin Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377, 1389 (1994) ("[F]act-finding requires more than objective assessment of the evidence presented—the fact-finder must select between or among competing perspectives, a task that engages the fact-finder's personal perspectives. A jury, which represents a range of perspectives, may perform the nonobjective aspect of fact-finding more effectively than a judge." (citation omitted)).

may be unjust.[130] Judges are an imperfect protection against that danger because they too are officers of the government.[131] Nevertheless, both judges and juries have an advantage over legislators in the sense that they look at the question of desert one case at a time, translating a general judgment into one tailored to the individual circumstances of each defendant. By eliminating that case-by-case assessment of jurisdictional facts, findings-based statutes eliminate a potent protection against the tendency toward excessive criminalization.

Indeed, the jury is particularly well-suited to guard against federal overreaching. One of the core purposes of the institution of the criminal jury is to apply the conscience of the local community to the question of the defendant's guilt.[132] To that end, the Sixth Amendment requires that the jury in a criminal case be drawn from the "district wherein the crime shall have been committed."[133] It ensures that the law will be filtered not only through "the people" but through a particular subset of the polity: the local community.[134] Requiring local juries to find a connection between the

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130. *See, e.g.*, HANS & VIDMAR, *supra* note 66, at 155 ("Because lawmakers cannot anticipate every set of circumstances, it is up to the jury to adjust the general rule of law to the justice of the specific case."); John H. Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUDICATURE SOC'Y 166, 170 (1929) ("The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved.").

131. *See* Neder v. United States, 527 U.S. 1, 32 (1999) (Scalia, J., concurring in part and dissenting in part) (emphasizing that judges "are officers of the Government, and hence proper objects of that healthy suspicion of the power of government which possessed the Framers and is embodied in the Constitution").

132. *See, e.g.*, Barkow, *supra* note 97, at 59 ("The jury possesses the power to elaborate the governing norms underlying criminal laws from the perspective of the community . . . ."); Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1658 (2000) ("Local jurors stamp the community's judgment on the verdict, permit the trial to serve as an outlet for community concern, and interpret ambiguous statutory terms in light of the common sense of the community. These essential jury functions were understood by the Founders . . . ."); Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 31 & n.110 (2001) (describing John Adams's view that "the jury was the 'Voice of the People,' the community personified to render judgment in a particular case"); *see also* A HANDBOOK OF JURY RESEARCH § 3.03(b) (Walter F. Abbott & John Batt eds., 1999) (reporting that studies of jury decisioumaking "show that jury verdicts mirror local sentiments").

133. U.S. CONST. amend. VI. The vicinage requirement is evidence that the jury-trial guarantee is not simply a promise that the defendant's guilt will be decided by "the people" rather than the government but also is designed to channel decisionmaking in a way that gives primacy to the judgment of the community. *See* Amar, *supra* note 121, at 685–88. For discussions of the genesis of the requirement, see Engel, *supra* note 132, at 1673–91, and Lisa E. Alexander, Note, *Vicinage, Venue, and Community Cross-Section: Obstacles to a State Defendant's Right to a Trial by a Representative Jury*, 19 HASTINGS CONST. L. Q. 261, 264–66 (1991).

134. The requirement that jurors be drawn from the locality where the offense occurred is not designed solely for the benefit of the defendant—indeed, in some circumstances it may run directly counter to the defendant's self-interest, as when jurors from a particular locality are likely to be more outraged by a given offense than jurors from afar. *See* Engel, *supra* note 132, at 1658–60 (citing as examples trials of officers involved in the shooting of Amidou Diallo and the beating of Rodney King). Instead, the vicinage requirement is best understood as a structural mechanism tied

defendant's conduct and interstate commerce—to determine whether the defendant falls within the scope of the federal government's legitimate interests—puts that protection to work in a concrete and straightforward way.

One might object that jurisdictional facts are unlikely to be the subject of good-faith dispute and therefore that any disagreement between judge and jury will be the result of jury nullification.[135] After all, the requisite connection between the defendant's conduct and interstate commerce need not be particularly robust. The Hobbs Act, for example, is satisfied so long as the defendant's conduct affected interstate commerce "in any way or any degree,"[136] and courts have interpreted that command to require only a *de minimis* effect on commerce.[137] Since any imaginable robbery or extortionate act will have at least *some* effect on interstate commerce, the argument goes, a jury acquittal on the jurisdictional element is more likely to reflect defiance of the legal standard than any judgment about the facts of the defendant's case.

There is reason to doubt the claim that jurisdictional facts are hardly ever in dispute. Although it is virtually impossible to identify cases in which defendants have been acquitted because the jury was not persuaded on the jurisdictional element of the Hobbs Act and like statutes, the number of cases in which guilty verdicts have been overturned on appeal makes clear that there is ample room for good-faith disagreement on what sorts of activities affect interstate commerce.[138] To be sure, the disagreements tend to center on the proper application of the legal standard set out in the jurisdictional element rather than on purely factual questions of what the defendant did and to whom. But such disputes nevertheless fall squarely within the jury's

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to the democratic function of the criminal jury, guaranteeing a voice for local values in each case. *See id.*

135. Nullification is made possible by the distinctive rules that govern criminal prosecutions. *See supra* notes 97–100 and accompanying text.

136. 18 U.S.C. § 1951(a) (2000).

137. *See* St. Laurent, *supra* note 30, at 91 & n.167 ("Prior to *Lopez*, every federal court of appeals that had considered the jurisdictional requirement of the Hobbs Act had found it satisfied by a de minimis connection to interstate commerce." (citing cases)). Every court to consider the question has held that the *de minimis* standard survived the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995). United States v. Williams, 342 F.3d 350, 354 (4th Cir. 2003); United States v. Clausen, 328 F.3d 708, 711 (3d Cir. 2003); United States v. Peterson, 236 F.3d 848, 851 (7th Cir. 2001); United States v. Malone, 222 F.3d 1286, 1295 (10th Cir. 2000); United States v. Smith, 182 F.3d 452, 456 (6th Cir. 1999); United States v. Hickman, 179 F.3d 230, 231 (5th Cir. 1999) (en banc) (affirming the panel's decision by an equally divided vote); United States v. Alfonso, 143 F.3d 772, 775 (2d Cir. 1998); United States v. Nelson, 137 F.3d 1094, 1102 (9th Cir. 1998); United States v. Robinson, 119 F.3d 1205, 1208 (5th Cir. 1997); United States v. Castleberry, 116 F.3d 1384, 1387 (11th Cir. 1997); United States v. Harrington, 108 F.3d 1460, 1465 (D.C. Cir. 1997).

138. *See supra* note 67 (citing cases in which the Hobbs Act and money laundering convictions were overturned on appeal based on insufficient evidence of commercial effects); *see also* United States v. Mills, 204 F.3d 669, 670 (6th Cir. 2000) (reversing a judgment of acquittal on a Hobbs Act charge for solicitation of bribes from individuals because the defendants "had actual knowledge that the bribe money would be obtained through loans made in interstate commerce").

"constitutional responsibility . . . not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence."[139]

Though there is scant basis for the claim that a jury finding in the defendant's favor on a jurisdictional element always will be the result of nullification, it cannot be denied that jurors *may* resort to nullification with respect to jurisdictional elements. It does not follow, however, that such elements ought to be removed from the jury's consideration. The power to nullify is the power to correct for overinclusiveness in the criminal law—to shift the focus from the general to the individual and say that although the broad terms of the law technically apply to the defendant's conduct, the defendant does not fall within the perceived spirit of the law and therefore should be spared.[140] That principle has obvious application to jurisdictional facts regarding the interstate commerce nexus, on which federal power to prosecute the defendant turns. In cases in which federal law prohibits conduct that is permitted under state law, nullification can be a powerful statement in favor of the state-level policy decision and against that of the federal government.[141] And in cases in which the offense at issue is a crime under both federal and state law, nullification may convey the jurors' judgment that the defendant does not deserve to be punished by the federal government. That judgment might be based on jurors' knowledge of the harsh consequences of a federal conviction, such as the widely publicized penalties for possession of crack cocaine;[142] it might reflect their view that

139. United States v. Gaudin, 515 U.S. 506, 514 (1995).

140. Jury nullification is a contentious issue. *See* JEFFREY ABRAMSON, WE THE JURY 61–95 (2000) (discussing the history of nullification and arguments for and against it). While some believe that the jury's "power to issue an unreviewable general verdict despite the letter of the law introduces a critical check on the government," Barkow, *supra* note 97, at 37, others contend that jury nullification is at best a nuisance, "an unavoidable result of the recognition of two other important rights: the defendant's right under the Sixth Amendment to a jury's independent assessment of the facts, and the defendant's interest in the finality of acquittals protected by the Double Jeopardy Clause," Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 446–47 (1998) (citation omitted). The broad terms of that debate are beyond the scope of this Article. If jury nullification is invalid across the board, then plainly it provides no reason to distinguish jurisdictional facts from other facts relevant to criminal punishment. We can therefore assume that jury nullification is valid at least some of the time and ask whether there is reason to think differently about the issue when jurisdiction is on the line.

141. *Cf.* JAMES P. LEVINE, JURIES AND POLITICS 109 (1992) ("It is not only in regard to defining and redefining ambiguous parts of the law that local views are brought to bear by jurors. Outright jury nullification of relatively clear-cut statutes also normally reflects local feelings about laws.").

142. Under federal law, offenses involving five grams of crack cocaine generate the same sentence as 500 grams of powder cocaine, 21 U.S.C. § 841(b)(1)(B)(ii)(II), (iii) (2000), even though most cocaine is imported into the country in powder form, and powder cocaine can easily be converted into crack. *See* William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1258, 1263, 1269, 1273–74 (1996) (providing information about the importation of cocaine powder and the process by which cocaine powder is

the defendant's conduct was not serious enough to warrant "going federal"; or it might be inspired by the jurors' belief that the federal government has no legitimate interest in prosecuting local crimes. But whatever the precise reasons for it, nullification on jurisdictional grounds has a direct link to the government-checking purpose of nullification more generally.

Like a move away from individualized proof beyond a reasonable doubt, then, a shift from a case-by-case jury finding to a categorical finding by federal legislators constitutes a loss, a cost, for criminal defendants. Defendants have a real interest in a jury's finding of the facts that expose them to criminal punishment. The benefit to defendants is not simply a windfall in the sense that involving the jury might lead to more acquittals for reasons unrelated to the core purposes of the jury-trial guarantee. Instead, requiring juries to find the facts that establish the basis for federal punishment ensures that the jury serves its key function "as circuitbreaker in the [government's] machinery of justice."[143]

V. Deference to Congressional Findings

We have seen that permitting Congress to prohibit conduct under the Commerce Clause based on its own findings regarding the typical economic effects of such conduct has a significant downside. The move from jurisdictional elements to findings increases the risk that individual defendants will be subjected to criminal punishment even though their conduct had no effect on interstate commerce. It also removes the jury—as representative of the people generally and the local community in particular—from the decisionmaking process. Those costs are ignored in the vast literature on the Commerce Clause. Properly understood, however, they suggest the need to think twice about the propriety of categorical findings-based legislation when criminal punishment is at stake.

This Part will examine whether the costs of findings-based prohibitions are justified by the asserted benefits of leaving questions of commerce largely to Congress's discretion. Because the costs under consideration are tied to the distinctive protections that govern criminal prosecutions, any analysis of the benefits of legislative findings must be context-specific as well. This Part will consider the two most common justifications for deference to Congress on Commerce Clause matters: first, that "the structure of American politics" ensures that Congress will not overstep the bounds of its enumerated powers;[144] and second, that Congress is institutionally better

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transformed into crack and also describing a case in which a supplier of powder cocaine received a significantly lower sentence than two defendants who cooked that powder to create crack cocaine).

143. Blakely v. Washington, 542 U.S. 296, 306 (2004).

144. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 219 (2000); *see* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550–51 (1985) ("[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to

equipped than the courts to resolve complex and far-reaching factual questions regarding the effects of particular activities on the national economy. It will demonstrate that, whatever their merit in the civil sphere, those arguments fail to make a persuasive case for findings-based criminal prohibitions.

A. Political Safeguards

One of the leading arguments in favor of deference to Congress with respect to the commerce power is that judicial review is unnecessary to prevent federal overreaching.[145] That argument descends from Herbert Wechsler's seminal 1954 essay on the "political safeguards of federalism" in which he advanced the view that the structure of American government—including a House made up of members who represent "the people of the states," with state control of districting; a President elected by an Electoral College composed of delegates from each state; and a Senate that "cannot fail to function as the guardian of state interests" given its seniority system, committees, and the possibility of filibuster—ensures that federal legislators will not trample on the interests of their state counterparts.[146] In recent years, several commentators have questioned whether Wechsler's claims accurately describe the modern political reality.[147] But others have stepped in to update Wechsler's central thesis for a contemporary audience. Most notably, Larry Kramer has argued that various overlapping safeguards, including "political parties, the administrative bureaucracy, the intergovernmental lobby," and the role of states as the primary fora for political recruitment and training, work together to inhibit undue federalization.[148]

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observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress." (citing, among others, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175–84 (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954))).

145. The political-safeguards theory has two important aspects, only one of which is relevant for our purposes. The theory holds both that the framers intended that states' rights would be protected through politics rather than judicial review, and that the framers were correct—judicial review continues to be unnecessary because the political safeguards of federalism have proved equal to the task. The first part of the argument, based on original intent, is beyond the scope of this Article. For critiques of the original-intent claim, see, for example, Moulton, *supra* note 31; Yoo, *supra* note 31. It bears emphasis, however, that the historical argument rarely is presented as an independently sufficient basis for judicial deference on commerce issues. Instead, the historical claim typically is paired with the comforting insistence that judicial review is not necessary after all to protect states from federal overreaching. *See infra* notes 146–48 and accompanying text.

146. Wechsler, *supra* note 144, at 546–58.

147. *See, e.g.*, Calabresi, *supra* note 4, at 790–99; Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 860–68 (1979); *see also* Moulton, *supra* note 31, at 911–12 (noting the "remarkable weakness . . . of [the political-safeguards] claim as a matter of political science").

148. Kramer, *supra* note 144, at 285; *see also* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1520–42 (1994) (highlighting the bond between federal and state politics that results from strong political parties). For a critique of the "political science" aspect of Kramer's

The goal of the political-safeguards argument is to defend the practice of deferential rational basis review of federal legislation against the charge that a more robust form of judicial scrutiny is needed to protect states against potential federal excesses. As such, the argument rests on a tacit assumption that legislation enacted under the Commerce Clause imperils only states' rights, even when it prescribes criminal penalties. It should be clear from the previous Part that such a conceptualization is wrong, or at least incomplete, where criminal legislation is concerned. Criminal Commerce Clause statutes are not *only* about states' rights; they also implicate the rights of criminal defendants to adequate proof of facts essential to criminal punishment. Yet for all the talk about process protections for states, no one suggests that federal politics protects criminal defendants in a way that obviates the need for judicial review. To the contrary, it is widely recognized that the interests of criminal defendants get lost in the political process.[149]

It is possible, however, to translate the political-safeguards claim into one that responds to the concerns raised in the previous Part. The argument would go like this: case-by-case adjudication of jurisdictional elements is unnecessary to protect criminal defendants against unwarranted federal punishment because the political safeguards of federalism reduce the risk of error at the front end by ensuring that Congress does not prohibit conduct with no connection to commerce. Likewise, there is no need to subject jurisdictional facts to a jury determination because local interests are fully represented in the political process.

Faith in the political safeguards of federalism therefore might provide a reason to entrust criminal defendants' interests to the political process, on the view that defendants' interests are aligned with—and will be protected by—states' interest in avoiding overbroad federal laws. The difficulty with that view is that, as explained below, the politics of crime control give states scant reason to resist federal overreaching in the criminal context. Far from muting the accuracy- and jury-related concerns described in Part III, consideration of the dynamics of the political proeess suggests all the more

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argument, see Marshall, *supra* note 114, at 149–52, which disputes Kramer's argument that there is a state–federal interdependence promoting respect for states' rights and instead argues that there is a strong political trend toward nationalization and the expansion of federal power.

149. *See* Donald Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1089 (1993) ("[L]egislators undervalue the rights of the accused for no more sinister, and no more tractable a cause than that a far larger number of persons, of much greater political influence, rationally adopt the perspective of a potential crime victim rather than the perspective of a suspect or defendant."); Stuntz, *supra* note 71, at 20 ("A lot of constitutional theory has been shaped by the idea . . . that constitutional law should aim to protect groups that find it hard or impossible to protect themselves through the political process. If ever such a group existed, the universe of criminal suspects is it."); *cf.* Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CAL. L. REV. 1013, 1025 (2004) ("[A] prisoner's only hope often lies in the courts. It is highly unlikely that the majority of people, in their exercise of popular constitutionalism, will act to protect prisoners and their rights.").

reason to require case-by-case adjudication of the facts that expose individuals to federal criminal punishment.

1. Federal Criminal Law Today.—Arguments about the political safeguards of federalism usually begin with the observation that states have done fairly well so far without much help from the Court. Kramer, for example, maintains that, notwithstanding the unprecedented size of the modern federal government, "the important objects of daily life are still chiefly matters of state and local, not federal, cognizance."[150] That may be an accurate description of the relationship between the entire body of federal law and the entire body of state law. The claim is unpersuasive, however, if one focuses on *criminal* law.

Federal criminal law has expanded exponentially in the last century, far outpacing growth at the state level. At the founding, crime was almost entirely a matter of state control. The first federal criminal bill prohibited only actions that infringed on clear federal interests: treason, serious felonies in federal forts, piracy and other felonies on the high seas, and related crimes.[151] With the exception of crimes committed on federal land, offenses against individuals were solely a matter of state law.[152] Matters are notably different today. State criminal codes have expanded, to be sure.[153] But federal criminal law is broader still; recent estimates suggest that the number of federal offenses is larger than that of most states, and in many cases *much* larger.[154]

Whatever the precise numbers, it is impossible to deny that the ratio of state-to-federal criminal offenses has changed dramatically in the past two centuries. In the context of criminal law, it simply is not the case that "the important objects of daily life" are matters of state, not federal, cognizance. Instead, we have a system of largely overlapping jurisdiction.

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150. Kramer, *supra* note 144, at 227.

151. *See* Act For the Punishment of Certain Crimes Against the United States, Apr. 30, 1790, 1 Cong. Ch. 9, 1 Stat. 112; DWIGHT F. HENDERSON, CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801–1829, at 7–8 & tbl.1 (1985) (describing the 1790 Crimes Act).

152. *See* Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996) (asserting that, before the Civil War, the scope of federal criminal jurisdiction was very narrow and violent crimes "were the exclusive concern of the states").

153. William Stuntz cites statistics for three representative states, Illinois, Virginia, and Massachusetts, all of which experienced growth in their criminal codes, expanding from a range of 131 to 214 offenses in 1856, to between 421 and 535 offenses in 2001. Stuntz, *supra* note 114, at 513–14. Stuntz acknowledges that today's numbers "seriously understate the growth in the number of separate offenses" in most state codes, *id.* at 514, but he agrees that "[f]ederal criminal law probably covers more conduct . . . than any state criminal code," *id.* at 517.

154. One recent estimate places the number of federal offenses at over four thousand. John S. Baker, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 3 (2004), *available at* http//www.fed-soc.org/Publications/practicegroupnewsletters/criminallaw/crimreportfinal.pdf. Compare the state figures, *supra* note 153.

2. Federal Legislators' Incentives to Expand Federal Criminal Law.— Criminal punishment is a distinctly, perhaps uniquely, one-sided issue for legislators. No politician, state or federal, Democrat or Republican, wants to appear "soft on crime."[155] Indeed, in this age of partisan rancor, crime control may be the one truly bipartisan issue.[156] While other issues provide opportunities for uncontroversial platforms—who can't claim to be "for the environment" on some level?—federal criminal legislation provides a rare opportunity for political gains with few, if any, countervailing costs. Industry groups may oppose otherwise politically attractive environmental programs, for example, but almost no one opposes new efforts at crime control.[157] The group affected most directly by criminal legislation, potential criminal defendants, has little political influence.[158] And while groups such as the ACLU often represent the interests of those accused of crime, debates about criminal law tend to be dominated by victims' rights groups, prosecutors, law enforcement agencies, and ordinary voters concerned for their personal safety.[159] As a result, while other areas of the law experience ebbs and flows, federal criminal law almost always expands.[160]

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155. *See* Ashdown, *supra* note 28, at 794 ("It is virtually inconceivable today to imagine a political position that does not include a 'get tough on crime' stance."); Barkow, *supra* note 111, at 1280–81 ("Candidates for office at all levels of government—from the presidency, to Congress, to state officials—have learned that an opponent's charge that they are soft on crime can be devastating to their political futures because it resonates with voters."); Stuntz, *supra* note 114, at 508 (noting that federal criminal law has expanded steadily "under very different sorts of Congresses and Presidents").

156. *See* Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 43 (1997) ("By 1996, it was hard to find a difference between the positions of the Republicans and Democrats on crime issues."); Stuntz, *supra* note 114, at 509 ("[B]oth major parties have participated in a kind of bidding war to see who can appropriate the label 'tough on crime.'").

157. *See* Beale, *supra* note 156, at 43 ("[T]here is little if any political resistance to changes such as harsher sentences for federal offenders, [and] more broadly defined federal crimes . . . .").

158. *See* Barkow, *supra* note 111, at 1282 (noting that criminal defendants are unlikely to expect to be caught and, once prosecuted and convicted, "it is hard to imagine a more anemic political group"); Dripps, *supra* note 149, at 1090 (explaining that "very few people expect to commit crimes that come to the attention of the police" and that "the group of people who might expect to be targets of police investigation or defendants at a criminal trial, whether they are guilty or innocent, is largely confined to a small segment of the electorate").

159. Several commentators have described the array of interests aligned in favor of tougher criminal laws and penalties. *See, e.g.*, Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 728–29 (2005); Dripps, *supra* note 149, at 1091–94 (citing police, prosecutors, victims, and even potential victims as examples of groups pushing for harsher criminal statutes); Stuntz, *supra* note 114, at 544–45 (focusing on the disproportionate power wielded by federal prosecutors due to the increased public attention given to federal criminal cases). For a discussion of the various factors that influence the public's fear of crime and desire for ever-broader laws and stricter punishments, see generally Beale, *supra* note 156, at 45–47, 64.

160. *See* Ashdown, *supra* note 28, at 807 ("Additional criminal legislation is more likely . . . than repeal of some that now exists; the latter, simply put, would be bad politics."); Stuntz, *supra* note 114, at 527–28 ("[C]riminal law expands in different areas at different times and

The problem goes deeper still, however. Commentators have observed that criminal law, including federal criminal law, "will always be broader than ordinary majoritarian politics would suggest."[161] The extra push typically is supplied by prosecutors, who have their own institutional reasons for wanting more crimes on the books. As William Stuntz has explained, "[l]egislators gain when they write criminal statutes in ways that benefit prosecutors" because prosecutors are the most salient interest group and legislation that helps prosecutors typically translates into more convictions—a good result for everyone except criminal defendants.[162] For their part, "[p]rosecutors gain from statutes that enable them more easily to induce guilty pleas."[163] The easier it is to prove an offense, the easier it is to persuade the defendant that nothing will be gained by going to trial. As a result, prosecutors tend to clamor for broader criminal prohibitions.[164]

That dynamic can be observed in the development of federal criminal legislation targeting gambling on the basis of its presumed links to organized crime. Congress first tried to regulate gambling by focusing on interstate movement. The Gambling Devices Act prohibited the interstate transportation of any "machine or mechanical device . . . designed and manufactured primarily for use in connection with gambling,"[165] and the Travel Act made it a crime to travel in interstate commerce or to use the mail or any facility in interstate commerce in connection with any unlawful activity.[166] By the late 1960s, however, federal prosecutors had grown dissatisfied with the existing mechanisms for reaching illegal gambling. Representatives from the Department of Justice testified before Congress that "many Federal investigations of gambling operations end with no indictments because of the lack of evidence of an interstate element."[167] A

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places, but it always expands."); *see also* AM. BAR ASS'N, *supra* note 108, at 15 ("There is widespread recognition that a major reason for the federalization trend—even when federal prosecution of these crimes may not be necessary or effective—is that federal crime legislation is politically popular.").

161. Stuntz, *supra* note 114, at 528.

162. *Id.*

163. *Id.*

164. Stuntz illustrates the point as follows: "[A] given crime is defined by elements ABC; A and B are easy to prove, but C is much harder. Criminalizing AB, with the understanding that prosecutors will determine for themselves whether C is satisfied, raises the odds of conviction and reduces enforcement costs." *Id.* at 531.

165. Act of Jan. 2, 1951, 64 Stat. 1134 (1951) (codified as amended at 15 U.S.C. §§ 1171–1177 (2000)).

166. Foreign Travel in Aid of Racketeering Enterprises Act, Pub. L. No. 87-228 § 1(a), 75 Stat. 498, 498 (1961) (codified as amended at 18 U.S.C. § 1952 (2000)); *see* Rewis v. United States, 401 U.S. 808, 811–14 (1971) (holding that the Travel Act applied to an operator of a gambling establishment if he, or his agents or employees, traveled across state lines in furtherance of an illegal activity, but not if only his customers traveled interstate in order to place bets).

167. S. REP. NO. 91-617, at 72 (1969) (Conf. Rep.) (quoting the DOJ's statement at the hearings). Federal prosecutors also complained that the limits of existing law hindered investigations because it could be difficult at the investigatory stage to show an interstate connection, as was required in order to obtain a search warrant based on a probable cause to believe

broader prohibition that "eliminat[ed] the requirement that an interstate element be proved in each case" would solve that problem, they explained, offering both "a promise of conserving investigative manpower requirements and an opportunity of concluding successfully investigations that have been thwarted in the past and cases that have not been subject to prosecution in Federal courts for lack of proof of a specific interstate aspect."[168]

Congress responded with the Organized Crime Control Act of 1970,[169] which prohibited all "illegal gambling business[es]."[170] Gone was the jurisdictional element that had hampered investigation and prosecution under prior law. Instead, the new Act relied on congressional findings to establish the basis for federal jurisdiction as a categorical matter. Congress had determined that "illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof."[171] In prosecutions under the Act, that finding would operate as a proxy for a case-specific showing that the defendant's gambling activities affected interstate commerce.

It is easy to understand why Congress acceded to prosecutors' requests for a broader prohibition on gambling. Although, by its terms, the new statute applied to a huge portion of gambling activity nationwide, Congress did not have to worry that it would overwhelm federal prosecutors, courts, and prisons. Federal prosecutors are under no obligation to prosecute every act that falls under a given statute,[172] and their "[e]nforcement discretion dramatically changes the trade-offs legislators face when defining crimes."[173] Especially at the federal level, legislators know that very few potential offenses will be prosecuted.[174] Because they do not need to balance the

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that federal law was being violated. *Id.*; *see also* Brickey, *supra* note 28, at 33 ("[I]nvestigations of large gambling operations often foundered because the government could prove an interstate nexus with the gambling activities of only a few of the many participants.").

168. S. REP. NO. 91-617, at 72 (1969) (Conf. Rep.) (describing the DOJ's testimony).

169. Pub. L. No. 91-452, tit. VIII, 84 Stat. 936 (codified as amended at 18 U.S.C. § 1955 (2000)).

170. The prohibited businesses are defined as gambling businesses that violate state or local law, "involve[] five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business," and "ha[ve] been or remain[] in substantially continuous operation for a period in excess of thirty days or [have] a gross revenue of $2,000 in any single day." 18 U.S.C. § 1955(b)(1)(ii)–(iii).

171. § 801, 84 Stat. at 936.

172. *See* AM. BAR ASS'N, *supra* note 108, at 33 ("A federal prosecutor is under no legal requirement to state why any particular defendant has been selected to be prosecuted in the federal system and receive a significant federal sentence, and why the many other similar defendants are left to state prosecution. Restraint is essentially left to self-imposed prosecutorial discretion."); Stuntz, *supra* note 114, at 543 ("United States Attorneys' offices, together with enforcement agencies like the FBI, have the power to set their own agendas, to decide what cases they wish to spend time on and what cases they wish to ignore.").

173. Stuntz, *supra* note 114, at 547.

174. *See* AM. BAR ASS'N, *supra* note 108, at 19 ("[F]ederal prosecutions comprise less than 5% of all the prosecutions in the nation. The other 95% are state and local prosecutions."). In 2002,

benefits of new criminal legislation against the risk of criminalizing too much, federal legislators "will tend to see criminal law as a one-way ratchet."[175]

3. States' Incentives to Resist the Expansion of Federal Criminal Law.—Given that federal legislators have strong incentives to expand federal criminal law as far as possible, the key question is whether adequate political safeguards exist to provide a check. The answer is no, for the simple reason that states rarely have cause to oppose new federal enactments.[176] Federal criminal law supplements rather than supplants state law, and most federal crimes are crimes under state law as well.[177] If the public demands a governmental solution to some crime-related problem, both the state and federal governments can respond, and legislators at both levels can reap political rewards for getting tough on crime and outlawing fearsome behavior. Nothing is lost, from the states' perspective, as a result of the duplicative federal prohibition.[178] The states still do most law *enforcement*,

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federal convictions accounted for 5.7% of all felony convictions. *See* DOJ, FELONY SENTENCES, *supra* note 110, at 3 tbl.

175. Stuntz, *supra* note 114, at 547; *accord* Dripps, *supra* note 149, at 1090 ("Executive discretion . . . operates as an important shock-absorber that protects legislatures from hostile reaction to law enforcement operations.").

176. That problem is not unique to criminal law. As others have recognized, where there is "pork" to be had from the federal government—whether in the form of farm subsidies, defense contracts, protection from hazardous waste, or any of countless other examples—state legislators often will be eager to get it for the benefit of their own constituents. *See* Calabresi, *supra* note 4, at 797–98; Daryl Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 940–42 (2005); *see also* Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1128 (1997) ("Although those who represent or work for states and localities may be concerned with empowering subnational governments, they will also feel other pressures—programmatic needs, the influence of private interest groups, ambitions to serve in higher levels of government."); John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 89 (2004) (arguing that "[t]he structure of federalism . . . must be protected against the machinations of both federal and state officials" because of the "possibility that principal–agent problems will arise in the maintenance of federalism when the interests of elected officials diverge from those of ordinary citizens"); *cf.* New York v. United States, 505 U.S. 144, 182 (1992) ("[P]owerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests."). That will not always be the case, however; where possible, state legislators likely will prefer to maximize their political rewards by taking credit for services for themselves. *See* Kramer, *supra* note 144, at 223–24 (explaining that, absent political safeguards to counteract the tendency, federal and state legislators would have incentives to act as rivals rather than allies as they vie for the support and gratitude of local constituents). Generally speaking, therefore, the most that can be said is that states will not *always* play their intended role in the political-safeguards game. Matters are more stark in the arena of criminal law, where state acquiescence in the exercise of federal power is likely to be the norm rather than the exception.

177. *See* Ashdown, *supra* note 28, at 793–94; Curtis, *supra* note 108, at 87.

178. *See* Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1195 n.107 (2001) ("When it comes to the federalization of crime, . . . state governments have little interest in speaking up on behalf of criminal defendants."); *cf.* Litman & Greenberg, *supra* note 30, at 970 (arguing that federal statutes that

prosecuting more than ninety percent of all crimes.[179] So federal criminal law does not steal any meat and potatoes from state prosecutors and police chiefs, most of whom are elected.[180]

Not only are state law enforcement personnel unlikely to mind overlapping federal jurisdiction, they may welcome it: given that federal sentences tend to be higher than state sentences,[181] the threat of federal prosecution is a valuable bargaining tool for state prosecutors seeking a guilty plea.[182] And state prosecutors have powerful incentives to get as many guilty pleas as possible.[183]

States are unlikely to cry foul even in the relatively rare instances where federal criminal law exceeds the scope of state law. State law may be narrower than federal law for a host of reasons unrelated to any state interest in encouraging—or even simply permitting—the conduct in question. For example, a state may decriminalize activities not because it deems them blameless but because its limited resources are better spent elsewhere.[184] In

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duplicate state-law prohibitions do not implicate federalism concerns because they "do not preempt state legislation and generate relatively few prosecutions (and those mostly in cooperation with state authorities)").

179. *See supra* note 174. It is important to recognize that the scope of federal law matters even if it largely overlaps with state law and even if it is enforced relatively rarely. First, the fact that prosecutions are rare matters not at all to those defendants who actually *are* prosecuted federally. Second, the existence of a federal criminal prohibition will have some deterrent effect even if the law is seldom enforced. Indeed, one of the reasons federal offenses tend to carry higher sentences than equivalent state offenses is to counteract the rarity of federal enforcement: the idea is that potential offenders will take into account not only the risk of prosecution but the potential cost of conviction and will decide to obey the law. *See* Barkow, *supra* note 111, at 1305–06. Third, the breadth of federal criminal law has tangible consequences for criminal defendants even where it does not result in prosecution because state proseeutors can use the threat of federal prosecution to induce a plea to state charges. *See infra* notes 182–83 and accompanying text. Finally, and perhaps most important, the presence of overlapping federal legislation may retard prolegalization experimentation at the state level. Lobbyists likely will concentrate their efforts on the federal government because it is more effieient to lobby one legislature than fifty and there is little point to legalization in the states if the same conduct is criminal under federal law. *See* Devins, *supra* note 178, at 1194 ("[A]s compared to lobbying fifty state legislatures, there are fewer transaction costs associated with national legislation."); Marshall, *supra* note 114, at 146–47. For their part, state legislators may wish to save their political powder for issues on which they can actually make a difference: tangible benefits are needed in order to outweigh the potential costs of appearing soft on crime. Thus, the breadth of federal criminal law may be somewhat self-sustaining.

180. *See* Stuntz, *supra* note 114, at 533.

181. *See supra* notes 110–12 and accompanying text.

182. *See* Brickey, *supra* note 56, at 1165; Curtis, *supra* note 108, at 95; *see also* Litman & Greenberg, *supra* note 30, at 968 (describing how the San Antonio Independent School District Police Department welcomed federal participation in a state–federal task force on the view that "the threat of federal prosecution was a valuable tool for local law enforcement" and how the Department "protested vehemently" when the U.S. Attorney's Office ceased bringing prosecutions under the Gun Free School Zones Act after the Fifth Circuit's decision in *United States v. Lopez*, 2 F.3d 1342 (1993)).

183. *See* Stuntz, *supra* note 114, at 538 ("Local prosecutors have too many cases and too little time; anything that converts contested trials into guilty pleas is valuable to them.").

184. In a recent article on the politics of sentencing, Rachel Barkow explains that cost constraints may force states to take a more level view of the costs and benefits of criminal

such circumstances, the broader sweep of federal law provides no cause for complaint and may well be a boon to state officials who would put offenders behind bars if they could afford to do so.

To be sure, in some instances the difference between state and federal law may reflect a real policy disagreement on the criminality of certain conduct. But states' complaints about federal criminal law may well fall on deaf ears.[185] Federalism-based arguments do not resonate well with voters, who tend to focus on political outcomes rather than the reasons for them.[186] Thus, states that are at the vanguard of a decriminalization movement, or are resisting a push toward creating some new offense, likely will find it difficult to sway federal legislators reluctant to appear soft on crime.

In sum, the political safeguards of federalism offer scant protection against federal overreaching in the context of criminal law. In the rare instances in which states oppose new federal enactments or desire a repeal of existing prohibitions, any solicitude for the states likely will be overcome by federal legislators' own powerful incentives to take a tough-on-crime stance. Much more common is the situation in which federal law overlaps with state law. In such circumstances, state representatives have little to no incentive to oppose politically popular federal criminal enactments. If there is to be a check against federal overreaching on crime control issues, therefore, it must come from outside of ordinary politics.

B. Institutional Competence

The second argument for leaving questions of commerce largely to Congress is based on comparative institutional competence. For nearly a

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punishment than does the federal government. Barkow, *supra* note 111. The states have finite resources: they have less money at their disposal than the federal government, and typically they cannot engage in deficit spending. *Id.* at 1290. Moreover, the costs of law enforcement—most notably incarceration—make up a large chunk of most states' budgets. *Id.* As a result, states have an incentive to reduce sentences and experiment with alternative forms of punishment. Barkow demonstrates that many states in fact have begun to do just that. *Id.* at 1285–90. Cost considerations, it seems, can counteract the political pressure to be tough on crime. *But see id.* at 1301–02 (explaining that the federal government does not experience similar cost constraints).

185. That is especially true if the proposed solution is the repeal of existing law. As has been well documented elsewhere, it is much easier to block congressional action than to compel it. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEXAS L. REV. 705, 712, 715 (2002) (explaining that the Constitution makes it harder to enact legislation than to block it because the demands of bicameralism and presentment to the President require supermajoritarian consensus before new legislation can be enacted); McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS., Winter & Spring 1994, at 3, 11 ("[A]ttempts to pass new legislation typically must navigate through numerous veto gates before even reaching the presidential approval/veto stage: agreement must be reached among House and Senate committees, the majority party leadership in both chambers, majorities in both chambers, and the president.").

186. *See* Marshall, *supra* note 114, at 145 ("[I]t is politieally damaging to oppose substantively popular legislation on federalism grounds. Any congressman will tell you that she cannot get away with arguing that a given piece of legislation should be defeated simply because Congress does not have authority to enact it.").

century, courts and commentators have championed judicial self-restraint on Commerce Clause issues on the ground that legislators are better than judges at understanding and resolving complex economic questions.[187] Given that there is no reason to believe that courts are better suited than Congress to find the "right" answer, the argument goes, the decision should be left to democratically elected and accountable representatives rather than unelected judges.[188]

Like the political-safeguards argument considered above, the institutional-capacity justification for judicial restraint rests heavily on a set of claims about how institutions work—namely, that Congress is good at finding the sorts of facts relevant to economic issues and courts are not. Congress, it is said, "can readily gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy."[189] "The greater number of members and their varied backgrounds and experience make it virtually certain that the typical legislature will command wider knowledge and keener appreciation of current social and economic conditions than will the typical court."[190] Legislators, moreover, "have substantial staff, funds, time and procedures to devote to effective information gathering and sorting."[191] Legislators can take years to study a

187. *See* Oregon v. Mitchell, 400 U.S. 112, 247–48 (1970) ("The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication."); BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 116–17 (1924) ("Some of the errors of courts have their origin in imperfect knowledge of the economic and social consequences of a decision, or of the economic and social needs to which a decision will respond."); Buzbee & Schapiro, *supra* note 4, at 143 ("The courts . . . are not well-suited to gather the evidence necessary to assess the magnitude of complex social practices . . . .").

188. *See, e.g.*, Henry Wolf Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6, 7 (1924) (explaining that "the layman may be quite ready to defer to the opinion of the court when the decision requires a definition of the legal significance of the phrase 'ex post facto law,'" but not when "he knows of no particular reason for supposing that judges are better able to decide [the relevant question] than other intelligent persons"); Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 210 (1971) ("By hypothesis, judicial review is countermajoritarian . . . . This may not be objectionable when the Court is giving effect to a fairly absolute, enduring command rooted either in the words of the Constitution or in years of constitutional tradition. It is objectionable where the Court is simply second-guessing the legislature on some eclectic question . . . ."); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 887 (2003) ("The high deference usually reflected in 'rationality review' represents a recognition that courts might misunderstand the facts, and that when the facts are unclear, judgments of value should be made politically, not judicially.").

189. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 384 (2001) (Breyer, J., dissenting); *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665–66 (1994) ("As an institution, . . . Congress is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon an issue as complex and dynamic as that presented here." (quotation marks omitted)).

190. Cox, *supra* note 188, at 209.

191. Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 578 (1994).

given problem;[192] they can form special subcommittees to focus on particular issues and develop the necessary expertise;[193] and they can hold hearings across the country, call witnesses, requisition studies, and obtain expert advice from various legislative support services.[194]

Courts, by contrast, must look at problems one case at a time, which may prevent them from taking an appropriately global view of a given issue.[195] They must rely on the information presented by the parties and their amici or engage in their own independent inquiry. But the parties' data may be skewed to support only one side of the dispute,[196] and courts typically lack the resources—the time, the expertise, the sheer manpower—to collect and digest vast amounts of extra-record data.[197]

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192. Devins, *supra* note 178, at 1179 ("Unconstrained by the need to decide a particular case at a particular moment in time, . . . legislative committees may conduct hearings over a number of months, even years, before acting.").

193. *See* Cox, *supra* note 188, at 209 ("The legislative committee, especially when armed with able counsel and power of subpoena, is better equipped to develop the relevant data."); Saul M. Pilchen, *Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337, 363–65 (1984) ("Congress has been understood to have plenary power to investigate. . . . Repeated investigation of a particular subject area often leads a committee or subcommittee to develop substantial expertise, which may well be deferred to by the whole Congress when considering proposed legislation.").

194. *See* Devins, *supra* note 178, at 1179; *see also* Colker & Brudney, *supra* note 4, at 117 ("Congress educates itself not just through structured record evidence but through a range of informal contacts—including local meetings with constituents, ex parte contacts between members (or staff) and lobbyists, and exchanges with executive branch representatives."). The legislative process also affords Congress substantial flexibility to deal with problems that might evolve over time. *See* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 871 (2004) ("Judicial rulemaking is limited by strong stare decisis norms that limit the ability of judicial rules to change quickly; in contrast, legislatures enjoy wide-ranging discretion to enact new rules.").

195. *See* CASS SUNSTEIN, THE PARTIAL CONSTITUTION 147–48 (1993) ("Courts are rarely experts in the area at hand. Moreover, the focus on the litigated case makes it hard for judges to understand the complex, often unpredictable effects of legal intervention. Knowledge of these effects is crucial but sometimes inaccessible.").

196. *See, e.g.*, Cox, *supra* note 188, at 209 ("A court may hear expert witnesses, but they are seldom more than special pleaders. The customary reliance is upon the lawyer's brief . . . ; but even in skilled hands, it hardly equips a court to decide which side is right about a highly controversial social or economic question—assuming that 'rightness' can be proved."); Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 105 (questioning whether judges are capable of reaching wise decisions when parties' experts offer conflicting opinions).

197. *See, e.g.*, Cox, *supra* note 188, at 209 ("Courts have always found it hard to develop the background facts in constitutional cases. Judicial notice often means only intuition or prejudice."); Peggy C. Davis, *'There Is a Book Out . . .': An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1595–98 (1987) (describing how extra-record literature can "infect[] judicial decisionmaking"); David L. Faigman, *"Normative Constitutional Factfinding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 577–93 (critiquing cases in which the Supreme Court has misconstrued, misapplied, or ignored relevant scientific and empirical data); Arthur Selwyn Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1211–18 (1975) (discussing problems that arise when the Court relies on data that has not been subjected to adversarial testing); Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 1006 (1999) ("The review of facts is

Implicit in the institutional critique of courts is an assumption that the factual questions that need to be answered in cases involving the commerce power are the sweeping sort that would benefit from time, expertise, and a national perspective.[198] That assumption makes sense when one considers that the purpose of the institutional-capacity argument is to explain why courts should not strike down Commerce Clause legislation simply because they disagree with Congress's judgment about the connection between a given activity and interstate[199] commerce. The argument, in other words, is directed to *how courts should behave in cases involving findings-based statutes*—cases in which the inquiry necessarily is pitched at a high level of generality, involving the economic characteristics of a broad class of activity.

Given its focus, the institutional-capacity argument has very little traction on the question at issue here: whether Congress ever should be permitted to rely on its own findings, rather than providing for case-by-case adjudication of the jurisdictional facts, when criminal punishment is at stake. The argument tells us why we should prefer judicial deference to Congress over some form of heightened scrutiny of findings-based statutes. It says nothing about why we should prefer categorical congressional findings to case-by-case adjudication by means of jurisdictional elements.

Indeed, the key insight of the institutional-capacity argument—that heightened scrutiny of Commerce Clause enactments requires courts to substitute their judgment for that of Congress on economic questions that Congress is better suited to answer—is simply inapposite to the choice between deferential review of findings-based statutes and case-by-case adjudication by means of jurisdictional elements. Recall that Congress's claimed institutional advantage is that it can look at economic issues holistically whereas judges and juries see only one case at a time. Unlike heightened scrutiny, case-by-case adjudication of jurisdictional elements

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time-consuming. Unlike legislatures and agencies, judges do not have years to amass the huge factual records.").

198. Notice, as well, the assumption that the only relevant factfinders are Congress and courts. There is no place for the jury in the institutional-capacity story. The omission is important, as adding the jury to the mix negates a key aspect of the argument—the claim about relative democratic legitimacy. Congress should have the last word, we are told, because absent some compelling reason to prefer judicial review, unelected judges should defer to the judgment of elected legislators. That claim is weak to begin with. As the discussion in the previous subpart makes clear, there *is* a compelling reason to prefer judicial review in this context: the politics of crime control give federal legislators strong incentives to ignore the constitutional limits on their power. But that is not the only problem. Federal legislators may be the people's representatives, but jurors *are* "the people." *See* LEVINE, *supra* note 141, at 17 ("Elected officials may at times reflect the will of the people, but their views are an indirect representation of current feelings. Jury decision making, on the other hand, is literally the *vox populi*—the voice of the people. It is populism in action."). Congress has no democratic advantage here.

199. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 616–18 (1995) (Breyer, J., dissenting) (critiquing the majority's decision to strike down the Gun Free School School Zones Act on the ground, *inter alia*, that a legislature is more likely than a court to decide accurately whether a significant factual link exists between a given activity and interstate commerce).

does not rule out a role for Congress's holistic judgment. Instead, it divides the inquiry into a generalized question, reserved for Congress, and a defendant-specific question to be answered by the jury.

Consider again the Hobbs Act, which prohibits robbery and extortion that affects interstate commerce "in any way or any degree."[200] As noted above, the Hobbs Act permits conviction on proof of a *de minimis* effect on interstate commerce.[201] That meager requirement may at first blush seem hard to square with the rule that Congress may regulate intrastate activities only if they have a "substantial" effect on interstate commerce.[202] But the Court long has held that Congress may legislate on the basis of the *aggregate* effect of economic activities.[203] The question of aggregation is different in an important respect from the question posed by jurisdictional elements. Jurisdictional elements ask, "did *X* activity affect interstate commerce in this instance?" The answer to that question can change from case to case, depending on the particular circumstances of the defendant's conduct: one defendant's act of extortion may have an effect on interstate commerce while another's may not. Aggregation, on the other hand, asks whether the combined effects of every instance of commerce-affecting *X* are substantial enough to warrant federal action. The answer to that question is not defendant-specific and will not change from case to case. Consistent with the nature of the inquiry, aggregation never has been the subject of a jurisdictional element but instead has been left to Congress's judgment.[204]

Given that jurisdictional elements leave the question of aggregation in Congress's hands, it is hard to see why categorical findings-based prohibitions offer any significant advantages over a case-by-case approach in terms of Congress's ability to see the big picture. Jurisdictional elements and findings-based statutes differ only with respect to the threshold question whether activity *X* had some effect on interstate commerce in the individual case—jurisdictional elements require a case-by-case assessment of whether

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200. 18 U.S.C. § 1951 (2000).

201. *See supra* note 137 and accompanying text.

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

203. *See* Gonzales v. Raich, 125 S. Ct. 2195, 2205–07 (2005) (discussing Wickard v. Filburn, 317 U.S. 111 (1942)).

204. *See supra* note 137 (citing cases holding that the *de minimis* standard of the Hobbs Act survives *Lopez*'s emphasis on "substantial" in the substantial-effects test). Although the courts are unanimous that the effect on commerce to be proved in each case need not be substantial, there is some disagreement on the reason for that rule. Most courts have reasoned that Congress validly may prohibit individual instances of robbery and extortion that have only a small effect on interstate commerce so long as it rationally could conclude that the effects of such activities are substantial when considered in the aggregate. The D.C. Circuit, however, has held that aggregation is unnecessary when the class of conduct being regulated is confined (by means of a jurisdictional element) to conduct that affects interstate commerce. *See* United States v. Harrington, 108 F.3d 1460, 1470 (D.C. Cir. 1997) ("Where the nexus between a federal statute and interstate commerce must be proved in each application of the statute, [the] 'aggregation' doctrine—which is designed to extend the commerce power to cases in which the evidence specific to each individual case may be insufficient to demonstrate the existence of an interstate nexus—is unnecessary.").

the defendant's act *X* affected interstate commerce, whereas findings-based statutes rest on Congress's judgment that every act *X* affects interstate commerce. Why should Congress's national perspective give it an edge on that threshold question? If anything, it would seem that Congress, which necessarily acts on the basis of its understanding of the typical characteristics and consequences of given activities rather than on particular facts about particular cases, would be worse at identifying the commercial effects of an individual defendant's actions than judges and juries, whose judgments are based on individualized evidence. To be sure, in some cases the connection between *X* and interstate commerce may be hard to see without a broader understanding of the national economy. For example, it might not be evident to the average lay person why a particular marketing policy has anti-competitive effects, such that it falls within the prohibition of the antitrust acts.[205] But if Congress has developed special expertise, there is no reason why it cannot share its insight with federal prosecutors, who can then explain the issue to judges and juries.[206]

It should come as no surprise, then, that for all the ink that has been spilled on the question of judicial competence to assess the economic effects of particular activities, no significant concerns have been raised about the capacity of courts and juries to cope with jurisdictional elements. Instead, it appears that courts have had little trouble obtaining the necessary evidence regarding the economic effects of the defendant's conduct and that juries have been capable of understanding that evidence. Nor should their apparent success be particularly startling. The question whether the defendant's conduct affected interstate commerce is simply a question of causation, and courts and juries consider such questions all the time. Causation may be complicated at times, or it may touch on difficult economic or scientific

205. 15 U.S.C. §§ 1–37a (2000).

206. Consideration of Congress's incentives reveals another flaw in the institutional-capacity claim. Factfinding capacity is irrelevant absent some assurance that the putative factfinder will make a good faith effort to seek out and digest all the relevant information. *See* Devins, *supra* note 178, at 1182 (questioning whether "Congress has the incentives to take factfinding seriously"); Pilchen, *supra* note 193, at 362 ("While legislatures have unique structural capabilities for conducting far-reaching investigations that are not possessed by courts, political pressures often inhibit impartial evaluations of factual merits."). And there is reason to doubt that federal legislators presented with a proposal for a new criminal prohibition will take advantage of the services available to them and make a serious effort to determine whether the antisocial activity under consideration has a sufficient connection to interstate commerce. Chances are that no one—not the states, not the public, and certainly not prosecutors—will complain if Congress criminalizes conduct that does not, in fact, have any effect on interstate commerce. On the flip side, any federal legislator who opposes a popular crime bill on the ground that it exceeds the commerce power is likely to catch substantial political heat. *See* Devins, *supra* note 178, at 1195 ("[V]oters expect lawmakers to support politically popular legislation, not block it for a principle as abstract as Congress's failure to show—through factfinding—that the measure addresses a national problem."); *see also supra* text accompanying note 186. So, for the same reason that process safeguards are insufficient to prevent federal overreaching in the context of criminal law, Congress's *capacity* for factfinding is insufficient to ensure a genuine search for the "right" answer to questions regarding the interstate commerce nexus.

issues. But there is nothing in the nature of the "affects commerce" inquiry that differentiates it as a categorical matter from other hard questions.

Of course, case-by-case adjudication of jurisdictional elements may result in some false negatives even if juries are capable of understanding the factual questions involved. That alone cannot justify a move to findings-based criminals statutes, however. As explained in Part II, the constitutional requirements that govern criminal prosecutions are grounded on the view that "it is far worse to convict an innocent man than to let a guilty man go free."[207] They embody a fundamental value judgment that when criminal punishment is on the line it is better to be underinclusive than overinclusive. To that end, the reasonable-doubt and jury-trial requirements minimize the risk of error in only one direction—in favor of the defendant and against criminal punishment.[208] Application of such asymmetrical requirements to any set of facts necessarily increases risk of error in the other direction. That may fairly be identified as a cost of the procedural protections governing criminal prosecutions, but it is a cost that the Constitution itself requires.

VI. Toward a Defendant-Specific Approach to Criminal Commerce Clause Legislation

Under current Commerce Clause jurisprudence, Congress's decision about how to draft a criminal prohibition has significant consequences for criminal defendants—and, as a practical matter, for the scope of federal law. Given the differences between a requirement of proof beyond a reasonable doubt and a requirement of mere rationality, and between a defendant-specific inquiry and one addressed to a broad range of conduct, the move from jurisdictional elements to findings results in losses in accuracy in the individual case. Moreover, by drafting a statute to omit a jurisdictional element, Congress writes the jury out of the picture, thereby reducing a critical check on governmental overreaching and removing a distinctly local voice from the decisionmaking process.

Those costs are not counterbalanced by the asserted benefits of leaving questions of commerce largely to Congress's discretion. It may be more efficient for Congress to rely on its own categorical judgment rather than requiring federal prosecutors to prove a connection to commerce in each case, but efficiency concerns have never been permitted to trump the requirements of proof beyond a reasonable doubt and presentation to a jury.[209] The overlapping set of constitutional protections that applies to criminal prosecutions is designed not to promote efficiency but to create speed bumps on the route to the jailhouse door. If application of those

207. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

208. *See supra* notes 90–92 and accompanying text.

209. *See supra* note 88 and accompanying text.

protections to the facts that provide the basis for federal punishment results in fewer federal prosecutions, that is hardly reason to abandon the effort.

Findings-based statutes also may permit the federal government to reach conduct whose effects on commerce may be difficult to prove beyond a reasonable doubt (or may be difficult to discover without the investigative authority made possible by a broad prohibition).[210] But the same could be said of any mechanism that allows the government to avoid the asymmetrical risk of error created by application of the reasonable-doubt and jury-trial requirements.[211] If the government's interest in convicting the "guilty" were sufficient to overcome the values of the procedural protections governing criminal prosecutions, those rules would be a dead letter. In order to justify permitting Congress to avoid the requirements of proof and jury presentation for the facts that establish the basis for federal power under the Commerce Clause, therefore, it is not enough to say that case-by-case adjudication by means of jurisdictional elements may let some commerce-affecting behavior slip through the cracks. Instead, one must explain why the underinclusiveness that follows from those protective measures is particularly intolerable in the Commerce Clause context (more so than, say, in prosecutions of suspected serial killers). In light of the facts that jurisdictional elements still leave room for the expertise Congress may gain from its ability to look at issues holistically, that most federal offenses are punishable under state law as well, and that Congress remains free to legislate broadly by civil means, any such argument would be dubious at best.

The argument for findings-based statutes becomes weaker still when one considers the political dynamics behind criminal Commerce Clause legislation. The degree to which the political process is skewed in favor of tough-on-crime measures creates a significant risk that federal criminal legislation will sweep too broadly. The need for a check from outside normal politics is correspondingly strong.

In sum, then, categorical findings-based criminal prohibitions offer little to commend and much to condemn. Deference to congressional findings may be appropriate in civil cases because of the very different interests at stake, but courts should abandon that lenient approach in the criminal

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210. *See supra* notes 167–68 and accompanying text (describing federal proseeutors' complaints about early gambling statutes).

211. *See* Mullaney v. Wilbur, 421 U.S. 684, 701 (1975) ("It has been suggested that because of the difficulties in negating an argument that the homicide was committed in the heat of passion the burden of proving this fact should rest on the defendant. No doubt this is often a heavy burden for the prosecution to satisfy. The same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial. But this is the traditional burden which our system of criminal justice deems essential." (citations omitted)); Wiley, *supra* note 125, at 1084 ("*All* strictures on prosecutors 'obstruct' prosecutorial efficiency—the reasonable doubt standard, the rules of evidence, the Bill of Rights, and so forth. Of course prosecutors could work more efficiently without rules. So what?").

context.[212] The federal government should not be permitted to impose criminal punishment on individuals absent proof in each case of the factual predicate for federal action. Instead, Congress should be required to include jurisdictional elements in any future criminal prohibitions,[213] and—in order to safeguard the defendant's Due Process and Sixth Amendment rights to adequate proof of the facts that are "necessary to constitute the crime . . . charged"[214]—courts should interpret existing findings-based statutes to require a jurisdictional showing.[215]

The connection to interstate commerce that must be proved in each case need not be substantial. As explained above, the Court long has held that Congress may legislate on the basis of the aggregate effects of economic activities, and the quantitative question of aggregation has never been the subject of a jurisdictional element.[216] The question for the jury in the individual case is simply whether the defendant's conduct had *some* effect on interstate commerce. That standard is easily satisfied in any case that plausibly falls within an area of federal concern. Yet as courts repeatedly have recognized in cases involving "affect[s] commerce" jurisdictional elements, there is a tangible difference between something and nothing.[217] For criminal defendants, it is the difference between conviction and acquittal.

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212. *Cf.* Dorf, *supra* note 70, at 64–65 (suggesting that the "Court might turn to its rights jurisprudence as a supplement to its federalism jurisprudence," taking a more limited view of the commerce power where individual rights are at stake).

213. The approach suggested in the text is not a plain-statement rule. If Congress were to enact a findings-based statute that specifically provided that there must *not* be any proof in the individual case of the connection between the defendant's conduct and interstate commerce, such a statute would be unconstitutional on the same ground as a statute that provided that a connection to commerce must be proved to the judge by a preponderance of the evidence. *See supra* note 102 and accompanying text (explaining why the proposed federal code reform would have been unconstitutional).

214. *In re* Winship, 397 U.S. 358, 364 (1970).

215. *Cf.* United States v. Maxwell, 386 F.3d 1042, 1069 (11th Cir. 2004) (holding that the federal child pornography statute cannot constitutionally be applied to intrastate possession of noncommercial pornography absent some showing that such possession affected interstate commerce and observing that "[t]he fact that the Constitution might require showings that a statute does not is no anomaly, but is instead an indispensable ingredient in the recipe for any statute that is facially valid but invalid as applied in particular cases"); United States v. Zwick, 199 F.3d 672, 687–88 (3d Cir. 1999) (citing the need to "avoid constitutional concerns" in construing the federal bribery statute, 18 U.S.C. § 666, to require proof of a nexus to federal funds), *abrogated by* United States v. Sabri, 541 U.S. 600 (2004); United States v. Santopietro, 166 F.3d 88 (2d Cir. 1999) (also requiring a nexus between federal funds and payments received by the defendant), *abrogated by Sabri*, 541 U.S. 600; United States v. Lopez, 2 F.3d 1342, 1368 (5th Cir. 1993) (suggesting that the Gun Free School Zones Act of 1990 could be constitutionally applied if the government charged and proved a connection to commerce and explaining that "[a]n indictment that fails to allege a commerce nexus, where such a nexus is a necessary element of the offense, is defective" and that "[t]his is true even though the language of [the statute] contains no such requirement" (citing Russell v. United States, 369 U.S. 749, 763–66 (1962); and 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 19.2, at 452 (1984))).

216. *See supra* notes 200–03 and accompanying text.

217. *See* cases cited *supra* notes 67 and 138. The point also is illustrated by the handful of cases in which courts have sustained as-applied challenges to findings-based Commerce Clause

Of course, some criminal statutes contain jurisdictional elements that create an evidentiary burden so slight as to be functionally meaningless. An example is the child pornography statute, which prohibits the knowing possession of materials that contain any visual depiction of a minor engaging in sexually explicit conduct "that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported, by any means including by computer . . . ."[218] As several courts have acknowledged, the requirement that the visual depiction in question be produced using materials that have traveled in interstate commerce at some point in time is no requirement at all: it is virtually impossible to imagine a case in which it will not be satisfied.[219]

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statutes on the ground that the defendant's conduct, while within the class of conduct described by the statutory text, does not have any plausible connection to interstate commerce. *See* United States v. Smith, 402 F.3d 1303, 1322 (11th Cir. 2005) (holding that the child pornography statute cannot constitutionally be applied to intrastate, noneconomic activity); *Maxwell*, 386 F.3d at 1067–68 (refusing to sustain the application of the federal child pornography statute to a defendant whose activity was noneconomic and noncommercial); United States v. Stewart, 348 F.3d 1132, 1140 (9th Cir. 2003) (holding 18 U.S.C. § 922(o) unconstitutional as applied to the simple possession of a machinegun made with parts transported in interstate commerce), *petition for cert. granted, decision vacated in light of* Gonzales v. Raich, 125 S. Ct. 2195 (2005); United States v. McCoy, 323 F.3d 1114, 1122–23 (9th Cir. 2003) (holding that the federal child pornography statute cannot constitutionally be applied to "simple intrastate possession of home-grown child pornography not intended for distribution or exchange"); United States v. Corp, 236 F.3d 325, 326, 333 (6th Cir. 2001) (striking down a conviction for possession of child pornography when the minor pictured in offending materials was the 23-year-old defendant's 17-year-old girlfriend and there was no evidence that the defendant had any other sexual involvement with minors). The concerns driving those decisions are valid ones. But, as other courts have recognized, the as-applied decisions are hard to square with the prevailing rule that "[w]hen Congress regulates a class of activities that substantially affects interstate commerce, a defendant's claim that his personal activities did not affect interstate commerce fails if his activity is within that class." United States v. Morales-de Jesus, 372 F.3d 6, 17 (1st Cir. 2004); *see also* United States v. Holston, 343 F.3d 83, 90–91 (2d Cir. 2003) (rejecting an as-applied challenge to a conviction for production of child pornography under 18 U.S.C. § 2251(a) on the ground that, "when Congress regulates a class of activities that substantially affect interstate commerce, . . . the nexus to interstate commerce . . . is determined by the class of activities regulated by the statute as a whole, not by the simple act for which an individual defendant is convicted" (quotation marks and alterations omitted)); *McCoy*, 323 F.3d at 1137 (Trott, J., dissenting) ("[T]he resolution of this case boils down to whether the statute under review, . . . which encompasses a certain kind of intrastate possession, passes Commerce Clause muster, *not* whether [the defendant's] categorically peculiar circumstances have a pellucid nexus to interstate commerce.").

218. 18 U.S.C. § 2252A(a)(4)(B) (2004).

219. *See Maxwell*, 386 F.3d at 1063 (holding that the jurisdictional element in the child pornography statute is "patently insufficient to ensure the statute's constitutional application"); *McCoy*, 323 F.3d at 1126 (recognizing that the jurisdictional element is "useless" and "provides no support for the government's assertion of federal jurisdiction"); United States v. Rodia, 194 F.3d 465, 473 (3d Cir. 1999) (recognizing that "[a] jurisdictional element is only sufficient to ensure a statute's constitutionality when the element either limits the regulation to interstate activity or ensures that the intrastate activity to be regulated falls within one of the three categories of congressional power" and upholding the child pornography statute on a "substantial effects" theory, not on the basis of the phantom jurisdictional element); *accord Corp*, 236 F.3d at 330–31; United States v. Kallestad, 236 F.3d 225 (5th Cir. 2000); United States v. Angle, 234 F.3d 326, 337 (7th

It is important to recognize, however, that such "phantom" jurisdictional elements—elements that do nothing to restrict the scope of the statute—are by no means inevitable. To the contrary, they are linked in an important respect to Congress's assumed power to prohibit conduct on the basis of its own findings. Consider the Supreme Court's decision in *United States v. Scarborough*, in which the Court held that the "affect[s] commerce" element of the federal felon-in-possession statute[220] may be satisfied by proof that the firearm in question had traveled in interstate commerce at some point in time.[221] *Scarborough* often is invoked as authority for the proposition that "once moved in commerce" jurisdictional elements are sufficient to satisfy the requirements of the Commerce Clause.[222] But nothing in the Court's opinion suggests that evidence of past movement in commerce actually establishes a constitutionally meaningful (much less sufficient) effect on commerce. Instead, the Court's decision in *Scarborough* rested heavily on *Congress's findings* regarding the effects of firearm *possession* on interstate commerce.[223] The Court's permissive interpretation of the jurisdictional element, therefore, was influenced by the fact that the element did not have to do all the work: the constitutionality of the prohibition could be tested in light of the facts to be proved at trial *plus* the facts found by Congress regarding the commercial effects of firearm possession.[224]

Take away the overlay of congressional findings, and phantom jurisdictional elements look much different. Under the case-by-case approach proposed here, the predicate for federal action would have to be established by the evidence presented at trial; that evidence no longer could be supplemented by background findings regarding the typical commercial effects of the conduct in question. Such an approach would force courts to take a harder look at whether proof of the jurisdictional facts identified in the statute would be sufficient, without more, to bring the defendant's conduct

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Cir. 2000). *But see* United States v. Hoggard, 254 F.3d 744, 746 (8th Cir. 2001) (holding that the jurisdictional element is an independently sufficient basis on which to sustain the constitutionality of the child pornography statute); United States v. Robinson, 137 F.3d 652, 656 (1st Cir. 1998) (same).

220. 18 U.S.C. § 922(g) (2000) ("It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.").

221. 431 U.S. 563 (1977).

222. *See, e.g.*, Litman & Greenberg, *supra* note 30, at 932–33.

223. *See* 431 U.S. at 571 (noting that Congress found that possession of firearms by felons "constitutes . . . a burden on commerce or threat affecting the free flow of commerce" (quotation marks omitted)). Indeed, the Court recognized that "the purpose of [the statute] was to proscribe mere possession" and that Congress had included a jurisdictional element out of an abundance of caution rather than an intent to limit the reach of the statute. *Id.* at 575.

224. In approving the jurisdictional element in the child pornography statute, the First Circuit likewise relied on Congress's findings regarding the effects of child pornography possession on interstate commerce. *See Robinson*, 137 F.3d at 655–56.

within the scope of the commerce power.[225] The answer is easy when the statute in question demands proof that the defendant did something "affecting commerce"; it is far less clear when all that is required is evidence that the defendant possessed something created from materials that once moved in interstate commerce.[226] I do not purport to predict how courts would resolve the inquiry for the many different jurisdictional elements in federal criminal statutes, but it seems safe to say that the phantom elements that survive scrutiny under current law would not fare as well under the approach I suggest.

Finally, it bears emphasis that the benefits of case-by-case proof of the connection between criminal conduct and interstate commerce reach beyond individual defendants. Although my focus has been on the individual rights implications of current Commerce Clause jurisprudence, the far more common complaint is a structural one grounded on concerns about the federal–state balance. The two conceptions are not mutually exclusive. By eliminating procedural protections designed to minimize the risk of erroneous federal convictions, current law also eliminates a potent protection against federal overreaching. And by restoring the protections of the reasonable-doubt and jury-trial guarantees to criminal prosecutions under the Commerce Clause, the approach I propose serves both individual and structural interests.

Those who believe in the need for a check on federal overreaching in order to protect the values of federalism typically advocate some form of heightened judicial scrutiny of Commerce Clause legislation, such as that employed in *United States v. Lopez*.[227] As compared to case-by-case adjudication of jurisdictional elements, however, heightened scrutiny has several disadvantages. Heightened scrutiny pitches the battle over federal power at the highest level of generality, pitting the wisdom of federal judges against that of Congress on the question whether a broad class of conduct is

225. The question for the court, in other words, would be whether the jurisdictional element is sufficient to "ensure, through case-by-case inquiry," that the activity in question has "an explicit connection with or effect on interstate commerce"—that is, that the defendant's conduct falls within Congress's power under the channels, instrumentalities, or substantial effects categories. United States v. Lopez, 514 U.S. 549, 561 (1995).

226. My own view is that the jurisdictional element in the child pornography statute is constitutionally insufficient. Given its reference to interstate movement, the statute may appear to be a "channels" regulation. It is not. A true channels statute actually *regulates* (or prohibits) the movement of something or someone across state lines. By definition, then, it can be enforced at the point of such movement, or at least shortly thereafter. The child pornography statute is quite different. It regulates conduct that occurs well after the material moves interstate, conduct that could not possibly be anticipated—and therefore could not be regulated—when the material actually travels in the channels of interstate commerce. Nor does the movement of some material—film paper, for example, or ink—establish that the defendant's possession of child pornography has any meaningful effect on interstate commerce.

227. 514 U.S. 549 (1995). *See, e.g.*, Calabresi, *supra* note 4; McGinnis & Somen, *supra* note 176; Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEXAS L. REV. 1459 (2001); Yoo, *supra* note 31.

adequately connected to interstate commerce—or, as the Court put it in *Lopez*, whether the activity in question is "economic."[228] By requiring judges to analyze the relationship between the entire class of regulated conduct and the national economy rather than focusing the inquiry on a particular individual or set of individuals, the heightened-scrutiny approach opens itself up to complaints about relative institutional competence. Heightened scrutiny also amplifies concerns about the countermajoritarian nature of judicial review by obliging unelected judges to substitute their judgment for that of federal legislators on debatable economic questions.

Jurisdictional elements avoid those problems by mandating a defendant-specific inquiry that fits comfortably within the ken of judges and jurors and is easily distinguished from the sort of inquiry Congress typically undertakes. Moreover, while cases like *Lopez* treat the question whether the activity at issue is "economic" as a pure question of law on which courts have the final say,[229] case-by-case adjudication of jurisdictional elements recognizes that an assessment of economic effects has elements of both fact-finding and law-application. Like other mixed questions, the question whether an individual's conduct affected interstate commerce inevitably will be resolved in different ways in different circumstances depending on the identity of the decisionmaker and the particular facts of the case. Jurisdictional elements vest primary decisionmaking authority in the jury, giving the local community a direct voice in the process.

Perhaps most important, jurisdictional elements create an opportunity for an ongoing dialogue among jurors, judges, and Congress about the proper subjects of federal action. When a statute contains a jurisdictional element, the constitutional question of what sorts of commercial connections are enough to bring an activity within the scope of the commerce power is transformed into a question of statutory interpretation and application. To be sure, jurisdictional elements must be interpreted in the shadow of the Constitution: when determining what it takes to satisfy an "affects commerce" element, for example, courts must take account of the constitutional limits on Congress's legislative authority. Nevertheless, through the development and review of jury instructions, judgments on the sufficiency of the evidence, debates about the proper interpretation of jurisdictional elements, and so on, the case-by-case approach makes room for a more fine-grained, and less final, inquiry into the boundaries of federal power.

VII. Conclusion

The constitutional requirements of trial by jury and proof beyond a reasonable doubt serve to protect criminal defendants against unwarranted

228. *See supra* note 46.

229. *See id.*

criminal punishment and to ensure that the determination of guilt is made by a local jury rather than an officer of the federal government. The purposes of those protections apply with full force to aspects of the offense that are jurisdictional in nature. Yet current Commerce Clause doctrine permits Congress to avoid application of the reasonable-doubt and jury-trial requirements simply by drafting criminal prohibitions in a certain way. That doctrine lacks any compelling justification. It is a consequence of courts' longstanding failure to recognize that findings-based statutes not only raise questions of federalism but also implicate questions of individual rights—and their related failure to distinguish between civil regulations and criminal prohibitions. Attention to the distinctive features of criminal law and to the values served by the reasonable-doubt and jury-trial requirements reveals the need for a new approach to criminal Commerce Clause statutes, under which the basis for federal jurisdiction must be proved to the jury beyond a reasonable doubt in each case.